

No Empty Robe

Justice Harry Blackmun was not a pawn of his clerks.

BY JOSEPH F. KOBYLKA

In the May/June issue of *Legal Affairs*, Professor David Garrow of Emory University paints Harry Blackmun as a phantom justice—an empty robe into which his clerks poured legal arguments and political positions. Whether one likes Blackmun or not (and that often pivots off what one thinks about the Supreme Court’s opinion in *Roe v. Wade* (1973)), Garrow’s argument is acontextual and seriously overreaches its evidence.

I am currently finishing writing a biography of Blackmun, and the justice that Garrow portrays in “The Brains Behind Blackmun” is contrary to the justice my research has shown me.

First, let me note where Garrow—in my reading of Blackmun’s papers—gets the story right. Toward the end of his 24-year tenure, Blackmun became increasing reliant on his clerks for drafting opinions and communicating with the chambers of other justices.

Take the abortion cases on which Garrow focuses. *Roe* hung in the balance in the late 1980s and early 1990s in several cases: *Webster v. Reproductive Health Services* (1989); *Hodgson v. Minnesota* (1990); and *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992).

In these cases, Blackmun was a decidedly marginal player on the Court as Justice John Paul Stevens (and his clerks) took the lead in attempting to sway the position of moderate justices (Sandra Day O’Connor, Anthony Kennedy, and David Souter). Blackmun himself had played this role with “swing justices” (Potter Stewart, Lewis Powell Jr., and Stevens) in the late 1970s and early 1980s when abortion questions came before the Court.

When the Court heard *Webster*, though, Blackmun was 81 years old and the younger (at 69!) Stevens took the point in attempting to influence the swing justices. He kept it—much to the apparent chagrin of many of Blackmun’s clerks, as noted by Garrow—until Blackmun’s retirement in 1994. If Blackmun “abdicated” his lead in this line of cases, he did so to another justice—one with whom he was in substantial agreement.

This said, it is important to note what Garrow neglects: Blackmun did not change his position on the abortion right, nor did his clerks engineer that position. As Garrow himself notes, Blackmun’s understanding of a constitutional basis for the abortion right is manifest in his notes for *United States v. Vuitch* as early as 1971—before *Roe* was even argued.

Here, in a case involving a prosecution under a Washington, D.C., abortion statute, Blackmun wrote that the state would have to bear “the burden of proof as to all aspects of the crime,” that this would require “expert medical testimony,” and that he would “pump a lot of area into the [statute’s preservation of the mother’s life or health] exception.” Further, as Garrow notes, Blackmun wrote, “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” (emphasis added). These comments clearly foreshadow Blackmun’s ultimate position in *Roe*.

IN CONTROL

This leads to my primary point of disagreement with Garrow’s analysis: There is a *huge* difference between a justice’s relying on clerks in executing his wishes and ceding his or her function to them. Direction and oversight is a form of control—one pre-

sent in *all* chambers—and there is no evidence in the papers that Blackmun was not in control of his chambers.

Even in his later years, when Blackmun ceded more drafting to his clerks, he still prepared his meticulous notes for oral arguments and closely memorialized conference discussions. If he was functionally AWOL, why would he do this? How would he do this?

In his rush to paint Blackmun in an empty robe, Garrow ignores the context of conversation in which his clerks—even in the latter days of his tenure—worked with him. They ate breakfast together every day. They met and talked with him about what he had them working on. He came into their offices to bid them adieu at 7 p.m. every night, carrying papers to work on at home.

These conversations were not transcribed and put into Blackmun's files, but they occurred. By ignoring them (or the fact that they occurred), Garrow neglects an important conduit of communication.

He also ignores the larger Court context. Blackmun worked with other justices throughout his tenure and adjusted his opinions and positions to the matrix of collegial interaction. The trimester formulation in *Roe* was discussed among Blackmun and his clerks, for example, but the pressure to change the point of the state's compelling interest—in light of the competing considerations of the woman's (and her doctor's) needs and potential fetal life—from quickening to viability to a combination of both came from the other justices. This is amply demonstrated in Blackmun's papers (as well as those of Justices William Brennan Jr. and Thurgood Marshall).

Clerks had *input into* the process, but they *weren't the process*. Yet this aspect of the record gets nary a word from Garrow.

A PAWN IN ROE?

Garrow's effort to make Blackmun a creature of his clerks even in the *Roe* decision strains credulity. Of course, his clerks played an important role in his deliberations on the case—they

were working for him and that is in part what clerks do—but nowhere in the record can an honest eye find evidence of Blackmun's abdication of responsibility. He didn't always summer in the Mayo Clinic's library, but that is where he went (to research the medical aspects of abortion) the summer the Court held over the *Roe* opinion. His clerks worked for him in Washington; he worked for himself in Rochester, Minn. This is divided labor, not abandonment of authority.

In the end, Garrow comes close to giving away his argument in writing, "No public evidence exists that Blackmun experienced the type of mental decrepitude that marred the final terms of Justices [Hugo Black, William O. Douglas, and Thurgood Marshall]. . . . Nor is there any evidence that a clerk ever determined or altered any of Blackmun's votes in a case . . . or that Blackmun ever voted while failing to understand what he was doing."

Despite these caveats though, Garrow concludes, "What transpired in Blackmun's chambers, especially after 1990, was nonetheless a scandalous abdication of judicial responsibility." This emotionally laden and rhetorical language is not well supported by his evidence, and it would be more fitting for talk radio than serious analysis.

I'm not an apologist for Blackmun. In fact, I've written quite critically about him (and his colleagues) for their deliberations and opinions in *Roe* and *Doe v. Bolton* (1973).

Neither, though, am I an apologist for partial analysis. Much of what Garrow concludes is unsupported inference narrowly channeled to make an argument that, on sober and serious reflection, does not stand up well. Love him or hate him, Blackmun was his own justice.

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