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## THE ROAD TO ROE - AND BEYOND HARRY BLACKMUN TRAVELED FAR TO ROE V. WADE AND HE KEPT RIGHT ON GOING

By David J. Garrow

The universal acknowledgment that *Roe v. Wade* is the most important legacy of Harry A. Blackmun's 24 years as a justice of the US Supreme Court unfortunately obscures the tremendous changes that took place in Blackmun's own appreciation of the constitutional status of reproductive rights between 1971, when *Roe* first came before the high court, and 1992, when the surprising endorsement of *Roe* in *Planned Parenthood v. Casey* by three conservative justices -- Sandra Day O'Connor, David H. Souter and Anthony M. Kennedy -- guaranteed that a woman's right to choose abortion will remain protected by the Constitution.

Blackmun was already 61, and an 11-year veteran of the 8th Circuit Court of Appeals, when President Richard M. Nixon nominated him to the high court in early 1970 in the wake of successive Senate rejections of two earlier Nixon nominees, appellate judges Clement F. Haynsworth Jr. and G. Harrold Carswell. Blackmun had an unremarkable and uncontroversial record on the appellate bench, and his childhood friendship with Nixon's newly-appointed chief justice, fellow Minnesotan Warren E. Burger, further strengthened the perception that Blackmun would be a mainstream conservative.

Blackmun came to the Supreme Court with a decidedly humble estimation of his own intellectual qualifications for the post, and during his first two years there -- years in which many new justices have a difficult time adjusting to the intensity of the workload -- many of the court's clerks wondered whether Blackmun indeed was up to the job. But his most formative years had not been his decade on the 8th Circuit; rather they were from 1950 to 1959, when he was resident counsel at Minnesota's famous Mayo Clinic. That experience had left Blackmun with a deep respect for the medical profession, and a good understanding of its work.

In spring 1971, the court announced it would review both *Roe v. Wade*, in which a lower federal court had struck down Texas' antiabortion law, and a highly similar case from Georgia, *Doe v. Bolton*. Although Blackmun himself would not remember it this way in later years, those around him in December 1971 believed he very much wanted the job of writing the *Roe* and *Doe* decisions. When, however, Blackmun's first draft of *Roe* explicitly dodged the central constitutional question, his supporting colleagues -- William O. Douglas, William J. Brennan Jr., Thurgood Marshall and Potter Stewart -- protested firmly but politely, and the cases were carried over to fall 1972 so that Blackmun could do further work and also so that newly-seated justices Lewis F. Powell and William H. Rehnquist could take part.

Abortion, Blackmun repeatedly reminded his fellow justices, was "so sensitive and so emotional an issue" that the court would be criticized no matter what it did, but by November 1972, Blackmun had moved to the point where his draft opinions in *Roe* and *Doe* now offered full constitutional protection for a woman's right to choose abortion up until the end of the first trimester of pregnancy. To some who saw Blackmun daily during those months, his work on the abortion cases afforded him an opportunity to establish himself as his own man, because -- as one co-worker memorably put it -- "There was no question that Blackmun was tired of being

referred to as a 'Minnesota Twin' and tired of being leaned on by such an overbearing son of a bitch as Warren Burger." Justices Brennan and Marshall gently and successfully lobbied Blackmun to shift Roe and Doe's fundamental line of demarcation from the first trimester to the much later stage of fetal viability, but the most striking emphasis in Blackmun's drafts -- namely, the need for the abortion choice to reflect "the best medical judgment of the pregnant woman's attending physician" -- remained constant right up until the 7 to 2 decisions in both Roe and Doe were publicly handed down on Jan. 22, 1973.

As commentators both favorable and hostile readily acknowledged, Roe and Doe as written seemed to be decisions that had more to do with doctors than with women. The "abortion decision in all its aspects," Blackmun emphasized in Roe, "is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician." Blackmun's Mayo-based medical orientation shone through again and again; as one Yale law professor hostile to Roe later put it sarcastically, Blackmun "treats the private physician with the reverence that one expects only from advertising agencies employed by the American Medical Association."

Given the many state and lower federal court decisions that had already struck down restrictive abortion laws, Roe v. Wade, as Blackmun himself later put it, "was not such a revolutionary opinion at the time." And since abortion was, indeed, in Blackmun's mind in 1973 "essentially a medical decision," he even publicly confessed just a few days after the opinions were issued that "I really resent that it had to come before the court."

Blackmun's fundamentally medical, doctor-oriented perspective on the court's constitutional protection of reproductive rights remained constant as late as the court's 1979 reaffirmation of Roe in Colautti v. Franklin. But beginning with Ronald Reagan's November 1980 election to the presidency, Blackmun began to worry that Roe's long-term constitutional survival might eventually be called into question. Just a week after Reagan's triumph, Blackmun privately warned Brennan and Marshall, "I fear that the forces of emotion and professed morality are winning some battles."

In 1983, newly-named Justice Sandra Day O'Connor mounted an intense attack on Blackmun's Roe and Doe opinions while dissenting in an Ohio abortion case, and three years later, with Burger's defection to the dissenters' side, what in 1973 had been a 7-vote majority shrank to the narrow margin of 5 to 4.

Blackmun responded to the court's shrinking support for Roe by expanding his own defense of it. Writing for the majority, he still emphasized how state antiabortion limitations "intrude upon the physician's exercise of proper professional judgment," but in 1986 he gave greater attention than he had 13 years before to how the "Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." "Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision . . . whether to end her pregnancy. A woman's right to make that choice freely is fundamental."

By 1987, Blackmun was terming Roe "a landmark decision" in the "emancipation of women," but come 1989 and the Missouri abortion case of Webster v. Reproductive Health Services, where two new justices -- Kennedy and Antonin Scalia -- added their votes to the anti-Roe trio of Rehnquist, O'Connor and Byron White, Blackmun wrote a despondent first draft of a dissent, ruing how "Roe no longer survives." Much to his relief, O'Connor soon came loose from the

incipient Rehnquist majority, thus denying the anti- Roe forces a meaningful outcome, but throughout the late 1980s and early 1990s, Blackmun regularly found himself in the minority on all issues of women's rights.

In 1991 and 1992, with abortion rights hanging in the balance by only a thread, Blackmun's appreciation of Roe continued to move away from the medically-centered perspective he had articulated before 1986 and toward an increasingly feminist understanding of his own earlier handiwork. Roe, Doe and their progeny, he wrote in dissent in 1991, "are not so much about a medical procedure as they are about a woman's fundamental right to self-determination. . . . 'Liberty,' if it means anything, must entail freedom from government domination in making the most intimate and personal of decisions."

Then, in spring and summer 1992, came the remarkable outcome in *Planned Parenthood v. Casey*, with Souter, O'Connor and especially Kennedy upsetting all expectations by reaffirming the constitutional nucleus of *Roe v. Wade* rather than joining Rehnquist, White, Scalia and Clarence Thomas to inter it. For Blackmun, the stunning result in *Casey* was both a professional triumph and personal vindication. "Now, just when so many expected the darkness to fall, the flame has grown bright," he wrote in his *Casey* concurrence. He praised the joint opinion of O'Connor, Kennedy and Souter as "an act of personal courage and constitutional principle," and noted that "What happened today should serve as a model for future Justices and a warning to all who have tried to turn this Court into yet another political branch."

Blackmun ended his *Casey* opinion on an apprehensive and unusually personal note. "In one sense," he observed, the approach of the *Casey* majority "is worlds apart from that of The Chief Justice and Justice Scalia. And, yet, in another sense, the distance between the two approaches is short -- the distance is but a single vote. I am 83 years old. I cannot remain on this Court forever, and when I do step down, the confirmation process for my successor well may focus on the issue before us today. That, I regret, may be exactly where the choice between the two worlds will be made."

But we, like Blackmun, now know that Senate confirmation of Blackmun's successor will not require such a choice between two worlds, for it was the accomplishment of *Casey* -- now aided by the election of a president who favors abortion rights and the subsequent replacement of White with Ruth Bader Ginsburg -- that the constitutional core of *Roe v. Wade* is indeed safe. For O'Connor, for Kennedy and for Souter, there is no going back upon the dramatic commitment they made in *Casey*, and it is difficult to imagine any Senate Judiciary Committee -- or at least any Senate Judiciary Committee not peopled by a majority of Jesse Helmses -- approving any Supreme Court nominee who refuses to endorse at least the O'Connor-Kennedy-Souter stance in *Casey*.

And so Harry Blackmun retires from the US Supreme Court knowing that his landmark legacy will indeed endure, and knowing too that its real meaning -- just as he himself came to see in the 1980s and 1990s -- stands for much more than even he himself was able to articulate back in those doctor-oriented days of 1973.

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