

Justice Brennan and His Law Clerks

Stephen Wermiel

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JUSTICE BRENNAN AND HIS LAW CLERKS

BY STEPHEN WERMIEL*

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I. INTRODUCTION

During his thirty-four Terms on the U.S. Supreme Court,¹ Justice William J. Brennan Jr. employed more than one hundred law clerks.²

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1. Justice Brennan began his service on October 16, 1956, appointed by President Eisenhower, and terminated his active service on July 20, 1990, becoming a senior judge. SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 80, 96, 536–37, 540 (2010).

2. Accounts vary of the number of law clerks who worked for Justice Brennan. During his active tenure on the Court, Justice Brennan directly employed 102 law clerks and at times had the services of at least four more who were clerking for retired Justices. After he retired, he had seven additional law clerks. *See, e.g.*, TODD C. PEPPERS, *COURTIERS OF THE MARBLE PALACE: THE RISE AND INFLUENCE OF THE SUPREME COURT LAW CLERK* 220–21 (2006) (listing 108 law clerks for Justice Brennan); *Justice Brennan Memorials*, BRENNAN CENTER FOR JUST. N.Y.U. SCH. L., <http://www.brennancenter.org/justice-brennan-memorials> (last visited Nov. 1, 2014), *archived at* <http://perma.cc/79KD-GEVU> (noting that Justice Brennan worked with 112 law clerks).

By most descriptions, Justice Brennan's relationship with his law clerks was a unique experience, even in the rarified atmosphere of one of the most prestigious apprenticeships in any professional field. Not only did Justice Brennan's law clerks get to draft many important opinions, but they also served as his emissaries to glean information from the clerks of other Justices.³ The experience of his law clerks went well beyond a post-law-degree seminar in jurisprudence and functioned as a course in both negotiation and judicial politics.

This Essay examines the relationship between Justice Brennan and his law clerks. There has been much debate about the proper role of Supreme Court law clerks. The goal of this analysis is to provide a brief glimpse of how one Justice chose and then worked with his clerks so that they contributed significantly to his very substantial body of work. The intent is to inform rather than fuel debate about the role and influence of law clerks.

II. SELECTING LAW CLERKS

Justice Brennan's selection of Supreme Court law clerks may be roughly divided into three periods: what might be called the Harvard Law School period when his clerks came exclusively from his alma mater,⁴ the next decade of firsts, and the final fifteen years. Each period was a bit different than the one before it.

As an appellate judge and then state justice in New Jersey, Justice Brennan had one law clerk each year.⁵ Notable among them were the sons of his former Newark law partners. His first clerk was James Pitney, son of his former partner Shelton Pitney, and grandson of Supreme Court Justice Mahlon Pitney.⁶ Later in his New Jersey tenure, he hired Roger Ward, the son of another former partner, Waldron

3. See Outline of Office Procedures for WJB's Chambers, Sixth Edition 25, 28 [hereinafter Outline] (on file with author).

4. See *infra* notes 10–21 and accompanying text.

5. See STERN & WERMIEL, *supra* note 1, at 52, 55, 98.

6. *Id.* at 29, 52. Mahlon Pitney served on the U.S. Supreme Court from 1912 to 1922. *Members of the Supreme Court of the United States*, SUP. CT. U.S., http://www.supremecourt.gov/about/members_text.aspx (last visited Nov. 1, 2014), archived at <http://perma.cc/7P89-V3ZL>.

Ward.⁷ The elders Pitney and Ward both helped Brennan's career and success at their law firm, in which he was a name partner for a time.⁸

When he moved to Washington and joined the U.S. Supreme Court, Justice Brennan was entitled to two law clerks.⁹ In the first Term that began in October 1956, Justice Brennan took with him one clerk from New Jersey, Clyde Szuch, a recent graduate of Harvard Law School, and retained Richard Rhodes, an Indiana University Law School graduate who was scheduled to clerk for Justice Sherman Minton, whose retirement created the vacancy that Justice Brennan filled.¹⁰

Of far greater significance, Justice Brennan, in 1956, accepted the suggestion of fellow Justice Felix Frankfurter that he have Harvard Law School Professor Paul Freund,¹¹ a leading constitutional scholar, select his law clerks for him.¹² Justice Frankfurter had a similar arrangement with Harvard Law School Professor Henry Hart.¹³ Justice Brennan wrote Freund on October 19, 1956, to say, "the purpose for writing this is to ask if I dare enlist your aid to do for me what Professor Hart is doing for Mr. Justice Frankfurter."¹⁴ Justice Brennan told Freund he "would be eternally grateful," and added that "it would be a contribution to the work of the Court of incalculable value."¹⁵

7. See STERN & WERMIEL, *supra* note 1, at 23; *Memorial: Roger Coursen Ward '44*, PRINCETON ALUMNI WKLY., Feb. 11, 2009, <https://paw.princeton.edu/issues/2009/02/11/sections/memorials/6849/index.xml>, archived at <http://perma.cc/A7RB-76MX>.

8. See STERN & WERMIEL, *supra* note 1, at 40–41. The law firm went through numerous name changes over the decades but was more contemporarily known as Pitney Hardin until it merged in 2007 creating Day Pitney. *About Day Pitney*, DAY PITNEY, <http://www.daypitney.com/about/> (last visited Nov. 1, 2014), archived at <http://perma.cc/TK88-T2CB>.

9. Letter from Paul Freund, Professor, Harvard Law School, to William J. Brennan Jr., Justice, U.S. Supreme Court (Oct. 2, 1956) (on file with the author).

10. STERN & WERMIEL, *supra* note 1, at 71–72, 98–99; *IU Mauer School of Law Inducts Four as Academy of Law Alumni Fellows*, INDIANA U. (Mar. 23, 2012), <http://newsinfo.iu.edu/news-archive/21678.html>, archived at <http://perma.cc/XKS8-LAL3>. Minton announced on September 7, 1956, that he planned to retire on October 15, 1956. See STERN & WERMIEL, *supra* note 1, at 71–72.

11. Justice Brennan and Freund were classmates in the Harvard Law School class of 1931, but they were not close friends. See STERN & WERMIEL, *supra* note 1, at 25; Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Joseph Weintraub, Justice, Supreme Court of New Jersey (Nov. 13, 1962) (on file with the author).

12. Vince Blasi, *On Law and Justice*, 35 U. CHI. L. REV. 388, 388 (1968) (book review); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul Freund, Professor, Harvard Law School (Oct. 19, 1956) (on file with the author).

13. Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul Freund, Professor, Harvard Law School (Oct. 19, 1956) (on file with the author).

14. *Id.*

15. *Id.*

Under the arrangement, Freund selected two clerk candidates and submitted the names to Justice Brennan, who accepted the recommendations virtually without question.¹⁶ Justice Brennan did add one important qualification before Freund made his first picks. In a letter to Freund on December 15, 1956, Justice Brennan noted that because of the volume of memos in pending and granted cases, his clerks must “know how to type.”¹⁷ For the next eight Court Terms—1957 through 1964—Freund submitted his two selections to Brennan.¹⁸ The Harvard grads went directly from law school to the Supreme Court and did not have an intervening federal circuit court clerkship, as would become the practice in later years.¹⁹ Not only were they all Harvard Law students, they were also all male.²⁰ That there were no women may not have been surprising during this period, since there had only been

16. *See, e.g.*, Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Jan. 8, 1959) (on file with the author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Nov. 10, 1959) (on file with the author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Dec. 8, 1960) (on file with the author).

17. Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Dec. 15, 1956) (on file with the author).

18. *See, e.g.*, Letter from Paul Freund, Professor, Harvard Law School, to William J. Brennan Jr., Justice, U.S. Supreme Court (Jan. 12, 1957) (on file with author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul Freund, Professor, Harvard Law School (Dec. 30, 1957) (on file with author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Jan. 8, 1959) (on file with author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul Freund, Professor, Harvard Law School (Dec. 14, 1959) (on file with author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Dec. 8, 1960) (on file with author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Dec. 11, 1961) (on file with author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul Freund, Professor, Harvard Law School (Dec. 26, 1962) (on file with author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Dec. 21, 1963) (on file with author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Oct. 13, 1964) (on file with author).

19. *See, e.g.*, Letter from Paul A. Freund, Professor, Harvard Law School, to William J. Brennan Jr., Justice, U.S. Supreme Court (Nov. 9, 1959) (on file with author); Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Maurice Rosenberg, Professor, Columbia Law School (Oct. 28, 1966) (on file with author); *see also, e.g.*, PEPPERS, *supra* note 2, at 31 (noting that a previous federal court clerkship is much more common now than it was fifty years ago).

20. *See* Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Joseph Weintraub, Justice, Supreme Court of New Jersey (Nov. 13, 1962) (on file with the author).

one woman law clerk at the Court some years earlier.²¹ Still, the maleness of the culture is inescapable in the correspondence. Freund talked about the “men” he was sending, and in a December 15, 1958, letter to Justice Brennan wrote, “You must know how much these opportunities mean to the men in law school.”²² In a January 14, 1957, letter accepting Freund’s first recommendations, Justice Brennan enclosed “letters . . . to each of the boys.”²³

It was not long before Justice Brennan began getting pressure from the deans of other law schools to consider their students. Eugene Rostow, the dean of Yale Law School, wrote Justice Brennan in June 1957 asking when Justice Brennan would like law clerk suggestions from Yale and what criteria should be considered.²⁴ A few months later, Rostow wrote again, asking whether the “men” he proposed to recommend should have a circuit court clerkship first.²⁵ Freund was in England for the academic year, and Justice Brennan wrote to complain that he was “being bombarded with letters from many schools suggesting interviews with nominees for clerkships next year.”²⁶ Justice Brennan then wrote back to Rostow, “You are not going to like me for this, but I have decided that I will continue to take advantage of Paul Freund’s generosity in assisting me in the selection of law clerks.”²⁷ Justice Brennan added that he knew there were other qualified applicants from other law schools but that “it is a great comfort to have the help of someone like Paul whose judgment for this purpose necessarily commands [his] full respect.”²⁸

21. The first woman was hired as a law clerk by Justice William O. Douglas in the 1944 Term. David J. Danelski, *Lucile Lomen: The First Woman to Clerk at the Supreme Court*, 23 J. SUP. CT. HIST. 43, 43, 46 (1999). Her name was Lucille Lomen. *Id.* The second woman, Margaret Corcoran, was not hired by Justice Hugo L. Black until the 1966 Term. PEPPERS, *supra* note 2, at 20.

22. Letter from Paul Freund, Professor, Harvard Law School, to William J. Brennan Jr., Justice, U.S. Supreme Court (Dec. 15, 1958) (on file with the author).

23. Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Jan. 14, 1957) (on file with the author).

24. Letter from Eugene V. Rostow, Dean, Yale Law School, to William J. Brennan Jr., Justice, U.S. Supreme Court (June 3, 1957) (on file with the author).

25. Letter from Eugene V. Rostow, Dean, Yale Law School, to William J. Brennan Jr., Justice, U.S. Supreme Court (Oct. 22, 1957) (on file with the author).

26. Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Oct. 24, 1957) (on file with the author).

27. Letter from William J. Brennan, Justice, U.S. Supreme Court, to Eugene V. Rostow, Dean, Yale Law School (Oct. 29, 1957) (on file with the author).

28. *Id.*

Freund continued to pick the law clerks until December 1963, for the Court's 1964 Term. But in 1963, Justice Brennan became somewhat disillusioned with his alma mater, where his Court decisions were sometimes not well-received and where Justice John M. Harlan, who had no connection to Harvard, was chosen to be a member of the university's visiting committee, seemingly passing over Justice Brennan.²⁹ In October 1964, Justice Brennan wrote Freund that he would only need one recommendation.³⁰ His close friend David Bazelon, chief judge of the U.S. Court of Appeals for the District of Columbia Circuit, had "a Yale boy [that] year" for whom he had a high regard, and "[had] been urging [Justice Brennan] to give him a chance."³¹ So for the first time since his initial year on the Court, when the Term began in the fall of 1965, Freund had selected Owen Fiss from Harvard, but Bazelon had contributed Peter Strauss from Yale.³²

The Harvard Law School hold on Justice Brennan's clerkship slots was over. During the next ten Court Terms, including the 1965 year in which Fiss and Strauss served, Justice Brennan had twenty-five law clerks, only four of whom came from Harvard Law School. In place of the Harvard clerkships, Justice Brennan began giving slots to specific schools. By October 1965, he had made commitments to fill the next three years with clerks from schools that included the University of Pennsylvania, Notre Dame, Stanford, Michigan, and Yale.³³ During the ten Terms from 1965 through 1974, Justice Brennan took five clerks from Yale; four from Harvard; two from each of Pennsylvania, New York University, and Berkeley; and one from each of Stanford, Virginia, Michigan, Chicago, Boston College, Notre Dame, and the University of

29. For a discussion of Justice Brennan's disillusionment, see STERN & WERMIEL, *supra* note 1, at 203–04.

30. Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Oct. 13, 1964) (on file with the author).

31. *Id.*; see also STERN & WERMIEL, *supra* note 1, at 97–98, 241.

32. See Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul Freund, Professor, Harvard Law School (Nov. 20, 1964) (on file with author); Letter from Paul A. Freund, Professor, Harvard Law School, to William J. Brennan Jr., Justice, U.S. Supreme Court (Oct. 13, 1964) (on file with author). Fiss would later become a professor at Yale Law School. Owen M. Fiss, YALE L. SCH., <http://www.law.yale.edu/faculty/OFiss.htm> (last visited Nov. 1, 2014), archived at <http://perma.cc/5MHZ-NZU9>. Strauss would be a professor at Columbia Law School. Peter L. Strauss, COLUMBIA L. SCH., http://www.law.columbia.edu/fac/Peter_Strauss (last visited Nov. 1, 2014), archived at <http://perma.cc/6Y6Z-A2EG>.

33. Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Maurice Rosenberg, Professor, Columbia Law School (Oct. 27, 1965) (on file with the author).

Detroit Law School.

It was at the end of this decade that Justice Brennan accepted his first woman law clerk, Marsha Berzon, a graduate of the University of California at Berkeley Law School and later a judge on the U.S. Court of Appeals for the Ninth Circuit.³⁴ Berzon was not the first woman applicant proposed to Justice Brennan. In 1970, his former law clerks Robert O'Neil and Stephen Barnett were both teaching at the law school at Berkeley when they suggested he consider a woman at the top of the class, Alison Grey.³⁵ Justice Brennan refused to consider a woman at the time, rejecting the idea out of hand.³⁶ When Barnett proposed the name of Berzon in 1973, Justice Brennan turned thumbs down again, but this time Barnett questioned Justice Brennan's judgment in a letter and prompted a reconsideration for Berzon.³⁷ Ironically, when Berzon served as Justice Brennan's first woman law clerk in the October 1974 Term, there were several other women clerking that year, two of whom were the first women clerks for other Justices, too.³⁸ By the time he retired, Justice Brennan had employed seven women law clerks.³⁹ It seems likely that he remained more comfortable with men as clerks, however, since the seven clerks he hired in his retirement years were all male. It is worth remembering that Justice Brennan went to law school, practiced law, and sat on the bench for most of his career in an environment occupied almost entirely by men.

If he was slow to hire women, Justice Brennan was even slower to hire African-Americans. The first African-American law clerk Justice Brennan hired was scheduled to start work on Monday, July 23, 1990,

34. See STERN & WERMIEL, *supra* note 1, at 399–401; PEPPERS, *supra* note 2, at 157 & 274 n.64.

35. Alison Grey, subsequently Alison Grey Anderson, would become a law professor at the University of California at Los Angeles Law School. PEPPERS, *supra* note 2, at 157. An account of her failed attempt to obtain a clerkship can be found in STERN & WERMIEL, *supra* note 1, at 386–89; see also PEPPERS, *supra* note 2, at 157.

36. See STERN & WERMIEL, *supra* note 1, at 386.

37. STERN & WERMIEL, *supra* note 1, at 399–401.

38. In the 1974 Term, Justice Thurgood Marshall hired Karen Hastie Williams, his second woman clerk. ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES: 100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 90 tbl.2.II (2006). Justice Lewis Powell hired Julia Penny Clark, and Justice Harry Blackmun hired Karen Nelson Moore, the first woman for both of those Justices. *Id.*

39. The seven were Marsha Berzon, Mary Mikva, Marie Deveney, Virginia Seitz, Lisa Heinzerling, Regina Maloney, and Nory Miller. See PEPPERS, *supra* note 2, at 220–21.

what would have been the start of his thirty-fifth Term.⁴⁰ But on Friday, July 20, 1990, he retired from active service after suffering the effects of a mild stroke.⁴¹ So Justice Brennan never had an African-American law clerk.

It was also during this period of 1965 through 1974 when Justice Brennan began selecting mostly clerks who had a previous clerkship, typically on a federal appeals court. Fiss clerked for Justice Thurgood Marshall when he was a judge on the U.S. Court of Appeals for the Second Circuit, and Strauss clerked for Bazelon.⁴² From the 1965 Term until his retirement at the end of the 1989 Term, almost all of Justice Brennan's law clerks had at least one previous judicial clerkship. The previous experience was provided clerking for about thirty different federal judges,⁴³ but the field was heavily dominated by Bazelon and his colleague on the U.S. Court of Appeals for the District of Columbia, Judge Skelly Wright.⁴⁴ The two men, between them, provided about one-fourth of Justice Brennan's clerks in the years in which most clerks had prior experience.⁴⁵ Justice Brennan came to rely heavily on Wright, Bazelon, and other lower court judges because he made a practice of not interviewing and, in many years, not even meeting the law clerks until they were already at work.⁴⁶ Once Freund stopped making the recommendations, deans of other law schools and former Brennan clerks teaching at different schools would send the names of candidates, and then Justice Brennan would solicit feedback from the lower court

40. STERN & WERMIEL, *supra* note 1, at 536–37 & 647 n.537. The clerk was Marcella David, who went on to become a law professor; she has been a professor or administrator at the University of Iowa Law School since 1995. *Marcella David*, U. IOWA C. L. <http://www.law.uiowa.edu/faculty/Marcella-david.php> (last visited Nov. 1, 2014), *archived at* <http://perma.cc/95JV-43FD>.

41. STERN & WERMIEL, *supra* note 1, at 536–38.

42. *Fiss*, *supra* note 32; Resume of Peter L. Strauss, Betts Professor of Law, Columbia Univ. Sch. of Law, *available at* <http://www.law.columbia.edu/null?exclusive=filemgr.download&id=612658>, *archived at* <http://perma.cc/B4WM-6PTE>.

43. It is interesting to note that Justice Brennan did not have law clerks from state supreme courts although he was, himself, a product of the New Jersey Supreme Court and despite having given a very influential speech about the importance of state constitutions. See William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490–91 (1977).

44. STERN & WERMIEL, *supra* note 1, at 245, 247.

45. See PEPPERS, *supra* note 2, at 33 tbl.2.5.

46. See STERN & WERMIEL, *supra* note 1, at 247; Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Theodore Voorhees, Dean, Catholic University of America (Oct. 10, 1975) (on file with author).

judges for whom the applicants clerked.⁴⁷

Although the pathways for clerkship selection changed over the years, Justice Brennan never departed from his practice of relying on others to recommend law clerks and continued throughout his tenure to hire them without meeting them.

III. INSIDE THE BRENNAN CHAMBERS

It is clear that the procedures followed in the Brennan chambers between the Justice and his law clerks changed over the course of his thirty-four-year tenure. It is impossible to document every change and when each occurred. This portion of the Essay will try to highlight some basic facets of the work done by the law clerks and will discuss some of the changes that took place over time.

A. *Handling the Certiorari Petitions*

Justice Brennan was well-known for reviewing the Court's petitions for certiorari himself.⁴⁸ He believed that he could look at a petition and very quickly determine whether it presented any issues of concern to him that would be worthy of the Court's time; he could do this much more efficiently than having his clerks read the petitions, he maintained.⁴⁹ It is not completely clear when he started this practice. In his letter to Freund in 1956 asking that his future clerks be able to type, he described asking the clerks for "detailed cert. memoranda."⁵⁰ At some point early in his tenure, however, Justice Brennan established the practice that his law clerks would review the petitions that accumulated during the Court's summer recess. The clerks would write memos on these petitions for Justice Brennan to review, and the petitions and memos would be compiled for Justice Brennan to review sometime after Labor Day.⁵¹ Most of those petitions would be handled by the Justices at their conference the week before the opening day of the Court Term on the first Monday in October.⁵² After Labor Day, however, Justice

47. See Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Theodore Voorhees, Dean, Catholic University of America (Oct. 10, 1975) (on file with author).

48. There are many accounts of Justice Brennan's handling of the petitions for certiorari. See, e.g., Peter L. Strauss, *Justice Brennan*, 65 ST. JOHN'S L. REV. 11, 12 (1991).

49. *Id.*

50. Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Dec. 15, 1956) (on file with the author).

51. Outline, *supra* note 3, at 4–5.

52. See *id.* at 5, 10.

Brennan would review the incoming petitions himself.⁵³ The petitions and responses and any other supporting briefs would be wheeled into Justice Brennan's office on a wooden library cart. He could often dispose of a case simply by looking at the "Question Presented" at the front of the petition.⁵⁴

The significance of this practice for Justice Brennan's law clerks is that they were not saddled throughout the Court Term, as the clerks of other Justices were, with writing memos on the petitions.⁵⁵ This was one of many things that made the Brennan clerkship desirable. The clerks had more free time to work on other things. This practice held true for Justice Brennan even as the Court's handling of petitions for certiorari changed around him. As the volume of petitions increased and new Justices came on board in the early 1970s, the Justices in about 1973 formed a sharing arrangement—the cert. pool—in which each petition was read once by a law clerk who wrote a summary memo that was shared with all of the Justices joining in the arrangement.⁵⁶ When the pool began to operate, several Justices did not participate but still had their own law clerks screen the petitions for them.⁵⁷

From at least the retirement of Justice Frankfurter in 1962 to Justice Brennan's retirement in 1990, Brennan was the only Justice who routinely reviewed the cert. petitions himself and did not assign the task to his clerks, except during the summer.⁵⁸ Justice Brennan's ability to handle the petitions impressed his law clerks. In a procedural manual for the operation of the chambers,⁵⁹ the clerks wrote to future clerks that when they presented the summer memos and petitions to Justice Brennan, "In typical speedy style, [Justice Brennan] will finish with the memos before you've even started on the next list."⁶⁰ But the manual

53. See STERN & WERMIEL, *supra* note 1, at 278; Outline, *supra* note 3, at 19.

54. See BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS: INSIDE THE SUPREME COURT* 273 (1979).

55. See WARD & WEIDEN, *supra* note 38, at 138 tbl.3.3, 142 tbl.3.4; Outline, *supra* note 3, at 19.

56. See WARD & WEIDEN, *supra* note 38, at 136–42; WOODWARD & ARMSTRONG, *supra* note 54, at 272–73.

57. See WARD & WEIDEN, *supra* note 38, at 126; WOODWARD & ARMSTRONG, *supra* note 54, at 272–73.

58. See PEPPERS, *supra* note 2, at 157; WOODWARD & ARMSTRONG, *supra* note 54, at 272–73; Outline, *supra* note 3, at 4, 19.

59. According to the manual, it was first prepared by the law clerks in the 1983 Term and then was regularly updated in subsequent years. Outline, *supra* note 3, at 1.

60. *Id.* at 5.

also urged the clerks to keep an eye out for weeks in which Justice Brennan seemed swamped with the volume of cases and might need help with the petitions. The clerks wrote that Justice Brennan “will never ask for help doing certs during the year. . . . [B]e sensitive to this and offer to take them off his hands for a week.”⁶¹

One possible downside was raised in the manual to the combination of Justice Brennan not participating in the pool and handling the certiorari petitions himself during the Term. The clerks wrote that “[they] (and WJB) were out of the loop on the cases that were likely to be granted.”⁶² The manual urged the clerks to stay in close touch with other chambers to be aware of and able to engage in discussion of cases that the Court may be considering granting review.⁶³

The manual outlines for the law clerks numerous other facets of the certiorari process in the Brennan chambers. Among the examples, the manual note, “[E]ven if a petition meets the usual criteria for certworthiness, WJB not infrequently wants to deny for defensive reasons. If the case is potentially a vehicle for retrogressive change in the law, you may recommend a vote to deny.”⁶⁴ The manual also instructs the Brennan law clerks on handling certain kinds of cases over the summer when Justice Brennan had a set position on the issue.⁶⁵ The manual suggests that the law clerks look through all capital cases, even during the Court Term when Justice Brennan was reviewing them.⁶⁶ “We realized that these cases required coordination between chambers and therefore volunteered to take on this extra task,” the clerks wrote.⁶⁷ The manual also notes that the clerks should use standard Justice Brennan dissents in obscenity and double jeopardy cases.⁶⁸ The manual also warns clerks to watch out for certiorari grants by conservative Justices in criminal cases and to avoid their own grants in criminal cases if there is a chance that “conservatives will use the case to set the clock

61. *Id.* at 20.

62. *Id.* at 19. WJB are the initials for Justice William Joseph Brennan. Inside the Court, much correspondence and many records refer to the Justices by their initials, so TM for Justice Thurgood Marshall, WOD for Justice William O. Douglas, SOC for Justice Sandra Day O’Connor, to cite a few examples. *See, e.g., id.* at 16.

63. *Id.* at 20.

64. *Id.* at 10.

65. *Id.* at 14–19.

66. *Id.* at 15–16.

67. *Id.* at 16.

68. *See id.* at 14, 18.

back.”⁶⁹

The clerks also had the responsibility, even during the Court Term, for drafting dissents from the Court’s denial of certiorari,⁷⁰ although Justice Brennan did not file huge numbers of these beyond his standard dissents in obscenity, death penalty, and double jeopardy cases.⁷¹ A big responsibility, once the Court allowed executions to resume after *Gregg v. Georgia*,⁷² was coordinating dissents in death penalty petitions and emergency applications for a stay of execution with the law clerks to Justice Marshall, who also objected in all capital cases.⁷³

B. Cases on the Merits

The manual for the Brennan chambers makes clear what was true for virtually his entire tenure on the Supreme Court: “Your principal task for the year will be to prepare and draft opinions for the argued cases.”⁷⁴ As former clerk Peter Strauss described Justice Brennan’s thinking, “[H]e could assess the certiorari petitions so much more quickly than we, and he certainly didn’t want to waste our time in preparing him for arguments he could assess himself; why didn’t we put our effort into the opinions he had asked us to help him draft?”⁷⁵ There were exceptions to the opinion-writing drafts by the law clerks. In his landmark First Amendment decision, *New York Times Co. v. Sullivan*,⁷⁶ Justice Brennan did the initial draft himself on a legal pad.⁷⁷ This happened in other cases as well.⁷⁸

For most of his early years on the Court, however, the pattern was well-established. The clerks worked on drafts of the opinions, and Justice Brennan did not expect them to prepare the often lengthy bench

69. *Id.* at 18–19.

70. *See id.* at 20.

71. *See, e.g., id.* at 14–16, 18–20.

72. 428 U.S. 153, 207 (1976). Justice Brennan dissented. *Id.* at 227 (Brennan, J., dissenting).

73. *See* Gerald F. Uelmen, *Justice Thurgood Marshall and the Death Penalty: A Former Criminal Defense Lawyer on the Supreme Court*, 26 ARIZ. ST. L.J. 403, 403 (1994); Outline, *supra* note 3, at 16–17.

74. Outline, *supra* note 3, at 25.

75. Strauss, *supra* note 48, at 12.

76. 376 U.S. 254 (1964).

77. LEE LEVINE & STEPHEN WERMIEL, *THE PROGENY: JUSTICE WILLIAM J. BRENNAN’S FIGHT TO PRESERVE THE LEGACY OF NEW YORK TIMES V. SULLIVAN* 18 (2014).

78. *See* STERN & WERMIEL, *supra* note 1, at 58.

memos summarizing cases that were about to be argued.⁷⁹ It appears from his letter to Freund about having the law clerks be able to type that he did ask the clerks to prepare bench memos when he first arrived at the Court, noting in the letter that the clerks needed to be able to type “comprehensive bench memoranda in argued cases.”⁸⁰ He soon abandoned the practice, however, and prepared for the arguments himself.

In later years, Justice Brennan still did not require bench memos. But his practice changed at least twice. At some point, and certainly by the 1980s, he began going over the cases that were to be argued by meeting with his law clerks and talking them over at length.⁸¹ Typically, one law clerk would take the lead on the case, but all of them would discuss each of the upcoming arguments with Justice Brennan in his office in the week or two before an argument session.⁸² They would wrestle with different questions in the cases, consider strategy if Justice Brennan had a particular interest in the case, and argue about opposing views, including trying at times to anticipate the views of other Justices.⁸³ Although the clerks did not have to write anything for these meetings, they needed to be exceedingly well-prepared to go over the cases. In his final years on the Court, he did ask the clerks to prepare bench memos, according to the manual for Brennan office procedures,⁸⁴ but he continued to read the briefs as well.

Also in this later period, Justice Brennan would meet a second time with the clerks after the oral arguments to go over the case yet again and determine finally how he would vote.⁸⁵ The manual warns the clerks that while they may be caught up in the details and nuances of the arguments, Justice Brennan “may seem preoccupied with the bottom line with respect to the judgment—that is whether to reverse, affirm,

79. See Outline, *supra* note 3, at 25–26.

80. Letter from William J. Brennan Jr., Justice, U.S. Supreme Court, to Paul A. Freund, Professor, Harvard Law School (Dec. 15, 1956) (on file with the author).

81. Outline, *supra* note 3, at 27.

82. *Id.* at 25–27. The Court hears oral arguments in seven two-week periods in October through April and has breaks in between these argument sessions. See, e.g., *Supreme Court Calendar: October Term 2014*, SUP. CT. U.S., http://www.supremecourt.gov/oral_arguments/2014TermCourtCalendar.pdf, archived at <http://perma.cc/TAJ7-AL7T>; *Supreme Court Calendar: October Term 2013*, SUP. CT. U.S., http://www.supremecourt.gov/oral_arguments/2013TermCourtCalendar.pdf, archived at <http://perma.cc/76R5-6WK2>.

83. See Outline, *supra* note 3, at 25–27.

84. *Id.* at 26–27.

85. *Id.* at 28.

[etc.] Law clerks often don't think in such practical terms, so make sure that you give WJB the correct recommendation for disposition of the judgment."⁸⁶

Another change involved preparing Justice Brennan for the Court's conferences after the oral arguments. Typically the Justices meet twice a week in a closed-door conference at which only the nine Justices are present and no staff is allowed.⁸⁷ At these sessions, they decide the cases that have been argued.⁸⁸ As he grew older and found his once legendary memory for details fading somewhat, Justice Brennan began to have his law clerks prepare statements for him to read at the Court's conference.⁸⁹ The practice may have initially been intended to provide him a document to remind him as he prepared for the conference, but by the mid-1980s, if not earlier, he was reading verbatim the statements of his views at the conferences.

In the opinion drafting, Strauss described how, in the 1960s, Justice Brennan reviewed the work of the law clerks "with care, of course—a cartload of books went into chambers along with the draft, and much changed opinions often emerged."⁹⁰ In later years, Justice Brennan's editing grew lighter and lighter until late in his tenure when he did little editing at all, making some of the law clerks a bit unsettled.⁹¹ But throughout his tenure, the law clerks asserted universally that when they drafted opinions, it was always only after receiving clear marching orders from Justice Brennan about the focus, breadth, and nature of the decision.⁹² Indeed, many clerks considered it one of the pleasures of a Brennan clerkship to be able to sit with the Justice when he returned from conference and debrief him on what took place behind the closed doors.

Did the Brennan law clerks exert too much influence because they were drafting the opinions? Or did the Justice keep his finger on the pulse of the law by giving clear direction to his assistants before they started writing and then by editing after they finished? This debate, an

86. *Id.*

87. See WOODWARD & ARMSTRONG, *supra* note 54, at 2–3; Outline, *supra* note 3, at 29.

88. See WOODWARD & ARMSTRONG, *supra* note 54, at 2–3; Outline, *supra* note 3, at 29.

89. Outline, *supra* note 3, at 28–29.

90. Strauss, *supra* note 48, at 12–13.

91. STERN & WERMIEL, *supra* note 1, at 525.

92. See *id.*

ongoing dialogue about the role of the law clerks, is an important one but is not the focal point of this Essay. Certainly, it is indisputable that the Brennan law clerks exerted a substantial amount of influence about how the law developed by being the drafters of his opinions, both for the Court and in dissent. It is also beyond dispute that the influence of the law clerks increased as Justice Brennan got older and edited less actively. But this Essay will leave to others the debate over whether the influence was too much.

Justice Brennan always considered his law clerks to be his strategic partners in the Court in a number of important ways. Throughout his tenure, Justice Brennan took a pragmatic approach to the job of Justice, believing that the goal was to try to work with his colleagues to get a majority for an opinion, preferably one that reflected his view. This approach led to the famous story of how Justice Brennan would meet with his clerks for the first time and taunt them by asking what the most important principle of constitutional law was. When they seemed stumped, he would hold up his hand with five fingers and say, “It takes five votes to do anything around here. That is the most important principle of constitutional law.”⁹³ Clerks for Justice Brennan got to experience this side of their Justice and the Court in different ways. It was Justice Brennan’s longstanding practice to encourage his clerks to interact with those of other Justices and to serve as his emissaries. When Justice Brennan found himself with a narrow five-four or six-three decision to write, where it was essential in his view to ascertain the common ground that would hold that majority together, he would often dispatch his law clerks to chambers of the swing or deciding Justice to determine what that colleague’s concerns were. The law clerks gained valuable lessons in investigation and negotiation, both important skills for lawyers. They would determine what concerns another Justice had about a case and then, whenever possible, steer Justice Brennan’s opinion in that direction to retain a majority.⁹⁴ This was not always an easy task, but it was a talent for which the Brennan law clerks became well known over the years, and one that was not part of the experience of many other clerks to other Justices.

The Brennan office manual also suggests that by the 1980s, the Brennan law clerks joined him in strategic thinking about opinion

93. *See id.* at 196.

94. *See* Outline, *supra* note 3, at 28.

assignments.⁹⁵ Under the Court's procedures, the Chief Justice assigns who will write the majority opinion when he is in the majority, but if the Chief Justice is in dissent, then the most senior Justice in the majority makes the assignment.⁹⁶ Beginning in 1976, after Justice William O. Douglas retired, Brennan was the most senior Justice until he retired in 1990. As the leader of a liberal wing on a Court that grew increasingly conservative during that period, he often found himself in dissent, but when he was in the majority in a five-four case, the opinion assignment would often be his. "WJB relies a great deal on clerks to make the 'correct' assignments," the manual written by the law clerks asserts.⁹⁷ The manual described different factors the clerks should consider, such as sharing good opinion assignments with the other liberal Justices and combating Justice Brennan's tendency to want to keep the best opinions for himself.⁹⁸

C. *The Term Histories*

A final and unique part of the job for Brennan law clerks was compiling what he called his "Term Histories." Beginning in 1960, Justice Brennan had the law clerks write narrative accounts at the end of the Term of the most important cases in which he was involved during the year.⁹⁹ The earliest histories are relatively short, but over time, they grew to more than a hundred pages in some years. They reflect a detailed description of the case, from who voted for and against granting the petition for certiorari, to what happened at conference, to how the opinion took shape through different drafts and input from other Justices. When they were completed, the histories were printed like little booklets. One copy was placed in the bottom drawer of Brennan's desk, where he could easily refer to them, and a second copy was placed in the safe in Brennan's chambers. As Justice Brennan described it, "You see the way we work this is the clerks prepare these things and then they submit them to me. Then I edit them and usually make quite a few changes."¹⁰⁰ Justice Brennan would use the histories often to refresh his memory of what happened in an earlier case; this might help

95. *Id.* at 30.

96. *See* WOODWARD & ARMSTRONG, *supra* note 54, at 3.

97. Outline, *supra* note 3, at 30.

98. *Id.*

99. *Id.* at 42.

100. Interview with William J. Brennan Jr., Justice, U.S. Supreme Court (Mar. 13, 1987) (transcript on file with the author).

him with strategy in planning a subsequent decision or in reviewing arguments with the law clerks in a later case.¹⁰¹

The Brennan clerks also wrote many speeches for him. In the 1960s, he maintained a very active speaking schedule at civic organizations, bar associations, and colleges and law schools.¹⁰² While he withdrew from visibility in the 1970s, he resumed his heavy schedule of speaking in 1983,¹⁰³ and the clerks churned out many drafts of speeches in this era.

In all of these respects—opinion-drafting, negotiating with other chambers, and preparing the Term Histories—Brennan law clerks had a unique experience in which they played a major role in shaping many of the important legal developments for more than three decades.

IV. THE PERSONAL SIDE

The final aspect of the experience for law clerks was the personal side of Justice Brennan. His law clerks are near unanimous in praising his warm and unpretentious nature. A theme that comes through in numerous sources is how Justice Brennan did not want to impose on the time of the law clerks and how unassuming he was in his dealings with them.¹⁰⁴ This surprised many of the clerks and surprises others when they read about this facet of the man. By all rights, it was his time that should have been protected as the Justice with the heavy workload and weighty family obligations.¹⁰⁵ But as clerks noted in different written works, Justice Brennan did not like to ask the clerks to take on extra work and worried about their workloads.¹⁰⁶

101. The existence of the histories was little known until 1979 with publication of *The Brethren*, in which it was apparent that the authors had obtained a copy of Brennan's Term History of the case, *U.S. v. Nixon*, 418 U.S. 683 (1974), involving President Nixon's claim of executive privilege from having to turn over secret White House tape recordings to a federal prosecutor. See WOODWARD & ARMSTRONG, *supra* note 54.

102. See STERN & WERMIEL, *supra* note 1, at 204, 293, 298.

103. He withdrew from activities beyond the Court itself when his first wife, Marjorie, was diagnosed with cancer in 1969. STERN & WERMIEL, *supra* note 1, at 488. In roughly the same period, Justice Abe Fortas resigned from the Court after public scrutiny of his activities and financial ties. *Id.* at 316. The need to spend time caring for his wife and the taint of the Fortas scandal prompted Brennan to make very few public appearances outside the Court in the 1970s. See *id.* at 319–20, 488. After Marjorie died in 1982, Brennan married his secretary, Mary Fowler in 1983 and resumed a very active schedule of speeches around the country and abroad. *Id.* at 482, 488.

104. See, e.g., Outline, *supra* note 3, at 20, 41, 46–47.

105. His family obligations are discussed *supra*, note 103.

106. This theme is clear in both the Peter Strauss article, *supra* note 48, and the Outline, *supra* note 3.

A hallmark of the Brennan clerkship was the daily hour-long morning coffee session he held with the clerks.¹⁰⁷ At about 9 a.m. every morning, the clerks would gather in front of his desk, bring him a cup of coffee, and sit and discuss current events, issues facing the Court, history, sports, or anything else of interest. In these sessions, they came to feel like family gathered at the breakfast table, adding an extraordinary element of warmth and personal touch to the clerkship. Justice Brennan was not the only Justice to meet regularly with his clerks for informal discussion; Justice Harry Blackmun could be seen many mornings during his tenure having breakfast with his clerks in the Supreme Court cafeteria.¹⁰⁸

Still the experience was a unique enhancement for the Brennan clerks, one that clerks in many other chambers did not get to share. Justice Brennan had a prodigious memory for most of his tenure on the Court. The morning coffees were a chance for him to learn details of the lives of his clerks, details that he would never forget when he later met a spouse, a child, or a parent of one of his clerks.¹⁰⁹ The clerks were always touched by his uncanny ability to reach into his memory and remember something about the parents when they came to visit the Court.

Justice Brennan was so reluctant to impose on others, including his clerks, that, in his final Term, the clerks noted in the manual for the chambers that they discovered that Justice Brennan liked his morning coffee with cream and sugar or sweetener. “For nearly 34 years,” they wrote, “he has been drinking weak black (actually light brown) coffee because his clerks thought he liked it that way.”¹¹⁰ Of course the point is not lost that perhaps he was being accommodating to the clerks who wrote the manual by accepting cream and sugar and had really preferred it black, as per the preceding years.¹¹¹

A high point for Brennan law clerks, as for those of many other Justices, was the periodic clerk reunions. Justice Brennan became legendary for reviewing each Court Term and recalling something about the clerks and the cases they worked on, year-by-year. It is impossible to know for sure how much of those much-anticipated orations were

107. See Outline, *supra* note 3, at 41.

108. WOODWARD & ARMSTRONG, *supra* note 54, at 181.

109. See STERN & WERMIEL, *supra* note 1, at 247.

110. Outline, *supra* note 3, at 41.

111. *Id.* at 41–42.

from Justice Brennan's memory and how much was written. And even when the reunion talks were written, handwritten drafts in the Brennan papers suggest that they may have been written from Justice Brennan's memory.¹¹²

The reunions stood out for the clerks as a point of unity, a time that resembled a large extended family coming together. So it came as something of a shock to Justice Brennan and to others in attendance on October 20, 1979, at the International Club in Washington, when Justice Brennan's candid, and seemingly confidential, discussion that he was thinking of retiring yielded a front-page story in *The Washington Post* a couple of days later.¹¹³ The leak from the reunion caused dismay and reflected an unusual breach of the loyalty that Justice Brennan so prized. This leak came at roughly the same time that it became apparent that one or more clerks had shared portions of the Term Histories with the authors of *The Brethren*.¹¹⁴ Together, the leak from the reunion and the leak of at least one Term History constituted the low point in Justice Brennan's relations with his law clerks.

V. CONCLUSION

Despite the leaks in 1979, Justice Brennan never really stopped trusting fully in his law clerks. Undoubtedly, the sense of belonging to a family may have shifted during his tenure from the early feel of a father and his boys to a later image of a grandfather and his grandchildren. It is clear, though, that whatever the metaphor for the strong bond between Justice Brennan and his law clerks, those law clerks—at the service of their Justice—played an important role not only in the history of the Supreme Court but in the development of American law.

112. Justice Brennan's narrative for the 1979 clerk's reunion began with his own handwritten draft on a legal pad (copy on file with the author).

113. For a full account of this episode, see STERN & WERMIEL, *supra* note 1, at 456–58.

114. This incident is discussed fully *supra* note 101.