

The Brethren: Inside the Supreme Court Study Guide

**The Brethren: Inside the Supreme Court by Bob
Woodward**

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Plot Summary

The Brethren by Bob Woodward and Scott Armstrong examines the functioning of the Supreme Court during the period from 1969 to 1976. This time frame corresponds to the first seven years of Warren E. Burger's appointment as Chief Justice. The book offers fascinating insight into the workings of the Supreme Court. Woodward and Armstrong show the readers the personalities at work and how those personalities interact in reaching decisions. The book begins at the close of the Warren Court years. The reader is taken through the selection and nomination process of Warren E. Burger for the position of Chief Justice. Enough of the Warren Court is discussed for the reader to determine the differences between the approaches of Warren and Burger. Burger was more concerned with controlling the writing of the decisions during his tenure of the Court and would often change or remain undecided until ascertaining how the others voted.

Woodward and Armstrong allow the reader to become acquainted with the personalities of the various Justices as well as their views and styles. The likes and dislikes of each Justice is discussed and their closeness to their clerks is revealed. The mechanics of things and how those things get done is also revealed. The Justices spend a great deal of time talking with their clerks, since the clerks write most of the drafts and need to know the position of the Justice that they work for. In some ways, they also shape the opinion of the Justices. The Justices also have various social outings with their clerks, and in many cases, remain friends with them.

The book is written in the familiar style of Bob Woodward, with the off-the-record technique. This makes the book interesting and easy to read, like a novel. The inside look at the workings of the Court reveals the problems that the judges have as they struggle with various things like being shorthanded or having no mechanism in place to deal with the physically and mentally incapacitated William Douglas when he refused to retire after his stroke and the Justices have to try to protect the integrity of the Court decisions.

Many important cases come up before the Court during this period, and many of them are discussed in the book. The impressive feature here is the lack of discussion among the Justices, who spend more time discussing cases with their clerks rather than with each other. Another feature that stands out are the machinations of vote switching, since a Justice can change his vote until the decision is handed down. This was a tactic of Chief Justice Burger used to control the writing of the decision. Woodward and Armstrong hit hard at the shortcomings of Burger throughout the book, especially his way of controlling the assignments of decisions by waiting to announce his vote until the end.

Readers everywhere will find this book to be informative and enjoyable reading. It gives the readers a view of the Supreme Court that the reader could not normally obtain, a perspective that allows the reader to have no knowledge of law or the legal system and yet still be able to understand the book.

Prologue

Prologue Summary and Analysis

The United States Supreme Court performs its work in secret. Very little of what they do is in front of the public, whether it is internal debates, drafts of opinions, deliberations, etc. The decisions are announced in the form of written decisions. The Justices also tend to shun the public eye, limiting their public appearances to those that are ceremonial. The court's session, known as the term, is from October to June or July. This is the period during which it hears cases and renders decisions.

There are seven steps with each case that comes before the Supreme Court. The Court must decide if it wants to take the case. The Court hears fewer than two hundred of the five thousand cases that get filed. When it decides to hear a case, this is known as granting cert and it is determined by the positive votes of at least four of the nine Justices. The second step is to schedule the written and oral arguments for both sets of lawyers. The written arguments are called briefs; the oral arguments are before the Court with usually one half hour allowed to each side. Following this, the Justices hold case conference, where they meet to discuss the case and reach a preliminary decision. One of the Justices then writes the majority decision. Other Justices may write dissenting or concurring decisions and this procedure may take several months. The Justices then join one of the decisions. The last step is announcing the final opinion and this is the one that contains the legal precedents.

Chief Justice Earl Warren retired from the Court in 1968. He had been Chief Justice for fifteen years. Under his tenure, the Court rendered many controversial decision regarding racial discrimination, prayer in public schools, and various constitutional guarantees to different groups within society. His four clerks departed with him. They were the ones who did the research and drafts of the Court opinions. Warren used to spend Saturdays with his four clerks at the University Club, where they would dine and watch football. They discussed the fact that President Richard Nixon would name Warren's successor and Warren had them all write down who they think that Nixon would select. Warren wrote down the name of Warren E. Burger.

Warren wasn't wrong. President Nixon invited Warren E. Burger to the White House on February 4, 1969 to perform a ceremonial swearing-in. After the ceremony, Nixon and Burger began to talk, and found they shared a lot of views. Burger was the kind of judge that Nixon was looking for, in terms of views. Nixon told Ehrlichman to schedule an appointment with Burger. Although there never was a meeting, Attorney General John Mitchell consulted with Burger on people who were qualified to hold judicial positions. Burger received an invitation to the White House for the reception Nixon was holding for Chief Justice Warren.

Nixon considered other people, mainly, Potter Stewart, for the position. Stewart called Ehrlichman and scheduled an appointment with the President. He sat and thought about



whether or not he really wanted the Chief Justice position. He considered various pros and cons. He was worried that his wife's drinking problem would become public knowledge if he went for the Chief Justice spot. He eventually told the President that he did not want the position, and they discussed the other Associate Justices as Stewart tried to figure out who Nixon was considering.

On May 19, Nixon had the F.B.I. begin the background investigation of Burger, and on May 21, Burger was formally offered the position through John Mitchell. Burger accepted without hesitation, and the appointment was formally announced that evening. There were somewhat mixed reactions to the Burger announcement, and he expected a messy Senate confirmation hearing, which began two weeks later. The hearings lasted two hours, and six days later, the senate confirmed the appointment. He was sworn in two weeks later.

One of Warren's last acts was to overturn a Court of Appeals decision that was decided by Burger. This was in the case of Adam Clayton Powell, who Congress had deprived of his seat due to his behavior. Warren held that Congress could not do so legally. This caused Burger to be upset. "Burger had heard that Warren delegated the writing of his opinions to his clerks. That was only one of the many practices that he was going to stop. As far as he was concerned, the Warren legend was a fabrication. He thought Warren was sloppy, politically motivated, interested more in results than in legal reasoning. He was a man playing to get himself a place in history, a man without intellectual honesty" (Prologue, p. 26).

Burger was formally sworn in as Chief Justice on June 23. This was the last day of the Supreme Court term.



1969 Term

1969 Term Summary and Analysis

As Chief Justice, Burger was in charge of the Supreme Court building. While the other Justices were on vacation, Burger was in Washington touring the building. He worried that his office was too small for his use since he was third in line as official representative of the United States, after the President and Vice-President, and would have to meet with visiting dignitaries. He decided the conference room would be good for this purpose since it had originally been intended for the Chief Justice. Burger decided to make some other changes also. The chairs of the Justices were all different, since each Justice chose his own chair. Burger decided that this practice was coming to an end for appearances sake.

He also decides to curve the bench so that each Justice could see and hear the others.

Burger took the clerks to lunch at the National Lawyers Club, where he talked about politics. He told them that he wanted to implement his changes as soon as possible, even without consulting the other Associate Justices. He eventually dropped his plans for the conference room after discussing the issue with his clerks. The Justices would still use the conference room for their meetings, but Burger would keep his desk on the side. He tried to secure funding for nine more clerks, but found they would only ask for three. He set out to hire them in August to try to help out with the *informa pauperis* petitions. These were known as IFP's, and were from people who couldn't afford an attorney or the filing fees. The clerks would write one page summaries of the IFP's for circulation to the Justices. Burger did not favor the IFP process and changed the procedure for reviewing the petitions. "Burger's clerks believed he had effectively devastated the Court's role as the last bastion of hope for these people. Without knowing any law, most petitioners had little chance of catching the Court's attention. The I.F.P.'s, however, were only one example, in Burger's view, of how law clerks had come to have too much power and influence" (1969 Term, p. 34).

Law clerks typically talk over their situations and details about their justices during lunch. Burger didn't like this practice and sent them a memo preventing his own clerks from discussing any details with other clerks. He didn't want any of his thoughts or views known before the publication of the decision. The clerks could not even talk about what decisions they were working on. This effectively prohibited the learning process and the sharing of research and ideas between clerks.

Hugo Black was asked to rule on the delay of racial segregation in Mississippi on August 29. As a Supreme Court Justice, he was assigned to at least one of the federal appeals districts for emergency and special petitions. A lifelong supporter of desegregation, Black watched as the Fifth Circuit Court of Appeals reversed itself on a racial desegregation decision. The Nixon administration had a go-slow policy that didn't make Black happy, and now he was being asked to overturn the Fifth Circuit Court. He



was worried about the full Court and what it would accept, or he would have immediately overturned the decision. If they didn't agree with his decision, they could decide to hear the case and then reverse him. This is something that Black wanted to avoid. He decided not to overturn the lower court and said so in a five page opinion, saying they should present the case to the full Court.

The Inc. Fund applied for and was granted cert and the Justices decided to put the case at the head of the docket. The oral arguments would be heard in two weeks, in October. At that time, the courtroom was packed with people. The court allowed for two hours of arguments, double the usual time. Jack Greenberg, the attorney for Inc. Fund, wanted the original plans implemented by court order. His point of view was that the schools remained desegregated while the arguments and delays went on. The government's case was presented by the head of the Civil Rights Division of the Justice Department, Jerris Leonard.

The Justices met to discuss the case the following day. Some viewed the case as being a landmark decision, as important as the Brown case. Burger didn't agree with Black that delay must be avoided at all costs. He felt that there could be some logical reasons for the delays and that the appeals courts and HEW were in a better position to judge than the Supreme Court was. At the conference, each Justice presented his views, beginning with Burger, and then in the order of seniority. After Burger came Hugo Black, then William O. Douglas, John Harlan, William J. Brennan, Stewart Potter, Byron White and Thurgood Marshall. Black said that if the decision used the word "plan", he would write a separate opinion. Harlan said that if Black did that, he also would write a separate opinion. Most of the justices were upset by Black's position. They all agreed that the lower court needed guidance and they couldn't have any ambiguity in their decision. The Court could not appear to be delaying.

Burger met with Harlan and Stewart after the meeting to discuss the writing of the opinion. Harlan decided to write the draft himself, instead of following the usually procedure and assigning it to a clerk. Harlan wrote a two-page draft which he went over the next day with Burger and White. They decided not to set a date, but instead to let the Fifth Circuit Court do that, and sent copies to the other Justices. Black had stayed home for the day, but was called by Brennan with details of what was happening. Brennan consulted with Douglas and Marshall and wrote a draft order. Black spent the following Sunday working on his dissent, which he sent to each of the Justices.

Black was creating problems for them all. He was unmoving in his position. None of them was trying to stall the desegregation. "The Chief was alarmed at Black's memo and his threatened dissent. If the Court unanimity broke apart on a school case, particularly so early in his tenure, he would be declared an instant failure. He and the Court might never recover. The press would compare him unfavorably to Warren, who had held the Court together for fifteen years on these cases. They would say that the Court had collapsed in the first month of Burger's first term" (1969 Term, p. 53).

Burger decided to write an opinion that the whole court could agree on, because it was appearing that there was a four-to-four deadlock on the Court. Stewart had a clerk write



an opinion for him, trying to come in between Black and Burger. Harlan was also working on another draft order with a December 31 deadline for a plan and an order making the plan effective by that date. In the end, they all accepted the Brennan order, which was issued per curiam. This meant that there was no designated author. Stewart saw the situation as being indicative of the poor leadership of Burger.

A week later, Nixon nominated Clement F. Haynsworth, Jr. to fill the Associate Justice position vacated by Abe Fortas. There was a great deal of opposition, and the Senate rejected the nomination. The Court was waiting for its needed ninth justice. Since it required four Justices to vote to hear a case, many cases had three votes and were waiting for a fourth with the number of petitions growing daily.

There was a philosophical difference between some of the justices. Harlan felt that Burger didn't pay enough attention to explaining the reasoning for decisions. Black, who had been on the Court since his appointment in 1937, was concerned with unruly behavior in the various courtrooms and promoted a conference to examine the Constitutional limits on judges' ability to deal with unruly behavior. He incorporated a list of permissible actions that a judge could take into a decision on the Allen case.

Every week, Burger had to go over the petitions for cert with the Court personnel. This was a task that he hated. Burger found it difficult to keep track of what happened at the various conferences. He wasn't good at that kind of record keeping, but he did keep track of the workload of each Justice on a large sheet of butcher paper. He could assign the writing duties when he was in the majority, so he tried to be in the majority on most decisions. Selecting who would write an opinion basically meant affecting the direction of that written opinion. Burger felt that if he was associated with the majority decision, it would indicate his strong leadership of the Court.

Some cases, like the *Bivens v. Six Unknown Named Agents*, troubled Burger. In this case, Bivens wanted to sue federal agents for the damages they caused when they broke into his home without a search warrant. Burger felt that the five votes for cert meant that the Justices wanted to overturn the lower court's decision on illegal police searches. He tried to convince some of the Justices to change their votes. Stewart agreed to change his vote. Harlan also agreed, with the stipulation that the case be held over to the next term.

Potter Stewart was also not happy with Burger as the Chief Justice. He had heard stories from his clerks about Burger when he was at the District of Columbia Court of Appeals. He didn't like the way Burger kept shifting positions. He did not dissent until the following April, when he wrote a dissent about a man who claimed double jeopardy when robbing poker players. He was found not guilty in the first trial and guilty in the second trial. This was his first dissent. In the meantime, Senate hearings were underway to fill the Fortas seat. The nominee was G. Harrold Carswell, and he was having a rough time of it. He was rejected by the Senate.

During this time, the Nixon administration launched an impeachment attempt against Douglas. Douglas had survived the first such attempt in 1953 after a vote on the

Rosenbergs. The current attack was led by Gerald R. Ford, tying Douglas and his position with the Parvin Foundation with ties to gambling and organized crime. At one point, Nixon ordered Mitchell to have Ford end the impeachment investigation, but found that they couldn't just end it.

There was a case, Utah Public Service Commission v. El Paso Natural Gas Co., which had been bouncing around for twelve years. A petition had been submitted for a rehearing, which Burger favored because he wanted to reverse the decision of the Warren Court. The courts had ordered divestiture in the antitrust case. Rule 58 required that a rehearing could only be considered if it was brought up by one of the Justices who had sat on the case. Burger was looking for a way around Rule 58, feeling that any Justice should be able to bring about a rehearing. Douglas felt just as strongly the other way. The Courts were having problems gaining compliance with their rulings. Burger suggested a change in the rules that the other Justices were agreeable with but which put him on a collision course with Douglas, who wrote a dissent before a decision was reached.

Harry A. Blackmun of Rochester, Minnesota, was requested to come to Washington D.C. by John Mitchell. He was successfully confirmed by the Senate and received two large canvas bags of certs to work on as soon as he was approved. All of these petitions were awaiting the decisive fourth vote. He only voted for cert in three or four of the cases. The Court now would have nine members, and Burger was happy at how his first year went. Blackmun joined the Court at its busiest time, in June. Sixteen cases would be put over to the next tem.



1970 Term

1970 Term Summary and Analysis

Burger was very concerned with appearances and was looking for a landmark case that would distinguish him and his Court. "As his second term approached, Burger worried increasingly about how his tenure would measure up against Earl Warren's. In Warren's first term, the Court had handed down the Brown school desegregation ruling. Over the next sixteen years, his monumental reputation for leadership and integrity had rested in large part on the continuing chain of school desegregation cases" (1970 Term, p. 95). Busing was becoming a very heated issue throughout the nation.

In Charlotte, North Carolina, the US District Judge James B. McMillan ordered desegregation in Mecklenberg County to be based on the racial composition of the population, seventy-one percent white and twenty-nine percent black. Burger felt that this was a form of racial mixing that went beyond the intent of the Brown case. Right after this ruling, Burger wrote a concurrence to an opinion on a different desegregation case, and the President issued a policy statement on desegregation. Shortly after this, the Fourth Circuit Court of Appeals ruled on the McMillan order and remanded the case, saying McMillan tried to go too far in achieving perfect racial balance. Before the hearing could take place, the case was appealed to the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education*. Black parents wanted a quick ruling, but the Court wouldn't hear the case until its new term beginning the following October.

Burger held a news conference on August 31 in his chambers to explain why the Court decided not to hold a special summer session to address the busing issue. It wanted to hear the different busing cases before addressing the issue. The three pending cases were placed at the head of the docket for the coming session, and Burger said there would be a landmark decision. Burger had an ally in Hugo Black on this issue. Black felt that desegregation meant that children should go to the nearest available school and not shifted around to meet some racial mix figure. He felt that desegregation could be obtained without unnecessary busing. Burger also knew that he could count on Blackmun's vote. Beyond that, he wasn't sure how the rest of the Court would vote.

Arguments were heard on October 12 and 13. The Solicitor General argued that there were no Constitutional provisions or requirements for racial balancing and that children should be allowed to attend the school in their neighborhood. The Inc. Fund attorney, James M. Nabrit III argued that busing was an appropriate desegregation remedy and was necessary to achieve full desegregation. Burger implemented special rules to keep the clerks from gaining information on what the various positions were. Since there was no majority of five, Burger said he would write a draft opinion with the different viewpoints. There was no vote taken, but Douglas noticed a majority of five supporting the McMillan order. Since Douglas was the senior member in the majority, he felt he should assign the task of writing the opinion. However, he had to wait to see what was



written by Burger, who was going to try to have a decision written that would look like it was unanimous.

When the case was remanded to McMillan, he held eight days of hearings and basically issued his original order, saying he did so because it accomplished what was required. Stewart supported McMillan until it came to the busing of elementary school students. He agreed with the Fourth Circuit Court on the subject of busing elementary school students and ordered his clerk to write the order that reversed McMillan and upheld the Fourth Circuit.

Burger circulated his draft on December 8. Stewart found it to be horrible, since Burger didn't address many major issues and said that the issue of residential segregation was a separate issue. The gist of the Burger draft was to send the case back to McMillan without with reversal or reaffirmation. Stewart thought that the Burger opinion would cause a lot of trouble in both the North and the South and had his own memo circulated within the week. His memo was simply a memo and he wanted them all to know it was nothing more than a memo because he didn't want to challenge the Chief Justice. Brennan and others urged Stewart to circulate his draft, which he finally did, because a majority of the Court consisted of five votes. The Chief also wrote another draft, but ignored almost all of Stewart's points.

Harlan also had his clerk working on the issue researching the relevant law. On the basis of his research, Harlan concluded that federal judges could order whatever remedy they felt was required for the situation. Harlan had the information printed and sent it as a suggestion for revisions to the Burger memo, subject to it being accepted. Douglas, Brennan, Marshall, and White didn't like Burger's draft and felt that Stewart's draft was closer to their own views. His alternative resulted in Stewart being the negotiator with the Chief Justice.

Douglas was concerned about the possibility of backlash and of the Court appearing to be an instrument of the Nixon administration. Douglas viewed the treatment of McMillan as the most important factor. He didn't see it necessary to reverse McMillan because of the elementary school children being bused, because he could affirm with the busing of the children handled within the text of the opinion. Douglas talked to Stewart about this point, and Stewart agreed and ordered the opinion rewritten. Marshall also agreed. The affirmation would make others read the McMillan opinion.

Stewart had to negotiate every paragraph with Burger. Stewart tried to include as much of his own draft and to get Burger to delete the damaging parts of his own draft. Stewart knew he had the majority vote of six with his draft, and was trying to work with Burger so as not to alienate him. Marshall tried to get Burger to include a discussion of residential segregation. Black would not support anything that approved of busing or racial balance. Burger was clearly in the minority, trying to control the decision. Residential segregation was handled with the term that judges should "give weight" to the fact. This new draft had eight judges supporting it, with Black still being unhappy. They eventually placated Black, and the decision was announced as unanimous in the Charlotte case.



Burger, Harlan, and others wanted to overturn some of the Warren Court decisions. Harlan felt it was dangerous to do away with precedents because of different people being on the Court. Burger wanted to change many of the criminal law decisions of the Warren Court, in addition.

During this time, Black was reconsidering his position on the exclusionary rule. This rule had to do with evidence obtained in an illegal search being excluded from presentation in court. Harlan, White, Burger, and Blackmun were in favor of making change to the exclusionary rule, and Black was the possible fifth vote that they required. Burger's problem was that he could not come up with an alternative to the rule that would serve to prevent abuse. In the *Mapp v. Ohio* case in 1961, the Warren Court ruled the state as well as the federal government had to abide by the exclusionary rule. Stewart had his clerk write a draft of the opinion on the Fourth Amendment case, which circulated to the other Justices. White didn't want a decision in this term, but wanted this case and others like it put over into the next term. From his point of view, Stewart was solving nothing in his memos, and White wasn't happy with any of the decisions in these cases. The term ended with no major actions on these cases.

There were other cases that weren't as controversial. *Griggs v. Duke Power Co.* had the Court rule against Duke Power's requirement that workers have a high school diploma and pass an intelligence test before they would work as a coal miner. In *Phillips v. Martin Marietta*, the issue was discrimination since the company would not hire women with young children. The Court felt that if the Company couldn't prove a difference in job performance, it would lose the case.

In 1970, there was a petition for cert involving the State of Massachusetts, which enacted a law stating that no citizen could be forced to fight in a war unless it was constitutional. The question was, could the President authorize a war without the consent of Congress? The case, involving a state filing against the federal government, went right to the Supreme Court. Douglas and Stewart needed two more votes before the case would be heard. Black, who was basically a pacifist, didn't want to hear the case involving the Vietnam War. Harlan made a third vote, so Douglas needed one more to have the case put on the docket. Since he could not muster a fourth vote, they issued a denial of cert.

Cohen v. California was a First Amendment case in which Paul Cohen, who wore a jacket with the saying "Fuck the Draft", was given a thirty day sentence for disturbing the peace. Black wanted the decision reversed without any oral arguments. The lawyers were asked not to use the phrase in arguments before the Court, but they did use it once. The Court voted to reverse the conviction and that the slogan was part of free speech. Douglas, the most senior Justice in the majority, assigned the writing of the decision to Harlan.

Another petition for cert was *Clay v. US*. In this case, Clay claimed that, due to his Black Muslim faith, he was a conscientious objector and therefore exempt from military service, since he refused induction into the Army. The result was his being banned from boxing for four years and a resulting loss in winnings. Brennan wanted the Court to hear



the case, so they granted cert. Ali had made a comment that the war was not declared by Allah, so he would not fight in it. The government used this statement to claim that he was not really a conscientious objector and the Court agreed, ruling five to three against Ali. Harlan, who was assigned to write the opinion, had a clerk who conducted some research on the Black Muslims, and presented Harlan with materials that supported the view that Clay (Ali) was a conscientious objector. Harlan incorporated these views into the decision without telling Burger. They decided to rule in Ali's favor in a per curiam decision.

In June, the publication of The Pentagon Papers began, first in the New York Times and then in the Washington Post. Both were enjoined by federal courts on the grounds of national security. Both immediately appealed to the Supreme Court on the basis of the First Amendment. The Court was being asked to decide on both cert and overruling the injunction. Harlan thought that it was too early for the court to get involve. Stewart, on the other hand, didn't want any delays. He wasn't accepting the national security argument. Douglas, Black, Brennan, and Marshall wanted to grant cert, but since the case was an emergency appeal, they needed a fifth vote. Burger, Harlan, White, and Blackmun wanted the case heard in October during the regular term. This meant that Stewart held the crucial, deciding vote. Harlan changed his vote and cert was granted with the arguments scheduled for the next day.

Griswold had some national security officials tell him what the sensitive parts were. Some of them comprised multiple volumes. Griswold had to shorten the list to make it credible and this he did, with one item consisting of four volumes of the work. He also requested a secret session without the public for security reasons. The motion was denied and arguments were given in a packed courtroom. The government held that publication would affect the security of the country. In a 1931 case, the publication of sailing dates and the location of troops was the kind of material that was deemed to affect national security. Griswold argued that this was too narrow a definition. Attorney for the Times pointed out that it had been eleven days since publication and nothing had happened to the country. The documents were kept in the conference room under guard. The Justices had to read whatever they wanted to read in the conference room and could not remove the material to their chambers. The Justices voted to lift the injunction and allow the publication. The result would be given in a per curiam brief and the Justices could write their own opinions.

1971 Term

1971 Term Summary and Analysis

Burger met the new clerks for the term in the cafeteria. At this luncheon, the clerks could discuss the various cases with the Chief Justice. Burger tried to squeeze in a lunch with the clerks at least once a month. He kept them until almost three o'clock, when he returned to his chambers to deal with the Winston-Salem emergency request. He had to telephone the Justices who weren't in Washington for their opinions. Since several of the Justices were against a stay, Burger ruled that he couldn't grant one because of the shortness of time to the opening of the school year. Burger wanted the lower courts to understand that racial balancing wasn't required.

Black and Harlan were both in the Bethesda Naval Hospital in mid-July during the Court's vacation. Black was convinced he was dying of cancer, even though the doctor's couldn't find any. He finally resigned on September 17 at the age of eighty-five. Black died on September 25. Harlan resigned on September 23 because he was diagnosed with cancer. This meant that there were even Justices on the Court and they quickly revised their schedule, not knowing how long they were going to be short-handed and with the start of the new term only two weeks away.

The Nixon administration had some trouble finding acceptable candidates. When Nixon, Mitchell, and John Dean would come up with some names, they would find that they couldn't muster the support that they needed. Burger feared they would go the whole term with only seven Justices. They finally convinced Lewis Powell to accept the nomination for Black's seat and William Rehnquist to accept the nomination for Harlan's seat. Nixon packaged the nominations together for Senate consideration, trying to avoid problems with the Rehnquist nomination. The ABA committee voted in favor of both candidates. Powell had an easier time before the Senate than Rehnquist did, but both received confirmation in December and would be sworn in after the holidays.

While this was going on, the Court was hearing cases. In *Sierra Club v. Morton*, the Sierra Club tried to block eighty acres of wilderness from being used in a ski resort. Because none of their members were affected, the lower court ruled against them. Blackmun joined Douglas in dissent. Another major issue involved abortion, and this was an issue that Douglas waited for. The court had two cases pending, *Doe v. Bolton* and *Roe v. Wade*, in which the Court wanted to address the issue of federal intervention in state proceedings. Both of these cases would be decided before the two new Justices were sworn in.

The Court viewed the abortion issue as one of jurisdiction. Sarah Weddington argued the Texas case before the Court, with the state's side being presented by Assistant Attorney General of Texas, Jay Floyd. The Georgia case was argued by Margie Pitts Hames, who said there was no question of jurisdiction. In Georgia, a medical panel was required to make the decision on whether or not an abortion could take place. These



were not the first abortion laws to come before the Court. The Justices decided they had jurisdiction in the case. Now the issue centered on whether women have the right to have an abortion, and in the Georgia case, the discussion was on the doctor being interfered with by requiring a panel.

Douglas, Brennan, Marshall, Stewart, and Blackmun were in favor of ruling against the abortion laws. Burger and White dissented. When the assignment sheet was circulated, the Justices found that the Chief had assigned the two abortion cases to Blackmun when Burger was not in the majority. The same was true for several other cases. "Never, in Douglas's thirty-three years on the court, had any Chief Justice tried to assign from the minority in such fashion. For two terms now there had been incidents when the Chief had pleaded ignorance, had claimed he hadn't voted, had changed his vote. Until now they had been isolate instances" (1971 Term, p. 171). Douglas had been keeping track of the votes and was amazed at what was happening. In one case, Douglas assigned the writing and then told Burger that he did so since Burger wasn't in the majority.

Burger's problem is that he was too busy with all of his social, professional, and ceremonial engagements. Because of this, he didn't do his homework and was often not prepare for their conferences, which is why he made so many mistakes when it came to decisions and assigning writing duties. Most of his knowledge of the cases was from the summaries written by his clerks, not his reading of the briefs. Since Blackmun was assigned the opinions on the two abortion cases, he set out to write them. He did most of the work himself, without much reliance on his clerks. Brennan had approached the issue of abortion on the basis of privacy, but Blackmun, under the urging of Burger, did not join this view.

When Rehnquist and Powell joined the Court, Burger wanted the abortion and other cases reargued and decided by the nine Justice Court. They eventually decided against this, and Blackmun kept working on this opinion. In the meantime, the Court went on to *Lloyd v. Tanner*, which had to do with the distribution of anti-war literature at a shopping center in Portland, Oregon. They had been ejected by the guards at the shopping center. When the vote was taken, the Court, without the vote of the Chief Justice, was tied. Burger would have the tie-breaking vote and he was undecided. Douglas had assigned the *Lloyd* opinion to Marshall and when he went out of town, Burger assigned it to Powell. Douglas wrote an angry memo when he returned, in which he took Burger to task for remaining undecided so he could control the writing assignment. The memo concerned the last case of the year. Burger responded that he thought that he was in the majority.

Blackmun had been the general counsel at the Mayo Clinic when he was in private practice. He wanted to write an opinion that would win the respect of both the legal and medical community. He studied the history of abortion in the US and noted that the state became more involved as the length of the pregnancy increased. His early draft claimed that the states couldn't interfere in the woman's right to have an early abortion. Douglas, Brennan, Marshall, and Stewart supported Blackmun's draft. White did not like Blackmun's approach in attacking the Texas law, saying it was vague. Blackmun wanted



to write a decision that would be supported by the full Court. However, in June, he withdrew his opinion, wanting it held over until the next term, which enraged Douglas. When Brennan sided with Blackmun about holding the case over, Douglas wrote an angry memo about keeping politics out of court decisions, among other things. The Douglas memo, if released, would make public the internal problems of the Court. They finally all agreed that the abortion issue should be put over until the next term.

Another case brought before the Court during the 1971 Term was *Flood v. Kuhn*, a case involving St. Louis Cardinal baseball player Curt Flood. The Cardinals had traded Flood to the Philadelphia Phillies and Flood sued under antitrust law. At issue was the reserve clause that allowed teams to trade players without the consent of the players. In two previous cases, the Court held that major league sports was exempt from antitrust laws, so they felt that this case should be easy. Blackmun was assigned to write the decision and found he had to keep adding baseball players from the various teams that were favorites of the other Justices and the clerks. After Blackmun withdrew the abortion case, Burger announced he would support the decision in the Flood case.

There were also cases involving pornography during the term, some of them being *Hartstein v. Missouri*, *Miller v. California*, and *Wiener v. California*. Each of the Justices had his own definition of what was and wasn't pornography. An erection meant something was to be considered pornographic. The Court mostly followed the 1967 *Redrup v. New York* subjective ruling, that if the judges didn't think it was obscene then it wasn't. Douglas felt that there was no way to define obscenity so that an individual would know beforehand if something was or wasn't obscene. Douglas was afraid that the two new Nixon appointees, along with Burger, would result in a war on pornography, which he viewed as a war on free speech. Burger was looking forward to the obscenity cases. He felt that he could distinguish his Court by doing what the Warren Court could not do. Most of the Justices preferred not to see most of the evidence in the pornography cases, but some of them did watch the movies that were evidence. Their viewing was known as movie day.

Burger wrote a memo that looked at the obscenity cases within the privacy doctrine, known as the Stanley privacy doctrine. But when Burger circulated the opinion he had written, it was an attempt to define obscenity rather than viewing it within the privacy doctrine. Not all of the Justices agreed with this approach. Brennan would only accept a definition to apply in public places where children could be affected. Douglas felt that a definition of this kind could someday be used in censoring consenting adults, and Burger agreed that they could not structure such a definition in the time remaining. The Justices held a conference at which they decided to put the current cases over to the next term and to accept additional cases so that they could address a broad range of issues regarding obscenity.

The Court also considered several cases having to do with capital punishment. Past cases had to do with procedural issues, but they now would be ruling on whether the death penalty was in violation of the Eighth Amendment as cruel and unusual punishment. Marshall viewed it as a form of racial discrimination, since the wealthy could afford attorneys and were rarely sentenced to death. Justices had voted to uphold



the death penalty in the past, but would not maintain a moratorium on the death penalty while they considered a variety of cases. Marshall did not feel that they would vote to do away with the death penalty. He knew that he, Brennan, and Douglas would vote against the death penalty; Burger, Rehnquist, and White would vote to uphold, so the fate of the death penalty lay in the hands of Blackmun, Powell, and Stewart. Stewart could see himself voting either way, depending on the circumstances. White was influenced by the argument that the death penalty was ineffective because of the infrequency of the sentence. If it could function as a form of deterrence, then White felt that it was justified.

They took a tentative vote at their conference on January 21. Burger, Blackmun, Rehnquist, and Powell voted to uphold. Marshall, Douglas, Brennan, Stewart, and White voted to strike. They each agreed to write their own opinions so all of their views were considered and presented. Each Justice put forth his own views. The decision was announced on June 29.



1972 Term

1972 Term Summary and Analysis

Harry Blackmun spent the summer of 1972 at his home in Rochester, Minnesota working in the library of the Mayo Clinic. This is where he did his medical research. A pregnancy was divided into three trimesters of three months each. During the third trimester, the fetus became viable, or capable of living on its own outside the womb. Abortions were considered safe during the first two trimesters. Powell, like Blackmun, also researched abortion during the summer. His in-laws were obstetricians so he could learn all of the stories from them.

At a conference vote in October, they voted six to three to allow abortion. Blackmun won the Chief's support by devising a formula where the state's interest in the abortion would begin in the second trimester, where they could be allowed to protect the health of the woman. In the third trimester, the state's interest is to protect the fetus. This mechanism eliminated the problem of viability as the dividing point. Blackmun wrote the opinion with Douglas and Stewart writing concurrences and White and Renquist writing dissents. Burger wrote a concurrence that was given after the inauguration of Richard Nixon for his second term.

Burger found the abortion decision leaked to the press before its official announcement. Burger had each Justice question his clerks and said he would have the FBI administer lie-detector tests if necessary. One of Powell's clerks had inadvertently leaked the story and told Powell who talked to the Chief. The clerk talked with Burger and had to put the facts into writing. Burger later talked with the staff of Time, where the story had been leaked. The day that the decision was officially announced, Lyndon Johnson died. This is the event that dominated the news, but the Court was still flooded with calls and letters.

In summer of 1972, the officers at the Court were being remodeled to accommodate the larger staffs of the Justices. Douglas found this to be a waste of money. The obscenity cases were scheduled at the beginning of the new term. One case involved adult movies and the other two cases involved adult book stores. In doing their research, the clerks began with Burger's memo from the previous year. Consenting adults in the privacy of their own home should be allowed to watch what they want, but if the concept was extended, and then the privacy of others was violated.

In November, Burton Marks argued a pornography case before the Court. He said the adult movie theaters and adult bookstores were run by businessmen who did not want to run afoul of the law, but they had to know what the law was in order not to violate it, and the courts were unclear as to the relevant law. In the movie theater situation, the theater had no advertising or picture outside. The book in question from the adult bookstore contained no pictures in it. Burger wanted to let the local authorities devise their own standards for obscenity cases. Stewart didn't agree with this because he



thought the First Amendment should be the same everywhere, which meant it could not depend on local standards. "Besides, no one could predict whether lower courts judges, juries and state legislatures would do better under Brennan's definition than under the Chief's. For White, the Chief's approach seemed to allow more local flexibility, but his drafts had their problems. They were filled with awful ramblings, and each new version seemed to contain intemperate language. Burger's clerk delivered each successive draft to White's chambers with an apology for its tone. The clerk said he had done his best to harness and control the Chief, but Burger insisted on releasing a little venom" (1972 Term, p. 250).

Most of the Justices did not want to tell the states what they could and could not allow in terms of obscenity. White wanted the states to have flexibility in terms of what was protected speech, which would allow the states to select their own definition of obscenity. Brennan wrote a dissent when Blackmun became the fifth vote, and was willing to sacrifice all definitions of obscenity. The opinion came down on June 21, and Burger proudly noted that the decision made a distinction between hard core pornography and expression covered by the First Amendment.

A case heard on January 17, *Frontiero v. Richardson* was a sex-discrimination case, wherein Frontiero had asked for the same larger quarters and monetary increase that men received when they married. The lower court said she was not entitled to the same benefits as the men unless her husband was legally dependent on her for support. The Supreme Court had previously ruled that states could not treat men and women differently without a clear reason. Burger thought the *Frontiero* case should be handled in the same way. Rehnquist favored upholding the lower court. The case was assigned to Brennan. Brennan wrote two drafts: a narrow one that was limited and a broad one that resulted in a constitutional ban. He circulated both of them. Douglas, Marshall, and White joined the broadly written draft. Powell wrote a dissent to the broad version in which Burger, Blackmun, and Rehnquist joined. This left Stewart as the deciding vote. Stewart wanted a compromise, which Brennan rejected. Brennan published the broad version of the draft.

There were other cases for the Court to decide. In *re Griffiths*, the Court had to decide if resident aliens could become members of the bar. Connecticut would not allow aliens to join the bar. *San Antonio v. Rodriguez* was a Texas case in which the lower court ruled that property taxes could not be used to finance public education. Powell wrote the decision ruling against the challenge to the use of the tax. Marshall wrote a dissent. *Almeida-Sanchez v. US* involved a border patrol search for illegal aliens that turned up marijuana and no aliens. There was no search warrant as the Fourth Amendment required.

Keyes v. School District No. 1 was a Denver case involving school desegregation and busing. White, who was from Denver, had worked for the school board and was wondering if he should disqualify himself from the case, which might leave the Court in a deadlocked position on a vote. The Denver case was one in which there was no history of legislated desegregation, so they had to prove that the children were first separated by race, unlike cases from the South. The Denver judge, William Doyle,

agreed that the Park Hill area's school board's actions resulted in segregation and ordered the busing of four thousand children. He also ordered desegregation in the core city schools and the end of most one-race schools. The Tenth Circuit Court reversed Doyle's order for the core city schools but not for the Park Hill area. Black parents appealed to the Supreme Court. The Court voted five to three in favor of the parents, with White withdrawing due to a possible conflict of interest. The writing of the opinion was assigned to Brennan.

Brennan took the approach that the problems in the Park Hill area were sufficient to result in the entire system to be desegregated. Because of the violation of rights, the system was to be desegregated all at once, instead of in a piecemeal approach. Douglas, Marshall, and Stewart joined Brennan in his decision. Burger and Rehnquist dissented, along with Powell, who wanted to write his own opinion. The decision was announced on June 21.



1973 Term

1973 Term Summary and Analysis

When the US was bombing Cambodia in July 1973, a New York District Court issued an injunction to halt the bombing. The Court of Appeals lifted the injunction and the American Civil Liberties Union appealed to the Supreme Court in July, when the Court was in recess. Marshall held an emergency hearing in his chambers and issued an order refusing to halt the bombings. The ACLU had the right to appeal to another Justice, and sent their staff to Goose Prairie to find Justice Douglas. Douglas agreed to hear the appeal. Douglas ended the stay, thus allowing the district court to order a halt to the bombing. The government tried to get Marshall to stop the district court from ordering a halt to the bombing. Marshall consulted with the other Justices and wrote an order. Douglas fired back with a dissent challenging Marshall's right to do so.

The obscenity rulings of the previous year were resulting in more rulings. Brennan had his staff look for outrageous convictions that they could use against the reality of allowing for community standards to determine what is and isn't obscene. In *Jenkins v. Georgia*, a movie-house operator was convicted for showing the movie *Carnal Knowledge*. The Justices agreed that the movie was not obscene. Rehnquist was assigned to write the decision along with another, *Hamling v. US*. The job Rehnquist had was to explain why the case involving *The Illustrated Presidential Report of the Commission on Obscenity and Pornography* was obscene and why *Carnal Knowledge* was not. The Court was back to dealing with obscenity on a case-by-case basis.

The Court also heard its first reverse discrimination case, *DeFunis v. Odegaard*. This case centered on affirmative action programs. The applicant to a law school was denied admission because he was white, whereas blacks with lower scores were admitted. The applicant claimed this was racial discrimination. The Justices considered side-stepping the issue since the applicant had eventually been admitted to law school. Another case, *Milliken v. Bradley*, involved the issue of busing in Detroit. The case mustered five votes against busing. Since this was the first time that Burger was in the majority on a major desegregation case, he wrote the decision himself. When Burger circulated his decision in April, Powell found that it prevented any busing between city and suburb, which Powell felt went too far, and the other Justices did also. Burger revised the draft somewhat, requiring the showing of illegal acts before city-suburban busing would be allowed.

1973 was the year of Watergate. H.R. Haldeman and John Ehrlichman resigned in May, 1973, right before the annual reunions that Burger held with his former law clerks. This was an elaborate black-tie affair held in the East and West Conference rooms. The Chief would circulate to the different tables, talking with his former clerks. In the end, they had a question and answer period, and when Watergate was mentioned, Burger stood up for Nixon, much to the amazement of his former clerks. When Archibald Cox subpoenaed the tapes and the White House asked to quash on the basis of executive



privilege, it looked like the case would come to the Court. The Nixon White House finally announced that they would not appeal and that they had worked out a compromise.

Marshall and his clerks were enjoying an evening at Marshall's Falls Church house on October 20 when the firing of Cox was announced. The Attorney General and his deputy had resigned since they refused to fire Cox. The Acting Attorney General, Robert Bork, had agreed to fire Cox. The FBI was shown sealing the Special Prosecutor's office. Nixon turned the tapes over to Judge Sirica within a week. In March, indictments were handed down against Haldeman, Ehrlichman, and Mitchell. More tapes were subpoenaed by Leon Jaworski, the new Special Prosecutor, and John Doar, The Chief Counsel to the House Judiciary Committee. Jaworski filed a petition asking the Supreme Court to hear the tapes case. Jaworski was asking for what is called expedited review, where the lower courts can be skipped in matters of public importance. This required five votes from the Justices.

Rehnquist disqualified himself from the case. At a May 31 conference, the Justices agreed with Burger's proposed rules not to tell their clerks about the case and to announce the results immediately to prevent any possible leaks. Douglas, Brennan, Stewart, White, and Powell voted to expedite. Burger then decided to join the majority. The Court was asked to rule again when a grand jury named Nixon an unindicted co-conspirator. The White House asked the Court to determine if a grand jury could do this to a sitting President. The Justices decided to grant cert.

Nixon did not have much support among Court members. Brennan felt that there was a chance for a unanimous decision, and he talked to Douglas about the chance for a single opinion signed by all of the Justices. Some of the Justices were in agreement with this approach; other saw it as going around the Chief. Brennan talked to Burger, who said he would take the matter into consideration. Douglas read the brief, wrote a draft of an opinion, and circulated it. Brennan felt that Douglas raised some issues that didn't have to be addressed. Powell circulated a memo with his thoughts on the subject. They all felt that Burger would try to take the opinion assignment for himself. Blackmun pointed out to Burger that if there were an impeachment trial, he would have to preside and it would be better if he didn't write the opinion.

Oral arguments were on July 8. Jaworski presented the case for the government and James St. Clair presented the case for the President, who was the defendant in the case. The Justices held their conference on the case the next day. They all agreed that there was some executive privilege, but that they had reached a consensus against the President. Brennan suggested a single opinion signed by all in a show of strength. Burger announced that he would write the opinion and hoped to have it ready within a week. "Marshall was afraid a single opinion would never attract all eight votes. The Justices were agreed on the result, but not on the reasoning. The discussion in conference had been odd. Conversation at conference normally focused on a case in light of the Constitution. This discussion had centered more on the Court's role and power than on the case" (1973 Term, p. 310).



Burger worked on the opinion with his two clerks. He knew that they were coming closer and closer to impeachment, and he was interested in the relationship between the different branches of government. He had his clerks gathering information about the conducting of the trial. Burger had never been a trial judge and his clerks knew that. When the opinion was circulated, the Justices weren't too impressed by it. They thought that sections of it were poorly written. They made suggestions and gave them to Burger. It happened to be right after the funeral of Earl Warren. Burger complained that he had been busy with the funeral and hadn't had much time.

The Justices were beginning to confront Burger and to openly talk about the problems they were having with him. What could they do about the situation? White said he would write a draft and circulate it. They agreed they wanted to avoid a confrontation with Burger, so White adapted the draft and added a paragraph written by Brennan, and Brennan redrafted a section written by Powell on presidential subpoenas. All of this was decided on Saturday at a lunch attended by White, Stewart, and some clerks. This lunch became known as the conspiracy lunch. When they talked to Marshall, he agreed with the draft.

Burger circulated his latest version of the executive privilege section on July 17. Brennan thought it was an improvement over the original. In it, he discussed the competing demands of the executive and judicial branches and the core functions of each. One of the core functions of the judiciary was making sure that all evidence was available for a criminal trial, which was the issue with the tapes. The circulated draft received comments and Burger had to make revisions. He told the others that the draft of the entire opinion would be available in a few days.

On Saturday, a newspaper article said the Court might not be able to deliver a decision since the House Judiciary Committee was supposed to rule on impeachment in a few days. Burger thought they were four days away from announcing the decision. Stewart wrote a revision of the Chief's draft, which his clerks typed on Sunday. White and Marshall approved of it, and they all said they would join Burger only if he approved. Burger did a rewrite and dropped the whole section on core functions. Brennan said he could accept it and so did Douglas. Most of the other Justices said they could accept Burger's latest version and they decided to hold a conference the next day. At the conference, it looked like things were going to fall apart. Eventually, the final vote revealed a unanimous decision which was announced the next day.

When Nixon was informed of the decision and the fact that it was unanimous, he basically decided that he had no choice but to comply.



1974 Term

1974 Term Summary and Analysis

After the Detroit busing and the tapes decisions were handed down, the Court was adjourned until the first Monday in October. There were rumors that the decision wasn't Burger's but was authored by other Justices; namely, Stewart and White. Burger wanted the rumors stopped and had the Court's Press Office, Barrett McGurn, talk to the reporters. When the recess began, Burger and his wife traveled to Europe for a vacation. A few days later, Burger, in the Netherlands, received a call telling him that Nixon was going to resign. Ford was requesting that the Chief Justice return the next day to swear him in. They were flown back in an Air Force plane so Burger could be there for the ceremony on August 9. They flew back to the Netherlands on August 12 to continue their vacation. Burger didn't return until September. When he returned, he was hit by a car while bicycling and spent six days at Bethesda Naval Hospital.

Powell and his wife, Jo, returned for the new term. Powell had quit smoking. He was interviewing clerks since each Justice could now have four. His clerks recommended he select Joel Klein, which he did. All of the new clerks attended the opening cocktail party where Burger and Brennan spoke. Brennan talked about the need for confidentiality and not leaking information to the press and how clerks had to be careful, even in the cafeteria.

Saxbe v. Bustos was one of the first cases heard and this was an immigration case. Douglas wrote the opinion, which allowed entry for day workers from Canada and Mexico. When he went away to Nassau for the holidays, he gave his clerks the time off. Douglas suffered a stroke right after he and wife Cathy arrived in Nassau. Douglas was flown back to the United States and admitted to Walter Reed Hospital. On January 6, the Justices held a conference to determine what to do in light of Douglas's illness. There were no rules and he could vote without having to attend the conferences. They finally decided to delay their votes in some cases where Douglas might be the crucial fifth vote. Marshall was hospitalized in February with pneumonia.

The Douglas secretaries and clerks visited him daily in the hospital and worked from there. He received an overnight pass to go home, but went to work at the court instead and refused to return to the hospital the next day. He finally agreed to attend physical therapy sessions. Three weeks later he was back in Walter Reed and admitted he had not been ready to return to work.

One case before the Court was *Southeastern Promotions, Ltd. v. Conrad*, which had to do with the city of Chattanooga prohibiting the musical *Hair* from playing at its civic auditorium. Burger was very offended by the play, especially since there was a character named Burger in it. He wasn't the object of that character since he wasn't even on the Court when the play was written, but he was still offended by it. The Court voted to uphold the lower Court and Brennan assigned the writing to Blackmun. In



another obscenity case, *Erznoznik v. City of Jacksonville*, the city of Jacksonville, Florida prevented the showing of movies with nudity at a drive-in because the screen was visible to places off of the drive-in's property. There was a four-four deadlock and Douglas was in the hospital. Powell decided to change his vote and they decided to knock down the ban. Burger wrote a dissent which delayed announcing the case which irritated the other Justices.

Warth v. Seldin dealt with civil rights and zoning laws in Rochester, New York. This case dealt with a suburb which had a zoning requirement that only allowed single-family dwellings on large lots. This basically barred low-income families from living there because they couldn't afford the house or lot. In order to sue, the poor had to have the money to begin building a low-income housing project that the locality could ban. "Brennan saw this as an extension of a disastrous trend. The lower courts would get the message that the poor must prove precisely how they were affected before they would even have standing to bring suit in federal court. The Court would no longer be the final protector of right, the guarantor of fair play" (1974 Term, p. 367).

The other Justices had to devise a mechanism for dealing with the illness of Douglas, who was physically and mentally disabled. They came up with a way of basically nullifying his vote and they were rather worried about the ethics of the situation. Burger asked Brennan to talk to Douglas about resigning, but Brennan told him that he didn't have that kind of relationship with Douglas and to ask Abe Fortas, or Clark Clifford. Douglas finally went to the New York University Medical Center for rehabilitation.

Another issue that came up was the rights of mental patients. One such case was *O'Connor v. Donaldson*. When on the Appellate Court, Burger had had a feud with David Bazelon over the issue and the handling of insanity pleas. Bazelon took a broad view of the use of the insanity plea, whereas Burger took a narrow view. Bazelon was in favor of freeing as many mental patients as he could and believed that if the government involuntarily committed them, then it had the legal obligation to provide treatment for them. This was the issue in *Rouse v. Cameron* in 1966. In 1974, there was a petition for cert for a case based on this issue.

In the *Donaldson* case, the lower court awarded damages to a man who had been held for fifteen years in a mental institution in Florida. On appeal, the Fifth Circuit upheld and wrote an opinion on the right to treatment issue, which Burger disagreed with. Burger wanted to overturn the decision. Joel Klein, Powell's clerk, had worked on the Mental Health Law Project and was a strong advocate of rights for the mentally ill. At the conference on the case, Burger was against the Fifth Circuit decision, Brennan supported the award of damages. White sided with Burger, whereas Marshall, Blackmun, Powell, and Rehnquist supported the damage award but were not sure about the right to treatment. Burger took the case for himself to write, based on the questioning of the right to treatment and not on the awarding of the damages.

When Burger circulated the opinion some months later, the clerks met to discuss it. Stewart agreed to write a dissent in which he did not concede a right to treatment, but stated that the case should be sent back to the lower court for the award of damages.

Burger tried to obtain votes for his draft, but there were no joins. White announced that he would vote with Stewart and sent a join memo along with joins from Douglas, Powell, and Blackmun, as this meant a total of seven votes for the dissent version. They had Douglas reassign the opinion to Stewart, since they were now in the majority. Burger sent a memo that Stewart was writing the majority opinion. The Chief decided to write a concurrence that stressed the right to treatment issue. The decision was announced on June 26 and the Court adjourned on June 30.



1975 Term

1975 Term Summary and Analysis

Burger went to New York to visit Douglas on July 24. He had decided that Douglas had to resign for the good of the Court. Too many cases were being held over and there was also a backlog. Douglas and his wife spent the summer at Goose Prairie. In September, he appeared in Yakima to hear an emergency request. Douglas issued the stay the attorneys had sought after rambling on a bit about federalism. The ploy failed, as the press portrayed Douglas as incapacitated, and his wife called friends to try to talk him into resigning. Charles Reich traveled to Goose Prairie with this goal in mind. Douglas countered the arguments offered for him to resign. He couldn't read, so none of the cert petitions were worked on, but he returned to Washington on September 27 to see if he could handle the work.

He attended a cert conference on September 29. His clerks and secretaries wheeled Douglas and ten carts of papers into the conference room and got him situated with the right case. Brennan sat next to Douglas and assisted him and cast his vote for him. It was an uneasy situation for everyone, especially since Douglas was incontinent and had a bag for his waste. Oral arguments began on October 6. "After the lunch break, Douglas was more animated, chatting with Stewart, gesturing with his right arm, keeping the messengers busy with notes and requests for books. The next day he was back to dozing. A pattern was evident. Douglas had moments of lucidity and energy followed by near incoherence and sleep. His absences increased. He could barely function on the bench. He needed help to get his glasses from his coat pocket under his robe. His pills made him drowsy. Often he left the bench midway through oral arguments because of the unbearable pain" (1975 Term, p. 392). The situation was stressful for everyone.

In October, the doctors at Walter Reed told Douglas that his condition was permanent. Douglas and his wife Cathy traveled to the Rusk Institute to consult with the doctors there. They agreed, but said he might improve with rest. He returned to work, but the pain was too great. He decided to quit, and informed Burger and the others. A letter was sent to the President. The Douglas clerks were reassigned, with one kept available since a retired Justice always had an office and clerk available.

Due to the Douglas resignation, the Justices had to rearrange their seating orders at the conference table and in the Court. After the original tenseness passed, they settled down to work and discussing the cases at hand. One issue, *Buckley v. Valeo*, dealt with the financing of presidential campaigns from tax dollars to reduce the influence of big money on politics and elections. The law required strict reporting, which was challenged by some politicians on the basis of free speech violations. Limiting contributions amounted to limiting campaign activity and speech. Burger wanted to strike the law, but the other Justices supported parts of the law. The Justices had a time constraint, since part of the funding was due to be paid in six weeks. Without it, several candidates would

have to withdraw from the race. They decided to draft a per curiam opinion under Stewart, Powell, and White. Brennan eventually replaced White and the three divided up the work. Rehnquist decided to write a part and Burger was assigned the preamble and statement of the facts.

Douglas returned at the end of November. He still had an office and one clerk. He knew that he could work on lower court cases even though he was retired, so he came in nearly every day. He did not seem to understand that he wasn't a Justice in the sense that he had been and could not write decisions or opinions, but could do assignments from the Chief Justice. Most of his memos were ignored by the other Justices and he wrote a memo mentioning this fact, citing the relevant law as it applied to retired Justices.

The decision on the campaign funding case was to come down on January 30, and Douglas told his clerk to ready his own opinion for the announcement. The clerk refused and the opinion was announced without the input of Douglas. President Ford knew that he had to find a replacement for Douglas and his wife Betty was pushing for the appointment of a woman. President Ford eventually nominated and appointed John Paul Stevens.

The first case that Stevens sat on was *Hampton v. Mow Sun Wong*, which was questioning the constitutionality of a Civil Service Commission rule that barred aliens from holding most federal jobs. The four-to-four deadlock had Stevens with the pivotal vote. Stevens voted to find the rule unconstitutional and the majority assigned the writing of the decision to Stevens. Stevens was assigned several other cases and proved to be a strong member of the Court. In one case, *Alexandria Scrap Co. v. Hughes*, his minority opinion actually swayed the majority to change their votes.

There were several cases based on the Fourteenth Amendment saying that no one should be deprived of life, liberty, or property without due process. These were civil rights cases. Brennan believed that the Fourteenth Amendment included a person's good name. This was the issue in *Paul v. Davis*. Stewart, Burger, Blackmun, Rehnquist, and Power were the majority, with Brennan, Marshall, and White being the minority. Their action would result in fewer opportunities for civil rights suits and Fourteenth Amendment protection. Rehnquist was assigned to write the opinion.

Other cases involved the federal minimum wage laws in *National League of Cities v. Usery*. This was discussed at the March 5 conference at which it was decided that there was a precedent in *Maryland v. Wirtz*. They could not strike the law without overruling the precedent. The only difference between the two cases was the occupation of the employees. The assignment was given to Rehnquist, who wrote that states might be hard pressed to meet the financial obligation of the minimum wage. Brennan headed the dissenters, but Stevens just wrote a memo, not a dissent.

Rehnquist and Stewart became closer as the term went on. This affected the alignment of the Court. Rehnquist took on extra assignments to help out where he could. He was conscientious and determined to be a better Justice. He was now in a position where he



could influence Powell, White, and Stewart at times. To Stewart, Rehnquist was a team player and part of the political center, and Stewart was impressed with Rehnquist's opinions and dissents as well as his tactics. Rehnquist would put in extreme statements for them to edit out so his basic position was presented. Rehnquist stayed on Burger's good side and tried not to antagonize him.

There were several abortion issues that came up. With Douglas gone, they could not be sure of how the rulings would go. A Missouri law placed restrictions on abortion that had previously been ruled on. Eventually, they voted to strike the Missouri law. *Singleton v. Wulff* concerned the right of doctors to bring suit, challenging a law that prevented federal funding of abortion for the poor. The Court voted that they could. Blackmun wrote the opinions, switching his vote on one so he could write three opinions.

With Douglas gone, Brennan was now the one who was in confrontation with Burger. He didn't like Burger's tactics of vote changing or controlling the assignment of opinions by his voting. His role as senior Associate Justice meant increased frustrations for Brennan as he dealt with Burger. In one case, *Chandler v. Roudebush*, a case involving the rights of federal employees to introduce new evidence at trials, Burger changed his vote five times before making it a unanimous decision in favor of the worker's rights to enter evidence. Brennan also clashed with the Chief in the *Nebraska Press Association v. Stuart* case, in which the majority of the Justices voted to ban gag orders in lower court trials. Burger took the assignment for himself and Brennan's clerks wanted him to write a counter draft supporting a ban on all gag orders, since Burger wouldn't accept that position. Burger was insulted by the Brennan draft. Burger eventually prevailed.

Doe v. Commonwealth's Attorney was a case involving a Virginia law that made homosexual acts illegal even if they were performed in private by consenting adults. The case came from a three-judge panel and had to be decided under federal law. The Court voted to affirm the decision without offering any explanation, which infuriated Marshall.

Stevens was somewhat disappointed in his first half-terms on the Court. He was the most junior member and he was also snowed under by the amount of paperwork involved. He gave up trying to read all of the cert petitions and came to rely on the memos from his clerks. Stewart liked Stevens and applauded his efforts. White was slightly critical of Stevens and his likelihood to stand alone on issues instead of joining a majority.

Burger had been chief for six years now and he was still looking for the kind of case that would be landmark. He had a penchant for trying to find cases that would strike down the exclusionary rule regarding the admissibility of illegally seized evidence. There were two cases in this category, *Stone v. Powell* and *Wolff v. Rice*. Both were murder cases in which the defendants claimed that the evidence was illegally obtained and were petitioning to have their convictions overturned on technicalities. When they exhausted the state courts, they turned to the federal courts for a writ of habeas corpus. Powell wrote the opinion which limited the petitions for habeas corpus, but not the exclusionary

rule. Burger was upset, but couldn't do anything since the majority had joined Powell's decision.

Death penalty cases were at issue again, as to whether or not they constituted cruel and unusual punishment. The Court had been divided on the issue when Stevens arrived. There was a special Saturday conference in January to consider the death penalty cert petitions, at which they felt they should select a bundle of cases to decide the Eighth Amendment question. They chose cases from five states: Woodson, Roberts, Jurek, Proffitt, and Gregg from North Carolina, Louisiana, Texas, Florida, and Georgia, respectively. There was a conference on April 2 and voted seven to two that the death penalty was cruel and unusual. They upheld the death penalty in all cases but North Carolina. Burger assigned all five decisions to White. All of the opinions were reconciled and the judgments were announced on July 2. They ended up upholding three laws and striking two.

Two weeks later, when the Court was in recess, a petition was filed for a rehearing in the three cases where the law was upheld. The case was to come before Powell, who told Burger he would grant the stay because if anyone was executed before a full Court hearing, he would be denied his right. Burger said he would have to reconvene the Court to overturn the stay. Powell granted the stay on July 22 without Burger reconvening the Court.

The character of the Court had changed with the new appointees. On the last day of the session, July 6, five Fourth Amendment cases were handed down. All of the rulings were in favor of government and against citizens' rights, leading the authors to conclude: "The Center was in control" (1975 Term, p. 444).



Characters

Warren E. Burger

Warren E. Burger was the Chief Justice of the US Supreme Court during the period covered by this book. Burger had first met Nixon, the President who appointed him, in 1948 at the Republican National Convention where Burger was the floor manager for Minnesota Governor Harold Stassen. He was also a force in helping Eisenhower win the Presidential nomination in 1952. He served as an assistant attorney general and then became a judge in the United States Court of Appeals for the District of Columbia in 1956. During his years on the Court, Burger wanted to find a decision for a landmark case that would give him a reputation like Earl Warren had.

Burger was concerned with how he would be viewed as a Supreme Court Justice. He wanted to be remembered for strong leadership and landmark decisions. With this goal in mind, he was always delaying his vote until after the others had voted, or switching votes so that he would be in the majority. In this way, he could control the assignment of the writing of the opinion. This, he felt, would indicate strong leadership on his part. In actuality, his wishy-washy actions irritated the other Justices, because many times he made writing assignments that he shouldn't have made because he wasn't in the majority. There was no written procedure for doing these assignments, so the only way that the irregularities could be pointed out was through confrontation. William Douglas and then Brennan would occasionally confront the Chief, but there wasn't much that they could do.

William O. Douglas

Douglas was an Associate Justice of the Supreme Court. An accomplished author, Douglas had written twenty books, many articles, and speeches. Douglas taught at Yale Law School before joining the Securities and Exchange Commission. Roosevelt appointed him to the Supreme Court in 1939. He survived one impeachment attempt after the vote on the Rosenbergs in 1953 and another one was launched by the Nixon administration. Douglas is usually portrayed as the antagonist of Burger. After Douglas had his stroke, he refused to resign from the Court. This made a tense situation for everyone, since he had to be wheeled in and out of conferences, he would fall asleep during sessions, and someone had to help him shuffle the papers. He was also incontinent and had to have a bag attached for his waste. The other Justices knew that Douglas was physically and mentally incapacitated, but there was nothing that they could do to force his resignation. When he finally resigned, he still had the privilege of maintaining an office at the Court, which he did. Even though he had resigned, he kept trying to take part in various cases until they eventually had to tell him that he couldn't.

Douglas was one of the greatest jurists of his time. He took part in many decisions during his years on the Court and was widely respected by most people, despite the



impeachment attempts. The other Justices looked up to him for his leadership and his wisdom.

Stewart Potter

Potter was Associate Justice on the Supreme Court and was Burger's main opposition for the Chief Justice position. Stewart, a Republican, had been born into wealth in Ohio. He was Phi Beta Kappa at Yale before attending Yale Law School. He served on the Sixth Circuit Court of Appeals and then on the US Supreme Court in 1958, having been appointed by Eisenhower to both positions.

Hugo Black

Black was an eighty-one-year-old Associate Justice of the Supreme Court. He had graduated from the University of Alabama Law School, with his previous education consisting of reading the Great books. In 1926, he was elected to the Senate and became a Roosevelt protégé, and in 1937, Roosevelt appointed him to the Supreme Court. He resigned in 1971 and died less than two weeks after his resignation.

John Harlan

John Harlan was a Chief Justice of the Supreme Court. Coming from a wealthy family, he attended Princeton and Oxford and had been a Wall Street lawyer. He was also the grandson of a Justice. Harlan had the reputation of being a frequent dissenter on the Warren Court. He resigned in 1971 when he discovered he had cancer.

William J. Brennan

Brennan was a Supreme Court Associate Justice. After the departure of Douglas, he was the senior Associate Justice. As such, he had several run-ins with Burger over the assignment of writing opinions.

Byron White

White was an Associate Justice on the Supreme Court. He had been a University of Colorado football player who played in the NFL. He played football while attending Yale Law School. He worked as the deputy attorney general under John Kennedy, who appointed him to the Court the following year. He was known to be tough on civil rights and criminal justice.



Thurgood Marshall

Marshall was an Associate Justice on the United States Supreme Court. He had been head of the Inc. Fund until he was appointed to the Second Circuit Court of Appeals by President Kennedy in 1961. He was made Solicitor General by President Johnson in 1965, and two years later was appointed to the Supreme Court. He was the head lawyer on the original Brown case.

Harry A. Blackmun

Blackmun, of Rochester, Minnesota was appointed by Nixon to fill the vacant Fortas seat. He graduated Phi Beta Kappa from Harvard and then attended Harvard Law School. He was in private practice for sixteen years and spent ten years representing the Mayo Clinic. Eisenhower appointed him to the Eighth Circuit. He was also a life-long friend of Burger, who he went to grade school with.

Lewis Powell

Powell was a sixty-four-year-old Richmond attorney when Nixon appointed him to the Supreme Court. Powell did not want the nomination because of his age but the Virginian was a good candidate. He graduated Phi Beta Kappa from Washington and Lee College and then attended Law School there. He attended graduate school at Harvard and had served as President of the ABA and the American College of Trial Lawyers and held various other positions.

William Rehnquist

Rehnquist was appointed to the Court by Nixon in 1971. He had received his undergraduate and masters degrees from Stanford and an additional masters in history from Harvard. He attended Stanford Law and was Editor of the Law Review. He had worked as an attorney in Phoenix for sixteen years and was a Goldwater Republican. In 1969 he became the head of the Office of Legal Counsel and the U.S. Department of Justice. He was forty-seven at the time of his appointment.

John Paul Stevens

Stevens was appointed by President Ford to fill the seat vacated by William Douglas. Stevens from the Seventh Circuit Court in Chicago. He had graduated first in his law class at Northwestern University.

John Ehrlichman

Ehrlichman was Nixon's White House counsel.



Earl Warren

Warren is Chief Justice as the book opens. He is at the end of his term in 1968, having served for fifteen years.

John Mitchell

Mitchell was Attorney General under Richard Nixon.

Leon Jaworski

Jaworski was appointed Special Prosecutor after the firing of Archibald Cox.

James St. Clair

St. Clair was the attorney for President Nixon during the Watergate hearings.



Objects/Places

The United State Supreme Court appears in non-fiction

The United States Supreme Court is located in Washington D.C. at Second and Constitution. It is the place where the nine Justices hear cases and render their opinions.

University Club appears in non-fiction

The University Club is a private club in Washington D.C. that Earl Warren belonged to.

The White House appears in non-fiction

The White House in Washington D.C. is the home and office of the President of the United States. As such, it is the site of many meetings.

The U.S. Department of Justice appears in non-fiction

The Justice Department building is located in Washington D.C. and is the site of the location of the office of John Mitchell, the Attorney General under Richard Nixon.

National Lawyers Club appears in non-fiction

The National Lawyers Club is a private club in Washing D.C. favored by Warren E. Burger.

Goose Prairie appears in non-fiction

Goose Prairie was the vacation home of William O. Douglas.

Trader Vic's appears in non-fiction

Trader Vic's was a Washington D.C. restaurant where Justice Marshall and others eat.

Rochester, Minnesota appears in non-fiction

Rochester was the home of Harry Blackmun and where he returned to when the Court was not in session.



Richmond, Virginia appears in non-fiction

Richmond was the home of Lewis Powell and one of his clerks. They often rode together on the weekends.

Falls Church, Virginia appears in non-fiction

Falls Church was the Washington D.C. suburb where Justice Marshall lived.

Rusk Institute appears in non-fiction

The Rusk Institute was a rehabilitation hospital at New York University in New York City where Justice Douglas went to recover from his stroke.



Themes

The Role of Protocol

One of the themes that carries throughout the book is the role of protocol. Protocol here refers to how they do things at the Supreme Court. This doesn't just mean who sits in what chairs or walks in what order. The term is used here to describe the unwritten rules that prescribe behavior. For example, the Justices meet in the conference room to vote on cases having to do with petitions for cert or after hearing oral arguments. The unwritten rules determine the order in which they talk and vote. This is usually done in terms of seniority in that the most junior member is that last to speak.

Protocol also has to do with how assignments are made. The most senior member in the majority makes the written assignment of the opinion, and it isn't always the Chief Justice. When Burger became Chief Justice he would withhold his vote or change his vote in many cases in order to be in the majority. This then allowed him to assign the written case. This is what often became an issue between Burger and first Douglas and then Brennan who were the senior members of the Court. Many decisions that they should have assigned were assigned by Burger. Since unwritten rules are not written down, it is hard to enforce them and fight the abuses of them. There was not much that they could do in the situation except have a confrontation. This was also a recurring problem throughout the book. This was one of the most interesting things to watch throughout the book.

Office Politics

Another theme that prevails throughout the book is what one can call office politics. These are the normal little games that must be played when people work together, and the Supreme Court was no different than any office in this respect. The Justices and clerks were careful of how they dealt with one another to avoid injured feelings. The alleged shenanigans of Burger when it came to the assignments can also fall into this category. He felt that he had to control the written assignments, whether he was in the majority or not, and the ends seemed to justify the means when he came to vote delaying and vote switching.

Office politics exist alongside regular politics in terms of conservative, center, and liberal positions regarding the issues. There was some vote trading and deals that went on as one Justice would change a vote on a particular case to gain support on a different case, but this was more or less minimal. A lot of votes changed as more reasoning and research took place, but this is vote switching in response to more information becoming available on a concept or situation. Since a Justice can change his vote until the decision is announced, there was usually a sufficient period of time in which more information could become available or more discussions could take place that would allow for vote changing.



The Role of the Clerks

Each Justice had clerks assigned to him, first three clerks and then four clerks. The clerk is a lawyer who does the research and writes many of the drafts. They are professionals, not clerical employees. Clerks are hired for each term. Many clerks to the Supreme Court come from the lower courts, usually the Court of Appeals in Washington, D.C. Each Justice has a different procedure for the hiring of clerks. Some do their own interviewing, others do not and don't even meet them until the first day of work.

The Justices rely on the clerks a great deal and discuss the issues and the personalities involved with their clerks. The Justices use their clerks in different ways. Some have them do all of the research and most of the writing. Some just have them do the research and they do their own writing. It is an individual decision based on the preferences of the particular Justice. But since the clerks are all lawyers, most of them are treated as equals in many ways, which is why there is so much discussion between a Justice and his clerks. Many clerks have their own opinions and try to shape that of their Justice.

The clerks have their own social events and many of them include things like basketball games with the Justices. The Justices rely on them a great deal to do the nitty-gritty work that needs to be done. They all put in long, hard hours.

Style

Perspective

The authors are both professional writers and newsmen. Bob Woodward has written several other books and has his own off-the-record style which comes through in this book. The authors don't let on that they are the press but they are and they are telling the story of how the Supreme Court functions. They are on the scene in Washington where the action is. They know many of the personalities involved and have covered some of the major events discussed. There are many rare insights into the inner workings of the Court that are revealed from this book.

The intended audience is anybody who is interested in a behind the scenes look at the Court and its personalities. An obvious intended audience would be law school students or anybody in the legal profession. Students would find this book very informative about the day-to-day operation of the Court and what life as a clerk is like and what kind of work the clerks do. Most people who like to follow national events would also find the book to be interesting reading.

Tone

The book is written in an objective third person point of view. Woodward and Armstrong are telling a story of what goes on at the Court and they comprise the third person who is telling the story. The book, even though dealing with factual events, reads like a novel with the reader waiting to see what happens next. The authors discuss some of the issues involved in the cases but in a non-emotional way. They don't let on what their own points of view are about controversial subjects like abortion or the death penalty and they don't try to force any viewpoints on the reader at any time.

The reader has to appreciate the manner in which the book is written. Woodward is known for his off-the-record style of writing, which carries over into this book. The reader has to appreciate the ease with which the book flows. Even though there are some legal issues involved, the reader doesn't have to have a background in law to understand or follow the book. Any issues that are relevant are readily explained by the authors, which are one of the reasons why the book can appeal to a broad audience.

Numerous quotes are sprinkled throughout the book along with appropriate footnotes. Many of the footnotes are informational which allows the reader to learn more information about a particular topic.

Structure

The structure of the book is relatively simple. There is an Introduction, Prologue, and seven chapters, even though they are not called chapters. There is one for each term

from 1969 until 1975. The information is presented in chronological order, without any need for backtracking. All of the required information is presented when an issue or event is discussed, so there is no need for the reader to spend much time looking up information.

The book is very readable because it is very interesting reading. There are many footnotes throughout the book, many of which are informational, giving the reader more information about a particular event. The footnotes enhance the material in the book but are not necessary to an understanding of the information in the book.

The authors chose the best format for a book of this kind. Instead of labeling the divisions as chapters, they title them with the year of the terms in question and this seems to enhance the information and the presentation of the book. There is a selection of pictures in the book, which helps the reader to get to know the Justices a little better, since it makes them seem more human to the reader.

Quotes

"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." (Prologue, p. 10)

"Richard Nixon was impressed. This was a voice of reason, of enlightened conservatism - firm, direct and fair. Judge Burger knew what he was talking about. The President questioned him in some detail. He found the answers solid, reflecting his own views, and supported with evidence. Burger had ideas about improving the efficiency of judges. By reducing the time wasted on routine administrative tasks and mediating minor pretrial wrangle among lawyers, a judge could focus on his real job of hearing cases. Burger also was obviously not a judge who focused only on individual cases. He was concerned about the system, the prosecutors, the accused, the victims of crime, the prisons, the effect of home, school, church and community in teaching young people discipline and respect." (Prologue, p. 12)

"In fact, Burger concluded, the Supreme Court Building with its fine workmanship, its columns, its brass doors and best wood was as grand as the White House, but it had not been kept up. A top-to-bottom reorganization was needed. The nineteenth-century administrative system might be charming, but it was inefficient." (1969 Term, p. 31)

"The next day, Friday, October 24, the Justices met in conference to discuss the case. Tradition dictated that the Chief speak first, that he outline the issues and briefly state his view. Then the discussion would proceed in order of seniority, starting with Black. Theoretically, voting would then take place in the opposite order, starting with the junior Justice, Thurgood Marshall. But over a period of time, the formal vote had been dispensed with, since, in expressing his views, each Justice let it be known where he stood. If his position was firm, it amounted to a vote." (1969 Term, pp. 42-43)

"As the Justices expressed their views, Burger grew increasingly worried. The new chief had seen during this first week that many cases were not decided at conference. Feelings were tentative, disagreements subtle. Often, something had to be put down on paper before a consensus emerged. Burger knew that the press would view this case as the first test of his leadership. None of the opinions argued so far was nearly ready to be issued. Burger didn't want to let things get any more out of control than they already were." (1969 Term, p. 48)

"The chief knew that his ability to hold the Court together on the sensitive busing issues would be a crucial test of his leadership. Unanimity in key school desegregation cases was a tradition. But Burger had trouble seeing how unanimity could be achieved. As the



term began, however, Burger found that he had an unexpected ally - Hugo Black, the previous term's militant proponent of desegregation 'now'. Black accepted busing in rural areas; most children were bused all their lives to one school or another. But, for all his hatred of segregation, Black viewed the urban neighborhood school as a foundation of community life. He was opposed to massive busing to achieve racial balance and wanted limits placed on the power of federal judges to order it." (1970 Term, p. 97)

"Traditionally, the courts had power to correct violations of constitutional rights. Judges could do whatever was necessary to correct the situation once a violation was proved. Burger wanted to limit judges to the minimum necessary to correct a violation, whereas the consensus of the conference was to have judges do anything that was effective in correcting a violation. Effectiveness should be the measure of a remedy, Stewart felt. Lower court judges should not be second-guessed unless they grossly abused their discretion." (1970 Term, p. 103)

"Harlan was exceedingly upset with the haphazard way in which the Pentagon Papers case had arrived at the Court. The Justices were considering a case less than twenty-four hours after the appeals. To make matters worse, they were going to decide immediately both on cert and on whether to continue the injunction. The case had come to them so quickly that it was impossible to calculate what consequences might result from an erroneous decision." (1970 Term, p. 140)

"Still, these were issues of the very sort that made Stewart uncomfortable. Precisely because of their political nature, the Court should avoid them. But the state legislatures were always so far behind. Few seemed likely to amend their abortion laws. Much as Stewart disliked the Court's being involved in this kind of controversy, this was perhaps an instance where it had to be involved." (1971 Term, pp. 167-68)

"Four misassignments at one time, however, was simply too much to let pass. Douglas was convinced that as the senior member of the majority, he should have assigned all four of the cases. What particularly bothered him was that the Chief had given the abortion cases to Blackmun, his personal ally. Blackmun had voted with the Chief nearly every time the previous term. The Chief might as well have assigned the abortion cases to himself." (1971 Term, p. 171)

"Since Black's departure, Douglas was the only First Amendment absolutist on the Court. He and Black had been certain that it was impossible to define obscenity. Any laws banning it, therefore, were doomed to be vague and unconstitutional. There could never be an obscenity law clear enough to meet the constitutional requirement that a person must know beforehand whether he is acting illegally." (1971 Term, p. 194)

"By late April, White was tired of the unproductive dialogue between Brennan and Burger. He was still unsure in which direction to go. Brennan's approach dictated too much to the states - telling them what they could and could not do in the obscenity area.



It would be like ordering a neighborhood to accept the most rancid pornography as long as it was for consenting adults. He was unimpressed with Brennan's complaints that the local governments would never be able to unambiguously define obscenity. After all, in order to protect children and unwilling viewers, Brennan still retained a definition of obscenity - 'explicit portrayals of ultimate sex acts,' which Brennan listed."(1972 Term, pp. 249-250)

"In previous cases, the Court had declined to treat sex discrimination as it did race discrimination - as virtually unconstitutional in all cases. The term before, the Court had unanimously struck down an Idaho law that gave automatic preference to men over women as administrators of estates (*Reed v. Reed*). But the decision, written by Burger, had held simply that states could not pass laws treating men and women differently unless some clear reason was given for doing so." (1972 Term, p. 254)

"The previous year's obscenity decisions began to bear expected fruit as juries returned convictions in erratic and unpredictable patterns. The four obscenity dissenters - Brennan, Marshall, Douglas and Stewart - continued to believe the Court should reverse such convictions, but despite their four votes they did not insist that each case be granted cert. Brennan knew they would lose and a formal decision would convert local obscenity convictions into national precedents, turn minor inequalities into landmark losses. He preferred to let disparities exist in the lower courts without the Supreme Court adding its imprimatur. Instead, they regularly filed a boilerplate dissent from the cert denials. They would not push to take a case until a fifth vote to reverse a conviction seemed likely." (1973 Term, p. 280)

"At last someone asked a direct Watergate question: Would the upcoming Senate hearings and publicity prejudice a fair trial later?
The Chief bristled and started to skirt the issue, but suddenly he changed his tone. It all had to be put in historical perspective, he said. Nixon had been elected to change some things. That was his mandate. Watergate was a political battle, a way for certain political elements to do what they had failed to accomplish in the 1972 election. The President was doing what he was elected to do. Now, the news media were on a witch-hunt trying to tie the actions of his aides to the President himself. The newspapers had become character assassins, the Chief declared. All the innuendo, distortion, hearsay and sensational headlines were vindictive." (1973 Term, p. 286)

"The President's lawyer was suggesting that the Court's opinion would be advisory, not binding on his client. The President would be looking for a loophole, some convenient language in the opinion that would suit him. Then he would decide how to apply its decision. St. Clair was saying that the Court could decide the law, but that the President would apply it. Nixon was telling the court that it could tell him what criteria to use in his decision, but it could not decide for him whether to turn over the tapes." (1973 Term, p. 306)



"In a discussion with the Dutch Prime Minister, Burger defended the tapes decision, saying that it 'had not by any means weakened the presidency and on the contrary had strengthened it, since the Court's decision made reference for the first time to the doctrine of presidential privilege.' The orderly transfer of power showed the resilience of the American constitutional system. This was 'in substantial part due to the tone set by President Nixon in his excellent, statesmanlike address of resignation,' Burger said." (1974 Term, p. 352)

"With Douglas in and out of the hospital, the term's main cases continued to back up. There were many discussions at conference about what to do. Cases would be heard and decided, Douglas would participate and vote as he was able, the conference decided. But there was a point at which the welfare, prestige and authority of the Court might come into play. As it became increasingly obvious that Douglas was physically and mentally disabled, a consensus began to develop. They would hold up on any 5-to-4 decisions that had Douglas in the majority to see if someone in the minority would be willing to switch and make it 6-to-3. If that did not happen, those 5-to-5 cases would be treated as if they were 4-to-4 ties, and they would be put over for reargument the next term." (1974 Term, p. 367)

"After the Chief's circulation and Stewart's dissent, Klein conducted a campaign against the Chief's approach, giving every phrase and sentence the worst possible interpretation, particularly the 'antisocial acts' language. The debate turned not on what the Chief had said or intended, but on what Klein and some other clerks said it might mean. The isolation of the Chief and his clerks from the flow of Court gossip left the negative interpretation unrebutted, yet Klein was still unable to persuade Power to vote for Stewart's draft." (1974 Term, p. 378)

"In late October, Burger circulated the first assignment sheet of the term. At the minimum, the Chief usually gave each Justice at least one or two cases to write. Douglas got none. In each of the three cases where Douglas technically had the prerogative to assign the opinion, Brennan and Burger had consulted on the assignments. Brennan, White and Marshall would each take one. Brennan was pained to find himself conspiring with Burger on assignments. The others viewed it as the surest signal that Douglas was finished." (1975 Term, p. 393)

"President Ford and his White House advisers realized that the selection of a successor for Douglas would be a very delicate matter, given Ford's role as leader of the unsuccessful move to impeach Douglas six years earlier. And, since he was the only unelected President in history, the Democrats on the Senate Judiciary Committee might make any nomination by Ford a political issue. He had to find someone quickly and get the person confirmed before the 1976 presidential primary campaigns." (1975 Term, p. 400)

"As Brennan became more upset about Burger and the general direction of the Court's decisions, his clerks became a force of their own. Brennan infected them with suspicion, and they, in turn, fed Brennan's distrust of the Chief. The clerks also began wagering a



private, rear-guard war against the Chief. With Douglas gone, they understood that Brennan would have to be the whistle blower. They became a pocket of underground resistance with strong ties to the clerks in most of the other chambers. They constantly ridiculed Burger, even at morning coffee in Brennan's presence." (1975 Term, p. 418)

"Steven's first half-term on the Court left him disappointed and frustrated. He was distressed by the amount of paperwork. For the first month he tried to read every cert petition himself, as Brennan did. Then he gave in and accepted his clerks' cert memos. At conference, he spoke as forcefully and persuasively as he could. But as the junior Justice, he spoke last, the least effective position to be in. Burger always seemed impatient by the time discussion got around to Stevens, and the others had usually made up their minds. Stevens therefore spoke up more during oral argument, trying to get his points across before conference. He also circulated detailed memos and presented each of the others with his theories." (1975 Term, p. 427)

Topics for Discussion

Explain what happens in the seven steps involved in a Supreme Court case.

What are IFP's and what was Burger's attitude towards them?

Explain how the assignment of written opinions works. How does the lack of written rules affect this process?

When the Supreme Court is in recess, what procedures are there for emergency cases?

What is expedited review? In what circumstances is it appropriate?

Was the Supreme Court a political situation? In what ways did it or did it not serve as such?