

BY TIM EIGO

# Covering the Court



On February 15, Linda Greenhouse, a Pulitzer Prize-winning reporter for *The New York Times*, spoke at Arizona State University. She was there at the invitation of the ASU School of Justice & Social Inquiry, and she presented the seventh annual John P. Frank Memorial Lecture. Her talk—“Change and Continuity on the Supreme Court”—arose from research she had done in the archived papers of Supreme Court Associate Justice Harry Blackmun. That research led to a series of articles in the *Times*, as well as a book—*Becoming Justice Blackmun: Harry Blackmun’s Supreme Court Journey*.

Earlier in the day of her lecture, Greenhouse sat down and spoke with ARIZONA ATTORNEY magazine.

**ARIZONA ATTORNEY:** Justice Blackmun's estate gave you the opportunity to research his archived papers two months before they were made public. Would you have jumped at the chance if it had been offered by any justice's estate, or did you especially prize the chance to peer into Justice Blackmun's papers?

**LINDA GREENHOUSE:** His papers were reputed to be a fabulous Supreme Court collection, because he was known as a real packrat; he saved everything. Compared to almost any other collection of Supreme Court papers, they were expected to be something special.

I would have jumped at the opportunity to get into anything having to do with the Court behind the scenes, so it was a fortuity that it happened to be a very rich collection.

**AZAT:** Was it well organized?

**GREENHOUSE:** It was, but it was huge. There were half a million documents, almost 1,600 boxes. I had this two-month head start, but that had to include time for writing, so let's say it was really six weeks, or five weeks, leaving time to write. So where to begin?

I was able to hire a research assistant, named Frank Lorson, who had just retired as the longtime career chief deputy clerk of the Supreme Court, so he really knew the subject. So between the two of us, we devised a roadmap to the collection, which is online at the Library of Congress ([www.loc.gov/rr/mss/blackmun](http://www.loc.gov/rr/mss/blackmun)).

**AZAT:** Did you stick to the roadmap?

**GREENHOUSE:** Like any process of original research, the happenstance happily took over. For instance, there's a set of files that are just called "Justice Files." And they're every Justice that he served with, in alphabetical order. I started going through those on the second or third day, in order. And the first one I picked up was Hugo Black, which was a very thin file, because they only overlapped for a year and a couple of months.

Well, the first document was a memo from Black to Blackmun, with copies to all of the other Justices, bitterly complaining

about Blackmun's tardiness in circulating a dissenting opinion, and therefore holding up Black's circulating his majority opinion. It was very sharply written, and it included Blackmun's very wounded and defensive response. And I thought, "Whoa, has this ever seen the light of day anywhere?" As far as I could tell, it hadn't. So it just kind of draws you in.

Then there was the decades of correspondence between Blackmun and [Warren] Burger. That was just a treasure trove, because it documented the nature of that unusual relationship.

**AZAT:** Did it surprise you how thin-skinned Justice Blackmun was?

**GREENHOUSE:** It surprised me. His little notes to himself in this kind of running chronology that he kept for all his years on the Court—not quite a diary, but a "chronology," he called it—where he would say things like, "The Chief Justice spoke sharply to me today in Conference"—it was surprising.

He was a very sensitive person, and that had its pluses and its minuses. I have to think it was a minus in some of his interactions with his peers; it was a plus in investing him with a kind of compassion for the underdog that informed some of his jurisprudence.

**AZAT:** When you first began reviewing the papers, it was with an eye toward writing articles in the *Times*. Was it only later that you thought there was a book in this?

**GREENHOUSE:** I didn't have any idea. I had no anticipation of ever writing a book. The day that the first of the articles appeared, I got a call from a publisher—Henry Holt—from one of their editors, Paul Golob, who said, "I want to talk to you about turning this into a book."

At first, I said, "No, I have to get back to my day job. I'm way behind. I've been away for two months." But we did talk, and he is a wonderful book editor. Not only that, but he's a real Supreme Court groupie, and was very well read in Supreme Court material, as a matter of his personal interest. So it occurred to me that together we could make this work, and working with him would be added value to the project,



because he just seemed so smart about it—which was a good judgment on my part, because it turned out to be true. It was a lot of fun working with him.

**AZAT:** Did you ever consider adding other materials, such as the views of scholars or former clerks?

**GREENHOUSE:** No. As I said, I had a day job. The deal with the book was, it had to be something I could write over the summer, and turn in the manuscript by the time the next Term of Court began on the first Monday in October. That precluded roaming the countryside and tracking down law clerks and going outside the record. The whole construct was going to be, it's Harry Blackmun as revealed in his collected papers. Whatever I could extract from that to make a coherent narrative of the man's life. And it was going to stand or fall on that basis.

**AZAT:** Reading the book, Blackmun does not sound like a man crafting his legacy in his papers.

**GREENHOUSE:** No. He saved everything. Now, the question is why did he decide to have them released that soon, only five years after his death? Typically, it's been "after the death of everybody I served with."

Some of his law clerks who had been advising him on various aspects of his estate said, "Mr. Justice, don't you think that's kind of soon. Don't you want to wait?" And he said, no, this is what I want.

Of course, he had no way of knowing that in that 10-year period [from his retirement until his death], nobody else would have retired. He could not have anticipated that, because that was a historically long period without turnover at the Court. So it made it seem even sooner than it was, because his papers revealed the interactions of the exact same people who were on the Court when he was there. That was a bonus obviously as far as I was concerned.

So his view of his legacy was revealed.

He must have felt that he had a story to tell, that his papers would tell that story, and that he wanted it told in almost real time, so that the people who heard it would be people who had lived through it and could

appreciate whatever it was he thought he was saying.

**AZAT:** His words revealed a man who cared a lot about what people thought.

**GREENHOUSE:** He did, and he probably wanted to get his life and work out there unmediated: "Here it is, make of it what you will."

**AZAT:** Looming over the entire book was Warren Burger, almost a tragic figure. Is that overstating the case?

**GREENHOUSE:** No, I agree with you. For me, that was the biggest surprise. I knew Burger; I wrote his obit. I wrote Blackmun's obit. So I knew the trajectory of both of their lives and how they had been close early on and had drifted apart later on. But the flavor, the texture of it, the incredible closeness in their young adult lives, and the bitterness of the separation that came through in the letters, the communications, the Blackmun diary entries, and so on. That was a surprise, and I actually ended up more empathetic for Burger than I would have anticipated, because he did seem like such an emotionally needy person. And you had to end up feeling like there was a kind of a tragedy there.

**AZAT:** Reading your book, one is given the impression that Burger had little awareness of his own motivations and the sources of his anger. On the other hand, Blackmun seemed preoccupied with self-awareness.

**GREENHOUSE:** I agree. Burger had no sense of how he came across to other people, no superintending eye on himself.

Blackmun maybe erred in the other direction; he was preoccupied with what other people thought. So it ended up like oil and water, which we know is not a good combination.

**AZAT:** An Arizona lawyer who was also a Chief Justice, William Rehnquist, died in 2005. Is it too early to say what his legacy is? Could it be federalism, or is it that he was a good administrator and a good colleague, a breath of fresh air after Warren Burger?

I don't know whether the Rehnquist so-called federalism revolution is going to last; it doesn't seem to have a lot of momentum right now.

**GREENHOUSE:** It probably is too early. My initial take on him was, [he was] probably one of the country's great Chief Justices. He was not only a good administrator, but great in the sense that he had a vision and he was able to project that vision onto the Court, and turn things in his direction.

I'm not sure whether that will hold up; I think it's too soon to say. I don't know whether the Rehnquist so-called federalism revolution is going to last; it doesn't seem to have a lot of momentum right now.

He ended up his last couple of years being kind of to the right of the working majority at the Court, and was in dissent on some of the major cases in his last couple of Terms.

He certainly had a long tenure; I think he was a very well-respected figure. What



his lasting contribution is going to be, I think we're probably decades from being able to really assess that.

**AZAT:** As for Sandra Day O'Connor, she got the appellation "swing vote." Was that accurate?

**GREENHOUSE:** She never like that "swing vote" label, and I guess I'm wary of it also, because it sort of implies that a person hangs back and waits to see which way the wind is blowing, and then they swing in a certain direction. And I don't think that was her M.O.

I think rather she brought a very partic-

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ular perspective, which was not so much a doctrinally impelled one, but a practical sense, maybe based on the fact that she was the only member of that Court [during her tenure] who had ever served in elective office. So she had a sense of how the law plays out on the ground that made her perhaps less beholden to a set of ideological givens, that made her seem less predictable.

I think [the term "swing vote" is] in a way sort of short-circuiting the contribution she really made, which is to bring a real dose of pragmatism to the Court. And I think that accounts for a number of her more important votes.

**AZAT:** Your book title, *Becoming Justice Blackmun*, is intriguing. How did you come up with it?

**GREENHOUSE:** I came up with it after writing the last lines of the book. Blackmun, late in life, had given a speech saying he had felt like a cork bobbing on the waters of a moving stream. It was sort of an odd image, but it gave me this little thing to play with metaphorically about swimming and the water and reaching the shore and becoming Justice Blackmun.

**AZAT:** In contrast, you've said before that Chief Justice Rehnquist probably never changed his position on anything while on the Court. But Justice O'Connor left the Court a far different person than the person who began on the Court.

**GREENHOUSE:** I think when she first started, she had a few fixed ideas [as in the affirmative action cases, such as *Shaw v. Reno*, 509 U.S. 630 (1993)]. You wouldn't have predicted that she would write for the Court in the University of Michigan affirmative action

case, reaffirming or even strengthening *Bakke* (438 U.S. 265 (1978)). But she came to that position through her study of and understanding of where the country was on some of these issues, and what was really in the longer-term interest of the country. Do you want to just be very rigid about this and say, "No way, ever, no matter what"? So I think she changed in that respect.

I think Chief Justice Rehnquist could sort of modulate his vote, if you will, but not necessarily his views. He could vote strategically, for instance in *Dickerson v. United States*, 530 U.S. 428 (2000), that refused to overturn *Miranda*. Not that he liked *Miranda* any better, not that he wouldn't have voted the other way as a matter of first impression. But he just didn't think, in terms of the relationship between the Court and Congress, that this was the

time for the Court to take a back seat to Congress, and say "You're right, you really have the right to overturn *Miranda* legislatively." He just wasn't going to say that.

So that wasn't a matter of changing his view. That was a matter of his strategic sense of where the Court ought to be at a given moment.

**AZAT:** In some areas, you found that the Court itself resisted change. In the book, you deal to some extent with the gender discrimination cases that came down. In almost every one, as you note, the Court found the State action was so extreme that it violated the most basic level of scrutiny. But was that simply a safe harbor that allowed the Court to avoid naming gender a suspect class worthy of strict scrutiny?

**GREENHOUSE:** If you look at *Frontiero v. Richardson*, 411 U.S. 677 (1973), the key case, yeah, there was resistance. I think there's always been some internal resistance on the Court to the multi-tiered Equal Protection scrutiny, so they just weren't going to go there.

When you look at the *VMI* case, though [518 U.S. 515 (1996)], when Ruth Ginsburg wrote for the Court a kind of intermediate-level scrutiny-plus—I forget her exact formulation—that functionally the Court has really come 95 percent of the way. So maybe the label doesn't matter anymore.

**AZAT:** Last June, you gave a speech at your alma mater, Radcliffe, at which you made strong statements about the current White House administration. You've gotten criticized severely for that. Did you expect that?

**GREENHOUSE:** No. Not at all. I didn't write that to be provocative and edgy. It wasn't received that way by my audience at all. It was only, frankly, NPR and a bunch of sanctimonious media minders that I think distorted it and made it into something that it wasn't.

**AZAT:** But some of the issues you discussed at Radcliffe, it could be argued, are matters that could be taken up by the Court. Isn't a reporter overstepping when she voices public opinion on those topics?

**GREENHOUSE:** The thing I was most criticized for was saying that the Bush administration had turned its attention to creating a law-free zone in Guantanamo instead of upholding the rule of law. Well, that was two years after the Court ruled in *Rasul against Bush* (542 U.S. 466 (2004)), that the administration was wrong to maintain the position that American law did not extend to Guantanamo. So far from being a pending case, it was *res judicata*.

I didn't state that to be edgy. I just thought I was stating an obvious fact—maybe an inconvenient fact, but that's what the Court ruled, by a vote of 6 to 3.

**AzAT:** Looking back, then, you don't think you violated any *Times* policies?

**GREENHOUSE:** Personally, no. I'm sorry my editors didn't feel that they could publicly stand up for me in what I thought was a kind of a swiftboating. I'm still angry about it, actually.

**AzAT:** In your book, you quote a commentator who suggests that in *DeShaney v. Winnebago County* (489 U.S. 189 (1989)), Blackmun was finally "speaking without any pretense of dispassionate neutrality" when he began his dissent "Poor Joshua." Did you feel the same as you spoke at Radcliffe, that the time for dispassionate neutrality was past?

**GREENHOUSE:** I wouldn't say that. I'm not at war with the notion that the role of a daily journalist, which is what I am, is not to inject your own passion into what you're covering, and I don't think I do that.

I actually didn't think I did that at Radcliffe. If you read the whole speech instead of the soundbites that NPR pulled out, it wasn't about politics, it was really just a generational sort of narrative.

**AzAT:** I did read the whole speech, and it was clearly generational, as you spoke to those who had graduated with you in 1968. And not that nonfiction is autobiography, but do you feel you have reached a certain point where you're "becoming Linda Greenhouse," especially as you spoke to your fellow alums?

**GREENHOUSE:** Well, it's naive for anybody to think that a person doesn't have views. I guess I feel sorry for anybody that's either so drowning in their own sanctimony or having such a limited view that they really think that a journalist or anybody else goes through life never coming to a conclusion about anything that they observe.

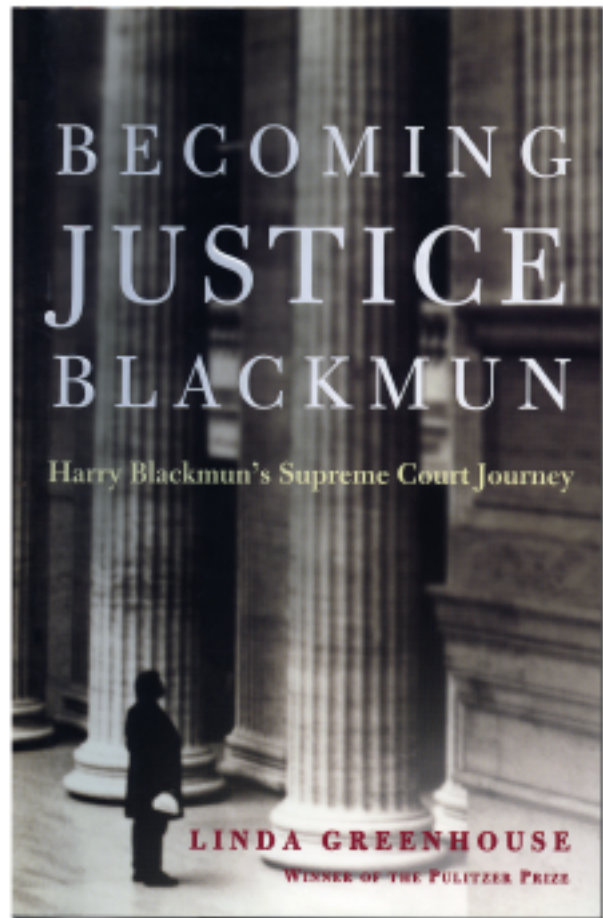
But I do accept the conventions of the trade that that's not part of the day job. But should I be free to go talk to a group of my fellow alumnae on the occasion of receiving their major annual award, and make a few personal observations? Yeah, I think I have that right. So be it.

**AzAT:** Have you gotten feedback from people outside the press?

**GREENHOUSE:** Yes. There was enormous pushback. I think a lot of people are just confused by the notion that it's not enough to judge somebody by their actual published work, but you have to be their babysitter and judge what they say, wherever they may go, even in Phoenix, Arizona.

**AzAT:** Shifting gears: Over time, have you found the Senate confirmation process for justices to be less informative and more stage-managed?

**GREENHOUSE:** Well, they've gotten more toxic. But in my view, that all begins with the President, and it depends how the President wants to play it. If he wants to use the power of Supreme Court confirmation



to press beyond the bounds of existing political consensus, you're going to get a big problem. If he plays it to the middle, you're not.

If you want a good political fight, it's easy to generate one. If you don't, it's easy to avoid one.

**AzAT:** Have the confirmation questions and answers become too devoid of meaning?

**GREENHOUSE:** Yeah, but in a way it's become a teachable moment for the public, because the questions the senators ask, even if they don't get very informative answers, flag both for the public audience and for the nominee, "Here are the hot-button issues, here's what's important."

I think it's useful for the public to hear that, even if they end up scratching their heads and they don't know what the nominee makes of it, at least they hear it unmediated as part of the political discourse. And I think that has a value. <sup>24</sup>