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SUPREME COURT CLERKS AS JUDICIAL ACTORS AND AS SOURCES

SCOTT ARMSTRONG*

The Brethren grew out of earlier work which Bob Woodward and I had done in exposing the events which became known as Watergate.¹ As a newspaper reporter for *The Washington Post*, Bob had covered (indeed, had driven) the evolving story of the burglary and its cover-up.² I had witnessed the unraveling of the cover-up as an investigator for the Senate Watergate committee,³ where I had the good fortune to participate in the discovery of the presidential taping system, an event that helped resolve the constitutional confrontation.⁴ We worked

* This Article is based on remarks delivered on April 12, 2014 at Marquette University Law School's conference *Judicial Assistants or Junior Judges: The Hiring, Utilization, and Influence of Law Clerks* as a participant in a panel with Tony Mauro of *The National Law Journal* and Stephen Wermiel of the American University Washington College of Law and author of *Justice Brennan: Liberal Champion* (with Seth Stern). The views expressed are mine alone. The majority of my quotations from and citations to court documents are from three sources: materials we collected which appear in the text of *The Brethren*, the documents available online in the Lewis Powell Jr. Papers at Washington & Lee University, and the documents online at *The Burger Court Opinion-Writing Database*, many of which appear only in partial form. Neither I nor the editors of *Marquette Law Review* have had the opportunity to review documents from the personal papers of the Justices (housed in collections at the Library of Congress and elsewhere) or to confirm the accuracy of the location of those documents. See MANUSCRIPT DIV., LIBRARY OF CONG., HARRY A. BLACKMUN PAPERS: A FINDING AID TO THE COLLECTION IN THE LIBRARY OF CONGRESS (rev. ed. 2010); MANUSCRIPT DIV., LIBRARY OF CONG., THURGOOD MARSHALL PAPERS: A FINDING AID TO THE COLLECTION IN THE LIBRARY OF CONGRESS (rev. ed. 2010); WILLIAM J. BRENNAN PAPERS: A FINDING AID TO THE COLLECTION IN THE LIBRARY OF CONGRESS (rev. ed. 2010); MANUSCRIPT DIV., LIBRARY OF CONG., WILLIAM O. DOUGLAS PAPERS: A FINDING AID TO THE COLLECTION IN THE LIBRARY OF CONGRESS (rev. ed. 2014); WASH. & LEE UNIV., A GUIDE TO THE LEWIS F. POWELL JR. PAPERS, 1921–1998 (2002), <http://ead.lib.virginia.edu/vivaxtf/view?docId=wl-law/vilxwl00013.xml>. Citations to these documents consist of the name of the Justice whose papers contain the document, followed by the box and folder number.

1. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (1979).

2. Woodward worked with fellow *Washington Post* reporter Carl Bernstein.

3. The Senate Select Committee on Presidential Campaign Activities was chaired by Senator Sam Ervin and directed by Chief Counsel Sam Dash. I was among the first ten members of the majority (Democratic) staff.

4. For a detailed explanation of how the tapes were discovered, see Scott Armstrong, *Friday the Thirteenth*, 75 J. AM. HIST. 1234 (1989).

together on *The Final Days*, which described President Richard Nixon's last year in office.⁵ Our exposure to Watergate made us intimately familiar with the inner workings of the Presidency and the Congress. We knew that those two branches of government operated differently from any classic civics textbook formulation. In fact, the details of Watergate represented a stark revisionist tale of how government works.

The Final Days included our reconstruction of the Supreme Court's handling of the Watergate tapes case, one of the most difficult constitutional entanglements it had ever faced. This reporting on the Court convinced us that the public knew little of the Court's internal processes. As the pinnacle of the judiciary, the Supreme Court was the least understood (or perhaps the most misunderstood) of the three branches of the federal government. While the Court was the most secretive and protective of its internal deliberations, it was possible for us as reporters to gain the confidence of at least some of the Justices and their clerks in order to document and explain how the Court actually functioned behind closed doors. The Court's internal deliberations were principled attempts to find working resolutions to the nation's most complicated and irresolvable issues, while at the same time they were often highly charged battles of political and personal will.⁶

As we began exploratory contacts with Justices and their clerks to set up confidential interviews,⁷ we recognized that we would not be able to interview them about cases currently before the Court. Since cases decided and sent back to lower courts for further action might return to the Court, we needed to establish a temporal buffer to assure our potential sources that we had no intention of reporting on pending matters. We wanted to cover a period that would allow us to track the

5. BOB WOODWARD & CARL BERNSTEIN, *THE FINAL DAYS* (1976).

6. Neither of us had an interest in, much less a stake in, any highfalutin concepts such as "legal realism" or "sociological jurisprudence." We merely wanted to document the unvarnished details of what happened—what was said and done—from as many vantage points as possible in the greatest possible detail. When we spoke with the Justices, we were focused on what they thought and felt about the cases and how they dealt with each other. We were only interested in what the clerks thought or said in so far as it documented what occurred within the chambers or between the nine Justices. A harsh critique of our methods is presented in George Anastaplo, *Legal Realism, the New Journalism, and The Brethren*, 1983 DUKE L.J. 1045.

7. All interviews were conducted "on background"; that is they were on the record—we could use the information—but only upon our assurance that the identity of the source would remain confidential. With this guarantee, those to whom we talked were willing to give us information we would never otherwise have been able to obtain.

evolution of the Court's approaches to the most compelling contemporary issues of the day: abortion rights and privacy; busing and affirmative action; capital punishment and due process for the accused; protections for speech and the press and limits on pornography. We decided to go back nine years to the 1969 nomination and confirmation of Warren Burger as Chief Justice, a logical starting point as the Court's membership shifted from the liberal majority of the Warren Court to a more conservative orientation with the addition of four appointments by Richard Nixon: Chief Justice Burger and Justices Harry Blackmun, Lewis Powell, and William Rehnquist. Because we began our reporting in the summer of 1977, we chose to follow the Court from the 1969 Term through the 1975 Term, which ended in June 1976, seven full Terms of the Court.⁸

In a closed institution where decisions and processes were spread across nine chambers, we realized that, regardless of how cooperative the Justices might be, they were less likely to recall vividly and with precision what had happened in a particular case among the thousands of cases they had handled in their Court careers. No one Justice could give us the hundreds of hours necessary to reconstruct what had happened across the seven Terms in each of nine chambers. We were concerned that we could never convince Justices to actually pull out their files and go over decisions in minute detail. Experience in dealing with large institutions had taught us that our best bet was to identify the clerk in each chambers who had worked on each key case and to use the clerk's recollection to develop detailed year-by-year chronologies to guide our reconstruction of events.

As Bob and I interviewed clerks, we prepared memos on carbonless six-ply paper.⁹ Our research assistant Ben Weiser cut and pasted the sections of the interview memos dealing with individual cases into case chronologies and sorted the details of each Justice's political and

8. In order to explain how Warren Burger replaced Earl Warren as Chief Justice, we began with a brief account of the failed effort of President Lyndon Johnson to appoint his close friend Abe Fortas as Chief Justice and the ensuing controversy that resulted in a Senate filibuster and Johnson's withdrawal of the nomination. This left the appointment of a Chief Justice to incoming President Richard Nixon. Shortly after Chief Justice Burger's confirmation, Justice Fortas resigned from the Court under threat of impeachment and was replaced by Justice Harry Blackmun. The illnesses and resignations of Justices Hugo Black and John Harlan in 1972 and the resignation of William O. Douglas in 1975 meant that, for the 1969–1975 Terms, we had twelve Justices to cover.

9. As I recall, these interview memos were usually between ten and twenty single spaced pages in length. It would have been far easier, had computer technology existed at the time, to prepare these digitally.

personal views, as well as the non-case specific interactions among the Brethren, into ever-expanding Justice profiles. Our interviews with the Justices who were willing to see us were similarly sorted into case specific references and general reflections on their background, tenure and interactions with their colleagues.

Our colleague Al Kamen, who had worked with us on *The Final Days* and was a better writer than either Bob or I, focused substantively on the context of each case, pulling the briefs and isolating the oral arguments which revealed the posture in which the case came up from the lower courts. Utilizing his enormous insight and patience, Al became both the principal editor and the arbiter of our disputes, particularly those over focus and emphasis. Al was an equal partner in the writing of the book.¹⁰

The master interview files became the backbone of ever more detailed and nuanced questions as we covered the same ground with additional clerks and went back again and again to talk to the clerks most centrally involved in each case. In this manner, we were able to trace how each Justice's views had developed, solidified, or changed at each state of a particular case: the granting of cert; oral argument; the preparation for conference; the assignment of the majority author; the drafting of the opinions; the circulation of opinion drafts, dissents, and concurrences; the collegial process of accommodations to the final majority and dissenting opinions. We had the advantage of starting with the final opinions published by the Court, but we soon saw that the true story of the Court's work was in the melding of views, the galvanizing of seemingly conflicting approaches, and the building interpersonal relationships that reflected each Justice's manner of persuading or otherwise influencing his colleagues.

By the time we had finished our first draft, eighteen months into the process, we had spoken with most of the clerks who served during the seven Terms.¹¹ Of the more than two hundred potential clerks we

10. Alice Mayhew, our editor at Simon & Schuster, was an important voice in focusing us on what the public most needed to understand about the Court. The enormous task of cutting down what could have been a 3,000 page tome fell to Milt Benjamin, a colleague at the *Post* who cleverly assisted us in honing to the most interesting narrative thread. Tom Farber, my longtime friend and a gifted writer, immeasurably improved the clarity of our prose.

11. Roughly speaking, each chambers had an average of three clerks per Term. In the first two Terms we covered, Justices Douglas and Black had only two clerks. In the last two years, each Justice was authorized to have four clerks, although few took advantage of it. The departure of Justices Black, Harlan, and Douglas in the middle of Terms, after clerks had been hired, meant that those clerks were absorbed into other chambers, raising the average

identified,¹² fewer than three dozen couldn't be located or wouldn't cooperate in any way. Of the remaining one hundred seventy plus clerks, I believe that roughly one hundred forty clerks cooperated with us in describing details of their own experiences at the Court. Of those, about seventy became what I would call "intimate sources," describing in great detail the major cases on which they worked. Typically, across each of the seven Terms, roughly twenty helped, of which ten or so were extraordinarily giving of their time and understanding. Some sat for "all day" or "all night" interviews.¹³ I do not recall a chambers in which at least one clerk for each Term did not cooperate.

I recall one interview that began at noon on a Saturday and lasted until 4 a.m. Sunday morning, when an exhausted clerk helped me carry to my car every piece of paper that had circulated among chambers not only during the clerk's Term but also during the prior Term. That treasure trove alone provided us with twelve legal file drawers of material. In some chambers, all the Justice's draft opinions and concurrences, whether eventually published or not, were bound and privately printed for the exclusive use of the former clerks, an invaluable resource for detecting the interplay between Justices and the evolution of final opinions, often where one Justice accepted language from a "circulated" draft by another Justice in order to secure that Justice's joining the majority (or dissenting) opinion.

As we collected thousands of pages of materials, we accumulated eight file drawers filled with unique documents from the Justices chambers, most of it from individual clerks.¹⁴ We winnowed this down to summaries and drafts with identifying materials removed, which we discreetly took back to other clerks to refresh their recollections. The

slightly above three per chambers per year.

12. In addition to the regular clerks in each of the nine chambers across seven Terms, we also interviewed clerks who had served in earlier Terms, particularly those who were involved in the screening of clerks for particular Justices. Thus, our target group was roughly two hundred clerks.

13. One fortunate feature of our interviewing schedule was the large number of clerks who had settled outside of Washington. Out-of-town interviews were often the most intense and productive. Once we had traveled hundreds or even thousands of miles to visit a clerk, we were shown great hospitality. On the other hand, the convenience of interviewing D.C. based clerks meant we could return again and again as the story came together.

14. This estimate is based on my own storage measurements. Bob and I each had a full complement of files. However, I recognize on writing this that we each had many boxes of additional documentation. I think it is safe to say that if one were to include lower court opinions, briefs, and background materials, we accumulated over 600,000 pages of materials.

result was as deeply documented a historical project as any I have known.¹⁵

Our commitment to protect our sources persuaded us that specific citation of particular documents, which might differ in various drafts, could lead to the identification of the chambers from which the document came. This, in turn, by process of elimination would point toward the clerk in that chambers who worked on that particular case. We took this commitment to an extreme, rarely describing the documentary authority we had for particular details for fear of letting down our sources.¹⁶ In retrospect, I regret that we were unable to devise a manner to cite the details in the hundreds of specific drafts and private papers we had.¹⁷ While such a system would have made the book more credible from its date of publication, it could have potentially exposed our sources and shaken their confidence in our discretion.¹⁸ As we wrote the book, we narrowed our focus to concentrate on the cases that illustrated the laborious decision making processes of the Justices and thus to gradually remove the clerks from the story except as the bit players they generally were. Our test of that standard was to some extent the reactions of the cooperating Justices themselves. If something in a single clerk's account could not be independently documented, we left it out.

The most valuable documentary materials to which we had (sporadic) access were the Brennan chambers' histories of key cases. Compiled by the clerk working on a particular case for Justice Brennan, the histories catalogued Justice Brennan's view of the evolution of the Court's thinking from the conference after oral argument to the circulation of the final opinions and dissents. Justice Brennan's clerks saw the circulations among the Justices as the draft opinions and

15. As the founder and director of the National Security Archive, a repository of classified and declassified government documents, I can say this with some authority. In addition, in nearly five decades as a Watergate, *Washington Post*, and independent investigator, I have been involved in some of the most extensive documentation projects involving government papers.

16. One exception was our description of Justice Byron White's own typewritten draft of his views on the death penalty where we describe precisely what "he typed on his ancient manual typewriter, with its several missing keys." See WOODWARD & ARMSTRONG, *supra* note 1, at 217. Justice White had shared the draft with all of his clerks, and one or more of them has shared the language outside his chambers.

17. Not surprisingly, we had cooperation from others besides Justices and clerks who were privy to Court drafts and inside materials. Since this is a sufficiently rarified cast of potential characters, I don't feel comfortable saying more.

18. This non-trivial issue is still a matter of some disagreement since it is not clear to me that even on a source's death are we free to disclose his or her identity.

dissents came into his chambers. But they had the advantage of another detailed source of information. Justice Brennan regularly debriefed them on the events at conference. And Justice Brennan, the most natural politician among the Brethren, often visited with other Justices on their thinking and carefully tracked the interpersonal dealings among the Justices.

The resulting tone of these histories, while not uniform, was more a political history of each case than a detailed explication of the evolution of each Justice's thinking. The tradition of the case history process reinforced a discipline in which Brennan clerks understood the accumulation of details and developments in other chambers to be relevant to this "extra duty." The rigorous curiosity of Brennan clerks provided a baseline of insight as they probed the highly educated and conscientious population of other clerks. Despite speculation that the book was largely based on the Brennan case histories, it was not. No one Brennan clerk provided us with a Term's worth of case histories. While we did not have physical access to the histories for most of the cases we singled out for attention, once we were aware of the existence of the histories, we found that Brennan clerks were the most likely to have these resources to refresh their recollections with details of what happened in other chambers. This in turn opened the doors to clerks in the other chambers who wanted to correct, reinterpret, or supplement what we had heard.

Clerks from other chambers were also often the benefactors of detailed and candid debriefs from their Justices, particularly clerks serving Justices Harlan, Stewart, and Powell and eventually Blackmun. In cases of special import, Justices White, Marshall, Rehnquist, Stevens, and, on occasion, even the Chief Justice provided their clerks with critically important details about their own appreciation of the dynamic within the Court. Justice Douglas, a study in arrogance and brusqueness, was the most taciturn with his clerks. But because he tended to circulate a constant drumbeat of notes and drafts to other chambers to which his clerks were privy, they too developed a special insight.¹⁹ As a result, we could construct a matrix of the Justices' thinking and personal exchanges for most cases. In instances where we discovered a nuance which was particularly closely held, we were able to

19. As Justice Douglas's intellectual capacity diminished in his later years on the court, this drumbeat slowed somewhat. But it also gave his clerks an uncommon amount of time to kibitz with other chambers.

go back to the most cooperative and informed clerks to confirm and clarify details.

The cases that make their way through the federal and state judicial systems to the Court are often the hard cases surrounding difficult issues that the other institutions of our society cannot resolve. To some degree, the Justices use their clerks to sift through the cases that come to them for cert looking for ones that will best allow a resolution of an issue on grounds which best frame what they think are the underlying legal principals. In other instances, a case may sound significantly different after briefing and oral argument or after other legal developments than it did when cert was granted. This may suggest to a majority of the Court that the case should be decided on narrower, less legally consequential grounds, thus providing the other institutions of society additional time and opportunity to get a better grip on a tangible approach to the legal issues presented. The melding of these contextual forces often gives the Court's final decisions a certain opaque, almost Delphic quality. Whatever the majority's guidance may be, whether clear or opaque, may be made more obscure by concurrences designed to qualify or limit the impact of the decision. Add to this *mélange* a proliferation of rigorous dissents, sometimes multiple dissents in the same case on different grounds, and one can understand the difficulty facing the lower courts, the Executive and Legislative Branches of government, the bar, and, most profoundly, those commentators and reporters who try to translate the import of the cases for the general public.

Virtually every clerk with whom we spoke felt that the Court's work was regularly, seriously misunderstood and sometimes deliberately misinterpreted. Many clerks maintained that the Court had no obligation to provide more guidance than it did in individual cases. But most clerks wanted the Court's processes and dynamics to be better understood. Despite the inherent risks in discussing their tenure as clerks, many found that the need to explain the Court warranted the risk.²⁰

Both the Justices and clerks who cooperated wanted us to appreciate the difficulty of formulating interpretations of the Constitution and of statutory framework sufficient to reconcile the various federal and state courts' approach to the most difficult issues of the times, issues which by

20. While we guaranteed the clerks and the Justices anonymity from public exposure and from being revealed to their colleagues, there is always inherent risk when a source undertakes to challenge an institutional vow of silence.

and large continue to fester.²¹ Indeed, this was the uniform common purpose of the Justices who spoke with us. I believe this desire to have the public understand the challenges they faced was the principal reason why none of the Justices, other than Chief Justice Warren Burger, discouraged their clerks from cooperating with us.²² And this was the reason why several Justices, across ideological lines, tacitly or explicitly encouraged their clerks to talk.²³

Our genuine confusion over the anomalies within the decision-making process and our intense desire to better understand the Court became our biggest assets. Our effort to “get it right” was the reason why so many clerks and the Justices expended so much effort to help us. Every difference of opinion among our sources allowed us to solicit more information to complete the picture.

Generally speaking, the clerks we interviewed were not a shy group. They were confident, competent, and, by and large, articulate. I suspect clerks today share this profile. Yet having heard others at this conference characterize contemporary clerks of the last decade, I am struck with how different the clerks of the late '60s and early '70s were from those of today. First of all, they were the product of the social and political upheaval of the time. They virtually all knew both draft dodgers and those who served in Vietnam. While they were not the boldest protestors of their generation, they all had informed views on the war in Vietnam. They had either participated and marched in civil rights protests against racism or wished they had. They knew about

21. Contrast this with the desire of a bloc on today's Court to declare certain issues, such as the need for affirmative action, to be resolved and no longer warranting the same degrees of attention and scrutiny.

22. Notably, in his first Term as Chief Justice, Burger had issued a memo stating that [t]he confidentiality is not limited to the minimum and obvious aspect of preserving the security of all information *within* the Court. Equally important is the private nature of everything that transpires in the Chambers of the Justice, including what he says, what he thinks, whom he sees and what his thinking may be on a particular issue or case.

WOODARD & ARMSTRONG, *supra* note 1, at 34.

23. I suspect that critics of the foibles of Chief Justice Burger were more willing to be cooperative than his supporters. But on most internal housekeeping matters, including his assignment practices, the Chief Justice had far more critics than supporters among either the Justices or the clerks! In fact, to my memory, at least one Burger clerk from each Term assisted us substantially, although their understanding of the significance of internal events was often better informed by their interactions with other chambers than from the Chief himself. Still, most Burger clerks went to great lengths to give a balanced and fair appraisal of the Chief Justice, warning us that his critics were inclined to be petty while candidly acknowledging that the other Justices held Chief Justice Burger in low esteem.

school segregation and the contemporary efforts to resolve its deleterious effects through bussing and other affirmative steps. Attica had made them familiar with the crisis in our prisons. Most had strong views about the disproportionate application of the death penalty to blacks. Although most were white males,²⁴ they knew women contemporaries who had dealt with unwanted pregnancy in an era of back-alley abortions. They had read in *The New York Times* about the failures of United States military ventures abroad. They knew in detail the official deceits contained in the Pentagon papers. They had seen Watergate play out as the investigations unfolded and brought the crisis to the Court.

The clerks we interviewed expressed a refined and vivid appreciation for the social issues of the day in other ways, too. Many of them (if not the majority, then close to it) graduated from the Court to go into government services or to work for public interest law firms.²⁵ Far fewer than today went into corporate law, perhaps because they did not have an astronomically expensive law school education. The clerks we got to know best tended to take their concerns about the institutional role of the Supreme Court back to the streets or into alternative applications of law in the social interest.²⁶ A significant number went into teaching law.²⁷

Although I have no way of confirming this from in-depth exposure, the descriptions of the selection criteria used to select clerks today as provided by knowledgeable participants in the conference lead me to conclude that clerks from the last decade are a wholly different breed.²⁸ While recent clerks have more experience after law school in major firms or the government, even in the Solicitor General's office, they seem to be narrower gauge in other ways. Based solely on their earning

24. Only half a dozen women clerks served during the seven Terms we covered. One of these clerks was the only African-American clerk to serve during those seven Terms.

25. Simply put, we came to admire the integrity and publicly spiritedness of many of the people we interviewed.

26. These activities include founding many of the most significant law and social policy organizations which continue to do important work today.

27. I understand from the Conference that many former clerks go into law school teaching, but I have the impression it is a substantially smaller proportion. See Artemus Ward, Christina Dwyer & Kiranjit Gill, *Bonus Babies Escape Golden Handcuffs: How Money and Politics Has Transformed the Career Paths of Supreme Court Law Clerks*, 98 MARQ. L. REV. 227, 233 fig.1, 236 fig.3 (2014).

28. While many of the clerks in the *Brethren* era were identifiably politically liberal and a smaller number clearly more conservative, there were no membership organizations which gave them credentials required for selection, the way contemporary clerks are often "pre-qualified" by membership in the Federalist Society or the American Constitution Society.

capacity, they are far more likely to see themselves as members of an elite destined to be part of the One-Percent.²⁹ I came away from the conference struck by the differences in character of “*The Brethren* clerks” versus those typifying today’s clerks. I do not mean to impugn the honesty or commitment of contemporary clerks, with whom I am only sparingly familiar, but they have projected vastly different career paths.

To varying degrees, the *Brethren* clerks served as a direct and immediate feedback loop for the Justices. In the isolated confines of an institution where many Justices eschew active social calendars,³⁰ Justices spend far more time with their clerks than with anyone else.³¹ The clerks traditionally become members of a surrogate family.³² As is the case of any family, the clerks expose the Justices to the more contemporary values of American society.³³ While I strongly suspect that this degree of Justice-clerk collegiality continues today, I also suspect that today’s clerks bring less insight into the cultural nuances and societal fringes that the Justices will inevitably encounter in cases.

I don’t mean to imply that the clerks we interviewed for *The Brethren* felt they were in charge of a reevaluation by the Court of contemporary American society or a rewriting of “the law.” But we found that a clerk’s proximity to, if not actual participation in, the social change of the time had significant impact in some of the chambers. It would be too strong to say the *Brethren* clerks saw themselves as the

29. I confess to being astounded by the characterization at the conference of contemporary clerks as typically feeling they had to serve in corporate law firms where starting salaries are well into six figures and signing bonuses are typically over \$250,000.

30. I believe that the Justices on the contemporary Court are more active participants in the social life of Washington than the Justices were in the seven Terms we covered in the book.

31. Although the contemporary Court may include Justices who are considerably more social than the Justices who sat during the years of our book, I suspect, given the workload during the Term, this statement applies to spouses, children, friends, professional peers (if there is such a category), or even with each other.

32. Three of the Justices serving when we began the book—Justices Byron White, William Rehnquist and John Paul Stevens—had themselves clerked at the Court. The same number of Justices on the current Court were clerks—Chief Justice John G. Roberts and Justices Stephen G. Breyer and Elena Kagan.

33. The clerks were by no means social peers of their Justices, but there were opportunities beyond the clerks’ work day. Any clerk interested in a rough competitive game of basketball could meet Justice Byron White on the “Highest Court of the Land,” the half court on the fifth floor of the Supreme Court. Justice Black regularly played tennis with his clerks. Justice Blackmun breakfasted daily with his clerks and spent most of the time discussing the news of the day and sports, rather than cases.

Court's conscience, but they were a de facto reflection of the country's conscience.

It seemed to me that clerks who served between 1969 and 1975 were possessed of what today would be an uncommon courage in speaking up, including speaking up to their Justices. It was not so much a "Truth to Power" brigade as it was a generation that collectively heard and expressed concerns about the roots of broad societal dissatisfaction with the status quo. The ethos of at least a dozen clerks in each year assured that any Justice susceptible to broadening the context in which he saw a case could do so by listening to the views of his clerks. There was in each Term a cadre of clerks willing to listen to the non-traditional voices in society, to hash over that message among themselves. In most Terms this was a fairly assertive and vocal group whose views would get to the Justices willing to listen. At the same time, it is important to remember that clerks from this period were predominantly middle-class white males whose concern for their own careers restrained them. They were certainly not at the Court to antagonize their bosses.

The *Brethren* Court Justices, with their conservative and liberal wings balanced at the center, may have had a greater willingness to listen to voices with which they were unfamiliar than those on the contemporary court. This may have also been enhanced by the turmoil in American society at the time and given them a greater willingness to bridge the gap between briefs which could not possibly capture the nuance of context within some of the most important cases. From my perspective there were more Justices from 1969 to 1975 than there are today who—across an ideological spectrum—were willing to compromise in search of resolutions less ideological than practical. This is not to say that they were more susceptible to public opinion or the views of clerks in their chambers than Justices today. Surely Chief Justices Burger and Justice Rehnquist were examples of Justices largely resistant to such influence. But the *Brethren* Court had members as conservative as Justices John Harlan and Harry Blackmun who did hear things from their clerks which helped them better appreciate that the context in which the cases came to them went beyond the insight they could glean from the briefs and the artificial structure of oral argument.³⁴ Similarly, after a few years of experience on the Court,

34. To varying degrees across different issues, I would put Justices William Brennan, Potter Stewart, Lewis Powell, John Paul Stevens, and, on occasion, Hugo Black and Byron White in this camp. Justices Marshall and Douglas had both been exposed to more and had less to learn from their clerks.

Justices such as Blackmun and Harlan were more likely to appreciate the vast experience of Justice Thurgood Marshall with his store of practical experience in a race- and class-divided society.³⁵

The portrait of the current Supreme Court's relation with its clerks as presented at the Marquette conference is strikingly different. While selecting clerks with some ideological bias was not unheard of in the *Brethren* Court, there was nothing like the ideological recruiting and screening of today's Court as described by the more knowledgeable participants at the conference.³⁶ As cynical as a reporter can be about the institutions of government, I was taken aback by the screening mechanisms used to select clerks today.³⁷ The degree of partisan screening by "feeder judges"³⁸ for certain Justices now suggests a self-fulfilling mechanism for institutionalizing the deep ideological divide on the current Court. As a *New York Times* article recently suggested,

In the last nine terms, the court's current Republican appointees hired clerks who had first served for appeals court judges appointed by Republicans at least 83 percent of the time. Justice Thomas hired one clerk from a Democratic judge's chambers, Justice Scalia none.

The numbers on the other side are almost as striking. Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Kagan hired from Democratic chambers more than two-thirds of the time. Justice Stephen G. Breyer is the exception: His hiring has long been about evenly divided.³⁹

While it is impossible to extrapolate from these statistics alone, the advent of a clerk population most likely to be interested in corporate practice⁴⁰ suggests the clerk feedback loop is more likely one of

35. See WOODWARD & ARMSTRONG, *supra* note 1, at 282.

36. See Lawrence Baum, *Hiring Supreme Court Law Clerks: Probing the Ideological Linkage Between Judges and Justices*, 98 MARQ. L. REV. 333 (2014); Christopher D. Kromphardt, *Fielding an Excellent Team: Law Clerk Selection and Chambers Structure at the U.S. Supreme Court*, 98 MARQ. L. REV. 289 (2014); Panel Discussion, *Judges' Perspectives on Law Clerk Hiring, Utilization, and Influence*, 98 MARQ. L. REV. 441, 444-48 (2014).

37. Screening by the *Brethren* Court Justices was generally conducted by former clerks or law professors well-acquainted with the Justice. Their criteria included such overtly biased attitudes as those of Justice Brennan opposing the possibility of women clerks until the 1974 Term. See SETH STERN & STEPHEN WERMIEL, *JUSTICE BRENNAN: LIBERAL CHAMPION* 386-89 (2010).

38. See, e.g., David R. Stras, *Secret Agents: Using Law Clerks Effectively*, 98 MARQ. L. REV. 151, 155-58 (2014).

39. Adam Liptak, *The Polarized Court*, N.Y. TIMES, May 11, 2014, at SR1.

40. Perhaps this propensity for corporate law has also penetrated the judiciary itself. Former federal Court of Appeals Judge J. Michael Luttig, who produced more than forty law

reinforcement rather than one that broadens a Justice's view. At the same time, in this age where Washington dysfunction and nonfeasance dominates the other two branches of government, one must consider that, however polarized the contemporary Court, it does do its business.

The Brethren covered seven Terms involving nearly 1,000 cases during which millions of pages of briefs were filed and more than 20,000 pages of opinions were published, which were in turn based on tens of thousands of pages of exchanged drafts and perhaps hundreds of thousands of pages of drafts that did not see their way out of changes.⁴¹ When we distilled our final product, what remained concentrated on the most important, and thus often the most contentious, of cases, those dealing with the most difficult issues facing the judiciary and the society at large. It was little wonder to us that our product did not capture the tedious and repetitive nature of most of the Court's work, which, while important, was not controversial. Instead, by the process of editing down to a readable narrative of those years, we were compelled to include that which was often the most poignant, the most heartfelt, and the most emotional. The routine was by and large left on the cutting room floor.

Since most of our readers would be reading for the first time about any of the inner workings of the Court—much less the unhappiness of the other Justices with the often heavy-handed, arrogant, and frequently insensitive style of Chief Justice Burger—there was a danger that readers would conclude that every passionate dissent was an expression of personal animosity among the Justices. We tried to emphasize the unusually collegial and generally congenial atmosphere of nine men bound by a common responsibility. There was little doubt that our first portrayal of enmity toward the Chief Justice's reign would color the reader's perception of an institution which had always been opaque.

As we polished the final drafts, we grew to appreciate how dramatically different our portrait of the Court would be for those who were unfamiliar with its inner workings. We did not fully appreciate, however, that our vivid collection of the Court's most important moments in those seven years would cause consternation within the

clerks for Justices Thomas and Scalia, has now quit to become the general counsel of the Boeing Company. See Adam Liptak, *A Sign of Court's Polarization: Choice of Clerks*, N.Y. TIMES, Sep. 7, 2010, at A1.

41. The opinions for the 1969–1975 Terms appear in volumes 396–428 of the *United States Reports*.

Court.⁴² As we checked the final details with our best sources, we realized that they were individually and collectively surprised at how much detail we had documented.⁴³ From later accounts of the Justices' reactions, many clerks who had cooperated with us became nervous that they might incur their own Justice's wrath for cooperation. As human nature dictates, many employed the classic ass-covering technique of expressing their shock to their Justices that others clerks had told us so much.

The Justices took to covering their own posteriors by taking turns telling the Chief Justice and their colleagues that they had not cooperated with us. After the first conference following the book's publication, we received firsthand accounts from three Justices who had been sources about the nearly unanimous disclaimers offered that day.⁴⁴ The Chief Justice added a comedic denial of his own by announcing he would not read the book, only to be photographed later in the day through the backseat window of a limousine exiting from the Court's underground garage with a copy of the book open before him.

Many reviewers and commentators speculated that, because clerks had broken some unwritten but presumed confidentiality agreement, *The Brethren* caused a lasting internal upheaval within the Court. Two consequences were frequently cited.

42. In order to be sure we had been technically correct on the procedural details and that our attempt to tell the story in plain English was still consistent with the legal community's norms and understanding, we asked several people to read a draft and give us their candid reactions. Among those readers were Stephen Breyer, a former Supreme Court clerk from an earlier era who had been the Chief Counsel of the Senate Judiciary Committee who is now himself a Supreme Court Justice, and Robert Reich, a former Assistant Solicitor General who later served as Secretary of Labor. My former colleague on the Watergate Committee, Professor Ronald Rotunda, author of an outstanding series of treatises on constitutional law, gave us sound advice. Douglas Woodlock, at the time an Assistant U.S. Attorney and for the last three decades a judge on the U.S. District Court for the District of Massachusetts, provided thoughtful comments. Two other associates from the Watergate Committee, Jim Moore, a former Second Circuit clerk, and Marc Lackritz provided helpful comments. While in no way responsible for the content of the book, these readers helped us avoid misleadingly worded interpretations.

43. Several clerks read portions of the rough galleys covering events in which they were involved.

44. The release of the papers of several retired and deceased Justices has confirmed not only that individual Justices spoke with one or both of us but that they went to considerable efforts to disguise that fact. Justices Powell, Stewart, and Blackmun were particularly worried that Chief Justice Burger and others would take a dim view of any cooperation, a concern that increased when certain events in the book appeared to have the advantage of their cooperation. The extent of their efforts to appease the Chief Justice and convince him they were not sources varied.

First, it was alleged that the relationships between the Justices and their clerks were permanently damaged.⁴⁵ In this view, clerks would no longer be privy to the internal workings of the Court because their Justices did not treat them as confidantes. I do not believe the clerk–Justice relationships have been altered in the book’s aftermath. Because their appointments for life have always dictated that Justices deal with each other in the most fraternal and collegial manner, their disappointments and frustrations are largely hidden under the veneer of formal courtesy and personal kindness. But now, as before, when these hidden rough edges became most pronounced and most likely to impact the decision-making process and the substance of decisions, the Justices continue to share their frustrations with their most trusted colleagues in occasional moments of candor. I believe these frustrations continue to be shared with at least some of their own clerks in the privacy of chambers. The difference *The Brethren* made was only momentary. From the reactions of Justices after the book was published, it seems the Justices had not anticipated what a collection of their most unique interactions would look like back-to-back. But once the internal norm of operational secrecy returned, the relations of candor with clerks returned, varying in accord with the personalities of the current Justices rather than some deep-seated, lingering concern over confidentiality.

The second alleged consequence attributed to *The Brethren*’s publication was the impact it had on the Court’s view of secrecy in cases coming before it, in particular the United States government’s case against former CIA officer Frank Snepp.⁴⁶ In 1977, Snepp published *Decent Interval*, an account of his service in Vietnam.⁴⁷ The CIA attacked the book as a threat to national security. After failing to get the Justice Department to halt publication because it could not prove Snepp had divulged secret information, the CIA succeeded in getting Justice to sue Snepp for violating the provision of his employment agreement in which he agreed to submit for prepublication review any information he intended to publish about the CIA. The district court ruled in the CIA’s favor, enjoining Snepp from publishing information

45. See, e.g., William J. Daniels, *The Clerks Talk: Commentary & Analysis of The Brethren*, 44 ALB. L. REV. 732, 737 (1980) (book review); Michael W. Steinberg, Book Review, 66 A.B.A. J. 186, 188 (1980).

46. See, e.g., Victor S. Navasky, *The Selling of the Brethren*, 89 YALE L.J. 1028 (1980) (book review); Frank Barbash, *Snepp Decision Seen Helping Court to Plug Its Own Leaks*, WASH. POST, Feb. 22, 1980, at A5.

47. FRANK SNEPP, *DECENT INTERVAL: AN INSIDER’S ACCOUNT OF SAIGON’S END TOLD BY THE CIA’S CHIEF STRATEGY ANALYST IN VIETNAM* (1977).

about the CIA without undergoing prepublication review and requiring that he forfeit all royalties to the government.⁴⁸ The court of appeals concluded that Snepp had a First Amendment right to publish unclassified information.⁴⁹ The court of appeals based its decision to reverse the constructive trust order upon the government's concession that Snepp's book had not revealed any classified information.⁵⁰

In response, the Court granted cert but issued a remarkable and unprecedented unsigned per curiam opinion, summarily reinstating the district court's imposition of a levy on Snepp's profits while confirming the district court's ban against further publication of information about the CIA without pre-publication review.⁵¹ Without benefit of briefs or oral argument, a majority consisting of Chief Justice Burger and Justices Stewart, White, Blackmun, Rehnquist, and Powell ignored the First Amendment issues raised by Snepp. The per curiam upheld the district court's gag order on Snepp's comments on the CIA without secrecy review and reinstated the confiscation of Snepp's royalties.⁵² The result was more than the government had requested.

The case drew considerable critical comment.⁵³ Snepp and others alleged that the case, having been considered during the period of publication of *The Brethren*, represented the majority's fury toward their clerks who had leaked.⁵⁴

Had the Snepp case fallen within the period we covered in the book, it would have become a centerpiece example of a single Justice's extraordinary lobbying for his own iconoclastic and activist views as well as for its importance to First Amendment cases in the national security area. Since we did not interview the participants and I have only been

48. *United States v. Snepp*, 456 F. Supp. 176 (E.D. Va. 1978).

49. *United States v. Snepp*, 595 F.2d 926 (4th Cir. 1979).

50. *Id.* at 929.

51. *Snepp v. United States*, 444 U.S. 507 (1980) (per curiam). See particularly the Stevens dissent, joined by Justices Brennan and Marshall. *Id.* at 516–26 (Stevens, J., dissenting).

52. *Id.* at 516 (majority opinion).

53. See, e.g., ALAN M. DERSHOWITZ, *THE BEST DEFENSE* 225–34 (1st Vintage Books ed. 1983); Barbash, *supra* note 46; Griffin B. Bell, *Secrecy After the Snepp Case*, WASH. POST, Apr. 9, 1980, at A21; Richard Cohen, *Can Court Take Away a Constitutional Right?*, WASH. POST, Mar. 6, 1980, at B1. See also Thomas Goldstein's review of *The Best Defense*. Tom Goldstein, *The Lawyer of Last Resort*, N.Y. TIMES, June 13, 1982, at A13.

54. See David J. Garrow, *The Supreme Court and The Brethren*, 18 CONST. COMMENT. 303, 304, 314–17 (2001).

able to review Justice Powell's case files,⁵⁵ I have to be more tentative than we would have been in *The Brethren*, where our accounts were based on full reporting.

Justice Powell's files show that the original votes on October 5, 1979, on both Snapp's and the Government's cert petitions, were 8–1 to deny cert. This would have left Snapp bound by the injunction but without any levy on his royalties. The single dissenting voice was that of Lewis Powell, who wanted to grant cert. The case was relisted to give Powell time to write a dissent to the cert denial. After assigning the case to a clerk for research, Powell completed a type written first draft, known as a "Chamber's Draft,"⁵⁶ on October 19, 1979, a remarkably quick response. Powell continued to revise this preliminary draft several times.⁵⁷

Justice Powell wrote Justice Blackmun on October 31, 1979, and asked if he would review his draft dissent.⁵⁸ Justice Powell told Justice

55. Justices Marshall and Blackmun's case files should also be available, but I could only find Justice Powell's online. The difficulty of finding one document among hundreds and hundreds of pages in a single Justice's case files is a vivid reminder to me of how important the clerks were in guiding us.

56. Many scholars of the Court fail to understand that there are often preliminary typewritten drafts which circulate informally among only a few chambers before the "published" or printed "First Draft" is circulated. Since many of these chambers drafts in typescript are not retained by their authors or the selected Justices who become privy to them, scholars often miss the interplay between chambers that determines a case's final outcome.

57. Lewis F. Powell, Jr., Chambers Drafts and Drafting Notes (Oct. 24–31, 1979), in *78-1871 Snapp v. U.S.—Opinion Drafts, 1979 Oct. 24–31*, http://law2.wlu.edu/deptimages/powell%20archives/78-1871_Snapp_U.S._Opinion1979Oct24-31.pdf, archived at <http://perma.cc/2JMW-94TS>, in WASH. & LEE UNIV., THE LEWIS F. POWELL JR. PAPERS, 1921–1998: SUPREME COURT CASE FILES [hereinafter POWELL PAPERS], <http://law2.wlu.edu/powellarchives/page.asp?pageid=1279>, archived at <http://perma.cc/85WG-R9EU>; Lewis F. Powell, Jr., Chambers Draft of *Snapp v. United States* (Oct. 23, 1979), in *78-1871 Snapp v. U.S.—Opinion Drafts, 1979 Oct. 23*, http://law2.wlu.edu/deptimages/powell%20archives/78-1871_Snapp_U.S._Opinion1979Oct23.pdf, archived at <http://perma.cc/HC4S-HQB4>, in POWELL PAPERS, *supra*; Lewis F. Powell, Jr., Chambers Draft of *Snapp v. United States* (Oct. 19, 1979), in *78-1871 Snapp v. U.S.—Opinion Drafts, 1979 Oct. 19*, http://law2.wlu.edu/deptimages/powell%20archives/78-1871_Snapp_U.S._Opinion1979Oct19.pdf, archived at <http://perma.cc/Z2ED-AA4P>, in POWELL PAPERS, *supra*; see also *78-1871 Snapp v. U.S.*, WASH. & LEE UNIV.: POWELL ARCHIVES, <http://law2.wlu.edu/powellarchives/page.asp?pageid=1762> (last visited Jan. 24, 2015), archived at <http://perma.cc/KP32-PJS6>.

58. Memorandum from Lewis F. Powell, Associate Justice, Supreme Court of the United States, to Harry A. Blackmun, Associate Justice, Supreme Court of the United States (Oct. 31, 1979) [hereinafter Memo from Powell to Blackmun], in *78-1871 Snapp v. U.S., 1979 Oct.*, http://law2.wlu.edu/deptimages/powell%20archives/78-1871_Snapp_U.S.1979Oct..pdf, archived at <http://perma.cc/RZ84-FU25>, in POWELL PAPERS, *supra* note 57. These also were apparently what Powell considered to be "chambers drafts" that were not circulated to the full Court. See Memorandum from Lewis F. Powell, Associate Justice, Supreme Court of the

Blackmun that he wanted to reaffirm the district court's opinion without argument and had already spoken to Justice Stewart, who expressed interest in a summary reversal.⁵⁹ Justice Powell believed that if Justice Blackmun agreed, he could get four other Justices to join them and then he could get Justice Stewart. Justice Powell also told Justice Blackmun that he was concerned that, even though the government did not want to have its case granted cert if Snepp's was not, Justice Powell was "persuaded that it would be in the interest of our country to reinstate the District Court's judgment . . . [, which] would require granting of both petitions, and a summary reversal only of the . . . judgment limiting damages."⁶⁰ Justice Powell told him the issue was "clear cut" and that he guessed "the government is nervous about this case, as it would be quite disastrous if Snepp's cross petition were granted and this Court went on to invalidate the secrecy agreement altogether."⁶¹ He noted that "[a] bill [was] still pending (according to what former Secretary of State Dean Rusk,^[62] ha[d] told [him]) that would damage even further the capacity of the CIA to function effectively in the national interest."⁶³ His files show that even before his initial cert vote Justice Powell began collecting news clips about the CIA reflecting his worry about their losing credibility and power in their contest with Soviet intelligence.⁶⁴

United States, to File (Apr. 10, 1980), in 78-1871 *Snepp v. U.S.*, 1980 Jan.–April [hereinafter *Snepp: 1980 Jan.–April*], http://law2.wlu.edu/deptimages/powell%20archives/78-1871_Snepp_U.S.1980.pdf, archived at <http://perma.cc/99T8-8NX3> (referencing "Ch. Draft 10/24/79 (Dissent)"), in POWELL PAPERS, *supra* note 57.

59. Memo from Powell to Blackmun, *supra* note 58, at 1–2.

60. *Id.* at 1.

61. *Id.*

62. It is unclear how Rusk communicated to Justice Powell. Rusk was at the time battling with Frank Church over the plan put forth by the committee he chaired (the Senate Select Committee on Intelligence Activities) to release details of Operation Mongoose, the Kennedy administration's efforts to have the CIA kill Fidel Castro, a plot that Rusk had endorsed. See Thomas Powers, *Inside the Department of Dirty Tricks*, ATLANTIC, Aug. 1979, at 33, 37–38. See also Dean Rusk's testimony before the Senate Select Committee on Intelligence Activities regarding inquiries into Rusk's involvements in assassination plots against foreign leaders. *Testimony of Dean Rusk Before the Senate Select Committee on Intelligence*, 94th Cong. 74–104 (July 10, 1975), <http://www.maryferrell.org/mffweb/archive/viewer/showDoc.do?docId=1365&relPageId=78>, archived at <http://perma.cc/F6MB-TBP9>. The Powell Papers also contain a Rusk Correspondence folder, which may shed further light on the two men's relationship. See *Personal Correspondence—General, 1932–1971: Container List*, http://law2.wlu.edu/deptimages/Powell%20Archives/Correspondence_1932-1971.pdf (last updated Feb. 3, 2003), archived at <http://perma.cc/MDG8-MNEH>, in POWELL PAPERS, *supra* note 57.

63. Memo from Powell to Blackmun, *supra* note 58, at 1.

64. One article quotes former CIA Directors William Colby and Richard Helms on the problem and notes that the Russians had allegedly revealed the identities of CIA agents

On November 6, 1979, Justice Powell circulated his “First Draft” selectively to several Justices, including Chief Justice Burger and Justice Rehnquist.⁶⁵ The same day, Justice Rehnquist agreed to join him in summarily ruling against *Snepp* and for the government.⁶⁶ On November 16, 1979, Justice Powell formally circulated his first draft and immediately received notes from Chief Justice Burger and Justice Stewart for his dissent. Justice Blackmun wrote three days later, saying, “You have written a persuasive dissent, and I am happy to join it.”⁶⁷ The next day, Justice Rehnquist formally joined the dissent. On November 21, 1979, the dissent became a *per curiam*. By the end of the week, Justice White had joined the others in the *per curiam*.⁶⁸

When Justice Stevens circulated his dissent to Justice Powell’s *per curiam* on January 3, 1980, Justice Powell wrote on his copy: “If this view prevailed the CIA might as well fold up. If any agent may publish secrets at will, subject only to post-publication sanctions, there would be little assurance of the most important secret being secure.”⁶⁹ To Justice

abroad. David Ignatius, *Spy Wars: Experts Fear That U.S. Loses Espionage Battle with the Soviet Union*, WALL ST. J., Oct. 4, 1979, at 1, available at http://law2.wlu.edu/deptimages/powell%20archives/78-1871_Snepp_U.S._Clippings.pdf, archived at <http://perma.cc/6BVY-NGEU>.

65. Lewis F. Powell, First Draft of *Snepp v. United States* (Nov. 6, 1979), in 78-1871 *Snepp v. U.S.*, 1979 Nov. 16, http://law2.wlu.edu/deptimages/powell%20archives/78-1871_Snepp_U.S._Opinion1979Nov16.pdf, archived at <http://perma.cc/NJW8-BRGB>, in POWELL PAPERS, *supra* note 57. It appears that pre-first drafts also went to other Justices because Justice Powell’s files contain pre-circulation first drafts with hand-written suggestions that do not appear to be in either Justice Powell’s or his clerk’s handwriting.

66. Memorandum from William H. Rehnquist, Associate Justice, Supreme Court of the United States, to Lewis F. Powell, Associate Justice, Supreme Court of the United States (Nov. 6, 1979), in 78-1871 *Snepp v. U.S.*, 1979 Nov. [hereinafter *Snepp: Nov. 1979*], http://law2.wlu.edu/deptimages/powell%20archives/78-1871_Snepp_U.S.1979Nov.pdf, archived at <http://perma.cc/TND7-VY24>, in POWELL PAPERS, *supra* note 57. Justice Rehnquist’s hand-written note is difficult to decipher and speaks of joining Justice Powell in affirming *Snepp*’s petition and reversing the government’s petition, which appears to state it backwards but nevertheless is clearly a join.

67. Memorandum from Harry A. Blackmun, Associate Justice, Supreme Court of the United States, to Lewis F. Powell, Associate Justice, Supreme Court of the United States (Nov. 19, 1979), in *Snepp: Nov. 1979*, *supra* note 66.

68. Memorandum from William H. Rehnquist, Associate Justice, Supreme Court of the United States, to Lewis F. Powell, Associate Justice, Supreme Court of the United States (Nov. 20, 1979) in *Snepp: Nov. 1979*, *supra* note 66; Conference Notes for *Snepp v. United States* (Nov. 21, 1979), in *Snepp: Nov. 1979*, *supra* note 66; Memorandum from Byron R. White, Associate Justice, Supreme Court of the United States, to Lewis F. Powell (Nov. 29, 1979), in *Snepp: Nov. 1979*, *supra* note 66.

69. Lewis F. Powell, Annotated Dissent by John P. Stevens to *Snepp v. United States* 1 (Jan. 3, 1980), in *Snepp v. U.S.—Opinion Drafts, 1980 Jan. 3–9*, <http://law2.wlu.edu/deptimages>

Stevens's assertion that "the reluctance of foreign governments to work with our government [if unclassified information is published] must be accepted as an inevitable by-product of the exercise of First Amendment rights by government employees," Justice Powell wrote in the margin that Justice Stevens "[s]ounds like Frank Church," the Chairman of the Intelligence Committee, which was actively legislating reforms of the intelligence agencies.⁷⁰ Justice Powell revised his per curiam and sent his draft to Justice Potter Stewart alone on January 10, 1980, and then, after many sets of full draft revisions, recirculated it to the entire conference.

Despite the logic that the majority's view of confidentiality agreements was influenced by the Justices' own relationships with the clerks in the context of the publication of *The Brethren*, Justice Powell's papers suggest otherwise. Justice Powell lobbied the Court vigorously on behalf of the CIA. From the Powell record, it would seem that from the moment the case arrived, Justice Powell was committed to giving the CIA the tools it needed to prevent any other CIA employee (or for that matter executive branch employee) from repeating Snepp's sin of publishing information governed by a pre-publication review requirement, regardless of whether it included classified information.⁷¹ Other clips reflect his concerns after the Snepp decision that it was being seen as "helping [the] Court to plug its own leaks."⁷² He made reference in his files to the fact that he had circulated his dissent long before *The Brethren* was published in December 1979.⁷³

/powell%20archives/78-1871_Snepp_U.S._Opinion1980Jan3-9.pdf, archived at <http://perma.cc/EU8V-ZFD7>, in POWELL PAPERS, *supra* note 57.

70. *Id.* at 6–7.

71. The historical record indicates that the White House of Gerald Ford identified Powell as one of the possible candidates to be Director of the CIA. See Memorandum from Donald Rumsfeld, Assistant to the President, to Gerald R. Ford, President of the United States (July 10, 1975), <http://www.fordlibrarymuseum.gov/library/document/0005/1561476.pdf>, archived at <http://perma.cc/3H2T-FVKS>. Justice White was given more serious consideration, according to the Ford papers.

72. Barbash, *supra* note 46 (title case omitted). See *id.*, across the top of which Justice Powell wrote, "A typically ignorant & biased view of a case perceived as denying use [of] a source of 'leaked' news." See Lewis F. Powell, Annotation to Barbash Clipping (Feb. 22, 1980), in 78-1871 *Snepp v. U.S.—Clippings*, http://law2.wlu.edu/deptimages/powell%20archives/78-1871_Snepp_U.S._Clippings.pdf, archived at <http://perma.cc/6BVY-NGEU>, in POWELL PAPERS, *supra* note 57. Justice Powell circulated these clips to those Justices who had joined the per curiam.

73. Memorandum from Lewis F. Powell, Associate Justice, Supreme Court of the United States, to File (Feb. 25, 1980), in *Snepp: 1980 Jan.—April*, *supra* note 58. Despite a note in Justice Powell's file that he circulated six drafts of his opinion, in reality he circulated

Two other factors suggest that the case outcome was not wholly the product of intemperate concerns about clerk confidentiality. First, Justice Brennan, the Justice most aggrieved of *The Brethren's* contents and most upset by the cooperation of clerks with our project,⁷⁴ did not join Justice Powell's opinion. He stuck with Justice Stevens's holding that the issues in the case were fundamentally First Amendment issues. And most important of all, none of the logic of Justice Powell's opinion (in so far as the opinion had a logic) seems to have influenced the Court's internal procedures. No employment agreements or other written restrictions were imposed on the clerks, something that could easily have been implemented had the six Justices joining the per curiam insisted upon it.⁷⁵

Despite the initial outcry from Court watchers and the more conservative members of the traditional bar, few critics alleged or cited specific errors. The most serious challenge to *The Brethren's* accuracy came in a case, *Moore v. Illinois*.⁷⁶

many more, since at least six appear to have gone only to individual Justices and not to the whole Court. At least one of these "pre-circulation" drafts was in typescript.

74. See *infra* notes 76–78 and accompanying text.

75. It may also be noteworthy that even Chief Justice Burger apparently made no effort to impose a secrecy agreement on the clerks despite the fact that he had written in the Pentagon Papers case that

[n]o statute gives this Court express power to establish and enforce the utmost security measures for the secrecy of our deliberations and records. Yet I have little doubt as to the inherent power of the Court to protect the confidentiality of its internal operations by whatever judicial measures may be required.

New York Times Co. v. United States, 403 U.S. 713, 752 n.3 (1971) (Burger, C.J., dissenting). In March 1989, under Chief Justice William Rehnquist, the Court created the *Code of Conduct for Law Clerks of the Supreme Court of the United States*. Canon Three of the *Code of Conduct* provides that

[t]he relationship between Justice and law clerk is essentially a confidential one. A law clerk should abstain from public comment about a pending or impending proceeding in the Court. A law clerk should never disclose to any person any confidential information received in the course of the law clerk's duties, nor should the law clerk employ such information for personal gain.

CODE OF CONDUCT FOR LAW CLERKS OF THE SUPREME COURT OF THE UNITED STATES Canon 3(C) (1989), quoted in Todd C. Peppers, *Of Leakers and Legal Briefers: The Modern Supreme Court Law Clerk*, 7 CHARLESTON L. REV. 95, 105 (2012). Note that Judge Alex Kozinski in *Conduct Unbecoming*, a book review in the *Yale Law Journal*, has other language attributed to the *Code of Conduct for Law Clerks of the Supreme Court of the United States*. Alex Kozinski, *Conduct Unbecoming*, 108 YALE L.J. 835, 835–36 (1999) (reviewing EDWARD P. LAZARUS, *CLOSED CHAMBERS: THE FIRST EYEWITNESS ACCOUNT OF THE EPIC STRUGGLE INSIDE THE SUPREME COURT* (1998)).

76. 408 U.S. 786 (1972).

When *The Brethren* came out, Justice Brennan was apparently apoplectic about what he thought was an intentional implication on our part that much of the book was based on his case histories and that he had been our major source. Justice Brennan's anger bubbled over when on *60 Minutes* I tried to deflect Mike Wallace's question about our sources and specifically whether Justice Brennan was our "Deep Throat."⁷⁷ I responded, "I think we'd rather not answer that," an answer that "enraged Brennan, who thought it intentionally left the impression" he had in fact been our major source.⁷⁸

I meant nothing more than that we didn't want to discuss sources in general. But as described later, Justice Brennan took his greatest umbrage at our treatment of the case of Lyman Moore. Moore had been sentenced to death for the shotgun murder of a bartender in Lansing, Illinois. With the death penalty being struck down in another set of four cases, Justice Brennan felt he was accused of refusing to overturn Moore's prison sentence even though he believed Moore was unfairly convicted. He particularly resented *The Brethren's* portrayal of his appealing Justice Blackmun, who he "hoped to bring into line on [the] unrelated abortion and obscenity cases."⁷⁹

What we had actually we said in the book was:

Moore argued that he had been unfairly convicted. The prosecution had withheld from the defense the fact that the three principal witnesses who claimed to have heard a "Slick" brag of the murder had all told police that they didn't think this Moore was the same "Slick." A judge had also permitted prosecutors to wave a sawed-off shotgun in front of the jury, though the prosecution admitted at trial that it was not the murder weapon.

At conference, the vote was 7 to 2 to uphold Moore's conviction, with Marshall and Douglas the only dissenters. Moore would not get a new trial, but the death penalty decision in the other four cases would keep him from being executed.

The Chief assigned the case to Blackmun. . . .

When the opinion finally came around, it said the information, if withheld, did not prove Moore's innocence, but only tended to show that he was not the same man who had

77. Wallace was referring to Woodward's legendary, well-placed, and at that time undisclosed source during Watergate, as popularized by the movie version of *All the President's Men*.

78. STERN & WERMIEL, *supra* note 37, at 461.

79. *Id.* (quoting Fred Barbash, *Author's View: No True Leader*, WASH. POST, Dec. 2, 1979, at A1).

bragged about the murder. Waving the shotgun before the jury, Blackmun stated, was not a sufficiently significant error to justify a new trial.

Marshall was upset. During his days of criminal-law practice, he had seen many men convicted by distorted presentations of the facts. . . .

The identification by eyewitnesses had been crucial to obtaining the conviction and Blackmun was ignoring many of the facts damaging to their testimony. This was a miscarriage of justice. Marshall's analysis was circulated as a dissent. Blackmun responded in a set of footnotes arguing his own version of the facts.

Powell and Stewart quickly switched their votes, and Marshall needed only one more to take away Blackmun's majority. His friend Brennan would surely provide the fifth vote. Brennan, after all, was the author of a landmark 1963 decision (*Brady v. Maryland*)^[80] that required prosecutors to turn over all exculpatory evidence to the defense.

One of Brennan's clerks thought that if Brennan had seen the facts as Marshall presented them, he would not have voted the other way. He went to talk to Brennan and, thirty minutes later, returned shaken. Brennan understood that Marshall's position was correct, but he was not going to switch sides now, the clerk said. This was not just a run-of-the-mill case for Blackmun. Blackmun had spent a lot of time on it, giving the trial record a close reading. He prided himself on his objectivity. If Brennan switched, Blackmun would be personally offended. That would be unfortunate, because Blackmun had lately seemed more assertive, more independent of the Chief. Brennan felt that if he voted against Blackmun now, it might make it more difficult to reach him in the abortion cases or even the obscenity cases.

Sure, "Slick" Moore deserved a new trial. But more likely than not, it would result in his being convicted again. After all, Moore had a long record. He was not exactly an angel. Anyway, the Court could not concern itself with correcting every injustice. They should never have taken such a case, Brennan said. He felt he had to consider the big picture.

80. We were incorrect about Justice Brennan's role in *Brady v. Maryland*, 373 U.S. 83 (1963). He had not been the author. In the second printing, we corrected this to say he "had been a moving force behind a whole series of cases that required prosecutors to turn over all exculpatory evidence to the defense." BOB WOODWARD & SCOTT ARMSTRONG, *THE BROTHERS* 272 (paperback ed. 2005).

“He won’t leave Harry on this,” Brennan’s clerk reported to Marshall’s clerk.

The clerks were shocked that such considerations would keep a man in prison. They wondered whether Brennan still would have refused to switch if the death penalty had not been struck.

Marshall’s clerk asked his boss to talk to Brennan.

Marshall refused. It was not his style. He resented pressure from the Chief and he was not about to imitate his methods.

Marshall’s clerk made a final appeal through Brennan’s clerks.

Brennan had his priorities. His priority in this case was Harry Blackmun. There would be no new trial for “Slick” Moore.⁸¹

Justice Brennan’s fury presented itself two months later when a review of *The Brethren* appeared in *The New York Review of Books*. The scathing review was written by Anthony Lewis, a *New York Times* columnist and an experienced court watcher with extraordinary ties to Justice Brennan.⁸² Characterizing our treatment of Chief Justice Burger as “hit-and-run journalism,” Lewis said our account of the *Moore* case made “a serious charge [against Justice Brennan] without serious evidence” that

[gave] the impression of relying on a conversation between Brennan and a law clerk that the law clerks of that term say never took place. If the passage was not meant to rely on such a conversation with a clerk, then it grossly and deliberately misleads the reader. In sum, the treatment of *Moore v. Illinois* leaves doubts not only about the authors’ understanding but about their scrupulousness.⁸³

Lewis corrected us on two points: Justice Brennan was not the author of the *Brady* opinion, Justice Douglas was, and the decision did not require

81. WOODWARD & ARMSTRONG, *supra* note 1, at 224–25.

82. Anthony Lewis, *Supreme Court Confidential*, N.Y. REV. BOOKS, Feb. 7, 1980, at 3. Lewis also wrote two of the most influential books about the Supreme Court: *Gideon’s Trumpet*, which explicated the 1963 Supreme Court case *Gideon v. Wainwright*, 372 U.S. 335 (1963), that guaranteed legal representation to poor defendants charged with serious crimes, and *Make No Law*, an account of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the 1964 Supreme Court decision that revolutionized American libel law. See generally ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964); ANTHONY LEWIS, *MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT* (1991).

83. Lewis, *supra* note 82, at 4–5.

evidence to be turned over unless it was “material to guilt or to punishment.”⁸⁴

Lewis found Paul Hoeber, the Brennan clerk who worked on *Moore v. Illinois*. Hoeber told Lewis his account, which Lewis quoted:

This is a case that was decided the last day of the term. The feeling among Marshall’s clerks, Douglas’s, [Justice Lewis F.] Powell’s was that the case was being wrongly decided. Right at the last minute—I think the day before—one of them came to me, and I think it was Marshall’s clerk. He said to me, “Is there any chance of talking to Brennan and getting him to switch his vote?”

. . . I did talk to Brennan, and I said the view among us clerks is that Marshall is right. Brennan’s response was, “No, I’ve read the opinions, it’s a factual case, and Blackmun is right. As far as the law goes, there is nothing inconsistent with *Brady*.”

The conversation took two or three minutes. And I wasn’t “shaken,” as the book says. I told my co-clerks that Brennan was firm, I told Marshall’s and I told Powell’s. That is all that happened.

I can just tell you that there was no such conversation.⁸⁵

Lewis went on to say that

Hoeber was sufficiently outraged when he read *The Brethren* that he telephoned the three other men who had clerked for Justice Brennan in the 1971–1972 term. All agreed that they had had no such conversation with the Justice. The idea that Justice Brennan had acknowledged to one of his clerks the correctness of the dissent in *Moore* was, to them, simply false.⁸⁶

Lewis cited a conversation that Hoeber had with Woodward complaining that “none of the four clerks of that term had such a conversation with Justice Brennan.”⁸⁷ Hoeber said Woodward’s response was that there were other sources. Hoeber told Lewis that he and the other three Brennan clerks called twenty-nine of the thirty clerks that Term, and “[n]one knew anything about clerks having been ‘shaken’ or ‘shocked.’”⁸⁸

84. *Id.* at 3.

85. *Id.* (alteration in original) (quoting Paul R. Hoeber).

86. *Id.*

87. *Id.*

88. *Id.*

The remainder of Lewis's review takes exception with the notion that we found the Supreme Court worthy of such detailed inquiry and included what Justice and clerks said in moments of candor. Reports of the feelings expressed inside the Court, were, to Lewis, "not news."⁸⁹

We were surprised by the tone of the review, although other defenders of the Court and its Justices had made some similar objections without alleging errors. The discussion of the *Moore* case was most surprising for two other reasons. First of all, with the exception of Justice Brennan's articulated motivation for not shifting his vote, Hoerber had confirmed the basic details of the case including raising the issue with Justice Brennan, who refused to change, and then telling this to his co-clerks and to clerks from at least three other chambers. So the only real question raised was, what was conveyed in those conversations?

The second shocking thing was that the two interviews with Hoerber had been on the record, making him one of only two clerks who spoke on the record.

I was particularly struck because at the time I read Woodward's memo about his first interview with Hoerber, I was writing our first draft treatment of the capital punishment cases and had paid insufficient attention to the *Moore* case as a cast off remainder. Woodward's notes said:

Another case involving a guy named Slick; believe case was *Moore v. Illinois*. It was a Blackmun opinion and Bren. joined it. Decision was clearly wrong but Bren. did not want take back his vote. It had started out as 7 to 2; Pow. [Justice Lewis Powell] and one other switched after more study as any logical person would have done. So it was 5 to 4. Bren. held to original position because it was Blackmun. Clerks blamed themselves for not getting on the case early and seeing what it involved. Marsh. [Marshall] dissented.⁹⁰

Armed with Hoerber's cryptic account of the case, I joined Woodward in interviewing other clerks and sources. In all we had six sources in addition to Hoerber who confirmed or offered additional detail. Two of those other sources had spoken directly to Justice Brennan.

89. *Id.*

90. Scott Armstrong & Bob Woodward, *The Evidence of 'The Brethren': An Exchange*, N.Y. REV. BOOKS, June 12, 1980, at 47, 48.

So when Lewis's review was published, I was absolutely sure we had accurately captured the Brennan conversation with Hoerber and what Hoerber had told others. One of the sources who spoke directly to Justice Brennan had spoken to other Justices as well and had been given the same rationale as we quote Justice Brennan giving Hoerber; all of our sources said at the time they were either "surprised" or "shocked," and two reported Hoerber as "shaken." In addition, when Hoerber and his three co-clerks sent a letter to the *Post* disputing the account of the *Moore* case, we had contacted Hoerber and read him the notes of his interview. One half hour later, a messenger arrived withdrawing the letter on Hoerber's behalf.⁹¹

We wrote a strong response to Lewis in *The New York Review of Books*,⁹² which referenced the details of our interviews and that the Brennan clerks had withdrawn their letter. We asked whether it was more

likely that Hoerber's new position is accurate after the publication of a book that contains criticisms of his former boss? Or is it more likely that Hoerber was accurate in 1972 when he reported Brennan's reaction to others at the Court and in 1977 when he gave the same account to us? It seems far more likely to us that Hoerber's memory and candor were operating more precisely before there was a public controversy about the case, than after.⁹³

Lewis responded in *The New York Review of Books* with more inconclusive information from clerks admitting to having spoken to us about the case but denying there were sources for the account of Justice Brennan's motives. He does acknowledge that, upon re-interviewing them, the Brennan clerks admitted withdrawing their letter.⁹⁴

The dialogue was left to die there.⁹⁵ But we got a bit more of the context when the well-documented biography of Justice Brennan—

91. I don't have access to our files, but I believe the other clerks also withdrew from the letter.

92. Armstrong & Woodward, *supra* note 90, at 47.

93. *Id.* at 48.

94. Anthony Lewis, *Anthony Lewis Replies*, N.Y. REV. BOOKS, June 12, 1980, at 48.

95. It was over twenty years later before Lewis privately acknowledged to me that our account of the case was likely correct. The papers of other Justices had by that time confirmed our story, as well as others that Justice Brennan had told Lewis were untrue. Justice Brennan's animosity towards *The Brethren* apparently reflected a deep animosity toward the press, which belied the important role he has played in upholding other free press and free speech values.

Justice Brennan: Liberal Champion, by Seth Stern and Stephen Wermiel⁹⁶—came out. In it, the authors noted: “Brennan certainly did not mind when his clerks and a friendly journalist sought to challenge the book’s most damaging charge against him: that he switched votes to curry favor with Blackmun.”⁹⁷ The book cites the clerks’ letter without noting that they withdrew it. “‘I can’t adequately tell you how much your response means to me,’ Brennan wrote Lewis.”⁹⁸ The book contains many stories which confirm our treatment of cases but shows just how thin-skinned Justice Brennan was about his treatment by the press.

On reflection, I began to wonder what other details might be available in recently released Justices’ files that would explain what happened as well as why Justice Brennan and his clerks were so upset. What I found would not change our account of the *Moore* case aside from a few details, but it would put it in a larger context which we may have failed to emphasize sufficiently.

The most difficult task in long narratives about complex, interlocked sequences of events is to tell the constantly overlapping details in coherent chronologies, without constantly repeating details in a cumbersome way that would annoy and distract readers. On re-reading *The Brethren* recently, I recognized some of the shortcomings of our efforts. Because of the order in which we present our accounts of the case groupings—particularly our treatment of the abortion cases and the decision to hold them over to the next Term—the reader is deprived of a sense of the full depth of intrigue in the interplay between chambers in the second half of the 1971 Term.

The 1971 Term represents one of the most dramatic transitions in the Court’s history. Justices Black and Harlan departed in September 1971. With the delays in replacing them caused by the failure of the Carwell and Haynesworth nominations, the arrival of Justices Powell and Rehnquist in January 1972 accelerated the shift from the liberal orientation of the Warren Court to a more conservative and more deeply divided Burger Court. The two new members had missed October through December oral arguments, covering roughly half the court’s workload.

96. STERN & WERMIEL, *supra* note 37.

97. *Id.* at 468. Actually, the book said he refused to switch votes, although as the account below notes, it may be accurate to say he had already switched votes and refused to switch back.

98. *Id.* at 469.

With the availability of Justice Powell's digitalized case files online⁹⁹ and the selected availability of certain of Justices Douglas's, Marshall's, and Blackmun's files in digitized form online,¹⁰⁰ it is now possible to see the timing of some of these events with more precision than we could muster from the records and accounts we gathered from multiple sources as we worked.

The history preceding the Blackmun circulation in *Moore*, as well as the timing of the circulation, shed further light on the dynamic that was going on within the Court.

When Justices Powell and Rehnquist came on the Court, Justices Douglas, Brennan, and Marshall and even Justice Potter Stewart began to worry about the appointment of four Justices by Nixon.¹⁰¹ Chief Justice Burger already had one "twin," since Justice Blackmun had shown very little independence to date. Now, two more appointments would likely make a solid lock.¹⁰² They were aware that Chief Justice Burger sent "eyes only" memos to the two new Justices.¹⁰³

After oral argument in the two abortion cases, Chief Justice Burger assigned them to Justice Blackmun. On December 18, 1971, Justice Douglas objected in a memo to Chief Justice Burger with copies to all the members of the conference:

As respects your assignment in this Case [*Doe v. Bolton*], my notes show there were four votes to hold parts of the Georgia Act unconstitutional and to remand for further findings, e.g., on equal protection. Those four were Bill Brennan, Potter Stewart, Thurgood Marshall and me.

There were three to sustain the law as written — you, Byron White, and Harry Blackmun.

99. POWELL PAPERS, *supra* note 57.

100. PAUL J. WAHLBECK, JAMES F. SPRIGGS II & FORREST MALTZMAN, THE BURGER COURT OPINION-WRITING DATABASE (2011) [hereinafter WAHLBECK, ET AL., OPINION-WRITING DATABASE], <http://supremecourtopinions.wustl.edu/>, archived at <http://perma.cc/3E4Z-R7LN>. To give the fullest explanation, it would be necessary to gather and digitalize the files of these four Justices. In addition, Justice Brennan's files are available for authorized uses, which will shed further light. Justices Stewart and White's recently unsealed files will also help complete the picture.

101. There had been no similarly high number of Justices appointed since the Roosevelt administration, and never had four Justices been appointed within the first three years of a president's term.

102. See WOODWARD & ARMSTRONG, *supra* note 1, at 172–73, 222.

103. For example, in January 1972, the Chief Justice privately took Justice Powell aside to give him an opinion by Justice Douglas that had never been published but that conflicted with his current position on the death penalty cases in an effort to undermine Justice Douglas's credibility with Justice Powell.

I would think, therefore, that to save future time and trouble, one of the four, rather than one of the three, should write the opinion.¹⁰⁴

Chief Justice Burger responded to Justice Douglas on December 20th:

At the close of discussion of this case, I remarked to the Conference that there were, literally, not enough columns to mark up an accurate reflection of the voting in either the Georgia or the Texas cases. I therefore marked down no votes and said this was a case that would have to stand or fall on the writing, when it was done.

That is still my view of how to handle these two (also No.70-18—*Roe v. Wade*) sensitive cases, which, I might add, are quite probable candidates for reargument.

However, I have no desire to restrain anyone's writing even though I do not have the same impression of views.¹⁰⁵

Justice Douglas feared that Chief Justice Burger was also anxious to delay cases until Justices Powell and Rehnquist could vote on them. On January 18th, in response to an invitation by Chief Justice Burger to the Justices to designate cases which should be reargued, Justice Blackmun suggested that it might be best to have *Roe* and *Doe* reargued the next

104. Memorandum from William O. Douglas, Associate Justice, Supreme Court of the United States, to Warren E. Burger, Chief Justice, Supreme Court of the United States (Dec. 18, 1971), in *The Burger Court Opinion Writing Database: Doe v. Bolton* [hereinafter *Opinion Writing Database: Doe v. Bolton*], http://supremecourtopinions.wustl.edu/files/opinion_pdfs/1971/70-40.pdf, archived at <http://perma.cc/3BKP-FAD2>, in WAHLBECK, ET AL., OPINION-WRITING DATABASE, *supra* note 100. Also note that according to the conference notes of Justices now available, Justice Blackmun either voted to strike both statutes or to strike only the Texas law. Justice Douglas's notes have four Justices—Douglas, Brennan, Stewart, and Marshall—voting to strike both statutes. See Douglas B1589. Justice Brennan's notes have a 5–2 split in both cases. See Brennan B420b. Justice Brennan's notes also reflect that both Justices Douglas and Blackmun “seemed to favor remanding the [*Doe*] case” to get a “richer and more detailed record.” See DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF *ROE V. WADE* 532 (1994). Garrow reports that, according to Justice Douglas's clerks, after the conference on the cases, the Court's senior member “was in an especially good mood, for he had been very pleasantly surprised by Harry Blackmun's comments about both *Roe* and *Doe*.” *Id.* Because of this, even though he had initially considered Justice Potter Stewart for authorship of the opinions, he was now inclined to assign them to Justice Blackmun. *Id.* at 533, cited in Joseph F. Kobyłka, *Tales from the Blackmun Papers: A Fuller Appreciation of Harry Blackmun's Judicial Legacy*, 70 MO. L. REV. 1075, 1085 n.73 (2005), <http://scholarship.law.missouri.edu/cgi/viewcontent.cgi?article=3676&context=mlr>, archived at <http://perma.cc/4GPV-ACFZ>.

105. Memorandum from Warren E. Burger, Chief Justice, Supreme Court of the United States, to William O. Douglas, Associate Justice, Supreme Court of the United States (Dec. 20, 1971), in *Opinion Writing Database: Doe v. Bolton*, *supra* note 104.

Term.¹⁰⁶ From Justice Douglas's perspective, should the cases be reargued with the two new Nixon appointees voting, a majority for a privacy right which would strike the abortion laws could turn into a 5–4 decision supporting continued state regulation.

On March 6, 1972, Justice Douglas again challenged Chief Justice Burger's assignment practices in a polite but direct memo to the Chief regarding an unauthorized wiretapping case, in which he questioned the Chief having assigned the case when in fact Justice Douglas was the senior Justice who favored the majority view:

I think the assignment to Byron (much as I love my friend) is not an appropriate one for the reason that he and two others including yourself voted to affirm on the statute, while there were five who voted to affirm on the Constitution. Those five were Brennan, Stewart, Marshall, myself, and Powell.

You will recall that Lewis Powell said that to handle the government's problem of searching the country over for an appropriate magistrate to issue a warrant, an opinion should be written suggesting that the court here in the District of Columbia should handle all of the cases, which I thought was a splendid idea.

With all respect, I think Powell represents the consensus.

I have not canvassed everybody, but I am sure that Byron, who goes on the statute, will not get a court.

To save time, may I suggest you have a huddle and see to it that Powell gets the opinion to write?

Or if you want me to suggest an assignment, that would be mine.¹⁰⁷

106. Memorandum from Harry A. Blackmun, Associate Justice, Supreme Court of the United States, to Warren E. Burger, Chief Justice, Supreme Court of the United States (Jan. 18, 1972), in *70-18 Roe v. Wade*, http://law2.wlu.edu/deptimages/powell%20archives/70-18_RoeWade.pdf, archived at <http://perma.cc/C6CK-VXUJ>, in POWELL PAPERS, *supra* note 57; see WOODWARD & ARMSTRONG, *supra* note 1, at 170.

107. Memorandum from William O. Douglas, Associate Justice, Supreme Court of the United States, to Warren E. Burger, Chief Justice, Supreme Court of the United States (Mar. 6, 1972), in *70-153 U.S. v. U.S. District Court for the Eastern District of Michigan, Southern Division* [hereinafter *U.S. v. U.S. District Court: Mar.–Apr. 1972*], *1972 March–April*, http://law2.wlu.edu/deptimages/powell%20archives/70-153_U.S.%20v.%20U.S.%20District%20Court,%201972March-April.pdf, archived at <http://perma.cc/9N8U-MCBC>, in POWELL PAPERS, *supra* note 57. Justice Douglas also objected to assignments in *Gooding v. Wilson*, insisting that Justice White had voted with a five person majority along with Justice Douglas. Justice White said he had not voted that way, and the issue was dropped. See WOODWARD & ARMSTRONG, *supra* note 1, at 177. We also describe the case of *Lloyd v. Tanner*, in which Justice Douglas insisted that because the Chief was unsure of his position, he was the senior

That same day, Chief Justice Burger responded to Justice Douglas's challenge by politely rebuffing his suggestion:

I have your memo of March 6 and see no reason why Lewis should not undertake to write and see what support his position achieves. I am not as clear on Lewis' position as your memo suggests but I would be happy if his view could command a majority.

I believe there may be much likelihood of Byron's securing substantial support and I am not sure Byron's and Lewis' views are not rather close.

In all events this, like several other of our current cases, will not clarify until we have something in writing.

I adhere to my request that Byron proceed to write. We cannot evaluate the views until we see them. They may not "write" as they were expressed at Conference and of necessity few were very precise — or could be.¹⁰⁸

Justice Douglas responded two days later by addressing the question directly to Justice Powell but copying only Justice Brennan:

The vote at Conference was to affirm but there were five of us who could not do it on the statute but went on the Constitution. And according to my notes, you were one of the five. Byron, however, was explicit. He could not go on the Constitution but would have to go on the statute.

Traditionally an opinion would therefore be in the province of the senior Justice to assign. That was not done in this case and the matter is of no consequence to me as a matter of pride and privilege—but I think it makes a tremendous difference in the result.

I am writing you this note hoping you will put on paper the ideas you expressed in Conference and I am sure you will get a majority. I gather from the Chief's memo that he is not at all averse to that being done.¹⁰⁹

After examining the records in the case, Justice Powell delicately demurred the next day:

Justice in a 4–4 vote and wanted to assign Justice Thurgood Marshall. *Id.* at 178–81.

108. Memorandum from Warren E. Burger, Chief Justice, Supreme Court of the United States, to William O. Douglas, Associate Justice, Supreme Court of the United States (Mar. 6, 1972), in *U.S. v. U.S. District Court: Mar.–Apr. 1972*, *supra* note 107.

109. Memorandum from William O. Douglas, Associate Justice, Supreme Court of the United States, to Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States (Mar. 8, 1972), in *U.S. v. U.S. District Court: Mar.–Apr. 1972*, *supra* note 107.

In view of the exchange of notes as to how we proceed with the opinion writing in the above case, I thought it might be well for me to outline my present thinking on this case. I have no very clear idea as to whether the substance of these views is shared by other members of the Court. I suspect each of us differs in certain respects.

Byron (to whom I am sending a copy of the memorandum) is clearly better qualified than I am to write, and I assume that he will do so. But I will undertake to enlarge this memorandum into a draft if this seems desirable.¹¹⁰

Justice Powell set about writing an opinion which would become the majority view. But in the context of Chief Justice Burger's strong objections, Justice Powell wrote him a "personal" note suggesting that if the Court did not go along with setting a Constitutional standard, the case would come right back to them again in some other guise.¹¹¹ The other votes fell into place as joins and concurrences and a join only in the result from the Chief. Justice Blackmun remained silent until June 12th, when he joined Justice Powell's opinion.

On April 21st, Justice Douglas assigned to Justice Marshall an important case, *Lloyd Corp. v. Tanner*,¹¹² involving the free speech rights of antiwar demonstrators who had distributed literature in a private retail mall, noting the vote had been 5–4 with Justice Douglas the most senior in the majority.¹¹³ On the 24th, Chief Justice Burger responded with a head-on challenge:

110. Memorandum from Lewis F. Powell, Associate Justice, Supreme Court of the United States, to Warren E. Burger, Chief Justice, Supreme Court of the United States, and William O. Douglas, Associate Justice, Supreme Court of the United States (Mar. 9, 1972), in *U.S. v. U.S. District Court: Mar.–Apr. 1972*, *supra* note 107.

111. Memorandum from Lewis F. Powell, Associate Justice, Supreme Court of the United States, to Warren E. Burger, Chief Justice, Supreme Court of the United States (May 3, 1972), in *The Burger Court Opinion Writing Database: United States v. United States District Court for Eastern District of Michigan*, http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1971/70-153.pdf, archived at <http://perma.cc/H57X-TGCE>, in WAHLBECK, ET AL., OPINION-WRITING DATABASE, *supra* note 100.

112. *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

113. Memorandum from William O. Douglas, Associate Justice, Supreme Court of the United States, to Warren E. Burger, Chief Justice, Supreme Court of the United States (Apr. 21, 1972), in *The Burger Court Opinion Writing Database: Lloyd Corp. v. Tanner* [hereinafter *Opinion Writing Database: Lloyd Corp. v. Tanner*], http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1971/71-492.pdf, archived at <http://perma.cc/5N2E-UKCP>, in WAHLBECK, ET AL., OPINION-WRITING DATABASE, *supra* note 100; see WOODWARD & ARMSTRONG, *supra* note 1, at 178–81.

The vote was not 5–4 as I had reserved and not voted at all.

Independent of what Harry does I will assign this case in due course if I vote to affirm. With a Federal Judicial Center meeting Saturday and part of Sunday I have not as yet worked on the assignments of our final cases. If I am not in the majority, you will, of course, then be free to assign.¹¹⁴

That same day, Justice Blackmun diplomatically wrote Justice Marshall:

I note Justice Douglas' assignment of the opinion in this case to you. Please bear in mind that my vote at Conference was very tentative. I am not at all at rest and at the moment could go either way. I mention this because of the closeness of the vote.¹¹⁵

On April 25th, Justice Powell responded diplomatically to a request from Justice White, the senior member of the court who had voted for the other side of the *Tanner* case from Justice Douglas's:

This is to confirm that I will be glad, as you requested, to draft an opinion for those of us who voted to reverse the above case.

I note that Harry's vote is still tentative and my notes indicate that the Chief reserved decision. Thus, unless advised to the contrary, I will assume that you, Bill Rehnquist and I are the only solid votes on our side at this time.¹¹⁶

On May 1st, Justice Douglas responded to Chief Justice Burger with his own challenge:

You apparently misunderstand. *Lloyd* is already assigned to Thurgood and he's at work on an opinion. Whether he will command a majority, no one knows.

Under the Constitution & Acts of Congress, there are no provisions for assignment of opinions. Historically, the Chief Justice has made the assignment if he is in the majority. Historically, the senior in the majority assigns the opinion if the Chief Justice is in the minority.

114. Memorandum from Warren E. Burger, Chief Justice, Supreme Court of the United States, to William O. Douglas, Associate Justice, Supreme Court of the United States (Apr. 24, 1972), in *Opinion Writing Database: Lloyd Corp. v. Tanner*, *supra* note 113.

115. Memorandum from Harry A. Blackmun, Associate Justice, Supreme Court of the United States, to Thurgood Marshall, Associate Justice, Supreme Court of the United States (Apr. 24, 1972), in *Opinion Writing Database: Lloyd Corp. v. Tanner*, *supra* note 113.

116. Memorandum from Lewis F. Powell, Associate Justice, Supreme Court of the United States, to Byron R. White, Associate Justice, Supreme Court of the United States (Apr. 25, 1972) (emphasis added), in *Opinion Writing Database: Lloyd Corp. v. Tanner*, *supra* note 113.

You led the Conference battle against affirmance and that is your privilege. But it is also the privilege of the majority, absent the Chief Justice, to make the assignment. Hence, *Lloyd* was assigned and is assigned.¹¹⁷

Making reference to a bussing case from the previous Term, Justice Douglas continued:

The tragedy of compromising on this simple procedure is illustrated by last Term's *Swann*. You who were a minority of two kept the opinion for yourself and faithfully wrote the minority position which the majority could not accept. Potter wrote the majority view and a majority agreed to it. It was not circulated because we thought you should see it. After much effort your minority opinion was transformed, the majority view prevailed, and the result was unanimous.

But *Swann* illustrated the wasted time and effort and the frayed relations which result when the traditional assignment procedure is not followed.

*If the Conference wants to authorize you to assign all opinions, that will be a new procedure. Though opposed to it, I will acquiesce. But unless we make a frank reversal in our policy, any group in the majority should and must make the assignment.*¹¹⁸

Justice Douglas imputed the worst motives to Chief Justice Burger:

This is a two-edge sword. Byron might well head up five members of the Court, you, Bill Brennan, Potter Stewart and I being the minority; and we might feel very strongly about it. But in that event it is for Byron to make the assignment. *It is not for us in the minority to try to outwit Byron by saying "I reserve my vote" and then recast it to control the assignment. That only leads to a frayed and bitter Court full of needless strains and quarrels.*

Lloyd stays assigned to Thurgood.¹¹⁹

On May 8th, the tension rose again, when Chief Justice Burger informed the conference that he continued "to find the case a very

117. Memorandum from William O. Douglas, Associate Justice, Supreme Court of the United States, to Warren E. Burger, Chief Justice, Supreme Court of the United States (May 1, 1972), in *Opinion Writing Database: Lloyd Corp. v. Tanner*, *supra* note 113.

118. *Id.* (emphasis added).

119. *Id.* (emphasis added).

difficult one” but “concluded to vote to reverse the judgment under review” and was assigning the case to Powell.¹²⁰

Under pressure from the Chief Justice, Justice Blackmun wrote later that day: “Dear Chief: I have spent a good bit of the weekend wrestling with this case. I have now concluded that my vote will be to reverse and not extend *Logan Valley* to the present situation.”¹²¹ Justice Blackmun’s shift after the Chief Justice’s declaration took the majority away from the Douglas, Brennan, Stewart, and Marshall coalition. The shift gave Justice Powell a majority before he had even circulated a draft opinion. Most of all, it cemented the view of the Douglas coalition that Justice Blackmun could well shift his position in cases important to Chief Justice Burger.

On May 18th, Justice Blackmun circulated his “first and tentative draft” opinion in *Roe v. Wade* holding that the Texas statute was unconstitutionally vague, which in effect would invalidate the abortion laws in a majority of states.¹²²

Justice Brennan endorsed the draft the same day but sent his comments to Justice Blackmun with suggestions for the other abortion case:

My recollection of the voting on this and the *Georgia* case was that a majority of us felt that the Constitution required the invalidation of abortion statutes save to the extent they required that an abortion be performed by a licensed physician within some limited time after conception. I think essentially this was the view shared by Bill, Potter, Thurgood and me. My notes also indicate that you might support this view at least in this *Texas* case. In the circumstances, I would prefer a disposition of the core constitutional question. Your circulation, however, invalidates the Texas statute only on the vagueness ground. I see no reason for a reargument in the *Georgia* case. I think we

120. Memorandum from Warren E. Burger, Chief Justice, Supreme Court of the United States, to the Conference (May 8, 1972), in *Opinion Writing Database: Lloyd Corp. v. Tanner*, *supra* note 113.

121. Memorandum from Harry A. Blackmun, Associate Justice, Supreme Court of the United States, to Warren E. Burger, Chief Justice, Supreme Court of the United States (May 8, 1972), in *Opinion Writing Database: Lloyd Corp. v. Tanner*, *supra* note 113.

122. Memorandum from Harry A. Blackmun, Associate Justice, Supreme Court of the United States, to Conference (May 18, 1972), in *The Burger Court Opinion Writing Database: Roe v. Wade* [hereinafter *Opinion Writing Database: Roe v. Wade*], http://supremecourt.opinio ns.wustl.edu/files/opinion_pdfs/1971/70-18.pdf, archived at <http://perma.cc/J565-UPKM>, in WAHLBECK, ET AL., *OPINION-WRITING DATABASE*, *supra* note 100.

should dispose of both cases on the ground supported by the majority.

This does not mean, however, that I disagree with your conclusion as to the vagueness of the Texas statute. I only feel that there is no point in delaying longer our confrontation with the core issue on which there appears to be a majority and which would make reaching the vagueness issue unnecessary.¹²³

Justices Douglas and Marshall indicated a week later their assent to the *Roe* case.

On May 25th, Justice Blackmun circulated his draft of *Doe v. Bolton*, striking down the Georgia law and upholding only abortions performed in a licensed hospital by a licensed physician “based upon his best clinical judgment . . . an abortion is necessary.”¹²⁴ The draft opinion in *Bolton* was considerably more substantive than the *Roe* draft. The opinion balanced the State’s interest in preserving life with the right of a woman and her doctor to control her body. It did not go all the way to establishing a constitutionally based right of privacy, but it was close enough that Justices Douglas, Brennan, and Marshall immediately joined.

Chief Justice Burger once again pushed for a reargument of the abortion cases. On Saturday, May 27th, he went to Justice Blackmun’s chambers and met privately with Justice Blackmun for hours. Justice Blackmun’s clerks waited anxiously to find out what cases the Chief was discussing with Justice Blackmun, but the Justice left the office without a word to them.¹²⁵

123. Memorandum from William J. Brennan, Jr., Associate Justice, Supreme Court of the United States, to Harry A. Blackmun, Associate Justice, Supreme Court of the United States (May 18, 1972), in *Opinion Writing Database: Roe v. Wade*, *supra* note 122.

124. Harry A. Blackmun, *Doe v. Bolton* (May 25, 1972) (circulated draft) (quoting Act of Apr. 10, 1968, No. 1157, sec. 1, § 26-1202(a), 1968 Ga. Laws 1249, 1277) (internal quotation marks omitted), as available in *Opinion Writing Database: Roe v. Wade*, *supra* note 122.

125. WOODWARD & ARMSTRONG, *supra* note 1, at 186. The clerks speculated that there was a connection between Chief Justice Burger’s providing Justice Blackmun with a fifth vote for Justice Blackmun’s majority opinion in *Flood v. Kuhn* and Justice Blackmun’s willingness to put over the abortion case for reargument. At the time of the conference, Justice Marshall had voted with Justice Blackmun in favor of major league baseball and Chief Justice Burger for Flood. *See id.* at 190. Once Justice Marshall switched to a dissent, Justice Blackmun, still lacking the Chief’s vote, did not yet have a majority. He had only himself and Justices Stewart, White, and Rehnquist. *Id.* at 190–91. Justice Powell, who favored Flood, insisted on recusing himself for a conflict of interest despite his clerks’ unsuccessful last-minute effort to get him into the case, since holding stock in Budweiser (the owner of the St. Louis Cardinals) would not be seen as a conflict if he voted against Major League Baseball. *Id.* at 191–92. For a very well-researched book that relies on several Justices’ papers, see also BRAD SNYDER, *A WELL-PAID SLAVE: CURT FLOOD’S FIGHT FOR FREE AGENCY IN*

On Monday morning, May 29th, Justice White circulated a strong dissent in the abortion cases, but Justice Stewart called Justice Blackmun indicating he too would join if accommodated on a couple of points. Justice Blackmun now had a 5–2 majority. Even if Justices Powell and Rehnquist had sided with Chief Justice Burger and Justice White against striking down the abortion statutes, there would have been a five man majority to strike them down.

Despite his five-man majority striking down the Texas and Georgia abortion statutes, on May 31st Blackmun waived once again. He wrote the conference indicating his belief that “on an issue so sensitive and so emotional as this one, the country deserves the conclusion of a nine-man, not a seven-man court, whatever the ultimate decision may be.”¹²⁶ Justice Blackmun also said, “Although I have worked on these cases with some concentration, I am not yet certain about all the details.”¹²⁷

PROFESSIONAL SPORTS 283–304 (2006) (citing Douglas B1561/F71-32(d); Blackmun B60/F9; *id.* at B145/F2–3; *id.* at B1403/F4–5; Brennan BI:253/F8; 1971 Case History, Brennan BII-6/F14–15; Marshall B87/F10; Powell B148/F3).

The Brethren's handling of *Flood v. Kuhn* has also been challenged, including by Ross Davies, who notes that Justice Blackmun denied our story that, after being called to task by Justice Marshall for not having any black players on his original list of greats, he added three — Satchel Paige, Jackie Robinson, and Roy Campanella. Ross E. Davies, *A Tall Tale of The Brethren*, 33 J. SUP. CT. HIST. 186, 190 (2008). The issue of whether we erred is whether Justice Marshall's chiding of Justice Blackmun was based on his failure to include the names of blacks in his first circulation of a “published” draft of the opinion. Professor Davies has located what he characterizes as Justice Blackmun's first draft, which includes the names of the black players. I have not had time to track down our files. While we could be wrong on this detail, I suspect that the list Justice Marshall was using to chide Justice Blackmun was from a chambers draft, a working typescript shared among clerks prior to the first formal published draft. For a discussion of Justice Powell's use of such drafts in the *Snepp* case, see *supra* notes 56–68 and accompanying text. But our account did not imply that Justice Marshall was using the names to bargain. He was simply chiding Justice Blackmun for not understanding that blacks had been excluded from the major leagues until 1947. It may be noteworthy that without the names of the three black players, the careers of those on the roster predate 1945. (This supports the theory that the list that Justice Marshall saw was in typescript form at a stage when the only names on the list predated 1945. This may also account for Justice Blackmun's exclusion of Camillo Pascual. See WOODWARD & ARMSTRONG, *supra* note 1, at 190–91.) It is also clear from Justice Marshall's dissent that his differences with Justice Blackmun were substantive on both the issue of stare decisis and the uniquely weakened position of labor representation for players as a result of the Court's deference to Major League Baseball.

126. Memorandum from Harry A. Blackmun, Associate Justice, Supreme Court of the United States, to the Conference (May 31, 1972), in *Opinion Writing Database: Roe v. Wade*, *supra* note 122.

127. *Id.* at 2. In *The Brethren*, we had this happening on June 3rd, WOODWARD & ARMSTRONG, *supra* note 1, at 186, but Justice Powell's files indicate otherwise.

Justices Douglas, Brennan, Stewart and Marshall were concerned that the Chief Justice was pressuring Justice Blackmun and that after the break before next Term's reargument Justice Blackmun might abandon the majority stance on the constitutional merits.¹²⁸ All three immediately weighed in against reargument. Justice Brennan tried to change Justice Blackmun's mind, saying, "I see no reason to put these cases over for reargument," particularly since "there are five of us (Bill Douglas, Potter, Thurgood, you and I) in substantial agreement with both opinions and in that circumstance I question that reargument would change things."¹²⁹ Justice Douglas was even stronger:

While we could sit around and make pages of suggestions, I really don't think that is important. The important thing is to get them down.

In the second place, I have a feeling that where the Court is split 4-4 or 4-2-1 or even in an important constitutional case 4-3, reargument may be desirable. But *you have a firm 5 and the firm 5 will be behind you in these two opinions until they come down.* It is a difficult field and a difficult subject. But where there is that solid agreement of the majority I think it is important to announce the cases, and let the result be known so that the legislatures can go to work and draft their new laws.¹³⁰

The next day, June 1st, Justice Powell, who had not participated in the case, circulated his first comment on the matter to the conference, indicating his preference for reargument:

I have not read the briefs; nor have I read either of Harry's opinions. I am too concerned about circulating my own remaining opinions to be studying cases in which I did not participate. I certainly do not know how I would vote if the cases are reargued.

In any event, I have concluded that it is appropriate for me to participate in the pending question. I have read the memoranda circulated, and am persuaded to favor reargument primarily by the fact that Harry Blackmun, the author of the opinions, thinks the cases should be carried over and reargued next fall. His

128. WOODWARD & ARMSTRONG, *supra* note 1, at 186-87.

129. Memorandum from William J. Brennan, Associate Justice, Supreme Court of the United States, to Harry A. Blackmun, Associate Justice, Supreme Court of the United States (May 31, 1972), in *Opinion Writing Database: Roe v. Wade*, *supra* note 122.

130. Memorandum from William O. Douglas, Associate Justice, Supreme Court of the United States, to Harry A. Blackmun, Associate Justice, Supreme Court of the United States (May 31, 1972), in *70-18 Roe v. Wade*, *supra* note 106.

position, based on months of study, suggests enough doubt on an issue of large national importance to justify the few months delay.¹³¹

Justice Rehnquist chimed in for reargument, creating a majority for reargument.

The same day, Justice Douglas wrote Chief Justice Burger with copies to the rest of the Court stating that if the vote of the Conference was to reargue, he would “file a statement telling what is happening to us and the tragedy it entails.”¹³²

He sent to Justice Brennan alone his draft memorandum which complained that Chief Justice Burger had usurped the assignment of the case although the Chief was in a minority of three of the seven eligible to vote.¹³³ The political accusation was now being threatened as a public circulation:

The Chief Justice represented the minority view in the Conference and forcefully urged his viewpoint on the issues. It was a seven-man Court that heard these cases and voted on them. Out of that seven there were four who initially took a majority view. Hence traditionally the senior Justice in the majority should have made the assignment of the opinion. *The cases were, however, assigned by the Chief Justice, an action no Chief Justice in my time would ever have taken.* For the tradition is a longstanding one that the senior Justice in the majority makes the assignment.

The matter of assignment is not merely a matter of protocol. The main function of the Conference is to find the consensus. When that is known, it is only logical that the majority decide who their spokesman should be; and traditionally the selection has been made after a very informal discussion among the majority.

When that procedure is followed, the majority view is promptly written out and circulated, after which dissents or concurrences may be prepared.

When, however, the minority seeks to control the assignment, there is a destructive force at work in the Court. When the Chief

131. Memorandum from Lewis F. Powell, Associate Justice, Supreme Court of the United States, to the Conference (June 1, 1972), in *70-18 Roe v. Wade*, *supra* note 106.

132. Memorandum from William O. Douglas, Associate Justice, Supreme Court of the United States, to Warren E. Burger, Chief Justice, Supreme Court of the United States (June 1, 1972), in *70-18 Roe v. Wade*, *supra* note 106.

133. Justices Powell and Rehnquist had not been on the Court when the case was originally argued and had not participated in the decision.

Justice tries to bend the Court to his will by manipulating assignments, the integrity of the institution is imperiled.

....

Perhaps the purpose of The Chief Justice, a member of the minority in the Abortion Cases, in assigning the opinions was to try to keep control of the merits. If that was the aim, he was unsuccessful. Opinions in these two cases have been circulated and each commands the votes of five members of the Court. Those votes are firm, the Justices having spent many, many hours since last October mulling over every detail of the cases. The cases should therefore be announced.

The plea that the cases be reargued is merely another strategy by a minority somehow to suppress the majority view with the hope that exigencies of time will change the result. That might be achieved of course by death or conceivably retirement. But that kind of strategy dilutes the integrity of the Court and makes the decisions here depend on the manipulative skills of a Chief Justice.

The *Abortion Cases* are symptomatic. This is an election year. Both political parties have made abortion an issue. What the parties say or do is none of our business. We sit here not to make the path of any candidate easier or more difficult. We decide questions only on their constitutional merits. To prolong these *Abortion Cases* into the next election would in the eyes of many be a *political gesture unworthy of the Court.*

Each of us is sovereign in his own right. Each arrived on his own. Each is beholden to no one. *Russia once gave its Chief Justice two votes; but that was too strong even for the Russians. . . .*

Five members of the Court have agreed on a disposition of the Texas and Georgia *Abortion Cases*. One dissent has already been written. Those opinions should come down forthwith.¹³⁴

Justice Brennan, fearing the damage that would be done to the Court by the ferocity and specificity of the attack, urged Justice Douglas to soften the language and bracketed phrases he felt would be the most damaging. Justice Douglas removed several of the most offensive references.¹³⁵ But Justice Douglas refused to remove the rest, and on

134. WOODWARD & ARMSTRONG, *supra* note 1, at 187–88 (emphasis added); see William O. Douglas, First Draft of Dissent to Order for Reargument in *Roe v. Wade* and *Doe v. Bolton* (June 2, 1972), as quoted in JAMES F. SIMON, THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT 102–03 (1st Touchstone ed. 1996); see also William O. Douglas, Sixth Draft of Dissent to Order for Reargument in *Roe v. Wade* and *Doe v. Bolton* (June 13, 1972), in *Opinion Writing Database: Roe v. Wade*, *supra* note 122.

135. SIMON, *supra* note 134, at 103–04. These included the references to the Russian Chief Justice having two votes, the statement that “[w]hen the Chief Justice tries to bend the

June 13th, Douglas circulated to everyone in the conference his sixth draft, now styled as a dissent, and left for Goose Prairie.¹³⁶

Justice Blackmun was bothered by the looming confrontation.¹³⁷ Justice Douglas's threat to expose the reargument decision as a "political gesture unworthy of the Court" hung like a sword of Damocles over the Court's reputation as well as a stinging insult to Justice Blackmun's reputation.¹³⁸

Court to this will by manipulating assignments, the integrity of the institution is imperiled," and the phrase "an action no Chief Justice in my time would ever have taken." *Id.* at 103. He also changed the phrase "manipulated for unworthy objectives" to "frustrated." *Id.* at 104.

136. William O. Douglas, Sixth Draft of Dissent to Order for Reargument in *Roe v. Wade* and *Doe v. Bolton* (June 13, 1972), in *Opinion Writing Database: Roe v. Wade*, *supra* note 122; see WOODWARD & ARMSTRONG, *supra* note 1, at 187–88.

137. WOODWARD & ARMSTRONG, *supra* note 1, at 187.

138. After Justice Douglas's memo leaked to the press on July 4, 1972, see *Move by Burger May Shift Court's Stand on Abortion*, WASH. POST, July 4, 1972, at A1, cited in GARROW, *supra* note 104, at 557–60 & 866 n.99, Justice Douglas wrote Chief Justice Burger a handwritten note saying he was "upset and appalled" at

the nasty story about the abortion cases

. . . I have never breathed a word concerning the cases or my memo to anyone outside the Court. . . .

We have our difference; but so far as I am concerned they are wholly internal; and if revealed, they are mirrored in opinion files, never in "leaks" to the press.

Letter from William O. Douglas, Associate Justice, Supreme Court of the United States, to Warren E. Burger, Chief Justice, Supreme Court of the United States (July 4, 1972), quoted in GARROW, *supra* note 104, at 558. Inviting Burger and his wife Vera to visit him and his wife Cathy in Goose Prairie, he signed the letter "[w]ith affectionate regards." *Id.*

Chief Justice Burger responded to Justice Douglas on July 27th after the Term ended to refute some of his charges. His memo reflects the extraordinary pressures the Court faced and the unprecedented nature of Justice Douglas's threatened dissent:

1. It is not accurate, as you state, that "The Chief Justice represented the minority view in the Conference" on the abortion cases, unless you add that there was no majority for any firm position. On the Texas case there was a consensus, if not unanimity, that the Texas statute had to fall. There were varying views as to the basis. No one's notes are controlling nor likely to be comprehensive, or even precisely accurate. Mine are "final disposition to wait on writing and grounds" as to both cases.

My notes show, and my recollection is the same, that on the Georgia case there was no "majority" in the sense of identifying the assigning author. It is not in accord with my records of the Conference or my recollection that "out of the seven there were four who initially took a majority view," as you state. There simply was no majority for any clear-cut disposition on all issues or even the basic issues, and that is not at all unusual in a case of this kind. Some of us saw one aspect of infirmity in the Georgia statute; others saw different weaknesses. The discussion was extended and positions altered in the course of it—which is also not unusual. You are correct that you were not "in the majority," primarily because no "majority" could be spelled out. I would not try to characterize affirmatively any Justice's position on all the facets of the Georgia case, but my notes reflect that Bill Brennan and Potter

Stewart were very near each other but they were not fully joined by others.

Any implication that Bill Brennan or Potter would have had the assignment is not supported by my recollection or notes and *if* either of them entertained that thought, at the time or since, they have never mentioned it to me—as I surely would welcome their doing if they agreed with your recital of facts.

That leaves Byron as next in line. His position does not suggest—nor has it ever—that he should have made the assignment. Moreover, at this point it is obvious as a matter of arithmetic that Bryon, or any one junior to him, was in any “majority.” Nor did Thurgood’s position suggest to him or others that he was senior of some “majority”—also by this stage mathematically impossible. Thurgood has never suggested he should have assigned the case for writing.

2. The correct evaluation of the Conference discussion, as I see it, was made by at least three Justices during the Conference, when they said their final position, in the Georgia case particularly, would “depend on how it is written”.

3. I agree entirely the assignment function is “not merely a matter of protocol”. On the contrary, it is a most arduous and time consuming operation and an important one. Hughes had attributed to him the statement that it was one of the most difficult of his tasks.

....

Your unprecedented proposed dissenting statement, now withdrawn, seems to imply bad faith if positions are not firm, fixed and final when a Conference adjourns. If a single member of the Court would endorse your view on this, I would be astonished. The record, which I reexamined in detail after the surprising statements of your dissent, shows that I have never undertaken to assign from a minority position. Thus there is not the slightest basis for your statement. I would be interested in having you identify the cases in which you think that happened.

To return to the abortion cases, in which you acknowledge you were not in the majority, you suggested, after the initial Conference, that I should not have assigned them to Harry because his view would not command a majority. I do not recall that anyone joined you in your expression. Subsequently, Harry did not undertake to submit an opinion but only a memorandum accompanied by his expression for reargument. Your analysis of Harry’s position would appear somewhat faulty by your own prompt endorsement of his preliminary memorandum in these cases. . . .

Your statement that the Texas and Georgia cases with a 7-man Court had “five votes” must be coupled—as you do not couple it—with the action of a majority of the Court to reargue these cases. That action speaks for itself. Brewster had a majority of the 7-man Court, but even though I was in the majority I urged that we reargue and the Court so voted. Crucial constitutional issues should not be resolved by four of a 7-man Court when there are nine Justices at the time the case comes down.

I appreciate your subsequent longhand notes, but with respect to your position on the abortion cases I write you now, as I said, to keep the record straight, and to allow any future scholar who may peruse the current press accounts or papers of Justices to have the “due process” benefit of all the facts in context, as I have tried to place them fairly. I believe, if you “sort out” the sequence of events, you will agree the foregoing is a fair statement of the situation. The abortion issues, like obscenity and others, are problems of extraordinary difficulty and we will need our best effort to achieve a reasonably satisfactory result.

With the Court thus roiled by the two abortion cases, another fragile coalition began to emerge in the equally difficult death penalty cases. On June 13th, Marshall recirculated his Eighth Amendment argument. Justices Douglas and Brennan had already joined, and Justice White was willing to concur but on a different ground. That day Justice Stewart circulated his concurrence with the prospective majority per curiam also on a different ground. The backlog of majority opinions, concurrences and dissents at the Print Shop was so great that Justice Stewart sent his concurrence around in Xeroxed draft form.¹³⁹ It effectively meant that the death penalty statues of most states were struck down, although no single logic was agreeable to the majority. Each member of the majority would write separately. Justice Brennan immediately proposed a per curiam holding simply that “[t]he Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”¹⁴⁰

At the same time, the dissenting side firmed up as Justice Blackmun, after struggling with the death penalty, joined the respective opinions of Chief Justice Burger and Justices Powell and Rehnquist, adding only his poignant personal reflections on capital punishment:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood’s training and life’s experiences, and is not compatible with the philosophical

Vera [Chief Justice Burger’s wife] joins in wishing you and Cathy a good summer and that Cathy will recover promptly from her virus in the clear, clean air of your mountain.

Regards,
WEB [signed]

Memorandum from Warren E. Burger, Chief Justice, Supreme Court of the United States, to William O. Douglas, Associate Justice, Supreme Court of the United States (July 27, 1972) (emphasis added), in *Opinion Writing Database: Roe v. Wade*, *supra* note 122.

139. Memorandum from Potter Stewart, Associate Justice, Supreme Court of the United States, to the Conference (June 13, 1972), in *The Burger Court Opinion Writing Database: Furman v. Georgia*, http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1971/69-5003.pdf, archived at <http://perma.cc/D749-NA6Z>, in WAHLBECK, ET AL., *OPINION-WRITING DATABASE*, *supra* note 100.

140. *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (per curiam).

convictions I have been able to develop. It is antagonistic to any sense of “reverence for life.” Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these convictions.¹⁴¹

Justice Powell, who was disappointed that his opinion upholding the death penalty had not carried a majority, continued to tinker with his opinion hoping he could persuade either Justice Stewart or Justice White to switch. He emphasized the long, unbroken line of precedents upholding the death penalty and the fact that the question of the jury’s discretion to impose the death penalty had been decided the year before in the *McGautha* case, a decision in which both Justices Stewart and White had joined.¹⁴² If he could persuade either one, he could still have his majority.

Justice Douglas had asked that the death penalty decision not come down for another two weeks, the last day of the Term, so he could revise his concurrence. He told Justice Brennan that he wished to add a footnote noting the same very weakness Justice Powell had pointed out, that the decision in effect overruled *McGautha* without saying so.

Justice Brennan worried that the logic of Justice Douglas’s concurrence might push Justices White and Stewart back to upholding the statutes. While the 5–4 majority to strike down the capital punishment standards existed, it was technically not in place. The coalition would have to survive until the last day of the Term, when the decision with its nine separate opinions totaling 50,000 words and 232 pages would be announced.

The next day, June 14th, Justice Blackmun finally circulated his first draft of the *Moore* case, the only one of the death penalty cases that remained before them on other grounds. At January conference, eight members of the Court—everyone but Justice Rehnquist—agreed the case should be remanded for a new trial. The Chief had assigned the case to Justice Blackmun based on a consensus of six Justices (Burger, Douglas, Stewart, White, Powell and Blackmun) who agreed that the exclusion of jurors who did not favor capital punishment violated the

141. Harry A. Blackmun, Fourth Draft of Dissent from *Furman v. Georgia* (June 21, 1972), in *69-5003 Furman v. Georgia, Part 13*, http://law2.wlu.edu/deptimages/powell%20archives/69-5003_FurmanGeorgia13.pdf, archived at <http://perma.cc/T976-DNSL>, in POWELL PAPERS, *supra* note 57.

142. See *McGautha v. California*, 402 U.S. 183 (1971).

Witherspoon case. But now, anticipating the upcoming announcement that the death penalty statutes had been struck down, Justice Blackmun noted in his cover note that since there was no longer a death penalty issue, the *Witherspoon* doctrine no longer needed to be addressed.¹⁴³

At conference the previous January, Justices Brennan, Marshall, and Stewart, at least tentatively, had indicated that they believed there was a *Brady* violation because of the evidence which had been withheld by the prosecutors.¹⁴⁴ Justices Douglas, White, and Powell had thought the *Brady* issue was marginal and insufficient to justify a *Brady* violation finding. The Chief had been silent on the issue at conference, having only agreed on the remand on the *Witherspoon* issue. But now Justice Blackmun's first memorandum indicated that he did not find the evidence withheld to be a sufficient *Brady* violation to require reversal; the Court should affirm the conviction. Based on what had been said at conference, Justice Blackmun would still have a 5- or 6-man majority.¹⁴⁵

The next day (June 15th), Justice Stewart told Justice Blackmun he was "not . . . at rest" with Justice Blackmun's argument.¹⁴⁶ A day later, Justice Marshall circulated a typescript draft dissenting on the basis that Moore was denied a fair trial by the *Brady* violations relating to the prosecutors withholding of evidence about the misidentification of Moore by key witnesses.

Over the next week, Chief Justice Burger and Justices White and Rehnquist joined the Blackmun draft. Justice Powell reviewed the Blackmun draft and the Marshall draft and noted to his clerks that he would probably join Justice Blackmun's opinion because the issues were "essentially *factual* — e.g. materiality of [the evidence] not disclosed" —

143. Memorandum from Harry A. Blackmun, Associate Justice, Supreme Court of the United States, to the Conference (June 14, 1972), in *The Burger Court Opinion Writing Database: Moore v. Illinois* [hereinafter *Opinion Writing Database: Moore v. Illinois*], http://supremecourttopinions.wustl.edu/files/opinion_pdfs/1971/69-5001.pdf, archived at <http://perma.cc/62AU-JZ6W>, in WAHLBECK, ET AL., OPINION-WRITING DATABASE, *supra* note 100.

144. According to Justice Powell's conference notes, there were five votes to affirm the case on its merits, with Justice Douglas leaning that way. Lewis F. Powell, Conference Notes from *Moore v. Illinois* (Jan. 24, 1972), in 69-5001 *Moore v. Illinois*, http://law2.wlu.edu/deptimages/powell%20archives/69-5001_MooreIllinois.pdf, archived at <http://perma.cc/G4LA-4H2T>, in POWELL PAPERS, *supra* note 57.

145. Harry A. Blackmun, First Draft of *Moore v. Illinois* (June 14, 1972), in 69-5001 *Moore v. Illinois*, *supra* note 144.

146. Memorandum from Potter Stewart, Associate Justice, Supreme Court of the United States, to Harry A. Blackmun, Associate Justice, Supreme Court of the United States (June 15, 1972), in *Opinion Writing Database: Moore v. Illinois*, *supra* note 143.

and the Illinois court was “better equipped than we to decide.”¹⁴⁷ If Justice Powell went ahead and joined him, Justice Blackmun would have a five-man majority in *Moore* even without Justice Douglas.

At this point, the controversy over the abortion cases came back into play. Justices Douglas and Blackmun talked about Justice Douglas’s incendiary dissent to putting the abortion cases over for reargument. “Douglas refused [once again] to withdraw his dissent until Blackmun personally assured him that his position of declaring the abortion statutes unconstitutional was firm, and that he had no intention of reversing that position after reargument.”¹⁴⁸ Justice Blackmun agreed.¹⁴⁹ On June 19th, Justice Douglas withdrew his lengthy dissent and agreed to simply note he was dissenting to the reargument order.¹⁵⁰

On June 20th, Justice Blackmun got two unexpected pieces of good news about his opinion draft of *Moore v. Illinois*. Justice Blackmun received a cryptic note from Justice Douglas saying, “I acquiesce in your Parts I to IV.”¹⁵¹ That same day, Justice Brennan joined Justice Blackmun’s *Moore v. Illinois* opinion. Now Justice Blackmun’s majority, if Justice Powell stayed with him, would be 7–2!

However, within days the tide shifted away from Justice Blackmun’s *Moore v. Illinois*. On June 22nd, Justices Stewart and Douglas joined Justice Marshall’s dissent. Justice Blackmun was back to 6–3, provided he held on to Justice Powell’s vote.

147. Lewis F. Powell, Annotations to Harry A. Blackmun, First Draft of *Moore v. Illinois* (June 16, 1972), in 69-5001 *Moore v. Illinois*, *supra* note 144.

148. SIMON, *supra* note 134, at 104.

149. *Id.* at 104 (citing Interview by James F. Simon with Harry A. Blackmun, Associate Justice, Supreme Court of the United States, Wash., D.C. (Nov. 16, 1992)).

150. Lewis F. Powell, Annotations to William O. Douglas, Sixth Draft of Dissent to Order for Reargument in *Roe v. Wade* and *Doe v. Bolton* (June 13, 1972), in 70-18 *Roe v. Wade*, *supra* note 106; *see also* *Roe v. Wade*, 408 U.S. 919 (1972) (granting reargument) (Douglas, J., dissenting); *Doe v. Bolton*, 408 U.S. 919 (1972) (granting reargument) (Douglas, J., dissenting).

151. See William O. Douglas, Annotations to Memorandum from Harry A. Blackmun, Associate Justice, Supreme Court of the United States, to the Conference (June 14, 1972), in *Opinion Writing Database: Moore v. Illinois*, *supra* note 143, showing a handwritten note by Justice Douglas: “Dear Harry—I think this suggested Part V as amended by Potter is OK. Please Join me. I acquiesce in your Parts I to IV.” This was written on Justice Blackmun’s memo of a week earlier when Justice Douglas was presumably in Goose Prairie starting his summer break. Mail was often delayed. The handwritten note has no date. Justice Blackmun’s chambers’ apparently typed version is dated June 21, 1972, which is probably the date Justice Blackmun received it rather than the day it was written. *See* Copy of Handwritten Note by WOD (June 21, 1972), in *Opinion Writing Database: Moore v. Illinois*, *supra* note 143.

Justice Powell's clerk had reviewed the evidence again and wrote a second case memo noting that the "trial was a mockery of due process" and recommending that Justice Powell join Justice Marshall's dissent.¹⁵² On June 27th, Powell joined Marshall's dissent, noting privately that "I expect the defendant is guilty as charged, but you have persuaded me that he did not receive a fair trial."¹⁵³ Now Blackmun's majority was back to 5-4.

We do not know the precise date that Paul Hoeber went back to Justice Brennan about changing his vote, but it was likely in the next few days. In this context, an appeal to Justice Brennan on the facts as Justice Marshall presented them may have seemed like it would have a high likelihood for success given his original conference vote that this was a *Brady* violation. A Brennan switch would give Justice Marshall a 5-4 majority and reaffirm the line of *Brady* cases that prevented prosecutorial misconduct.

As we wrote in *The Brethren*, Justice Brennan was encouraged that Justice Blackmun had seemed more independent of the Chief Justice but was concerned that if he voted against Justice Blackmun at this point, "it might make it more difficult to reach him in the abortion cases. . . . Marshall's clerk made a final appeal through Brennan's clerks. Brennan had his priorities. His priority in this case was Harry Blackmun. There would be no new trial for 'Slick' Moore."¹⁵⁴

From what we have been able to determine—with the exception of Chief Justice Burger and Justice Brennan—other Justices did not complain of specific errors in the reporting we did on cases, albeit there were many pro forma denials among Justices that they had made the remarks about each other that were attributed to them.

152. Memorandum from Arthur Fox, Law Clerk, to Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States (June 20, 1972), in *69-5001 Moore v. Illinois*, *supra* note 144.

153. Memorandum from Lewis F. Powell, Jr., Associate Justice, Supreme Court of the United States, to Thurgood Marshall, Associate Justice, Supreme Court of the United States (June 27, 1972), in *Opinion Writing Database: Moore v. Illinois*, *supra* note 143.

154. WOODWARD & ARMSTRONG, *supra* note 1, at 225. Another indication that Brennan and Marshall clerks found it hard to understand why Justice Brennan refused to join Justice Marshall's opinion to make a majority was the fact that three months earlier Justice Brennan had joined Justice Marshall's dissent in *Schneble v. Florida*, 405 U.S. 427 (1972). In that case, Justice Marshall objected to the Court's finding of harmless error when the confession of a codefendant who did not take the stand was admitted at trial, which the Court's majority agreed had deprived a defendant of his right under the Sixth Amendment Confrontation Clause.

Fortunately, the personal papers of Justices Douglas, Marshall, and Blackmun have collectively confirmed most of the controversial details in the book.¹⁵⁵

At the Marquette conference and elsewhere there has been considerable speculation and concern that clerks may be the true authors of Supreme Court opinions. This was not our experience. One of the rare examples of a heavily clerk-influenced opinion was the *O'Connor v. Donaldson*¹⁵⁶ case about the rights of involuntarily committed mental health patients. A Powell clerk named Joel Klein,¹⁵⁷ who was familiar with the case from his previous work at the Mental Health Law Project, played an unusual role in educating the Court and in actively organizing the clerks to shape an alternative opinion to Chief Justice Burger's attempt to strike any "right to treatment" from federal law.¹⁵⁸ Even in this extraordinary instance, Klein did not "write" the opinion. In fact, he barely was able to convince his own Justice, Powell, to join the eventual majority opinion written by Justice Stewart.

Throughout *The Brethren*, we illustrated the irreverent style of Justice Marshall, including a proclivity to watch daytime television in his chambers and a commitment to a short day in chambers. In retrospect, I believe our references to what clerks in other chambers thought of Justice Marshall misled many readers.¹⁵⁹ The general view in other chambers of Justice Marshall as "laid back" and less prepared than his peers was perceived by some readers as showing a contempt on the part of Marshall clerks toward their boss. In fact, what we heard from Marshall clerks was generally a deep affection, admiration, and respect

155. *New York Times* reporter Linda Greenhouse concluded in her biography of Justice Blackmun that "Blackmun's case files attest to [*The Brethren's*] accuracy." LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN'S SUPREME COURT JOURNEY* 254 (2005). Mark Tushnet, a Marshall clerk during one of the Terms we cover and Constitutional scholar, said, "*The Brethren* has been controversial, but on most particulars and in its general depiction of the Supreme Court under Chief Justice Burger, its accuracy has not been impugned." Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 *GEO. L.J.* 2109, 2109 n.2 (1992); see also Garrow, *supra* note 54.

156. 422 U.S. 563 (1975).

157. After clerking, Klein joined the Mental Health Law Project and later served in the White House Counsel's office, as Assistant Attorney General in the Antitrust Division, and as New York City School Chancellor under Mayor Michael Bloomberg.

158. See WOODWARD & ARMSTRONG, *supra* note 1, at 369–83.

159. Since even our former colleague Juan Williams has suggested that our account of Justice Marshall's informal and often jocular manner was a depiction of Justice Marshall as lazy or uncaring, I take responsibility for insufficiently emphasizing his passion and clear direction more clearly. See JUAN WILLIAMS, *THURGOOD MARSHALL: AMERICAN REVOLUTIONARY* 369–71 (1998).

for Justice Marshall.¹⁶⁰ While Marshall clerks were given more latitude in the initial drafting of opinions and dissents than clerks in other chambers, the logic, the reasoning, the points of law, and — most of all — the passion were Justice Marshall's. Justice Marshall was as sure of his position on cases as any other Justice. Justice Marshall was one of the most experienced litigators to sit on the Court during the seven years we covered and was by far the most street savvy Justice in matters of racial discrimination, criminal law, and labor relations. Justice Marshall knew what he wanted to convey and why.¹⁶¹

Generally, I would submit that a clerk's undue influence over an opinion is a non-issue. The influence a clerk might have on a Justice and the Justice's opinions is more a matter of the clerk's background and personal relationship with the Justice. Clerks who bring more diversity of class and race, more practical real-world experience, and a deeper interest in American society and its government can bring valuable insights and sensitivity to the Justices they serve. I suspect a majority of the current members of the Court, as portrayed at the Marquette conference, prefer clerks with a greater ideological affinity and less extensive real world experience. The current system in which most clerks are burdened with substantial educational bills yields more clerks who feel they must devote much of their career to corporate law. This bias has become even more pronounced by the Justices' need to survive grueling confirmation processes which increasingly favor nominees who eschew anything or anyone controversial.

160. The one exception to this general characterization of Justice Marshall's clerks respect for the Justice was the case of *Schlesinger v. Holtzmann*, 414 U.S. 1321 (1973), in which Justice Marshall was reluctant as the lone Circuit Justice for the Second Circuit to restore an emergency injunction halting the bombing of Cambodia until the Court could hear the case. WOODWARD & ARMSTRONG, *supra* note 1, at 277. When Justice Douglas indicated he might act unilaterally, Justice Marshall polled his colleagues, who agreed with him that he should not reinstate the injunction but instead write a rather complicated order explaining why not. *Id.* at 277–78. When Justice Marshall asked his avidly antiwar clerk to assist, the clerk, frustrated by Justice Marshall's timidity, balked at helping to write the longer opinion, and Justice Marshall issued a brief order instead. *Id.* at 278.

161. Mark Tushnet, a former Marshall clerk during the 1972 Term, currently a professor of law, has written a commendably detailed law journal article that makes this point better than we did in *The Brethren*. See Tushnet, *supra* note 155. Tushnet argues that as the Warren Court was replaced by the ever more conservative Burger Court, Justice Marshall found himself primarily writing in dissent. *Id.* at 2128. Moreover, his experience as a “senior partner in a [very active] small law firm, the legal department of the National Association for the Advancement of Colored People,” meant Justice Marshall was accustomed to and comfortable as a delegator and motivator, as opposed to the “hands-on micromanagement” style of other Justices. *Id.* at 2111–12.

If the day ever returns where a President can appoint Justices with broader interests and more creative decision-making processes, I hope that future clerks can make the kind of contributions to their Justices that the *Brethren* clerks made during their service. Indeed, I would hope that they would also take seriously the need to clarify the past two decades of the Court's inner workings. There have been no detailed accounts of the dynamics which produced the cases which chose the forty-third President of the United States, abolished limits of campaign contributions, restricted the ability of cities to control handguns, permitted same-sex marriage, upheld national healthcare, broadened religious freedom to include corporations, diluted the Justice Department's ability to enforce election law fairness, struck down a ban on protests near abortion clinics, let stand Texas restrictions on voting without ID's, and other important issues.¹⁶²

Without candid firsthand accounts that thoughtfully explain the Court's recent Terms, the public is left with the shallowest of partisan portrayals. When *The Brethren* explained the Court's handling of the Nixon tapes case, many readers were shocked by the secret infighting that had produced the decision. Today's college students who read *The Brethren* as their first exposure to the Court's internal deliberations have a much different reaction. They marvel at how principled the *Brethren* Court seems compared to the contemporary Supreme Court's presumed raw political wrangling. The public view of the individual Justices is once again as poorly informed as it has ever been, relying most often on caricatures based on their political backgrounds, their religions, their voting patterns, or superficial courtroom patterns of conduct.

It is my hope that once again Justices and their clerks will find that they too have an obligation to assure that the Court's processes and dynamics are better understood, and that they will once again share that information in a candid and serious manner.¹⁶³

162. See *Bush v. Gore*, 531 U.S. 98 (2000); *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008); *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Shelby Cnty. v. Holder*, 133 S. Ct. 2612 (2013); *McCullen v. Coakley*, 134 S. Ct. 2518 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014). I am unaware of any other in depth accounts discussing the Court's internal deliberation of key cases, apart from two: LAZARUS, *supra* note 75, and David Margolick, Evgenia Peretz & Michael Shnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310, which discusses the Court's handling of *Bush v. Gore* in detail.

163. Many commentators have discussed the impact of the *Code of Conduct for Law Clerks of the Supreme Court of the United States* on the ability of law clerks to discuss their

work. See, e.g., Kozinski, *supra* note 75. In fact, with the authorization of their Justice, there is no constraint. Moreover, there is considerable guidance that can be offered without violating any confidentiality agreement. And of course there is no constraint on the part of a Justice. It is reasonable to assume, as we did in *The Brethren*, that unattributable guidance “on background” has institutional advantages. See Judge Alex Kozinski’s reflections on the Lazarus book in *Conduct Unbecoming*, a book review in the *Yale Law Journal*. *Id.*