



By Richard Lazarus

In Blackmun Papers, Inside Key Decisions

For an environmental law professor interested in the Supreme Court, the release this spring of Justice Harry Blackmun's papers, five years after his death, was the equivalent of the California Gold Rush. Although the Library of Congress, where the Blackmun papers are located, has (fortunately) not witnessed a rush akin to the half million people who descended upon California with the discovery of gold at John Sutter's mill in 1848, scholars will be mining the jurist's papers for years. Buried within the hundreds of boxes containing the justice's papers are a bevy of nuggets revealing the decisionmaking process of the court in many of the most significant environmental law cases from 1970 until Blackmun's retirement in 1994. He died on March 4, 1999.

What makes the Blackmun papers so important is that they are far more extensive than Justice Thurgood Marshall's papers, which were made publicly available immediately upon his death in 1993. Marshall generally saved only the most formal documents about particular cases. Justice Blackmun, by contrast, saved almost every piece of paper that entered his chambers, including many that, for most people, would likely have a half life no longer than that required to find the trash can.

The most extraordinary documents, however, are Blackmun's handwritten notes prepared during the conference when the justices deliberated in complete privacy and then voted on cases. It is fascinating to read how Chief Justice Warren Burger, in characterizing

the lower court's decision in the famous standing case, *U.S. v. S.C.R.A.P.*, claimed that D.C. Circuit Judge Skelly Wright "did a snow job" on Judge Flannery in that case. No less interesting is the discovery that in *Tennessee Valley Authority v. Hill*, the infamous snail darter case, even those justices considered most sympathetic to environmental protection expressed doubts regarding the Endangered Species Act's efficacy. Reportedly, Marshall stated that Congress "can be a jackass" and Justice Stevens acknowledged that the statute was "stupid."

In several cases, the initial conference votes tell a story quite different from that later announced by the Court's formal opinion. This is certainly true for *Chevron v. NRDC*, one of the most significant cases of the modern environmental law era. In *Chevron*, the Court upheld EPA's construction of the Clean Air Act, allowing EPA to treat multiple individual emitting stacks at one facility as a single "source." The Court's final opinion was unanimous in favor of EPA, with three justices recused based on a variety of conflicts. According to Blackmun's conference notes, however, the initial vote was tied at three to three, with Chief Justice Burger, Justice Brennan, and Justice O'Connor favoring NRDC's view. For O'Connor, in particular, that result was "very painful" because "industry is suffering," but she did not believe that the legislative history supported EPA.

Justice Blackmun was also on the Court for many important regulatory takings cases. It was not, however, until Justice Scalia joined the Court in 1986 that a majority of the justices seemed to launch themselves toward establishing precedent that imposed a more meaningful constitutional check on what they perceived to be environmental protection law's excessive encroachments on private property rights. For that reason, it is fascinating to learn from the Blackmun papers that Scalia's own views in this area have apparently been evolving and that he may not have been the uncompromising advocate of regulatory takings claims, as many have long assumed.

Blackmun's conference notes hint that Scalia's first reaction to the regulatory takings claims in two cases soon

after Scalia joined the Court, *First English Evangelical Lutheran Church v. County of Los Angeles* and *Nollan v. California Coastal Comm'n*, was that such claims were more properly seen as sounding in due process rather than as "takings." Hence, Blackmun's notes indicate that Scalia at the conference characterized the temporary impairment of land use at issue in *First English* as not "a taking" but something that could be a due process deprivation. Indeed, Scalia's doubts about the regulatory takings rationale may explain why he was the very last justice to join the chief's majority opinion in *First English*. The chief first circulated his draft opinion in mid-February, which all the others in the majority joined within a few days, except for Scalia who did not join until May 28.

Even in *Nollan*, which was Scalia's first regulatory takings opinion for the Court, he reportedly expressed some ambivalence at conference about the landowner's takings rationale for his constitutional claim. Blackmun wrote that Scalia stated at conference that the permit exaction of public beach access challenged in *Nollan* was a "gimmick" that lacked a reasonable relationship to the underlying restriction, but not "a regulatory taking." Not until a week or so after Scalia decided to join the chief's opinion in *First English* did Scalia finally circulate his draft opinion in *Nollan*, which squarely relied on the landowner's regulatory takings theory. Because many government regulators and environmentalists have long contended that the entire notion of regulatory takings is constitutionally misplaced and should be relegated to less favored due process claims, the fact that Scalia, too, may have early on expressed similar sentiments — at least in the context of permit conditions and temporary takings — is historically intriguing.

Similar nuggets and surprising explanations appear in Blackmun's papers concerning a host of environmental cases. For their discovery, however, you will have to join the rush yourself at the Library of Congress (or await a fuller law review article I expect to publish next year).

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