

2001

# The Supreme Court and the Brethren

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## Recommended Citation

Garrow, David J., "The Supreme Court and the Brethren" (2001). *Constitutional Commentary*. 249.  
<https://scholarship.law.umn.edu/concomm/249>

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## Articles

### THE SUPREME COURT AND *THE BRETHREN*

David J. Garrow\*

Bob Woodward and Scott Armstrong's book *The Brethren*<sup>1</sup> was a 1979 blockbuster that generated extensive controversy both inside and outside the Court. Their sources had allowed Woodward and Armstrong access to private documents detailing the Court's consideration of argued cases and had regaled the two reporters with stories about behind-the-scenes back-biting amongst the Burger Court's members. A newly available file of the Justices' private correspondence about the book dramatically increases our knowledge of *The Brethren's* impact on the Burger Court. The new file, contained in the personal papers of the late Justice Lewis F. Powell, Jr.,<sup>2</sup> offers considerable evidence indicating which Justices spoke with Woodward and/or Armstrong. The documents also reveal that the Justices were deeply worried about the book's impending disclosures for more than two years before it appeared. More substantively, Powell's

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\* Presidential Distinguished Professor, Emory University School of Law. I owe special thanks to Dennis J. Hutchinson and Ross Davies for their reactions to earlier drafts of this article, and thanks as well to my colleague Morgan Cloud, my former assistant Andrew Larrick, and my present assistant Stephen Levin. Archivist John Jacob at the Law Library of the Washington and Lee University School of Law has been especially kind and helpful.

1. Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon and Schuster, 1979).

2. Lewis F. Powell, Jr., Papers, Law Library, Washington and Lee University School of Law, Lexington, VA. No such documents appear among the Supreme Court papers of the late Justice Thurgood Marshall, which have been publicly available since 1993 in the Manuscript Division of the Library of Congress, and no similar file exists in the papers of the late Justice William J. Brennan, Jr., at the Library of Congress, which also have been perused extensively by scholars. Powell's file on what he termed "The Book" was not used in any extensive detail by John C. Jeffries, Jr., in his impressive biography, *Justice Lewis F. Powell, Jr.* (Charles Scribner's Sons, 1994).

file details how before *The Brethren's* publication as well as after, both Justices and former law clerks were busily engaged in private damage control by insisting—sometimes convincingly and sometimes not at all—that *they* were not among the many sources. And perhaps most notably of all, the new file suggests that the Court's handling of its widely-criticized 1980 summary decision in *Snepp v. United States*<sup>3</sup> was significantly influenced by the fury toward “leakers” that Powell and some of his fellow Justices had developed during the very months when *Snepp* was under consideration within the Court.

## I

Bob Woodward now readily confirms, as Powell's own documents explicitly indicate, that Powell, who died in 1998, was among the Burger Court jurists who talked with him and/or Armstrong.<sup>4</sup> Woodward and Armstrong stated in 1979 that a total of five Justices had actively assisted them,<sup>5</sup> and Woodward himself, in a 1989 *Playboy* interview with the late J. Anthony Lukas, identified former Justice Potter Stewart, who had died in 1985, as *The Brethren's* secret instigator and primary early source.<sup>6</sup> In two extensive conversations in November 2000 and February 2001, Woodward also confirmed that Harry Blackmun, who passed away in 1999, was among the Justices who spoke with Armstrong and him.<sup>7</sup> Woodward additionally identified Powell as the unnamed Justice whom he had told Lukas in 1989 had invited him to the Court for an immediate conversation when Woodward had first telephoned him and who then talked with Woodward for hours on at least three successive days.<sup>8</sup> Furthermore, in keeping with his 1989 statement to Lukas that he and Armstrong would willingly identify which Justices had spoken with them once those Justices had died,<sup>9</sup> Woodward

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3. 444 U.S. 507 (1980).

4. Bob Woodward conversation with David J. Garrow (Nov. 28, 2000). See also Jeffries, *Justice Lewis F. Powell* at 390 (cited in note 2).

5. See Fred Barbash, *Five 'Brethren' Helped Authors*, Washington Post A1 (Dec. 9, 1979).

6. See J. Anthony Lukas, *Playboy Interview: Bob Woodward*, 36 *Playboy* 51, 62 (Feb. 1989).

7. Woodward conversation with Garrow (Nov. 28, 2000).

8. Woodward conversation with Garrow (Nov. 28, 2000); Lukas, 36 *Playboy* at 64 (cited in note 6) (“I remember calling one Justice for the first time, and he said, ‘Can you be here in five minutes?’ It was before the term started. We just sat there in his chambers for two or three hours. I went back the next day and the day after that.”).

9. Lukas, 36 *Playboy* at 64 (cited in note 6) (“[w]hen others die, I’ll be happy to name them, too.”).

obliquely but explicitly confirmed that none of three other now-deceased Justices, William J. Brennan, Jr., Thurgood Marshall, and Chief Justice Warren E. Burger, had been among the five who talked with them.<sup>10</sup> Thus the two other Justices who spoke with Woodward and Armstrong must have come from amongst the remaining trio of William H. Rehnquist, Byron R. White, and John Paul Stevens, the latter of whom joined the Court only midway through the last term that *The Brethren* covers, 1975-76. The documents in Justice Powell's file very strongly suggest that now-Chief Justice Rehnquist was one of the two, and some of Powell's written comments suggest that now-retired Justice White is more likely than Justice Stevens to have been the other.<sup>11</sup>

Justice Powell's file on what he and others at the Court called "The Book" also details how Justice William J. Brennan, Jr., whom some early critics of *The Brethren* mistakenly concluded was one of the authors' most important sources, forcefully and unequivocally told his colleagues that he had provided Woodward and Armstrong with absolutely no assistance whatsoever.

Woodward described to Lukas in 1989 how *The Brethren's* origins lay in a chance conversation with Stewart at an April 1977 party hosted by *Washington Post* publisher Katherine Graham. Woodward parlayed that meeting into an invitation to Stewart's home a few evenings later, where the Justice—at least in Woodward's telling—gave vent to his "anger" and "disdain" toward Chief Justice Warren Burger and spent several hours de-

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10. Woodward refuses to *expressly* name or confirm the identities of those Justices who did *not* in some fashion aid him or Armstrong, saying "I'm just not going to comment" when asked for explicit confirmation that Burger, Brennan, and Marshall were *not* among the five who did assist them. He readily reiterates, however, that he does and will explicitly confirm the identities of those Justices who *did* help him and Armstrong once they are deceased, and he confirms that Stewart, Powell, and Blackmun were among the five while refusing to voice any similar confirmation when asked about Burger, Brennan, and Marshall. Woodward conversation with Garrow (Nov. 28, 2000).

11. Following the April 15, 2002, death of retired Justice White, Bob Woodward, in an alteration of his previous stance (see note 9), declined to address whether Justice White *had* assisted him and Armstrong, or whether he had not. Woodward acknowledged that explicitly characterizing Justice White's status (particularly if the characterization were negative), might thereby automatically identify the statuses of either or both now-Chief Justice Rehnquist and Justice Stevens. "I'm just worried about now through the process of elimination and so forth getting down to indirectly perhaps and inadvertently identifying somebody who may still be around. So I'm going to decline to go further on this. . . . It is out of an excess of caution and it is a fair question but I realize your detective work on this is leading you where you want to go and in terms of somebody who might still be around, so I'm just going to pass on your question and I hope you'll understand." Woodward voice-mail message to Garrow (April 19, 2002).

scribing in “incredible detail” how each of his colleagues behaved during the Justices’ private conferences. Woodward told Lukas that Stewart “knew what he was doing and I think he almost hoped that he could bring Warren Burger down by launching this inquiry into how he ran the Court.”<sup>12</sup>

Stewart’s unprecedented openness—“Look, any time you want anything, or you want to talk, you call. I’ll answer any question,” Woodward quoted him as saying that April night<sup>13</sup>—launched Woodward and his partner into full-time work on the book in the summer of 1977. By late September Woodward had also had his successive conversations with Lewis Powell. On September 28, 1977, five days before the start of the Court’s new term, the Justices had an extensive conference discussion “about Bob Woodward.” It may not have been their first, and it apparently was stimulated by Warren Burger’s desire to have the conference impose upon *all* Justices an unwritten but nonetheless ostensibly binding rule barring any and all contact with any journalist.<sup>14</sup>

After that conference discussion, Lewis Powell wrote a letter of objection to Burger that he left unsent.<sup>15</sup> In it Powell acknowledged that “I have talked to Bob Woodward at his request about his proposed book,” but he stressed that “I never reveal—even to my wife Jo—what goes on in the Conference Room.” Powell contended that “we should not foreclose all conversations with representatives of the media,” and said he had been “more than a little discomfited by some of the Conference conversations about this subject” that suggested otherwise. Powell concluded that “if those who elect not to talk to media representatives are concerned that those of us who do may violate confidences, I would prefer a policy of no communication whatever—despite my own conviction that this is not in the best interest of the Court as an institution.”<sup>16</sup>

One week later Powell sent Woodward a letter intended to document Powell’s insistence that he had told Woodward nothing of consequence. He decorously enclosed for Woodward cop-

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12. Lukas, 36 *Playboy* at 62 (cited in note 6).

13. *Id.* at 62-64.

14. Draft Letter from Lewis F. Powell, Jr. to Warren E. Burger (“Dear Chief”), Lewis F. Powell, Jr. Papers, Supreme Court Subject Files, Woodward Book, Washington and Lee University School of Law Library, Lexington, VA (Oct. 4, 1977).

15. *Id.* (“I decided *not* to send this letter,” Powell wrote on the first page of the four page draft typescript).

16. *Id.* at 2, 3.

ies of several innocuous speeches he had given and almost mockingly added that "I think you also will find quite helpful a film that is shown here at the Court fairly regularly for tourists."<sup>17</sup>

Woodward and Armstrong's work continued apace through the balance of 1977 and the first months of 1978. In June 1978, Washington's *Legal Times* published an odd duo of stories. One, by then-editor David Beckwith, hyped the forthcoming book—still almost eighteen months away from publication—as "the biggest leak of all."<sup>18</sup> Helped in significant part by comments from Woodward himself, Beckwith stated that the two authors "have accumulated a staggering amount of unpublished information" and had completed a draft in which the "harshest criticism" was aimed at Chief Justice Burger and Justice Marshall. The book was now "a frequent topic of hand-wringing conversations and denials of complicity at the Court," Beckwith said, and it had produced "a mood of anger and frustration among current Justices. Byron White is reported to be particularly livid."<sup>19</sup> A second article, by well-known Washington practitioners and former Supreme Court law clerks E. Barrett Prettyman, Jr., and Allen R. Snyder, emphasized how Woodward and Armstrong had obtained copies of countless internal Court documents and advanced a Burger-like argument that individual Justices should be prohibited from disclosing any such materials.<sup>20</sup>

Fast on the heels of the *Legal Times* stories came a new round of requests from the authors to Justices and former clerks. On July 7, Woodward called Powell seeking another face-to-face interview and voicing "concern that there had been a 'whispering campaign' against his book." Woodward confirmed that there was now a complete first draft and told Powell, as Powell recounted in a memo, that he wanted "to make sure that he is not making some erroneous statements about members of the Court or its processes." Powell declined the request, recounting in the memo that "in view of the documentary materials that we

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17. Letter from Lewis F. Powell, Jr. to Bob Woodward ("Dear Bob"), Powell Papers (Oct. 11, 1977).

18. David Beckwith, *Coming: Woodward's Book—The Biggest Leak of All*, *Legal Times* 23, 23-24 (Jun. 19, 1978).

19. *Id.*

20. E. Barrett Prettyman, Jr. and Allen R. Snyder, *Are Specific Guidelines Needed to Protect Justices' Confidentiality at Supreme Court?*, *Legal Times* 23 (Jun. 19, 1978); see also E. Barrett Prettyman, Jr. and Allen R. Snyder, *Breaching Secrecy at the Supreme Court—An Institutional or Individual Decision?*, *Legal Times* 6 (Jun. 12, 1978).

have heard are in” Woodward’s hands, “I thought it inadvisable to put myself in the position of appearing to assist him.”<sup>21</sup>

Four days after Woodward’s request, Powell telephoned both Potter Stewart and “Bill” Rehnquist. Powell’s private memo states that Rehnquist “had had a similar request about ten days ago from Scott Armstrong, and had given Scott a negative answer—after Bill talked to me.” Powell then called Woodward to again say “no,”<sup>22</sup> but the very next day Woodward renewed his approaches to some of Powell’s most knowledgeable former clerks, telling them—just as he had Powell—that he wanted their input so as to avoid unnecessary mistakes. One former clerk who heard from Woodward warned Powell that same day that the book would contain “unprecedented” disclosures and “will certainly be a whopper.”<sup>23</sup>

Powell shared copies of his private memo about Woodward with both Stewart and Rehnquist,<sup>24</sup> and Stewart told Powell that his “basic instincts” were “very similar” to Powell’s with regard to how they should not aid Woodward concerning specific cases.<sup>25</sup> In 1989, Woodward acknowledged that Stewart’s attitude had changed as the research had proceeded and as Stewart discovered that “he wasn’t necessarily going to be happy with the result. I think he realized he had started an avalanche of sorts that was going to cause the Court a lot of problems internally and externally.”<sup>26</sup>

By mid-September of 1978, as Powell continued to hear from other former clerks about the extent and detail of Woodward’s documented, case-specific knowledge, Powell drafted a letter to Stewart and Rehnquist warning them that he was “now convinced that the Woodward book is going to be sensational and perhaps damaging—in the short term—to the Court and perhaps to our harmony.”<sup>27</sup> Powell again left the letter un-

21. Memorandum from Lewis F. Powell, Jr., (“Re: Woodward Book on the Court—Memorandum to the File”), Powell Papers (July 11, 1978).

22. *Id.* at 2.

23. Letter from Larry Hammond to Lewis F. Powell, Jr., Powell Papers 3 (July 12, 1978).

24. Letter from Lewis F. Powell, Jr. to Potter Stewart and William Rehnquist (“Dear Potter and Bill”), Powell Papers (July 13, 1978).

25. Letter from Potter Stewart to Lewis F. Powell, Jr. (“Dear Lewis”), Powell Papers (July 15, 1978).

26. Lukas, 36 *Playboy* at 64 (cited in note 6).

27. Draft Letter in reference to “*Woodward’s Book*” from Lewis F. Powell, Jr. to Potter Stewart and William H. Rehnquist (“Dear Potter and Bill”), Powell Papers (Sept. 14, 1978).

jotting that he would "brief Potter, Byron [and] Bill verbally."<sup>28</sup> But several weeks later he sent a letter to Burger warning him that Woodward has "a vast amount of what we consider confidential material" and that several former clerks had confirmed that Burger would be "a central target" of the book.<sup>29</sup>

Burger in reply told Powell that Woodward's work "illustrates why we (collectively 8-1) make a fundamental mistake in allowing staffers here to talk to anyone outside." Former clerks ought to realize that "there are hazards in talking with certain 'categories' in this life," and any clerk who called Woodward "Bob," as one of Powell's had, was simply demonstrating that he was "a child in the hands of these 'sharpies.'"<sup>30</sup>

## II

Over a year passed before the precise timing of the book's actual release was announced. Shortly before the release, on December 2, 1979, Woodward and Armstrong appeared on CBS's *60 Minutes*, and the next day *Newsweek* magazine published extensive excerpts from and commentary on the book. Columnist George Will, afforded an early glance, wrote that "the Justices are brothers in the style of Cain and Abel. This book will destroy the Court's collegiality, if there is any to destroy."<sup>31</sup>

The following day Powell wrote one letter to Burger and another to his children and other relatives. He told the Chief Justice that *The Brethren* is "fictional and outrageously slanderous, especially about you," and confessed that "I am deeply distressed that my name is implicated." Without actually denying that he had denigrated Burger's judicial competence in private remarks that the book quoted, Powell nonetheless suggested that such statements had been "manufactured from whole cloth." The letter closed by saying that "I would like to clear the atmosphere within the Court to the extent that I can and assure you that you have my wholehearted respect," but once again Powell left the letter unsent.<sup>32</sup>

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28. Id. ("Decided not to send this. Will brief Potter, Byron [and] Bill verbally.")

29. Letter from Lewis F. Powell, Jr. to Warren E. Burger ("Dear Chief"), Powell Papers (Oct. 17, 1978).

30. Letter from Warren E. Burger to Lewis F. Powell, Jr. ("Dear Lewis"), Powell Papers (Oct. 23, 1978).

31. George Will, *The Injudicial Justices*, *Newsweek* 140 (Dec. 10, 1979).

32. Draft Letter in reference to "*Woodward's Book*" from Lewis F. Powell, Jr. to Warren E. Burger ("Dear Chief"), Powell Papers (Dec. 4, 1979). ("Not sent" scribbled

To his family, Powell wrote that Burger “has provided splendid leadership for the judicial system” and dismissed *The Brethren* as “a sorry example of the gutter level of what is called investigative reporting.”<sup>33</sup> The next day Powell drafted a statement, intended for public issuance by all eight of the Associate Justices, which declared that “the picture of a personally contentious Court is fiction, not fact,” but Powell’s file does not reveal whether he ever circulated his draft.<sup>34</sup>

Powell sent Thurgood Marshall a handwritten note telling him that “You have the respect and friendship of all of your colleagues” and reassuring him that “your distinguished place in the history of our country is secure.”<sup>35</sup> Powell’s friend Gerald Gunther, a distinguished professor at Stanford Law School, told the Justice that he found the book “repulsive,”<sup>36</sup> and Powell complained to an old Richmond friend that “it is difficult not to believe that a society is sick when its highest monetary rewards go to those who misinform, entertain and titillate.”<sup>37</sup>

Powell blithely insisted to one former clerk that “I will not believe that any of my clerks were ‘suckered’ by Woodward,”<sup>38</sup> and told his protege J. Harvie Wilkinson III, now Chief Judge of the U.S. Court of Appeals for the Fourth Circuit, that *The Brethren* “serves no historical or societal purpose. Indeed, its only purpose, in all probability, was to make money for the writers.”<sup>39</sup> To Gerald Gunther, Powell was blunter, saying that the book employed “double and triple hearsay, mind reading and stolen documents” and amounted to “essentially a get-rich-quick scheme.”<sup>40</sup>

“I am more distressed by the breach of confidentiality by clerks—and perhaps others here at the Court—than I am by the

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at the top of the first page).

33. Letter from Lewis F. Powell, Jr. to (“Dear Smiths, Carmodys, Sumners and Powell III’s”), Powell Papers (Dec. 4, 1979).

34. Draft (“Statement”), Powell Papers (Dec. 5, 1979).

35. Letter from Lewis F. Powell, Jr. to Thurgood Marshall (“Dear Thurgood”), Powell Papers (Dec. 6, 1979).

36. Letter from Gerald Gunther to Lewis F. Powell, Jr., Powell Papers 2 (Dec. 7, 1979).

37. Letter from Lewis F. Powell, Jr. to George D. Gibson, Powell Papers (Dec. 11, 1979).

38. Letter from Lewis F. Powell, Jr. to Samuel Estreicher (“Dear Sam”), Powell Papers (Dec. 13, 1979).

39. Letter from Lewis F. Powell, Jr. to J. Harvie Wilkinson III (“Dear Jay”), Powell Papers (Dec. 13, 1979).

40. Letter from Lewis F. Powell, Jr. to Gerald Gunther (“Dear Gerry”), Powell Papers (Dec. 18, 1979).

content of the book," Powell told Gunther.<sup>41</sup> When former clerks wrote to him to express their own dismay and to confess that they had been "naive" in talking with Woodward,<sup>42</sup> Powell admitted that "the breach of trust by the law clerks comes as a shock."<sup>43</sup> Robert D. Comfort, who had clerked for Powell in 1977-78, lamented that "such a massive breach of personal and professional integrity is nearly enough to make one ashamed of belonging to the group."<sup>44</sup>

Christina Whitman, a 1975-76 clerk, told Powell that a former Brennan clerk had observed that "our whole generation of clerks will be remembered with shame,"<sup>45</sup> but she strongly supported Powell's view that clerks from some chambers were more likely to have afforded Woodward wholesale cooperation than those from others. "I was aware that in the year I was there few of our fellow clerks felt a close personal bond of the sort that existed in your Chambers," Whitman wrote Powell.<sup>46</sup> According to Whitman some of the clerks tended "to view the Court in terms of petty politics." Amongst the 1975-76 clerks who had that attitude, "[u]nfortunately, they were also the clerks that had the time to find out everything they could about what went on concerning every case in every chambers. The Woodward book reflects their view of the Court."<sup>47</sup>

In late December, Justice Brennan asked Powell whether Powell believed Brennan ought to make a public response to *The Brethren's* allegation that Brennan had been guilty of unprincipled vote-trading in a 1971 criminal case, *Moore v. Illinois*.<sup>48</sup> Woodward and Armstrong had falsely "snitch-jacketed" Brennan in their initial interview on *60 Minutes*, when Mike Wallace had asked about the book's use of at least one "Term

41. Id.

42. Letter from Christina B. Whitman to Lewis F. Powell, Jr., Powell Papers (Dec. 13, 1979) ("As you know, I talked with Bob Woodward. I do not think that I betrayed your trust. But I have increasingly felt that I was naive about the enterprise in which he was engaged").

43. Letter from Lewis F. Powell, Jr. to Christina B. Whitman ("Dear Chris"), Powell Papers (Dec. 18, 1979).

44. Letter from Robert D. Comfort to Lewis F. Powell, Jr., Powell Papers (Dec. 17, 1979).

45. Letter from Christina B. Whitman to Lewis F. Powell, Jr., Powell Papers 1 (Dec. 27, 1979).

46. Id. at 2.

47. Id. at 3.

48. Letter from Lewis F. Powell, Jr. to William J. Brennan, Jr. ("Dear Bill"), Powell Papers (Dec. 28, 1979) ("This refers to our conversation this morning about the Woodward book. The question you raised as to whether you should make a response is difficult to answer.").

history” that were prepared annually within Brennan’s chambers. “William Brennan will be referred to as the Deep Throat of the Supreme Court. Does he know that you have it?” After a pause, Armstrong had replied that “I think we’d rather not answer that.”<sup>49</sup>

Powell reassured Brennan that “[b]ased on conversations with several of our colleagues here, I think you would be gratified by the deep sense of outrage we feel that the Woodward book ‘targeted’ to some extent on you.” Reminding Brennan that “you have written the opinions in more landmark cases than any other Justice in this century,” Powell concluded that “I do not think you need to defend yourself.”<sup>50</sup>

In response, Brennan explained that the annual “histories,” which dated back to Brennan’s very first Term on the Court, were kept under lock and key; he did not tell Powell that former clerks retained copies of the “history” covering their term of service. Woodward and Armstrong had one or more of the histories plus copies of other documents from Brennan’s case files, but Brennan emphasized that

they obtained them without my knowledge or consent. I have never met either Woodward or Armstrong. I have never talked to either of them, by telephone or in person. I have not personally delivered or authorized any person to deliver the histories to Woodward, Armstrong or anyone else. They could only have obtained them from some unauthorized person or persons, for example a faithless law clerk. That smacks of encouraging or aiding and abetting a theft.<sup>51</sup>

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49. As quoted in Anthony Lewis, *Supreme Court Confidential*, N.Y. Rev. of Books, 3, 5-6 (Feb. 7, 1980).

50. Letter from Powell to Brennan, Powell Papers at 1, 2 (cited in note 48).

51. Letter from William J. Brennan, Jr. to Lewis F. Powell, Jr., Powell Papers 2, 2-3 (Jan. 3, 1980). See also Jeffries, *Justice Lewis F. Powell* at 390-91 (cited in note 2). Notwithstanding Bob Woodward’s oblique but explicit confirmation in November 2000 that Justice Brennan was not among the five Justices who spoke with him or Armstrong, Scott Armstrong in a conversation on the very same day expressed some discomfort when he was read these sentences from Brennan’s letter to Powell. After indicating that “I think there are a number of things wrong here,” Armstrong explained that one was that “I met Brennan” prior to beginning work on *The Brethren*. Armstrong understandably is more likely to remember once meeting Justice Brennan than was Brennan likely to have remembered meeting Armstrong. A second thing, Armstrong said, was how “deliver is an interesting verb.” Characterizing Brennan’s denial as “very artfully done,” Armstrong indicated his belief that Brennan had indeed been aware that former clerks were making the contents of Brennan chambers’ documents and histories available to Woodward and Armstrong. In a subsequent follow-up conversation, Woodward explicitly stated that the only indications he or Armstrong had ever had that Brennan knew that former clerks were sharing their copies of documents from their terms of service with the two reporters

A scathing review of *The Brethren* in the *New York Review of Books* by *New York Times* columnist and former Court correspondent Anthony Lewis supplied *exactly* the rebuttal of Woodward and Armstrong that Brennan had had in mind.<sup>52</sup> But among some Justices and former clerks, efforts to discover precisely who *had* been amongst *The Brethren's* primary sources continued apace into early 1980. The most assiduous report Powell received was from Jack B. Owens, a 1973-74 clerk who had subsequently helped litigate the famous 1978 case of *Regents of the University of California v. Bakke* on behalf of the appellants. "[A] good deal of the material relating to the 1973 Term," Owens informed Powell, "resulted from what can only be described as a hemorrhage in the White Chambers. When I became aware that the book was being written and began to dig into who was talking to the authors, it became apparent to me that at least two of the White clerks" from 1973 had granted Woodward "lengthy" interviews and one had given Woodward "a great deal of internal court documents." A 1973 Stewart clerk also had provided "substantial assistance," but far more astoundingly, "one of the Blackmun clerks and, heaven forbid, one of

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rested upon former clerks' statements to them that Brennan had not objected to their speaking with Woodward and Armstrong. It appears as if the extent of cooperation that former Brennan clerks accorded the two reporters convinced the duo, even absent any direct evidence, that Brennan must implicitly have approved such cooperation. Woodward conversations with Garrow (Nov. 28, 2000 and Feb. 6, 2001); Armstrong conversation with Garrow (Nov. 28, 2000). Justice Brennan's official biographer, Stephen Wermiel, when asked for his comments, explained that Brennan's "denials to me were as adamant and consistent as that letter. He never wavered." Wermiel conversation with Garrow (Feb. 5, 2001); see also Lee Epstein and Jack Knight, *Piercing the Veil: William J. Brennan's Account of Regents of the University of California v. Bakke*, 19 Yale L. and Policy Rev. 341, 343 n.11 (relating a June 16, 2000 e-mail message from Professor Walter F. Murphy in which Murphy recalled a conversation from twenty years earlier during which Justice Brennan asserted that documents had been removed from his desk without his permission and showing Murphy "jimmy marks" on one or more drawers. "Clearly someone had used a crow bar or similar instrument to break the lock.") Asked about Murphy's recollection, Brennan biographer Stephen Wermiel questions the dependability of Murphy's story. "My impression . . . was always that Brennan kept the desk drawers unlocked. I used to walk in there in 1987 while he was sitting there and open the drawer and take out one or more 'histories.' And he certainly never showed me any jimmying or even hinted at it." E-mail message from Stephen Wermiel to David J. Garrow (Oct. 26, 2001). I thank both Professor Wermiel and Professor Epstein for their helpfulness on this matter.

52. Lewis, N.Y. Rev. of Books (cited in note 49). In the June 1978 *Legal Times* article heralding Woodward's forthcoming book, author David Beckwith had closed by saying that the book "will undoubtedly eclipse Anthony Lewis's *Gideon's Trumpet* as the standard of inside Supreme Court reportage. That can't come soon enough for Woodward, who refers contemptuously and scatologically to the Lewis book as pure Court-sanctioned public relations." See Beckwith, *Legal Times* at 23 (cited in note 18).

the Chief's clerks agreed to read and review the galleys of the book. Both of them now regret that mightily."<sup>53</sup>

Perhaps most strikingly of all, Owens informed Powell that "[o]ne of the Rehnquist clerks from our term reported that he had given a 5-hour interview to Woodward. He said that he did so at the behest of the Justice." After Woodward had approached Owens, "I began calling other clerks to warn them," but "I learned that it was too late in a number of cases, particularly in the case of the White clerks and one Stewart clerk, whose approach to clerking had bothered me during the 1973 Term." *The Brethren's* "real sources are not very many in number," Owens concluded, but "those people who decided to play ball gave them a great deal of information, much of it slanted and inaccurate (and occasionally vindictive)."<sup>54</sup>

In response, Powell told Owens that "I agree substantially with your assessment of what happened" and added that reportedly one 1975-76 clerk had "kept a daily diary of all the clerk gossip and delivered the diary to Woodward."<sup>55</sup> Powell's bitter anger at the book did not slacken, and he told one ABA friend that "[t]hose who deliberately set out to weaken the institution of an independent judiciary do the cause of freedom a grave injustice."<sup>56</sup>

### III

On February 19, 1980, the Court handed down a six-to-three summary affirmance in *Snepp v. United States*,<sup>57</sup> a case which the Justices had first discussed in early October. Former CIA agent Frank Snepp had published a 1977 best-seller, *Decent Interval*, detailing CIA ineptitude during the fall of Saigon in 1975, without submitting his manuscript for CIA approval. The government had sued Snepp, alleging that he had violated his CIA secrecy agreement and seeking all of Snepp's royalties plus mandatory CIA preclearance of anything and everything Snepp might ever write in the future. The government had won an all-

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53. Letter from Jack B. Owens to Lewis F. Powell, Jr., Powell Papers 1, 2 (Jan. 24, 1980).

54. *Id.* at 2, 3.

55. Letter from Lewis F. Powell, Jr. to Jack B. Owens, Powell Papers (Jan. 29, 1980).

56. Letter from Lewis F. Powell, Jr. to Leonard S. Janofsky, Powell Papers (Mar. 6, 1980).

57. 444 U.S. 507 (1980).

but-complete victory in the lower courts,<sup>58</sup> and when the parties' cross-petitions first came before the Justices, only Lewis Powell—who wanted to expand the scope of the government's victory—voted to grant certiorari.<sup>59</sup>

Powell drafted a dissent from denial, and in late October he individually approached both Potter Stewart and Harry Blackmun in the hope that they would join him in supporting a summary ruling on the merits.<sup>60</sup> Stewart and Blackmun, along with Burger and Rehnquist, all quickly joined when Powell first circulated his draft in mid-November,<sup>61</sup> transforming the solo dissent into a five-justice majority. Byron White agreed in late November,<sup>62</sup> just days before *The Brethren's* public release, thus giving Powell the six votes informally required for a summary holding. In mid-January 1980, Powell circulated a revised draft,<sup>63</sup> and four weeks later the anonymous per curiam ruling was publicly issued.<sup>64</sup>

Three days after *Snepp* was handed down, the *Washington Post* published a prominent story headlined "Snepp Decision Seen Helping Court to Plug Its Own Leaks." Conservative commentator Bruce Fein was quoted as opining that "I see the decision as in part a reaction to confidences improperly breached" at the Court itself. "I can't say that conclusively," Fein added, but in ruling summarily, the Court exhibited "a kind of instinctive hostility" toward *Snepp's* disregard for institutional secrecy.<sup>65</sup>

58. See *United States v. Snepp*, 456 F. Supp. 176 (E.D. Va. 1978), affirmed in part and reversed in part, 595 F.2d 926 (4th Cir. 1979).

59. Docket Sheet, *Snepp v. United States*, No. 78-1871, Powell Papers (Oct. 5, 1979) (noting that all eight of his colleagues had voted to deny certiorari). See also Frank Snepp, *Irreparable Harm: A Firsthand Account of How One Agent Took On the CIA in an Epic Battle Over Secrecy and Free Speech* 336-37, 347-54 (Random House, 1999) (*Snepp* himself later recounting how documents from Justice Marshall's and Justice Brennan's case files detail the Court's consideration of his case).

60. Letter from Lewis F. Powell, Jr. to Harry A. Blackmun, *Snepp* File, Powell Papers (Oct. 31, 1979) ("At this time, I have spoken only to Potter, who—at the first Conference on this case—indicated to me some interest.").

61. Letter from Potter Stewart to Lewis F. Powell, Jr., *Snepp* File, Powell Papers (Nov. 16, 1979); Letter from Harry A. Blackmun to Lewis F. Powell, Jr., *Snepp* File, Powell Papers (Nov. 19, 1979); Letter from Warren E. Burger to Lewis F. Powell, Jr., *Snepp* File, Powell Papers (Nov. 16, 1979); Letter from William H. Rehnquist to Lewis F. Powell, Jr., *Snepp* File, Powell Papers (Nov. 20, 1979).

62. Letter from Byron R. White to Lewis F. Powell, Jr., *Snepp* File, Powell Papers (Nov. 29, 1979).

63. Letter from Lewis F. Powell, Jr. to Potter Stewart, *Snepp* File, Powell Papers (Jan. 11, 1980).

64. *Snepp v. United States*, 444 U.S. 507 (1980).

65. Fred Barbash, *Snepp Decision Seen Helping Court to Plug Its Own Leaks*,

Later that very same day Lewis Powell sent a letter to his five colleagues who had joined him in *Snepp*, enclosing a supportive editorial from the conservative and now-defunct *Washington Star*. In a visibly defensive tone, Powell reiterated that “we were doing nothing more than applying a contractual obligation that created a trust” and declared that “Snepp’s violation of his contract has caused irreparable harm to our country.”<sup>66</sup>

The ongoing public perception that the Court’s ruling in *Snepp* was a reaction to the institutional embarrassment it had suffered from *The Brethren* was an aspersion that all but preoccupied Powell.<sup>67</sup> Three days later, in a “memo to file,” Powell noted how journalists were suggesting that *Snepp* “was motivated by publication of *The Brethren* and a desire of the Court to create a precedent that would enable it to prevent ‘leaks.’ This speculation is wholly groundless.” Reviewing his own case file, Powell emphasized how his first circulation of his draft opinion occurred in mid-November, “two weeks before the Woodward book was published. There is no relationship in fact or in principle—except in the minds of some newsmen—between the *Snepp*

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Wash. Post A5 (Feb. 22, 1980). Critical professional commentary on *Snepp* includes: Diane F. Orentlicher, *Snepp v. United States: The CIA Secrecy Agreement and the First Amendment*, 81 Colum. L. Rev. 662, 706 (1981); Howard C. Anawalt, *A Critical Appraisal of Snepp v. United States: Are There Alternatives to Government Censorship?*, 21 Santa Clara L. Rev. 697, 725 (1981); James L. Oakes, *The Doctrine of Prior Restraint Since the Pentagon Papers*, 15 U. of Mich. J.L. Ref. 497, 515-16 (1982); Jonathan C. Meadow, *The First Amendment and the Secrecy State: Snepp v. United States*, 130 U. Pa. L. Rev. 775, 840 (1982); Peter E. Quint, *The Separation of Powers Under Carter*, 62 Tex. L. Rev. 785, 839-41 (1984); Judith Schenck Koffler and Bennett L. Gershman, *The New Seditious Libel*, 69 Cornell L. Rev. 816, 844-51 (1984); Comment, *Developments in the Law—The Constitutional Rights of Public Employees*, 97 Harv. L. Rev. 1738, 1772-73 (1984); Harold Edgar and Benno C. Schmidt, Jr., *Curtiss-Wright Comes Home: Executive Power and National Security Secrecy*, 21 Harv. C.R.-C.L. L. Rev. 349, 371-75 (1986); and Anthony R. Klein, *National Security Information: Its Proper Role and Scope in a Representative Democracy*, 42 Fed. Comm. L.J. 433, 443-47 (1990); see also: Anthony Lewis, *A Lawless Decision*, N.Y. Times A23 (Feb. 21, 1980); Anthony Lewis, *Disorder in the Court*, N.Y. Times 21 (Feb. 25, 1980); Anthony Lewis, *Enforcing Our Rights*, 50 Geo. Wash. L. Rev. 414, 418-19 (1982); Anthony Lewis, *National Security: Muting the ‘Vital Criticism,’* 34 UCLA L. Rev. 1687, 1695-96 (1987); and Anthony Lewis, *Limits on Presidential Power*, 49 U. Pitt. L. Rev. 745, 748-49 (1988). But see John C. Jeffries, Jr., *Rethinking Prior Restraint*, 92 Yale L.J. 409, 435-37 (1983) (defending the holding of the *Snepp* majority).

66. Letter from Lewis F. Powell, Jr. to the Chief Justice and Justices Stewart, White, Blackmun and Rehnquist (“Snepp Opinion”), *Snepp* File, Powell Papers (Feb. 22, 1980).

67. Maxine Cheshire, *With Secrets and Justices for All*, Wash. Post, H1 (Feb. 24, 1980) (asserting that *Snepp* is “viewed by many lawyers as an attempt by the [C]ourt to plug its own leaks”); Victor S. Navasky, *The Selling of the Brethren*, 89 Yale L.J. 1028, 1035 (1980) (asking “is it implausible that *The Brethren*’s disclosure of the Court’s secrets explains the language in *Snepp* permitting government agencies to punish current or former employees who leak information to the press?”).

opinion and *The Brethren*.”<sup>68</sup> Powell overlooked at least momentarily how both he and his colleagues had been exceptionally concerned about the “leaks” in Woodward and Armstrong’s book *long* before the book itself actually appeared, and their fears had perhaps been most acute in the weeks immediately preceding the book’s actual appearance.

Powell’s seemingly “protesteth too much” defensiveness concerning *Snepp* continued throughout the spring of 1980. In mid-April Powell prepared yet another private memo, this one seemingly focused on detailing just how thorough his and his colleague’s consideration of the case supposedly had been. Again Powell reiterated that “[t]wo drafts were circulated *before* “*The Brethren*” came out. Media speculation on this was paranoid.”<sup>69</sup>

#### IV

Eighteen months after *The Brethren*’s publication, Potter Stewart retired from the Supreme Court at the unusually early age of sixty-five. Stewart’s brother Zeph later wondered whether his sibling stepped down when he did because he sensed some early indications of incipient Parkinson’s Disease,<sup>70</sup> but Bob Woodward, in his 1989 “outing” of Stewart, volunteered that he believed that publication of *The Brethren* had “complicated [Stewart’s] presence on the Court. Another Justice told me that part of the reason Stewart had left the bench was that there was a suspicion—I suspect in Burger’s mind in particular—that this was a Stewart operation.”<sup>71</sup>

In his only recorded comment about *The Brethren*, Stewart told a 1983 interviewer that when the book first appeared, “I took it home and read it on a weekend, from cover to cover, closed it, and haven’t looked at it since.” Unlike Lewis Powell, Stewart said that “[I]nsofar as it was accurate I didn’t mind it so much. There *were* many inaccuracies in the book which most people might call minor inaccuracies but which I do not consider

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68. Memorandum from Lewis F. Powell, Jr. (“MEMO TO FILE—*United States v. Snepp*”), Snepp File, Powell Papers (Feb. 25, 1980).

69. Memorandum from Lewis Powell, Jr., (“No. 78-1871 *Snepp v. United States*”) Snepp File, Powell Papers (April 10, 1980).

70. Zeph Stewart e-mail message to David J. Garrow (Mar. 10, 2000) (“When I subsequently noticed in him some early signs of incipient Parkinson’s Disease, I wondered, without ever asking, if his consciousness of this problem may not have provided the impulse to retire at that time.”)

71. Lukas, 36 *Playboy* at 64 (cited in note 6).

minor. But insofar as it was accurate, there's no reason on earth that the American people should not know these things."<sup>72</sup>

Potter Stewart's own personal papers, like those of Warren Burger, remain sealed for some years to come, but Lewis Powell's file on "The Book" reflects how his unusually rich papers will offer students of the Supreme Court an oftentimes more valuable behind-the-scenes perspective than the over-heralded papers of Thurgood Marshall. Over time, *The Brethren* has won a far more respectful reception from scholars than it did from its immediate reviewers. Former Marshall clerk Mark Tushnet has acknowledged that "on most particulars and in its general depiction of the Supreme Court under Chief Justice Burger, its accuracy has not been impugned" and has often been confirmed.<sup>73</sup> But *The Brethren's* impact upon the internal life of the Court itself has never been sufficiently assayed. The possibility that Stewart's initial sponsorship of the book ironically hastened his own retirement may never be fully answerable. However, if neither Stewart's nor Rehnquist's papers are purposely winnowed before historians someday get their hands on them, the story that Powell's file tells about how cooperation with Woodward boomeranged into anger and regret may eventually be known in even richer detail.

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72. Robert Bendiner, *The Law and Potter Stewart: An Interview with Justice Potter Stewart*, *Amer. Heritage* 99-104 (Dec. 1983).

73. Mark Tushnet, *Thurgood Marshall and the Brethren*, 80 *Georgetown L.J.* 2109, 2109 n.2 (1992).