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# **A TALL TALE OF *THE BRETHREN***

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# A Tall Tale of *The Brethren*

ROSS E. DAVIES\*

In their book **The Brethren: Inside the Supreme Court**, Bob Woodward and Scott Armstrong tell a small but striking story of the racial insensitivity of Justice Harry A. Blackmun.<sup>1</sup> It happened during the drafting and circulation of opinions in *Flood v. Kuhn*, the 1972 baseball antitrust case.<sup>2</sup> As the story goes, when Blackmun circulated the first draft of his opinion in *Flood*, with its famously romantic introductory salute to the good old days of baseball and list of “celebrated . . . names” from the history of the game, the list of names was as segregated as the Topeka public schools in 1954. Blackmun had excluded African Americans from his list of baseball celebrities. It was only when pressed to do so by Justice Thurgood Marshall that he added black players to the list—Satchel Paige, Jackie Robinson, and Roy Campanella.

It has been said that this story from **The Brethren** “makes no sense,”<sup>3</sup> but that is not enough to make it false. **The Brethren** accurately reports some pretty nonsensical behavior by people who worked at the Supreme Court during the period covered by the book (1969 to 1976). Moreover, the authors of **The Brethren** claim there is documentary proof of their story of Blackmun-versus-Marshall in *Flood*. Nevertheless, the story is false. The document from which the authors quote—Blackmun’s allegedly racially exclusive circulated first draft in *Flood*—does not exist and never did. Paige, Robinson, and Campanella were present in the first circulated draft and thereafter. And thus Marshall’s objection to the offending draft never oc-

curred either. There was nothing to object to.

Before getting to the business of correcting this sliver of the historical record, it is worth pausing to consider the value of contradicting a two-page anecdote about a single baseball case buried in the middle of a 444-page book written almost thirty years ago. In short, the accuracy of **The Brethren**’s Blackmun-versus-Marshall story matters not only because it is generally good to know the truth—especially on a subject as perennially salient as a Justice’s views on the place of race in a decision by the Court—but also because **The Brethren** is an important book, the importance of which hinges in large part on the consistency with which the stories it tells turn out to be true.

## The Brethren

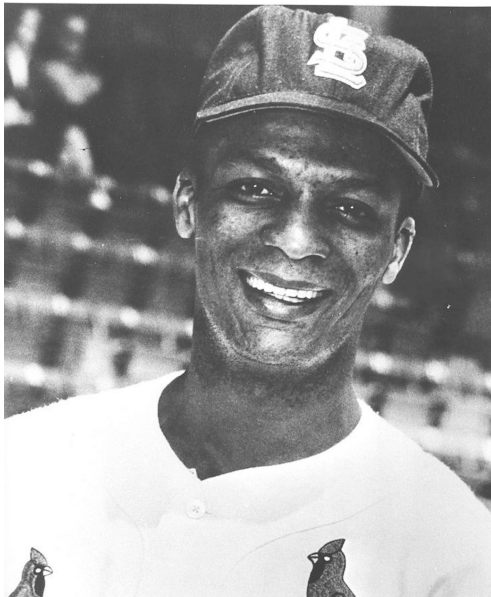
When it was published in 1979, **The Brethren** gave the public an unprecedented look at the inner workings of the Supreme Court.<sup>4</sup> It did so in a crisp, anecdotal style that made it appealing and accessible to the lay reader. The book's numerous behind-the-curtains vignettes also provided a wealth of otherwise unavailable factual detail about the thinking and behavior of the Justices and their staffs that made it irresistible to Supreme Court journalists, scholars, and other specialists. The combination of an important subject, intriguing new information, and good writing made **The Brethren** a commercial success. It was also controversial, both for its content (it related many less-than-flattering stories about the Justices and others at the Court) and for its method of reporting (it was based largely on anonymous sources and confidential documents).<sup>5</sup> The book weathered the early controversies and has gradually become a standard resource for scholars and other commentators—and, in recent years, even some federal judges<sup>6</sup>—seeking to understand the Court. The list of respectable scholars who have relied on **The Brethren** is long and lengthening.<sup>7</sup> Nowadays, whenever a new Supreme Court exposé appears, it is to **The Brethren** that it must first be compared.<sup>8</sup>

At first, however, readers—having no access of their own to Woodward and Armstrong's anonymous sources and confidential documents—had no basis for believing the stories told in **The Brethren**, other than the inherent plausibility of those stories and the authors' reputations for reliably uncovering and sorting the true from the not-so-true. On that front, there was at the time (and probably remains) no user of anonymous and confidential sources with a more impressive track record than Woodward. He had already written two anonymously sourced and largely vindicated books about the inner workings of the executive branch of the federal government, **All the President's Men** and **The Final Days**, as well as many articles based on anonymous sources

for the *Washington Post*. And Armstrong had played a major role in the research and writing of **The Final Days**.<sup>9</sup>

As time passed, **The Brethren** had to stand on its own. Anonymous sources spoke to other authors, previously confidential documents became public, and some stories told in **The Brethren** could be verified or falsified. If those stories that could be checked did not check out—if Woodward and Armstrong, or their sources, had been fabricating tales of the Supreme Court—those truths would come out, undermining not only those particular stories but also the book as a whole. After all, if the stories we *can* check turn out to be false, why should we believe the stories we *cannot* check?<sup>10</sup> On the other hand, if those stories that could be checked did check out, then the converse inference would apply: It would be only reasonable to acknowledge that the credibility of the stories we cannot check is enhanced by the accuracy of the ones we can. So far, **The Brethren**'s checkable stories have turned out, scattered bit by bit, episode by episode, to be true<sup>11</sup>—or at least not definitely false—with the exception of a few “small errors” picked up by early reviewers.<sup>12</sup> This has added to the credibility and influence of the book as a whole. Linda Greenhouse, the Pulitzer Prize-winning journalist who covers the Supreme Court for the *New York Times*, wrote in her biography of Blackmun that **The Brethren**'s “reliance on anonymous sources has made that best-selling book controversial, but, in many instances, Blackmun's case files attest to its accuracy.”<sup>13</sup> And Professor Mark Tushnet, who clerked for Marshall during part of the period covered by **The Brethren** and has studied the Court ever since, has observed that “[t]he accounts in **The Brethren** are factually accurate on nearly every point.”<sup>14</sup>

Until the opening of Blackmun's papers at the Library of Congress in 2004, the Blackmun-versus-Marshall episode in *Flood v. Kuhn* was one of the uncheckable stories. Now it can be checked, and it does not check out.



Curt Flood, the plaintiff in the landmark baseball antitrust case, played center field for the Saint Louis Cardinals. Although his 1969 legal challenge was ultimately unsuccessful, it brought about additional solidarity among players as they fought against baseball's reserve clause and sought free agency.



Bowie Kuhn was the commissioner for Major League Baseball who rejected Flood's challenge, citing the propriety of the reserve clause in the contract Flood had signed.

Which raises a more complicated question: If some of the stories we can check are true and at least one is false, does that make all of the remaining unchecked stories unreliable, or only some of them, or perhaps none? The answer to that question depends on the answers to two intermediate questions. First, where did the false story come from, the authors or a source? If the former, then all unchecked stories are subject to doubt. If the latter—if a source somehow duped the authors—then the second question arises: Did that source provide information for any other part of the book, and if so what part or parts? If the source helped only with the Blackmun-versus-Marshall story, then perhaps the rest of the book should retain the standing it enjoys today, subject perhaps to a bit of extra skepticism courtesy of one small blemish on the authors' reputation for winnowing truths from lies delivered by anonymous sources. If the source (or sources, if Woodward and Armstrong relied on more than one for Blackmun-versus-Marshall) did more, then those sto-

ries should be doubted (fool me once, shame on you; fool me twice...). The answers to these questions are probably available only from Woodward and Armstrong. But the true story of Blackmun-versus-Marshall in *Flood* can sharpen the questions, even if it cannot answer them. This is the added value of contradicting one anecdote about a single baseball case buried in the middle of **The Brethren**.

Which brings us to that anecdote: **The Brethren's** tall tale of Blackmun-versus-Marshall in the *Flood* case.

### The Tall Tale

Part I of Blackmun's published opinion in *Flood*, which he announced in Court on June 19, 1972, contains his salute to the game of baseball. It includes a list of eighty-eight "celebrated . . . names" from the history of the game, a list that grew from seventy-four names when he circulated his first draft of the opinion on

May 5, 1972. The tale of the birth and growth of the list was first reported by Woodward and Armstrong. Here is the story as they tell it on pages 190 and 191 of **The Brethren**, starting with Blackmun's reaction when Potter Stewart, the senior Justice in the majority after the initial vote in Conference on the case, assigned the opinion for the Court to him:

Blackmun was delighted. Apart from the abortion assignment, he felt he had suffered under the Chief, receiving poor opinions to write, including more than his share of tax and Indian cases. He thought that if the antitrust laws were applied to baseball, its unique position as the national pastime would be undermined. A devoted fan first of the Chicago Cubs and later the Minnesota Twins, he welcomed this chance to be one of the boys.

With his usual devotion to detail, Blackmun turned to the *Baseball Encyclopedia*, which he kept on the shelf behind his desk. He set down minimum lifetime performance standards—numbers of games played, lifetime batting averages or earned-run averages. He picked out representative stars from each of the teams, positions, and decades of organized baseball. Then, closeted away in the Justices' library, Blackmun wrote an opening section that was an ode to baseball. In three extended paragraphs, he traced the history of professional baseball. He continued with a list of "the many names, celebrated for one reason or another, that have sparked the diamond and its environs and that have provided timber for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in season and off season: Ty Cobb, Babe Ruth . . ." There were more than sev-

enty names. "The list seems endless," Blackmun wrote. He paid homage to the verse "Casey at the Bat," and other baseball literature. When he had finished, Blackmun circulated his draft.

Brennan was surprised. He thought Blackmun had been in the library researching the abortion cases, not playing with baseball cards.

One of Rehnquist's clerks called Blackmun's chambers and joked that Camillo Pascual, a former Washington Senators pitcher, should have been included in the list of greats.

Blackmun's clerk phoned back the next day. "The Justice recalls seeing Pascual pitch and remembers his fantastic curve ball. But he pulled out his Encyclopedia and looked up his record. He decided Pascual's 174 wins were not enough. It is difficult to make these judgments of who to include but Justice Blackmun felt that Pascual is just not in the same category with Christy Mathewson's 373 wins. I hope you will understand."

Calling Blackmun's chambers to request that some favorite player be included became a new game for the clerks.

Stewart was embarrassed that he had assigned the opinion to Blackmun. He tried to nudge him into recognizing the inappropriateness of the opening section, jokingly telling him that he would go along with the opinion if Blackmun would add a member of Stewart's home-town team, the Cincinnati Reds.

Blackmun added a Red.

Marshall registered his protest. The list included no black baseball players. Blackmun explained that most of the players on his list antedated World War II. Blacks had been excluded from the major leagues until 1947.

That was the point exactly, Marshall replied.

Three black players were added—Jackie Robinson, Roy Campanella, and Satchel Paige.<sup>15</sup>

This story has since been told and retold, in whole and in part, and has become part of the history of *Flood*.<sup>16</sup> Pieces of it soon checked out as true—the bit about Stewart and the addition of a Cincinnati Red, for example. Justice William O. Douglas's papers, which he had deposited in the Library of Congress, were opened to the public in 1986, just seven years after *The Brethren* was published. Douglas's file on the *Flood* case included three versions of Blackmun's *Flood* opinion:

- A version labeled “1st DRAFT” and “Circulated: 5/5/72.” This draft featured a list of only seventy-four “celebrated names,” and not one of them had been a Cincinnati Red.<sup>17</sup>
- A version labeled “2nd DRAFT” and “Recirculated 5/25/72.” In this draft, there were twelve more baseball greats on the list, one of whom was Reds pitcher Eppa Rixey.<sup>18</sup>
- A copy of the final slip opinion, dated June 19, 1972, with two more names on the list: Jimmie Foxx and Moe Berg. The story of their addition is not relevant here, and is well told (as is the entire story of the *Flood* case) in Brad Snyder's **A Well-Paid Slave: Curt Flood's Fight for Free Agency in Professional Sports**.<sup>19</sup>

When they were opened to the public during the 1990s, the papers of Justices Marshall and William J. Brennan, Jr. revealed *Flood* files that consistently matched the one in the Douglas papers. They included the same versions of Blackmun's *Flood* opinion, and no more.<sup>20</sup>

But, while the “1st DRAFT” and “2nd DRAFT” of Blackmun's *Flood* opinion in the files of Douglas, Brennan, and Marshall supported the anecdote about the addition of a Cincinnati Red, they undermined the Blackmun-versus-Marshall story about the ad-

dition of Paige, Robinson, and Campanella. The “1st DRAFT” in the Justices' files already had all three of those names. All three men were still there in the “2nd DRAFT,” and none of the twelve added celebrities was African American. And all three remained in the final slip opinion as well, accompanied by two more white additions, Foxx and Berg. That is, the three black baseball celebrities were there from the beginning, and no African Americans were added or subtracted thereafter. Moreover, the very labeling of the two drafts suggested that the version labeled “1st DRAFT” was, indeed, the first circulated draft, because it had been “Circulated,” while the “2nd DRAFT” had been “Recirculated.” If some other draft had been circulated prior to the “1st DRAFT” then surely the “1st DRAFT” would have been labeled “Recirculated” too. Furthermore, there was the word of Blackmun himself. He repeatedly acknowledged the provenance of the Rixey addition during his 1995 interviews with Professor Harold Koh for the Justice Harry A. Blackmun Oral History Project, and alluded to it in correspondence.<sup>21</sup> But he consistently denied the Blackmun-versus-Marshall story in his correspondence (it did not come up during the oral history interviews).<sup>22</sup>

Confirming a positive is, however, not the same as proving a negative. Who knows, perhaps Blackmun did circulate some sort of preliminary draft before the “1st DRAFT” in the Justices' files. Finding a needle (the added Cincinnati Red) in the proverbial haystack is one thing; proving there is no needle (the racially exclusive circulated draft) is quite another.

In addition, there is good reason for the careful reader to discount Blackmun's statements that there was no dispute with Marshall over African Americans on the list of “celebrated names.” Long experience teaches that some public figures sometimes resort to self-serving lapses of memory, artfully mendacious warping of the English language, or simple falsehood when recalling their foibles and mistakes or polishing their legacies. This



A Minnesota Twins fan, Justice Blackmun (pictured) was passionate about the game and collected baseball memorabilia. This annual pass to the American League, good for the year 1970, belonged to Blackmun.



is not to say that Blackmun lied when he denied the conflict with Marshall. Rather, it is to say that his word standing alone cannot serve in this context, no matter how honest he was in fact. Suffering that skepticism is a legacy for which he and all other public servants can thank prominent members of all three branches of the federal government who have given inaccurate accounts of their behavior only to have their misstatements discovered and disclosed, to the shame of the institution, if not the individual. And then there is the general imperfection of human memory that occasionally afflicts Supreme Court Justices just as it does the rest of us.<sup>23</sup> There is also some specific cause to suspect Blackmun's recall of matters relating to **The Brethren**. For example, in his Oral History, he minimizes his own role as a source for **The Brethren**, saying "One of them did come in and talk to me a little. It was a very short interview."<sup>24</sup> In fact, Blackmun's own records show that he met with Armstrong at least twice, and that he looked into and was impressed by Armstrong's background and credentials.<sup>25</sup> His appointment book for 1978 shows meetings with Armstrong on Thursday, July 6 at 2:30 p.m., and Friday, September 15 at 3:00 p.m., and notes added to a June 30, 1978 memorandum show the same two meetings.<sup>26</sup> Perhaps Blackmun misremembered the number of drafts he circulated in *Flood*, just as he misremembered the extent of his engagement as a source for **The Brethren**, including the number of times he met with Armstrong.

The Blackmun-versus-Marshall story is, however, more susceptible to proof or disproof than many of the stories in **The Brethren**, because the story stands or falls on the content of a document, not on the memory of a person, whether an anonymous source or a named Supreme Court Justice.

Recall that in the long second paragraph of the passage from **The Brethren** quoted above, the authors describe in detail Blackmun's preparation of his first draft, quoting from it twice, and concluding, "When he had

finished, Blackmun circulated his draft." It is this draft, they report, to which Stewart responded with a request that Blackmun add a Cincinnati Red, and to which Marshall objected on the ground that its list of "celebrated names" lacked African Americans. As Woodward and Armstrong explain in their "Introduction" to **The Brethren**, "[w]here documents are quoted, we have had direct access to the originals or to copies," including "unpublished drafts of opinions."<sup>27</sup> Thus, the quotes from the racially exclusive first draft must be from a document that the authors had in hand when they wrote the Blackmun-versus-Marshall story, not merely recitations from an anonymous source who told the authors what some document said. And thus there is no need to independently identify and corner an anonymous source—a practically impossible task, as aspiring story-checkers of **The Brethren** have learned.<sup>28</sup> All that is necessary to check the Blackmun-versus-Marshall story is to check the document—the draft Blackmun circulated without African-American players. If Blackmun circulated such a document, then Marshall's reaction and Blackmun's response are just about as plausible as the eminently believable story of Stewart's request for the addition of a Cincinnati Red. But if Blackmun did not circulate such a document, then there also was never a reaction against it by Marshall, and thus no such racial dispute between the two Justices in *Flood*.

No such document appears, or is referred to, in the other Justices' files. And four features of Blackmun's papers show that whatever **The Brethren** was quoting from in the story of Blackmun-versus-Marshall, it was not a racially exclusive draft circulated by Blackmun. Thus, the Blackmun-versus-Marshall story in **The Brethren** is not true.

First, Blackmun's *Flood* files contain two pieces of correspondence with Justice Potter Stewart which, taken together, reveal the logistical impossibility of a circulated draft predating the "5/5/72" "1st DRAFT" in the

papers of Douglas, Brennan, and Marshall. First, on March 20, 1972, Stewart announced his assignment of the opinion for the Court to Blackmun:<sup>29</sup>

March 20, 1972

*No. 71-32 – Flood v. Kuhn*

Dear Chief,

I have asked Harry Blackmun to undertake the writing of the opinion for the Court in this case, which, hopefully, can be a rather brief per curiam.

The Chief Justice

Copies to the Conference<sup>30</sup>

Blackmun's notes on *Flood* similarly indicate that when he made the assignment, Stewart did so with a request to keep it short.<sup>31</sup>

Six weeks later, Blackmun wrote to Stewart as follows:

May 4, 1972

Re: *No. 71-32 – Flood v. Kuhn*

Dear Potter:

I have a proposed Per Curiam for this case at the Printer. I must confess to you that I have done more than merely follow *Toolson* with a bare peremptory paragraph. The case, for me, proved to be an interesting one, and I have indulged myself by outlining the background somewhat extensively. As a matter of fact, this has prompted me to conclude that *Federal Baseball* and *Toolson* have a lot to be said for them. When I finally get



Satchel Paige, Jackie Robinson (pictured), and Roy Campanella all appeared on Blackmun's list of baseball's all-time greats. At issue is whether the Justice had prepared an initial draft that had not contained the names of any African American players.

to the heart of the matter, however, I give it rather summary treatment. The briefs on both sides are good and I rationalize by saying that they deserve at least this much.

Please give the opinion a reading and let me have your general reactions. The case, supposedly, is critical for the baseball world. I am not so sure about that, for I think that however it is decided, the sport will adjust and continue.<sup>32</sup>

Thus, on May 4, 1972 Blackmun is warning Stewart that his draft opinion in *Flood* is an elaborate piece of work, more than the brief per curiam Stewart had suggested, and that it is at the printer—meaning not yet ready for circulation, but soon. The next day, May 5, 1972, Blackmun circulates the “1st DRAFT” that can be found in the files of Douglas, Brennan, and Marshall. There would have been no point in sending the May 4 note to Stewart if Blackmun had already circulated a draft containing “somewhat extensive” background, including the list of “celebrated names.” If he had already circulated such a draft, then Stewart would already have known that he had “done more than merely follow *Toolson* with a bare peremptory paragraph.” But if there had been no earlier circulation, Blackmun might well have wanted to give Stewart a heads-up about the unexpectedly long (and surely unexpected in other ways, including the list of baseball celebrities) “1st DRAFT” that was in the works. And he did.

Second, Blackmun’s papers reveal his perfectly consistent opinion-circulation and recordkeeping practices, which in turn reveal that the only opinions he circulated in *Flood* were the version labeled “1st DRAFT” and “Circulated: 5/5/72” and the version labeled “2nd DRAFT” and “Recirculated: 5/25/72.”

Blackmun kept an “opinion log sheet” for every case in which he wrote an opinion for the Court or a substantial per curiam opinion. Each sheet begins with the name of the

case and the case number at the top, and lists down the right-hand side of the sheet the dates on which the decision was announced and on which drafts were circulated (for the first draft) and recirculated (for subsequent drafts). The rest of the sheet is devoted to other data about the case, including the dates on which other Justices joined Blackmun’s opinion and the circulations of concurrences and dissents by others. During the 1970–71 and 1971–72 Terms—Blackmun’s first two Terms on the Court, and the period preceding and including the drafting and announcement of his *Flood* opinion—whenever he circulated a draft opinion, he always recorded that circulation on the corresponding opinion log sheet.<sup>33</sup>

I have examined every piece of paper in every case file of every Justice whose papers are open to the public for every case in which Blackmun wrote an opinion for the Court or a substantial per curiam opinion during the 1970–71 or 1971–72 Term. In every case, Blackmun’s opinion log sheet corresponds perfectly to the circulated and recirculated drafts in those files.<sup>34</sup> And he was thorough. Consider *NLRB v. Scrivener*,<sup>35</sup> like *Flood* a 1971–72 Term case, in which his correspondence with Douglas reveals that Blackmun insisted on receipt of a formal “join” letter from Douglas so that his “records [would be] complete.”<sup>36</sup>

The opinion log sheet for *Flood v. Kuhn* was no exception to Blackmun’s invariably comprehensive and precise record-keeping. It records the same opinions found in the files of the five Justices whose papers are open to the public:

- “Circulated: 5/5/72”—the “1st DRAFT” in the Justices’ files.
- “Recirculated: 5/25/72”—the “2nd DRAFT” in the Justices’ files.
- “Announced: 6/19/72”—the slip opinion in the Justices’ files.

Like his *NLRB v. Scrivener* file, Blackmun’s opinion log sheet for *Flood* reflects his penchant for comprehensively accurate

record-keeping: it includes a correction to the date of assignment, changing it from March 20, 1972 (the date when Stewart notified the Court that he had assigned the *Flood* opinion to Blackmun) to April 3, 1972 (the date on which the Court's assignment list formally recorded Stewart's assignment of the opinion to Blackmun).<sup>37</sup>

Third, Blackmun's *Flood* files contain a five-page document consisting of proofreading and cite-checking corrections to Blackmun's *Flood* opinion, most of which are reflected in the "1st DRAFT." The document is dated "5/4/72" and signed "JTR" (the initials of John Townsend Rich, one of Blackmun's clerks at the time). Blackmun might have had a practice of circulating drafts of his opinions to the Court and only afterward enlisting his clerks to proofread and cite-check those opinions. Such a course would have been odd, even silly, and so it should come as no surprise that he did not operate that way. All of the evidence in his case files for the 1970–71 and 1971–72 Terms indicates that Blackmun's clerks squeeze his opinions before the first circulation to the other Justices, not after.<sup>38</sup> And so Rich's notes comport neatly with the timing of Blackmun's May 4 note to Stewart warning him of the "somewhat extensive" draft of his *Flood* opinion that had just gone to the printer. Rich finished proofreading and cite-checking on May 4, Blackmun promptly reviewed Rich's work and incorporated most of it, then sent the draft off to the printer and warned Stewart of what would circulate the next day—"5/5/72"—as the "1st DRAFT" of *Flood*.

Fourth and finally, Blackmun's files on the *Flood* case contain only the same three versions of his opinion that are available in the papers of Douglas, Brennan, and Marshall: (1) The version labeled "1st DRAFT" and "Circulated: 5/5/72," with a list of only seventy-four "celebrated names," including Paige, Robinson, and Campanella; (2) the version labeled "2nd DRAFT" and "Recirculated 5/25/72," with twelve more baseball greats on the list,

one of whom was Reds pitcher Eppa Rixey and none of whom was African-American; and (3) the final slip opinion, with Berg and Foxx slipped in.<sup>39</sup>

In sum, the evidence in Blackmun's papers, combined with the evidence in the papers of Douglas, Brennan, and Marshall, leaves no room for the circulation of a segregated first draft of Blackmun's *Flood* opinion. (Marshall's papers, by the way, contain no hint of any dispute of any sort, racial or otherwise, over Blackmun's list of "celebrated names.") Consider the following:

- If the story in **The Brethren** were true, then Blackmun's May 4, 1972 note to Stewart would not exist, because it reflects Blackmun's knowledge that Stewart had not as of that date seen Blackmun's "somewhat extensive[]" draft in *Flood*.
- If the story in **The Brethren** were true, then Blackmun's opinion log sheet for *Flood* would be inaccurate, even though there is not a single instance in any case from the 1970–71 or 1971–72 Terms in which a Blackmun opinion log sheet is inaccurate about any circulation of any draft of any of his opinions.
- If the story in **The Brethren** were true, then Rich would have proofread Blackmun's first circulated draft in *Flood* after that draft had circulated, even though there is not a single instance in any case from the 1970–71 or 1971–72 Terms for which a proofread has been preserved where a Blackmun clerk engaged in such nonsensical behavior. They proofed before circulation, not after.
- If the story in **The Brethren** were true, then not a single Justice whose files are open to the public would have saved the racially exclusive draft reported and quoted in **The Brethren**, even though every one of them who participated in the case saved every other draft.
- If the story in **The Brethren** were true, then the Blackmun opinion in the Justices' files labeled "1st DRAFT" and "Circulated: 5/5/72" that includes the three great

African American players would have been labeled “2nd DRAFT” and “Recirculated,” because it would have been preceded by the segregated draft from which Woodward and Armstrong quote. But there already is a version in each of those files labeled “2nd DRAFT” and “Recirculated”—the one dated “5/25/72” that features only a few additional white players, including Eppa Rixey, the Cincinnati Red.

The bottom line is that Blackmun’s first circulation in *Flood* was the “1st DRAFT” dated “5/5/72” that appears in all of the Justices’ files and that contains the names of seventy-four baseball celebrities, including the great African-American players Satchel Paige, Jackie Robinson, and Roy Campanella. Blackmun did not circulate a racially exclusive draft. It follows that any story about Marshall being offended by such a draft is wrong, because the basis for such a story—the circulated draft opinion—does not exist. Marshall and Blackmun certainly had disagreements on matters of race at the time,<sup>40</sup> but the integration of Blackmun’s list of baseball celebrities in *Flood* was not one of them.

\* \* \* \*

The fact that **The Brethren** contains inaccuracies should come as no surprise. No lengthy study of the Supreme Court or any other subject is (or likely ever will be) entirely accurate. Authors err. So do archivists, researchers, editors, typesetters, printers, and webmasters. Paper and electronic records can be incomplete or inaccurate. Human sources can be mistaken or misleading. And new discoveries can alter or destroy what were once perfectly reasonable understandings of history.

Finding each other’s inaccuracies and misinterpretations and bringing them to light is a service that historians provide to each other, to their subjects, and to the public. This kind of work involves reassessing existing evidence or combining new discoveries with that evidence to present a different—and, the revisionist hopes, more accurate—picture of the

past. **The Brethren** is a hard case, because much of its evidence is inaccessible. Its sources are anonymous and confidential.<sup>41</sup> That means there is no way for later students of the Court to return to that evidence, to reassess it, to combine it with new discoveries in order to improve our understanding of the Court. As Professor Walter Murphy observed in a review of **The Brethren**, “The scholar, of course, longs to see the full documents and to hear the tapes of the interviews, not only to check the accuracy of the authors’ work but also to test other ideas.”<sup>42</sup> Woodward and Armstrong’s approach surely enabled them to uncover many true stories that would otherwise have remained hidden, at least for a time, but it also disabled others from building on their work, at least in the conventional cumulative and synthetic senses. But at the very least, we can still compare a story presented in **The Brethren** with a story based on existing public records and new discoveries, and weigh their merits.

Which brings us to the questions suggested earlier in this article: What document were Woodward and Armstrong quoting from? Where did it, and the story of Marshall’s objection, come from? And did the source or sources for Blackmun-versus-Marshall contribute to any other stories in **The Brethren**? We are unlikely to learn the answers to these questions unless Woodward and Armstrong’s research files for **The Brethren** are opened to the public, as Woodward and Carl Bernstein’s files for **All the President’s Men** and **The Final Days** have been at the University of Texas, with files involving each confidential source remaining sealed until the source’s death.<sup>43</sup> For **The Brethren**, that is unlikely to happen anytime soon. After all, nearly all of the sources for the book spoke to Woodward and Armstrong on condition of anonymity.<sup>44</sup> Many of them were young at the time and are likely to be relying for their livelihoods and social standing on their lawyerly reputations for discretion and confidence-keeping for many years yet. It may well be that Woodward and Armstrong would prefer to endure whatever small doubts

might be raised by this article rather than break their promises to the source or sources of the Blackmun-versus-Marshall story.<sup>45</sup>

In the meantime, the careful reader of **The Brethren** might consider, on the one hand, that respected observers of the Court have concluded that “[t]he accounts in **The Brethren** are factually accurate on nearly every point”<sup>46</sup> and “in many instances, Blackmun’s case files attest to its accuracy,”<sup>47</sup> and, on the other hand, that in at least one instance—the story of Blackmun-versus-Marshall in *Flood*—the book is not accurate. For students of the Court, then, perhaps the best approach to **The Brethren** for the time being is the one to which President Ronald Reagan treated President Mikhail Gorbachev: Trust, but verify.<sup>48</sup>

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### Editor’s Note

Ross Davies, the author of “A Tall Tale of *The Brethren*,” sent a draft of the article to Bob Woodward and Scott Armstrong in September 2007, along with an invitation:

The enclosed article (which is scheduled to appear in the spring issue of the *Journal of Supreme Court History*) suggests that one passage in your book, *The Brethren*, is not accurate. If I have gone astray in any way, I would be grateful to hear about it from you before we go to press. Also, I am told by the editor of the *Journal* that she would be happy to consider printing a reply from either or both of you.

I sent a follow-up invitation of my own to Woodward and Armstrong early in 2008, and postponed publication of the article to our summer issue in order to give them plenty of time to draft a reply. Armstrong expressed an interest in replying, but in the end nothing was forthcoming from either him or Woodward. It would have been nice to include their perspective here and now, but it appears that we will have to wait for a later issue of this *Journal*, or for another forum.

### ENDNOTES

<sup>1</sup>**The Brethren: Inside the Supreme Court** 190–91 (1979) (hereafter **The Brethren**).

<sup>2</sup>407 U.S. 258 (1972).

<sup>3</sup>Brad Snyder, **A Well-Paid Slave: Curt Flood’s Fight for Free Agency in Professional Sports** 301 (2006) (hereafter **Well-Paid Slave**).

<sup>4</sup>Earlier profiles of the Court, such as Drew Pearson and Robert S. Allen’s **Nine Old Men** (1936) and J. Harvie Wilkinson’s **Serving Justice: A Supreme Court Clerk’s View** (1974), had not been anywhere near as revealing of its interior workings.

<sup>5</sup>See, e.g., Anthony Lewis, “Supreme Court Confidential,” *N.Y. Rev. Books*, Feb. 7, 1980 (hereafter “Supreme Court Confidential”); “The Evidence of **The Brethren**: An Exchange,” *N.Y. Rev. Books*, June 12, 1980 (hereafter “The Evidence of **The Brethren**”); John G. Kester, “Breaking Confidences,” *The Washingtonian*, Feb. 1980; see also Dennis J. Hutchinson, **The Man Who Once Was Whizzer White** 384–86 (1998) (hereafter **Whizzer White**); Adrian Havill, **Deep Truth: The Lives of Bob Woodward and Carl Bernstein** 130–35 (1995).

<sup>6</sup>See, e.g., *Landell v. Sorrell*, 382 F.3d 91, 109 (2d Cir. 2004), *rev’d* 126 S. Ct. 2479 (2006); *Larsen v. U.S. Navy*, 346 F. Supp. 2d 122, 132 n.5 (D.D.C. 2004).

<sup>7</sup>See, e.g., Neal Devins, “Should the Supreme Court Fear Congress?,” 90 *Minn. L. Rev.* 1337, 1341 (2006); Linda Greenhouse, “How Not to Be Chief Justice,” 154 *U. Pa. L. Rev.* 1365, 1369 (2006); James J. Brudney and Corey Ditslear, “Canons of Construction and the Elusive Quest for Neutral Reasoning,” 58 *Vand. L. Rev.* 1, 44 (2005); Clarke D. Forsythe and Stephen B. Presser, “The Tragic Failure of *Roe v. Wade*,” 10 *Tex. Rev. L. & Pol.* 85, 127 (2005); Sanford Levinson, “The Pedagogy of the First Amendment,” 52 *UCLA L. Rev.* 1359, 1361 (2005); see also G. Edward White, **The American Judicial Tradition** chs. 13 & 14 & 523 n.124 (3d ed. 2007) (describing **The Brethren** as “a source on the internal history of the Burger Court that needs to be used with great care”). A search for “woodward /5 armstrong /5 brethren” in Westlaw’s jlr database

of law reviews and similar periodicals on March 30, 2007 turned up 492 documents.

<sup>8</sup>See, e.g., David J. Garrow, "Breaking Silence and Legal Ground," *L.A. Times*, Jan. 23, 2007 (reviewing Jan Crawford Greenburg's **Supreme Conflict**); Rodger Citron, "A Peek Into the Marble Palace," *Legal Times*, May 29, 2006 (reviewing Todd Peppers's **Courtiers of the Marble Palace**); Kim I. Eisler, "Truth Teller or Sore Loser?," *Legal Times*, Apr. 27, 1998 (reviewing Edward Lazarus's **Closed Chambers**).

<sup>9</sup>Carl Bernstein and Bob Woodward, **All the President's Men** (1974); Bob Woodward and Carl Bernstein, **The Final Days** (1976).

<sup>10</sup>Victor S. Navasky, "The Selling of the Brethren," 89 *Yale L.J.* 1028, 1030 (1980).

<sup>11</sup>*Compare, e.g., The Brethren* at 357 *et seq. with Whizzer White* at 434–35, 463–65 (1998); Bruce Allen Murphy, **Wild Bill** ch. 38 (2003).

<sup>12</sup>See, e.g., Walter F. Murphy, "Spilling the Secrets of the Supreme Court," *Wash. Post Book World*, Dec. 16, 1979, at 11.

<sup>13</sup>Linda Greenhouse, **Becoming Justice Blackmun: Harry Blackmun's Supreme Court Journey** 254 (2005) (hereafter **Becoming Justice Blackmun**).

<sup>14</sup>Mark V. Tushnet, **Making Constitutional Law: Thurgood Marshall and the Supreme Court, 1961–1991** at viii (1997) (hereafter **Making Constitutional Law**).

<sup>15</sup>**The Brethren** at 190–91.

<sup>16</sup>See, e.g., Andrew O'Toole, **The Best Man Plays** 97 (2003); David Greenberg, "Baseball's Con Game," *Slate*, July 19, 2002; Roger I. Abrams, "Before the *Flood*," 9 *Marq. Sports L.J.* 307, 311 (1999); Tony Mauro, "Would the Court Go to Bat for Baseball?," *Legal Times*, Aug. 29, 1994; Chad Millman, "Bench Player," *Sports Illustrated*, Apr. 18, 1994; Max Vobiscum, "The Supreme Court's Sports Page," (Passaic County, NJ Bar Association) *Reporter*, Aug.–Sept. 1980, at 40; "Games Justices Play," *Newsweek*, Dec. 10, 1979, at 88.

<sup>17</sup>*Flood v. Kuhn*, 1st Draft at 4–5 (May 5, 1972), in Papers of William O. Douglas, Library of Congress, Manuscript Division, Box 1561 (hereafter Douglas Papers).

<sup>18</sup>*Flood v. Kuhn*, 2d Draft at 4–5 (May 25, 1972), in Douglas Papers.

<sup>19</sup>**Well-Paid Slave** at 305–6.

<sup>20</sup>*Flood v. Kuhn*, 1st Draft at 4–5 (May 5, 1972) and *Flood v. Kuhn*, 2nd Draft at 4–5 (May 25, 1972), in Papers of William J. Brennan, Jr., Library of Congress, Manuscript Division, Box I:268, Folder 2; Papers of Thurgood Marshall, Library of Congress, Manuscript Division, Box 87, Folder 10 (hereafter Marshall Papers). The *Flood* file in the papers of Justice Lewis F. Powell, Jr. contained no draft opinions at all. Lewis F. Powell, Jr. Papers, Washington and Lee University School of Law, Lewis F. Powell, Jr. Archives, Box 148. Powell determined early on in the de-

liberations over the *Flood* case that his ownership of shares of Anheuser-Busch, which owned the St. Louis Cardinals baseball team, a respondent in *Flood*, obligated him to disqualify himself, and he did so. Memorandum to the Conference (Mar. 21, 1972), in Powell Papers, box 148. The papers of the other members of the Court at the time—Chief Justice Warren Burger and Justices Potter Stewart, Byron R. White, and William H. Rehnquist—are not yet open to the public.

<sup>21</sup>The Justice Harry A. Blackmun Oral History Project 184, 186, 293 (1994–95) (hereafter Oral History); Harry A. Blackmun to Jim Caple, Feb. 11, 1997, in Papers of Harry A. Blackmun, Library of Congress, Manuscript Division, Box 145, Folder 3 (hereafter "Blackmun Papers").

<sup>22</sup>See, e.g., Harry A. Blackmun to Daniel Crystal, Oct. 9, 1980, in Blackmun Papers, Box 145, Folder 3; Harry A. Blackmun to Jim Caple, Feb. 11, 1997, in Blackmun Papers, Box 145, Folder 3.

<sup>23</sup>*Compare, e.g., Justice Thurgood Marshall*, Memorandum to the Conference (Oct. 4, 1984), in Blackmun Papers, box 1405, folder 14, *reprinted in* "NAACP Recusals," 10 *Green Bag 2d* 93, 93–99 (2006), *with Milliken v. Bradley*, 418 U.S. 717, 722 (1974); *id.* at 781 (1974) (Marshall, J., dissenting); *Meek v. Pittenger*, 421 U.S. 349, 356 n.5 (1975).

<sup>24</sup>Oral History at 292.

<sup>25</sup>See Memorandum from "sjb" to "Mr. Justice" (Jan. 17, 1978), in Blackmun Papers, Box 1435 ("sjb" were the initials of Blackmun's secretary, Shirley J. Bartlett).

<sup>26</sup>See 1978 Appointment book, in Blackmun Papers, Box 61; Memorandum from "sjb" to "Mr. Justice" (June 30, 1978), in Blackmun Papers, Box 1435; *see also Becoming Justice Blackmun* at 153.

<sup>27</sup>**The Brethren** at 4.

<sup>28</sup>See, e.g., "Supreme Court Confidential"; "The Evidence of **The Brethren**"; David J. Garrow, "The Supreme Court and **The Brethren**," 18 *Const. Commentary* 303 (2001); *see also, e.g., Leonard Garment, In Search of Deep Throat* chs. 4 & 5 (2000).

<sup>29</sup>Stewart had the privilege of assignment because he was the senior Justice in the majority at the time.

<sup>30</sup>Memorandum from Justice Potter Stewart to Chief Justice Warren Burger (March 20, 1972), in Douglas Papers, Box 1561.

<sup>31</sup>Handwritten note dated "3-20-72," in Blackmun Papers, Box 145, Folder 1 ("PS [Potter Stewart] Asks me to PC [per curiam] this essentially along t[he] lines of Toolson & n[ot] too long").

<sup>32</sup>Memorandum from Justice Harry A. Blackmun to Mr. Justice Stewart (May 4, 1972), in Blackmun Papers, Box 145, Folder 2.

<sup>33</sup>This is not to suggest that in later years he did not continue this practice. Rather, it did not seem necessary to go beyond the 1970–71 and 1971–72 Terms for the purposes of this article.

<sup>34</sup>Compare Justice Blackmun's opinion log sheets for the 1970–71 and 1971–72 Terms, in Blackmun Papers, Boxes 118, 133, with the corresponding case files in the papers of Justices Douglas (boxes 1507, 1511, 1516, 1518, 1542, 1543, 1545, 1547, 1549, 1551, 1561), Brennan (boxes I:233, I:236, I:239, I:240, I:244, I:246–I:248, I:257, I:258, I:259, I:261, I:263, I:265, I:267, I:268, I:273, II:3), Marshall (boxes 80, 81, 83–85, 87, 90, 91), Blackmun (boxes 120–22, 124, 125, 127, 129, 130, 134–40, 142, 145), and Powell (boxes 146–49).

<sup>35</sup>405 U.S. 117 (1972).

<sup>36</sup>Memorandum from Justice William Douglas to Justice Harry A. Blackmun (Feb. 16, 1972) and Memorandum from Justice Harry A. Blackmun to Justice William Douglas (Feb. 16, 1972) in Blackmun Papers, Box 142. When asked recently about Blackmun's papers, Justice Ruth Bader Ginsburg noted that "he was a great saver; he didn't toss out anything." "An Open Discussion with Justice Ruth Bader Ginsburg," 36 *Conn. L. Rev.* 1033, 1042 (2004). This is not to say that he knew all, saw all, and accurately recorded all that he knew and saw—see, e.g., *id.* at 1042 (recalling that he mistakenly noted an advocate had worn a red dress at oral argument when in fact she had worn black)—but rather that his compilations of documents relating to particular cases can generally be counted on to be complete.

<sup>37</sup>See Assignment List (Apr. 3, 1972), in Marshall Papers, Box 75.

<sup>38</sup>See generally Blackmun Papers, Boxes 119–31, 134–47.

<sup>39</sup>See Blackmun Papers, Box 145, Folder 1.

<sup>40</sup>See, e.g., *Palmer v. Thompson*, 403 U.S. 217 (1971); *Palmer v. Thompson*, 1st Draft at 3 (Apr. 29, 1971) (Blackmun, J., concurring), in Blackmun Papers, Box 124, Folder 10; **Becoming Justice Blackmun** at 67–68; see also Deborah C. Malamud, "Intuition and Science in the Race Jurisprudence of Justice Blackmun," 26 *Hastings Const. L.Q.* 73, 84–88 (1998); Henry J. Abraham, **Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton** 230–33 (rev. ed. 1999).

<sup>41</sup>This approach to studying the Court has shown signs of enduring popularity in recent times. See, e.g., Jan Crawford Greenburg, **Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme**

**Court** 321–22 (2007); Jeffrey Toobin, **The Nine: Inside the Secret World of the Supreme Court** 342 (2007).

<sup>42</sup>Walter F. Murphy, "Spilling the Secrets of the Supreme Court," *Wash. Post Book World*, Dec. 16, 1979, at 10. Scholars should be cautious, however, about exaggerating the importance of source-transparency in their work. Plenty of important and reputable scholarship generated in the academy shares **The Brethren's** source-opacity. Consider, for example, John W. Kingdon's highly regarded study of decision-making in the executive and legislative branches of the federal government, **Agendas, Alternatives, and Public Policies** (2d ed. 2003). Kingdon's book is based largely on interviews with "many congressional staffers, administration appointees, civil servants, lobbyists, journalists, researchers, and consultants" conducted during the late 1970s—the same period in which Woodward and Armstrong were doing their research for **The Brethren**. "I guaranteed [the interviewees] their anonymity," writes Kingdon, "so cannot acknowledge their help by name. But this book could not have been written without their generous cooperation." *Id.* at xvii, 232–33. Just like **The Brethren**. See also, e.g., Bennett Boskey, "Justice Reed & His Family of Law Clerks," in Bennett Boskey, **Some Joys of Lawyering** 14 n.4 (2007) (observing "that the claims of history, journalism, and biography strongly press against principles of privacy, confidentiality and ethics. There is not always a simple answer to questions of how much should be published how soon.").

<sup>43</sup>See The Woodward and Bernstein Watergate Papers: About the Papers, available at <http://www.hrc.utexas.edu/exhibitions/web/woodstein/about/> (last visited Apr. 20, 2008); Lee Hockstader, "Watergate Papers Sold For \$5 Million," *Wash. Post*, Apr. 8, 2003, at C1; see also, e.g., Bob Woodward, **The Agenda: Inside the Clinton White House** 12 (1993).

<sup>44</sup>**The Brethren** at 3–4.

<sup>45</sup>See *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); but see "The Evidence of **The Brethren**."

<sup>46</sup>**Making Constitutional Law** at viii.

<sup>47</sup>**Becoming Justice Blackmun** at 254.

<sup>48</sup>William Safire, "Nyet Problemly on Snow Jobs," *N.Y. Times*, Jan. 3, 1988, § 6, at 6 (Reagan: "Though my pronunciation may give you difficulty, the maxim is *doveryai no proveryai*. 'Trust but verify.'").