

## **Environmental Law in the Supreme Court: Highlights from the Blackmun Papers**

by Robert V. Percival

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### **I. Introduction**

With the retirement of Justice Sandra Day O'Connor and the nomination of Judge John G. Roberts, Jr., to succeed her, the U.S. Supreme Court is now experiencing its first change in membership in 11 years. The confirmation of Justice O'Connor's successor will bring to a close the second longest period in U.S. history that the same nine Justices have served together on the Court.<sup>1</sup> By replacing a Justice who often was a swing vote on a closely divided Court, her successor could have a profound influence on the development of American law for decades to come.

Both Congress and the federal judiciary played an important role in the early development of environmental law. Now that Congress is mired in prolonged gridlock over many environmental issues, the federal courts increasingly have become the focal point for environmental controversies. As the ultimate arbiter of issues of federal statutory and constitutional law, the Supreme Court has an enormous capacity to influence the shape of environmental law.

Twelve years ago, the release of the papers of the late Justice Thurgood Marshall, a few months after his death, afforded the public a rare glimpse into the inner workings of the Supreme Court. The Marshall papers provided a unique opportunity for the public to examine the decisionmaking processes of the Court during a period crucial to the development of environmental law. Based on a detailed review of these papers, this author wrote the first comprehensive examination of how the Supreme Court decided environmental cases from 1967 to 1991 in an article published by the Environmental Law Reporter (ELR) in the October 1993 issue of *News & Analysis*.<sup>2</sup>

Last year the U.S. Library of Congress released the papers of the late Justice Harry A. Blackmun, five years after his death. While the material in the Blackmun papers duplicates the Marshall papers' remarkably complete record of draft opinions and written memoranda exchanged among the Justices, the Blackmun papers provide significant new material in two important respects. First, the Blackmun papers provide the first inside look at how the Court handled cases during the three years after Justice Marshall left the Court in 1991 and before

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<sup>1</sup> The longest period in U.S. history without a change in the membership of the U.S. Supreme Court--11 years and 9 months--occurred between 1811 and 1823.

<sup>2</sup> Robert V. Percival, *Environmental Law in the Supreme Court: Highlights from the Marshall Papers*, 23 ELR 10606 (1993).

Justice Blackmun retired in 1994. This period is particularly important not only because the Court heard more than two dozen significant environmental cases during this time, but also because it marked a substantial shift in the Court's ideological balance due to the replacement of liberal Justice Marshall with conservative Justice Clarence Thomas. Justice Thomas quickly provided a reliable fifth vote for the signature elements of the William H. Rehnquist Court's conservative agenda in the areas of federalism, regulatory takings, and environmental standing.

But the Blackmun papers surpass the Marshall papers as a treasure trove for legal historians for a second reason--Justice Blackmun took more notes, and kept more papers, than Justice Marshall did. Blackmun scrupulously recorded minute details of his working life long before web-bloggers made it fashionable to share. His papers seem include virtually every scrap of paper he generated. Among the most significant materials in the Blackmun papers are notes taken by the Justice during the Court's post-argument conferences when the Justices vote on how cases are to be decided. Justice Blackmun's notes record how each Justice initially voted at conference and the reasons they gave for their votes, material of great significance that is not in the Marshall papers. His handwriting is not hard to decipher, though he wrote in a kind of shorthand that takes one some time to understand.<sup>3</sup> The Blackmun papers also contain handwritten memoranda he wrote recording his own thinking concerning the merits of each case argued before the Court. They also contain copies of the handwritten notes that various Justices passed to Justice Blackmun during oral argument and the Justice's own notes taken during the arguments in which he sometimes graded the lawyers who appeared before the Court. The papers also include videotape and a 510-page transcript of an oral history interview of Justice Blackmun conducted by his former law clerk Harold Koh, now dean of the Yale Law School.<sup>4</sup>

This Article reviews highlights of what the Blackmun papers reveal about the U.S. Supreme Court's handling of environmental cases during Justice Blackmun's service on the Court from 1970 to 1994. The Article first examines what new light the Blackmun papers shed on some of the principal findings of the author's October 1993 ELR article concerning the Marshall papers.<sup>5</sup> It then analyzes what the Blackmun papers reveal about challenges to environmental regulation in three areas in which the Rehnquist Court has had great impact: federalism, regulatory takings, and environmental standing. The Article then discusses what the

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<sup>3</sup> This Article makes several references to notes and memoranda contained in the Harry A. Blackmun Papers (on file with the Manuscript Division, U.S. Library of Congress) [hereinafter the H.A.B. Papers]. In order to make Justice Blackmun's notes easier to read in this Article, his shorthand has been translated into complete words rather than placing brackets around the additional letters not contained in the shorthand, (e.g., "be" instead of "b[e]" and "statute" instead of "stat[ute]").

<sup>4</sup> Koh's interviews with Justice Blackmun were recorded in several sessions between July 6, 1994, and December 13, 1995. They provide a warm and wonderful portrait of Blackmun's life as told in his own words. It is truly a shame that no similar oral history was recorded with Justice Marshall, who loved to tell stories about his life experiences, particularly his days as a crusading lawyer fighting for equal rights. One of the author's most memorable experiences during his year clerking at the U.S. Supreme Court is an afternoon in Justice Marshall's chambers when the Justice unexpectedly appeared in the clerk's offices and spent several hours talking about his life.

<sup>5</sup> See Percival, *supra* note 2.

papers show about relations among the Justices and public scrutiny of the Court's work. The Article concludes with some thoughts on the Court's role in shaping environmental law.

## II. The Supreme Court and the Environment During the Early Blackmun Years

Harry A. Blackmun was nominated by President Richard Nixon to be a Supreme Court Justice on April 14, 1970. Following the failed nominations of Clement Haynsworth and G. Harold Carswell, Blackmun was Nixon's third choice for the seat that had become available when Justice Abe Fortas resigned in May 1969.<sup>6</sup> After a confirmation hearing on April 29, 1970, that lasted for less than four hours, Blackmun was confirmed by the Senate by a 94 to 0 vote on May 12.

When Justice Blackmun assumed his seat on the Court on June 9, 1970, the National Environmental Policy Act (NEPA)<sup>7</sup> was less than six months old and none of the other major federal regulatory programs to protect the environment had yet been enacted. But an avalanche of new federal legislation enacted by Congress during the 1970s soon flooded the federal courts with environmental cases. Between its 1974 and 1984 Terms, the Supreme Court granted plenary review in a total of 89 environmental cases, an average of more than 8 per year.<sup>8</sup> By contrast, the Court today typically agrees to hear only two or three environmental cases each Term (though it has not yet agreed to hear any environmental cases in its upcoming October 2005 Term).

### A. Early Environmental Cases

Even before Congress had enacted most of the legislation that created federal regulatory programs to protect the environment, environmental issues were prominent on the Court's agenda in the early years of Justice Blackmun's service. Among the first environmental cases the Court confronted after Justice Blackmun's confirmation were efforts by states to redress transboundary pollution by bringing actions within the Court's original jurisdiction over disputes between states. While the Court had a long history of hearing such disputes,<sup>9</sup> it had grown weary of handling cases that involved complex factual disputes over the sources and impacts of pollutants. The Blackmun papers shed additional light on the reasons why the Court, after hearing oral argument in January 1971, refused to grant leave to the state of Ohio to file an

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<sup>6</sup> Fortas' resignation followed a successful Republican filibuster against President Lyndon B. Johnson's nomination of Fortas to be Chief Justice following Earl Warren's retirement in 1968. This enabled Nixon to appoint Warren Burger to be Chief Justice shortly after Nixon assumed the presidency in 1969.

<sup>7</sup> 42 U.S.C. §§4321-4370d, ELR <BI>Stat.<D> NEPA §§2-209.

<sup>8</sup> See Percival, *supra* note 2, at 10625, tbl. 1.

<sup>9</sup> Beginning in the early twentieth century, the Court had a long history of hearing federal common law nuisance actions under its original jurisdiction when they involved disputes between states over transboundary pollution. See Robert V. Percival, *The Clean Water Act and the Demise of the Federal Common Law of Interstate Nuisance*, 55 <BI>Ala. L. Rev.<D> 717 (2004).

original action against chemical companies in the United States and Canada who were discharging mercury into Lake Erie.<sup>10</sup> They indicate that several of the Justices initially were inclined to hear the case, but that their concerns over the complexity of the issues and the possibility of opening the doors to a flood of similar cases ultimately persuaded them not to. The Blackmun papers include a memorandum from Chief Justice Burger warning his colleagues that if the Court got involved in hearing such a complex, transboundary pollution dispute, as many as three special masters would have to be appointed, with at least one being a scientist. Justice Blackmun's detailed notes on the discussion at conference reveal that Justice Hugo Black argued that the Court "would be snowed under" if it took the case. Black emphasized that "we have the power to deny" leave to file. Justice Douglas responded that it was a "very important case" and that by taking it the Court "could do a great thing." "[L]et us be the storm center," Douglas argued, noting that "things do not always work out so disastrously." While Douglas voted to hear the case, he noted that it would be crucial to have the federal government become a party to the litigation. Justice Harlan expressed great deference for Douglas's views, but he concluded that "we should not take this." Harlan expressed doubt concerning the Court's capacity to control pollution and argued that the case would force the Court "to step out and make new law." Justice Stewart said, "I may be cynical," but he noted that the case was filed in the midst of a campaign. While Stewart argued that Lake Erie's pollution was "not a broad national problem," Justice White countered that the "issue is very federal." Justice Marshall cautioned that if the Court took the case, "Congress and the Administration are off the hook" for something that "no [one] wants to touch."

Justice Blackmun's personal notes on the case indicate that, like Justice Stewart, he was wary about encouraging state attorneys general to file such actions. Before the oral argument he wrote that "one thing I wish to be careful of is that we do not let ambitious attorneys general of various states and provinces make political capital out of something that happens to fall on their doorstep." Later Blackmun noted that "before the argument I was inclined to take jurisdiction," but that "now I lean the other way" because the state courts are available, Ohio may not have clean hands, and there could be a "flood of litigation" as "politicians get ambitious."<sup>11</sup> When the Court issued its decision refusing to hear the case, Justice John M. Harlan's opinion for the Court included a sentence, added at the suggestion of Justice Hugo Black, to clarify that Ohio could refile the case in state court.

Despite denying Ohio's motion for leave to file an original action, the Court was confronted with a similar case eight months later. The case involved an effort by the state of Illinois to file an original action against Milwaukee and other cities in Wisconsin. Illinois wanted the Court to issue an injunction to stop the cities from discharging sewage into Lake Michigan. A memorandum Justice Blackmun wrote to himself concerning the case provides some valuable insights into the Justice's views on environmental issues. Blackmun expressed concern about pollution problems coupled with skepticism about the motives of state officials who sought to file the action. He began his memorandum by writing: "This case is the Lake Michigan pollution controversy. Generally, I am sympathetic with the pollution claims, but I have a mild reservation

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<sup>10</sup> *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493, 1 ELR 20124 (1971). *See Percival, supra* note 2, at 10610.

<sup>11</sup> *Conferences Notes of Justice Blackmun and Personal Notes of Justice Blackmun, Ohio v. Wyandotte Chemical Corp.* (Jan. 18, 1971), H.A.B. Papers, *supra* note 3, box 654.

because I do not know to what extent this particular action is occasioned by overriding personal political considerations.”<sup>12</sup> Responding to a claim of sovereign immunity and a jurisdictional defense, Blackmun wrote: “These, of course, are technical defenses. They may afford some trouble but I am not impressed with either of them. It seems to me that in a pollution case technical defenses are out of place and that we should do our best to avoid them.”<sup>13</sup>

At the time, Congress had not established the comprehensive national regulatory program to prevent water pollution ultimately adopted in the Federal Water Pollution Control Act Amendments of 1972.<sup>14</sup> Federal law provided a procedure for holding interstate conferences in an effort to negotiate solutions to transboundary water pollution problems. Blackmun noted, “The federal act has been invoked and, in fact, there have been conferences among the Lake Michigan states for some years. What disturbs me is that I see little progress alleged, and I fail to be convinced that the remedy through the federal act is at all effective.” Blackmun observed that his “normal and instinctive reaction in these original suits is negative” because he believed such jurisdiction should be exercised “only under unusual conditions.” Yet he stated that “I am becoming distressed about pollution of our environment. I am distressed by the fact that these defendants raise technical issues. I am distressed by the fact that I fail to see a forum in which adequate relief could be obtained.” Declaring that “it is high time that some action” be taken, Blackmun expressed the view that the Court should take the case despite “the realization this will be a big headache for the Court and that it will prompt the appointment of a special master.”<sup>15</sup>

While the Court declined to grant leave for filing the case as an original action, it ruled that the case should be heard in federal district court, which it deemed to be a more appropriate forum for fact-finding.<sup>16</sup>

The first federal environmental law that substantially affected the behavior of federal agencies was the National Environmental Policy Act (NEPA), signed into law by President Nixon on New Years Day 1970. NEPA’s environmental impact statement requirement inspired Chief Justice Burger in 1972 to propose to his colleagues that Congress be required to prepare a “court impact statement” before adopting legislation that would increase the jurisdiction or caseload of the federal courts.<sup>17</sup> While hearing oral argument in a NEPA case<sup>18</sup> in 1973, Justice

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<sup>12</sup> Memorandum by Justice Blackmun concerning *Illinois v. Milwaukee*, No. 49 Orig. (Sept. 16, 1971), H.A.B. Papers, *supra* note 3, box 654.

<sup>13</sup> *Id.*

<sup>14</sup> 33 U.S.C. §§1251-1387, ELR <BI>Stat.<D> FWPCA §§101-607.

<sup>15</sup> Blackmun Memorandum, *supra* note 12.

<sup>16</sup> *Illinois v. Milwaukee*, 406 U.S. 91 (1972).

<sup>17</sup> Letter from Chief Justice Warren Burger to Carl Albert, Speaker of the U.S. House of Representatives (Oct. 13, 1972), Thurgood Marshall Papers (on file with the Manuscript Division, U.S. Library of Congress).

<sup>18</sup> *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669 (1973) (argued on Feb. 28, 1973).

Blackmun passed a handwritten note to Justice William J. Brennan stating: “I am sorry but I can not join your opinion until you file your impact statement under NEPA!!” Justice Brennan responded by writing “NEPA *uber alles*” on the note before passing it back to Blackmun.<sup>19</sup>

Justice Thurgood Marshall’s papers revealed that many of the environmental cases decided by the Supreme Court were cases in which the Court initially voted to deny review.<sup>20</sup> The Court has long employed the “Rule of Four,” which provides that petitions for certiorari will be denied unless at least four Justices to vote in favor of hearing a case. The circulation of draft dissents from denials of certiorari occasionally persuaded Justices who had voted against review to change their votes and the cases were then heard by the Court. For example, a draft dissent circulated by Justice Douglas in December 1972 persuaded the Court to hear, and later reverse, a decision overturning a criminal conviction of a polluter under the Refuse Act.<sup>21</sup> On three separate occasions, draft dissents from denial of review circulated by Justice Byron R. White, who long believed that the Court should be more active in resolving conflicts between lower court decisions, succeeded in persuading the other Justices to grant review in CWA cases. These included *City of Milwaukee v. Illinois*,<sup>22</sup> holding that the CWA preempted the federal common law of nuisance; *EPA v. National Crushed Stone Ass’n*,<sup>23</sup> holding that economic hardship did not compel the U.S. Environmental Protection Agency (EPA) to grant variances from effluent standards; and *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation*,<sup>24</sup> which required allegations of continuing violations before citizen suits could be brought to enforce the Act. The Blackmun papers suggest that one reason for the initial vote to deny review in the *Gwaltney* case was concern that the case was not the ideal vehicle for resolving the conflict among the lower courts.

The Blackmun papers provide more detail than the Marshall papers concerning the Court’s consideration of petitions for review because Justice Blackmun, unlike Justice Marshall, was a member of the “cert pool.” Formed in 1972, the “cert pool” was a group of five Justices<sup>25</sup>

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<sup>19</sup> Notes exchanged between Justices during oral argument (Feb. 28, 1973), H.A.B. Papers, *supra* note 3, box 116.

<sup>20</sup> See Percival, *supra* note 2, at 10609-10

<sup>21</sup> *United States v. Pennsylvania Indus. Chemicals Corp.*, 411 U.S. 655, 3 ELR 20401 (1973).

<sup>22</sup> 451 U.S. 304, 11 ELR 20406 (1981).

<sup>23</sup> 449 U.S. 64, 10 ELR 20924 (1980).

<sup>24</sup> 484 U.S. 49, 18 ELR 20142 (1987).

<sup>25</sup> Beginning with the Court’s 1972 Term, the Justices participating in the “cert pool” included Chief Justice Burger and Justices Blackmun, Powell, Rehnquist, and White. Because Supreme Court nominee John G. Roberts, Jr., clerked for Justice Rehnquist, the cert pool memorandums he prepared during the Court’s 1980 Term are available in the Blackmun papers and have been examined by the press in reporting on his nomination. See Nina Totenberg, White House to Release Some of Roberts’ Memos, National Public Radio broadcast, July 26, 2005 (available online at <http://www.npr.org/templates/story/story.php?storyId=4772148>). Justices O’Connor,

whose clerks pooled the task of preparing memoranda advising the five on whether to grant or deny review to petitions for certiorari. Occasionally the Justices decide that a lower court decision is so clearly erroneous that they dispense with oral argument and reverse it summarily, usually in an unsigned (per curiam) decision. For example, as the Marshall papers revealed, Justice Rehnquist was the moving force behind the Court's summary reversal and the author of the per curiam opinion in *Strycker's Bay Neighborhood Council, Inc. v. Karlen*,<sup>26</sup> a decision interpreting NEPA to impose only procedural, and not substantive, requirements on federal agencies.<sup>27</sup>

### *B. Reserve Mining and Judge Miles Lord*

Another early environmental controversy that drew national attention arose in Justice Blackmun's home state of Minnesota involved efforts to force the Reserve Mining Company to stop discharging 67,000 tons of taconite tailings daily into Lake Superior.<sup>28</sup> After a two-year interstate enforcement conference that heard hundreds of witnesses and compiled thousands of exhibits, the U.S. Department of Justice (DOJ) brought suit against Reserve in February 1972. The suit, which was joined by the states of Michigan, Minnesota, and Wisconsin as well as several environmental groups, was brought under federal and state common law and for violations of the Refuse Act,<sup>29</sup> the Clean Water Act (CWA),<sup>30</sup> and state air and water pollution regulations. Filed less than two years after Justice Blackmun joined the Supreme Court, the case was heard by federal district judge Miles Lord, an acquaintance of Justice Blackmun. Judge Lord determined that taconite tailings present in Duluth's drinking water posed a significant health risk because they were structurally similar to asbestos. He then conducted a separate trial to determine the best means for halting the discharges, but after becoming frustrated with the company's intransigence on the remedy issue, he issued an order requiring that the discharges cease immediately.<sup>31</sup>

Reserve appealed to a panel of Justice Blackmun's old colleagues on the U.S. Court of Appeals for the Eighth Circuit, who issued, and later renewed, a stay of Judge Lord's order to

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Scalia, Kennedy, Breyer and Ginsburg have now joined the "cert pool," leaving Justice Stevens as the only Justice not to participate in it.

<sup>26</sup> 444 U.S. 223, 10 ELR 20079 (1980).

<sup>27</sup> Percival, *supra* note 2, at 10611-12.

<sup>28</sup> Much has been written about the history of this case. For a new review of its history, see John S. Applegate, *The Story of Reserve Mining: Managing Scientific Uncertainty in Environmental Regulation*, in <BI>Environmental Law Stories<D> 43 (Richard J. Lazarus & Oliver A. Houck eds. 2005).

<sup>29</sup> Section 13 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. §407.

<sup>30</sup> 33 U.S.C. §§1251-1387, ELR <BI>Stat.<D> FWPCA §§101-607.

<sup>31</sup> *United States v. Reserve Mining Co.*, 380 F.Supp. 11 (D.C. Minn. 1974), *modified and remanded by* 514 F.2d 492 (8th Cir. 1975).

avoid a shutdown of the plant. Because they were less familiar with Reserve's history of intransigence, the Eighth Circuit judges believed that they could convince the company to negotiate a settlement. This upset the plaintiffs who believed that their citizens' health was being placed at risk every day the plant continued to operate. After the Eighth Circuit renewed its first, temporary stay order, the state of Minnesota asked the U.S. Supreme Court to vacate the stay. The state applied to Justice Blackmun, the Circuit Justice responsible for motions from the Eighth Circuit, who referred the matter to the Court. The Court denied the request to vacate the stay on July 9, 1974, over Justice William O. Douglas' dissenting vote.<sup>32</sup>

After negotiations with Reserve over the summer failed to develop agreement on a plan to abate the discharges, the states of Michigan, Minnesota, and Wisconsin joined by the plaintiff environmental groups, asked the Supreme Court again to vacate the stay. Describing the case as "the so-called Lake Superior pollution case," Justice Blackmun referred the application to the full Court on October 2, 1974, noting that the "matter now appears to be taking on much more heat."<sup>33</sup> Blackmun informed the Court that the Eighth Circuit "contemplated having the appeal heard on the merits at its December session, perhaps en banc."<sup>34</sup>

Just before the Supreme Court acted on the application to dissolve the stay, the Eighth Circuit announced a briefing schedule for hearing Reserve's appeal en banc, with the government's final reply brief due on December 9. The Blackmun papers reveal that the Court received this news only after the Justices already had drafted an order refusing to vacate the stay, over a vigorous dissent from Justice Douglas. But the Court's order included an unusual statement designed to put pressure on the Eighth Circuit to act expeditiously. It noted that four Justices "state explicitly that these denials are without prejudice to the applicants' renewal of their applications to vacate if the litigation has not been finally decided by the Court of Appeals by January 31, 1975."<sup>35</sup> The Blackmun papers indicate that Chief Justice Warren Burger responded to the news that the Eighth Circuit had agreed to hear the case en banc by proposing to change the draft order. However, Justice Blackmun insisted that it should be issued as is "so that

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<sup>32</sup> *Minnesota v. Reserve Mining Co.*, 418 U.S. 911 (July 9, 1974).

<sup>33</sup> Memorandum to the Conference by Justice Blackmun (Oct. 2, 1974), H.A.B. Papers, *supra* note 3, box 236.

<sup>34</sup> *Id.*

<sup>35</sup> *Minnesota v. Reserve Mining Co.*, 419 U.S. 802 (1974). In his dissent, Justice Douglas argued: If, as the Court of Appeals indicates, there is doubt, it should be resolved in favor of humanity, lest in the end our judicial system be part and parcel of a regime that makes people, the sovereign power in this Nation, the victims of the great god Progress which is behind the stay permitting this vast pollution of Lake Superior and its environs.

*Id.* at 804.



everyone concerned with the litigation would be under continuing pressure to resolve it . . .”<sup>36</sup> The order denying the motion to dissolve the stay was issued as drafted on October 11, 1974.<sup>37</sup> After the Eighth Circuit heard oral argument en banc, Judge Myron Bright was assigned to write the opinion of the court. The Blackmun papers reveal that Judge Bright phoned Justice Blackmun on January 27, 1975, to inform him “that an opinion will not be ready by January 31,” the date of the implicit deadline the Supreme Court had given the Eighth Circuit. However, Judge Bright stated that he did not think it was probable that the government would immediately file a new motion to vacate the stay after January 31.<sup>38</sup>

When the Eighth Circuit’s decision still had not been issued by early March 1975, the states and the U.S. government filed separate applications with the U.S. Supreme Court seeking to vacate the stay. On March 10, 1975, Justice Blackmun referred these applications to the full Court. He described the case as a “major piece of litigation” that “is boiling again.”<sup>39</sup> Justice Blackmun advised his colleagues that a draft opinion of more than 100 pages was circulating among the Eighth Circuit judges and that it was expected to be issued by March 20. The Supreme Court was scheduled to consider the motions to vacate the stay at a conference of the Justices on March 14. Apparently the Eighth Circuit accelerated its timetable for issuing the decision because it was released on March 14, the day the Court initially was to consider the new motions to vacate the stay. The Blackmun papers reveal that the Supreme Court had received an advance copy of the decision from Eighth Circuit Judge William Webster, who later became Director of the Federal Bureau of Investigation from 1978 to 1987. The decision upheld Judge Lord’s issuance of an injunction to require abatement of the discharges into Lake Superior, but rather than requiring that they be halted immediately, it gave Reserve “reasonable time” to abate them “on reasonable terms.”<sup>40</sup>

On March 18, 1975, four days after the Eighth Circuit’s decision was issued, Reserve’s lawyers sent a letter to the Supreme Court stating that the Eighth Circuit’s issuance of the decision made the applications to dissolve the stay moot.<sup>41</sup> On March 27, the states renewed their request that the Supreme Court dissolve the stay and either require immediate abatement of Reserve’s discharges or issue a “firm and specific” abatement timetable of no longer than two years. Without such a timetable, they maintained that the decision below was “little more than a

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<sup>36</sup> Letter from Justice Harry A. Blackmun to Chief Justice Warren E. Burger (Oct. 11, 1974), H.A.B. Papers, *supra* note 3, box 236.

<sup>37</sup> *Minnesota v. Reserve Mining Co.*, 419 U.S. 802 (1974).

<sup>38</sup> Memorandum to the Conference from Justice Harry A. Blackmun (Jan. 1, 1975), H.A.B. Papers, *supra* note 3, box 236.

<sup>39</sup> Memorandum to the Conference from Justice Harry A. Blackmun (Mar. 10, 1975), H.A.B. Papers, *supra* note 3, box 236.

<sup>40</sup> *Reserve Mining Co. v. EPA*, 514 F.2d 492, 5 ELR 20596 (8th Cir. 1975).

<sup>41</sup> Letter from Maclay R. Hyde to Mr. Francis J. Lorson, Deputy Clerk, U.S. Supreme Court (Mar. 27, 1975), H.A.B. Papers, *supra* note 3, box 236.

hollow judicial order.”<sup>42</sup> In a memorandum to the Conference, Justice Blackmun stated that each application “now possesses substantial aspect of mootness” and could be dismissed. But in view of the states’ plea for the Court to intervene on the basis of equitable considerations, Blackmun stated that he was more inclined to deny the applications than to dismiss them as moot. On March 31, 1975, the Court again denied the applications to lift the Eighth Circuit’s stay of Judge Lord’s immediate abatement order.<sup>43</sup>

The Blackmun papers reveal that Justice Blackmun closely followed subsequent developments in the Reserve Mining controversy. After bitter battles between Reserve and Judge Lord continued on remand, the Eighth Circuit ultimately removed Judge Lord from the case for exhibiting what it deemed to be pro-plaintiff bias and substantial disregard for its mandate.<sup>44</sup> Justice Blackmun’s files indicate that he immediately received a copy of the Eighth Circuit’s order and that he remarked that he would not be surprised if Judge Lord “came up here himself to argue the matter.”<sup>45</sup> Lord had represented himself at a hearing before the Eighth Circuit prior to his removal from the case. The files also indicate that after Judge Edward J. Devitt was appointed to take over the Reserve case from Judge Lord, Justice Blackmun immediately called Judge Devitt, to wish him well.

After Judge Lord’s removal from the case, a note to Justice Blackmun from the Supreme Court’s senior motions counsel James B. Ginty reported that a Minnesota Assistant Attorney General was conferring with the DOJ about the case and that “the states are seriously considering asking the Court of Appeals [judges] to recuse themselves from further action, with a new Court of Appeals or special appellate body being established to oversee the case!”<sup>46</sup> In July 1976, Judge Devitt found Reserve to have violated the law, fined the company heavily, imposed sanctions on it for its misconduct during discovery, and gave it one year to halt all its discharges.<sup>47</sup> These decisions later were upheld in full by the Eighth Circuit.<sup>48</sup> In a note to Justice Blackmun after Judge Devitt’s decision was announced, Federal Communications Commissioner Abbot Washborn, a native of Duluth, Minnesota, and a friend of Justice Blackmun, sent him a

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<sup>42</sup> See Supplemental Memorandum for Mr. Justice Blackmun from James B. Ginty (Mar. 27, 1975), H.A.B. Papers, *supra* note 3, box 236.

<sup>43</sup> 420 U.S. 1000 (Mar. 31, 1975).

<sup>44</sup> Reserve Mining Co. v. Lord, 529 F.2d 181, 6 ELR 20432 (8th Cir. 1976).

<sup>45</sup> Letter from James B. Ginty to Justice Blackmun (Jan. 9, 1976), H.A.B. Papers, *supra* note 3, box 236 (“You remarked the other day that you would not be surprised if Judge Lord came up here himself to argue the matter.”).

<sup>46</sup> Letter from James B. Ginty to Justice Blackmun (Jan. 12, 1976), H.A.B. Papers, *supra* note 3, box 236.

<sup>47</sup> United States v. Reserve Mining Co., 417 F. Supp. 789, 6 ELR 20628 (D. Minn. 1976).

<sup>48</sup> United States v. Reserve Mining Co., 543 F.2d 1210, 7 ELR 20051 (8th Cir. 1976).

note that simply asked: “Why is it that these companies--Reserve Mining, Armco, and Republic Steel--have to be dragged kicking and screaming into the decades of the 70’s?”<sup>49</sup>

The Blackmun files contain a copy of an article from the December 9, 1976, *Minneapolis Tribune* that included a profile of Judge Lord.<sup>50</sup> The article quotes Judge Lord’s reaction to his removal from the Reserve Mining case: “I knew I was right and I expected the kind of treatment I got from the Court of Appeals because I am certain that you cannot pick on anyone who has as many friends as Reserve has in the way that I did without being severely criticized.” Judge Lord noted that his prior reversal rate was about 15% but that he now expects it to be 90% because he embarrassed the Eighth Circuit. “Lord, assuming the role of a local magistrate, married a couple shortly after the reversal in his chamber. Within hours, the story was circulating around the building that the couple was in trouble because the marriage might be overturned by the Eighth Circuit.”

In April 1982, Judge Lord called Justice Blackmun to ask the Justice to reserve him a seat to watch an oral argument in the Supreme Court. During their telephone conversation, Justice Blackmun apparently told Judge Lord that he was upset that William Kunstler had been harshly critical of the Court when Kunstler had spoken at the University of Virginia Law School.<sup>51</sup> Lord relayed Blackmun’s comments to Kunstler, who wrote Blackmun a letter of apology on April 20, 1982.<sup>52</sup>

When Judge Lord resigned from the bench in 1985, Justice Blackmun sent him a letter regretting that he could not attend a celebration in honor of the judge. Blackmun wrote that “You have had a long and remarkable public career, and you must look back on the events of those years with a genuine measure of satisfaction. You have never withdrawn from incipient controversy. You have met all issues head-on. You have made your mark in Minnesota politics and on its federal bench.”<sup>53</sup>

Five months later, Justice Blackmun forwarded to Chief Justice Burger a newspaper article reporting that Judge Lord was undertaking an aggressive plaintiff’s practice during his retirement. Justice Blackmun wrote: “Dear Chief: The enclosed news report is of interest. I take

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<sup>49</sup> Letter from Abbott Washburn, Commissioner, Federal Communications Commission, to Justice Blackmun (July 12, 1976), H.A.B. Papers, *supra* note 3, box 236.

<sup>50</sup> Steve Berg and Doug Stone, The Lord of Federal Court, *Minneapolis Tribune*, Dec. 9, 1976, at 8C.

<sup>51</sup> Kunstler reportedly had called the Court, with the exception of Justices William J. Brennan and Marshall, “a pack of jackals who are running us down the road to an illiberal and unfree society.” John Mitchell, Kunstler Blast High Court for “Doing Devils’ Work”, <BI>Va. L. Wkly.<D> Apr. 9, 1982, at 3 (newspaper article attached to Letter from William M. Kunstler to Justice Harry Blackmun (Apr. 20, 1982), H.A.B. Papers, *supra* note 3, box 100).

<sup>52</sup> Letter from William M. Kunstler to Justice Harry Blackmun (Apr. 20, 1982), H.A.B. Papers, *supra* note 3, box 100.

<sup>53</sup> Letter from Justice Blackmun to Judge Miles W. Lord (Aug. 7, 1985), H.A.B. Papers, *supra* note 3, box 100.

it that he has *resigned* from the federal judiciary rather than merely retired.”<sup>54</sup> Burger returned the memorandum with the annotation: “Yes, and he’s losing no time!” The article attached to the note reports that, in addition to representing striking workers at a meat-packing plant,

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<sup>54</sup> Memorandum from Justice Blackmun to Chief Justice Burger (Jan. 3, 1986), H.A.B. Papers, *supra* note 3, box 100 (emphasis in original).

Lord said another chief concern in his new practice will be to mount legal challenges against key pro-business repeals made this year in the state's hazardous waste "Superfund" law. The changes, which limit the personal injury liability of companies that dump toxic wastes, were strongly endorsed by the insurance industry. . . . Lord said he will challenge the constitutionality of the new superfund law through court cases brought by individuals claiming personal harm related to asbestos fibers released into the air by Reserve Mining Co. operations in northern Minnesota. "I think there's little chance of repealing the law under the present administration, but maybe the courts will see that people shouldn't have their rights cut off just because someone says it's good for business," Lord said.<sup>55</sup>

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<sup>55</sup> Kevin Diaz, *Lord Moves Into Union's Corner in Hormel Fight*, <BI>Minneapolis Trib.<D>, Dec. 23, 1985, at 1A.

*C. The “Snail Darter” Case: Tennessee Valley Authority v. Hill*

One of the most startling revelations in the Marshall papers was that the Court had almost ruled summarily against the endangered fish in *Tennessee Valley Authority v. Hill*<sup>56</sup> -- the famous “snail darter” case involving the Endangered Species Act (ESA).<sup>57</sup> Five Justices initially voted in favor of reversing, without benefit of oral argument, a decision by the U.S. Court of Appeals for the Sixth Circuit halting construction of the nearly completed Tellico Dam. The Sixth Circuit had held that completion of the dam would violate the ESA because it would jeopardize the continued existence of an endangered species of fish--the snail darter. The Blackmun papers reveal that the “cert pool” memorandum concerning the case had recommended that the Justices simply deny review. The memorandum concluded that this was likely to be the only case where the ESA had been applied to projects nearly completed when the Act was enacted and that the Sixth Circuit had been correct in holding that continued appropriations for the Tellico Dam did not implicitly exempt the project from the ESA.<sup>58</sup>

However, many Justices were struck by what they considered to be the obvious folly of halting an expensive public works project to protect a tiny fish. The cert pool memorandum had confronted this issue by stating:

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<sup>56</sup> 437 U.S.153 (1978).

<sup>57</sup> 16 U.S.C. §§1531-1544, ELR <BI>Stat.<D> ESA §§2-18.

<sup>58</sup> The memorandum concludes: “While the case is interesting and the decision may seem outrageous at first, I would deny. The [Sixth Circuit] is probably correct and the issues are probably not of general importance.” Preliminary Memorandum by Thompson (July 21, 1977), H.A.B. Papers, *supra* note 3, box 268.

While it may seem absurd to scrap a \$100 million reservoir to preserve an obscure fish, Congress made no provision in the Act for courts to weight the competing costs in granting the relief; the Act merely mandates agencies to take all steps necessary to “ensure” the protection of the species.<sup>59</sup>

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<sup>59</sup> *Id.* at 5-6.

It had also noted that not all the costs of the project would be lost if dam construction was halted because money could be recovered from sales of acquired land and the project could still be transformed into a public recreation area.

At the initial conference to vote on whether to grant review in the case, Rehnquist discovered that four other Justices (Chief Justice Burger and Justices Blackmun, Lewis Powell, and White) agreed that the Sixth Circuit should be reversed summarily. He circulated a draft per curiam reversal stating that the court erred by issuing the injunction. Justice Powell, however, thought the Court should employ a different rationale for reversal by holding that the ESA did not apply to projects already under construction when it was enacted by Congress. Thus, the five Justices who favored summary reversal could not agree on a single rationale for doing so.

Justice Potter Stewart circulated a draft dissent from the summary reversal, a dissent quickly joined by Justices Brennan and Marshall. Stewart argued that it was up to Congress, and not the judiciary, to change the law. Justice John Paul Stevens then circulated an even stronger dissent that noted that the Court was deciding the case “on an entirely different ground” than either of the two issues on which the government had sought review and characterized the majority’s action as “unprecedented” and “lawless.” Next to the portion of the draft dissent where Stevens had written, “Perhaps it is somewhat odd for Congress to place such a high value on preservation of the snail darter,” someone in Blackmun’s chambers, perhaps the Justice himself, had written in the margin, “did it?”

The Blackmun papers provide greater insights than the Marshall papers do on the debate within the Court over the fate of the snail darter. Justice Blackmun’s files contain an undated, handwritten note to Blackmun from Chief Justice Burger stating that Justice White “has just about persuaded me that the Appropriations Act--necessarily approved by both Houses--operates as an amendment to the ‘Snail Darter Act.’” The note states that the Chief Justice will “stay with a Summary Reversal and try to get [Justice Stevens] to ‘cool it’ on his rhetoric.”<sup>60</sup> The note reports that Justice White believes that Justice Stewart will not “insist on oral argument.” However, Chief Justice Burger was not nearly as influential with his colleagues as he sometimes thought. Justice Blackmun ultimately convinced the other Justices not to act without first hearing oral argument.

The oral argument in the case turned out to be a classic, with Attorney General Griffin Bell displaying a tiny, dead snail darter in a jar of formaldehyde while young law professor Zyg Plater presented each Justice with an artist’s rendition of a beautiful fish as it would appear in its natural habitat. While oral arguments rarely have been known to shift votes, this case may have been the exception. Following oral argument, Justice Blackmun’s notes indicate that Chief Justice Burger and Justice White, who both previously had favored summary reversal, passed when it was their turn to vote. The Chief Justice noted that the Court must assume that the snail darter would become extinct if the project moved along. He stated that it would be “common sense” for the Court to hold either that the ESA does not affect a project authorized nine years earlier or that Congress, by continuing to appropriate money, said that “this project should go ahead.” But while noting that it was “possible to reverse,” he also suggested that he could go along if a majority wanted to affirm what the Sixth Circuit had done. Justice White also passed and indicated that he would vote over the weekend.

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<sup>60</sup> Handwritten note from Chief Justice Burger to Justice Harry Blackmun, Re: Snail Darters v. Elec. Power (undated), H.A.B. Papers, *supra* note 3.



The other seven Justices ultimately held to their initial views. Justice Brennan stated that §7 of the ESA clearly applied and had not been repealed by implication through subsequent appropriations for the Tellico Dam. Justice Stewart stated that §7 is not ambiguous and that while earlier statutes allowed balancing, ESA §7 does not. While the snail darter garnered four votes at conference, even its defenders disparaged the ESA. Justice Marshall, who voted in favor of the fish, stated “Congress can be a jackass” and that he hoped Congress would do something about the statute. Justice Stevens, whom Blackmun’s notes describe as “very emotional,” stated that the ESA was a “stupid statute” but that it would “erode the structure of our Government” if the Court accepted the Attorney General’s arguments, which he described as distressing.

Justice Powell, who voted to reverse the injunction that barred completion of the dam, noted that “taking this case is wholesome” and that it had generated “much publicity.” He described it as an “easy case” because the “Act cannot apply to a project at this stage of completion.” While agreeing with Justice Powell on the merits, Justice Blackmun’s own notes on the case conclude by describing it as “a close tough case.” Justice Rehnquist also voted to reverse, rejecting the notion that an injunction was required to remedy any violation of the ESA. Justice White subsequently informed his colleagues that his vote was to affirm the decision blocking completion of the dam. Chief Justice Burger then also voted to affirm, which enabled him to give himself the assignment of drafting the majority opinion. In his majority opinion, the Chief Justice emphasized that Congress had spoken, that it was not the job of the judiciary to rewrite the statute, and that an injunction was the only way to remedy the violation.<sup>61</sup>

#### *D. The Chevron Mystery*

Following oral argument, the Justices confer in secret to vote on the merits of the cases they have heard. The Marshall papers generally do not include records of conference votes, much less what the Justices said at the time they voted. One of the greatest surprises in the Marshall papers was the lack of any indication that the Justices appreciated the significance of their decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,<sup>62</sup> which has become the most widely cited administrative law case in history.<sup>63</sup> The Court in *Chevron* upheld EPA’s “bubble policy” adopting a plantwide definition of “stationary source” under the Clean Air Act (CAA)<sup>64</sup> by applying a newly announced principle of judicial review--that in cases of statutory ambiguity, reviewing courts should defer to reasonable agency interpretations of statutes. This decision has been called “one of the very few defining cases in the last twenty years of American public law.”<sup>65</sup> Yet the record of written interchanges among the Justices revealed by the Marshall

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<sup>61</sup> *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 8 ELR 20513 (1978).

<sup>62</sup> 467 U.S. 837, 14 ELR 20507 (1984).

<sup>63</sup> Peter L. Strauss et al., *Gellhorn and Byse’s Administrative Law: Cases and Comments* 1033 (10th ed. 2003).

<sup>64</sup> 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.

<sup>65</sup> Cass R. Sunstein, *Law and Administration After Chevron*, 90 *Colum. L. Rev.* 2071, 2075 (1990).

papers showed that the decision was reached without any significant debate in writing over Justice Stevens' draft opinion, which was joined by all the other participating Justices within a week of its initial circulation.<sup>66</sup>

The Blackmun papers shed significant new light on the process by which *Chevron* was decided by revealing that the Justices initially were badly split when they met in conference on March 2, 1984, to vote on how to decide the case.<sup>67</sup> Only seven Justices voted at conference because Justices Marshall and Rehnquist had recused themselves from the case. Blackmun's notes indicate that Chief Justice Burger and Justices Brennan and O'Connor initially voted to affirm the decision of the U.S. Court of Appeals for the D.C. Circuit striking down EPA's plantwide bubble policy. The Chief Justice apparently expressed the view that EPA's construction of its authority goes "pretty far." Noting that EPA's two source definition was "troublesome," Justice Brennan stated that the Agency cannot have it "both ways" and that it "may not be what Congress intended" because it could give a "plant [the] perpetual right to pollute at [an] achieved level." Justice O'Connor noted that EPA's bubble policy "made sense as a concept," but she expressed the view the legislative history of the CAA did not support EPA's position. Blackmun's notes indicate that Justice O'Connor stated that "industry is suffering" and that this is "very painful for me."

Justices White, Powell, and Stevens cast votes for reversal that apparently were tentative because Blackmun's notes have question marks next to each of them. While noting that his vote was "very shaky," Justice White apparently stated that he was persuaded by *Alabama Power v. Costle*,<sup>68</sup> which had upheld EPA's use of a bubble policy to prevent significant deterioration of air quality by new sources in areas already in attainment with national air quality standards. Also citing *Alabama Power*, Justice Powell noted that the CAA is "complicated," but that deference is due to the Agency. He questioned whether the use of a bubble policy in nonattainment areas would prevent attainment of air quality goals. Justice Stevens, who ultimately authored the unanimous opinion of the Court, also voted at conference to reverse the D.C. Circuit, but he stated that he was "not at rest." He expressed sympathy for the Natural Resource Defense Council's view that the definition of "source" "ought to be the same throughout the statute," a position he had expressed while asking a question at oral argument. Stevens stated that he was "not sure *Alabama Power* was completely controlling," but that EPA may have adopted a "permissible reading of the statute." Finding the "House Committee reports confusing!," Justice Stevens concluded that "When I am so confused, I go with the Agency." Justice Blackmun provided a fourth vote for reversal and the case was assigned to Justice Stevens to prepare a draft opinion.

What started as a 4 to 3 vote to reverse ultimately became a unanimous 6 to 0 decision. On June 14, 1984, three days after Justice Stevens circulated the first draft of his majority opinion, Justice O'Connor circulated a memorandum recusing herself from the case as well. She explained: "Since the arguments were heard, my father died. His estate is still unsettled, but I will have a remainder interest in a trust to be established. His estate holds stock in at least one of

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<sup>66</sup> Percival, *supra* note 2, at 10613 (cited in Strauss et al., *supra* note 62, at 1033).

<sup>67</sup> Conference Notes on *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, H.A.B. Papers, *supra* note 3, box 397, folder 7.

<sup>68</sup> 636 F.2d 323, 10 ELR 20001 (D.C. Cir. 1979).

the parties to this action and until it is settled, I think it best that I not participate.”<sup>69</sup> The other two Justices who initially had voted to affirm--the Chief Justice and Justice Brennan--agreed to join the other Justices in adopting Justice Stevens’ draft majority opinion within a week of its initial circulation on June 11, 1984. In his “join” memorandum, Chief Justice Burger stated: “With others, I am now persuaded you have the correct answer to this case.”<sup>70</sup>

Justice Blackmun’s conference notes suggest that *Chevron* was born in part out of the Justices’ frustration at the difficulty of understanding the workings of complex, new regulatory programs like the CAA. The Marshall and Blackmun papers contain several references that make it clear that cases involving complicated regulatory programs are not among the Justices’ favorites. Justices schooled in the common law model of litigation involving disputes between private parties found it hard to adapt to the public law litigation spawned by the rise of federal environmental statutes and the regulatory programs they created. The *Chevron* doctrine of judicial deference to agency interpretations of ambiguous regulatory authorities represented an important strategy for coping with the new public law litigation. Justice Stevens’ statement at conference that “When I am so confused, I go with the Agency” suggests that it was founded in the realization that agencies had greater expertise than judges in understanding how regulatory programs are supposed to work.<sup>71</sup>

Similar concerns previously had led the Supreme Court to conclude that the new federal regulatory programs should displace the federal common law of nuisance. In 1981, the Court had held in *Milwaukee v. Illinois*<sup>72</sup> that the CWA preempted the federal common law of nuisance. Justice Rehnquist’s majority opinion noted that application of federal common law would be “peculiarly inappropriate in areas as complex as water pollution control” where difficult technical problems inspired Congress to entrust an expert administrative agency with authority to administer the Act.<sup>73</sup> But this did not prevent the Court from reviewing the legality of EPA actions implementing the CWA. When Oklahoma sought review of EPA’s decision to grant a water pollution permit to an upstream source in Arkansas, a law clerk sent Justice Blackmun a memorandum stating, “I don’t know what to advise you about these petitions. The clerks all call them ‘those horrible EPA cases.’”<sup>74</sup> The Court ultimately granted review and held that EPA had

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<sup>69</sup> Memorandum to the Conference from Justice Sandra Day O’Connor (June 14, 1984), H.A.B. Papers, *supra* note 3, box 397.

<sup>70</sup> Memorandum from Chief Justice Warren Burger to Justice John Paul Stevens (June 18, 1984), H.A.B. Papers, *supra* note 3, box 397.

<sup>71</sup> See also Jody Freeman’s fascinating account of the *Chevron* litigation, which provides the perspectives of the litigants in <BI>The Story of *Chevron*: Environmental Law and Administrative Discretion, in Lazarus & Houck, eds., *supra* note 19, at 171.

<sup>72</sup> 451 U.S. 304, 11 ELR 20406 (1981).

<sup>73</sup> *Id.* at 318-319.

<sup>74</sup> Memorandum to Justice Blackmun, from “Ann” (Ann Alpers) (Mar. 26, 1991), H.A.B. Papers, *supra* note 3, box 591.

the discretion to require downstream state water quality standards to be considered when permits are issued to sources in upstream states.<sup>75</sup>

*Chevron* played a prominent role in another environmental case the Court decided during Justice Blackmun's last Term. In *City of Chicago v. Environmental Defense Fund*,<sup>76</sup> the Court rejected a claim that Congress had exempted ash produced by municipal incinerators from regulation as a hazardous waste under the Resource Conservation and Recovery Act (RCRA).<sup>77</sup> When the case first came before the Court in 1992, the Court summarily vacated the Seventh Circuit's initial decision that the ash was not exempt. The Court remanded the case for reconsideration in light of a new EPA policy directive declaring that the agency had changed its position and now deemed the ash to be exempt.<sup>78</sup> The Blackmun papers reveal that the "cert pool" memorandum written by a law clerk to Justice Scalia had recommended that the Court summarily vacate and remand because of the "significant possibility that [EPA's] new directive will affect the resolution of this case."<sup>79</sup> Predicting correctly that the Seventh Circuit would simply restate its view that the statute clearly did not exempt the waste, Justice Blackmun's clerk had recommended that the Court simply grant review. After the Seventh Circuit again held that the ash was not exempt, the case returned to the Supreme Court, which granted plenary review.

Justice Blackmun's notes, taken two days before the oral argument, indicate that he believed that the statute "is not ambiguous" and that the EPA's "interpretation cannot be reconciled with the language and purpose of the statute." Thus, he concluded that it was not entitled to *Chevron* deference.<sup>80</sup> Aside from his usual notations concerning the age and alma maters of counsel, Justice Blackmun's only notes on the oral argument are the words "all very dull" written under the name of EDF's counsel, Professor Richard Lazarus.<sup>81</sup> Blackmun's observation surely reflects the wondrous complexity of RCRA, and not the merits of Professor Lazarus's performance, for Lazarus did a spectacular job and emerged as the victor in a surprising 7-2 decision by the Court. Despite several briefs arguing that a decision to affirm would have dire consequences for the ability of cities to dispose of their wastes, the Court voted overwhelmingly that the ash was not exempt from regulation as a hazardous waste under RCRA.

Justice Blackmun's notes indicated that the Justices voted 7-2 at conference to affirm the Seventh Circuit's decision that the ash was not exempt. While Chief Justice Rehnquist noted

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<sup>75</sup> *Arkansas v. Oklahoma*, 503 U.S. 91, 22 ELR 20552 (1992).

<sup>76</sup> 511 U.S. 328, 24 ELR 20810 (1994).

<sup>77</sup> 42 U.S.C. §§6901-699k.

<sup>78</sup> 506 U.S. 982 (1992).

<sup>79</sup> Preliminary Memorandum by John Duffy, *City of Chicago v. Environmental Defense Fund*, Nov. 1, 1992, H.A.B. Papers, *supra* note 3, box 639.

<sup>80</sup> Notes of Justice Blackmun, No. 92-1639 *Chicago v. EDF* (Jan. 17, 1994), H.A.B. Papers, *supra* note 3, box 639.

<sup>81</sup> Oral Argument Notes of Justice Blackmun, No. 92-1639, *Chicago v. Environmental Defense Fund* (Jan. 19, 1994), H.A.B. Papers, *supra* note 3, box 639.

that there were “plausible arguments on each side,” he concluded that the government should not get *Chevron* deference for its “strained reading of the statute.” Justice Stevens and O’Connor, the only two who voted to reverse, both stated that it was a “difficult case.” Stevens stated that he would “reverse on *Chevron* deference” and O’Connor stated that she agreed with Stevens. Surprisingly, Justices Scalia and Thomas, who virtually never rule in favor environmental interest, voted to reverse. Scalia stated at conference, “I do not see any ambiguity here” and that it was “a carefully drawn statute.” Justice Thomas stated that he doubted the legitimacy of EPA’s memo and that it should not be given deference. Justices Kennedy and Souter expressed the view that there were some ambiguities in the statute, but they too voted to affirm. Kennedy stated that the “statute does not tell what a generator is” and it “has to be given some meaning.” Souter stated that there was “an argument, at least, that there is an ambiguity.”

While Justice Scalia’s draft opinion quickly was joined by the other six Justices voting to affirm, three of them debated an issue that foreshadowed the Court’s subsequent decision in *United States v. Mead Corp.*<sup>82</sup> -- whether an agency internal policy memorandum, like EPA’s policy statement, could ever qualify for *Chevron* deference. In the concluding paragraph of his majority opinion, Justice Scalia states that the text of RCRA required the Court to reject the federal government’s plea for deference to EPA’s interpretation, “which goes beyond the scope of whatever ambiguity [the statute] contains.”<sup>83</sup> Chief Justice Rehnquist objected that this language could be read to imply that the statute *is* ambiguous and that EPA was not entitled to deference only because it failed step two of *Chevron* where deference is withheld if the interpretation is unreasonable. The Chief Justice noted that:

*Chevron* involved a formal rule-making proceeding, whereas the EPA’s memorandum in this case was accompanied by no such formal procedure, and was also *post litem mortam*. Prior to *Chevron* the difference between the weight to be accorded to a formal rule-making proceeding on the one hand, and a rather half-baked memorandum such as this on the other, was considerable; see *Skidmore v. Swift & Co.*, 323 U.S. 134, 130 (1944). *Chevron* cited *Batterton v. Francis*, 432 U.S. 416, 425, & n.9, which repeats the same theme.<sup>84</sup>

Rehnquist asked, “Are these differentiations of no concern after *Chevron*?” While noting that “[w]e don’t have to decide it here,” he expressed concern that Justice Scalia’s opinion might imply “that this sort of interpretive rule is entitled to the same degree of deference as a rule coming out of a formal rule-making proceeding.”<sup>85</sup>

Justice Scalia responded to Chief Justice Rehnquist’s memorandum, by noting that the “question you ask is a good one.” He stated:

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<sup>82</sup> 533 U.S. 218 (2001).

<sup>83</sup> 511 U.S. at 339.

<sup>84</sup> Memorandum from Chief Justice Rehnquist to Justice Scalia (March 11, 1994), H.A.B. Papers, *supra* note 3, box 639.

<sup>85</sup> *Id.*

My own view is that, since *Chevron* is essentially a separation-of-powers opinion (the Executive gets first cut at the ambiguity), all that is needed is certainty that the position in question *is* the authoritative view of the agency. I would even accept a position authoritatively provided at the litigation state. The notion that a position set forth by rulemaking or adjudication should be accorded greater weight because it has been formed on the anvil of public comment or adversary process is irrelevant to the purpose of *Chevron* – and not true anyway, since interpretive rules can be issued without notice and comment.<sup>86</sup>

In the copy of Justice Scalia's response in Justice Blackmun's file, an exclamation point is written in the margin next to the last sentence of the quotation above. While Justice Scalia did not agree to change the language on which the Chief Justice had focused, he did agree to add a footnote stating "we need not consider whether an agency interpretation expressed in a memorandum like the Administrator's in this case is entitled to any less deference under *Chevron* than an interpretation adopted by rule published in the Federal Register, or by adjudication."<sup>87</sup> Three days later, Justice Blackmun sent Justice Scalia a memorandum stating that while he would join Scalia's opinion he shared Chief Justice Rehnquist's "concern about the final paragraph" and that he "would prefer to see the comment omitted" or at least the addition of the footnote,<sup>88</sup> which ultimately was incorporated in Scalia's final opinion. Seven years later in *Mead* the Court decided the issue reserved in the footnote, rejecting Justice Scalia's position by an 8-1 vote over a sharp, lone dissent by Scalia.

### III. Environmental Law and the Rehnquist Court's "New Federalism"

Shortly after he joined the Court in 1972, Justice Rehnquist served notice that he wished to resuscitate constitutional limits on the authority of Congress that had been obliterated in the wake of the New Deal. In a lone dissent from a decision in 1975 upholding application of federal wage and price controls on state employees, Justice Rehnquist declared, "there can be no more fundamental constitutional question than that of the intention of the Framers of the Constitution as to how authority should be allocated between the National and State Governments."<sup>89</sup>

A year later Rehnquist achieved a major victory in *National League of Cities v. Usery* when the Court ruled 5 to 4 that it was unconstitutional to require state governments to pay their employees the federal minimum wage.<sup>90</sup> Justice Blackmun provided the crucial fifth vote for Justice Rehnquist's majority opinion, which stated that Congress may not regulate "an

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<sup>86</sup> Memorandum from Justice Scalia to Chief Justice Rehnquist (March 11, 1994), H.A.B. Papers, *supra* note 3, box 639.

<sup>87</sup> *Id.*

<sup>88</sup> Memorandum from Justice Blackmun to Justice Scalia (March 14, 1994), H.A.B. Papers, *supra* note 3, box 639.

<sup>89</sup> *Fry v. United States*, 421 U.S. 542, 549 (1975) (Rehnquist, J., dissenting).

<sup>90</sup> 426 U.S. 833 (1976).

undoubted attribute of state sovereignty” in a manner that would “displace the States’ freedom to structure integral operations in areas of traditional governmental functions.” Blackmun filed a concurring statement clarifying that he joined the majority opinion only on the understanding that it “does not outlaw federal power in areas such as environmental protection, where the federal interest is demonstrably greater and where state facility compliance with imposed federal standards would be essential.”<sup>91</sup>

The Court next confronted a major constitutional challenge to the Surface Mining Control and Reclamation Act of 1977 (SMCRA),<sup>92</sup> a statute that had been signed into law by President Jimmy Carter after having been vetoed by his predecessor, President Gerald Ford. In *Hodel v. Virginia Surface Mining & Reclamation Ass’n, Inc.*,<sup>93</sup> coal companies and landowners joined the states of Indiana and Virginia in challenging the statute. They argued that it exceeded Congress’ power under the Commerce Clause, violated the Tenth Amendment rights of the states, took private property without payment of the just compensation required by the Fifth Amendment’s Takings Clause, and violated due process by requiring alleged violators to pay civil penalties into escrow before being able to contest notices of violations. A federal district court ruled in their favor on the Tenth Amendment, takings, and due process issues while rejecting their commerce clause challenge. When the case reached the Supreme Court, it unanimously rejected both the Commerce Clause and Tenth Amendment challenges while finding the other claims premature because the litigation was a facial challenge to the statute that had yet to be applied directly to the plaintiffs.

Notes taken by Justice Blackmun during the Court’s conference vote make it clear that several Justices were troubled by provisions in SMCRA despite the Court’s unanimous decision to uphold it. While Justice Powell generally agreed that Congress had the power to enact the legislation under the Commerce Clause, he was undecided with respect to challenges to requirements that strip miners restore the land to the same contours it had before the removal of minerals. Justice Powell said, “I gag a lot,” and the “commerce power at some point runs into the Tenth” Amendment. Justice Rehnquist agreed that the Court’s prior precedents could be used to uphold the legislation under Congress’ commerce power, but he argued that “we have stood the Constitution on its head” and that while the Court has “upheld the regulation of production,” there are “limits” on federal power. Rehnquist stated that federal regulation of mining was “OK,” but not federal regulation of “what must be done afterwards.” He agreed with the district court on this aspect of the case but not with the court’s reliance on the Tenth Amendment.

Justice Stewart, who had joined Justice Rehnquist’s majority opinion in *National League of Cities v. Usery*, argued that *National League of Cities* is not a limit on the commerce power and that the commerce power was not the important issue raised by federal surface mining regulation. But, he asked, “Is everything federal now?,” citing *Wickard v. Filburn*,<sup>94</sup> which had upheld New Deal-era regulation of wheat grown solely for personal consumption. Justice Stevens stated that “strippers have had a competitive advantage over Illinois deep miners” and

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<sup>91</sup> *Id.* at 856 (Blackmun, J., concurring).

<sup>92</sup> 30 U.S.C. §§1201-1328, ELR <BI>Stat.<D> SMCRA §§101-908.

<sup>93</sup> 452 U.S. 264, 11 ELR 20569 (1981).

<sup>94</sup> 317 U.S. 111 (1942).

that SMCRA restores the competitive balance and makes it too expensive for some. He questioned whether the Court could duck the takings issue since the legislation effectively prohibits some from strip mining. But he believed that there was no merit in such takings claims based on Justice Louis D. Brandeis' dissent in *Pennsylvania Coal v. Mahon*,<sup>95</sup> a 1922 decision in which Brandeis had argued that a law banning removal of coal to prevent surface subsidence was not a regulatory taking because it merely prevented the creation of a nuisance. Stevens thought SMCRA's penalty provisions were "outrageous" and that the Court should hold them to be facially unconstitutional, though he later accepted the Court's conclusion that it was premature to reach this issue on a facial challenge.

In a subsequent memorandum to Chief Justice Burger,<sup>96</sup> Justice Powell indicated that he might dissent on the validity of the regulations requiring post-mining restoration of land. While agreeing that Congress does have "the power to regulate strip mining and perhaps the restoration of the mined land," he noted that "this legislation goes very far indeed in imposing post-mining obligations on miners." He expressed the view that "[t]he intrusion on traditional state and local land use control is substantial and pervasive, in addition to raising with respect to individual situations questions of 'taking' without just compensation."

Justice Powell ultimately joined Justice Marshall's majority opinion, but he filed a short concurrence. Powell's concurrence described SMCRA as "an extraordinary program of federal regulation and control of land use and land reclamation, activities normally left to state and local governments."<sup>97</sup> But he concluded that "the decisions of the Court over many years make clear that, under the Commerce Clause, Congress has the power to enact this legislation." Justice Marshall's majority opinion emphasized that the Court should defer to congressional findings concerning the effects of surface mining on the environment and the need for minimum national standards.

Rehnquist ultimately agreed that even purely intrastate activities can be regulated under the Act because of the substantial, cumulative effects of surface mining on interstate commerce. But he refused to join Justice Marshall's majority opinion because he believed it did not sufficiently emphasize the need to demonstrate a *substantial* effect on interstate commerce to justify federal regulation.<sup>98</sup> Rehnquist filed a short opinion concurring in the judgment.<sup>99</sup> He concluded by stating:

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<sup>95</sup> 260 U.S. 393 (1922).

<sup>96</sup> Memorandum from Justice Lewis F. Powell to Chief Justice Burger (Mar. 5, 1981), H.A.B. Papers, *supra* note 3, box 328.

<sup>97</sup> 452 U.S. at 305 (Powell, J., concurring).

<sup>98</sup> Chief Justice Burger filed a brief concurring opinion of his own stating that he agreed fully with Justice Rehnquist's "view that we often seem to forget that the doctrine that laws enacted by Congress under the Commerce Clause must be based on a *substantial* effect on interstate commerce." But he noted that he had joined the majority opinion "because in it the Court acknowledges and reaffirms that doctrine." 452 U.S. at 305 (Burger, C.J., concurring) (emphasis in the original).

<sup>99</sup> 452 U.S. at 307 (Rehnquist, J., concurring).



Neither Congress nor the States may act in a manner prohibited by any provision of the Constitution. But Congress must bear an additional burden: if challenged as to its authority to act pursuant to the Commerce Clause, Congress must show that its regulatory activity has a substantial effect on interstate commerce. It is my uncertainty as to whether the Court intends to broaden, by some of its language, this test that leads me to concur only in the judgments.<sup>100</sup>

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<sup>100</sup> *Id.*

As the Marshall papers revealed, three months after the Court released its slip opinions in the case, Justice Rehnquist asked the Court's permission to change language in his concurrence.<sup>101</sup> Rehnquist asked to change the penultimate sentence in his concurrence to read: "Congress must show that the activity it seeks to regulate has a substantial effect on interstate commerce."<sup>102</sup> This long-overlooked memorandum may have considerable contemporary significance because lower courts have used different rationales in upholding the constitutional authority of Congress to prohibit harm to species that are so endangered that they exist entirely intrastate.<sup>103</sup> This question has suddenly attracted considerable national attention in the wake of the nomination of Judge Roberts to the Supreme Court. Roberts was one of two judges to dissent from denial of a rehearing en banc in *Rancho Viejo, LLC v. Norton*,<sup>104</sup> which upheld application of the ESA to the arroyo toad--the now famous "hapless toad that, for reasons of its own, lives its entire life in California."<sup>105</sup> Judge Roberts served as a law clerk to Justice Rehnquist when the surface mining case was decided. Justice Rehnquist's concern that the "activity to be regulated" should be the proper focus of Commerce Clause analysis is the same issue raised in Judge Roberts' dissent from denial of rehearing en banc in the arroyo toad case.

When Justice O'Connor replaced Justice Stewart on the Court in 1981, Justice Rehnquist acquired a new ally in his campaign to protect states from overreaching by the federal government. This quickly became clear when the Court decided *Federal Energy Regulatory Commission (FERC) v. Mississippi*.<sup>106</sup> The case involved a constitutional challenge by

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<sup>101</sup> See Percival, *supra* note 2, at 10623, which notes Justice Rehnquist's request for change without describing the precise nature of how the wording was altered. In the light of contemporary confusion over how to conduct Commerce Clause analysis, the nature of the wording change requested by Rehnquist is described above because it now seems particularly significant.

<sup>102</sup> Memorandum to the Conference from Justice William H. Rehnquist (Sept. 3, 1981), H.A.B. Papers, *supra* note 3, box 328.

<sup>103</sup> See, e.g., *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 28 ELR 20403 (D.C. Cir. 1997); *Gibbs v. Babbitt*, 214 F.3d 483, 30 ELR 20602 (4th Cir. 2000); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 33 ELR 20163 (D.C. Cir. 2003); and *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622 (5th Cir. 2003).

<sup>104</sup> 323 F.3d 1062, 33 ELR 20163 (D.C. Cir. 2003), *reh'g en banc denied*, 334 F.3d 1158 (2003), *cert. denied*, 540 U.S. 1218 (2004).

<sup>105</sup> Contrary to some reports, Judge Roberts did not actually conclude that application of the ESA to the toad would exceed federal power. Rather, he stated that the D.C. Circuit should rehear the case because the panel's rationale for upholding the ESA was not consistent with the rationales used by other courts. He noted that en banc "review would also afford the opportunity to consider alternative grounds for sustaining application of the Act that may be more consistent with Supreme Court precedent." 334 F.3d 1158, 1160 (2003).

<sup>106</sup> 456 U.S. 742, 12 ELR 20896 (1982).

Mississippi to the Public Utilities Regulatory Policy Act (PURPA), legislation adopted by Congress as part of a package of measures to combat a national energy crisis. PURPA required state utility regulators to consider certain ratemaking standards to encourage energy conservation. After a federal district court found that the legislation exceeded Congress' commerce powers and violated the Tenth Amendment, the Supreme Court granted review. The Court ultimately reversed the lower court decision and upheld the legislation in a 5 to 4 decision.

Justice Blackmun's conference notes indicate that Justice O'Connor vigorously argued that the law violated the Tenth Amendment and garnered the votes of three other Justices who initially had been more tentative in their views. Justice O'Connor stated that the Commerce Clause supports PURPA but that the case raised "extremely serious" Tenth Amendment questions. She stated that FERC was "offering the states only one choice" and that this "goes too far." She asked whether "war powers outweigh this *incredible* [encroachment] on state power?" While expressing concern for states' rights, Justice Powell had noted the seriousness of the energy crisis. Opining that the "[Union of Soviet Socialist Republics] can move into the Middle East and destroy western society," Powell asked: "Do I have the nerve to say Congress does not have this power?" He noted that while some provisions of PURPA are "expressed as hortatory," they are "in effect mandatory," and while the federal government could preempt state utility regulation, it "never has." Justice Rehnquist then stated that he did not agree that Congress could preempt but that the legislation could be sustained under the Court's national security precedents and the *Fry v. United States*<sup>107</sup> case upholding federal imposition of wage and price controls. Justice Stevens voted to reverse and noted that his vote was not influenced by the energy crisis.

As a result of Justice O'Connor's forceful advocacy, Chief Justice Burger, who initially had voted to reverse, changed his vote and joined Justice O'Connor's dissent, as did Justice Rehnquist. In her dissent, Justice O'Connor argued that while Congress had the power under the Commerce Clause to enact PURPA, the Act violated the Tenth Amendment because it sought to "conscript state utility commissions into the national bureaucratic army."<sup>108</sup> Justice Powell filed a separate dissent.

A different set of federalism issues arose during the following Supreme Court Term when it considered whether the Atomic Energy Act preempted California's ban on construction of nuclear power plants until adequate storage facilities are available for nuclear waste.<sup>109</sup> As the Marshall papers revealed, the Court in *Pacific Gas & Electric Co. v. States Energy Resources Conservation & Development Commission* initially voted 6 to 3 to reverse the decision of the U.S. Court of Appeals for the Ninth Circuit, which had upheld the moratorium. But a majority of the Justices ultimately decided to uphold the moratorium. The Blackmun papers shed light on the discussion at conference and confirm that some of the initial votes in favor of reversal had not been very firm.

The papers indicate that while Justice Brennan voted in favor of reversal, he described the case as "close" and noted that all four of his clerks disagreed with him. He stated that the real question is whether Congress intended to leave to states the decision whether to have nuclear

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<sup>107</sup> 421 U.S. 542 (1975).

<sup>108</sup> 456 U.S. at 774 (O'Connor, J., dissenting).

<sup>109</sup> *Pacific Gas & Electric Co. v. States Energy Resources Conservation & Development Comm'n*, 461 U.S. 190, 13 ELR 20519 (1983).

power. Citing a “demanding need for national power,” Chief Justice Burger also voted to reverse. Justice White voted to reverse as well, noting that Congress wanted to keep judgments about nuclear safety to the federal Atomic Energy Commission. Justice Powell said that questions concerning the storage of nuclear waste were clearly preempted, but he was less certain whether judgments concerning the economics of nuclear power were preempted. Justice Rehnquist, a champion of states’ rights, described himself as “not fully at rest.” He observed that but for the fact that the moratorium involved nuclear energy, the case for preemption would be very weak because the state, if it wanted to, could say no to a coal-fired power plant. Rehnquist stated that the Atomic Energy “Commission reads [the] Atomic Energy Act to say ‘love me, love my dog,’” and he pointed out that nuclear energy has never been rejected by the state.

Justices Stevens and Blackmun voted to uphold California’s moratorium. Stevens stated, “Personally I favor nuclear power.” He conceded that Congress has the broadest power, but he argued that it had not been exercised to preempt the issues addressed by the state. And while voting to reverse, Justice Marshall stated that it was possible he could join Justice Stevens.

After the initial round of discussion, Justice Rehnquist agreed with Justices Stevens and Blackmun that there was no preemption. However, the final vote stood at what Justice White later described as “a rather shaky 6-3 to reverse.”<sup>110</sup> The Chief Justice assigned the opinion to Justice White who eventually became persuaded that the nuclear moratorium rested on economic, rather than safety, concerns, and thus was not preempted. Justice White authored what eventually became the opinion of a unanimous Court as each of the other five Justices who initially had voted to reverse ultimately joined it. Justice Blackmun filed a concurrence, joined by Justice Stevens, which argued that even if the moratorium had been motivated by safety concerns it would not be preempted.<sup>111</sup>

Justice Blackmun had a profound impact on Tenth Amendment doctrine because he ultimately became convinced that there was no principled way to define what was beyond the scope of federal power and that the political process provided the best protection for state interests. As a result, he ultimately provided the decisive fifth vote to uphold application of the Fair Labor Standards Act to state employees in *Garcia v. San Antonio Metropolitan Transit Authority*,<sup>112</sup> which overruled *National League of Cities v. Usery*. The papers of the late Justices Brennan and Marshall have already revealed the story of how Justice Blackmun, who had provided the decisive vote in *National League of Cities*, changed his mind.<sup>113</sup> Justices Rehnquist,

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<sup>110</sup> Memorandum from Justice Byron White to Chief Justice Warren Burger (Jan. 26, 1983), H.A.B. Papers, *supra* note 3, box 380.

<sup>111</sup> 461 U.S. at 223 (Blackmun, J., concurring).

<sup>112</sup> 469 U.S. 528 (1985).

<sup>113</sup> See Mark Tushnet, *Why the Supreme Court Overruled National League of Cities*, 47 Vand. L. Rev. 1623 (1994). Tushnet describes how *Garcia* was held over for reargument after Blackmun, who initially had been assigned to write an opinion for a 5 to 4 Court holding that the Fair Labor Standards Act could not be constitutionally applied to state employees, changed his mind late in the Court’s Term and circulated a decision upholding its application. While Blackmun’s initial draft would not have overruled *National League of Cities*, Memorandum from Justice Blackmun to Justice Powell (July 3, 1984), H.A.B. Papers, *supra* note 3, the decision he wrote for the 5 to 4 majority following the reargument did so. *Garcia* is

Powell, O'Connor, and Chief Justice Burger dissented, with Justice Rehnquist expressing confidence his approach eventually would prevail.<sup>114</sup>

Rehnquist's effort to provide greater constitutional protection for state interests received a significant boost in 1986 when Justice Antonin Scalia joined the Court and Rehnquist became Chief Justice. Justice Scalia became an aggressive advocate of reviving the Eleventh Amendment to immunize states from lawsuits by private parties. In 1989, his initial effort to do so backfired in *Pennsylvania v. Union Gas Co.*<sup>115</sup> The case involved the question of whether states could be held liable for cleanup costs under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).

As the Marshall papers revealed, the Justices originally voted 5 to 4 that states could not be held liable. Justice Scalia was assigned to draft the Court's majority opinion. Eager to expand states' Eleventh Amendment immunity, he took the position that Congress had intended to make states liable under CERCLA and to waive their Eleventh Amendment immunity but that Congress lacked the constitutional authority to do so. Justice White, who had voted with the majority, had premised his vote on the notion that Congress had not clearly expressed its intent to hold states liable. He refused to go along with Justice Scalia's attempt to erect new constitutional limits on congressional power. Thus, the ultimate result was shifting pluralities of Justices that joined Scalia in holding that Congress had intended to hold states liable and that joined Justice White in holding that Congress had the constitutional authority to do so.<sup>116</sup>

Justice Blackmun's conference notes indicate that there was a vigorous debate over Eleventh Amendment doctrine. Blackmun writes that Scalia said: "wish I could go along on" the "statutory grounds," but that it was "not clear enough for me." They reveal that Justice Brennan had his own Eleventh Amendment agenda--to persuade the Court to overrule *Hans v. Louisiana*,<sup>117</sup> a late 19th century decision in which the Court had ignored the plain language of the Amendment (immunizing states only from lawsuits by "Citizens of another State" or by foreigners) to apply it to lawsuits by state residents. Justices Blackmun, Marshall, and Stevens agreed that *Hans* should be overruled, with Stevens urging the others to look at the Eleventh Amendment and "read it literally" because "our 11th Amendment jurisprudence is a mess." Blackmun's personal notes state: "I prefer to overrule *Hans* . . . . No reason to perpetuate 11th

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one of the cases, along with *Roe v. Wade*, in which digital copies of Justice Blackmun's files have been made available on dedicated computer terminals in the Manuscript Reading Room at the Library of Congress. A sample of a page from these files is available online at <http://www.loc.gov/rr/mss/blackmun/images/garcia-ex-0020-640.jpg> (last visited Aug. 5, 2005).

<sup>114</sup> 469 U.S. at 579 (Rehnquist, J., dissenting).

<sup>115</sup> 491 U.S. 1, 19 ELR 20974 (1989).

<sup>116</sup> White joined what initially had been the four dissenters in the case--Justices Blackmun, Brennan, Marshall, and Stevens--in holding that Congress *did* have the constitutional authority to waive state sovereign immunity, while Justice Scalia joined the same four Justices to hold that Congress had clearly expressed its intent to do so, a position he needed to take in order to justify reaching the constitutional issue he wanted to decide.

<sup>117</sup> 134 U.S. 1 (1890).

Amendment jurisprudence any longer.”<sup>118</sup> Justice Scalia, who has been a vigorous advocate of textualism in constitutional interpretation, admitted at the conference that *Hans* was “wrong,” but he stated that states had placed “sufficient reliance on it to dissuade me from overruling it.” Justice Brennan disagreed, arguing that “States have not relied on *Hans* in any concrete way.”

Chief Justice Burger and Justices O’Connor, Kennedy, and White believed that Congress had not clearly expressed an intent to waive state sovereign immunity and they did not believe that *Hans* should be overruled. Justice O’Connor stated that *Hans* “is structurally correct” and that there had been enough reliance on it not to overrule it. Justice Kennedy stated that he would be “reluctant” to overrule *Hans*. When it became clear that Justice White did not support Justice Scalia’s attempt to limit congressional power to waive state immunity, Scalia explained: “I had written the opinion as I did because I thought it was the best shot (though a long one) at getting a single opinion for the Court.”<sup>119</sup>

In 1990, Justice Brennan retired and was succeeded by Justice David Souter. Surprisingly, this change in the Court’s membership has not proved as significant as many had initially thought. Far more significant has been the replacement of Justice Thurgood Marshall in 1991 with Justice Clarence Thomas. The latter appointment represented a significant shift in the Court’s ideological balance in a decidedly conservative direction. The new Justices quickly made a significant difference in 1993, when their votes proved crucial in producing a major victory for proponents of limiting federal power. In *New York v. United States*,<sup>120</sup> a state successfully argued that a requirement in the Low-Level Radioactive Waste Policy Act violated the Tenth Amendment by requiring states to “take title” to low-level radioactive waste generated in any state that had not made arrangements for its disposal by a certain date.

The Blackmun papers provide the first look at the Court’s decision process in *New York v. United States*. They reveal that the “cert pool” memorandum recommending that the Court take the case was greeted with open hostility in Justice Blackmun’s chambers. The pool memo, written by a clerk to Justice Thomas, argued that the Court should take the case because it “cleanly present[s] an important (and recurring) legal question, and because the case concerns an issue of national significance.”<sup>121</sup> Appended to the memorandum is a memo from a Blackmun clerk blasting the cert pool memo, noting that there is no circuit split, and arguing that only “a very activist-federalist [Court of Appeals] panel [would] go the other way.”<sup>122</sup> Reflecting the increasingly ideological polarization of the Court and its clerks, Blackmun’s clerk accuses the poolwriter of “bias,” argues that “he secretly wants a grant” and adds that he “also has a lousy jump shot – like his pool memos, it has *no touch*.” He notes that the “facts of this case hardly

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<sup>118</sup> Personal Notes of Justice Harry A. Blackmun (Oct. 23, 1988), H.A.B. Papers, *supra* note 3, box 519.

<sup>119</sup> Memorandum from Justice Antonin Scalia to Justice Byron R. White (Apr. 12, 1989), H.A.B. Papers, *supra* note 3, box 519.

<sup>120</sup> 505 U.S. 144, 22 ELR 21082 (1992).

<sup>121</sup> Preliminary Memorandum from Arnon Siegel, No. 91-543 *New York v. United States* (Jan. 3, 1992), H.A.B. Papers, *supra* note 3, box 600.

<sup>122</sup> J.M. Attachment to *id.* (Jan. 7, 1992).

suggest any kind of breakdown in the political process (all of NY's congressional delegation supported the Act!).” Thus, the “case would be useless as a means of ‘clarifying *Garcia* as the pool writer suggests in his parenthetical in the case caption.”<sup>123</sup>

After the Court granted the case, Justice Blackmun wrote in his notes: “This is a political case taken here to reconsider *Garcia*.” Blackmun also wrote that he believed that the federal interest was greater in the area of environmental protection than with respect to regulation of wages and hours of state employees. In a memorandum accompanying a draft bench memo once of Justice Blackmun's clerks echoed his thoughts on the putative majority's motives: “This is a highly political case, and the conservatives granted the case only to limit or overrule your decision in *Garcia* or Justice Brennan's in [*South Carolina v. Baker*]<sup>124</sup> regarding the [Tenth Amendment] or federalism-based limits on Congress' power to regulate under the Commerce Clause.”<sup>125</sup>

Justice Blackmun's notes reveal that six Justices voted at conference that the “take title” provision violated the Tenth Amendment. When the case was discussed at conference, Justice O'Connor argued that “take title goes beyond anything heretofore.” She described it as a “frightening result” from the perspective of the Tenth Amendment. Justice Scalia described the statute as “pure punishment,” while Justice Kennedy characterized it as “very dangerous.” The two newest members of the Court--Justices Souter and Thomas--also voted to strike it down. Justices Blackmun, Stevens, and White voted to uphold the statute.

After Justice O'Connor circulated her first draft of the majority opinion, one of Justice Blackmun's clerks sent him a note describing it as “a hyperbolic and somewhat nauseating ode to federalism.” The clerk expressed the hope that Justice Souter, who had voted to reverse at conference but who was believed not to be firm in that position, would join Justice White's dissent.<sup>126</sup> Two days later, Justice Souter joined O'Connor's draft opinion.

The case file reveals that the six Justices who voted to strike down the “take title” provision were not in complete agreement with respect to the relationship between the Tenth Amendment and the Commerce Clause of the Constitution. Six days after Justice O'Connor circulated her second draft of the majority opinion, Justice Kennedy sent her a two-page memorandum saying that he was in “full agreement” with “the result in this case and with what I think is the heart of your analysis.”<sup>127</sup> However, he requested that she make several changes in her draft opinion. First, Kennedy criticized O'Connor's suggestion that the Commerce Clause

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<sup>123</sup> Id. (emphasis in original).

<sup>124</sup> 485 U.S. 505 (1988) (rejecting a Tenth Amendment challenge, over a dissent by Justice O'Connor, to a provision of the Internal Revenue Code denying a federal income tax exemption for interest earned on unregistered state and local government bonds).

<sup>125</sup> Note to Justice Harry A. Blackmun from “Andrea” (Andrea M. Ward), (March 27, 1992), H.A.B. Papers, *supra* note 3, box 600.

<sup>126</sup> Note to Justice Harry A. Blackmun from “Andrea” (Andrea M. Ward), (June 7, 1992), H.A.B. Papers, *supra* note 3, box 600.

<sup>127</sup> Memorandum from Justice Anthony Kennedy to Justice Sandra Day O'Connor (June 11, 1992), H.A.B. Papers, *supra* note 3, box 600.

and the Tenth Amendment were mirror images of each other with anything added to one being subtracted from the other. He asked O'Connor instead to state that the Tenth Amendment is an independent limit on federal power derived from the structure of government. "The principle we must follow is that the national government may not infringe upon the fundamental political autonomy of the states," Kennedy wrote. He criticized O'Connor for suggesting that *Hammer v. Dagenhart*<sup>128</sup> (a 1918 case in which the Court held that Congress could not ban the interstate shipment of goods made with child labor because regulation of production was the province of the states) was correct given the state of the economy at the time. "In my view *Hammer* was wrong the day it was decided and we should not indicate otherwise," Kennedy stated. He disagreed with a statement by O'Connor that state sovereignty is not valuable for its own sake, noting that "its very existence serves to check the power of the federal government." While Kennedy expressed the view that "the Court took a wrong turn in *FERC v. Mississippi*," he concluded "we need not overrule it" because there "the federal government was coopting state procedural mechanisms and here it is altering its substantive law."

After Justice O'Connor responded by proposing new text stating that the federal structure "necessarily limits" congressional power, Justice Souter objected that such a statement was broader than necessary. He proposed substitute language, incorporated in the Court's final decision, that stated that while the text of the Tenth Amendment "is essentially a tautology," it "confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on Article I power."

The Court's decision in *New York v. United States*--that the statute unconstitutionally sought to "commandeer" state legislative processes--represented a major advance for efforts to revive constitutional limits on federal power. Subsequent to Justice Blackmun's retirement, the Rehnquist Court in two other 5 to 4 decisions went much further in this direction. In *United States v. Lopez*,<sup>129</sup> the Court for the first time in nearly 60 years struck down a federal statute--the Gun Free Schools Zone Act that prohibited the possession of firearms in proximity to schools--on the ground that it exceeded congressional power under the Commerce Clause. A year later, the Court in *Seminole Tribe of Florida v. Florida*<sup>130</sup> dramatically expanded states' sovereign immunity under the Eleventh Amendment by reversing *Pennsylvania v. Union Gas* and holding that Congress had no authority under the Commerce Clause to waive state sovereign immunity from private suits over violations of federal rights. Because Justice Blackmun already had retired from the Court when these cases were decided, there are no case files pertaining to them in the Blackmun papers.

#### **IV. The Revival of Regulatory Takings Doctrine**

In addition to reviving constitutional limits on federal power, a major part of the Rehnquist Court's jurisprudence has been to strengthen the constitutional protection of property rights. The

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<sup>128</sup> 247 U.S. 251 (1918).

<sup>129</sup> 514 U.S. 549 (1995).

<sup>130</sup> 517 U.S. 44 (1996).



Court has done so by making it easier for property owners to challenge environmental regulations as “regulatory takings” for which just compensation must be paid.<sup>131</sup> The concept of “regulatory takings” originated in a 1922 Supreme Court decision that extended the Fifth Amendment’s requirement that just compensation be paid when the government seizes private property to cover not only physical invasions of property, but also instances where regulation “goes too far.” With the advent of federal regulatory programs to protect the environment in the 1970s, concern arose that environmental regulation could give rise to regulatory takings problems.<sup>132</sup> Many courts sought to avoid confronting takings claims directly by holding that plaintiffs had to apply for variances and exhaust state remedies before such claims would be ripe for review.

In 1978, the Court in *Penn Central Transportation Co. v. City of New York*<sup>133</sup> reviewed whether a historic preservation regulation that prohibited the Penn Central Company from constructing an office tower over Grand Central Station in New York City was a regulatory taking. Justice Blackmun’s conference notes indicate that the initial vote in conference was 5 to 4 to reject the takings claim, though Justice Powell’s decisive vote to affirm the New York Court of Appeals’ finding of no taking had a question mark next to it. Chief Justice Burger, the member of the Court who most frequently vacillated when it came time to vote, declared that the landmark regulation was “clearly a taking,” that “none of our cases support” a contrary result, and that he had “never been firmer.”

Justice Brennan noted that Penn Central had not challenged the designation of Grand Central Station as a historic landmark and that it had made no effort to show that it could not earn a reasonable return on its investment. Thus, he concluded that the restriction was not a taking. Justice Stewart noted that “zoning is a taking away.” Justice White stated that a restriction on use is not in itself a taking and that the end result would probably have to be ad hoc. Justice Marshall described the situation as “a messy mess” and stated that “this is *not* zoning.” He initially passed when it came his turn to vote, but Marshall ultimately joined Justice Brennan’s majority opinion rejecting the takings claim. And citing *Pennsylvania Coal*, Powell expressed the view that “every regulation is in a sense a taking” and that it was “a question of degree.”

Justice Rehnquist said that under its police power the “city can take, all right,” but that the “question is whether they can take sans paying for it.” He distinguished zoning because “[i]n zoning, there is a benefit that accompanies the burden,” a point he ultimately emphasized in his dissenting opinion decrying the singling out of a few properties for landmark status. Justice

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<sup>131</sup> Ironically, the Court has moved in this direction even as it has made it more difficult for private parties to sue state entities by expanding their sovereign immunity under the Eleventh Amendment. See Robert V. Percival, *Greening the Constitution: Harmonizing Environmental and Constitutional Values*, 32 *Env'tl. L.* 802 (2002).

<sup>132</sup> In 1973, the Council on Environmental Quality (CEQ) devoted an entire chapter of its annual report to the takings issue. CEQ concluded that increased environmental consciousness would help change conceptions of property rights in a manner that would avoid takings problem. Council on Environmental Quality, *Environmental Quality* 149-150 (1973).

<sup>133</sup> 438 U.S. 104, 8 ELR 20528 (1978).

Stevens emphasized a similar “[d]istinction between the general and the particular” and stated that “zoning is general. Landmarking is not.” He noted that most landmarks are public property. The Court ultimately rejected Penn Central’s takings claim in a majority opinion by Justice Brennan, joined by Justices Blackmun, Marshall, Powell, Stewart, and White. The decision announced a three-part test for assessing regulatory takings claims that would consider the economic impact of the challenged regulation, the extent to which it interfered with distinct, investment-backed expectations, and the character of the government action. Justice Rehnquist’s dissent was joined by Chief Justice Burger and Justice Stevens.

A year later the Court decided in *Andrus v. Allard*<sup>134</sup> that the Eagle Protection Act’s prohibition on the possession or sale of eagle parts did not constitute a regulatory taking. While Justice Blackmun’s conference notes indicate that Justice Stevens and Chief Justice Burger initially held a contrary view, they ultimately switched their votes, though the Chief Justice concurred only in the judgment. In a memorandum explaining why he would not dissent, Justice Stevens wrote that “[f]urther study of this case persuades me that you are correct in stating that a flat proscription on the sale of wildlife without regard to the legality of its taking, is and for a long time has been a traditional legislative tool for enforcing conservation policy.”<sup>135</sup> Justices Powell and Rehnquist expressed initial doubts about whether the regulation constituted a taking, but they too ultimately joined Brennan’s opinion. Blackmun’s personal notes on the case ask: “Is this regulation unduly harsh?--Answer is No, therefore no taking.”

In *Agins v. City of Tiburon*,<sup>136</sup> the Court unanimously upheld a zoning ordinance that allowed only single-family dwellings and open space on certain land overlooking San Francisco Bay. The Blackmun papers reveal that the initial conference vote of the Justices following oral argument was 7 to 2 in favor of affirming the lower court’s dismissal of the takings claim. Justices Rehnquist and Stewart voted to dissent because they doubted the constitutionality of California’s practice of barring any damages remedy for regulatory takings. They interpreted the lower court’s dismissal on the pleadings of a complaint alleging total deprivation of the value of the property as upholding such a practice, even though it was obvious that the challenged ordinance permitted the construction of single-family dwellings.

When Justice Powell’s draft majority opinion was circulated, Justice Stewart’s concerns were mollified by footnote 6, which noted that California courts need not assume the truth of allegations that are “contrary to law or to a fact of which a court may take judicial notice.” The opinion noted that the California Supreme Court had “merely rejected allegations inconsistent with the explicit terms of the ordinance under review” in brushing aside the allegation of total deprivation of value. After five other Justices had agreed to join Justice Powell’s draft opinion of the Court, Justice Stewart also agreed to join, noting that footnote 6 “takes care of the basic problem I had with this case.”

Vigilant to protect state and local prerogatives, Justice Rehnquist was concerned that Justice Powell’s draft opinion suggested that regulation “effects a taking” if it “does not substantially advance legitimate governmental goals,” implying a kind of means-ends test for

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<sup>134</sup> 444 U.S. 51, 9 ELR 20791 (1979).

<sup>135</sup> Memorandum from Justice Stevens to Justice Brennan (Oct. 31, 1979), H.A.B. Papers, *supra* note 3, box 301.

<sup>136</sup> 447 U.S. 255, 10 ELR 20361 (1980).

takings derived from due process precedents. In a memorandum sent the day after Justice Stewart agreed to join Powell's opinion, Justice Rehnquist also offered to join if Powell replaced the "substantially advance" language to state, quoting *Village of Euclid v. Ambler Realty*,<sup>137</sup> that the ordinance could only be declared unconstitutional if it were "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare." This, Rehnquist argued, would "allow[] the states somewhat more latitude" than the "substantially advance legitimate governmental goals" test.<sup>138</sup> Powell declined to make such a change, noting that his majority opinion already referred to *Euclid* as the "seminal" decision while twice referencing the pages of that decision where the language favored by Justice Rehnquist appeared. Despite Powell's refusal to make the change, Justice Rehnquist joined his opinion, explaining that "[t]he 'nuance' which troubles me is probably not worth a separate concurring opinion in this case."<sup>139</sup>

Ironically, this "nuance"--reference to regulation needing to "substantially advance legitimate state interests"--acquired a life of its own as it was repeated in subsequent takings decisions. This created considerable confusion because it inadvertently imported into regulatory takings doctrine what was essentially a due process notion. After the Ninth Circuit affirmed a decision holding that a Hawaii law limiting the rent oil companies could charge their franchisees was a regulatory taking because it did not "substantially advance" state purposes, the Supreme Court in 2005 revisited this linguistic legacy of *Agins*. In *Lingle v. Chevron U.S.A., Inc.*, it reversed the Ninth Circuit and held that the "substantially advance" test no longer had a place in regulatory takings doctrine.<sup>140</sup>

During its 1986 Term, the first Term with Rehnquist serving as Chief Justice and Scalia as an Associate Justice, the Court decided three important regulatory takings cases, ruling in favor of the government in one case and in favor of landowners in two others. The first case, *Keystone Bituminous Coal Ass'n v. DeBenedictis*,<sup>141</sup> involved a facial challenge to a Pennsylvania statute very similar to the one that had spawned the creation of regulatory takings doctrine in 1922 in *Pennsylvania Coal v. Mahon*.<sup>142</sup> The Bituminous Mine Subsidence and Land Conservation Act required coal operators to leave as much as 50% of coal deposits intact in certain areas to prevent surface subsidence from damaging structures or water resources. Former

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<sup>137</sup> 272 U.S. 365 (1926).

<sup>138</sup> Memorandum from Justice Rehnquist to Justice Powell (May 29, 1980), H.A.B. Papers, *supra* note 3, box 314.

<sup>139</sup> Memorandum from Justice Rehnquist to Justice Powell (May 30, 1980), H.A.B. Papers, *supra* note 3, box 314.

<sup>140</sup> 125 S. Ct. 2074, 35 ELR 20106 (2005). The Court began its unanimous opinion by noting: "On occasion, a would-be doctrinal rule or test finds its way into our case law through simple repetition of a phrase--however fortuitously coined."

<sup>141</sup> 480 U.S. 470, 17 ELR 20440 (1987).

<sup>142</sup> 260 U.S. 393 (1922).

Solicitor General Rex Lee, representing owners of coal deposits, argued that the law constituted a regulatory takings because it required 26 to 30 million tons of coal to be left in the ground.<sup>143</sup>

Justice Blackmun's notes reveal that the Justices voted in conference 5 to 4 to reject the takings challenge, the same margin by which the case ultimately was decided. Justices Brennan, Blackmun, Marshall, Stevens, and White voted to reject the takings claim, though Blackmun's notes have a question mark after White's vote and two question marks after Marshall's. Blackmun records Chief Justice Rehnquist stating at conference that "*Pennsylvania Coal* is close and was correct," though he noted that the takings issue "depends on the point of view--9% v. 27 million tons," an apparent reference to the percentage and tonnage of coal deposits that allegedly could not be mined under the law. Decrying "a complete taking," Justice Powell stated that he agreed with Chief Justice Rehnquist and that the case should be "decided on stare decisis" because the "statute is the same, except for a few words," to the one at issue in *Pennsylvania Coal*. Justice O'Connor stated that the Court "cannot destroy *Pennsylvania Coal*," a case Justice Scalia described at conference as "an anchor." Scalia opined that the Pennsylvania statute was "[l]ess a regulation than a rip-off" because it "gives economic wealth to the surface owner."

Justice Brennan stated that the statute did not render "mining impractical" and that it had been adopted at the behest of the federal government. Justice White stated that he was "not fully at rest" and that he agreed that "yes, something has been taken." Justice Stevens stated, "[t]his is like a zoning case" and that "*Hodel* controls." In *Hodel*, discussed earlier, the Court had upheld the constitutionality of SMCRA's controls on strip mining with Stevens at conference opining that Justice Brandeis had the better view when he dissented in *Pennsylvania Coal*. While Justice White's vote initially was shaky in *Keystone*, he held to it. He eventually proved to be the key swing Justice in two of the three takings cases that Term. White was the only Justice to vote with the majority in all three, including the two in which the Court ruled in favor of property owners.

In his personal notes on the case, Justice Blackmun initially wrote that *Pennsylvania Coal* "does not control" because in the case at issue the statute is designed to protect public resources--a dam, the tax base, and land development--and that the state had not acted to take, but rather only to regulate to preserve the common good. But after further examination of *Pennsylvania Coal*, two days before oral argument Blackmun wrote: "The case is closer than I at first thought, and not easy." He explained that *Pennsylvania Coal* did involve a "public aspect," though he noted that the Court there stressed the fact-bound nature of its inquiry and that the case occurred "64 years ago!" He concluded that there is "no set formula" for deciding takings claims and "a common sense approach" should be used.

Three months later the Court decided *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.<sup>144</sup> In that case, the owners of a summer camp that had been destroyed by a flood challenged a regulation that prevented them from rebuilding in a floodplain. Alleging a regulatory taking, they sought damages in an inverse condemnation action filed in California state court. The state court dismissed their lawsuit on the ground that a damages remedy was not available under state law, which provided only for invalidating regulations that were deemed to be takings.

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<sup>143</sup> *Supreme Court Told Pennsylvania Statute Unconstitutionally "Takes" Unmined Coal*, 17 Env't Rep. (BNA) 1182 (Nov. 14, 1986).

<sup>144</sup> 482 U.S. 304, 17 ELR 20787 (1987).

In their initial vote the Justices split 5 to 3 to 1, with Justices Brennan, Marshall, Powell, and White joining Chief Justice Rehnquist in voting for the landowner, Justices O'Connor, Scalia, and Stevens voting for the government, and Justice Blackmun voting to dismiss the case as improvidently granted.<sup>145</sup> Justice Scalia ultimately changed his vote and joined Chief Justice Rehnquist's majority opinion, and Justice Blackmun joined the dissent, producing a 6 to 3 final outcome.

Justice Blackmun wanted to dismiss the case as improvidently granted because there had been no final ruling from a state court that a taking had occurred. But several Justices expressed the view that "the case is here" and that they should deal with it. Justices Brennan and White decried the lack of guidance the Supreme Court had supplied to the California courts on takings issues as a result of the Court's 1981 decision in *San Diego Gas & Electric Co. v. City of San Diego* in which it dismissed a takings claim for want of a final judgment.<sup>146</sup> Many courts had avoided deciding cases raising takings claims by finding that they were not ripe. This had made property owners more determined to fashion a successful theory of temporary takings to overcome the courts' reluctance to confront takings claims.

Justice Blackmun's conference notes indicate that Chief Justice Rehnquist stated, "I feel no taking here," but that the issue of "compensation is presented" and that "we deal only with the *temporary* taking." Justice Stevens advocated for a higher standard for temporary takes-- "measure it by when *all* use is denied." Justice Scalia stated that a temporary impairment is not a taking but that it could be a deprivation of due process.

On the remedy issue, several Justices expressed dismay at the argument made by the Solicitor General as amicus curiae that the Fifth Amendment's takings clause is only a limitation on the power of government to act and not a remedial provision. Arguing that the Fifth Amendment is not self-executing, the brief for the United States claimed that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government."<sup>147</sup> Justice Powell called this argument "shocking," and Justice Scalia stated that it would be a "disaster!" were the Court to adopt it. After the oral argument, a law clerk to Justice Blackmun alerted him that several clerks "have pushed the argument that the 'remedy' issue is indeed final," a claim made by the appellant at oral argument but not clearly articulated in the briefs.<sup>148</sup>

While he had voted initially to reject the takings claim, Justice Scalia ultimately became the last Justice to join Chief Justice Rehnquist's majority opinion--more than three months after

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<sup>145</sup> "Dismiss as improvidently granted" refers to what the Court does with cases that it determines, after initially agreeing to review them, are not appropriate for the Court to decide.

<sup>146</sup> 450 U.S. 621, 11 ELR 20345 (1981).

<sup>147</sup> Brief for United States as Amicus Curiae at 14, *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, quoted at 482 U.S. 304, 316 n.9.

<sup>148</sup> Memorandum to Justice Harry A. Blackmun from "Jim" (James A. Fanto) (Jan. 14, 1987), H.A.B. Papers, *supra* note 3, box 469.

it was first circulated.<sup>149</sup> The Court held that damages must be provided to landowners where property was subjected to a temporary taking.

The first draft of the Chief Justice's opinion, circulated on February 18, 1987, stated that "on the record in this case the Fifth and Fourteenth Amendments to the U.S. Constitution would require compensation" for the period that the regulation had prevented rebuilding the plaintiffs' camp. This language was changed in a subsequent draft of the opinion to clarify that the Court was not holding as a matter of law that a temporary taking had occurred. This change was highly significant because on remand the California courts found that no taking had occurred since the regulation was designed to prevent harm to the public in floods, bringing it within the nuisance exception to regulatory takings doctrine.<sup>150</sup>

The final regulatory takings case decided in 1987, *Nollan v. California Coastal Commission*,<sup>151</sup> involved a challenge to a decision by the California Coastal Commission, an agency that regulates land use in coastal areas of California. The Commission had conditioned approval of a permit to replace a beachfront bungalow with a larger home on the landowners' agreement to provide an easement to facilitate public access to the beach.

At conference the Justices voted 6 to 3 to reverse the lower court's decision that had rejected the takings claim, with only Justices Blackmun, Brennan, and Stevens voting in favor of the Coastal Commission. Justice Blackmun's conference notes have a question mark next to Chief Justice Rehnquist's vote to reverse. The Chief Justice reportedly stated that while there is "no doubt" that the state has the power to condition the granting of the permit, the "State ought to pay here" because the easement was not related to the impact of the new structure. Justice Brennan stated that this was "no taking," and he spoke at length concerning the landowner's lack of reasonable expectations. Justice Powell expressed the view that the "public beaches should be reserved for the public." However, he voted to reverse because he found "no relationship between the State's purpose and this building enlargement." Justice O'Connor stated that this was "a taking" and that there "has to be a reasonable relationship." Justice Scalia described the Commission's action as "a gimmick" that was "not a regulatory take," but he too emphasized that there "has to be a reasonable relationship." Justice Marshall stated that the "State has a right to take but must pay," though he later changed his vote and joined Justice Brennan's dissent siding with the Commission, producing another 5 to 4 outcome.

Justice Scalia was assigned the task of drafting the majority opinion in this case while Justice Brennan drafted the principal dissent. The first draft of Justice Brennan's dissent included a 10-page discussion of why the Commission's action was consistent with the public trust doctrine. Brennan traced the public's right of access to the sea to ancient Roman law. The decision below had not mentioned the public trust doctrine and it had not been discussed at oral argument, though an amicus brief had offered it as an alternative grounds for rejecting the

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<sup>149</sup> The unusual length of time it took Justice Scalia to join Chief Justice Rehnquist's opinion may be a reflection of Scalia's initial doubts about the Court's expansion of regulatory takings doctrine. See Richard Lazarus, In Blackmun Papers, Inside Key Decision, *Environmental Forum* 8 (April 2004).

<sup>150</sup> *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 258 Cal. Rptr. 803, 19 ELR 21329 (1989).

<sup>151</sup> 483 U.S. 825, 17 ELR 20918 (1987).

takings claim. In response to Brennan's dissent, Justice Scalia redrafted his opinion to reject application of the public trust doctrine. This horrified Justice Brennan and his clerks who realized that their discussion of the public trust doctrine would be counterproductive if it induced the majority to reject it explicitly. As a result, Justice Brennan removed all references to the public trust doctrine from his dissent. One of his law clerks even contacted one of Justice Blackmun's clerks to suggest that Blackmun remove a reference to the California Constitution's public trust from his separate dissent lest a "mention of the word[s] might trigger a response on Justice Scalia's part."<sup>152</sup> Blackmun did not remove this reference, which simply stated that the Court's decision does not "implicate in any way the public-trust doctrine" because neither the decision below nor the parties had relied upon it.<sup>153</sup>

The Court's campaign to strengthen property rights broke new ground in 1992 when the Court decided *Lucas v. South Carolina Coastal Commission*.<sup>154</sup> David Lucas, a developer who owned one of the few undeveloped lots on a barrier island, argued that regulations issued under South Carolina's Beachfront Management Act effected a taking of his property by barring the construction of a residence on it. Despite a trial court's finding that the regulations had rendered Lucas' property valueless, the South Carolina Supreme Court rejected his takings claim on the ground that the regulation was necessary to prevent harm to the public. Lucas then sought review in the U.S. Supreme Court.

The Blackmun papers reveal that Justice O'Connor initially proposed to summarily reverse the South Carolina Supreme Court and to treat the case as one involving only a temporary taking. In a memorandum to the conference,<sup>155</sup> Justice O'Connor noted that the Beachfront Act had been amended in 1990, two years after its enactment, to permit landowners to obtain variances in circumstances like those pertaining to Lucas. She maintained that this rendered any permanent takings claim by Lucas unripe until he applied for and was denied a variance. But she noted that because there was no variance procedure in effect during the first two years the Act was in effect, Lucas could have a temporary taking claim under *First English*. Justice O'Connor proposed to summarily reverse on the ground that, with respect to a temporary takings claim, the South Carolina Supreme Court's decision was inconsistent with *Keystone Bituminous*. Noting that the Court in *Keystone* had weighed both the purpose of the regulation and its effect on the value of the land, she argued that it implicitly established that "the state's characterization of a particular use as a nuisance" would not automatically insulate a regulation from a takings claim.

Justice O'Connor's argument in favor of summary treatment did not prevail, as the Court instead granted plenary review, a course she had indicated she would favor "[i]f this case represented a permanent taking . . . ." In his personal notes on the case, Justice Blackmun, who was not sympathetic to Lucas' takings claim, outlined a two-part strategy for responding to it.

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<sup>152</sup> Memorandum to Justice Harry A. Blackmun from "Ellen" (Ellen E. Deason), (June 25, 1987), H.A.B. Papers, *supra* note 3, box 481.

<sup>153</sup> 483 U.S. 825, 865 (Blackmun, J., dissenting).

<sup>154</sup> 505 U.S. 1003, 22 ELR 21104 (1992).

<sup>155</sup> Memorandum to the Conference from Justice Sandra Day O'Connor, (Nov. 4, 1991), H.A.B. Papers, *supra* note 3, box 599.

First, he would argue that the “Act was a safety and health regulation that did not require compensation.” If that argument failed, he would seek to have the case dismissed as improvidently granted as an “unripe and temporary taking claim” not raised below. Blackmun noted that “all agree” that the “total elimination of value does not automatically require compensation under the Fifth Amendment” and that “no one has the right to use property that is noxious or harmful to others.”<sup>156</sup>

Justice Blackmun’s notes indicate that at conference following the oral argument in *Lucas*, the Justices voted 7 to 2 to reverse, with only Justices Stevens and Blackmun voting to uphold the judgment of the South Carolina Supreme Court and with Blackmun putting a question mark next to his own vote. Justices Kennedy, Souter, Thomas, and White stated that they would reverse and remand for further proceedings, while Chief Justice Rehnquist and Justices O’Connor and Scalia are listed as just voting for reversal.

The Chief Justice stated that “this type of regulation is not enough to bring the case under the nuisance line of cases.” Justice White stated that the “Permanent taking claim is not ripe.” Justice O’Connor stated that the “Temporary taking claim is ripe,” and she asked whether a permanent claim also was before the Court, a question she answered with “May be.” Justice Stevens was “skeptical” that this was a bona fide takings claim and questioned whether this was “a test or arranged case.” He said “we need more facts” before the Court could decide on a temporary takings claim. Justice Scalia described this as an “important case” and said that he could go with a temporary takings approach. He stated the Court could use a permanent takings approach and he noted that “ripeness is a prudential concept.” To sustain the court below, Scalia stated that he would “have to have something akin to a common law nuisance” but that he would “need more than we have here.” Justice Kennedy argued that the “*Agins* language is not correct and has to be explained.” Justice Souter stated that the “temporary takings claim is ripe and on the merits it covers permanent takings issue, too.” He stated that the case provides “an opportunity to begin to explain what we mean by a nuisance” and that “[w]e are not bound to accept any legislative determination.” Justice Thomas agreed that the claim was for a temporary taking.

The Court ultimately split 6 to 3 with Justice Scalia writing the majority opinion joined by the Chief Justice and Justices Kennedy, O’Connor, Thomas, and White. In his majority opinion Scalia created a new category of per se regulatory takings applicable when regulation deprives real estate of all economic value without being founded on the need to prevent a common law nuisance. He brushed aside the question whether it was a temporary or permanent taking by noting that the South Carolina Supreme Court had not decided the case on ripeness grounds even the statute had been amended, before it had decided the case, to authorize variances. Justice Souter filed a statement arguing that the case should have been dismissed as improvidently granted because it rested on what he viewed as the improbable and unreviewable assumption that the regulation had destroyed all economic value of the property. Justice Kennedy filed a concurring opinion emphasizing that concepts of nuisance can change over time and affect the reasonableness of property owners’ development expectations.

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<sup>156</sup> Notes of Justice Blackmun, (Feb. 29, 1992 and March 1, 1992,) H.A.B. Papers *supra* note 3, box 599 (the “all agree” is penciled in the margin next to the “total elimination of value . . .” phrase).



Justices Blackmun and Stevens dissented, with Blackmun arguing that the Court had “launched a missile to kill a mouse.” He harshly criticized Justice Scalia’s majority opinion. When asked about this case by Dean Koh as part of the Library of Congress’ oral history project, Blackmun said that he could not remember how his views on takings issues evolved, but that he was surprised when reminded of the strong language he had used in his dissent. “I didn’t feel I ever used strong language, but some of it is rather strong.”<sup>157</sup> Justice Blackmun’s papers include a memorandum from one of his clerks reporting on Justice Scalia’s initial reaction upon reading the Blackmun dissent. “I talked to Scalia’s clerk. [Antonin Scalia] himself read our dissent and got so angry he has decided to extensively respond (and do so nastily).”<sup>158</sup>

Other memoranda in the Blackmun papers document some of the reasons for changes in the majority opinion and dissents in *Lucas*. At the request of Chief Justice Rehnquist, Justice Scalia modified language in his opinion to more clearly reject the noxious use logic of the South Carolina Supreme Court.<sup>159</sup> Justice O’Connor asked Justice Scalia to clarify whether he meant to say that the burden of persuasion shifts to the state, prompting Scalia to add new language to that effect. Foreshadowing their subsequent dispute in *Palazzolo v. Rhode Island*<sup>160</sup> over the relevance of the *Penn Central* decision in takings analysis, Justice O’Connor asked Scalia to remove a footnote that she read as saying that *Penn Central* was “unsupportable.”<sup>161</sup> After Justice Scalia explained that he was referring only to a portion of the state court’s decision in *Penn Central*, Justice O’Connor dropped her objection.<sup>162</sup>

Among the most interesting documents in the *Lucas* case file are the “hold” memoranda written by Justice Scalia to advise the Court on what action it should take following issuance of the *Lucas* decision on cases held in abeyance pending its decision.<sup>163</sup> There are two such memoranda in the *Lucas* case file.<sup>164</sup> In each case, Scalia recommends that review be denied

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<sup>157</sup> The Justice Harry A. Blackmun Oral History Project, at 444, H.A.B. Papers, *supra* note 3. [hereinafter Oral History Project] (available online at <http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09>).

<sup>158</sup> Memorandum to Justice Harry A. Blackmun from “Molly” (Molly McUsic) (June 25, 1992), H.A.B. Papers, *supra* note 3, box 599.

<sup>159</sup> See Memorandum from Chief Justice Rehnquist to Justice Scalia (June 2, 1992), H.A.B. Papers, *supra* note 3, box 599.

<sup>160</sup> 533 U.S. 606, 32 ELR 20516 (2001).

<sup>161</sup> Memorandum from Justice Sandra Day O’Connor to Justice Antonin Scalia (June 26, 1992), H.A.B. Papers, *supra* note 3, box 599.

<sup>162</sup> *Id.* (separate memorandum sent on the same day as the memorandum cited in n. 143).

<sup>163</sup> By tradition, it is the responsibility of the Justice who authors the majority opinion to examine the cases held pending its disposition and to make recommendations to the conference concerning how to handle them.

<sup>164</sup> Memorandum to the Conference from Justice Antonin Scalia, Re: *Esposito v. South Carolina Coastal Council* (June 25, 1992), H.A.B. Papers, *supra* note 3; Memorandum to the Conference

because the cases do not involve landowners who have been denied all economically beneficial use of their property. Remarkably, the plaintiffs in one set of the cases<sup>165</sup> owned properties located on the very same barrier island as Lucas' property. Scalia noted not only the lack of a finding of a total deprivation in value, but also that the plaintiffs eventually were able to obtain a variance allowing them to build. This may indicate that Justice Scalia had some appreciation of how limited the reach of *Lucas* would be given the extremely unusual trial court finding that the regulation resulted in a total deprivation of the property's value. Indeed, in light of the Court's subsequent *Palazzolo* decision, *Penn Central* now has moved back to center stage as the primary framework for assessing regulatory takings claims, with *Lucas*' categorical approach applicable only to an extremely narrow category of cases.

The final major regulatory takings case decided while Justice Blackmun was on the Court is *Dolan v. City of Tigard*.<sup>166</sup> The Court decided the case just days before Justice Blackmun's retirement. The case involved the question of whether a city could condition the grant of a permit to pave a parking lot and double the size of a hardware store on the property owners' agreement to dedicate a portion of their property for a public bike path and storm drain improvement. The cert pool memorandum in the case, authored by one of Justice Scalia's clerks, recommended that the Court grant review "to clarify the regulatory takings law and/or vindicate/clarify the teaching of *Nollan*." It conceded that "the split among courts of last resort is not deep," but it argued that courts clearly were employing somewhat different standards to assess the constitutionality of regulatory exactions.<sup>167</sup>

Justice Blackmun's clerk, who was assigned to review the cert petition, argued against granting review in *Dolan*. He did not perceive any conflict between *Nollan* and the Oregon Supreme Court's decision upholding the city of Tigard's requested exaction. He conceded that some courts had described the required nexus between the impact of a development and the requested exaction to be only a "reasonable" relation, while others had described it as a "substantial" one. But he reminded Justice Blackmun that he had dissented in *Nollan* and he feared that the Court would use the case to extend *Nollan* to make it harder to regulate land use.<sup>168</sup>

The Court granted review, and when it met in conference following the oral argument, the Justices voted 6 to 3 to reverse the Oregon Supreme Court's decision that had upheld the city's requested exaction. Voting in the majority were Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, Souter, and Thomas. Justice Blackmun's notes indicate that Chief Justice Rehnquist argued that the "city has not tried to quantify" the relationship between the

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from Justice Antonin Scalia, Re: Long Beach Equities, Inc. v. County of Ventura (June 25, 1992), H.A.B. Papers, *supra* note 3, box 599.

<sup>165</sup> *Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 21 ELR 21249 (4th Cir. 1991).

<sup>166</sup> 512 U.S. 374, 24 ELR 21083 (1994).

<sup>167</sup> Preliminary Memorandum, No. 93-518, *Dolan v. City of Tigard* (Nov. 16, 1993), H.A.B. Papers, *supra* note 3, box 645.

<sup>168</sup> Memorandum to Justice Blackmun from "Paul" (J. Paul Oetken), (Nov. 19, 1993), H.A.B. Papers, *supra* note 3, box 645.

impact of the development and the exaction, and that while a “precise fit [is] not necessary,” the city “has to do more than [what it has done] here.” Justice O’Connor said she was strongly in favor of reversal. “What is going on in the communities!” she exclaimed, arguing that the “state has the burden of proof.” While she noted that “flood control here is legitimate, to be sure,” she thought it important to “make the Takings Clause mean something.” Justice Scalia stated that he agreed with Chief Justice Rehnquist, that the “sky will not fall” if the Court reverses, and that this case involved “a shake-down.” Justice Kennedy stated that “the cities are not hurting” and that the “burden of proof [is] on the city.” While Justice Souter also voted to reverse, he is recorded as saying, “wish I had confidence to affirm.”

Only Justices Blackmun, Stevens, and Ruth Bader Ginsburg initially voted to uphold the city’s action by affirming the decision below. In his notes to himself, Justice Blackmun wrote that because his “dissent in *Nollan* objected to Scalia’s rigid approach,” this is an “easy case for me.” He noted that the development will cause traffic and runoff and that the city’s conditions were “tailored to address these effects.” Justice Stevens argued that if the state could deny the permit, it may also attach a condition that is totally unrelated. He admonished those voting to reverse by stating, “how little confidence you have in state courts.” Justice Ginsburg stated that the lower court opinion was “OK” and that “*Nollan* does not control this.”

Chief Justice Rehnquist assigned himself the task of drafting the majority opinion. As an advocate of protecting state sovereignty, Rehnquist may have experienced some of the inevitable tension between promoting this goal and the Court’s desire to strengthen private property rights against interference by government at all levels. After he circulated his first draft of the majority opinion on May 12, 1994, he was criticized by Justice Scalia for not going far enough. In a memorandum to Chief Justice Rehnquist, Scalia argued that Rehnquist’s proposed inquiry concerning “whether the extent of the exactions are *reasonably related* to the projected impact of the proposed development” was not strong enough and invited confusion with the weak rational basis test.<sup>169</sup> Scalia suggested that Rehnquist substitute “rough proportionality” or “substantial proportionality” instead. He also proposed language requiring an “individualized determination that the required dedication is directly related *in nature and degree* to the impact of the proposed development.”<sup>170</sup> Finally, Scalia objected to Rehnquist’s suggestion that the benefit conferred by regulation on the property owner was relevant to the proportionality determination.

Justice Kennedy agreed with Scalia that the Court should adopt a stronger test than “reasonable relationship.” He wrote that he thought “it important to state that the exaction must be commensurate, though not to the point of demanding exact mathematical precision, to the projected impact of the proposed development.”<sup>171</sup>

Justice Souter, who also had voted to reverse, though with misgivings, disagreed with both Scalia and Kennedy concerning the direction Chief Justice Rehnquist’s opinion should take. He did not want to go any further than the “reasonable relationship” test in the draft and this ultimately resulted in him switching his vote and voting to affirm. “Like John [Stevens], I am

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<sup>169</sup> Memorandum to the Conference from Justice Scalia (May 13, 1994), H.A.B. Papers, *supra* note 3, box 645 (emphasis in original).

<sup>170</sup> *Id.* (emphasis in original).

<sup>171</sup> Memorandum from Justice Kennedy to Chief Justice Rehnquist (May 16, 1994), H.A.B. Papers, *supra* note 3, box 645.

concerned about federal courts becoming micro-managers of state and local government zoning and permit decisions, and I think state and local governments should be permitted sufficient flexibility to do their jobs without interference from federal courts.”<sup>172</sup> Souter also believed that the benefits conferred by regulation on the landowner should be considered in assessing the net added burden of the proposed exaction on the landowner. He believed that while the public access component of the greenway easement sought in the case might fail a reasonable relationship test, a greenway easement without public access and the bicycle path easement satisfied a reasonable relationship test.

Chief Justice Rehnquist largely accommodated the concerns expressed by Justices Scalia and Kennedy. He adopted the “rough proportionality” test and Justice Scalia’s proposed language requiring individualized determinations that a required dedication is “related both in nature and extent to the impact of the proposed development.” Because of these changes, Justice Souter decided not to join the Chief Justice’s opinion. Instead, he switched his vote and filed a dissent. The end result of Justice Souter’s vote switch was that yet another important case was decided by a bare 5 to 4 majority.

The Blackmun papers also indicate that Chief Justice Rehnquist believed the “rough proportionality” test adopted in *Dolan* could be used to invalidate impact fees charged to developers if courts deemed them to be excessive. Pending its decision in *Dolan*, the Court had held a case in which a developer challenged both a \$280,000 fee to mitigate the loss of recreational facilities removed by his project and a \$33,220 fee to escape a municipal requirement that public art be placed on its grounds.<sup>173</sup> The Blackmun papers contain the Chief Justice’s hold memorandum where he recommends vacating and remanding the case, as the Court did, so that the California Court of Appeals “can determine whether the amount of the mitigation fee is reasonably related to the impact of the development.”<sup>174</sup> However, since the petitioners were only challenging the “fee in lieu of art” on the grounds that it violated *Nollan*’s nexus requirement, the Chief Justice thought this aspect of the judgment was secure because “*Dolan* does not alter the nexus requirement.”<sup>175</sup>

## **V. Standing and Citizen Access to Courts**

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<sup>172</sup> Memorandum from Justice David Souter to Chief Justice Rehnquist (May 17, 1994), H.A.B. Papers, *supra* note 3, box 645.

<sup>173</sup> *Ehrlich v. Culver City*, 19 Cal. Rptr. 2d 468 (1993), *cert. granted, vacated & remanded*, 512 U.S. 1231 (1994).

<sup>174</sup> Memorandum to the Conference from Chief Justice Rehnquist (June 23, 1994), H.A.B. Papers, *supra* note 3. Box 645.

<sup>175</sup> *Id.* On remand, the California Court of Appeals struck down the \$280,000 recreational impact fee on the ground that the city failed to provide sufficient evidence to support a fee of that magnitude. It upheld the requirement that the developer provide art in an area of the project accessible to the public as the type of aesthetic control well within the city’s authority to impose. *Ehrlich v. City of Culver City*, 50 Cal. Rptr. 2d 242, *cert. denied*, 519 U.S. 929 (1996).

During the nearly quarter century of Justice Blackmun's service, the Court decided several cases with profound implications for the public's ability to have access to the courts to ensure that environmental laws are implemented and enforced. While Blackmun quickly became a champion of citizen access to courts, he was not enthusiastic about the Court's first step in that direction, which arose during his very first Term on the Court. At the behest of a citizens group seeking to preserve a park from destruction in Memphis, Tennessee, the Court in *Citizens to Preserve Overton Park v. Volpe*<sup>176</sup> reversed a decision by the Secretary of Transportation to authorize the expenditure of federal funds to build an interstate highway through the park. Rejecting the Secretary's claim that the decision was unreviewable because it was committed to agency discretion by law, the Court signaled that the judiciary should be willing to review a wider range of agency decisions and to scrutinize more carefully the rationales offered to support them.

Justice Blackmun's papers contain a revealing three-page memorandum he wrote expressing his reactions to the case. He begins by stating: "This, as we knew, is a messed up case. It is one which, in a sense, has been in the making for a long time, but suddenly finds itself in litigation."<sup>177</sup> While he agreed that "the record is indeed a fuzzy one," he thought that the Secretary of Transportation could "cure any defect" by making formal findings in the future, as new regulations required. "The ultimate result is perfectly clear, namely, that the Secretary will approve the location, the city will be most content, and the construction will go along." The only costs to this course, according to Justice Blackmun, are "additional costs and the disfavor of the conservationists." While noting that he is "not at all" opposed to the government's suggestion of a remand, Justice Blackmun stated that, "As Justice Marshall pointed out in conference, if we remand we will get only a snow job and nothing more."<sup>178</sup> Predicting that the "Court is going to stress and strain and all it will accomplish is delay and additional expense," he concluded that he was "inclined to affirm and to do so with as little struggle as possible, and with as short an opinion as possible."

The Court ultimately reversed, and Justice Blackmun joined the Court's opinion. He filed a concurrence emphasizing that it was understandable why the record is sketchy and that the case was a product of a decade of efforts to solve highway problems in Memphis and not entirely the responsibility of the current Secretary of Transportation.<sup>179</sup>

During Justice Blackmun's second year on the Court, the Court heard the landmark *Sierra Club v. Morton*<sup>180</sup> case that recognized the legitimacy of using allegations of aesthetic harm as a basis for standing to sue, while rejecting the Sierra Club's bid to establish virtually automatic standing to litigate any environment issue in which they were interested. The Blackmun papers contain the Justice's detailed and extensive notes on the case and the Court's

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<sup>176</sup> 401 U.S. 402, 1 ELR 20110 (1971).

<sup>177</sup> Memorandum by Justice Harry A. Blackmun, Re: No. 1066--Citizens to Preserve Overton Park, Inc. v. Volpe (Jan. 11, 1971), H.A.B. Papers, *supra* note 3, box 130.

<sup>178</sup> *Id.*

<sup>179</sup> 401 U.S. at 422 (Blackmun, J., concurring).

<sup>180</sup> 405 U.S. 727, 2 ELR 20192 (1972).

deliberations, which are not written in the shorthand he eventually employed to take notes at conference. They also include the statement he had drafted to read from the bench in dissent when the decision was announced on April 19, 1972, though the document is marked “not used 4-19-72.”

Blackmun’s conference notes indicate that Chief Justice Burger argued that if the “Sierra Club could get into every environmental case,” the “[e]nd result is immobilization of government.” The notes indicate that Justice Douglas initially passed when it came his turn to vote and then later explained that he might recuse himself from the case because he had been a member of the Sierra Club for 10 years, and lately an honorary member, though he had resigned years ago. Justice White is quoted as saying, “everyone in the [United States] is not a private Attorney General.”

Justice Blackmun wrote the following in a memorandum to himself:

Ten years ago Sierra would have had no recognizable standing. On the other hand, I think this Court in [*Association of*] *Data Processing [Service Organizations, Inc. v. Camp]*<sup>181</sup> and related cases has gone far down the road to uphold standing in a litigant. This, of course, can be carried too far. On the other hand, with the broad environmental purposes of Sierra and with the members of Sierra enjoying the particular region in which this project is to be placed, it seems to me that there ought to be enough here for standing. Furthermore, if an organization of this kind does not have standing, who does? It would be hard to find someone else other than a resident in the immediate vicinity. These are probably few, if any exist at all, because of the wilderness character of the area and the substantial reach of federal lands. Certainly Sierra is a responsible representative.

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<sup>181</sup> 397 U.S. 150 (1970).

In his statement to be read from the bench, Blackmun stated that “our emerging problems of the environment and ecological unbalance are worrisome problems indeed, and I am distressed that our law is so inflexible that we find ourselves helpless procedurally to meet these new problems.” He proposed two alternatives. The first was to conditionally reverse contingent on “the Sierra Club amending its complaint to meet the specifications the Court prescribes for standing.” The second “is to permit an imaginative expansion of our traditional concepts of standing in order to enable an organization like the Sierra Club to litigate environmental issues.” He argued that the latter would not be “a very deep incursion upon tradition,” particularly in light of *Data Processing* and *Barlow [v. Collins]*,<sup>182</sup> decisions recognizing the standing of beneficiaries of regulation.

As the Marshall papers revealed,<sup>183</sup> after it became clear that the Sierra Club would lose the case, Justice Brennan unsuccessfully sought to have the case dismissed as improvidently granted. Justice Stewart did modify his draft majority opinion one week before it was announced to add a crucial footnote specifying that the Sierra Club was free to amend its complaint on remand. Justice Douglas did not recuse himself. Instead, he issued his famous dissent arguing that trees should have standing.

When he joined the Court in 1986, Justice Scalia had already launched a campaign for more restrictive standing doctrine to make it more difficult for environmental interests to have access to courts.<sup>184</sup> In a pair of decisions in 1990 and 1992, he accomplished a significant part of this agenda. Writing the opinion for the Court in *Lujan v. National Wildlife Federation*,<sup>185</sup> Scalia made it much more difficult for environmental interests to challenge alleged violations of public lands law by government agencies. As the Marshall papers revealed,<sup>186</sup> Scalia went far beyond what had been agreed to at conference when he drafted the opinion for the Court, stating not only that the plaintiffs’ allegations of injury were not specific enough to establish standing, but also that the Bureau of Land Management’s “land withdrawal program” could not constitute reviewable final agency action.

Two days before oral argument, Blackmun wrote down his impressions of the case, which seemed to track closely the language used in a bench memo one of his law clerks had prepared. “Too bad we took this case,” he wrote. Blackmun believed that the “only important question is whether plaintiff’s injury is a sufficient basis for NWF to challenge aggregate land use decisions, nationwide.” Blackmun noted that the D.C. Circuit had covered this “only with a footnote,” that it was “hardly briefed” and that the facts are undeveloped. As to the sufficiency of the affidavits by NWF members to establish standing, Blackmun wrote that the Peterson and Erman affidavits are “pretty *thin*, I feel.” However, he concluded that their sufficiency is “a

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<sup>182</sup> 397 U.S. 159 (1970).

<sup>183</sup> Percival, *supra* note 2, at 10620.

<sup>184</sup> Antonin Scalia, *The Doctrine of Standing as an Essential Element of Separation of Powers*, 17 <BI>Suffolk Univ. L. Rev.<D> 881 (1983).

<sup>185</sup> 497 U.S. 871, 20 ELR 20962 (1990).

<sup>186</sup> See Percival, *supra* note 2, at 10623.

matter of intuition” and that there are “few established standards for this determination.” He concluded that “I feel it is good enough” and the Court should “allow the suit to go forward.” Blackmun believed that the trial court’s refusal to allow the plaintiffs to supplement the record “was foolish, but not an abuse” and not in itself worthy of review.<sup>187</sup>

The case was argued on April 16, 1990. Blackmun’s notes include the statement “Earth Day irony,” perhaps a reference to the fact that a case that would restrict access to courts by environmental interests was being argued the week of the annual Earth Day celebration. John G. Roberts, Jr., who was then serving as acting solicitor general, argued the case for the federal government. In his notes on the oral argument Blackmun noted only that the future Supreme Court nominee was 35 years old and that he had graduated from Harvard Law School. The only note Blackmun wrote concerning Roberts’ argument are the words “too positive”.<sup>188</sup>

The Blackmun papers suggest that some of the Justices who joined Scalia’s opinion did not intend to foreclose the standing of environmental plaintiffs to challenge decisions concerning public lands. For example, Justice Blackmun’s conference notes show that Justice Kennedy voted to reverse, while stating that he was “not comfortable.” “We *know* there is standing” but the district court did not abuse its discretion by insisting that follow the rules of procedure for demonstrating it. Justice O’Connor agreed that the district court had not abused its discretion, but she expressed her view that certain affidavits can be considered on remand, though “something additional [is] needed.” Justice White questioned how to deal with allegations concerning uncertainty and adverse effects. Justice Stevens argued that the district court had abused its discretion and that it was “quite wrong” to use standing in a way that is “clearly outcome determinative.”

The high water mark of Justice Scalia’s campaign to restrict environmental standing occurred in 1992 when the Court decided *Lujan v. Defenders of Wildlife*.<sup>189</sup> The Court held that members of an environmental organization who had visited foreign sites where endangered species were found did not have standing to challenge the legality of a decision that the ESA did not apply to the actions of federal agencies outside of the United States. The Blackmun papers indicate that Justice Scalia tried to use the case as a vehicle for making it virtually impossible to bring citizen suits to enforce the environmental laws. While Justice Scalia’s majority opinion in *Defenders* is widely viewed as severely restricting environmental standing, it would have been much worse but for the efforts of Justices Kennedy and Souter, who viewed Scalia’s initial draft opinion as too extreme, as explained below.

When the Court considered the petition for certiorari in *Defenders*, one of Justice Blackmun’s law clerks advised him that although the case probably would garner the necessary four votes for review, he should vote to deny because the case “represents another opportunity for the Court to restrict standing.”<sup>190</sup> The papers of Justice Blackmun reveal that the initial

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<sup>187</sup> Justice Harry A. Blackmun handwritten notes, April 14, 1990. H.A.B. Papers, *supra* note 3, box 560.

<sup>188</sup> Justice Harry A. Blackmun, Oral Argument Notes, *Lujan v. Natl. Wildlife Federation*, April 16, 1990. H.A.B. Papers, *supra* note 3, box 560.

<sup>189</sup> 504 U.S. 555, 22 ELR 20913 (1992).

<sup>190</sup> Annotation by law clerk on Cert Pool Memorandum for May 5, 1991, Conference. H.A.B. Papers, *supra* note 3, box 591.



conference vote in *Defenders* was 7 to 2 to reverse the Eighth Circuit decision that had upheld the plaintiffs' standing to sue. Justices Blackmun and O'Connor were the only votes to affirm, and Blackmun put a question mark after his own vote. Justice Stevens subsequently joined the dissenters because he believed that the Court should reach the merits and hold that the government had acted properly in limiting the territorial reach of the ESA.

Chief Justice Rehnquist asked Justice Scalia to draft the majority opinion. On February 7, 1992, Scalia circulated the first draft of what Justice Blackmun ultimately described as "a slash and burn expedition through the law of environmental standing." In the draft Scalia attempted to convert the prudential notion that courts should decline to hear generalized grievances into a constitutional requirement that would bar environmental plaintiffs from establishing standing if their injuries were widely shared. This would make it difficult for environmental plaintiffs to challenge the legality of government action unless they could establish that it had caused them some particularized injury.

Scalia's aggressive efforts to restrict standing were well known, and his draft opinion was slow to win acceptance. Three weeks after Scalia's draft was circulated, Chief Justice Rehnquist became the first Justice to join it. Justice White joined the Scalia opinion 10 days later, and Justice Thomas joined the following week. Justice Blackmun circulated the first draft of his dissent on April 7, 1992. A week later Justice O'Connor joined the dissent.

Six weeks later, Justices Kennedy and Souter still had not committed themselves and Scalia lacked a majority for his opinion. One of Justice Blackmun's law clerks informed him in a memorandum that Kennedy and Souter, who voted with Scalia at conference, "are unhappy with the opinion and met yesterday to talk about it." He noted that "[t]hey may circulate a public or private note to [Justice Scalia] urging changes, perhaps that he dispense with any reference to the so-called 'particularized injury' requirement."<sup>191</sup>

The clerk's intelligence proved accurate. Justice Souter sent Scalia a memo asking him to modify his discussion of the "particularized injury" requirement:

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<sup>191</sup> Memorandum to Justice Blackmun from "Jeff" (May 28, 1992), H.A.B. Papers, *supra* note 3, box 591.

Frequently . . . you discuss the requirement that an injury giving rise to standing be, among other things, “concrete” and “particularized.” The text leaves it somewhat unclear whether these are two different requirements (despite the fact that in several places you speak in the singular of a “requirement”). In footnote 1, you say that the particularity requirement “mean[s] that the injury must affect the plaintiff in a personal and individual way.” If so, I agree, but I think that this definition simply clarifies the meaning of concreteness (i.e., concreteness to whom). Moreover, I’m concerned about your hypothetical in footnote 1: the reason an ordinary citizen would lack standing to protest the closing of military bases is not that every other American would share his “interest,” whatever it might be, but simply that the interest would be insufficiently concrete as to him. So it is with this case: respondents’ “procedural injury” is inadequate not because it is universal, but because it is utterly abstract (at least as to ordinary citizens).

I think that this portion of the opinion should rest entirely on the issue of concreteness. Despite ambiguous dicta in some of our cases, I doubt anyone would lack standing to sue on the basis of a concrete injury that everyone else has suffered; Congress might, for instance, grant everyone standing to challenge government action that would rip open the ozone layer and expose all Americans to unhealthy doses of radiation. Yet the repeated references to a particularity requirement, which might be taken as conceptually independent of a concreteness requirement, draw that conclusion into doubt.<sup>192</sup>

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<sup>192</sup> Letter from Justice David H. Souter to Justice Antonin Scalia (May 8, 1992), H.A.B. Papers, *supra* note 3, box 591.

Souter asked Scalia to remove the references to “particularity” and “particularized injury” from his opinion and to eliminate the hypothetical in order “to clarify the concreteness requirement without suggesting that the universality of an injury deprives anyone of standing.” Justice Kennedy, who was drafting a concurring opinion joining all but the “redressability” discussion in Scalia’s draft, expressed his agreement with Souter’s concerns and indicated that he would not join Justice Scalia’s opinion unless Scalia made the changes requested by Souter. Four days later, Scalia agreed to make the changes Souter and Kennedy sought.

After Scalia made the requested changes, Justice Blackmun’s law clerk credited Blackmun’s draft dissent with having substantially limited the damage from Scalia’s opinion:

In the dissent, we attacked 4 aspects of the majority opinion: (1) the finding of no “injury”; (2) the finding of no “redressability”; (3) the discussion of “procedural injury”; and (4) the discussion of “particularized” injuries and “generalized grievances.” In my opinion, we ended up forcing severe changes or a loss of [Scalia’s] majority on the latter three points. First, [Kennedy] and [Souter] declined to join the redressability section. Second, the majority clarified (albeit by footnote) the meaning of “procedural injury” to include injuries from violations of procedural rights “designed to protect some threatened concrete interest,” . . . , and specifically protected citizen suits for environmental impact statements. Third, at [Kennedy’s] and [Souter’s] behest, [Scalia] was forced to abandon reference to the “particularized” injury requirement, except once at the beginning of the opinion along with a limiting footnote.<sup>193</sup>

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<sup>193</sup> Memorandum to Justice Blackmun from “Jeff” (Geoffrey M. Klineberg), (June 2, 1992), H.A.B. Papers, *supra* note 3, box 591.

Three days later, a law clerk reported to Justice Blackmun that word had spread throughout the building that Justice Scalia was “irate at [Justice Kennedy] for submitting his concurrence and felt that it ‘scuttled’ his majority opinion.”<sup>194</sup>

On June 4, 1992, Justice Stevens filed his concurrence in the judgment arguing that the environmental plaintiffs had standing but that the government was correct on the merits in limiting the ESA’s reach to the domestic activities of federal agencies. After Scalia responded to Stevens’ arguments, Stevens sent a memorandum to Scalia that stated: “I should note that I like your reference to my ‘Linnaean leap,’ but I hope it does not indicate that you have mistaken a botanist for a zoologist. I had thought my natural development of standing jurisprudence had more of a Darwinian character.”<sup>195</sup> Scalia responded in a memorandum to Stevens:

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<sup>194</sup> *Id.*

<sup>195</sup> Memorandum from Justice Stevens to Justice Scalia (June 10, 1992), H.A.B. Papers, *supra* note 3, box 591.

It is my understanding (though I am a classicist and not a scientist) that Linne was responsible for the system of binomial nomenclature which is used for both plants and animals. I frankly had thought of saying that you were reversing the process of Darwinian evolution, but I thought it would be too cruel.<sup>196</sup>

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<sup>196</sup> *Id.*

This completed the voting in *Defenders* and the decision was released on June 12, 1992. News of the *Defenders* decision spread around the world on the very day that President George H.W. Bush was speaking at the Rio Earth Summit. Many were surprised by the harsh tone of Justice Blackmun's dissent, which accused Justice Scalia of conducting "a slash and burn expedition" through the law of environmental standing. When interviewed by Dean Koh for the oral history project, Blackmun was asked whether he was surprised that Justice O'Connor had joined his dissent. He replied: "Not particularly, no. We weren't always close in our voting pattern, but I think she was as offended by the decision as I was."<sup>197</sup>

Justice Scalia's efforts to restrict standing in environmental cases did not extend to those in which business interests were claiming that the government had acted illegally in implementing the environmental laws. In 1997 he authored a unanimous decision for the Court in *Bennett v. Spear*<sup>198</sup> that reversed a decision holding that ranchers lacked standing to challenge the legality of action taken by the Secretary of Interior under the Endangered Species Act. Justice Scalia's efforts to restrict standing for environmental plaintiffs ultimately went too far for most of his colleagues on the Court. In *Friends of the Earth v. Laidlaw Environmental Services*<sup>199</sup> all of the other Justices except for Justice Thomas, rejected his argument that members of environmental groups who live or recreate in close proximity to facilities allegedly violating the environmental laws lacked standing to bring citizen suits. Justice Ginsburg wrote the majority opinion for a 7 to 2 Court, holding that "reasonable concerns" about the effects of environmental violations were sufficient to enable such citizens to satisfy Article III standing requirements.

## **VI. Relations Among the Justices and the Public Image of the Court**

The Blackmun papers provide insight into the personalities of some of the Justices, showing that they are ordinary human beings who sometimes behaved like schoolchildren when bored during oral argument. Justices Blackmun and Stewart were avid baseball fans. During the 1973 National League Championship Series, Stewart had his clerks pass him notes providing him with details of a game between the New York Mets and Stewart's beloved Cincinnati Reds. The clerks interrupted their play-by-play to report the shocking news that "V.P. Agnew Just Resigned!" followed by the score: "Mets 2 Reds 0."<sup>200</sup> When the Reds played the Red Sox in the 1975 World Series, Blackmun bet on the Red Sox and Stewart won \$4.00 when the Reds won. After Blackmun passed Stewart a note congratulating him on the Reds' victory, Stewart responded: "Dear Harry, Many thanks. It was a great Series, and the Reds were darn lucky to win."<sup>201</sup>

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<sup>197</sup> Oral History Project, *supra* note 157, at 443.

<sup>198</sup> 520 U.S. 154 (1997), 27 ELR 20824.

<sup>199</sup> 528 U.S. 167, 30 ELR 20246 (2000).

<sup>200</sup> Note, H.A.B. Papers, *supra* note 3, box 116.

<sup>201</sup> Note from Justice Potter Stewart to Justice Harry A. Blackmun (Oct. 23, 1975), H.A.B. Papers, *supra* note 3, box 116.

When asked by Dean Koh about his practice of exchanging notes with other Justices during oral argument, Blackmun confirmed that it was a means of coping with boredom and keeping himself awake. He recalled sending a note to Justice Douglas when he

was writing so furiously [during oral argument] in a case involving the Glass-Steagall Act. It was a pretty boring argument. I sent a note to him just to keep myself awake, and I said, “What are you doing, writing another opinion?” And he sent a note back right away to the effect [that] “Yes this lawyer was through twenty minutes ago, but he didn’t know it.”<sup>202</sup>

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<sup>202</sup> Oral History Project, *supra* note 157, at 429.

During oral argument in a tax case, Chief Justice Burger sent Blackmun a note chiding him for having been the decisive fourth vote in favor of the Court reviewing the case. “You were the 4th Cert vote. I was first so you had the last clear chance to retrieve my error!”<sup>203</sup> When the Court was hearing a case in March 1975 concerning whether New York’s regulations on Aid to Families with Dependent Children were consistent with federal law when they assume that unmarried lodgers contribute to household support,<sup>204</sup> Justice Rehnquist passed around a note containing the following old limerick: “There was a young girl from Cape Cod, who thought little kids came from God. But it wasn’t the almighty who lifted her nighty, it was Rodger the Lodger, by God!”<sup>205</sup>

Another strategy the Justices used to fight boredom on the bench was to give each other trivia quizzes. In 1983, Justice Rehnquist sent Blackmun a note that read: “From what operas are these choruses from? Soldiers Chorus, Hail Bright Abode, Anvil Chorus, Pilgrim’s Chorus, Humming Chorus.” Blackmun correctly responded: “Faust, Tannhauser, Il Trovatore, Tannhauser, Butterfly.”<sup>206</sup> Other quizzes asked “What states border the most other states” and what state capitals begin with the letter “A.”<sup>207</sup> The only notes touching on environmental matters are those described above that mentioned NEPA’s environmental impact statement requirement. However, for reasons unknown, during a day of arguments devoted to personal jurisdiction, Justice Rehnquist passed Justice Blackmun a note translating the famous Latin maxim that is at the root of the common law of environmental protection. The note read: “*Sic utere tuo ut non alienum laedas* very rough--you may use your own property only in such way that do not injure others (Pace Matthew Hale).”<sup>208</sup>

The conference notes confirm Chief Justice Burger’s reputation for strategic voting to ensure that he would keep the ability to select who would draft the majority opinion. They show that Burger often passed when the voting commenced, which enabled him to gauge which side would command a majority before he cast his vote.<sup>209</sup> At times he candidly stated that he could

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<sup>203</sup> Note from Chief Justice Burger to Justice Blackmun (April 17, 1972), H.A.B. Papers, *supra* note 3, box 116.

<sup>204</sup> *Van Lare v. Hurley*, 421 U.S. 338 (1975).

<sup>205</sup> Note from Justice Rehnquist (Mar. 26, 1975), H.A.B. Papers, *supra* note 3, box 116.

<sup>206</sup> Note from Justice Rehnquist to Justice Blackmun (Oct. 12, 1983), H.A.B. Papers, *supra* note 3, box 116.

<sup>207</sup> Blackmun responded to the latter quiz with “Maine, Maryland, Georgia, New York, and New Mexico,” apparently confusing Albuquerque with Santa Fe.

<sup>208</sup> Note from Justice Rehnquist to Justice Blackmun (Nov. 8, 1983), H.A.B. Papers, *supra* note 3, box 116.

<sup>209</sup> Justice Blackmun was one of several Justices who were irritated by Chief Justice Burger’s opinion writing assignment practices. In a note to himself written on March 3, 1980, he observed: “What a funny place. 1. TM changes his vote on Walter-Sanders (this was inevitable--either WJB or his clerks got to him). 2. Meanwhile the CJ assigns that case to me! . . . 3. He



vote either way and would be willing to go with the majority. Occasionally, as in the snail darter case, he switched his vote only after another Justice's vote switch changed the outcome of a case. The notes passed among the Justices at oral argument show Chief Justice Burger joking about his ability to use opinion assignments to influence his colleagues. For example, during an oral argument in March 1975, Burger sent Blackmun a note that read: "Harry if you don't vote to DIG I'll assign all Indian cases to you along with the [Federal Power Commission] FPC case!!"<sup>210</sup> "DIG" is shorthand for "dismiss as improvidently granted."

Notes taken by Justice Blackmun indicate that he was often irritated by some of his colleagues' behavior on the bench. He complained that Justices Brennan, Marshall, Stewart, White, and even the Chief Justice talked too much (and too loudly) during oral arguments.<sup>211</sup> He also did not think Chief Justice Burger did a good job of controlling the discussions during conferences after the oral arguments.<sup>212</sup> Blackmun's notes give the reader the impression of someone who feels left out because he was not being treated like "one of the boys." While complaining at one point that Justices Brennan, Stewart, and White are always talking about the 1980 presidential campaign, Blackmun too followed political developments. On January 20, 1987, Blackmun asked Chief Justice Rehnquist to predict who will be sworn in as the next

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keeps Va Newspapers for himself--as I knew he would. Now he will straighten it all out! It should go to PS."

<sup>210</sup> Note from Chief Justice Burger to Justice Blackmun (Mar. 27, 1975), H.A.B. Papers, *supra* note 3, box 116.

<sup>211</sup> On February 27, 1980, Blackmun noted: "WJB-BRW constantly and loudly talking. I complain to WHR and threaten to leave Bench. This is a very *rude* tribunal." H.A.B. Papers, *supra* note 3, box 116. In response to Blackmun's complaint, an unidentified Justice advised him in a note:

Some of the arguments are boring and I think Bill [Brennan] has probably decided how to vote before he ever gets to the bench, but he could still (as could Byron [White]) find something *quiet* to do so as not to interfere with those who want to listen and to not give impression of discourtesy to attorneys--do you think a mention to them might be beneficial.

H.A.B. Papers, *supra* note 3 (emphasis in original). When Justice Brennan was unusually quiet, Blackmun sent him the following note on March 23, 1982: "You have been utterly quiet today! Is everything all right? HAB" Brennan responded: "Fine--I'm just bored. The previous argument was atrocious. And this one my view is already settled. The deaf child case is tough and we didn't get much help." H.A.B. Papers, *supra* note 3, box 116 (The "deaf child case" to which Brennan referred is apparently *Board of Education v. Rowley*, 458 U.S. 176 (1982)).

<sup>212</sup> On February 15, 1980, Blackmun wrote: "The conference today was like a bunch of cackling hens all speaking at once, interrupting, and some confusion. Spoiled children reaction at times." H.A.B. Papers, *supra* note 3, box 116. On February 27, 1980, Blackmun wrote: "Conference All talking at once--no order--eager speakers--irrelevant talk re Israel. I say a confusing case is made more confusing by the cross talk. They are like a bunch of school children." H.A.B. Papers, *supra* note 3, box 116. On March 28, 1980, Blackmun wrote: "The CJ cannot control the conference." *Id.*

President exactly two years from that date. Rehnquist presciently replied: “If a Republican, Bush or Dole. If a Democrat maybe someone who is now regarded as a total dark horse.”<sup>213</sup> On the day Ginsburg’s nomination to the Court was announced by President George Clinton, Justice Kennedy sent fellow Harvard Law School graduate Blackmun the following note: “Dear Harry, We still seem to fall one short of a Harvard Law School majority on our Court. But if you are patient, we shall prevail. Tony”<sup>214</sup>

During the 1990s, the Justices became far more active than they were in the 1970s and 1980s in asking questions at oral argument.<sup>215</sup> Many have noted that the Justices on the Court today tend to use questions to debate each other at oral argument, with Justice Scalia leading the charge for the conservatives. In his later years on the Court, Justice Blackmun complained that Justice Scalia asked too many questions and tended to dominate oral arguments. After Justice Ginsburg joined the Court, Blackmun occasionally kept track of how many questions Justices Ginsburg, Scalia, and Souter each had asked.<sup>216</sup> When asked by Dean Koh how he felt about Justice Scalia’s vigorous questioning at oral argument, Blackmun replied:

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<sup>213</sup> Note from Chief Justice Rehnquist to Justice Blackmun (Jan. 20, 1987), H.A.B. papers, *supra* note 3, box 116.

<sup>214</sup> Note from Justice Kennedy to Justice Blackmun (June 14, 1993), H.A.B. Papers, *supra* note 3, box 116. Justices Blackmun, Kennedy, Scalia, and Souter were the four graduates of Harvard Law School then serving on the Court. While Justice Ginsburg had attended Harvard Law School, she graduated from Columbia Law School. Because she replaced Yale Law School graduate Byron R. White, the number of Harvard Law School graduates on the Court remained at four. The confirmation of Judge John G. Roberts, Jr., to the Supreme Court would finally give Harvard a five-Justice majority because he has been nominated to the seat occupied by Stanford graduate Sandra Day O’Connor.

<sup>215</sup> On December 2 1992, Justice White sent Blackmun a note “Five minutes went by before the 1st question. That’s a record at least for the last few years.” H.A.B. Papers, *supra* note 3, box 116.

<sup>216</sup> For example, Justice Blackmun records that in one case argued on October 13, 1993, Justice Ginsburg asked 21 questions, Justice Scalia asked 18, and Justice Souter asked 7. In another case argued that day, Ginsburg beat Scalia by a 27 to 15 margin, with Souter asking 11 questions.

Well, Nino is a very charming individual, especially socially around a dinner table or something. He's just full of charm, and it's nice to have him around. I'm a little personally critical of him; I think he asks too many questions on the bench and sometimes takes over the whole of counsel's argument, asking questions, and then he's buttressed by Justice Ginsburg, who wants to keep up with him in questions. And yet one gets into conference, and he doesn't take over the conference at all.<sup>217</sup>

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<sup>217</sup> Oral History Project, *supra* note 157, at 368.

Like the Marshall papers, the Blackmun papers tend to confirm the accuracy of Bob Woodward's and Scott Armstrong's book *The Brethren*, which brought unwanted publicity to the Court when it was published in the fall of 1979. The Blackmun papers reveal that Justice Blackmun cooperated with co-author Scott Armstrong, who interviewed him for the book. In June 1978, Armstrong phoned Blackmun's chambers to request an interview ostensibly about Blackmun's life prior to joining the Court.<sup>218</sup> Blackmun's records indicate that he was interviewed by Armstrong on both July 6, 1978, and September 15, 1978. Several former law clerks to Justice Blackmun contacted his chambers to report that they were receiving requests for interviews by the authors. Justice Blackmun had one of his law clerks phone a former clerk to tell him that "some of the other clerks have talked to Scott Armstrong as well as the Justice himself, and that the Justice has no objection to his seeing Mr. Armstrong, but that he should not underestimate him."<sup>219</sup> One former clerk sent the Justice a six-page memo providing details of his interview with Armstrong stating that he did not disclose much and Armstrong criticized him for wasting his time.<sup>220</sup>

When *The Brethren* was published in December 1979, nearly all of the Justices expressed outrage that some of their former law clerks apparently had talked to the authors about their work.<sup>221</sup> At the time it was not widely known that Justice Blackmun had granted an interview to one of the authors, although it was rumored that two Justices had done so. The Blackmun files suggest that the Justice instructed his current law clerks about the importance of maintaining confidentiality. They contain a letter from Judge Harry Phillips, Senior Circuit Judge of the Sixth Circuit who wrote:

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<sup>218</sup> Memorandum to Justice Blackmun from "sjb" (June 30, 1978), H.A.B. Papers, *supra* note 3, box 1435.

<sup>219</sup> Handwritten note dated July 10, 1978, on Memorandum to Justice Blackmun from "sjb" dated July 7, 1978, H.A.B. Papers, *supra* note 3, box 1435.

<sup>220</sup> Memorandum from Ralph I. Miller, Conference with Scott Armstrong (July 14, 1978), H.A.B. Papers, *supra* note 3, box 1435.

<sup>221</sup> In a Memorandum to the Conference dated December 31, 1979, Justice Powell wrote:  
I suppose all that is really new (apart from a change in the actors) is that some clerks – I believe only a few – betrayed extensively and imaginatively the confidentiality that has been honored here over the decades. In any event, as the New Year dawns I pay tribute to our Chief who has borne the recent highly commercialized libel with urbanity, dignity, and wonderous good humor.  
H.A.B. Papers, *supra* note 3, box 1435.

It is difficult for me to comprehend how any law clerk to a Supreme Court Justice or any other judge could breach his or her obligation of confidentiality by divulging derogatory court gossip to a newspaper reporter. It is claimed that the material for *The Brethren* was received from former law clerks to Justices of the Supreme Court. If so, these attorneys have violated a relationship of trust, and are guilty of disservice to the judiciary, the legal profession and the nation.<sup>222</sup>

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<sup>222</sup> Letter from Judge Harry Phillips (Dec. 7, 1979), H.A.B. Papers, *supra* note 3, box 1435.

Blackmun apparently distributed a copy of this letter to each of his law clerks.<sup>223</sup>

Despite his cooperation with the authors, Justice Blackmun was not portrayed in a favorable light in *The Brethren*. Responding to a supportive letter from a member of the public, Justice Blackmun wrote:

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<sup>223</sup> A note written on the bottom of the letter states: “12/10/79--HAB instructed me to give a copy of this letter to each of the law clerks, and I have done so. Bsw.”

The authors of “The Brethren” are chewing on us but this, too, will pass. It always hurts a little to be described directly and by innuendo as an uninspired clod. I make no apology whatsoever, though, for being described as agonizing over our decisions here. Nearly all of them are close enough so that one should agonize.<sup>224</sup>

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<sup>224</sup> Letter from Justice Harry A. Blackmun to Mr. W.T. Akers, Jr. (Dec. 27, 1979), H.A.B. Papers, *supra* note 3, box 1435.

*The Brethren* had portrayed Blackmun as somewhat indecisive and the Justice who took the longest to write his draft opinions. Responding to these charges, Blackmun wrote: “So far as the authors suggestion about my slowness is concerned, I submit that I have never held anything up and am no slower than some of the others.”<sup>225</sup> The book also reported that some of his colleagues were embarrassed when Blackmun wrote a long tribute to his favorite heroes in the history of baseball at the start of his opinion in *Flood v. Kuhn*,<sup>226</sup> the decision upholding baseball’s antitrust exemption. In one of his notes to Justice Stewart while on the bench, Blackmun shared some old baseball cards that belonged to one of his clerks and noted that the clerk was concerned with *The Brethren*’s report that the opinion “embarrassed.” Stewart circled the word “embarrassed” on the note and wrote “nonsense.”<sup>227</sup> Despite his unsympathetic portrayal in the book, Justice Blackmun was not as harsh as his colleagues in his reaction to its publication, perhaps because he had cooperated with the authors. In another letter responding to a request for comment on it, he wrote: “It does have some factual inaccuracies, but perhaps it served a purpose.”<sup>228</sup>

Justice Blackmun was no stranger to criticism, having been subject to a relentless barrage of hate mail from opponents of the *Roe v. Wade* decision he authored.<sup>229</sup> The Blackmun papers show that in May 1984 he made an unusual request of Justice O’Connor. She had drafted the opinion for a unanimous Court in a case with significant implications for landowners in Hawaii.<sup>230</sup> Blackmun asked:

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<sup>225</sup> Letter from Justice Harry A. Blackmun to James K. Marugg of Pasadena, California (Feb. 25, 1980), H.A.B. Papers, *supra* note 3, box 1435.

<sup>226</sup> 407 U.S. 258 (1972).

<sup>227</sup> Note from Justice Blackmun to Justice Stewart (Dec. 5, 1979), H.A.B. Papers, *supra* note 3, box 116.

<sup>228</sup> Letter from Justice Harry A. Blackmun to Ms. Maya Radoczy of Seattle, Washington (Nov. 12, 1981), H.A.B. Papers, *supra* note 3, box 1435.

<sup>229</sup> 410 U.S. 113 (1973).

<sup>230</sup> *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 14 ELR 20549 (1984).



I wonder if I may raise a point of personal privilege. I shall be in Honolulu May 20-22. Do you think the decision in these cases could be withheld until after the 22nd? I run into enough flak as it is these days, and I think it would be better if I were out of the State by the time the decision comes down.<sup>231</sup>

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<sup>231</sup> Memorandum from Justice Harry A. Blackmun to Justice Sandra Day O'Connor (May 9, 1984), H.A.B. Papers, *supra* note 3, box 405.

O'Connor quickly agreed to Justice Blackmun's request.<sup>232</sup>

Earlier this year, a professor who had studied the Blackmun papers published an article accusing Justice Blackmun of "a scandalous abdication of judicial responsibility to his clerks."<sup>233</sup> While the examples cited by the author involved abortion and death penalty cases, a review of Blackmun's handling of environmental cases offers no support for these sensational charges. Comparison of the Blackmun environmental case files with those in the Marshall papers shows nothing out of the ordinary in the degree of responsibility possessed by Blackmun's clerks. As happened in virtually all Justices chambers, in some cases Justice Blackmun rejected the recommendations of his law clerks (as when they urged him to join the majority in the snail darter case), while in other cases clerks prepared first drafts of opinions that the Justice adopted with little editing.<sup>234</sup> But one clear difference between the Marshall and Blackmun papers that provides a decisive refutation of these charges is that the Blackmun papers contain detailed, handwritten memoranda from the Justice to himself, reflecting his thinking on each case and why he reached the result that he did.

While Supreme Court Justices have not taken kindly in the past to public examination of their work, it seems apparent that their initial harsh reaction to release of the Marshall papers was overblown. This, coupled with the fact that Justice Blackmun's papers were not released until nearly ten years after his retirement, may explain why the release of the Blackmun papers did not generate as much controversy as release of the Marshall papers did. During his interviews with Dean Koh, Justice Blackmun acknowledged the historical value of making his papers available to the public. "There is a lot of history in these files, I think a lot of interesting history, as to how the Court works and how these general principles are developed."<sup>235</sup> Blackmun noted that a five-year wait between the death of a Justice and the release of his files might be more appropriate than the few months that transpired in the case of Justice Marshall's papers. He also noted that the *Legal Times*' publishing of "Marshall nuggets" means that people are "trying to read more into his writings than perhaps is there sometimes."<sup>236</sup>

## VII. Conclusion

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<sup>232</sup> Memorandum from Justice Sandra Day O'Connor to Justice Harry A. Blackmun (May 9, 1984), H.A.B. Papers, *supra* note 3, box 405 ("I will be more than happy to get you safely back on the Mainland before lowering the boom by announcement of this decision.").

<sup>233</sup> David J. Garrow, *The Brains Behind Blackmun*, <BI>Legal Affairs<D>, May/June 2005, available at [http://legalaffairs.org/issues/May-June-2005/feature\\_garrow\\_mayjun05.msp](http://legalaffairs.org/issues/May-June-2005/feature_garrow_mayjun05.msp) (last visited Aug. 5, 2005).

<sup>234</sup> The author can confirm from his personal experience that the same occurred in Justice White's chambers, even though it is well known that White's clerks had virtually no influence on his decisionmaking. See Oral History Project, *supra* note 157, at 15 (Blackmun notes that during his last two or three years on the bench he let his clerks prepare first drafts of opinions).

<sup>235</sup> *Id.* at 275.

<sup>236</sup> *Id.*

The papers of the late Justice Harry A. Blackmun provide a remarkably rich archive that documents how the Court, for nearly a quarter century, handled environmental cases during a period crucial to the development of environmental law. While many of the memoranda in the Blackmun papers also are in the papers of the late Justice Thurgood Marshall,<sup>237</sup> which were released in 1993, the Blackmun papers are far more extensive than Marshall's. The Blackmun papers contain detailed notes taken in conference, including how the Justices initially voted, cert pool memoranda, and the Justice's own detailed notes taken prior to, and during, oral argument. The Blackmun papers also provide the first glimpse at how the Court handled the many significant cases it decided during the three years after Justice Marshall retired in 1991, including *New York v. United States*, *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, and *Lujan v. Defenders of Wildlife*.

This Article has examined some of the highlights of what the Blackmun papers reveal about the Court's handling of these and other environmental cases between 1970 and 1994. Given the immense amount of material in the Blackmun papers, this article only scratches the surface, but it enables one to construct at least a rough sketch from an insider's perspective of the Court's reaction to environmental issues during this period. When Justice Blackmun joined the Court, environmental issues were near the top of the national agenda and the Court had a passionate advocate for environmental interests in Justice William O. Douglas. While initially dismissive of the concerns of environmental plaintiffs in *Citizens to Preserve Overton Park v. Volpe*, Blackmun joined Douglas in championing environmental concerns a year later in *Sierra Club v. Morton*. Following Justice Douglas' retirement in 1975, the Court had no Justice with Douglas' intuitive understanding of the importance of environmental law. But Justice Blackmun generally became a reliable vote in favor of environmental interests.<sup>238</sup> Even while providing the crucial fifth vote in 1976 for a decision barring the federal government from regulating the wages and hours of state employees, Blackmun made it clear that the Tenth Amendment would not prevent the application of federal environmental regulations to state facilities.

The Blackmun papers show the Justices struggling to understand the complex, new federal regulatory programs Congress established in the early 1970s to protect the environment. Justices schooled in a common law mindset found it difficult to adapt to regulatory legislation designed to prevent diffuse harm whose sources are not easily traceable and whose consequences

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<sup>237</sup> For a comprehensive analysis of what the Marshall papers show concerning the Court's handling of environmental cases, see Percival, *supra* note 2.

<sup>238</sup> Justice Blackmun ultimately compiled a voting record that, following Justice Douglas's retirement, was second only to Justice Marshall's in the support for environmental interests. See Percival, *supra* note 2, at 10626 (statistics on voting records of the Justices in environmental cases from 1970-1991 show that Justice Blackmun supported environmental interests in approximately 60 percent of cases, approximately the same percentage as Justice Brennan, while Justice Marshall did so in approximately 65 percent of cases, and Justice Douglas in 75 percent). Using a slightly different database of environmental cases over the period from 1969-1999, Richard Lazarus subsequently reached similar conclusions (Justice Marshall supporting environmental interests in 61 percent of environmental cases and Justices Blackmun and Brennan in 58 percent of such cases). Richard J. Lazarus, Restoring What's Environmental About Environmental Law in the Supreme Court, 47 U.C.L.A. L. Rev. 703, 812 (2000).

may not become manifest until long in the future. The Blackmun papers show a Court whose Justices often express bewilderment, or even contempt, for the new laws and the regulatory programs they spawn, but who nonetheless try to ensure that the laws will be given a fair chance to accomplish their ends. They do so initially by granting substantial deference to the administrative agencies charged with implementing and enforcing the laws and by opening up the courts to lawsuits by the laws' intended beneficiaries. The Blackmun papers suggest that the Court's *Chevron* decision, now a landmark in the field of administrative law, was in large a product of the Justices' difficulty understanding the complexities of the Clean Air Act. They also show that the seeds of the Court's 2001 *Mead* decision limiting *Chevron*'s reach were planted as early as 1994 when the Justices decided another environmental case shortly before Justice Blackmun's retirement.

The new environmental laws raised important questions concerning the constitutional reach of federal authority, the effect of environmental regulation on property rights, and who has standing to speak for the environment, issues that all remain alive today. This Article reviewed how the Court responded to each set of issues. It documented the long crusade by Justice (now Chief Justice) Rehnquist to set judicially enforceable limits on federal regulatory authority and how Justice O'Connor quickly became an even more enthusiastic champion of this cause after she joined the Court in 1981. It explained how the Court upheld federal constitutional authority to regulate even purely intrastate strip mining, and the confusion over how to define what activities substantially affect interstate commerce – confusion that persists today. The Blackmun papers chronicle how Justice Blackmun undermined efforts to erect constitutional limits on federal power after he became convinced in 1985 that the political process, and not the judiciary, was the best vehicle for preserving federalism. They reveal how Justice Scalia's effort in 1989 to use the Eleventh Amendment to immunize states from Superfund liability backfired as a result of Justice White's insistence on deciding the case on narrower statutory grounds. After Justice Thomas replaced Justice Marshall on the Court, new Tenth Amendment limits on federal power were announced in *New York v. United States*. The Blackmun papers reveal confusion between Justices O'Connor, Kennedy, and Souter concerning the relationship between the Tenth Amendment and federal Commerce Clause power and the perception in Justice Blackmun's chambers that an ideologically driven Court now was pursuing a political agenda. Shortly after Justice Blackmun's retirement, the Court interpreted the Commerce Clause and the Eleventh Amendment to erect new constitutional limits on federal power.<sup>239</sup> These decisions may serve as important vehicles for deterring overreaching by federal authorities, even if they ultimately prove to have little impact on federal environmental law, as the Court's most recent "medical marijuana" decision may indicate.<sup>240</sup>

The Article also examined the Court's long struggle to fashion a comprehensible theory of regulatory takings. The Justices acknowledge that all regulation, including zoning, limits the use of property in ways that can have substantial economic impacts on property owners. The difficult challenge is to define when government action goes "too far" and requires that property owners be compensated. The Blackmun papers show that even some Justices who are

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<sup>239</sup> See *supra* notes 111-12 and accompanying text.

<sup>240</sup> *Gonzales v. Raich*, 125 S. Ct. 2195 (2005) (upholding, by a 6 to 3 vote, over a sharp dissent from Justice O'Connor joined by Chief Justice Rehnquist and Justice Thomas, federal power to regulate purely intrastate cultivation and use of marijuana for state-approved medical purposes).

enthusiastic champions of property rights initially questioned whether it was appropriate to expand regulatory takings doctrine rather than relying on due process concepts. This article traced how the Court progressed from developing rationales to avoid deciding takings cases to expanding protection for property owners in its 1987 “takings trilogy.” The papers document the important role that Justice Blackmun played in upholding a law barring mining that could cause surface subsidence, even as the Court expanded the rights of property owners to obtain damages for temporary takings and to resist easement exactions. They provide the first look at why the Court in 1992 afforded categorical regulatory takings protection to owners of real estate rendered entirely valueless by regulation, even though such cases may prove to be as rare as the ivory-billed woodpecker. The article also discussed how Justices Scalia and Kennedy pushed Chief Justice Rehnquist to make it more difficult for regulators to justify regulatory exactions, even though this ultimately resulted in the loss of Justice Souter’s vote in *Dolan v. City of Tigard*.

The Article reviewed what the Blackmun papers show concerning the evolution of the law of environmental standing. It traced the Court’s initial broadening of the doctrine to embrace standing for aesthetic injury to environmental interests. The Article then reviewed how one Justice, determined to restrict environmental standing, became the author of a series of decisions making it more difficult for environmental interests, but not for business interests, to have standing to challenge the legality of government actions. However, as the Blackmun papers reveal, this Justice’s efforts to make it constitutionally impossible for environmental groups to challenge the legality of broadly applicable government action or to sue over violations that cause widely diffuse harm ultimately were thwarted by more moderate Justices. Following Justice Blackmun’s retirement, the Court has even moved standing doctrine in a more moderate direction.<sup>241</sup>

The Blackmun papers also illustrate the important role the Chief Justice can play in shaping the direction of the Court. So long as he votes with the majority, the Chief Justice selects which Justice will draft the majority opinion. The author of the majority opinion generally has enormous influence on how broadly or narrowly are the grounds on which cases are decided. While other Justices voting in the majority may refuse to join opinions that they believe go too far, they sometimes opt to join opinions that may not precisely reflect their views, especially if the opinion has been drafted by a Justice with experience or expertise in a particular area of law. In cases involving interpretations of complex regulatory schemes or issues of administrative law, the Justices have shown considerable deference to their colleagues who draft the majority opinions, even at times when these changed the result initially agreed upon at conference. The Blackmun papers show that Chief Justice Burger often passed when initially voting on a case, which preserved his ability to vote in the majority and thus assign the opinion. Once he acquired a conservative majority on the Court, Chief Justice Rehnquist has been able to pursue much of his conservative agenda by assigning majority opinions to the Justice most eager to push the law in new directions.

Aside from the greater selectivity of the Justices in deciding how many cases to hear each year,<sup>242</sup> perhaps the most striking change in the Court during the Blackmun years is the

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<sup>241</sup> See *supra* note 199 and accompanying text (discussing *Friends of the Earth v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 30 ELR 20246 (2000)).

<sup>242</sup> See Percival, *supra* note 2, at 10608-10609. During Justice Blackmun’s service on the Court, the number of cases the Court was asked to review doubled from 3,000 to 6,000 annually, while the number of cases the Court agreed to hear fell by more than half from more than 200 to

increasingly sharp ideological split among the Justices. Even though Justice Blackmun's own appointment to the Court came after two previous nominees for the seat had been rejected, the Court he joined was not riven with sharp ideological or partisan splits. Today the Court is closely divided with all but two "swing" Justices usually considered reliable votes for either a conservative or a liberal outcome. Virtually all of the significant decisions breaking new ground in the areas of federalism, regulatory takings and standing have been decided by a 5-4 vote with the two "swing" Justices siding with the three conservatives. Subtle signs of the growth of ideological divisions on the Court surface in the Blackmun papers. Justice Blackmun directed his clerks to annotate the "cert pool" memoranda to identify the Justice for whom the author of the memo clerked, as well the lower court judge for whom the author previously worked. Many Justices now select their clerks from a pool of applicants who clerked for a small group of Court of Appeals judges who are strongly identified with either a conservative or liberal point of view. Justice Blackmun and his clerks increasingly expressed skepticism about the role of ideological agendas in influencing how other Justices and their clerks approached the tasks of deciding what cases the Court should hear and how broadly they should be decided. To be sure, the Marshall papers contain evidence of strategic voting by Justices Brennan and Marshall to avoid cases that could be vehicles for the law developing in directions they disfavored. But more Justices today seem to be making some effort to select clerks who will be comfortable with their ideological predilections. This may have contributed to reports of sharper conflicts between clerks in different chambers in recent years..<sup>243</sup>

Review of the Blackmun papers indicates that even though the Justices often failed to fully grasp the intricate details of the environmental laws or the complex regulatory programs they spawned, the Court has continued to play a vital role in preserving law as a vehicle for environmental protection. When extreme interpretations were urged by opponents of regulation, moderate voices on the Court usually asserted themselves and kept the laws' basic infrastructure intact and the courthouse doors open to environmental interests. While the Court may never again have as eloquent a champion of environmental interests as Justice William O. Douglas, it is still reasonable to hope that future Justices will possess the same basic sense of fairness and concern for the downtrodden that Justice Blackmun displayed during his service on the Court. As the Court embarks on a new Term with its first change in membership in over a decade, it would be most welcome to find in the paper trail it leaves future generations more open minds, a willingness to listen, and a commitment to deliberative processes that provide a level playing field for all who appear before it.

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approximately 100 annually. Supreme Court review is now sought in more than 7,000 cases per year, but the Court hears oral argument in less than 100 cases annually. The Justices' Caseload at <http://www.supremecourtus.gov/about/justicecaseload.pdf> (visited Aug. 10, 2005).

<sup>243</sup> See, e.g., Edward Lazarus, *Closed Chambers* (1998); David Margolick, Evgenia Perez & Michael Shnayerson, *The Path to Florida: What Really Happened in the 2000 Election*, *Vanity Fair*, Oct. 2004, at 310.