BOOK REVIEW

THE BRETHREN. By Bob Woodward and Scott Armstrong. New York: Simon and Schuster, 1979. Pp. 467, Price $13.95.

PAUL BENDER †

The Brethren is "an account of the inner workings of the Supreme Court from 1969 to 1976—the first seven years of Warren E. Burger's tenure as Chief Justice of the United States." [1] The authors are newspaper reporters who are not lawyers. They do not approach the Court through its published written opinions, as lawyers usually do. Instead, they base their book primarily on information obtained through confidential interviews with a large number [2] of former law clerks (presumably clerks who served at the Court during the Terms in question), with "several dozen" former Court employees (probably Justices' secretaries and messengers for the most part), and with "several" Justices, none of whom is explicitly identified.[3] In addition to information obtained orally from these sources, the authors secured, from "dozens" of them, "thousands of pages" [4] of confidential internal court documents—"internal memoranda between Justices, letters, notes taken at conference, case assignment sheets, diaries, unpublished drafts of opinions and, in several instances, drafts that were never circulated even to the other Justices." These internal papers constitute the "core documentation" of the book.[5]

† Professor of Law, University of Pennsylvania. A.B. 1954, LL.B. 1957, Harvard University. Professor Bender served as law clerk to Mr. Justice Frankfurter at the 1959 Term.

[1] B. WOODWARD & S. ARMSTRONG, THE BRETHREN 2 (1979) [hereinafter cited as THE BRETHREN].

[2] The authors say they interviewed "more than 170" law clerks. *Id.* 3. This is almost the number of clerks who worked at the Court during the seven Terms covered by the book. Of course, useful information may not have been received from every clerk who was interviewed. The authors go on to say, however, that '[i]n virtually every instance we had at least one, usually two, and often three or four reliable sources in the chambers of each Justice for each of the seven years." *Id.* 4. If the authors had an average of two sources per chambers per year, that would make about 125 sources, the large majority of whom were probably clerks. Thus, it is likely that most of the law clerks who served the Justices during the period covered by the book also served to some degree as "sources" for the authors.

[3] However, Chief Justice Burger is clearly not among them. The authors note that the Chief Justice "declined to assist us in any way." *Id.* 3.

[4] There were enough documents to fill "eight file drawers." *Id.* 4.

[5] *Id.* 4.

I. The Book

The Brethren itself consists of a prologue, followed by separate chapters devoted to each of the seven Supreme Court Terms between 1969 and 1976. The prologue briefly treats President Nixon's appointment of then-Judge Warren E. Burger to the position of Chief Justice. The perspectives employed here are different from those ordinarily used in describing events of this type. For example, we first see Chief Justice Earl Warren, just after Nixon's election and having already announced his intention to resign from the Court, taking his "ritual" Saturday lunch with his law clerks at Washington's Metropolitan Club. Warren, who is "haunted" by the prospect of a Nixon-selected Chief Justice, suggests "with a grin" that " 'we all write down on a piece of paper who we think the nominee will be.' " Warren (to my surprise) names Burger.[6] We next see Nixon and Burger, at Nixon's invitation, conferring privately at the White House shortly after the inauguration about the state of the federal judiciary. We learn that "Nixon was impressed. . . . Judge Burger knew what he was talking about." John Ehrlichman, summoned to join the meeting, concludes "that if ever a man was campaigning for elevation in the judiciary, it was Warren Burger." [7] Later, Justice Stewart, who is being mentioned as a possible replacement for Warren, calls on Nixon in order to withdraw himself from consideration. Their conversation is recounted. And so on.

In almost all instances, these private events are described as if the authors had directly observed or listened to them; many conversations are set forth verbatim. The authors also often write as though they were privy to the thoughts of the participants in the events they describe.[8] Thus, Justice Stewart's "stomach knotted as he drove through the Washington traffic" to see Nixon; Nixon said, " 'Potter, there has been an awful lot of support for you [as Chief Justice]' " and asked "Why?," "in surprise," when Stewart said he wanted to be out of the running for the job; and, as Stewart drove back to the Court, he "regretted that he had given phony reasons for taking himself out." [9]

---

[6] *Id.* 11 (quoting Chief Justice Warren).

[7] *Id.* 12-13.

[8] The authors admit to having "attributed thoughts, feelings, conclusions, predispositions and motivations to each of the Justices. This information comes from the Justices themselves, their diaries or memoranda, their statements to clerks or colleagues, or their positions as regularly enunciated in their published Court opinions." *Id.* 4.

[9] *Id.* 16-17.

The chapters devoted to each Court Term are entirely episodic in nature. They focus on cases decided during that Term, the number of cases ranging from as few as five to more than a dozen. The cases treated are not thematically related and apparently were chosen for the book either because of their obvious importance as landmark decisions on great public issues (the abortion cases,[10] the Nixon tapes case,[11] the Pentagon Papers case,[12] and the capital-punishment cases [13]) or because the authors had obtained relatively interesting internal memoranda an anecdotes relating to them. The authors suggest that cases were selected primarily because they provided insight into the Court's "internal dynamics." [14]

When cases are discussed at length,[15] we follow their step-by-step progress within the Court, from the original consideration of the petition for certiorari or jurisdictional statement through the oral argument, the Court conference, the assignment of the majority opinion, the preparation of draft opinions within the various chambers, negotiations among Justices over drafts and votes, and the final public announcement of the decision. Briefer treatments may show only one or two of these stages. Much of the description of the workings of the Court is based on the internal Court documents that the authors obtained; these documents are often quoted or summarized. As in the prologue, however, private thoughts and conversations also receive great emphasis.

The treatment of the 1973 abortion cases provides a more or less typical example of the general character of the bulk of *The Brethren*. Thus, after oral argument we learn that "Douglas ascribed to Burger the most blatant political motives" in his (ultimately successful) effort to assign the majority opinion to Justice Blackmun, despite Burger's being an apparent member of the minority in the cases.[16] Justice Blackmun, "hid[den] away in the recesses of the Justices' library," then prepares the first draft of his opinion for the Court.[17] After five months, one of his law clerks, at last permitted to look over the draft, is "astonished" that the

[10] Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973).

[11] United States v. Nixon, 418 U.S. 683 (1974).

[12] New York Times Co. v. United States, 403 U.S. 713 (1971).

[13] Furman v. Georgia, 408 U.S. 238 (1972).

[14] THE BRETHREN, *supra* note 1, at 2.

[15] The Nixon tapes case, United States v. Nixon, 418 U.S. 683 (1974), takes up the greatest amount of space—about 60 pages. More typical is the Pentagon Papers case, New York Times Co. v. United States, 403 U.S. 713 (1971), which occupies about 12 pages.

[16] THE BRETHREN, *supra* note 1, at 169-72.

[17] *Id.* 182.

Justice's work is "crudely written and poorly organized" and does not "explain on what [legal or constitutional] basis Blackmun had arrived at the apparent conclusion that women had . . . a right to abortion." [18] Justice Stewart joins this draft even though he disagrees with its reasoning and is troubled by "its inelegant construction and language." [19] Blackmun is "disturbed" by a dissent Justice White has prepared and decides he has "more work to do." [20] After a "lobbying" visit from the Chief Justice, and after the Chief Justice "shift[s] sides to provide the crucial fifth vote" for a Blackmun opinion in another case, Blackmun decides near the end of the Term to withdraw his abortion opinion, although five Justices have already joined it. The case will thus be reargued the next Term with the participation of Justices Powell and Rehnquist (who had not been appointed in time to participate in the first argument). Blackmun tells his clerks that more votes will mean wider public acceptance for the opinion and that " 'I think we can get Powell.' "[21] Justice Douglas is "enraged." He suspects that the Chief Justice will use the summer to sway Blackmun to Burger's view on the merits of the cases. Douglas circulates a written dissent (quoted at length) that he threatens to publish if the cases are put over; it accuses the Chief Justice of improperly trying "to bend the Court to his will by manipulating assignments." [22] The Court thereupon "erupted in debate" about whether Douglas was bluffing. Justices Brennan, Marshall, and Stewart "pleaded with Douglas to reconsider." As the authors describe the Justices' position, "[t]he Chief might be a scoundrel, but making public the Court's inner machinations was a form of treason." [23] Douglas relents, in part because Blackmun promises that his vote is a firm one. Ultimately, Justice Powell does join the majority after reargument. He concludes "that the Constitution did not provide meaningful guidance . . . [so that] he would just have to vote his 'gut.' " [24] The Chief Justice remains undecided about his vote for weeks, vexing the other Justices, who want the long-delayed opinion to come down. He finally joins the majority opinion, but only after being confronted about his delay by Justice Stewart, who says to him at conference, " 'Vote now or let

[18] *Id.* 183.

[19] *Id.* 184.

[20] *Id.* 186.

[21] *Id.* 186-87 (quoting Justice Blackmun).

[22] *Id.* 187.

[23] *Id.* 188.

[24] *Id.* 230.

the decision come down with only eight votes.' "[25] We are told that Justices Brennan and Stewart thought the Chief Justice was "stalling" so that the abortion cases would be announced after the second Nixon inauguration: It would be "embarrassing for Burger to stand there, swearing in the man who had appointed him, having just supported a sweeping and politically volatile opinion that repudiated that man's views."[26]

Interspersed throughout these chapters are vignettes of individual Justices at work, and even at play: Justice White, a "fierce competitor," cheating at basketball with the clerks;[27] Justice Marshall, "putting on" unsuspecting tourists who mistake him for an elevator operator;[28] the Chief Justice, complaining about the unsuitability of his small office.[29] There are also observations about the Justices by other Justices and clerks: "Black was being too emotional. Ever since his stroke, Black had been increasingly unpredictable, testy and belligerent, Harlan thought."[30] "Powell . . . found White an enigma."[31] In conjunction with the feelings and motivations that the authors attribute directly to their subjects, this material is strongly suggestive of the personalities and capacities of the individual members of the Court. These personal characterizations are an important part of the book, designed by the authors to "help explain the decisions and actions."[32]

Indeed, the personality and capacities of Chief Justice Burger, and the extremely negative reaction of the other Justices to him, provide perhaps the book's only consistent theme. The Chief Justice is shown throughout as vain, pompous, manipulative, and prone to self-deception; as a judge of mediocre intellect and limited ability at his craft; as a Justice incapable of moral or intellectual leadership on the Court. Every other Justice is repeatedly critical—often openly so before law clerks or other Justices—of the Chief Justice's motives, capacities, or both. Justices other than the Chief get generally mixed reviews from their peers, the law clerks, and the authors. Justice Rehnquist, for example, is shown as being friendly and smart, but intellectually dishonest and excessively conservative. Justice Douglas is "the greatest living jurist" (Justice Blackmun's

[25] *Id.* 236 (quoting Justice Stewart).
[26] *Id.* 236.
[27] *Id.* 185.
[28] *Id.* 59.
[29] *Id.* 29.
[30] *Id.* 46.
[31] *Id.* 259.
[32] *Id.* 4.

characterization),[33] but rude, insensitive, and irresponsible. Justice Harlan and Chief Justice Warren seem to be the only relatively unqualified heroes, although for different reasons. Warren is shown, in retrospect (and especially as compared with his successor), as a progressive and effective leader of the Court. Harlan is perhaps the single most impressive figure in the book—a judge of great ability, dedication, unfailing courtesy, and absolute integrity. Of the present members of the Court, the portrait offered of Justice Brennan seems to be the most favorable. Justice Brennan, now the senior member of the Court, is shown as being on the correct side of substantive issues,[34] as conscientious, effective, friendly, and humane, but somewhat too prone to political manipulation within the Court.

The Brethren is journalism, not legal analysis. Nevertheless, a number of aspects of the book are of interest to lawyers. This is especially so since the book—an instant best seller in hardcover, after newspaper syndication of substantial excerpts, and obviously destined for vast distribution in paperback—will have a significant impact on public perception of the Supreme Court and the profession.[35]

II. Confidentiality at the Court

The Brethren is based almost entirely on material and information that can, with some degree of accuracy, be considered to have been confidential before its publication there. The propriety and potential effect of alleged breaches of confidentiality in the preparation of the book have been widely discussed.[36]

The precise nature of the confidentiality constraints at the Supreme Court is not entirely clear. Information about decisions themselves is certainly not supposed to be leaked before the decisions are officially announced, but neither these authors nor their sources have committed that kind of breach.[37] Internal memoranda,

---

[33] *Id.* 185.

[34] The authors appear generally to agree with the direction of the Court during Earl Warren's tenure as Chief Justice.

[35] A movie version, alas, seems unlikely.

[36] *See, e.g.*, Lewis, *Supreme Court Confidential*, N.Y. Rev. Books, Feb. 7, 1980, at 3, 5-6; Will, *The Injudicial Justices*, Newsweek, Dec. 10, 1979, at 140. *See also* Baker, *Under the Black Robe*, N.Y. Times, Dec. 11, 1979, at A23, col. 5 (The "law clerks know all. What's more, half of them tell all . . . .").

[37] The authors do recount one instance in which *Time* magazine, almost by inadvertence, acquired and published advance information about a decision. A law clerk had talked with a *Time* reporter about the 1973 abortion decisions, Doe v. Bolton, 410 U.S. 179 (1973), and Roe v. Wade, 410 U.S. 113 (1973), expecting them to come down imminently, in order to provide background for a *Time* story. In the ordinary course, that story would have been published after the decisions had

preliminary opinion drafts, and the like (all of which are recorded in *The Brethren*) are also probably not meant for contemporaneous publication, even after decisions are announced, but such material has, in the past, been made available to and been used by legal scholars [38] and historians [39] after some years have passed. Perhaps only Justices—and not clerks—should ever be entitled to authorize such uses. In modern times, however, at least one Justice, who was highly sensitive to the proprieties and the Court's traditions, regularly provided his clerks with a bound set of opinions written in the chambers during the Term. Included in this volume were a number of internal memoranda and preliminary opinion drafts. It has also been common for law clerks joining law faculties to share with their colleagues inside Court stories and views of Court personalities very similar to those recounted in *The Brethren*.[40] (Much of *The Brethren* itself could probably have been pieced together from such multiple hearsay, although not with nearly the same sense of immediacy.) As for the "secret" Court conference, some Justices keep detailed logs of conference proceedings, and Justices often relate particular conference incidents to their clerks. *The Brethren* shows the different views among the Justices about sharing this kind of information with clerks. The Chief Justice appears as perhaps the least forthcoming; for example, after certain minor leaks to the Solicitor General's staff are discovered, he observes that "he avoided the possibility of leaks by not telling his own clerks about votes or discussions at conference."[41] (Justice Brennan is said to have dis-

been announced; however, the Court delayed announcement of the cases, and *Time* published the expected result anyway. Threatening to call in the F.B.I. to administer lie-detector tests so that the responsible person could be found and fired, Chief Justice Burger asked the Justices to question their clerks about the leak. The guilty law clerk quickly admitted his responsibility and offered to resign, but an apology to the Chief Justice sufficed. THE BRETHREN, *supra* note 1, at 237-38. On an earlier occasion, Solicitor General Griswold told the Chief Justice that clerks were leaking information about decision dates to lawyers on the Solicitor General's staff. F.B.I. lie-detector tests were proposed by the Chief Justice then, too, but the other Justices objected; instead, a committee on security was established. The law clerks were also forbidden to play basketball with members of the Solicitor General's office. *Id.* 150.

[38] A. BICKEL, THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS (1957).

[39] A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956). *See also* W. DOUGLAS, GO EAST, YOUNG MAN (1974).

[40] Today's law clerks may, in general, be unreliable confidants. A story now circulating has it that Justice Brennan recently said, at an annual dinner for past and present law clerks, that he was considering retirement. This news was carried by the wire services before the dinner was over.

All the Justices seem to agree that clerks should not talk to reporters during their service at the Court. At the Chief Justice's initiative, the clerks are now informed of this rule at a beginning-of-Term social occasion. THE BRETHREN, *supra* note 1, at 356.

[41] *Id.* 150.

posed of this suggestion by observing, "You can tell he doesn't talk to his clerks by reading his opinions.")[42]

The authors seem keenly aware that their book is based upon confidential material. "For . . . nearly two hundred years," they say, "the Court has made its decisions in absolute secrecy . . . . No American institution has so completely controlled the way it is viewed by the public."[43] They are also certainly aware of the perceived value of confidentiality in many circumstances. For example, they note that they have kept the identity of *their* sources confidential because "[t]his assurance . . . was necessary to secure their cooperation."[44] Although the situations of reporters and judges are obviously not identical, the authors might well agree that Justices, too, may find it easier to share ideas with clerks and other Justices if there is an assurance that confidentiality is to be substantially preserved.[45] A Justice, for example, clearly ought to feel completely free to change his mind about a case as a result of discussions within the Court. His openmindedness may decrease, however, if there is a significant possibility that his changes of position will be made public.

Is *The Brethren* a justifiable breach of expectations of confidentiality within the Court (assuming, as seems likely, that it *is* to some extent a breach of those expectations)? For the authors of *The Brethren,* the answer is easy: The Court's "deliberative process" has been "hidden from public view," yet "[m]uch of recent history, notably the period that included the Vietnam war and the multiple scandals known as Watergate, suggests that the detailed steps of decision making, the often hidden motives of the decision makers, can be as important as the eventual decisions themselves."[46] The analogies to Vietnam and Watergate are intriguing, but the fact is that the authors did not uncover—nor is it likely that they ever expected to uncover—dishonesty or corruption in the Court re-

42 *Id.* (quoting Justice Brennan).

43 *Id.* 1. I am not sure that this sentence is entirely accurate: Presidents and senators, for example, surely have internal memoranda, conversations, and even formal meetings that they try to keep secret, and often do. The Supreme Court, on the other hand, publicly explains the reasoning behind its decisions in its written opinions and publishes dissents from within the institution. These opinions contain significant information and evidence about internal processes, although that information is far from complete. It is true, however, that the Court, unlike Congress and the Executive, has not often been the subject of direct contemporaneous investigative reporting of its internal procedures and deliberations.

44 *Id.* 3-4.

45 The authors say that they "ensure[d]" that their project "would in no way interfere with the ongoing work of the Court" by limiting their investigation and interviews to cases reaching the Court before 1977. *Id.* 2. Would they have this temporally limited a view of the needs of press confidentiality?

46 *Id.* 1.

motely similar to, or as publicly harmful as, that uncovered by those other recent examples of investigative reporting. Indeed, as I suggest below, the Court, as depicted in *The Brethren,* seems gratifyingly scandal-free, although other procedural deficiencies and improper manipulations are certainly evident. What the authors really seem to be saying is that the Court's internal secrecy itself provides both the occasion and the justification for their efforts, as reporters, to secure its breach. The deliberative processes of an important policymaking organ of government are, in their view, necessarily a matter of public interest and a fit subject for journalistic inquiry.

I find it difficult to quarrel seriously with this general proposition, or to exempt the Supreme Court or this book from its reach. My view of the situation might be different if *The Brethren* were not a book published several years after the events in question but a series of investigative reporting exposés—in a newspaper, on television, or in a magazine— of immediately past or pending Court proceedings. Such intensive daily or weekly media coverage of internal Court maneuvers, tentative votes in pending cases, and similar matters would, I think, seriously endanger the character of the institution. The changes in Court attitudes, procedures, and even substantive doctrine that might occur as a result of a consciousness on the part of Justices and clerks that positions taken at each stage of the decisional process might immediately appear in the press would very likely not be changes for the better. That kind of reporting may be protected by the first amendment, but I would try to dissuade a reporter from attempting it, and I suspect (and hope) that sources for such an effort would be hard to come by. Publication of *The Brethren* may perhaps make such destructive press attention somewhat more of a threat than it has been, but the book itself seems to me to be a once-in-a-generation phenomenon that will not lead inexorably in that harmful direction.[47] The Court would thus seem well advised to ignore the breaches of confidentiality that produced *The Brethren,* rather than to make oppressive changes in internal relations and practices in order to tighten security against a possible sequel.[48] *The Brethren* is not a harmful book, unless the Court, by overreacting to it, chooses to make it so.

---

[47] During the 1979 Term information about a pending decision in a case about the rights of the press leaked to a television news reporter, who put it on the air. The source was apparently an employee in the Court's printing office who, upon being discovered, was transferred elsewhere. The information, as broadcast, was quite garbled and generally useless.

[48] The quality of the clerk-Justice relationship is already in sufficient danger, most Justices now having *four* clerks.

The moral propriety of the behavior of Court employees and Justices who provided material to these authors seems to me to be a more difficult issue.[49] The first amendment certainly did not *require* such cooperation. Are the inadequacies and behind-the-scenes machinations of the Burger Court sufficiently dreadful to demand public exposure, despite implicit or explicit promises of confidentiality by clerks and other Court employees? Once it was clear that the book was to be written anyway, might a law clerk or Justice justifiably conclude that it might as well be complete, or accurate, and furnish information on that basis? What degree, if any, of disaffection with the Court's leadership or current doctrines would justify a Justice in breaching the secrecy of the conference? I am not entirely sure of the answers I would give to questions like these. I confess, however, to feeling both regret and uneasiness over the magnitude of the disclosures that produced *The Brethren*, even as I conclude both that the public has a legitimate interest in the subject of the book, and that the end product was undoubtedly improved by the variety and depth of its sources.

III. Is *The Brethren* Fact or Fiction?

Does *The Brethren* present an accurate picture of the "inner workings" of the Supreme Court? The book, as noted below, contains numerous errors of law and legal analysis. Given the multiple-hearsay (and perhaps self-serving) nature of much of its evidence of conversations, attitudes, and motivations, it probably contains numerous factual errors as well. The authors' narrative style also tends to oversimplify and overdramatize complex people, motives, and events. Complete "truth" about matters of this nature is, in any case unattainable. Bearing all these qualifications in mind, it nevertheless seems to me that *The Brethren* is an essentially accurate rendering, for a lay audience, of the cast of characters at the Court and the kinds of maneuverings that take place in the decisional process surrounding important or controversial cases.

The most important caveat I would affix to this judgment concerns the fact that cases were chosen for treatment in the book *because of* their importance or divisiveness. A large part of the Court's work, however—a part that understandably gets very little attention in *The Brethren*—is not political or divisive. Many Supreme Court cases are decided unanimously; in others the result is a foregone conclusion and there is little internal debate; a large

[49] So far as we know, all the sources knew they were contributing to a book; the information they provided was not euchred out of them.

number of cases also involve issues that are more technical than political. These relatively noncontroversial cases are the glue that holds the Court together. A reader of *The Brethren* might wonder how the institution can survive with so much apparent mutual anger, distrust, and disrespect among the Justices. One important explanation is that, at most times, there is a large core of more or less routine, even dull, Court work about which there is either substantive agreement or, at the least, a strong sense of common purpose.

Lawyers will be vexed by *The Brethren*'s constant errors and imprecisions in describing legal issues and procedures. Cases that appear in the book are usually recognizable to those familiar with the originals, but the authors' statements are very often importantly wrong or incomplete. The Court has never held, for example, "that before criminal prosecutions could begin, accused pornographers must be allowed a hearing to determine whether the materials are obscene." [50] School busing decisions are not properly regarded as "conflicting" when they rest on opposite findings of relevant facts.[51] *Kirby v. Illinois* [52] did not merely "refuse to extend" Warren Court precedents on the right to a lawyer at a line-up; rather, it drew a distinction that is totally inconsistent with the reasoning of those precedents.[53] Justice Brennan did not "dissent" in *Stanley v. Georgia;* [54] he concurred in the result. Federal agents are not "normally immune" from suits because they were "acting officially." [55] One could go on and on. The book would have benefited if the authors had had the manuscript reviewed by someone more knowledgeable than they in matters of federal law and procedure, someone who might also have told them that "cert" is not a word, but an abbreviation that deserves a period at its end.[56]

IV. Evaluating the Court's "Inner Workings"

Now that we have peered inside the Supreme Court (if only through a somewhat fuzzy lens), what may we conclude about the people and processes thus revealed? No one, I expect, has been

[50] The Brethren, *supra* note 1, at 252.

[51] *Id.* 426-27.

[52] 406 U.S. 682 (1972).

[53] *See* The Brethren, *supra* note 1, at 223.

[54] 394 U.S. 557 (1969). *See* The Brethren, *supra* note 1, at 195.

[55] *Id.* 68.

[56] The level of accuracy of legal analysis in the book, however, seems at least equal to that contained in most mass-media reports of Supreme Court decisions.

under the impression that the Court of the early and mid-1970s was an especially distinguished Supreme Court. *The Brethren* will not disturb this view. We ought to be pleased—but again not surprised—at the moral caliber of the Court, at the apparent complete absence of corruption or improper political influence. When a lobbyist tries to talk to two Justices about the merits of a pending case, they react as though he were contagious.[57] There are no calls from (or to) the White House or the Congress about pending decisions. Greed and ambition appear to play no part in decisionmaking. As for internal Court politics, the authors directly describe but one instance of anything resembling improper vote-trading on the merits of a case. Whatever actually transpired on that particular occasion,[58] Court "politics" as shown in *The Brethren* generally involve proper matters for compromise in a collegial body, such as the breadth or wording of a proposed majority opinion, the timing of the decisional process, or certiorari policy. One cannot help being dismayed—even alarmed—at the seemingly endless series of improprieties regarding Court traditions attributed to the Chief Justice—especially those traditions connected with the assignment of opinions—but even here there may be some cause for optimism. Most of the other Justices are agog at the Chief's behavior;[59] there is resistance to him, even by Justices who agree with him on the merits; and it appears by the end of the book that most traditional practices will ultimately survive.

---

[57] *Id.* 79-85.

[58] Justice Brennan, allegedly convinced in his own mind that a criminal defendant in a capital case has received an unconstitutionally unfair trial, nevertheless decides to provide a fifth vote to affirm because he does not wish to offend Justice Blackmun, who has worked hard on the majority opinion and who, if properly cultivated, shows signs of drawing further away from his alliance with the Chief Justice. The story comes from a Brennan clerk who tried to convince the Justice to change his vote in the case and "returned shaken" at Brennan's explanation of his refusal to do so. *Id.* 225.

Brennan's vote here does, indeed, seem somewhat mysterious in view of the facts revealed in the official report of the case—facts suggesting not only strong prosecutorial impropriety but also a distinct possibility of the defendant's innocence. Moore v. Illinois, 408 U.S. 786 (1972). Yet it seems to me quite unlikely that Justice Brennan would admit to a law clerk—or to himself—that he was voting against his constitutional convictions in a serious criminal case. Perhaps the law clerk, disappointed at his failure to convince his Justice to change his vote, transposed his own clear view of the merits to his apparently unreasonably recalcitrant boss. Indeed, substantial doubt has been cast on the truth of this episode as reported in *The Brethren. See* Lewis, *supra* note 36, at 3.

[59] During the 1975 Term, for example, Justice Brennan is preparing at conference to assign a case in which Justices Burger, Powell, and Rehnquist are in the minority. The Chief Justice suddenly "decided to switch his vote to the majority. 'Jesus Christ,' [Justice] White bellowed, throwing his pencil on the table and pushing his chair back in disgust. 'Here we go again.'" THE BRETHREN, *supra* note 1, at 423-24.

The most important things about a Supreme Court are its opinions and decisions: Are they intelligible? What is their philosophy? Are they correct? What is their impact on the country? Where are they heading? The authors, whose focus is "inside," have little to say about these substantive external questions, although the first seven years of the Burger Court certainly provide a lot of provocative material. Consider the dangerous contraction in access to federal courts for plaintiffs seeking to present certain types of constitutional claims; [60] the premature stagnation of large parts of the equal protection clause; [61] the enormous and largely unjustifiable erosion of the concept of "state action"; [62] the curious shift of attention in the Court from the rights of minorities and the underprivileged to the rights of business and the middle class.[63] There may be institutions for which it is true, as Woodward and Armstrong assert, that "the often hidden motives of the decision makers can be as important as the eventual decisions themselves." [64] The Supreme Court, I think, is not such an institution.

The Brethren is moderately entertaining and generally informative. It may have a beneficial influence on the standards for selection of Supreme Court Justices in the future (especially Chief Justices). It will probably—although it should not—adversely affect to some extent the quality of some relationships on the Court, especially the relationship between Justices and their law clerks. As an "inside" account of an institution whose main product and significance is a vast body of published opinions and decisions, however, it fails to contribute substantially to the public's ability to evaluate the most important—that is, the legally substantive—aspects of the Burger Court's performance.

---

[60] *See, e.g.,* Stone v. Powell, 428 U.S. 465 (1976); Warth v. Seldin, 422 U.S. 490 (1975); Laird v. Tatum, 408 U.S. 1 (1972); Younger v. Harris, 401 U.S. 37 (1971).

[61] *See, e.g.,* Maher v. Roe, 432 U.S. 464 (1977); Washington v. Davis, 426 U.S. 229 (1976).

[62] *See, e.g.,* Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974).

[63] *See, e.g.,* Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978); Raymond Motor Transp., Inc. v. Rice, 434 U.S. 429 (1978); Buckley v. Valeo, 424 U.S. 1 (1976) (per curiam); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973); Dandridge v. Williams, 397 U.S. 471 (1970).

[64] THE BRETHREN, *supra* note 1, at 1.

BOOKS RECEIVED

APPELLATE COURTS AND LAWYERS: *Information Gathering in the Adversary System.* By Thomas B. Marvell. Westport, Conn.: Greenwood Press, 1979. Pp. x, 391. $22.50.

BAR ADMISSION RULES AND STUDENT PRACTICE RULES. By Fannie J. Klein, Steven H. Leleiko & Jane H. Mavity. Cambridge, Mass.: Ballinger Publishing Co., 1978. Pp. 1225.

BLUE JEANS AND BLACK ROBES: *Teenagers and the Supreme Court.* By Peter Sgroi. New York: Julian Messner, 1979. Pp. 192. $7.79. Paperbound.

CAUSES AND DAMAGES. By Aleksander Peczenik. Lund, Sweden: Juridiska Föreningen i Lund, 1979. Pp. xix, 426.

CHARTING THE FUTURE: *The Supreme Court Responds to a Changing Society, 1890-1920.* By John E. Semonche. Westport, Conn.: Greenwood Press, 1979. Pp. xiii, 470. $25.00.

CHILLING JUDICIAL INDEPENDENCE. By Irving R. Kaufman. New York: The Association of the Bar of the City of New York, 1979. Pp. 50.

CHINESE LEGAL TRADITION UNDER THE MONGOLS: *The Code of 1291 as Reconstructed.* By Paul Heng-chao Ch'en. Princeton, N.J.: Princeton University Press, 1979. Pp. x, 205. $19.50.

CHURCH, STATE, AND PUBLIC POLICY: *The New Shape of the Church-State Debate.* Jay Mechling, ed. Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978. Pp. 119. Paperbound.

CITIZENSHIP AND THE AMERICAN EMPIRE: *Notes on the Legislative History of the United States Citizenship of Puerto Ricans.* By José A. Cabranes. New Haven, Conn.: Yale University Press, 1979. Pp. viii, 101.

THE CIVIL RIGHTS INJUNCTION. By Owen M. Fiss. Bloomington, Ind.: Indiana University Press, 1978. Pp. 117. $10.95.

CONFESSION AND AVOIDANCE: *A Memoir.* By Leon Jaworski with Mickey Herskowitz. Garden City, N.Y.: Anchor Press/Doubleday, 1979. Pp. 336. $10.95.

THE CONSTITUTION AND CHIEF JUSTICE MARSHALL. By William F. Swindler. New York: Dodd Mead, 1979. Pp. xiii, 414. $17.95.

CORPORATE COUNSEL'S ANNUAL—1979. Jeremiah J. Spires & Edward J. Burchell, eds. New York: Matthew Bender, 1979. 2 Volumes. Pp. xxxvii, xvii, 1636.

CORPORATIONS AT THE CROSSROADS: *Governance and Reform.* Deborah A. DeMott, ed. New York: McGraw-Hill Book Co., 1980. Pp. 392. $29.95.

CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY. 1979 Supp. By Harold W. Chase & Craig R. Ducat. Princeton, N.J.: Princeton University Press, 1979. Pp. 152. $3.50. Paperbound.

CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY. 1978 Supp. By Harold W. Chase & Craig R. Ducat. Princeton, N.J.: Princeton University Press, 1978. Pp. 81.

CRIME AND JUSTICE: *An Annual Review of Research.* Norval Morris & Michael Tonry, eds. Chicago: University of Chicago Press, 1979. Pp. xi, 348. $14.00.

THE CRIMINALLY INSANE: *A Community Follow-up of Mentally Ill Offenders.* By Terence P. Thornberry & Joseph E. Jacoby. Chicago: University of Chicago Press, 1979. Pp. xii, 292. $19.00.

CRIMINAL VIOLENCE, CRIMINAL JUSTICE. By Charles E. Silberman. New York: Vintage Books, 1978. Pp. xxii, 745. $3.95. Paperbound.

A CROSS-CITY COMPARISON OF FELONY CASE PROCESSING. By Kathleen B. Brosi. Washington, D.C.: Institute for Law and Social Research, 1979. Pp. xii, 180.

THE DEVELOPMENT OF AMERICAN CITIZENSHIP. By James H. Kettner. Chapel Hill, N.C.: University of North Carolina Press, 1978. Pp. 391. $20.00.

DICTIONARY OF LEGAL ABBREVIATIONS USED IN AMERICAN LAW BOOKS. Compiled by Doris M. Bieber. Buffalo, N.Y.: Wm. S. Hein & Co., Inc., 1979. Pp. 337. $7.95. Paperbound.

ESSAYS ON HUMAN RIGHTS: *Contemporary Issues and Jewish Perspectives.* By David Sidorsky, ed., in collaboration with Sidney Liskofsky and Jerome J. Shestack. Philadelphia: The Jewish Publication Society of America, 1979. Pp. xv, 359. $12.00.

FAIR REPRESENTATION, THE NLRB AND THE COURTS. By Timothy J. Boyce. Philadelphia: Industrial Research Unit, The Wharton School, University of Pennsylvania, 1978. Pp. ix, 130.

FEDERAL DISTRICT JUDGES: *An Analysis of Judicial Perceptions.* By William I. Kitchin. Baltimore: Collage Press, 1978. Pp. 225. Paperbound.

FOLDED LIES: *Bribery, Crusades, and Reforms.* By W. Michael Reisman. New York: The Free Press, A Div. of Macmillan Publishing Co., Inc., 1979. Pp. ix, 277. $12.95.

FROM *Brown* TO *Bakke*: *The Supreme Court and School Integration: 1954-1978.* By J. Harvie Wilkinson III. New York: Oxford University Press, 1979. Pp. viii, 368. $17.95.

GETTING WHAT YOU DESERVE: *A Handbook for the Assertive Consumer.* By Stephen A. Newman & Nancy Kramer. New York: Doubleday & Company, 1979. Pp. xiv, 328. $8.95. Paperbound.

HOW NATIONS BEHAVE: *Law and Foreign Policy.* 2nd Ed. By Louis Henkin. New York: Columbia University Press, 1979. Pp. xv, 400. $25.00 hardbound, $7.00 paperbound.

HOW TO WRITE PLAIN ENGLISH: *A Book for Lawyers and Consumers.* By Rudolf Flesch. New York: Harper & Row, 1979. Pp. xiii, 126. $8.95.

IMPORTED 18TH CENTURY LAW TREATISES IN AMERICAN LIBRARIES 1700-1799. By Herbert A. Johnson. University of Tennessee Press, 1978. Pp. 95. $16.50.

INFERIOR COURTS, SUPERIOR JUSTICE: *A History of the Justices of the Peace on the Northwest Frontier, 1853-1889.* By John R. Wunder. Westport, Conn.: Greenwood Press, 1979. Pp. xvi, 246. $18.95.

INJUSTICE FOR ALL. By Anne Strick. Penguin Books, 1977. Pp. 280. $3.95. Paperbound.

IN RE ALGER HISS: *Petition for a Writ of Error* Coram Nobis. Edith Tiger, ed. New York: Hill and Wang, 1979. Pp. xxiv, 438. $17.50 hardbound, $8.95 paperbound.

JUST DESERTS: *Sentencing Based on Equality and Desert.* By Richard G. Singer. Cambridge, Mass.: Ballinger Publishing Co., 1979. Pp. xvii, 220. $17.50.

LABOR AND THE LAW. 3d Ed. By Charles O. Gregory & Harold A. Katz. New York: W.W. Norton & Company, 1979. Pp. 719. $30.00 hardbound, $10.95 paperbound.

THE LANDRUM-GRIFFIN ACT: *Twenty Years of Federal Protection of Union Members' Rights.* By Janice R. Bellace & Alan D. Berkowitz. Philadelphia: Industrial Research Unit, The Wharton School, University of Pennsylvania, 1979. Pp. xiv, 363. $15.00. Paperbound.

LAW AND POLITICS: *The House of Lords as a Judicial Body, 1800-1976.* By Robert Stevens. Chapel Hill, N.C.: University of North Carolina Press, 1978. Pp. 701.

LAW, INTELLECT, AND EDUCATION. By Francis A. Allen. Ann Arbor: The University of Michigan Press, 1979. Pp. viii, 123. $12.00 hardbound, $5.95 paperbound.

THE LAW OF INVESTMENT MANAGEMENT. By Harvey E. Bines. Boston: Warren, Gorham & Lamont, 1978. 1 volume with annual cum. supplements. Pp. xxii, 740.

THE LAWSUIT LOTTERY: *Only the Lawyers Win.* By Jeffrey O'Connell. New York: The Free Press, 1979. Pp. xiii, 271. $10.95.

LAWYERS: *A Client's Manual.* By Joseph C. McGinn. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1979. Pp. xiii, 207. $5.95. Paperbound.

LAWYERS AND THE LEGAL PROFESSION: *Cases and Materials.* By Murray L. Schwartz. New York: Bobbs-Merrill Co., 1979. Pp. xxvii, 840.

LEGAL IDENTITY: *The Coming of Age of Public Law.* By Joseph Vining. New Haven, Conn.: Yale University Press, 1978. $16.00.

THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES: *Part I, The Antitrust Laws.* Earl W. Kintner, ed. New York: Chelsea House Publishers, 1978. 3 Volumes. Pp. xvi, 982.

MENTAL ILLNESS, DUE PROCESS AND THE ACQUITTED DEFENDANT: *Report and Recommendations.* By The Special Committee to Study Commitment Procedures and the Law Relating to Incompetents. New York: The Association of the Bar of the City of New York, 1979. Pp. 47. Paperbound.

THE MILITARY AND AMERICAN SOCIETY: *Cases and Materials.* By Donald N. Zillman, Albert P. Blaustein & Edward F. Sherman. New York: Matthew Bender. $24.50.

ON PRESS. By Tom Wicker. New York: Berkley Publishing Co., 1978. Pp. 303. $2.95. Paperbound.

ON THE PENITENTIARY SYSTEM IN THE UNITED STATES AND ITS APPLICATION IN FRANCE. By Alexis de Tocqueville & Gustave de Beaumont. Carbondale, Ill.: Southern Illinois University Press, 1979. Pp. xi, 222. $5.95. Paperbound.

PATTERN JURY INSTRUCTIONS: *A Critical Look at a Modern Movement to Improve the Jury System.* By Robert G. Nieland. Chicago: American Judicature Society, 1979. Pp. ii, 116. Paperbound.

THE PHILOSOPHY OF REGULATION OF THE BANKING SYSTEM. By John G. Heimann. New York: The Association of the Bar of the City of New York, 1979. Pp. 19.

POLITICAL PARTIES. 2d Ed. By David W. Abbott & Edward T. Rogowsky. Chicago: Rand McNally College Publishing Co., 1978. $8.95. Paperbound.

POLITICAL THEORY AND INTERNATIONAL RELATIONS. By Charles R. Beitz. Princeton, N.J.: Princeton University Press, 1979. Pp. ix, 212. $16.50 hardbound, $3.95 paperbound.

POPES, LAWYERS, AND INFIDELS: *The Church and the Non-Christian World 1250-1550.* By James Muldoon. Philadelphia: University of Pennsylvania Press, 1979. Pp. xi, 212. $15.00.

PRISONERS OF WAR IN INTERNATIONAL ARMED CONFLICT: *International Law Studies, Volume 59.* By Howard S. Levie. Newport, R.I.: Naval War College Press, 1978. Pp. lxix, 529.

PUBLIC ADMINISTRATION: *Policy-Making in Government Agencies.* 4th Ed. By Ira Sharkansky. Chicago: Rand McNally College Publishing Co., 1978. Pp. xvii, 386.

PUBLIC INTEREST LAW: *An Economic and Institutional Analysis.* By Burton A. Weisbrod, Study Director, in collaboration with Joel F. Handler and Neil K. Komesar. Berkeley: University of California Press, 1978. Pp. x, 580. $9.50. Paperbound.

THE PURSUIT OF EQUALITY IN AMERICAN HISTORY. By J. R. Pole. Berkeley: University of California Press, 1978. Pp. 395. $16.95.

THE QUESTION OF PAROLE: *Retention, Reform, or Abolition?* By Andrew von Hirsch & Kathleen J. Hanrahan. Cambridge, Mass.: Ballinger Publishing Co., 1979. Pp. xxx, 178.

REAL ESTATE LAW. By B. J. Reiter & R.C.B. Risk. Toronto: Emond-Montgomery Limited, 1979. Pp. li, 1210.

THE REFORM OF FBI INTELLIGENCE OPERATIONS. By John T. Elliff. Princeton, N.J.: Princeton University Press, 1979. Pp. xi, 248. $14.50.

SIGNIFICANT DECISIONS OF THE SUPREME COURT, 1977-1978 TERM. By Bruce E. Fein. Washington, D.C.: American Enterprise Institute for Public Policy Research, 1979. Pp. 162. Paperbound.

THE STRUCTURE OF PROCEDURE. By Robert M. Cover & Owen M. Fiss. Mineola, N.Y.: The Foundation Press, Inc., 1979. Pp. x, 544. Paperbound.

SURVEY OF CONSUMER FRAUD LAW. By Jonathan A. Sheldon & George J. Zweibel. Washington, D.C.: National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, 1978. Pp. ix, 216. Paperbound.

SURVEY OF LITERATURE ON DISCOVERY FROM 1970 TO THE PRESENT: EXPRESSED DISSATISFACTIONS AND PROPOSED REFORMS. By Daniel Segal. Washington, D.C.: Federal Judicial Center, 1978. Pp. iii, 88. Paperbound.

THE T'ANG CODE: *Volume I, General Principles.* Wallace Johnson, trans. Princeton, N.J.: Princeton University Press, 1979. Pp. xii, 317. $25.00.

TAXING UNREALIZED GAINS: *The Nettle and the Flower.* By James B. Lewis. New York: The Association of the Bar of the City of New York, 1979. Pp. 27.

TORRENS IN THE UNITED STATES. By Blair C. Shick & Irving H. Plotkin. Lexington Books, 1978. Pp. 176.

TRAGIC CHOICES. By Guido Calabresi & Philip Bobbitt. New York: W.W. Norton & Co., 1978. Pp. 252.

THE UNITED STATES COURT OF CLAIMS, A HISTORY: *Part I, The Judges 1855-1976.* By Marion T. Bennett. Washington, D.C.: Court of Claims, 1976. 2 Volumes. Pp. x, 235. Paperbound.

THE UNITED STATES COURT OF CLAIMS, A HISTORY: *Part II, Origin—Development—Jurisdiction 1855-1978.* By Wilson Cowen, Philip Nichols, Jr. & Marion T. Bennett. Washington, D.C.: Court of Claims, 1978. 2 Volumes. Pp. xi, 183. Paperbound.

URBAN POLITICS AND THE CRIMINAL COURTS. By Martin A. Levin. Chicago: The University of Chicago Press, 1977. Pp. x, 332. $6.95. Paperbound.