

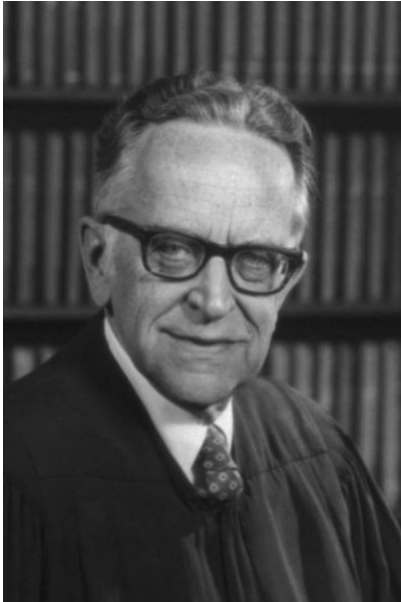


Washington Post editor/reporter Bob Woodward is in a good amount of hot water, and deservedly so, [for publicly insinuating that White House economic advisory Gene Sperling threatened him in a recent e-mail exchange](#). As it turns out, when the exchange was revealed, Sperling was merely saying — in a very friendly way — that Woodward would “regret” writing that Obama had “moved the goalposts” in the debate over the sequester. Sperling wasn’t threatening retaliation; he was arguing that Woodward would regret saying it because it was patently false, [as subsequent observers have pointed out](#).

This isn’t the first time that Woodward’s sourcing and reportage has been revealed to be seriously flawed: in *Slate*, [Tanner Colby does an epic takedown of *Wired*](#), Woodward’s portrait of John Belushi, which Belushi’s manager said was so wrong “it makes you think Nixon might be innocent.”

And then, of course, there is *The Brethren*, Woodward’s (and Scott Armstrong’s) expose of the Supreme Court. I admit that I love *The Brethren*, and find it very illuminating in many ways. But Woodward got into trouble for that, too, in ways that actually have intellectual purchase and interest for Legal Planet readers.

At issue was Woodward’s claim in the book that in a case called [Moore v. Illinois](#), decided in June 1972, Brennan refused to change his vote to free an unfairly incarcerated man because he did not want to insult Harry Blackmun, then a newly-appointed, insecure, and somewhat conservative justice. Brennan was the 5th vote for Blackmun’s opinion, and having Blackmun lose his majority, Brennan worried, would drive Blackmun closer to Chief Justice Burger. In particular, Brennan realized that key abortion and [obscenity](#) cases were coming up the next term, and he wanted Blackmun’s vote.



This contention launched a heated debate in the legal profession and the academy, and particularly [between Anthony Lewis and Woodward in the pages of the New York Review of Books](#). Lewis interviewed the same law clerks that Woodward said he had interviewed, and every single one of them denied Woodward's story; Lewis also found what he regarded as compelling evidence that Brennan could not have done such a thing. Thurgood Marshall, who wrote the dissent in *Moore*, also said that Woodward's story was ridiculous. Woodward had his own sources, and accused Lewis and others of being part of a conspiracy to protect the Court.

Reading through it all, though, I couldn't help wondering: so what if Brennan did what Woodward said he did? If Brennan sincerely thought that he needed Blackmun for these other crucial cases, why was it necessarily bad for him to have made a tacit deal in this way? It's not as if prior restraint of the press and abortion rights are irrelevant and unimportant. If you have to sacrifice one man to serve more years in prison in order to establish abortion and free-speech rights, why is that a bad thing to do?

I know: judges aren't supposed to do that. We want them to be completely principled, and not stoop to horse-trading considerations. Well, we also want a unicorn. The Supreme Court is a nine-member institution; you need to assemble five votes for a position. Yes, a justice can be very principled — and isolate him- or herself on the Court, have little influence on the direction of the law, and fail to accomplish his or her goals. We are shocked, *shocked* that politics is going on here!

People's lives are at stake in these cases, and not just the petitioner in *Moore*. If you are pro-choice, it is the hundreds and thousands of women whose lives and freedoms are at

stake. Why is it bad to decide that they are just as, or even more, important than Moore's freedom?

As it turns out, even if Brennan had made this calculation (which I doubt), it seems like it was not worth the trouble. Blackmun voted with the conservative majority in *Miller v. California*, the obscenity case, and of course wrote the opinion in *Roe v. Wade*. But that doesn't mean that Brennan was wrong.