HARRY BLACKMUN'S PAPERS reveal that, more than any justice in memory, he gave his law clerks control over his thinking and writing when he was on the Supreme Court.

The Brains Behind Blackmun

BY DAVID J. GARROW * ILLUSTRATION BY ALAN DINGMAN

Harry A. Blackmun served on the United States Supreme Court for almost a quarter of a century, beginning in 1970 after his selection by President Richard Nixon and ending in 1994 with his retirement at age 85. When Blackmun's papers were opened to public inspection in March 2004, five years after his death, laudatory news stories highlighted his evolution toward a more compassionate jurisprudence. Those accounts contrasted sharply with coverage at the outset of Blackmun's Supreme Court career, when critics dismissed him as Chief Justice Warren Burger's "Minnesota Twin," made fun of his excessive interest in trivia, and viewed his early record on the court as anything but sensitive to society's least fortunate. Yet a far more troubling story emerges from the pages of Blackmun's papers, one that remains almost wholly unreported.

It is the story of a justice who ceded to his law clerks much greater control over his official work than did any of the other 15 justices from the last half century whose papers are publicly available. Whether any current justices are similarly abdicating their responsibilities will not be known until their case files are opened in the future.

Blackmun's clerks played substantial roles in producing his opinions as early as 1971, when the landmark abortion cases *Roe v. Wade* and *Doe v. Bolton* first came before the court. But Blackmun's comments and case files show his clerks' involvement in his work increasing substantially during the 1980s and early 1990s. In Blackmun's final term of 1993–94, his clerks were almost wholly responsible for his famous denunciation of capital punishment in his dissent in *Callins v. Collins*.

This degree of clerk involvement is indefensible. Decades ago, Justice Louis D. Brandeis declared that "the reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington who do their own work." Today, no knowledgeable observer of the court would make a similar claim. As late as 1940, most clerks acted primarily as secretaries. In some cases a clerk might contribute an important footnote to an opinion, but not until Justice Frank Murphy and Chief Justice Fred Vinson joined the court in the 1940s did clerks take the lead in writing opinions and sometimes determine a justice's vote. As the number of clerks increased from two to three and, finally, to four, so did their involvement in their justice's work. Some of the best-known opinions of such renowned former justices as Felix Frankfurter and John M. Harlan II were written almost entirely by their clerks. Judge Alex Kozinski of the U.S. Court of Appeals, Ninth Circuit, who clerked for then-Judge Anthony Kennedy and for Chief Justice Burger, admits that "few judges draft their own opinions from scratch." More significantly, Kozinski also acknowledges "the pressure to give away essential pieces of your job." Unfortunately, as Kozinski notes, "the only guarantee one can have that judges are not rubber-stamping their law clerks' work product is each judge's sense of personal responsibility."

In the case of Harry Blackmun, that sense of personal responsibility appears to have been sadly lacking. Blackmun's case files, including those for many of his best-known opinions, are replete with examples of law clerks doing far more than drafting the justice's opinions. In several of Blackmun's most notable cases, the records indicate that the justice was less familiar with the substance of his opinions than he should have been. In addition, many memos to Blackmun from his clerks reflect a lack of deference that contrasts sharply with the respectful tone of clerks' memos to contemporary justices, including the late Thurgood Marshall, whose case files became publicly available upon his death in 1993. Some memos to Blackmun explicitly demean and insult other justices and suggest that Blackmun, unlike Marshall and Justices William J. Brennan and Lewis F. Powell, condoned such comments. Perhaps the picture the Blackmun Papers paint does not reflect practices in any current justice's chambers. Yet Blackmun's case files offer a powerful and poignant warning to present and future justices that the failure to closely supervise young clerks can damage the court's reputation and undermine its authority.

Blackmun's authorship of *Roe v. Wade* and *Doe v. Bolton* became the signature event of his 24 years on the court. The pair of cases challenging anti-abortion statutes in Texas and Georgia was decided during Blackmun's third term as a justice. Yet even then, Blackmun allowed his clerks to play influential roles not only in drafting the two opinions but also in honing the constitutional standards that made the two cases famous.

Even before *Roe* and *Doe* arrived at the court, Blackmun was clearly comfortable with interpreting the Constitution to protect women's access to abortion. Writing to himself just prior to the oral argument in *United States v. Vuitch*, the court's first abortion case, in January 1971, Blackmun noted that the 1965 case *Griswold v. Connecticut*, which upheld the right of married couples to use contraceptives, and the 1969 case *Stanley v. Georgia*, which protected the possession of pornography in the home, "afford potent precedence in the privacy field. I may have to push myself a bit, but I would not be offended by the extension of privacy concepts

to the point presented by the present case." At conference, however, the justices decided *Vuitch* on grounds that allowed them to avoid the constitutional privacy issue.

When Blackmun began preparing for *Roe*'s initial oral argument in December 1971, his notes about the case reiterated his comments about *Vuitch*. "A fundamental personal liberty is involved here—right to receive medical care," he wrote. "Much precedent for this sort of thing—Griswold et al." After argument and the justices' private conference, Burger assigned Blackmun to write the opinions in *Roe* and *Doe*.

Law clerk John T. Rich, who now practices law in Washington, D.C., prepared a long memo for Blackmun summarizing the issues in *Roe*. After a first draft of the *Roe* opinion was completed in mid-May 1972, Rich gave Blackmun a forceful, 13-page list of recommended changes. *Doe* was the responsibility of Rich's co-clerk, George Frampton, who is now a New York lawyer. By mid-May, Frampton had a draft opinion ready for distribution. While not as assertive as Rich, Frampton nonetheless told Blackmun that the opinion should more clearly state that it was affirming the lower court's decision to void several restrictions on abortion in the Georgia statute. "I feel even more strongly now that you should make explicit what the opinion presupposes by approving the decision of the court below as far as it went." But both drafts were held in abeyance after a majority of the court, at Blackmun's urging, scheduled *Roe* and *Doe* for reargument during the following term, when a full bench that included Powell and William Rehnquist—who had joined the court after the initial arguments—could decide the two cases.

Over the summer, while Blackmun visited the Mayo Clinic's library in Rochester, Minn., to research the medical aspects of abortion, Rich and Frampton did substantial work on the draft opinions before their clerkships ended in early August. In mid-July, Frampton informed Blackmun that "after thinking about the overall structure of the opinions, John and I have concluded that there is a strong argument for leaving the Texas case to go off on vagueness," meaning that in *Roe* the court would void the Texas statute as too vague, and *Doe* would become the more constitutionally significant opinion. Frampton wanted the opinions to provide "a comprehensive prescription" for how states should revise their abortion laws, and on August 11, 1972, he sent Blackmun revised drafts of both *Doe* and *Roe*, as well as advice on strategy.

> I want to urge you again to circulate your revised draft before oral argument," Frampton wrote to Blackmun. "[I]t will nail down your keeping the assignment, it should influence questions and thinking at oral argument, and it might well influence voting. It will also put a premium on getting the cases handed down quickly. . . .

Frampton also told Blackmun about an analytical distinction that would prove crucial in the final *Roe* and *Doe* opinions. "I have written in, essentially, a limitation of the [abortion] right depending on the time during pregnancy when the abortion is proposed to be performed," Frampton explained. "I have chosen the point of [fetal] viability for this 'turning point' (when state interests become compelling) for several reasons: a) it seems to be the line of most significance to the medical profession, for various purposes; b) it has considerable analytic basis in terms of the state interest as I have articulated it. . . ."

He also highlighted another addition. "I have included a section designed to show in greater detail that neither the law nor any other discipline has really arrived at a consensus about the beginning of life." But Frampton confessed that, as to constitutional privacy analysis, "I would have liked to do more here, butI really didn't have time at the end," and he regretted the deficiency. "Since the opinion does use this right throughout, and since it is a new application of it, I think considerable explanation is required in addition to what the circulated draft contained—which was little more than one sentence plus a string cite in [the] text."

After the two cases were argued

again in October 1972, Blackmun prepared for the conference, assuming that they would remain his responsibility. "I am revising and expanding the proposed opinions that commanded a majority," he jotted to himself. "I have a lot of personal investment," he added, and "It is not a happy assignment—[I] will be excoriated." The task of handling both *Roe* and *Doe* had passed to new law clerk Randall Bezanson, who now teaches law at the University of Iowa. In a November 29 memo to Blackmun, Bezanson questioned Frampton's selection of viability as the point at which the right to an abortion should be limited, a choice that Powell had also recommended.

"By selecting viability," Bezanson asked Blackmun, "would you not be suggesting that prior to that point no limitations could be placed on abortions (except those permitted in your opinions as they now stand)." Bezanson then offered an analysis that decisively shaped how *Roe* would balance the woman's right and the state's interests throughout pregnancy:

> Let's assume that prior to the end of the first trimester no limitations could be placed on abortion, as your opinion now provides. And assume that after viability the state's interest becomes sufficiently compelling to prevent abortions except in limited circumstances—preserving the life of the mother, or her health as narrowly defined in a statute. I am still of the opinion that during the 'interim' period between the end of the first trimester and viability (about 6 months), the state might impose some greater restrictions relating to medical dangers posed by the operation, e.g., the operation would have to be performed in a hospital, as opposed to a clinic close to a hospital, and the like. One of the positive attributes of your approach, as I see it, is that it leaves the state free to place increasing restrictions on abortions over the period of gestation if those restrictions are narrowly tailored to state interests. Justice Powell's suggestion seems to view the relevant state interests too narrowly, and disregards the state's interest in assuring that the medical procedures employed will be safe. Your opinion, as I view it, rests on two state interest[s], which become compelling in varying degrees over time, and not simultaneously: the state's interest in preserving the life of the fetus (here the most logical cutoff, as Justice Powell suggests, is viability), and the state's interests in assuring that the abortion procedure is safe and adequately protects the health of the patient (it is this interest to which I think Justice Powell gives too little weight). The fetus is pretty large at 4 or 5 or 6 months, althoughit may not be 'viable.' I

would imagine, and your opinion suggests to me, that the medical risks which attend abortion of a fetus increase as the size of the fetus increases. Thus the state's interests may increase vis-à-vis this factor before 'viability.'

While the first trimester is, as you admit, an arbitrary cutoff, I don't think that it is all that arbitrary, and I would not want to prejudge a state's interests during the 'interim' period between the end of the first trimester and viability at this time. I would stand by your original position, subject to minor change, and leave the question of what legitimate interests a state might have of requiring greater protection through higher medical standards to another case.

Blackmun adopted all of Bezanson's recommendations in a December 4, 1972, letter to Powell. One week later, while on the bench during oral argument, Powell passed Blackmun a note that read, "I will join your present opinion and so I leave entirely to you whether to address the 'viability' issue." Marshall and Brennan concurred, prompting Bezanson to advise that the opinion should go ahead and "articulate the two state interests, and the point at which they assume increasing significance. With respect to the state's interest in preserving the safety of the operation and the conditions surrounding it, regulation might be permissible somewhere between the end of the 1st trimester (if that is the cut-off selected) and 'viability' or beyond. But with respect to the state's interest in preserving fetal life, the opinion might, for example, indicate that only after 'viability' does this interest become sufficiently compelling to support regulation in furtherance of this interest."

The majority opinions in *Roe v. Wade* and *Doe v. Bolton* came down on January 22, 1973, and owed a great amount of their substance and language to Frampton and Bezanson. The *Roe* opinion declared that, "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability," a statement that clearly echoed Frampton's August memo. As Blackmun acknowledged in a 1995 oral history interview with former clerk Harold H. Koh, who is now dean of Yale Law School, Frampton was the clerk who "did the major work on *Roe* . . . a lot of good, solid work on the opinion."

Yet what stands out most in the work of Blackmun's clerks on *Roe* and *Doe* is not the remarkable extent of their contributions, but the unusually assertive and forceful manner in which the clerks voiced their views to Blackmun. Although no one has reviewed every one of Blackmun's case file folders, the behavior of Blackmun's clerks in preparing the *Roe* and *Doe* decisions was the first significant example of conduct that formed a clear pattern after the mid-1980s. While Blackmun's clerks made historically significant and perhaps decisive contributions to *Roe* and *Doe*, in later years they exerted even greater influence on opinions in landmark cases.

Writing *Roe v. Wade* significantly

affected Blackmun's self-perception. As public criticism of the decision continued after 1973, Blackmun became so preoccupied with *Roe* that a tone of self-pity crept into his personal notes whenever a new abortion case came before the court. In 1976, while Blackmun was contemplating a statute that authorized abortions only when a woman's life was in danger, he jotted, "It seems to me that this is 'playing God' just as much as my detractors accuse me of doing in the critical letters that have come in." He anticipated being "chewed upon at length during these abortion arguments" when the case was heard, and he later expressed dread about a case involving the right to use contraceptives. "Here we are again in a general area in which I have already had too much to say by way of opinions of the Court." Late in 1978 Blackmun again made the same point. "More A[bortion]," he noted. "I grow weary of these. . . . Wish we had not taken the case."

Yet Blackmun also seemed oddly detached from the doctrinal issues underlying *Roe*. In the 1980s, when *Roe*'s privacy analysis became central to constitutional arguments for gay rights, Blackmun's reactions were puzzling. In a New York case, he initially voted with the four most conservative justices to hear arguments, but shifted sides and helped dismiss the case because he wanted to wait for one that directly addressed the "deviant sex issue." In 1986, *Bowers v. Hardwick* did just that. Michael Hardwick had been arrested under Georgia's anti-sodomy law for having oral sex in his bedroom with another man. At first the justices seemed ready to strike down the statute by a vote of 5-4, with Powell among the majority. But Powell, a consistent supporter of *Roe*, changed his vote after deciding that the constitutional right to privacy should not cover gay sex. Powell's switch meant that the court would uphold the statute, turning what would have been a majority opinion by Blackmun into a dissent. Clerk Pamela Karlan, now a professor at Stanford Law School, took the lead in preparing the dissent, which argued that "the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy."

When the court was ready to announce the *Bowers* ruling, Karlan played a decisive role in determining the timing. "I've thought a bit about your announcing the dissent from the bench," she wrote to Blackmun, "and I think you should do it. The majority's treatment is a disgrace and it's well worth making clear to everyone what the case is really about." She added: "As for timing, whether you want to announce the dissent or not, I think Friday [June 27, 1986] is a bad day to have the case brought down. A summer Friday and Saturday are probably the least likely time for people to take notice of what the Court has done. I would press, if I were you, for Monday instead." Just as Karlan recommended, the announcement of *Bowers v. Hardwick* was held over until Monday, June 30, 1986.

In his 1995 oral history, Blackmun recalled that, in *Bowers*, Karlan "did a lot of very effective writing, and I owe a lot to her and her ability in getting that dissent out. She felt very strongly about it, and I think is correct in her approach to it. I think the dissent is correct." Even nine years after the case, Blackmun's phrasing seems strange, particularly his statement that Karlan was "correct in her approach." The words imply that Karlan not only wrote the opinion, but also conceived the substance and structure of its argument. Even odder was Blackmun's answer to a question about the relationship between *Roe* and *Bowers*. Did Blackmun's position in *Roe*, Koh asked, lead him to the *Bowers*

dissent? "Never thought about that one, but maybe they go together," Blackmun responded. That was an astounding answer for someone who had ostensibly written a landmark dissent that explicitly relied on *Roe*'s constitutional privacy analysis. Blackmun's own statements reflect a remarkable lack of personal involvement in one of the most notable opinions of his career.

Perhaps Blackmun was tired on the day of that conversation. Maybe he was losing his memory or mental acuity, although no such deterioration is apparent from the video recordings or transcripts of his lengthy interviews with Koh. Alternatively, perhaps Blackmun, particularly in light of his apparent characterization of the *Bowers* dissent as Karlan's, never had thought much about the connection between *Bowers* and *Roe*. In another interview five months later, Koh again asked about *Bowers*: "Did you see it as an explicit link to *Roe v. Wade* and the right-to-privacy arguments in *Roe v. Wade*?" Blackmun

Blackmun's Clerks

GRAPHIC BY HANNAH FAIRFIELD

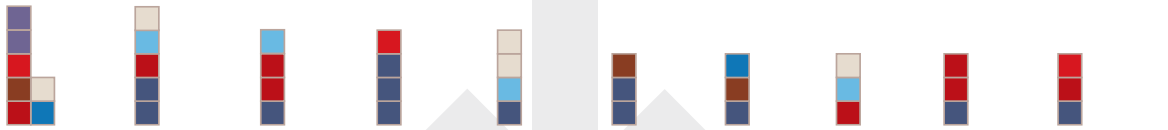
Law Schools

Yale and Harvard top the list by a large margin.

Yale 22 | Harvard 21 | Chicago 7 | Stanford 6 | U.Va. 5 | Columbia 4 | Michigan 3 | N.Y.U. 3 | Penn 3 | Other 16

Feeder Judges

Nearly half of Blackmun's clerks came to him from 10 federal judges.



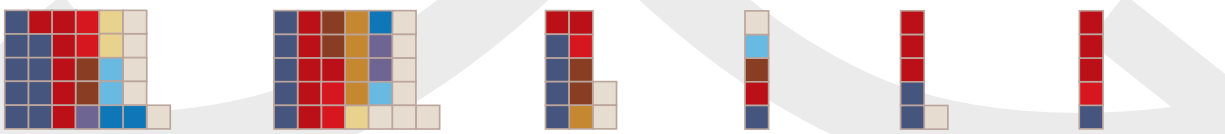
Abner Mikva, *D.C.*, 7 | Patricia M. Wald, *D.C.*, 5 | Wilfred Feinberg, *2nd*, 4 | William A. Norris, *9th*, 4 | James L. Oakes, *2nd*, 4 | David L. Bazelon, *D.C.*, 3 | Louis H. Pollack, *Eastern Pa.*, 3 | Roger Robb, *D.C.*, 3 | Malcolm R. Wilkey, *D.C.*, 3 | Abraham D. Sofaer, *Southern N.Y.*, 3

JUSTICE HARRY A. BLACKMUN

SUPREME COURT 1970–1994

After Blackmun

More Blackmun clerks chose careers in academia or the public sector than in private practice.



Academia 31 | Private Practice 31 | Government 12 | Judiciary 5 | Business 6 | Public Interest 5

SOURCES: INDIVIDUAL CLERKS

answered, "No, I would hesitate to say that I did."

But when Koh subsequently asked Blackmun to identify his "best opinion," the retired justice replied, "the dissent in *Bowers*." Blackmun's readiness to anoint *Bowers* as his most significant work is not necessarily surprising, but it again underscores the oddity of his responses to Koh's questions about the dissent. Any justice who could readily identify his foremost piece of work presumably would have reflected long and hard on its legal bases and precedents.

In another of his 1995 oral history interviews with Blackmun, Koh asked the former justice whether there was "a different style of operating with your law clerks on the Supreme Court than on the Court of Appeals [for the Eighth Circuit]," where Blackmun served as a judge from 1959 until 1970. "Well, it certainly was true in my case," Blackmun answered, "but that again was a matter of evolution. It wasn't a sudden different operation. As we went along and I felt more comfortable, particularly more comfortable with the new sets of clerks [each term], I think their assignments and their production came along in different ways and always became more helpful to me as the years went by." "More helpful to me as the years went by" is a phrase crucial to understanding what happened during Blackmun's 24 years on the Supreme Court. Although Karlan's role in *Bowers*, like Frampton's and Bezanson's contributions to *Roe*, was remarkably substantive, the Blackmun Papers suggest that, from the late 1980s until Blackmun's retirement in 1994, the extent of his clerks' influence on his most notable opinions increased even further.

In the spring of 1989, law clerk Edward Lazarus, now a lawyer and legal columnist based in Los Angeles, wrote most of Blackmun's outspoken dissent in the abortion case of *Webster v. Reproductive Health Services*, although Blackmun himself drafted two paragraphs. Lazarus kept Blackmun apprised of his writing, and when it was almost complete, he told Blackmun, "I hope you like what I have drafted. . . ." Lazarus also provided Blackmun with archly sardonic comments about other justices, like one note reporting that "The expected circulation from SOC [Sandra O'Connor] has been delayed until sometime later this afternoon. Apparently, her tennis game with [First Lady] Barbara Bush this morning, and her luncheon appointment, have precluded her final pre-circulation review."

The following year, clerk Anne Dupre, who now teaches at the University of Georgia Law School, performed yeoman service in the 1989 term's two notable abortion cases, *Hodgson v. Minnesota* and *Ohio v. Akron Center for Reproductive Health*. Dupre closely monitored developments in other chambers and advised Blackmun on how to deal with other justices. In one memo to Blackmun, she wrote:

> WJB's [William J. Brennan's] clerk has informed me that WJB is considering sending the attached memo to JPS [John Paul Stevens]. He wanted to check with you to see what you thought, but did not feel up to a telephone call. (His clerk says WJB is feeling somewhat better, but is still weak). I have been talking a great deal to WJB's clerk since TM's [Thurgood Marshall's] concurrence and dissent was circulated. I think it is a good idea to ask for these changes so that JPS can get as many votes as possible for his opinion. As I stated in a previous memo, I do not think it is good strategy to be too combative with JPS in this case. SOC's [Sandra O'Connor's] clerk does not think that these changes will scare off SOC who, from what I hear, is still on board, but will write separately.

Also in the 1989 term, clerk Martha Matthews, who now directs the domestic violence clinic at the University of Southern California Law School, had extensive conversations with clerks in other chambers while opinions were being drafted in *Cruzan v. Director, Missouri Department of Health*, a landmark "right to die" case to which she was assigned. When Brennan's dissent in the case was first circulated in late May 1990, almost six months after *Cruzan* was argued, Matthews informed Blackmun that "It covers all the points I think are important (I worked fairly closely with J. Brennan's clerk in drafting this). I do not really know what your views are on this case, but I can see no reason not to join this—with one exception." She added, "I do not know whether you have special concerns or thoughts about the case that might prompt you to write a separate dissent as well. If so, perhaps I could help draft something?"

It is extraordinary for a clerk to acknowledge that she did "not really know" her justice's views on one of the term's most significant cases long after it was argued. It indicates that Blackmun had offered Matthews no substantive guidance on *Cruzan* and it suggests that, by the spring of 1990, he was giving his clerks little explicit direction in the court's most notable cases.

During the 1991 term, two of the decade's premier cases, *Lee v. Weisman* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, came before the court. Clerks Molly McUsic (who is now a senior fellow at a Maryland-based conservation foundation) and Stephanie Dangel (who is now a lawyer in Pennsylvania) played notable roles in both cases. In *Lee*, which involved a challenge to a prayer at a public school graduation ceremony, McUsic recommended with great reluctance that Blackmun join Justice Kennedy's draft of a majority opinion. It contained some "very troubling" sentences, McUsic told Blackmun, but it was probably "the only version that could capture a majority. I do not think I could draft anything that would please Justice Kennedy, unless it was as narrow as this. Justice Souter might be able to, but there is no way to know." McUsic's choice of words suggested that in Souter's chambers, unlike in Blackmun's, the justice did at least some of the drafting.

McUsic also took the lead in handling *Planned Parenthood v. Casey*, an abortion case that most observers believed could lead to *Roe*'s demise because the recent replacement of Marshall with conservative Justice Clarence Thomas would create an anti-abortion majority. "The prospect of this case being heard has gripped the attention of the outside world," McUsic told Blackmun. "If you believe there are enough votes on the Court now to overturn *Roe*, it would be better to do it this year before the election and give women the opportunity to vote their outrage. The only harm would be that *Roe* would be overturned sooner rather than later. While under usual circumstances that harm would be enough to avoid hearing the case for as long as possible, the November Presidential elections may tip the scale in favor of hearing this case."

McUsic explained her thinking. "Assuming DHS [David H. Souter] sits on the fence and declines to vote to overrule, there are now just 5 votes to do so. But CJ [Rehnquist] and/or BRW [Byron R. White] could decide to step down. (BRW has yet to select clerks for next year). With the worsening economy, a new President could also be elected" and replace Rehnquist or White with a pro-choice nominee.

Stephanie Dangel, who would take over from McUsic on *Casey*, soon chimed in. "Peter Rubin, DHS' [David H. Souter's] clerk, claims that DHS is trying to write the question" on which the court would grant certiorari "in such [a] way as to avoid overruling Roe. . . . Peter says he has confirmed this with his boss . . . [and] says that DHS' desire for more time is due to his hope that he would have the summer to think about this question. Unlike the Chief and SOC [Sandra O'Connor], DHS is not concerned about the election."

One week later, Blackmun's clerks gave him a joint memo recommending that he vote to hear *Casey*. "Moreover, we feel strongly that the case should be heard this spring," they wrote, "and that you should oppose efforts to relist the case any further," because such efforts would delay it until the fall. The clerks also drafted a dissent to relisting, writing that "We should conduct our business above the fray of politics," but the draft was put aside when the court granted certiorari on January 21.

Casey was argued on April 22, 1992, and at the justices' private conference there appeared to be five votes for upholding Pennsylvania's anti-abortion law. Chief Justice Rehnquist assigned himself the majority opinion and circulated an initial draft on May 27. Not until May 30 did Kennedy, ostensibly a member of Rehnquist's narrow majority, inform Blackmun that he and Justices O'Connor and Souter had secretly been preparing an opinion that would reaffirm *Roe*'s core. Four days later, the three justices circulated their draft.

Dangel recommended that a separate opinion from Blackmun put "the best possible spin" on the three justices' joint draft. Explaining that there was "a real need for something short and snappy that summarizes just what has happened in this case," Dangel told Blackmun, "I wanted to give you a brief summary of the approach I am taking in my draft. (I have cleared the approach with your other clerks, together with JPS's [John Paul Stevens's] clerk.) Pl[ea]se let me know if you think I'm headed down the wrong track."

Dangel confessed that she was "somewhat ambivalent about what has happened in this case," for while "there is much to be admired in the formation of the troika and the substance of their opinion, . . . given the middle ground that they have taken, I fear the decision may have the effect of removing abortion from the political agenda just long enough to ensure the re-election of Pres. Bush and the appointment of another nominee from whom the Far Right will be sure to exact a promise to overrule *Roe*."

Sketching a three-part outline, Dangel explained that the specifics of the third section "cannot be worked out until AS [Antonin Scalia] has circulated his monstrosity" of a dissent. She explained that "while there may be something to cheer in the troika's opinion, there is much more to fear from the right. And the difference between the two positions is a single vote—a single vote that is up for grabs in the coming election. As you have no doubt gathered, this opinion is more rhetoric than research."

Dangel concluded by telling Blackmun, "I plan to give you a draft of this opinion late Thursday or early Friday," but she added, "I think it is preferable to circulate after the conference on Friday," since the opinion "should ruffle some feathers on the right" and it would be "better to give them a few days to cool off before you have to meet with them again." She gave Blackmun a partial draft on Sunday, explaining that it was incomplete in part because "the evil nino [Scalia] has yet to circulate."

Revisions continued during the ensuing week, with Dangel telling Blackmun that "[t]he one 'substantive' decision you will have to make is whether you want to go with an ending that links the future of reproductive rights to the upcoming election (or confirmation process) in the manner that my earlier draft did.

It is extraordinary for a clerk to acknowledge that she did "not really know" her justice's views on one of the the term's most significant cases long after it was argued.

It's pretty radical. . . ." A day later, Dangel notified Blackmun that she had changed the ending so that "it now reads less as a battle cry, and more as a lament," and she followed up with another memo reporting that a Stevens clerk had said the Blackmun opinion would further politicize the decision. "I hope you don't feel that we were pressuring you too much on the final section of this opinion. You certainly should not include it if you feel uncomfortable," Dangel wrote. She added, however, that "this is not just about abortion or this Term," because "the Justices who get appointed in the next few years are going to make up the Court for most of my life!"

Dangel closed by remarking that "while this is completely inappropriate, I cannot help [but] be disappointed with JPS [John Paul Stevens]" both in *Casey* and in two other cases where he diverged from Blackmun. "The people of America need someone to tell them the truth. And, as the author of *Roe*, I think you're the only person who can do it." Later that day, Dangel informed Blackmun that Kennedy had had a clerk pass along his concern about how the Blackmun draft referred to Rehnquist simply as "the Chief." "While I have my doubts as to whether he deserves to be call[ed] 'Justice' on this one," Dangel told Blackmun, "I guess there's no need to ruffle feathers needlessly."

The partisan politics evident in McUsic's and Dangel's memos should not have been tolerated by any justice, liberal or conservative, and no similarly intemperate statements appear in clerks' memos to Brennan, Marshall, or Powell. In addition, the hostile and sometimes harshly sarcastic references to other justices—and Blackmun's failure to stop such comments—appear

to indicate that the justice himself lacked respect for some of his colleagues.

Just how disengaged Blackmun was during his final term on the court is highlighted by the story of his dissent in the 1994 death penalty case of *Callins v. Collins*. In the summer of 1993, clerk Andrew Schapiro, who now practices law in New York, wrote Blackmun a memo: "You have on occasion this Term expressed frustration with the Court's capital jurisprudence, and have suggested more generally that the death penalty itself may be invalid. . . . I want to outline briefly in this memo why I believe the time has come to abandon the effort to craft a constitutional death penalty." He explained that "twenty years of applying the Eighth Amendment to the death penalty has demonstrated that the rationalizing enterprise has failed. Efforts to fine-tune the machinery of death cannot succeed, because a process sufficiently accurate with respect to individual circumstances requires so much discretion as to be unacceptably arbitrary."

One week later, Blackmun noted on Schapiro's memo that incoming clerk Michelle Alexander, who now teaches at Stanford Law School, "will expand & see what she comes up with." In late October, Alexander gave Blackmun a memo saying, "here is the death penalty dissent," which "has been written for Gary Graham," a Texas death row inmate whose appeal the court had rebuffed earlier that year. "I believe that his case would provide an excellent vehicle for your dissent," Alexander said, but it "can be revised with little difficulty to account for the circumstances of any capital case." She explained: "There are numerous approaches that could be taken in this dissent, and I have chosen but one of them. After lengthy and helpful discussions with my co-clerks, we are of the opinion that this approach is the most persuasive and intellectually honest. You may, of course, disagree."

"This is a very personal dissent," Alexander continued, "and I have struggled to adopt your 'voice' to the best of my ability. I have tried to put myself in your shoes and write a dissent that would reflect the wisdom you have gained, and the frustration you have endured, as a result of twenty years of enforcing the death penalty on this Court. I recognize, though, that my writing style may be different than yours, and that I have no intimate familiarity with the evolution of your jurisprudence."

But all indications are that Blackmun was entirely happy with Alexander's work. Several weeks later, Alexander gave Blackmun a note that read, "This morning at breakfast you mentioned that you would like to release the death penalty dissent by the end of the calendar year. I think that is wise," because several pending cases offered appropriate opportunities. In particular, "there is little chance that a better vehicle for your dissent will come along before the end of the year" than *Schlup v. Delo*, an "extraordinary" capital case. In closing, she stated, "I would love to hear your thoughts."

Schlup was postponed, however, and Alexander reported that she had reviewed all petitioners with scheduled execution dates. "I recommend that you plan to release your dissent when Malcolm Rent Johnson is executed on January 31," she wrote. Alexander once again concluded her note by saying, "I'd love to hear your thoughts." One week later, with Johnson's execution indefinitely delayed, Alexander advised that "[i]nstead of searching for the ideal vehicle for the dissent, the dissent should be tailored for any death case," so that it simply could be issued whenever the next execution occurred. Two days later, she told Blackmun that she had revised the existing draft to remove the Gary Graham references, but explained, "I have not altered any of the cites. It is therefore unnecessary for you to recheck the cites for accuracy."

By mid-February it appeared certain that the next execution would be of Texas death row inmate Bruce Callins on February 22. Alexander told Blackmun that "I think it's important to vote to grant all the capital cases that are on the same order list as Callins" when that list was considered at the justices' February 18 conference. Those orders would be issued publicly on the following Tuesday, and "[t]hat means that your dissent will be released on February 22, the night of Callins' execution." Alexander emphasized that "this is an excellent arrangement," since "your dissent from the denial of cert will be released within hours of Callins' execution. Remember to state at the conference tomorrow that you vote to grant Callins' cert pet[itio]n and that you will circulate a statement dissenting from the denial of cert in the afternoon."

Blackmun's *Callins* dissent, highlighted by his declaration that "I no longer shall tinker with the machinery of death," was issued on February 22, and less than six weeks later, on April 6, Blackmun announced his retirement, effective after the end of the term. Readers of Alexander's and Schapiro's memos may rightly wonder who was functioning as a justice, and who as a clerk. Alexander twice told Blackmun, "I would love to hear your thoughts" about the opinion, yet her memos suggest that Blackmun was most concerned with whether he should "recheck the cites."

No public evidence exists that Blackmun experienced the type of mental decrepitude that marred the final terms of Justices Hugo L. Black, William O. Douglas, and Thurgood Marshall, as detailed in several scholarly studies of the justices' lives. Nor is there any evidence that a clerk ever determined or altered any of Blackmun's votes in a case, as did occur with Justice Frank Murphy in the 1940s, or that Blackmun ever voted while failing to understand what he was doing, as Marshall's case files reveal that he did on at least one occasion. But what transpired in Blackmun's chambers, especially after 1990, was nonetheless a scandalous abdication of judicial responsibility.

Harry Blackmun will be remembered first and foremost as the author of *Roe v. Wade*, just as Thurgood Marshall will be remembered as the Supreme Court's first African-American justice. Yet in the annals of Supreme Court history, Marshall unfortunately will also be remembered as a justice who overstayed his time on the bench. Likewise, Blackmun must now be seen not only as a justice who evolved toward a more compassionate jurisprudence but as a justice who increasingly ceded far too much of his judicial authority to his clerks. ■

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