

Courtside

The Court reverses its long-standing ban on taking notes at oral argument. Why now? (Plus: Bobble Chief.) | By Tony Mauro



Nota Bene

The late Justice **Harry Blackmun** would be very happy.

The Supreme Court's hoary and inexplicable policy against note-taking by the public in the Court chamber—which Blackmun first complained about in 1988—has been overturned.

Its demise came without fanfare and without public notice, but Court public information officer Kathy Arberg confirmed last week that sometime last November the policy against note-taking was “no longer enforced” by Court Police officers.

So as it stands now, those seated in the public section of the Court can take notes “as long as it's not a distraction,” joining justices, clerks, counsel, members of the Supreme Court Bar and journalists seated in the press section, who have traditionally been allowed to take notes. So far, the change in policy has worked well, Court officials agree.

One of the weblogs that handi-caps Court cases, <http://scotus.blogspot.com/>, first noted the change April 25 after blogger Ted Metzler attended the arguments in *Nike v. Kasky*. As he and other spectators went through security, Metzler recalls, “The officer told us we could bring in a notebook and pen and we all looked at each other.” Metzler is currently a law clerk at D.C.'s Goldstein & Howe and will soon be a summer associate at Wilmer, Cutler & Pickering.

The change in policy apparently came as a result of a discussion and vote by the justices themselves. But since the former policy was never articulated in writing, the Court apparently saw no need to announce its revocation. Court officials would not say who brought it to the justices for discussion or why. Complaints about the policy go back a long way, but none have been heard recently.

According to a note found in the late Justice Thurgood Marshall's papers in 1993, Blackmun first objected to the ban on note-taking in 1988. He wrote to then-Police Chief Kenneth Conlon, asking him to explain the rule as well as another policy that bothered him: the rule against spectators leaning their arms or elbows on adjacent chairs or railings.

To his credit, Conlon said he could not explain the note-taking ban, though he said the policy had “changed back and forth over the years.” As for the offense of elbow-leaning, Conlon offered the

explanation that it could interfere with other spectators and “perhaps lead to slouching, sleeping, and other unacceptable behavior.” Conlon also said candidly, “Without stretching these points, there is also consensus that the two issues, whether permitted or not, are not significant security considerations.”

Blackmun wrote to his colleagues that from his observation during arguments, enforcing the rules was embarrassing to spectators and “distasteful” for officers. “The note-taking proscription is of particular concern for visiting law school groups that are there for instruction purposes primarily,” Blackmun added, “I wonder if we go too far in our quest for decorum.”

Could the change be part and parcel of the Court's growing willingness to allow argument tapes to be released quickly in high-profile cases? Is it a symbolic gesture telling the news media and the bar that they no longer have a corner on communicating what takes place in the Court chamber? Why now?

“What can I say? The Lord and the Supreme Court work in slow and mysterious ways,” replies Ronald Collins, a senior scholar at the First Amendment Center in Arlington, Va., who complained about the policy in a 1997 *Washington Post* column.

Footnote: The other policy that bothered Blackmun, the ban on elbow-leaning, continues in full force. Red-faced lawyers were told by officers to remove their arms from railings numerous times during arguments last week.

Bobble Chief

Someday, when and if Chief Justice **William Rehnquist** retires, he will no doubt be honored with statues, ceremonies, and accolades from many sectors of the legal community.

For now, **Bobble Chief** will have to do.

The first of a limited-edition run of William Rehnquist bobble dolls has been minted under the direction of **Ross Davies**.

Davies is an assistant professor of law at George Mason University and the irrepressible editor in chief of *Green Bag*, the off-beat law review now ensconced at George Mason. About 1,000 dolls will be manufactured and numbered. Each of *Green Bag*'s roughly 700 subscribers as of April 1 will get one free. The rest will go to editors and friends of the law review, also for free.



STACEY CRAMP

NOD TO THE CHIEF: *Green Bag* is having about 1,000 bobble dolls made in honor of the chief justice of the United States.

The first doll was placed on Rehnquist's desk last week, and the initial report back to Davies was that Rehnquist "laughed a lot." No offense was intended or, apparently, taken.

And well there shouldn't be. This is not the cheap plastic kind of bobble doll given away at baseball stadiums that falls apart before the seventh inning.

The 7.5-inch tall Rehnquist doll that Davies commissioned is cold-cast ceramic and weighs in at more than a pound, with impeccable hand-painted detailing specific to the chief justice. His textured black robe has Rehnquist's bespoke four gold stripes on each sleeve, and he is

portrayed wearing the same tie he wore the first day of the Bill Clinton impeachment trial in 1999.

The rest of the details, hatched in Davies' fevered brain, take some explaining. The square platform on which Rehnquist the doll stands is covered by a map. No, it's not a map of Rehnquist's native Wisconsin. That would be too pedestrian. Instead, Rehnquist stands on a color reproduction of a map that was included in a 1979 ruling he wrote: *Leo Sheep v. United States*, 440 U.S. 668, involving public easements on land granted to the Union Pacific Railroad in 1862. Though one of Rehnquist's least known rulings, Davies likes it for its directness and for the fondness for history it displays. Rehnquist's opinion begins, "This is one of those rare cases evoking episodes in this country's history that, if not forgotten, are remembered as dry facts and not as adventure. Admittedly, the issue is mundane."

And in the Bobble Chief's hand is Volume 529 of the *United States Reports*, which contains *Bond v. United States*, an opinion written by Rehnquist in 2000. It was the case in which a border patrol agent boarded a bus in Texas, squeezed the soft luggage of a passenger, and discovered a brick of methamphetamine. Davies chose *Bond* in part because the luggage was described as—you guessed it—a green bag, but also because it was a rare Rehnquist criminal law decision in which the defendant won.

The idea for the Bobble Chief dates to 1997, when Davies and others revived *Green Bag*, a 19th century creation that had ceased publication in 1914. Baseball bobble-head figures were becoming popular at the time, and Davies recalls discussing a Rehnquist bobble doll as "something we'd do someday when we're rich." The magazine still is not rich, but last fall Davies began exploring the idea anyway. "It was for the joy of doing it," Davies says.

He located the top-of-the-line and world's biggest bobble-doll-making company, Alexander Global Promotions in Seattle. After Davies sent out dozens of photos of Rehnquist, a mold was made and a prototype created. "At first, the volume of *U.S. Reports* was lavender," he says. A real volume was shipped out, and the color now is correct. The price tag for the entire project, Davies estimates, is around \$10,000.

In addition to the design work, some legal research went into the

Bobble Chief, to determine if it was OK to replicate Rehnquist's image without permission or royalties. Mike Lewis, a product designer at Alexander Global, says a government-employed public figure is fair game, legally speaking. "We've done George Bush any number of times," he says, among the roughly 4,000 different dolls the company has made over four years.

Lewis says his company's goal is to be "fun but accurate," producing dolls that are "complimentary, not disparaging." As an example, he says, "If we are doing Jay Leno, we would not be looking to see how big we can make his chin." Lewis says the dolls are manufactured and painted in China.

For his part, Davies says, he wanted to be sure that Rehnquist did not know about the doll ahead of time, knowing that the Court is sensitive about product endorsements or commercialism.

Giving the dolls away for free also eases those concerns, though some of his friends say he's passing up a chance to make a buck. "They tell me I'll feel like a fool when one of these goes for \$500 on eBay," Davies says. He has plans to create similar dolls for the other eight justices.

Who had the temerity to present Rehnquist with the first doll? Davies won't say. "This person wants to be known as Deep Throat, so when he or she dies, I can tell you. But I can say this: It's not Fred Fielding."

Moving Target

It's an everyday ritual: Members of the Supreme Court Bar moving for the admission of prospective new members in open court.

Lawyers are instructed to approach the Court podium when called by the chief justice, and then to follow a script: "Mr. Chief Justice, and may it please the Court, I move the admission of _____ of the bar of _____. I am satisfied he (or she) possesses the necessary qualifications."

Any deviation from that wording, lawyers are warned, could result in the chief justice taking the motion under advisement—an embarrassment, to say the least. The only exception allowed is that the "movant" may note that the person being sponsored is a spouse, son, or daughter.

That is the rule. On April 30, the final day of scheduled oral arguments this term, Senior Judge **S. Jay Plager** of the U.S. Court of Appeals for the Federal Circuit became the extremely rare exception.

Plager rose to move the admission of six of his law clerks—one current, five former. But almost immediately, Plager tossed out the script. Playing off the named exceptions to the wording, Plager said that while the six were "nominally" his clerks, they were "more like sons and daughters."

It was a creative distortion of the rules, and a valiant salute to law clerks. But it did not play well with Chief Justice Rehnquist.

"Let's get on with it!" Rehnquist snapped at Plager. Chastened, Plager did just that, introducing the clerks by name. Rehnquist granted the motion, and the proceedings continued.

Plager declined comment afterward, but others who know him doubt the unpleasantness will have a long-lasting effect. A 1989 Bush appointee, Plager has been appointed by Rehnquist to serve on Judicial Conference committees over the years. He took senior status last year. Plager's official portrait was due to be unveiled at the Federal Circuit on May 2, and his former clerks were in town for the ceremony. He apparently decided it would be nice to honor them with the Supreme Court Bar admission ceremony.

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