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The Blackmun Papers: One Man's Shadow

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The growing supremacy of the nation's high court has been propelled by individual justices, whose personal influence decided not only individual cases, but also the future direction of the court.

By any measure, Justice Harry Blackmun was one of those rare justices whose personal influence continues to cast a decisive influence on the Supreme Court. In this case, the legacy of Justice Blackmun is reducible to the raw exercise of judicial activism, best symbolized in his infamous majority opinion for the case, *Roe v. Wade* that legalized abortion throughout America.

A more comprehensive picture of Harry Blackmun has emerged with the recent release of his papers at the Library of Congress. Blackmun was something of a pack rat, and his papers include more than 500,000 individual items. A product of St. Paul, Minnesota, Blackmun was appointed to the nation's high court in 1970. He was President Nixon's third choice to replace Justice Abe Fortas, and Blackmun was considered to be a safe, conservative appointee. That soon proved to be a very unsafe assumption.

It was the issue of abortion that catapulted Blackmun to national prominence. When the case, *Roe v. Wade*, appeared at the Supreme Court, only seven justices were involved in the original oral arguments. For this reason, the case was later re-argued and as the justices met in conference, Blackmun was assigned to write the opinion for the majority. As has already been documented, Blackmun and his colleagues were determined to "find" a right to abortion in the Constitution, and they went searching for an argument in order to make their case. The release of Blackmun's papers reveals an early readiness on his part to overthrow laws restricting abortion. In the 1971 case, *United States v. Vuitch*, Justice Blackmun dictated a memo to himself, indicating that he was already looking to find a right to abortion in a supposed constitutional guarantee of privacy. As reported in *The New York Times*, Blackmun said: "I may have to push myself a bit, but I would not be offended by the extension of privacy concepts to the point presented in the present case . . . I think I could go along with any reasonable interpretation of the problem in principles of privacy."

Blackmun was initially displeased to be given the assignment of writing the majority opinion for *Roe v. Wade*. In an early draft, Blackmun outlined his thought: "The right to privacy as exemplified in the decided cases here. This is broad enough to encompass the decision whether to terminate a pregnancy But, despite the arguments, the right is not absolute. There is a point at which another interest is involved—life or the potential of life I avoid any determination as to when life begins. Therefore, a balancing of interest." Those random thoughts actually provided the structure for Blackmun's argument in the *Roe* decision.

The Court's ruling in *Roe v. Wade* stands as the most significant milestone in America's slide toward the Culture of

Death. The decision, grounded in the opinion written by Justice Blackmun, opened the door for abortion on demand in all 50 states. Since 1973, well over 40 million unborn Americans have been murdered in the womb—all legally justified according to the dark logic offered by Justice Harry Blackmun.

The recently-released papers indicate the depth of Blackmun's commitment to the abortion cause. The justice delayed his retirement from the high court, timing his exit so that a pro-abortion president—in this case President Bill Clinton—would have the opportunity to name his replacement. Blackmun, who had been appointed to the court by President Richard M. Nixon as a conservative, retired as one of the most liberal justices in the nation's history.

Of course, the cultural elite applauds when a jurist moves leftward. This is explained as the “maturing” of the judge's legal philosophy. In this case, Blackmun “matured” into the primary legal theorist for the abortion movement.

At the same time, the release of these papers also underlines the dramatic and strategic importance of the role played by individuals such as Harry Blackmun. Republican presidents, hoping to appoint conservative justices to the Supreme Court, have often failed in their attempt to influence the Court's direction. Presidents Dwight D. Eisenhower, Richard M. Nixon, Ronald Reagan, and George H.W. Bush each appointed justices to the Court who turned out to be judicial activists of a liberal bent. President Eisenhower appointed California Governor Earl Warren as the Court's Chief Justice, only to see Warren transform the Supreme Court into an engine for social revolution. Nixon appointed Blackmun, and President Reagan appointed both Sandra Day O'Connor and Anthony Kennedy, while President George H.W. Bush appointed David Souter to the Court.

When the Court faced its most strategic opportunity to reverse *Roe v. Wade*, it would be Justices O'Connor, Souter, and Kennedy who would “save” Blackmun's legacy. The released papers document what was known by many at the time—that Justice Kennedy “flipped” on the question, eventually switching sides and joining Justice Blackmun in a support of *Roe v. Wade*. Kennedy would flip in other cases as well, joining Blackmun again to rule against graduation prayers in the case *Lee v. Weisman*.

Blackmun's papers also provide a window into the personal lives of the justices. Significantly, the papers document the dissolution of Blackmun's long friendship with Chief Justice Warren Burger. The two had met in kindergarten, grew up together in St. Paul, Minnesota, and were intimate friends—at least until both arrived at the U.S. Supreme Court.

In the end, Justice Blackmun's legacy rests on his judicial philosophy, and his philosophy was unapologetic judicial activism. Blackmun serves as “Exhibit A” of what inevitably results when justices confuse the rule of law with their own political causes. Blackmun saw himself as a crusader for individual rights and his selected moral principles. He simply decided that abortion should be a legal right, and thus he invented that “right” out of whole cloth, using the concept of privacy as a lever to distort the Constitution. His example must serve to warn all Americans about the importance of judicial appointments and the Supreme Court's role in our society.

Individual justices do make a difference, and the disastrous legacy of Harry Blackmun serves as a graphic reminder of this reality. Our constitutional ideal of separated powers makes sense only when each of the three branches of government understands its proper place. America entered a period of great peril when the Supreme Court undertook a legislative responsibility and took the power to decide issues such as abortion away from the elected representatives of the people and into its own hands. Unless this direction is checked and reversed, there is no hope of returning the Court to legal sanity and judicial restraint.

In the year 2004, *Roe v. Wade* appears as invincible as ever. Harry Blackmun must be grinning from the grave.

