

SQUARE DANCING AND A CAT AT THE SUPREME COURT

JUSTICE HARRY A. BLACKMUN'S
FIRST MOMENT IN CHARGE

Ross E. Davies[†]

Associate Justice Harry A. Blackmun served on the Supreme Court of the United States from June 1970 to August 1994. He had mixed feelings about the Chief Justices with whom he served. To oversimplify a bit, Blackmun was not entirely happy with how Chief Justice Warren E. Burger presided over the Court (1969-1986), but later on was pleased with Chief Justice William H. Rehnquist's leadership (1986-1994¹). Burger was, or Blackmun perceived him to be, an energetic yet ineffective manipulator and a poor administrator, while Rehnquist was forthright, even-handed, and efficient.²

Whatever might be said, pro or con, about Chief Justice Burger or Chief Justice Rehnquist, no one would say either was a slacker. Their diligence is reflected in "the official minutes of the Court," the *Journal of the Supreme Court of the United States*:

It is published chronologically for each day the Court issues orders or opinions or holds oral argument. The Journal reflects the disposition of each case, names the court whose judgment is under review, lists the cases argued that day and the attorneys who presented oral

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¹ After Blackmun's retirement in 1994, Rehnquist remained Chief Justice for another 11 years that we will not deal with here.

² Linda Greenhouse, *Becoming Justice Blackmun* 126-27, 153-60, 234-36 (2005).

argument, contains miscellaneous announcements by the Chief Justice from the Bench, and sets forth the names of attorneys admitted to the Bar of the Supreme Court.³

According to the *Journal* (summarized in Table 1 on page 3), Chief Justices Burger and Rehnquist had a combined average of less than two absences per year during the 24-plus years Blackmun served with them.

By statute⁴ and by long tradition,⁵ when the Chief Justice is not available, the most senior available Associate Justice steps in. That is why William O. Douglas (senior Associate Justice, 1971-1975) and William J. Brennan (senior Associate Justice, 1975-1990) dominate the tally of presiding Justices in Table 1. Potter Stewart appears once — on a day when neither the Chief Justice nor Brennan was available — because he was the second-most senior Associate Justice at that time. Byron R. White was the second-most senior Associate Justice from 1981 to 1990 (thus his four presiding appearances during that period, on days when neither the Chief Justice nor Brennan was available), and the most senior Associate Justice from 1990 to 1993 (thus his four presiding appearances during that period, on days when the Chief Justice was not available).

When White retired in June 1993, Blackmun became senior Associate Justice. He finally got his chance to preside when Rehnquist missed two days in 1994 — May 16 and 23 — just a few weeks before Blackmun's own retirement on August 3, 1994. They were uneventful sittings, during which Blackmun's presiding role consisted of running the agenda, certifying the day's orders by the Court, and announcing (in addition to his own opinions) the opinions per curiam and of members of the Court not present (Rehnquist and Sandra Day O'Connor).⁶ Eventful or not, sitting in the pilot's seat must have been at least a small thrill, even for someone who breathed the rarefied air of the Supreme Court on a daily basis.

³ *Journal*, www.supremecourt.gov/orders/journal.aspx. Scans of printed volumes of the *Journal*, dating back to 1890, are available on the Court's website.

⁴ See 28 U.S.C. § 3 ("Whenever the Chief Justice is unable to perform the duties of his office or the office is vacant, his powers and duties shall devolve upon the associate justice next in precedence who is able to act, until such disability is removed or another Chief Justice is appointed and duly qualified.").

⁵ See, e.g., George Lee Haskins & Herbert A. Johnson, *Oliver Wendell Holmes Devise History of the Supreme Court of the United States: Foundations of Power: John Marshall, 1801-15*, at 87 (1981); 3 *Documentary History of the Supreme Court of the United States, 1789-1800*, at 1 (Maeva Marcus et al. eds., 1990).

⁶ *Journal of the Supreme Court of the United States, October Term 1993*, at 801, 831, 835, 854 (May 16 & 23, 1994).

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**TABLE 1: PRESIDING ASSOCIATE JUSTICES
DURING THE TENURE OF HARRY BLACKMUN, 1970-1994**

Term	Total Chief Justice Absences	Presiding Associate Justices(s)	Date(s)
1969	0	none	none
1970	0	none	none
1971	1	Douglas	Oct. 26, 1971
1972	1	Douglas	June 11, 1973
1973	2	Douglas	Apr. 24 & 25, 1974
1974	1	Brennan	June 2, 1975
1975	0	none	none
1976	0	none	none
1977	3	Brennan	May 22, 30 & 31, 1978
1978	2	Brennan	May 21, 1979
		Stewart	June 28, 1979
1979	2	Brennan	June 2 & 10, 1980
1980	3	Brennan	May 4, June 1, Sept. 9, 1981
1981	5	Brennan	Jan. 25, Apr. 5, May 31, 1982
		White	July 1 & 2, 1982
1982	4	Brennan	Jan. 24, Mar. 7, June 24, Aug. 5, 1983
1983	6	Brennan	Jan. 23, May 15 & 21, June 18, 28 & 29, 1984
1984	0	none	none
1985	8	Brennan	Jan. 27, May 5, June 3, 26 & 27, July 1, 1986
		White	June 2 & 9, 1986
1986	1	Brennan	May 18, 1987
1987	1	Brennan	June 30, 1988
1988	0	none	none
1989	0	none	none
1990	0	none	none
1991	3	White	Apr. 27, May 4, June 26, 1992
1992	1	White	June 25, 1993
1993	2	Blackmun	May 16 & 23, 1994
1969-93	46		average Chief Justice absences/year <2

But how about days when the Court does not “issue[] orders or opinions or hold[] oral argument”⁷ — days when it does not engage in its formal, external, public-facing activities? Someone is still needed to preside over the internal, day-to-day operations of the Court. Usually, the Chief Justice is available to do that work, too. But not always, and then the same tradition involving the most senior available Associate Justice applies. Blackmun had at least one opportunity to serve as a substitute in that context as well. It occurred on February 9, 1990, when he was the *fourth*-most senior Associate Justice, behind Brennan, White, and Thurgood Marshall. On that occasion, Blackmun issued a memorandum to his colleagues, spelling out his leadership agenda as “acting Chief Justice.” It is reproduced on page 5 below, followed by replies from Associate Justices Sandra Day O’Connor and Anthony M. Kennedy (pages 6 and 7), and a note from Blackmun’s secretaries, Dooley Stephanos Peratino and Wanda S. Martinson, reporting on reactions in the Rehnquist, Brennan, and Kennedy chambers (page 8).⁸

Declaring that “I might as well make use of my newly found status,” he presented a wild plan for a Blackmun-led Court that included

reassigning cases, striking some as too difficult to decide, setting July and August argument sessions, closing the building now for a week or two, scheduling square dancing in the Great Hall, and obtaining a Court cat

One element of Blackmun’s plan received quick, strong support from a colleague — O’Connor responded, “By all means sign me up for the square dancing” — and there was, as you can see on the following pages, plenty of amusement from jolly Justices and their staffs.⁹

Alas, when the Court next convened, on February 20, Rehnquist was in the center chair and there were no signs of dancing, or of a cat. And so the world is left to wonder how exciting a Blackmun Chief Justiceship could have been.

⁷ *Journal*, www.supremecourt.gov/orders/journal.aspx.

⁸ Harry A. Blackmun, Memorandum to the Conference (Feb. 9, 1990), Papers of Harry A. Blackmun, Manuscript Div., Libr. of Cong. (hereafter “HAB Papers”), box 538; Sandra Day O’Connor, Memorandum to Harry A. Blackmun (Feb. 9, 1990), HAB Papers, box 1406; Anthony M. Kennedy, Memorandum to Harry A. Blackmun (Feb. 9, 1990), HAB Papers, box 538; Dooley Stephanos Peratino and Wanda S. Martinson, Memorandum to Harry A. Blackmun (Feb. 9, 1990), HAB Papers, box 538. See also David J. Garrow, *There’s Nothing to Fear in Those Papers*, Wash. Post, May 27, 1993, at A25.

⁹ Cf. Jay D. Wexler, *Laugh Track*, 9 Green Bag 2d 59 (2005).

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

February 9, 1990

MEMORANDUM TO THE CONFERENCE

The Chief Justice, Justice Brennan, Justice White, and Justice Marshall are all out of the city. This means, to use Byron's tired expression, that I am "acting Chief Justice."

It occurs to me that in this happy state of affairs things ought to be done, such as reassigning cases, striking some as too difficult to decide, setting July and August argument sessions, closing the building now for a week or two, scheduling square dancing in the Great Hall, and obtaining a Court cat to chase down the mice and "Boris," who, I am told, is the rat upstairs. I have discussed this with many who labor in the building and find unanimous consent for all these worthy projects.

I might as well make some use of my newly found status. We juniors on the Court seem to be the only Members who are doing any work these days.

H.

ROSS E. DAVIES



CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

Supreme Court of the United States
Washington, D. C. 20543

February 9, 1990

Dear Harry:

By all means sign me up for the square dancing. And I might offer some suggestions for those cases which are too difficult to decide.

Sincerely,

A handwritten signature in cursive script that reads "Sandra".

Justice Blackmun

Copies to the Conference

SQUARE DANCING AND A CAT AT THE SUPREME COURT

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE ANTHONY M. KENNEDY

February 9, 1990

Dear Harry,

I too was working most productively this morning until I was diverted by your memo. But rank does have its privileges, and I do think you are proceeding in the right direction.

Yours,

AMK/ej

Justice Blackmun

ROSS E. DAVIES

02-09-90

Mr. Justice:

Re: Your memo as "acting CJ"

We thought you might be interested in reactions, as we hear, from other chambers:

Dean from AMK's chambers asked me to tell you that you have her vote (except as to the July and August sessions).

AD said she received a message from one of WJB'S clerks who said that he "thought HAB's memo was hilarious."

Barbara in the CJ's chambers called to ask if you really did this or if someone did it as a joke. I confessed on your behalf, of course. She loved it and says she will leave it for the Chief, who "will think it's a riot."

dsp and wsm