



JUSTICE BYRON WHITE AND THE BRETHREN

Stephen R. McAllister

OVER THIRTY YEARS AGO, Bob Woodward and Scott Armstrong published *The Brethren*, an “inside” look at the workings of the Supreme Court over seven terms of the Court, from 1969 to 1976.¹ According to Woodward and Armstrong, five of the active Justices on the Court during that time period assisted them. That assistance apparently consisted of granting interviews with the authors, providing the authors with documents and materials related to the Court and its cases during these years, or both.²

To date, three of those Justices have been publicly identified: Potter Stewart, Lewis F. Powell, Jr., and Harry Blackmun. Furthermore, the authors appear to have confirmed that Chief Justice Warren E. Burger, and Justices William J. Brennan, Jr. and Thurgood Marshall, did *not* assist them. Ten years ago, Professor David Garrow narrowed the candidates for the final two Justices who aid-

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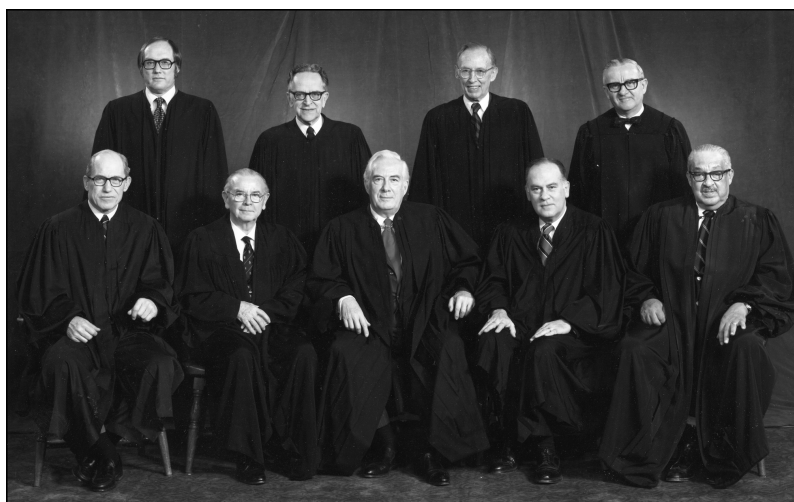
¹ Bob Woodward & Scott Armstrong, *The Brethren: Inside the Supreme Court* (Simon & Schuster 1979).

² David J. Garrow, *The Supreme Court and The Brethren*, 18 Const. Comment. 303, 304-05 (2001). There is evidence also that much of the documentary material provided to the authors came from law clerks to the Justices, and may well have been provided without the approval or authorization of a clerk’s Justice. *Id.* at 310-14.

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The Supreme Court of the United States in “The Brethren” years. Above, in October Term 1972. Back row (left to right): Lewis F. Powell, Thurgood Marshall, Harry A. Blackmun, and William H. Rehnquist. Front row (left to right): Potter Stewart, William O. Douglas, Warren E. Burger, William J. Brennan, and Byron R. White. Below, in October Term 1975. John Paul Stevens (back row, far right) has replaced William O. Douglas.



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ed Woodward and Armstrong down to three possibilities: Justice Byron R. White, Justice (later Chief Justice) William H. Rehnquist, and Justice John Paul Stevens.³

Following Justice White's death on April 15, 2002, Professor Garrow asked Woodward point blank whether Justice White had assisted the authors of *The Brethren*, but Woodward declined to confirm or deny White's assistance, because doing so "might thereby automatically identify the statuses of either or both now-Chief Justice Rehnquist and Justice Stevens,"⁴ who remained on the Court in 2002. This article identifies one of the remaining two with relative certainty – Justice White – based on a conversation with Woodward in May of 2011. Circumstantial evidence also suggests that the likeliest candidate for the final spot is Rehnquist.

I.

A LITTLE HISTORY WITH JUSTICE WHITE

My own history with Justice White began in the fall of 1988, while I was clerking for Judge Richard Posner. Justice White invited me to come to Washington to interview for a clerkship.⁵ The interview was interesting, not least because he had a habit of asking unusual and sometimes pointed questions during clerk interviews, a habit on display during my own interview. I found the Justice rather inscrutable, an impression that never completely disappeared, even after two years of clerking for him day-in and day-out.

One day in early October 1988, Judge Posner's secretary came into my office and said "there is a man on the phone who wants to talk to you. He sounds older, and he keeps calling but you were out and he won't leave a message." I answered the phone and immediately heard Justice White's gravelly voice: "Steve, this is Byron White, and I want you to come work for me." I accepted on the spot – although I was not sure whether the Justice was extending an

³ *Id.* at 305 nn. 10, 11.

⁴ *Id.* at 305 n. 11.

⁵ See generally Stephen R. McAllister, *Remembering Justice Byron R. White*, 50 U. Kan. L. Rev. 1077 (2002).

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Above: Justice Byron R. White and his law clerk, Stephen R. McAllister, circa 1990. Facing page: Byron R. White, law clerk to Chief Justice Fred M. Vinson, circa 1946.

invitation or issuing an order – and reported for duty the first week of July 1989.

My first day on the job was July 3, 1989, which also happened to be the last day the Court announced opinions for the October 1988 Term. *Webster v. Reproductive Health Services*⁶ was being announced that day, and some thought that it might be the case to overrule *Roe v. Wade*,⁷ so the courtroom was packed and the atmosphere was electric. Because my co-clerk and I were completely green as new law clerks, Justice White personally escorted us to seats on the south side of the courtroom. I will never forget the drama in the Court’s announcement of *Webster*, with Justices readings from various opinions, including Justice Blackmun in dissent;⁸ it was a dramatic start to my clerkship with Justice White.

⁶ 492 U.S. 490 (1989).

⁷ 410 U.S. 113 (1973).

⁸ 492 U.S. at 560 (“a chill wind blows”).

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The experienced clerks (those finishing their O.T. 1988 clerkships who overlapped with the new clerks during July) quickly made clear to us that Justice White expected his clerks to be circumspect, that no one spoke on his behalf except him, and that the Justice generally avoided law clerks from other chambers.



Sometimes the latter point was explained as a reaction to *The Brethren*, with the clerk “lore” being that Justice White blamed former law clerks at the Court for being the sources of much of the internal information and many of the inside stories the book contains.

An anecdote may help illustrate Justice White’s approach to law clerks outside his own chambers. During my time, one of the Court’s wonderful traditions was that law clerks from one Justice’s chambers would invite other Justices out to lunch. Thus, my co-clerks and I had five-person lunches (the four clerks and a Justice) with Chief Justice Rehnquist (he liked *The Monocle*), Justice Brennan (we had barbecue at a place called “Hogs on

the Hill”), Justice Antonin Scalia (the A V Ristorante Italiano, with anchovy pizza and opera on the jukebox), Justice Anthony Kennedy, and Justice Stevens. Justice Marshall had a year-end lunch with all of the clerks in the building, during which he regaled us with stories. Justice Sandra Day O’Connor hosted us for tea in her chambers.

But one Justice steadfastly refused to socialize with clerks from any chambers but his own, and that was Justice White. Every term, clerks from other chambers would deliver written invitations to him for lunch, but he never accepted, and I am not sure he always even answered the invitations. Sometimes the clerks from other chambers would ask us how they could get Justice White to accept their

invitations, but we had no answers. Fortunately, no other Justice seemed to hold it against us that our boss would not socialize with his or her clerks.

II.

FAST FORWARD TO MAY 15, 2011: BOB WOODWARD PRESENTS THE DOLE LECTURE AT THE UNIVERSITY OF KANSAS

On May 15, 2011, Bob Woodward came to the Dole Institute of Politics on the campus of the University of Kansas (where I teach) to present the 2011 Dole Lecture. To call it a “lecture” is really a misnomer, but in a good way. In fact, the Director of the Dole Institute, Bill Lacy, engaged in an extended question and answer session with Woodward, during which Woodward touched on numerous topics ranging from Watergate to U.S. military involvement in Iraq and Afghanistan. During the interview, Woodward had a way of turning himself into the interviewer rather than the interviewee, a tactic that put Director Lacy on the spot more than once to answer a question. Based on even just ninety minutes of observing Woodward in such a setting, it was not difficult to appreciate his ability to get information from people, presumably including Supreme Court Justices. Although Woodward and Lacy discussed several of Woodward’s numerous books, no mention was made of *The Brethren*.

I attended the event, wondering whether Woodward would talk about *The Brethren*. I had read the book in 1988 or 1989, prior to clerking for Justice White from 1989-91, and I had been given the strong impression during my clerkship and afterwards that Justice White despised the book and had little use for the press generally. The Dole Institute had a reception for Woodward following the lecture, and my wife and I attended. Woodward entered the room and began making his way around it, shaking hands and chatting with guests, soon arriving near us.

I shook hands with Woodward, introduced myself and my wife, and then told him that I was curious about *The Brethren* because I had clerked for Justice White. At that point, Woodward became ani-

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mated and said “he [Justice White] helped us.” This answer surprised me, given my strong impression that Justice White had no use for *The Brethren*, and I said so to Woodward. He did not go into any details, and there were many more people for him to meet at the reception so we could not extend the conversation, but he reiterated that “Justice White helped us.”

With that tantalizing morsel, I returned to my office the next day determined to dig a little deeper into the story of Justice White and *The Brethren*. This article is the result, although I can offer no written documentation of White’s involvement, if any, in the book. Perhaps Woodward has such documentation, or perhaps it exists in Justice White’s Supreme Court files, which are housed in the Library of Congress and will be available to the public on the tenth anniversary of White’s death – April 15, 2012.⁹

III.

JUSTICE WHITE AND *THE BRETHREN*

It is worth considering at least two questions regarding Justice White and *The Brethren*: (1) What was White’s attitude toward the book and why?; and (2) How might White have “helped” Woodward and Armstrong? The first question is easier to answer than the second.

A.

What was Justice White’s Attitude toward The Brethren and Why?

The clerk “lore” about Justice White certainly adopted as dogma the proposition that the Justice despised *The Brethren* and its revelations of a very human court. That same lore further held that Justice White blamed former law clerks at the Court for disclosing internal communications and documents to the authors. The Justice’s biographer wrote that “White was infuriated by *The Brethren*

⁹ See *Byron R. White: A Register of His Papers in the Library of Congress* (2003), located at hdl.loc.gov/loc.mss/eadmss.ms003003.

. . . which provided backstage accounts of the Court's decision-making process plus offstage gossip."¹⁰ Further, White "viewed *The Brethren* with unrelieved contempt, largely because he assumed former law clerks compromised the confidentiality of the institution they served . . ." ¹¹ Indeed, his biographer characterizes White's overall reaction to *The Brethren* as follows: "White was offended and hurt by the book, which retailed backstairs gossip and internal Court documents in the same leering tone. The image of the institution was damaged, the mystique of the decision-making process was shattered, and the net effect, worst of all in White's view, was that respect for the Court was eroded."¹² He further reports that:

White told his clerks for the 1979 term that he would not read the book, but he assigned them each to read a portion so that he could be told if there were specific examples of vote trading or irrational behavior that were recounted. After the assignment was completed, White said no more to his staff about "the book," and for several years he left an impression of unrequited rage with those who touched on the issue with him. He was also the old Naval Intelligence officer again, trying to determine quietly which of his own former clerks had spoken to the authors; there was no retaliation planned or executed, only private complaint. The only active measures he took were to speak less candidly with his own staff and not to have lunch with clerks from other chambers.¹³

At least one commentator wrote even before the book was published that "Byron White is reported to be particularly livid" about *The Brethren*.¹⁴

¹⁰ Dennis J. Hutchinson, *The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White* (Free Press 1998) at 2.

¹¹ *Id.* at 6.

¹² *Id.* at 385.

¹³ *Id.*

¹⁴ David Beckwith, *Coming: Woodward's Book – The Biggest Leak of All*, *Legal Times* 23-24 (June 19, 1978), cited and quoted in Garrow, *supra* note 2, at 307 and n.18.

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Professor Garrow has recounted that Justice Powell's papers include a letter from one of his clerks for the October 1973 Term, Jack B. Owens, to Justice Powell discussing the likely sources of information about the 1973 Term: "[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 the 1973 Term had granted Woodward "lengthy" interviews, and one had given Woodward "a great deal of internal court documents."¹⁵ Garrow further reports that "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'"¹⁶

If indeed some of Justice White's clerks were significant sources of information for Woodward and Armstrong, I was never aware of any animosity that Justice White held against any particular former clerks. Justice White typically had a clerk reunion once a year, usually at the Court, but occasionally in Colorado where it could be combined with a ski trip. Most of his former clerks attended those reunions, including the clerks from the 1973 Term, as well as those from other terms *The Brethren* covers.¹⁷ During the clerk reunions and other events, I never perceived that the Justice was holding a grudge against any of his former clerks for any reason, much less because of possible roles in providing information for *The Brethren*.

That said, Justice White systematically refused to have lunch with the clerks from other chambers. Perhaps that was his way of showing his continuing disdain for *The Brethren* and the clerks' role in providing information for the book. Or perhaps after a time it

¹⁵ Garrow, *supra* note 2, at 313 (citing and quoting Letter from Jack B. Owens to Lewis F. Powell, Jr., Powell Papers 1, 2 (Jan. 24, 1980)).

¹⁶ *Id.* at 314.

¹⁷ Justice White's biography includes a complete list of all of his clerks, listed by term. See Hutchinson, *supra* note 10, at Appendix D.

simply became his established practice and it saved him the time and effort of attending such lunches. The Justice was not averse to a lunch away from the building, and with some regularity would take his own clerks to lunch at various restaurants around Washington, DC. I have some entertaining stories about those lunches, stories that will remain confidential, except for one that directly implicates the Justice's attitude toward *The Brethren*.

One Saturday in the winter of 1989-90, Justice White invited his clerks to join him for lunch. The other three clerks either had previous plans or were unavailable, and so it turned out that I was the only clerk to accept his invitation. The Justice informed me that he would drive and that he would take me to a place he liked, not far away. We got in the Justice's new Ford Escort (he stated that he and Mrs. White had given each other matching Escorts as their Christmas presents) and left the Court's parking garage. As we proceeded down Capitol Hill along Independence Avenue, the Justice drove a bit like an old-school NFL halfback, weaving through traffic and even honking twice at cars that got in his way. We soon arrived at our destination – John Mandis' Market Inn,¹⁸ described in *The Brethren* as “a dimly lit restaurant on the other side of the Capitol.”¹⁹ I did not recognize the name or location and had never been to this restaurant.

Once we were seated and looking at menus, Justice White pointed to a booth in the restaurant and said “that booth is where we had the ‘conspiracy lunch’ discussed in *The Brethren*.”²⁰ I was surprised that he initiated any sort of conversation about *The Brethren*,

¹⁸ Unfortunately, the Market Inn apparently closed at the end of 2008 and has since been demolished, after being in business since 1959. See southwestquadrant.blogspot.com/2009/12/market-inn-demolished.html.

¹⁹ *The Brethren* at 322.

²⁰ The story is recounted in *The Brethren* at 322-28, and involves a Saturday lunch (July 13, 1974) between Justices White, Stewart and Brennan regarding the Nixon tapes case and their strategy for resolving it. No other Justice apparently was invited to the lunch (several were out of town or not at the Court on a Saturday in July) or knew about it until a few days later. The book refers to this meeting as the “conspiracy lunch,” *id.* at 326, or the “conspiracy luncheon.” *Id.* at 328.

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but he was in a jovial mood. He told me that he had come to the restaurant sometime after the book was published and asked a waitress “where did those Supreme Court Justices have the conspiracy lunch?” According to the Justice, she pointed out the booth with pride, and Justice White seemed very amused in retelling the story, not least because the waitress had no idea that one of the “conspirators” had asked her the question. This exchange suggested to me that Justice White had more knowledge of the details of *The Brethren* than he generally may have acknowledged, and that he could have a sense of humor about the book, at least 10 years after its publication.

B.

How might Justice White have “helped” Woodward and Armstrong?

This is the more difficult question, and one for which I have only speculative answers, informed by my experiences with Justice White. First, I cannot imagine Justice White himself providing any internal court documents or papers to Woodward and Armstrong. Maybe some of his clerks did so, but it would seem completely out of character for Justice White to do that. In my experience with him, he was always circumspect and generally reserved, although admittedly my time with him was post-*Brethren*.

White’s biographer recounts that “White destroyed the bulk of his papers prior to the beginning of October Term 1986,” at which time “the justice and three of his law clerks spent successive weekends running files through a paper shredder obtained specifically for the occasion.”²¹ Typically, “White gave no explanation for the project, other than that ‘it was time to clean up the place.’”²² If there was any documentary evidence in those files about White providing assistance to Woodward and Armstrong – a proposition that I frankly doubt – such evidence likely (if not certainly) was destroyed during the Justice’s 1986 shredding party. Unless Woodward and Arm-

²¹ Hutchinson, *supra* note 10, at 3.

²² *Id.*

strong have documents showing White's assistance, it seems to me unlikely, though I suppose possible, that such evidence will be found in White's files when they are opened to the public on April 15, 2012.

Two other thoughts occurred to me as I wrote this article. First, perhaps Woodward is mistaken about Justice White's assistance, not in the sense that the authors received no help from White's chambers while writing the book (there is evidence some of Justice White's clerks assisted the authors²³), but maybe Woodward perceived assistance from White's law clerks as being sanctioned or approved by White himself. Anyone who knew White well, however, would be skeptical of the proposition that he would allow law clerks to speak for him, or have them do something that he himself would not do directly. That was never Justice White's style, not in my experience.²⁴ Nor would such authorization or even tacit approval of law clerk assistance be consistent with Justice White's oft-reported fury at law clerks in general following publication of *The Brethren*.

My second thought was to reread *The Brethren* carefully to look for information that only could have come from Justice White himself. I did that, but found nothing of consequence. Information about cases easily could have come from law clerks alone or from other Justices, without White providing any information himself. In fact, virtually all of the discussions of White in the book involve information that would have been available to law clerks and other Justices; often the reported conversations involving White make clear that White was speaking to law clerks or sharing drafts of memoranda or opinions with them.

²³ See *supra* notes 15-16 and accompanying text.

²⁴ Indeed, *The Brethren* itself, at 180, seems to make this very point, describing Justice Marshall's effort to attract Justice White's vote in cases during the 1971 Term as follows: "All through the term, one of White's clerks had tried to convince Marshall's clerks that he could deliver White's vote on a certain case if Marshall would change a particular sentence. Bullshit, Marshall said. All of them – Marshall, his clerk, and White's clerk – knew that Byron White listened to Byron White and to no one else."

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One exception is White's reported telephone conversation with Ethel Kennedy following the Court's decision in *Buckley v. Valeo*,²⁵ regarding campaign finance laws. White reportedly teased Mrs. Kennedy that "if the majority had done what he had wanted, the expenditure limits would have been upheld. That would have made it impossible for wealthy individuals or families such as the Kennedys to spend virtually unlimited amounts on their campaigns, as they had done in the past."²⁶ No law clerk would have been directly privy to such a telephone conversation, although even in this instance it is possible that White mentioned the conversation to one or more of his clerks who in turn related the story to Woodward and Armstrong. In any event, this does not seem like the sort of conversation that Justice White would have mentioned to the press. He generally was guarded about discussing the Kennedys, though he did share some stories during my clerkship.

Thus, for me at least, the question remains, how might Justice White have "helped" Woodward and Armstrong? Assuming the Justice did not provide documents or written material to the authors, might he have given them an interview for the book? This is an intriguing possibility, and Justice White did give "a singularly candid interview to *Sports Illustrated* a few months after joining the Court,"²⁷ but in general he demonstrated a strong aversion to the press for his entire judicial career: "When journalists asked White for interviews, his standard reply was 'What could we talk about?'"²⁸

Furthermore, anyone who knew Justice White knows just how terse and inscrutable he could be, not just occasionally, but on a regular basis. It is difficult to imagine White opening up to either Woodward or Armstrong about internal Court matters in an interview, but perhaps White discussed the Court and cases with them, not fully appreciating the direction the book ultimately would take.

²⁵ 424 U.S. 1 (1976).

²⁶ *The Brethren* at 400.

²⁷ Hutchinson, *supra* note 10, at 2.

²⁸ *Id.*

As I said previously, my own impression after limited observation of Woodward in action is that he is a very effective interviewer.

Certainly, there is evidence that Justices Stewart and Powell later regretted their cooperation with the authors. Professor Garrow describes in some detail “the story that Powell’s file tells about how cooperation with Woodward boomeranged into anger and regret.”²⁹ Maybe part of Justice White’s public and vehement disdain for the book was driven by guilt, if in fact he cooperated with the authors or assisted them in some way. That would not be an uncommon reaction in such circumstances. In any event, it is a puzzle to me just how Justice White might have “helped” Woodward and Armstrong.

IV. FINAL CHAPTER?

Is there a final chapter, or at least a postscript, to *The Brethren* regarding Justice White? Perhaps, if Woodward and Armstrong are willing to provide it, but otherwise it may never be written. Justice White’s files will be opened to the public on April 15, 2012, the tenth anniversary of his death. But it seems unlikely that researchers will find any file on “The Book,” such as the file in Justice Powell’s papers.³⁰ Because White apparently purged his files in 1986,³¹ it seems to me very unlikely that he would have saved anything that connected him to *The Brethren*, if any such documents ever existed.

Based on Woodward’s assertion that White “helped” them, and assuming for the moment that Justice White was one of the active Justices who provided assistance, there remains the question whether the fifth Justice was Rehnquist or Stevens. Circumstantial evidence suggests Rehnquist. Based purely on the book’s scope, starting with the 1969 Term and ending with the 1975 Term, Justice Stevens seems an unlikely candidate. He does not even appear in the book until page 400 (of 444 pages), and the only term for which he

²⁹ Garrow, *supra* note 2, at 318.

³⁰ *Id.* at 303 n. 2.

³¹ Hutchinson, *supra* note 10, at 3.

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would have had any direct knowledge would have been the final term that the book covers.

Rehnquist, in contrast, was present on the Court for more than half of the time period the book covers, he is mentioned or discussed in the book numerous times, and his jocular and sense of humor shine through in the book, perhaps suggesting that the authors had direct and personal interaction with him. For what it is worth, but based solely on circumstantial evidence, if one were a betting man like Rehnquist was,³² one would probably put the best odds on the final unconfirmed cooperating Justice being William Rehnquist.

Justice Stevens is now retired, so no Justice who even potentially could have assisted the authors is sitting on the current Court. Apart from Justice Stevens, all of the Justices discussed in the book are now deceased. Perhaps that will be sufficient to permit Woodward to decide that he can confirm the identities of all of the Justices who assisted in the preparation of *The Brethren*. Is thirty-three years long enough for the public to wait for such information? What do you say, Mr. Woodward?



³² See Herman Obermayer, *The William Rehnquist You Didn't Know* (ABA Journal, Mar. 1, 2010), available at www.abajournal.com/magazine/article/the_william_rehnquist_you_didnt_know/.