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## BOOK REVIEW

### HARRY A. BLACKMUN: THE OUTSIDER JUSTICE

BY TINSLEY E. YARBROUGH

Reviewed by Katie M. Gray<sup>1</sup>

Justice Blackmun wrote down everything. From his personal diary, which he kept daily for nearly two decades from the age of eleven; to his frequent letters to family, friends, and associates; to his trademark lists and case memoranda, Blackmun, who died in 2004 at the age of ninety, appears to have left no thought untranscribed. But Blackmun's immodesty in his relationship with pen and paper belied his deeply self-doubting nature. Court observers agree that history will not remember Blackmun as a particularly expert Justice.<sup>2</sup> It is perhaps the case that he would have had it no other way.

Upon his death, Blackmun's will directed that his written files and a thirty-eight-hour oral history be donated to the Library of Congress. The sudden public availability of Blackmun's files has, naturally, produced a renewed interest in the Justice. In 2004, Blackmun's next-of-kin granted Linda Greenhouse, the longtime New York *Times* Supreme Court reporter, and Nina Totenberg, National Public Radio's legal affairs correspondent, a head-start in memorializing Blackmun posthumously. Greenhouse's biography, *Becoming Justice Blackmun*, was a national bestseller and will continue to set the standard for Supreme Court biographies for some time. Tinsley E. Yarbrough's *Harry A. Blackmun: The Outsider Justice* is the subject of this review, and is the second book-length publication based primarily on Blackmun's Library of Congress files. It will not be the last.

Yarbrough, the distinguished professor of political science at East Carolina University in Greenville, N.C., and prolific Supreme Court biographer, has chosen Harry Blackmun as his latest object. His Blackmun biography is extensively researched, true to its sources, and rarely editorial. Yarbrough quotes extensively from the Justice's personal diary, where the younger Blackmun would record his feelings on everything from his youthful romances and dating experiences, to his disappointments with his father's financial and familial fail-

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<sup>1</sup> Boston University School of Law, J.D. candidate, expected May 2008; University of Maine, B.A., 2005.

<sup>2</sup> See, e.g., Cliff Sloan, *The Trouble With Harry*, SLATE, May 19, 2005, <http://www.slate.com/id/2118929/nav/navoa/> (describing Justice Blackmun as "lacking . . . the firepower to forge an influential jurisprudence" and Blackmun's legacy as "uncertain").

ings, to his frank and shrewd economic balancing of educational and career options. To account for the period after which Blackmun ceased to maintain a diary, Yarbrough references Blackmun's capacious correspondence and case memoranda, as well as the oral history which Blackmun recorded with one of his former clerks, Yale law professor Harold Koh. The biography's frequent quotations make for a work that is beyond credible but that, for better or worse, permits its author only a meek voice.

Blackmun's tenure as a Justice is inextricably associated with his authorship of *Roe v. Wade*, arguably the most well-known and controversial Supreme Court case in history. It is here that Blackmun adapted and articulated the notion of the constitutional right to privacy as it applies to abortion. It is here that Blackmun assembled a meaningful majority (7-2) that agreed to prevent states from outlawing abortions until the stage of viability. And it is here, Yarbrough argues, that Blackmun engaged in judicial lawmaking on an extraordinary scale. Blackmun's opinion was also noteworthy for its rather detailed medical discussion, influenced no doubt by the Justice's time as counsel to the Mayo Clinic.

The decision in *Roe* would follow Blackmun unceasingly, with mailed death threats and, years later, with a single, glass-shattering shot through his living room window. The *Roe*-related mail that poured into his office did not deter Justice Blackmun from speaking out on the abortion issue outside of the courtroom. Known as a conservative at the time of his confirmation, Blackmun became more openly liberal as his time on the Court continued, and spoke publicly on issues he believed in. He was staunch in his position that the Constitution protects a woman's right to seek and undergo a safe abortion, and rather unflinching in resisting judicial exceptions to the tenuous rule.

Yet Yarbrough makes clear that Blackmun's legacy ought properly to focus as much on his death penalty stance as his place in the abortion debate. Blackmun was not too shy to speak out against the death penalty as a moral and legal matter. The practice caused him great anguish and strong distaste, feelings that he would express with greater frequency over time in voting, whether in majority or in dissent, to limit the scope of capital punishment. It was in dissent that he famously declared the failure of our country's "death penalty experiment" and his wish "no longer [to] tinker with the machinery of death."<sup>3</sup> It remains to be seen what role Blackmun's opinions might play in the imminent ruling on a death penalty case to which the Supreme Court has recently granted *certiorari*.<sup>4</sup>

This shift, from a conservative former tax attorney nominated under President Nixon to a man popularly regarded as a liberal judicial activist, seems an anachronism in the current legal climate. For what president would be so slipshod as to nominate someone who would so starkly shift position? Part of

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<sup>3</sup> *Callins v. Collins*, 510 U.S. 1141, 1145 (1994).

<sup>4</sup> *Baze v. Rees*, 217 S.W.3d 207 (Ky. 2006), *cert. granted*, 76 U.S.L.W. 3154 (U.S. Sept. 25, 2007) (No. 07-5439).

Blackmun's legacy is doubtless to serve as an example to present and future presidents of the necessity of taking great care with judicial nominations. At the same time, his jurisprudential transformation serves to demonstrate that platitude that as times change, so do people. Justice David Souter is another, extant example on the Court.

The preface to Yarbrough's biography offers several interlocking perspectives on Blackmun as outsider. First, Blackmun saw himself as an outsider on the High Court. He was but the third nominee for an open seat during Nixon's presidency, the first two choices having suffered hasty Senate rejections. With characteristic humility, Blackmun would commonly refer to himself as "old number three." He described his occupation as stressful and all-consuming. His relationship with Warren Burger, his childhood friend and the Chief Justice during the bulk of Blackmun's tenure on the Court, gradually deteriorated to a state beyond repair. Blackmun set himself apart by seeming never to believe that he deserved to hold the position he did. Others may have contributed to Blackmun's views of himself; a number of court observers and academics criticized Blackmun's constitutional analyses as, at best, notably undistinguished.

Blackmun's outsider status manifested itself also in his identification with the less fortunate, and with those one might call "regular people." In his Senate confirmation hearings in the spring of 1970, Blackmun stressed the importance of the "little person's" respect for the Supreme Court as a force upholding that institution's legitimacy and power. Whether as a job reference for his law clerks or in emotion-laden dissents, Blackmun made explicit his social conscience and concern for social inequities and poverty. He was outspoken in his activism for women's reproductive rights and against the death penalty. In his personal case memoranda, in which he religiously wrote his initial opinions on a case upon reviewing briefs on the issues, he derided those who argue against affirmative action for ignoring the privileges colleges and universities have long granted the wealthy and athletic.

More foundationally, Blackmun may have seen himself as an outsider in terms of social class. His father was consistently irresponsible with money and employment, causing Blackmun's mother and family much unnecessary strife. His father eventually ended up in jail. At Harvard, Blackmun was an atypical student, attending college and law school on scholarship yet at the same time working multiple jobs in order to support himself.

Finally, Blackmun revealed his deep-seated self-doubt more than occasionally. This insecurity, incommensurate with his personal accomplishments, came out in his writings as well as his actions. To get himself through the bar examination, Blackmun convinced himself that he would fail, thereby avoiding any potential for disappointment. He was typically self-deprecating, even as a Justice interviewing potential law clerks for the coveted positions. Although Blackmun's failure of confidence may have belied his personal accomplishments, it seems perfectly consistent with a notion of humility and Midwestern modesty that escapes some individuals of similar merit.

In combination, Yarbrough uses these dimensions to reveal Blackmun above all as a *deliberate* outsider: the outsider who identifies with other outsiders, the outsider who implicitly vows not to forget his origins, the outsider who refuses to ignore the little people, the outsider who is averse to losing touch. Blackmun was not an outsider by accident, but rather by choice.

As a Justice, Blackmun may have undergone a sort of ideological shift, or may have simply tapped into a part of himself that, in his pre-Court life, he had never had the occasion to reach. If his judicial philosophy strayed from conservatism as time went on, that conservatism carried on in his old-fashioned sensibility—a vague but pervasive notion of caring for others equally while also taking responsibility for oneself.

To reach this dimension of the Justice, Yarbrough leads us from his humble Minnesota upbringing to his workaholic period of schooling in Cambridge to his obsessions with making the right choices in life and work. The book begins dryly, as Yarbrough writes to get past the man's upbringing and education to the heart of Blackmun's judicial life. Where Greenhouse's biography spends considerable time establishing Blackmun's friendship with a young Warren Burger, Yarbrough downplays Burger's and Blackmun's early interactions in favor of more expediently reaching Blackmun's time as a Justice. He stresses the disagreements between the men on the Court without contrasting this with their earlier camaraderie. Yarbrough quotes Blackmun incessantly, which, although undoubtedly honest to Blackmun's thoughts and sentiments, reads a bit too much like a transcript. The book would have profited from greater emotional content had Yarbrough added more of his own prose to this portion of the biography. (The engaging and beautifully written preface to the book supports this assertion.)

But by far the more lively and useful parts of Yarbrough's work are those that lay out the gamesmanship, politics, and drama behind the scenes of the major Supreme Court decisions of Blackmun's tenure. *The Outsider Justice* is likely to be a definitive account of this period of the Justice's life. In general, Yarbrough follows the Justice's tenure chronologically, but helpfully categorizes the discussion into legal topics (affirmative action, criminal procedure, equal protection, and the like). *Roe* receives its own chapter. Throughout, Yarbrough gives the Justice and the opinions of the Court their due while noting where legal academics have criticized or praised certain decisions. It is here that Yarbrough's somewhat dry style pays off.

The reader, whatever her ideological leanings, is left with great respect for a man who recorded so many of his musings and opinions on paper and has left them open for the world to pore over. Justice Blackmun may be an outsider, but there is now all the time in the world to step inside his world. Yarbrough's biography makes this task not only less demanding, but overall enjoyable.

It is a particularly opportune time to release a biography for this Outsider Justice. Since publication of Linda Greenhouse's biography, the Senate has confirmed two new Justices to the Supreme Court. Samuel Alito and John

Roberts are conservatives who are widely regarded to have shifted the Supreme Court's balance to the right on a number of issues. Depending upon the docket in the years to come, this shift could seriously endanger Blackmun's *Roe v. Wade* ruling. In addition, the Supreme Court in fall 2007 stayed a number of executions pending a ruling on the constitutionality of lethal injections. Blackmun's legacy, linked as it is with the abortion and death penalty debates, is bound to transform over time along with the nature of these debates.

