

# Brethren

Inside the Supreme Court

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*To Katharine Graham, Chairman of the Board,  
The Washington Post Company,  
for her unwavering commitment to an independent press  
and the First Amendment.  
And to our children, Tali, Thane and Tracey.*

# Contents

|              |     |
|--------------|-----|
| Introduction | 1   |
| Prologue     | 7   |
| 1969 TERM    | 27  |
| 1970 TERM    | 93  |
| 1971 TERM    | 151 |
| 1972 TERM    | 227 |
| 1973 TERM    | 275 |
| 1974 TERM    | 349 |
| 1975 TERM    | 387 |
| Index        | 445 |

# Introduction

The United States Supreme Court, the highest court in the land, is the final forum for appeal in the American judiciary. The Court has interpreted the Constitution and has decided the country's preeminent legal disputes for nearly two centuries. Virtually every issue of significance in American society eventually arrives at the Supreme Court. Its decisions ultimately affect the rights and freedom of every citizen—poor, rich, blacks, Indians, pregnant women, those accused of crime, those on death row, newspaper publishers, pornographers, environmentalists, businessmen, baseball players, prisoners and Presidents.

For those nearly two hundred years, the Court has made its decisions in absolute secrecy, handing down its judgments in formal written opinions. Only these opinions, final and unreviewable, are published. No American institution has so completely controlled the way it is viewed by the public. The Court's deliberative process—its internal debates, the tentative positions taken by the Justices, the preliminary votes, the various drafts of written opinions, the negotiations, confrontations, and compromises—is hidden from public view.

The Court has developed certain traditions and rules, largely unwritten, that are designed to preserve the secrecy of its deliberations. The few previous attempts to describe the Court's internal workings—biographies of particular Justices or histories of individual cases—have been published years, often decades, after the events, or have reflected the viewpoints of only a few Justices.

Much 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. Yet the Court, unlike the Congress and the Presidency, has by and large escaped public scrutiny. And because its members are not subject to periodic reelection, but are appointed for life, the Court is less disposed to allow its decision making to become public. Little is

usually known about the Justices when they are appointed, and after taking office they limit their public exposure to the Court's published opinions and occasional, largely ceremonial, appearances.

*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. To ensure that our inquiry would in no way interfere with the ongoing work of the Court, we limited our investigation to those years. We interviewed no one about any cases that reached the Court after 1976.

We chose to examine the contemporary Court in order to obtain fresh recollections, to deal with topical issues and to involve sitting Justices. This book is not intended as a comprehensive review of all the important decisions made during the period. The cases we examine generally reflect the interest, time and importance assigned to them by the Justices themselves. As a result, some cases of prominence or importance—but which provide no insight into the internal dynamics of the Court—have been dealt with only briefly or not at all. The Court conducts its business during an annual session called a *term*, which begins each October and continues until the last opinion is announced in June or early July. The Court recess runs from then until the next October.

Normally, there are seven decision-making steps in each case the Court takes.

1. The decision to take the case requires that the Court note its jurisdiction or formally *grant cert.* Under the Court's procedures, the Justices have discretion in selecting which cases they will consider. Each year, they decide to hear fewer than two hundred of the five thousand cases that are filed. At least four of the nine Justices must vote to hear a case. These votes are cast in a secret conference attended only by the Justices, and the actual vote is ordinarily not disclosed.

2. Once the Court agrees to hear a case, it is scheduled for *written and oral argument* by the lawyers for the opposing sides. The written arguments, called legal briefs, are filed with the Court and are available to the public. The oral arguments are presented to the Justices publicly in the courtroom; a half-hour is usually allotted to each side.

3. A few days after oral arguments, the Justices discuss the case at a closed meeting called the *case conference*. There is a preliminary discussion and an initial vote is taken. Like all appellate courts, the Supreme Court is bound by the facts already developed from testimony and information presented to the lower trial court. The Supreme Court can reinterpret the laws, the U.S. Constitution, and prior cases. On this basis, the decisions of lower courts are affirmed or reversed. As in the cert conference, at which Justices decide which cases to



hear, only the Justices attend the case conferences. (The nine members of the Court often refer to themselves collectively as the conference.)

4. The next crucial step is the selection of one of the nine Justices to write a majority opinion. By tradition, the Chief Justice, if he is in the initial majority, can *assign* himself or another member of the majority to write the opinion. When he is not in the majority, the senior Justice in the majority makes the assignment.

5. While one Justice is writing the majority opinion, others may also be drafting a *dissent* or a separate *concurrence*. It can be months before these opinions—a majority, dissent or concurrence—are sent out or circulated to the other Justices. In some cases, the majority opinion goes through dozens of drafts, as both the opinion and the reasoning may be changed to accommodate other members of a potential majority or to win over wavering Justices. As the Justices read the drafts, they may shift their votes from one opinion to another. On some occasions, what had initially appeared to be a majority vanishes and a dissenting opinion picks up enough votes to become the tentative majority opinion of the Court.

6. In the next to last stage, the Justices *join* a majority or a dissenting opinion. Justices often view the timing, the sequence and the explanations offered for “*joins*” as crucial to their efforts to put together and hold a majority.

7. In announcing and publishing the final *opinion*, the Justices choose how much of their reasoning to make public. Only the final versions of these opinions are available in law libraries. The published majority opinion provides the legal precedents which guide future decisions by lower courts and the Supreme Court itself.

We began this project in the summer of 1977 as two laymen lacking a comprehensive knowledge of the law. We read as many of the cases and as much of the background material about the period as time would allow. We found the work of Derrick Bell, Paul Brest, Lyle Denniston, Fred Graham, Eugene Gressman, Gerald Gunther, Richard Kluger, Nathan Lewin, Anthony Lewis, John MacKenzie, Michael Meltsner, John Nowak, Ronald Rotunda, Nina Totenberg and Laurence Tribe particularly helpful. We thank them, and countless others on whose writings we have drawn.

Most of the information in this book is based on interviews with more than two hundred people, including several Justices, more than 170 former law clerks, and several dozen former employees of the Court. Chief Justice Warren E. Burger declined to assist us in any way. Virtually all the interviews were conducted “on background,” meaning that the identity of the source will be kept confidential. This

assurance of confidentiality to our sources was necessary to secure their cooperation.

The sources who helped us were persons of remarkable intelligence. They had unusually precise recall about the handling of cases that came before the Court, particularly the important ones. However, the core documentation for this book came from unpublished material that was made available to us by dozens of sources who had access to the documents. We obtained 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. By the time we had concluded our research, we had filled eight file drawers with thousands of pages of documents from the chambers of eleven of the twelve Justices who served during the period 1969 to 1976. The sole exception was the chambers of Justice John P. Stevens, who joined the Court during the last six months of the period covered in this book.

In 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 we have covered. Where documents are quoted, we have had direct access to the originals or to copies. We have 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. No characterization of a Justice could be comprehensive, but we believe those that are provided help explain the decisions and actions.

New documentation about the Burger Court will likely be available in the future. It may support additional interpretations of these events and these men. The account that follows is based on the information and documentation available to us.

Bob Woodward  
Scott Armstrong

**A** court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is the most likely to self-indulge itself and the least likely to engage in dispassionate self-analysis . . . In a country like ours, no public institution, or the people who operate it, can be above public debate.”

WARREN E. BURGER,  
Circuit Court of Appeals Judge, to  
Ohio Judicial Conference on  
September 4, 1968—nine months  
before being named Chief Justice  
of the United States



# Prologue



**E**ARL WARREN, the Chief Justice of the United States, hailed the elevator operator as if he were campaigning, stepped in and rode to the basement of the Supreme Court Building, where the Court limousine was waiting. Warren easily guided his bulky, 6-foot-1-inch, 220-pound frame into the back seat. Though he was seventy-seven, the Chief still had great stamina and resilience.

Four young men got into the car with him that fine November Saturday in 1968. They were his clerks, recent law graduates, who for one year were his confidential assistants, ghost writers, extra sons and intimates. They knew the "Warren Era" was about to end. As Chief Justice for fifteen years, Warren had led a judicial revolution that reshaped many social and political relationships in America. The Warren Court had often plunged the country into bitter controversy as it decreed an end to publicly supported racial discrimination, banned prayer in the public schools, and extended constitutional guarantees to blacks, poor people, Communists, and those who were questioned, arrested or charged by the police. Warren's clerks revered him as a symbol, the spirit of much that had happened. The former crusading prosecutor, three-term governor of California, and Republican vice-presidential nominee had had, as Chief Justice, a greater impact on the country than most Presidents.

The clerks loved their jobs. The way things worked in the Chief's chambers gave them tremendous influence. Warren told them how he wanted the cases to come out. But the legal research and the drafting of Court opinions—even those that had made Warren and his Court famous and infamous—were their domain. Warren was not an abstract thinker, nor was he a gifted scholar. He was more interested in the basic fairness of decisions than the legal rationales.

They headed west, downtown, turned into 16th Street and pulled into the circular driveway of the University Club, a private eating and athletic club next to the Soviet Embassy, four blocks north of the White House. The staff was expecting them. This was a Saturday ritual. Warren was comfortable here. His clerks were less so. They

never asked him how he could belong to a club that had no black members.

With his clerks in tow, Warren bounded up the thick-carpeted steps to the grill. It was early for lunch, not yet noon, and the room was empty. Warren liked to start promptly so they would have time for drinks and lunch before the football game. They sat in wooden captain's chairs at a table near the television and ordered drinks. The Chief had his usual gimlet. He was pensive. They ordered another round. Warren reminisced, told political stories, chatted about sports, and then turned to the recent past, to Richard Nixon's election. The Chief thought it was a catastrophe for the country. He could find no redeeming qualities in his fellow California Republican. Nixon was weak, indirect, awkward and double-dealing, and frequently mean-spirited. Throughout the 1968 presidential campaign, Nixon had run against Warren and his Court as much as he had run against his Democratic rival, Senator Hubert Humphrey. Playing on prejudice and rage, particularly in the South, Nixon had promised that his appointees to the Supreme Court would be different.

It was unlikely that a Nixon Court would reverse all the Warren Court's decisions. Though Justices John Harlan, Potter Stewart and Byron White had dissented from some of the famous Warren decisions, each of them had strong reservations on the matter of the Court's reversing itself. They believed firmly in the doctrine of *stare decisis*—the principle that precedent governs, that the Court is a continuing body making law that does not change abruptly merely because Justices are replaced.

But as Warren and his clerks moved to lunch, the Chief expressed his frustration and his foreboding about a Nixon presidency. Earlier that year, before the election, Warren had tried to ensure a liberal successor by submitting his resignation to President Lyndon B. Johnson. The Senate had rejected Johnson's nominee, Associate Justice Abe Fortas, as a "crony" of the President. All that had been accomplished was that Nixon now had Warren's resignation on his desk, and he would name the next Chief Justice.

Warren was haunted by the prospect. Supreme Court appointments were unpredictable, of course. There was, he told his clerks, no telling what a President might do. He had never imagined that Dwight Eisenhower would pick him in 1953. Ike said he had chosen Warren for his "middle of the road philosophy." Later Eisenhower remarked that the appointment was "the biggest damned-fool mistake I ever made." \* Well, Warren said, Ike was no lawyer. The clerks smiled.

\* Congressional Quarterly's *The Supreme Court: Justice and the Law*, 2nd ed., p. 163.



But Richard Nixon was, and he had campaign promises to fulfill. He must have learned from Eisenhower's experience. He would choose a man with clearly defined views, an experienced judge who had been tested publicly on the issues. The President would look for a reliable, predictable man who was committed to Nixon's own philosophy.

"Who?" asked the clerks.

"Why don't we all write down on a piece of paper who we think the nominee will be?" Warren suggested with a grin.

One clerk tore a sheet of paper into five strips and they sealed their choices in an envelope to be opened after Nixon had named his man.

Warren bent slightly over the polished wooden table to conceal the name he wrote.

*Warren E. Burger.*

Three months later, on the morning of February 4, 1969, Warren Burger, sixty-one, was in his spacious chambers on the fifth floor of the Court of Appeals on Pennsylvania Avenue, almost midway between the White House and the Supreme Court. President Nixon, who had been in office only two weeks, had invited him to swear in several high-ranking government officials at the White House. When he arrived at the mansion, Burger was instantly admitted at the gate.

Nixon and Burger first met at the Republican National Convention in 1948. Nixon was a freshman Congressman and Burger was floor manager for his home-state candidate, Minnesota Governor Harold Stassen. At the next convention, four years later, Burger played an important role in Eisenhower's nomination. He was named assistant attorney general in charge of the Claims Division in the Justice Department, and in 1956 he was appointed to the United States Court of Appeals for the District of Columbia.\* On that famously liberal court, Burger became the vocal dissenter whose law-and-order opinions made the headlines. He was no bleeding heart or social activist, but a professional judge, a man of solid achievement.

Now at the White House, the ceremonial swearings-in lasted only a few minutes, but afterward the President invited Burger to the Oval

\* There are three levels of courts in the federal judiciary:

—District Courts with about 600 judges; these judges, at the first step in the federal system, hear and try cases.

—Circuit Courts of Appeal; there are eleven of these intermediate circuits numbered First (New England states) through Tenth (Western states) plus the Circuit for the District of Columbia. There are from four to fourteen appeals court judges in each circuit. These judges hear appeals from the district courts and interpret the Constitution, Supreme Court rulings and federal laws.

—The Supreme Court, with nine members, reviews decisions made by both federal courts and state courts and handles other matters, such as disputes between states.