

**BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S
SUPREME COURT JOURNEY¹**REVIEWED BY MAJOR EMILY C. SCHIFFER²

[I]n September, just before the new term began, Justices Black and Harlan suddenly retired—each for reasons of rapidly failing health. . . . The vacancies presented Chief Justice Burger with an administrative problem. Given the contentious political climate, with memories of the Haynsworth and Carswell nomination debacles still fresh, there was every reason to fear that the positions would not be filled quickly.³

The bench had two empty seats, Congress quizzed potential justices, and reporters speculated on the future make-up of the Supreme Court. The challenges facing the Supreme Court in September 2005 were eerily similar to those in September 1971. Justice Harry A. Blackmun was an associate justice both when the Supreme Court lacked a full bench in 1971 and 1986 and during the adjustment periods following the new Court appointments. In 2006, as newly seated Chief Justice John G. Roberts, Jr., and Justice Samuel Alito move into their offices, there could not be a more relevant time in Supreme Court history for lawyers to learn from the past. In *Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey*, Linda Greenhouse uses the personal and official memoranda of Harry Blackmun (the Blackmun Papers) to examine his development as a Supreme Court Justice.⁴ *Becoming Justice Blackmun* is a highly readable, entertaining, and interesting legal narrative, but it has limited usefulness as a comprehensive biography of Justice Blackmun.

Justice Blackmun gifted his personal and official documents to the Library of Congress, directing that they be made public on 4 March

¹ LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* (2005).

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³ GREENHOUSE, *supra* note 1, at 80.

⁴ *Id.* at xi.

2004, five years after his death.⁵ The detail of these documents gave a unique glimpse into the inner-workings of the Supreme Court.⁶ Filling over 1,500 boxes and requiring more than 600 feet of space on the Library of Congress's shelves, Justice Blackmun's papers document almost every event in his personal and professional life from 1919 until his death in 1999.⁷ The Blackmun Papers encompass diverse items ranging from Justice Blackmun's honeymoon hotel receipts to the vote tallies for many significant Supreme Court cases during his twenty-four term tenure on the Court from 1970 to 1994.⁸

The Blackmun family granted three media outlets access to the files two months before their public release.⁹ One of the advance reviewers was Linda Greenhouse, the lead Supreme Court reporter for the *New York Times* since 1978.¹⁰ Greenhouse won a Pulitzer Prize in 1998 for her Supreme Court coverage.¹¹ Although Greenhouse is an experienced reporter, her critics often attack her favorable reporting of the Court's more liberal justices.¹² "'The Greenhouse Effect,' referring to the warm

⁵ Library of Congress Manuscript Reading Room, *U.S. Supreme Court Justice Harry A. Blackmun (1908–1999): A Selected Bibliography*, <http://www.loc.gov/rr/mss/blackmun/blackmun-ex-bib.html> (last visited Apr. 3, 2006) (listing available resources on Justice Blackmun within the Library of Congress). The Library of Congress digitized many articles of the collection and made them available on its website. The website includes a 518-page oral history of Justice Blackmun and assorted legal memoranda with Blackmun's handwritten notes.

⁶ GREENHOUSE, *supra* note 1, at xi.

⁷ *Id.* at xi, 1.

⁸ See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992); *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *Callins v. Collins*, 510 U.S. 1141 (1994); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *Buckley v. Valeo*, 424 U.S. 1 (1976); see also *supra* note 5.

⁹ Press Release, Library of Congress, Papers of Supreme Court Justice Harry A. Blackmun Opened for Research at Library of Congress (Sept. 7, 2005), available at <http://www.loc.gov/today/pr/2004/04-041.html> [hereinafter Press Release, Library of Congress].

¹⁰ John Greenya, *Blackmun's Path to Roe v. Wade*, WASH. TIMES, June 26, 2005, at B7 (reviewing GREENHOUSE, *supra* note 1).

¹¹ *Id.*

¹² John Leo, *Time to Fix the Court*, U.S. NEWS & WORLD REPORT, June 6, 2005, at 62 (discussing how Washington D.C. Appeals Court Judge Laurence Silberman coined the term "Greenhouse effect" addressing the issue of media having too much control over the holdings in federal cases and federal judges wanting the reporters approval). See Dahlia Lithwick, *The Souter Factor*, SLATE, Aug. 3, 2005. Justice Blackmun addressed his relationship with the press in an oral history conducted with Professor Harold Hongju Koh, a former law clerk for Justice Blackmun. Justice Blackmun stated "[r]elationships with the press, of course, are up and down and depending on which member of the press

reciprocity between court reporters and justices who meet with their approval, is named for her.”¹³

In *Becoming Justice Blackmun*'s prologue, Greenhouse appropriately warns readers that the book will be neither a “conventional biography nor a comprehensive survey of a judicial career.”¹⁴ She instead purports to provide a “coherent narrative” of Justice Blackmun's personal and professional life.¹⁵ *Becoming Justice Blackmun* achieves Greenhouse's goal and provides readers with a human interest story uncommon among conventional biographies.

Justice Blackmun evolved from a conservative Nixon appointee to one of the Court's leading liberal jurists. The turning point, Greenhouse concludes, was his historic abortion opinion in *Roe v. Wade* and its trying aftermath.¹⁶ As Greenhouse repeatedly emphasizes, Justice Blackmun became a historic Supreme Court Justice once he wrote and defended *Roe v. Wade*.¹⁷

[Justice Blackmun] locked *Roe* in a tight embrace and never let it go. Its defense carried him in new directions: to commercial speech in *Bigelow v. Virginia*, the abortion advertising case; to the other world “out there” of poverty and need in the abortion-funding cases; and, most significant, to his eventual commitment to the struggle for women's equality in the sex discrimination cases.¹⁸

As she parses the Blackmun Papers, Greenhouse supports her thesis about *Roe*'s impact with an analysis of Justice Blackmun's post-*Roe* opinions, demonstrating that Justice Blackmun found his true judicial

we're talking about.” See Transcript of the Justice Harry A. Blackmun Oral History Project: Interviews with Justice Blackmun, Conducted by Professor Harold Hongju Koh, Yale Law School (July 6, 1994–Dec. 13, 1995), available at <http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?SERIESID=D09&FOLDERID=D0901&SIZE=6408> [hereafter Blackmun Oral History].

¹³ Leo, *supra* note 12.

¹⁴ GREENHOUSE, *supra* note 1, at xi.

¹⁵ *Id.*

¹⁶ See *id.* at 101.

¹⁷ *Id.* at 251

¹⁸ *Id.* at 250–51.

heart only after he had to battle *Roe*'s critics.¹⁹ Greenhouse concludes that, out of necessity, Justice Blackmun evolved.²⁰

Becoming Justice Blackmun's organization and fluidity make the book a page-turner for readers who want to learn more about Justice Blackmun and the Supreme Court. Greenhouse analogizes her thematic organization to a miner "standing in front of a huge open-face mine on which seams of precious metals were visible, running in various directions. . . . I could choose the most promising and see where they led."²¹ Greenhouse thoroughly mined the stories of the friendship of Chief Justice Warren E. Burger and Justice Blackmun, the creation and evolution of *Roe v. Wade*, the development of Justice Blackmun's death penalty philosophy, and Justice Blackmun's treatment of sex discrimination.²² Illustrations from the Blackmun Papers enhance her observations. When discussing significant cases in Blackmun's career, Greenhouse intersperses images of Justice Blackmun's handwritten notes and comments.²³ These images allow readers to catch a rare, personal glimpse of his mental deliberations and judicial temperament.

Greenhouse also exposes the reader to the other justices who sat during Justice Blackmun's tenure, especially Chief Justice Warren Burger. The deteriorating friendship between Chief Justice Burger and Justice Blackmun becomes a significant focal point of the book. Greenhouse carefully tracks the exchanges of encouragement, congratulations, and, eventually, disappointment between the two men.²⁴ Additionally, Greenhouse examines Justice Blackmun's interaction with the rest of his contemporary justices, such as his manner of welcoming new justices to the Court.²⁵ Greenhouse includes personal notes between Justice Blackmun and other members of the Court that the public would not normally see. For example, in an exceptionally touching exchange between Justice Anthony Kennedy and Justice Blackmun, Justice

¹⁹ See *id.* at 251.

²⁰ *Id.* ("In defending his legacy, he created his legacy. He became Justice Harry Blackmun.").

²¹ *Id.* at xii.

²² *Id.* at xiii.

²³ *E.g., id.* at 130 (*Bakke* notes), 192 (conference notes from *Webster*).

²⁴ See, e.g., *id.* at 21 (Blackmun encouraging Burger to pursue a judicial appointment in 1957), 41 (Blackmun congratulating Burger on his nomination to be Chief Justice in 1969), 185 (noting that by 1986, "the friendship between Burger and Blackmun had vanished").

²⁵ *Id.* at 238. Justice Blackmun and Dottie Blackmun would host a function for the new justices. *Id.*

Kennedy pleads for Justice Blackmun to delay his retirement.²⁶ Justice Kennedy writes, “My own devotion to the Court and its constitutional place have been shaped in most profound ways by your splendid juristic dedication, and you still inspire me to try to do better in my own work.”²⁷ During that Supreme Court Term, Greenhouse portrays Justice Blackmun as the diplomatic glue that held many liberal opinions together.²⁸

Although it is an enjoyable book, *Becoming Justice Blackmun* is not flawless. First, the book has minimal usefulness as a scholarly source because it lacks documentation and balance. Throughout the book, citations and footnotes are conspicuously absent. Greenhouse writes as if the book is simply an extended newspaper article. She states, “Because Harry Blackmun saved so much written material, telling his story required only minimal investigation of other sources. To provide context for the narrative, I drew on my years of observing and reporting on the Supreme Court. . . .”²⁹ Although her journalistic prose makes the book an entertaining read, the lack of documentation might make readers question whether her conclusions come from the Blackmun Papers, her background knowledge of the Court, or her liberal views.³⁰ Providing some indication of the sources she bases her comments on would lend more credibility to her interpretation of the Blackmun Papers.

Second, *Becoming Justice Blackmun* views the effect of *Roe v. Wade* and Justice Blackmun’s defense of it through rose-colored glasses. Greenhouse underestimates the effect of Harry Blackmun’s upbringing when she concludes that the hardship of authoring *Roe v. Wade*, with its

²⁶ *Id.* at 234.

²⁷ *Id.* at 233.

²⁸ *Id.* at 235. Greenhouse writes:

According to data compiled by Joseph F. Kobylka, from the 1981 term through the 1985 term, Blackmun voted with William Brennan 77.6 percent of the time and with Thurgood Marshall 76.1 percent. From 1986 to 1990, his rate of agreement with the two most liberal justices was 97.1 percent and 95.8 percent.”

Id.

²⁹ *Id.* at 253. Greenhouse also lists a variety of other sources that she relied on for various sections of the book. *Id.* at 253–54.

³⁰ See Lithwick, *supra* note 12 (implying that Greenhouse is part of the “liberal intelligentsia” who justices so often try to please).

fallout, produced his judicial philosophy.³¹ Greenhouse initially discusses Justice Blackmun's family and childhood, but she fails to adequately relate his philosophy to these formative years.³² Justice Blackmun grew up "with progressive ideas about racial equality and a deep suspicion of the Southern states'-rights political agenda."³³ "Blackmun left a strong mark in [civil rights and states'-rights issues]—and probably would have done so even if he had never put pen to paper in *Roe*."³⁴ His admiration of the underprivileged classes came from "growing up . . . on the east side of St. Paul" with "people of not great influence politically or by wealth or otherwise."³⁵ Contrary to Greenhouse's suggestions, both this admiration for marginalized groups and the rest of his judicial ideology probably did not come entirely from authoring and defending *Roe*.

Third, Greenhouse fails to closely examine other significant Supreme Court cases decided during Justice Blackmun's tenure.³⁶ For example, *Daubert v. Merrill Dow Pharmaceuticals, Inc.*³⁷ is not mentioned even though the case is crucial to interpreting Federal Rule of Evidence 702. Greenhouse also gives scant attention to Blackmun's death penalty and affirmative action opinions. For example, she discusses Justice Blackmun's final declaration on the death penalty in five pages, affirmative action in seven pages, and *Roe v. Wade* in over seventy pages.³⁸ It is hard to ignore the fervor surrounding *Roe v. Wade*, but Greenhouse should have given more attention to all the topics she earlier pledged to "mine." Finally, Greenhouse fails to comment on Justice Blackmun's favorite opinion: *Flood v. Kuhn*.³⁹ A "sentimental journey" through baseball's greats,⁴⁰ Justice Blackmun referred to over one

³¹ Edward Lazarus, *The Natural Evolution of a High Court Liberal*, LOS ANGELES TIMES, July 17, 2005, sec. R, at 8 (reviewing GREENHOUSE, *supra* note 1).

³² *Id.*

³³ *Id.* His grandparents were Union Soldiers in the Civil War, and Justice Blackmun idolized Abraham Lincoln. *Id.*

³⁴ *Id.*

³⁵ Blackmun Oral History, *supra* note 12, at 52; *see also id.* at 58 (noting that Justice Blackmun "saw [discrimination] against the African-Americans and to some degree against Native Americans").

³⁶ *Id.* at 20 ("[*Roe v. Wade*] isn't the only thing I wrote. And, of course, my death penalty dissent seems to have taken some of the steam out of *Roe against Wade*, fortunately for me.").

³⁷ *Daubert v. Merrill Dow Pharms. Inc.*, 509 U.S. 579 (1993).

³⁸ GREENHOUSE, *supra* note 1, at 265–66.

³⁹ Blackmun Oral History, *supra* note 12, at 18.

⁴⁰ *Id.*

hundred famous baseball players in the first part of the opinion.⁴¹ In light of *Flood's* personal importance to Justice Blackmun, at least a passing reference by Greenhouse would have been appropriate.

In a biography, serious examination of the subject's faults helps the reader dissect and comprehend the famous person and lends credibility to the author. Although *Becoming Justice Blackmun* is admittedly not a "conventional biography," Greenhouse glosses over Justice Blackmun's faults to a disturbing degree. Besides giving short shrift to Justice Blackmun's tendency to be thin-skinned, Greenhouse blames the Burger-Blackmun relationship debacle on Chief Justice Burger.⁴² Without an honest account of Justice Blackmun's flaws, the reader feels a sense of imbalance.

Fourth, Greenhouse does not adequately explore a potentially controversial aspect of Justice Blackmun's career on the Court: his alleged over-reliance on law clerks for substantive, original legal opinions. Historian David Garrow, like Greenhouse, has examined the Blackmun Papers, but Garrow has concluded that Justice Blackmun lacked "personal responsibility" for the work being produced in his name.⁴³ Not only did Blackmun's clerks check legal citations (a traditional, mundane duty), but they also drafted original legal thought on cases where guiding precedent was absent.⁴⁴ His clerks forcefully suggested comments in opinions, pleaded that Blackmun adopt certain strategies, made disparaging comments at times about other Supreme Court Justices, and gathered intelligence from other clerks to forecast

⁴¹ *Flood v. Kuhn*, 407 U.S. 258, 262–63 (1972).

⁴² See GREENHOUSE, *supra* note 1, at 187 (Justice Blackmun annotates "[Chief Justice Burger] picks on me at conference" and "[Chief Justice Burger] for the first time very cool").

⁴³ David Garrow, *The Brains Behind Blackmun*, LEGAL AFFAIRS, May–June 2005, http://www.legalaffairs.org/issues/May0June-2005/feature_garrow_mayjun05.msp.

⁴⁴ *Id.*; see Blackmun Oral History, *supra* note 12, at 15 (Justice Blackmun states:

It varies from clerk generation to clerk generation because of the difference in their talents. The last two or three years, I've indulged in the luxury of letting them put together a first draft, which they like to do usually . . . I take it and go over it, read all the cited cases, add to it, delete some things. I spend about a week before that opinion circulates. . . I think they like to have the privilege of putting together a first draft.).

votes.⁴⁵ Garrow worries that sometimes Supreme Court Justices in general, and Justice Blackmun in particular, have delegated opinion writing duties to their law clerks.⁴⁶ Greenhouse responded to this concern by noting that, although it was not her “job to defend Harry Blackmun,” her book offers a “well-rounded” portrayal of the relationship between Justice Blackmun and his clerks, even noting some instances in which Blackmun rejected his clerks’ advice.⁴⁷ Although Garrow’s criticisms are far from undisputed, nothing in Greenhouse’s book sufficiently provides vindicating context for the writings passed between Justice Blackmun and his clerks.⁴⁸

Finally, Greenhouse’s examination of the decline of Chief Justice Burger and Justice Blackmun’s friendship is one-sided and somewhat unfair. Forgetting that it usually takes two people to destroy a friendship, Greenhouse seemingly blames Chief Justice Burger for the gradual deterioration of the relationship for his handling of *Roe* and its aftermath.⁴⁹ Greenhouse calls *Roe* a trip “into dangerous waters without a life preserver”⁵⁰ and a “baptism by fire”⁵¹ that Burger forced Blackmun to endure alone. Justice Blackmun’s response seems surprisingly petty—he refused to go to the ground-breaking ceremony for the Warren E.

⁴⁵ GREENHOUSE, *supra* note 1, at 125 (noting that in 1977, law clerk Richard K. Willard criticized Chief Justice Burger as follows: “Needless to say, I think the Chief’s comments on this case are ridiculous.”); *id.* (In 1986, law clerk Pamela Karlan (who is now a professor at Stanford Law school) wrote, “The Chief’s opinion has come around. Like the Bourbons, he forgets nothing and learns nothing.”); *see* Garrow, *supra* note 43 (noting the activity of Supreme Court clerks generally).

⁴⁶ Garrow, *supra* note 43.

⁴⁷ Tony Mauro, *Emory Prof: Blackmun Abdicated Power*, FULTON COUNTY DAILY REP., Apr. 20, 2005, at 20. *See also* GREENHOUSE, *supra* note 1, at 221 (describing Blackmun’s refusal to follow the recommendation of one of his clerks in *Mississippi University for Women v. Hogan*).

⁴⁸ At least two of Blackmun’s former clerks whose writings Garrow cited, Andrew Schapiro and Randall P. Bezanson, insist that their written work product for Justice Blackmun was based on his discussions with them. *Id.* at 20. In addition, both Joseph Kobyłka, who is writing a Blackmun biography, and Harold Koh, the Yale Law School Dean who conducted the Blackmun Oral History Project interviews, have criticized Garrow’s failure to consider the daily meetings and countless discussions that Justice Blackmun had with his clerks concerning the opinions they were drafting. *Id.* (Harold Koh noting that Blackmun had “myriad conversations each day” with his clerks); Joseph F. Kobyłka, *No Empty Robe: Points of View: Justice Harry Blackmun Was Not a Pawn of His Clerks*, LEGAL TIMES, Apr. 25, 2005, at 60.

⁴⁹ *See* GREENHOUSE, *supra* note 1, at 251.

⁵⁰ *Id.*

⁵¹ *Id.* at 127.

Burger Law Library;⁵² he threatened to write a disparaging footnote in retaliation in a dissent;⁵³ and he publicly stated, “I think I knew Warren Burger intimately, maybe in some ways better than he knew himself.”⁵⁴ At the conclusion of the book, regardless of who seems to be more responsible for the breakup of the friendship, the Justices’ nastiness toward each other should linger with readers. Despite their awesome responsibility in our judicial system, Supreme Court Justices are still mere mortals.

Overall, these criticisms do not diminish the book’s importance. Readers can enjoy the book as long as they are forewarned that it is not a scholarly source, but is instead a largely uncritical look at a few aspects of Justice Blackmun’s legal career. To an attorney, the book provides insight to the current Supreme Court, for Justice Blackmun was a “contemporary, for varying amounts of time, of seven of the current associate justices who sit on the Supreme Court.”⁵⁵ Tracking these Justices’ voting trends, internal conference conversations, and personality traits might help readers decipher the current Court’s composition and potential rulings. With Greenhouse’s book, the Court’s normally hidden traditions and procedures are exposed.⁵⁶

In light of the recent Supreme Court vacancies, Greenhouse’s book is even more intriguing. Tim Russert, commentator on *NBC’s Meet the Press*, questioned Senate Judiciary Committee Chairman Arlen Specter before the confirmation hearings for Chief Judge Roberts in September 2005. Russert’s first question reveals the continued importance of *Roe v. Wade*: “Do you believe that John Roberts would seek to overturn *Roe v.*

⁵² *Id.* at 185.

⁵³ *Id.* at 125.

⁵⁴ *Id.* at 124. Justice Blackmun’s comments on Chief Justice Burger’s briefs were more derogatory: “A regular law review article!” and “WEB did not write this.” *Id.* at 125.

⁵⁵ Press Release, Library of Congress, *supra* note 9 (listing John Paul Stevens, Sandra Day O’Connor, Antonin Scalia, Anthony M. Kennedy, David H. Souter, Clarence Thomas and Ruth Bader Ginsburg).

⁵⁶ GREENHOUSE, *supra* note 1, at 87. For example, discussing a note from Justice Burger to Justice Blackmun, Greenhouse notes:

As a communication from one justice to another on a pending case, Burger’s note was unusual, a clear violation of the Court’s social norms. In the Court’s ordinary practice, drafts of opinions circulate among the justices and are left to stand or fall on their own persuasive powers. When justices do lobby one another, the discourse is highly formal, with personal appeals disfavored.

Id.

*Wade?*⁵⁷ Supreme Court watchers should read *Becoming Justice Blackmun* for fascinating human interest stories behind the impersonal black and white lines of *Roe* and other landmark Supreme Court opinions. It is an engaging story, but for a more impartial view of Justice Blackmun, visit the the Library of Congress and read the Blackmun Papers yourself.

⁵⁷ MSNBC, Transcript for September 11, Sept. 11, 2005, <http://msnbc.msn.com/id/9240461>.