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Book Review (reviewing Bob Woodward et al., The Brethren: Inside the Supreme Court (1979))

Philip B. Kurland

The Brethren: Inside the Supreme Court. BOB WOODWARD AND SCOTT ARMSTRONG. Simon & Schuster, New York, 1979. Pp. 467. $13.95.

Philip B. Kurland†

I have read your piece. When you strike at a king, you must kill *him.*

Ralph Waldo Emerson[1]

When Bob Woodward and Scott Armstrong, boy reporters at the *Washington Post,* sat down at their typewriter—it was an IBM Selectric—their minds were racing in anticipation of their new achievement. They had brought down a President.[2] Congress had fallen by itself. There remained only the Supreme Court to be brought to its knees and they had the ammunition to do it. They had "interviews with more than two hundred people, including several Justices, more than 170 former law clerks, and several dozen former employees of the Court."[3] What is more, each of their informants had total recall. "The sources who helped us were persons of remarkable intelligence. They had unusually precise recall about the handling of cases that came before the Supreme Court, particularly the important ones."[4] Even better, they had documents purloined from the files of the Justices.

They would show what mortals these godlike Justices are and "what fools these mortals be."[5] They would put words into the mouths of the Justices and ideas into their minds.

This time, moreover, there would be none to naysay them. The White House had vigorously denied the press charges about its Wat-

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[1] *Quoted in* M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE SHAPING YEARS 1841-1870, at 54 (1957).

[2] *See* C. BERNSTEIN & B. WOODWARD, ALL THE PRESIDENT'S MEN (1974); B. WOODWARD & C. BERNSTEIN, THE FINAL DAYS (1976). Armstrong, according to the blurb on the book jacket, "was an investigator for the Senate Watergate Committee." Of course, there were other claimants to Brutus's mantle. *See, e.g.,* J. SIRICA, TO SET THE RECORD STRAIGHT: THE BREAK-IN, THE TAPES, THE CONSPIRATORS, THE PARDON (1979), *reviewed in* Kurland, *The Power and the Glory: Passing Thoughts on Reading Judge Sirica's Watergate Exposé,* 32 STAN. L. REV. 217 (1979).

[3] B. WOODWARD & S. ARMSTRONG, THE BRETHREN 3 (1979) [hereinafter cited without cross-reference as WOODWARD & ARMSTRONG].

[4] *Id.* at 4.

[5] W. SHAKESPEARE, A MIDSUMMER NIGHT'S DREAM, III, 2, 115.

ergate behavior, whether the allegations were true or false. But the Justices wouldn't take up the gauntlet: they were under a vow of silence and it would be *infra dig* for them to speak anyway. And since none of the informers was to be identified, they, like the earlier creation, "Deep Throat," could not challenge the authors' allegations. Their technique was once condemned when it was used by Senator Joseph McCarthy, but that was different. He was a Senator; they were "the Press." Besides, it is almost impossible, under the Supreme Court's own law, to libel a public figure and certainly the Justices are public figures.

And so came to pass the best seller that would bring kudos as well as cash to these daring authors. "Well roar'd, Lion."[6]

No. I have no more to prove the truth of these statements about what went on in the minds of the authors of this volume than they have to prove the truth of their statements about what went on in the minds of the Justices. When challenged for proofs, however, I can cite with equal justification "reliable sources on background."

The authors' primary purpose in writing this volume was allegedly to strip away the veil of secrecy from the Court's deliberations. The suggestion is that there is something sinister in its private processes for decisionmaking. At the very outset the book acknowledges that these processes are of ancient vintage:

> For . . . nearly two hundred years, the Court has made its decisions in absolute secrecy, handing down its judgments in formal written opinions. Only these opinions, final and unreviewable, are published. No American institution has so completely controlled the way it is reviewed by the public. The Court's deliberative process—its internal debates, the tentative positions taken by the Justices, the preliminary votes, the various drafts of written opinions, the negotiations, confrontations, and compromises—is hidden from public view.[7]

Indeed, this is true. The Court behaves much like the editorial board of a newspaper, depriving the public of access to deliberations that could never take place if the public were admitted to them.

It is not clear just how the authors would propose to abolish this secrecy. Would they make the conference room and the Justices' chambers subject to television coverage as the Justices go about their work? Would they make the drafts and memoranda subject to

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[6] *Id.* at V, 1, 257.

[7] WOODWARD & ARMSTRONG at 1.

disclosure under the Freedom of Information Act?[8] Would they have the Justices hold press conferences? Would they use the favorite device of the "investigative reporter," the leak? The last is the reliance of this book, but only long after the events occurred. The authors have eschewed revealing "inside" information about the last few Terms lest it "interfere with the ongoing work of the Court."[9] This tacit admission that publicity about the relations among the Justices could interfere with their proper functions does not comport either with the authors' general thesis or with their production of "evidence."

There is also a mysterious hint about the authors' own bravery in doing what they did here. In praising Benjamin Bradlee, the executive editor of the *Washington Post,* and their publisher, Richard Snyder, Woodward and Armstrong say: "No other newspaper editor or book publisher would have been willing to assume the risks inherent in a detailed examination of an independent branch of government whose authority, traditions and protocols have put it beyond the reach of journalism."[10] What risks? They do not say; they say only that the risks are "inherent." Men of La Mancha in their own eyes. The Sancho Panzas who spend much of their time engaged "in detailed examination of [this] independent branch of government" recognize windmills for what they are.

Although there are repeated intimations in the book that the secrecy of the conference room and the Justices' chambers is a consequence of Warren E. Burger's tenure as chief justice, such secrecy long antedates the period of the Burger Court. And the defense of the processes are to be found in the writing of the patron saint of the authors and their informers, Chief Justice Earl Warren, who also explains a tradition at which the authors take umbrage, that the Chief Justice votes last:

> On Saturday morning, we held a conference on the cases heard during the week. The procedure was very simple. In each case, the Chief Justice would, in a few sentences, state how the case appeared to him, and how he was inclined to decide it. Then, beginning with Justice Black, the senior Justice, each would speak his mind in a similar manner. He might only say, "I look at it the same way the Chief does and come to the same conclusion," or he might say, "I view the case differently. It seems to

[8] 5 U.S.C. § 552 (1976).

[9] WOODWARD & ARMSTRONG at 2.

[10] *Id.* at Acknowledgments.

me this is the real issue, etc.," defining it. Or, "I believe it is controlled by the case of *So-and-So v. So-and-So* (citing precedent), and that brings me out the other way." Then we proceeded down the line until everyone had spoken briefly in this formal manner. During all of this, nobody was interrupted, and there was no debate. If we were all of one mind and no one desired to say anything more, the case was ready for assignment for the writing of the opinion. The Chief Justice always assigned the opinion to be written if he were with the majority. If he were not, the senior Justice who was with the majority made the assignment. If, after the first canvassing of the Court, as I have described it, there was a difference of opinion, the case was open for debate. We did not observe Robert's Rules of Order or any other definite procedure. It was a self-disciplined affair, each Justice deferring to the speaker until he was finished. The discussion proceeded in an orderly manner until all had spoken much as they desired. If they were ready to vote, we did so at that time. In voting, we reversed the process and first called on the junior member, going up the ladder with the Chief Justice voting last. I have tried diligently to learn when and why this procedure was first adopted, but without success. It is one of those things that grew up in the dim past and has been carried on without question. . . .

During these conferences, no one was in the room except the Justices—not a secretary, a law clerk, or even a messenger. If it were necessary for anyone to contact us, it was done by written message and a knock on the door. When there was a knock, the junior member of the Court answered it unless he was speaking at the time, in which case some other Justice would respond. We had a telephone in the room, but I have no recollection of its ever having been used during a conference while I was on the Court.[11]

Other histories of the Court indicate that the conference has not always been so orderly and polite as Chief Justice Warren described

[11] E. WARREN, THE MEMOIRS OF EARL WARREN 282-83 (1977). A footnote here by the editor of the Warren autobiography is relevant to *The Brethren*. "Reliable sources have it that on at least one occasion the traditional knock on the door and delivery of the message were solemnly observed to carry World Series scores to the Chief Justice." *Id.* at 283 n.†. Woodward and Armstrong sneeringly report similar interests on the part of some Justices in securing information about current sports events. *E.g.*, WOODWARD & ARMSTRONG at 302 n.*. Is there any deep insight to be derived from the fact that at least the three most recent Chief Justices have suffered the affliction of being avid sports fans? It was even rumored that Chief Justice Vinson contemplated resigning his post to become Commissioner of Baseball.

it. There is an abundance of documentary evidence to this effect in Alpheus T. Mason's biography of Chief Justice Stone.[12] For example, Stone is recorded as writing: "I have had much difficulty in herding my collection of fleas . . . and they have been so busy disagreeing with each other that I have found it necessary to take more opinions than I really should."[13] In light of their own experiences, members of the academy who attend faculty meetings would not expect anything different.

Indeed, maintaining the Justices' freedom to wrangle with each other over matters for which easy unanimous answers should not usually be expected is the real and adequate justification for the privacy of the conference room and the chambers. The charge of inappropriate secrecy, not new to this book, nettled Chief Justice Warren:

> [I]n the news media the Court is often portrayed as a mysterious body operating behind a veil of secrecy, and the general public is led to believe that its "mystique" is beyond the comprehension of normal individuals. This is far from the truth, and after sixteen years on the Court and several in retirement, I am prepared to say that its processes are more available to the public than those of the other branches of government—the Congress and the presidency.
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> The reason its activities are not better known is because the media does not consider the Court's work newsworthy until it makes a decision which stirs emotion on the part of great numbers of people on the losing side. Then the media gives a superficial judgment which is often wide of the mark, and leaves the matter to the public in that unsatisfactory condition. This is largely because news gatherers are not deeply concerned with the proceedings before the Court until decision day; their homework is thus generally inadequate. . . .
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> . . . All these briefs are public documents open to inspection. . . . All arguments to the Court are open to the public, and much of the time the courtroom is crowded with lawyers, representatives of the news media, and members of the general public. With the argument concluded, the case is submitted to the Court for decision.
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> From this point until the decision of the Court is announced to the public, the decision-making process is, of ne-

[12] A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956).

[13] *Id.* at 605 (citation omitted).

> cessity, confidential. . . . Throughout the decision-making process, members of the Court are left to their own consciences in the quiet of their chambers to reflect on the facts and the applicable law, except for any discussions they might have with their colleagues on the merits of their cases.[14]

Remember, these are not the words of the great enemy of the press, the incumbent Chief Justice, but those of him of blessed memory—the great friend of the media, at least in retrospect[15]—Earl Warren.

The authors also, on several occasions, deride the attempts of the Court to enjoin the law clerks to silence. The clerks, it is suggested, objected to the initiating lectures telling them that what they learned and what they heard in the course of their duties was to be kept confidential. If the law clerks' rage was due to the implicit suggestion that absent such admonitions they would not know enough to keep quiet, the present volume proves the desirability and perhaps the necessity, if not the efficacy, of such warnings. Better men than these clerks have received such advice over the years, and better men than they have followed it, with no showing of detriment either to the Court or the country.

The fact of the matter is that the breaches of confidentiality made available by this book have revealed not a bit of wrongdoing by the Justices. Indeed, the only revelation that comes close to the line has been proved false. The authors adduce argument that Justice Brennan traded his vote in a criminal case as an inducement to attract Justice Blackmun to the Brennan camp in future abortion and obscenity cases.[16] The charge against Brennan has since been definitively disproved.[17] But the authors have not recanted. Instead, they have fallen back on "Deep Throat": "we know that from other sources."[18] Unidentified sources, of course. As Anthony Lewis has said about this treatment of *Moore v. Illinois*,[19] in language kinder than the authors deserve:

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[14] E. WARREN, *supra* note 11, at 335, 336-37; *cf. id.* at 342 ("the judicial process as it functions in the Supreme Court is more open than that of either the legislative or executive branches of the government").

[15] *See* Dennis, *Overcoming Occupational Heredity at the Supreme Court*, 66 A.B.A.J. 41, 45 (1980) ("Burger is in fact much more forthcoming with the public and the press than was Warren, but the public has forgotten this and focuses on the man of the moment.").

[16] WOODWARD & ARMSTRONG at 224-25.

[17] *See* Lewis, *Supreme Court Confidential*, N.Y. REV. OF BOOKS, Feb. 17, 1980, at 3.

[18] *Id.*

[19] 408 U.S. 786 (1972).

> *The Brethren* . . . makes a serious charge without serious evidence—almost offhandedly, in two pages. It gets facts wrong. It gives the impression of relying on a conversation between Brennan and a law clerk that the law clerks of that term say never took place. If the passage was not meant to rely on such a conversation with a clerk, then it grossly misleads the reader. In sum, the treatment of *Moore v. Illinois* leaves doubts not only about the authors' understanding but about their scrupulousness.[20]

Virginia Woolf once wrote: "I think politicians and journalists must be the lowest of Gods creatures, creeping perpetually in the mud, and biting with one end and stinging with the other."[21] *The Brethren* is only further evidence of the validity of this dictum. The publication of *The Brethren* is a media event, that is, an occasion without any intrinsic importance that is foisted off on a gullible public through ballyhoo as though there were something there. It is a tour-de-force effected solely through "hype." P.T. Barnum would have loved it.

The Brethren is a journalist's weapon that was quite clearly aimed at the bête-noir of the American press, the incumbent Chief Justice of the United States. Chief Justice Burger was an easy target for the gossip mongering of which this book largely consists, for surely at times he is vain, overbearing, crotchety, self-righteous, and thin-skinned, just like his predecessor. Nor did the authors miss their target. But they were firing a shotgun, not a rifle, and the buckshot they scattered tore the skin of every other Justice as much as it did that of the Chief. Indeed, the three Justices that the authors and their spies seemed to regard as the most admirable were among those most severely wounded: Justices Douglas, Brennan, and Marshall. The first of these largely because of the authors' disgustingly graphic depiction of a once-great jurist—perhaps the last of the Court's giants—in the final days of his tenure when he had control over neither his mind nor his body. And Brennan appears as a whimpering, petty, hate-filled, disappointed Don Quixote, frustrated by the failure of the new Chief to follow where his predecessor had led. Marshall is made to look like a clown, in the words of Woodward and Armstrong, like an "Amos and Andy" character, which is surely unfair.

But then no man is a hero to his lackeys. The stories told in *The*

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[20] Lewis, *supra* note 17, at 4.

[21] 1 LETTERS OF VIRGINIA WOOLF 332 (N. Nicolson & J. Trautman eds. 1975).

Brethren are built on the tale bearings of the Justices' loyal ex-staff members, law clerks apparently disappointed by their failure to control the decisions of the Court. Only Justice Stevens escapes with his skin intact, and that is probably because the scope of this volume covers only the first six months of his tenure. Or perhaps it was because Stevens, unlike his colleagues, employs only two clerks at a time, thus maintaining a closeness and confidentiality that is dissipated by the large numbers in other chambers.

Doubts must exist as to the truthfulness of the tattling. The sources of the stories are unidentified, allegedly because the tattlers were unwilling to be known for their breaches of confidence. The book consists largely of hearsay, or hearsay once-, twice-, or thrice-removed. That some of it is greatly embellished by the authors' imaginations seems obvious. That some of it is pure fiction is revealed by the numerous quotations of thoughts that could be known only to the minds they occupied. William Woolfolk's novel, *Opinion of the Court,*[22] admittedly fiction, anticipated most of the contents of *The Brethren,* except that the particular cases and Justices that he fictionalizes were of an earlier vintage. (The few statements of events about which I have knowledge are plainly erroneous. These disparities from truth are not important in themselves, but, like the story of *Moore v. Illinois,*[23] sow seeds of doubt about all the other allegedly factual statements unproved by objective data.)

I do not mean to deny the validity of the primary effect of the book, a demonstration that the Emperor is in fact naked. That the Justices have—and have expressed—distaste for one another, that they bicker and engage in petty annoyances, that each regards himself as the keeper of the Holy Grail, that some lack the learning or intelligence necessary to an adequate performance of their functions, that irrationality often replaces rationality as the measure of judgment, that politics in its lowest form plays a role in adjudication, all of these things cannot be gainsaid.

The fact is, however, that the Emperor has been naked almost since he came to power. Similar contemporary disclosures could have been made—had there been similar contemporary breaches of confidence—about the Justices of the Warren Court, the Vinson Court, the Stone Court, the Hughes Court, the Taft Court, and so on back to the time when the Great Chief Justice started the Court on its road to becoming a council of revision and a continuing constitutional convention.

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[22] W. WOOLFOLK, OPINION OF THE COURT (1966).

[23] *See* text and notes at notes 16-20 *supra.*

Obviously, the Court as a public institution of no small power is a very proper object of informed criticism. Judge Learned Hand once wrote that

> while it is proper that people should find fault when their judges fail, it is only reasonable that they should recognize the difficulties. Perhaps it is also fair to ask that before the judges are blamed they should be given credit of having tried to do their best. Let them be severely brought to book, when they go wrong, but by those who will take the trouble to understand.[24]

Nothing in *The Brethren* comes close to the kind of reasoned criticism of the Court's work that was endorsed by Judge Hand. The Justices are certainly not credited with "having tried to do their best." Surely there is no evidence of an attempt or a capacity "to understand them." Their treatment of the presidential-tapes case, *United States v. Nixon*,[25] for example, seems to rest on an assumption that there really were not two sides to the issues, that Justices who were not inclined to grant review before judgment in the court of appeals, or who entertained a notion that these were political, nonjudicial questions, or who were not sure before considering the arguments that the judgment must go against Nixon, were scoundrels supporting an evil President.

What we have in *The Brethren* is essentially a collection of personal crotchets, conceits, quirks, whimsies, foibles, eccentricities, and caprices of nine human beings engaged in a task worthy of Plato's Guardians. This book is not criticism, it is only muckraking. It will afford titillation to the naive, and rouse the prurient interest of the sophisticated, political voyeur. Perhaps it is in the best tradition of the journalistic profession, but if so it is the tradition of Walter Winchell rather than Walter Lippmann. In terms of importance and longevity, its most likely precedent is a book by one of the authors' "sponsors,"[26] Benjamin Bradlee's *Conversations with Kennedy*.[27] *The Brethren* likely will bring no shame to any except those who provided the offal that was packaged in this volume.

One can readily guess as to the book's lasting consequences. Temporarily, it may cause the Justices to deny private confidences to their law clerks or even to their colleagues. It may, but is not likely to, cause a lowering of popular confidence in the Court which,

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[24] L. HAND, THE SPIRIT OF LIBERTY 110 (3d ed. 1960).

[25] 418 U.S. 683 (1974).

[26] *See* WOODWARD & ARMSTRONG at Acknowledgments.

[27] B. BRADLEE, CONVERSATIONS WITH KENNEDY (1975).

while it does not stand high in the people's estimation, stands higher than either of the other two branches of the national government—or the press.[28] Since the power of the Court depends entirely on public respect for its judgments, the Court could come to feel somewhat constrained in rewriting the Constitution, congressional statutes, and executive orders. That would be a good, but not a likely, consequence so long as the Justices look upon this book as the shoddy thing that it is.

The only sure consequence of *The Brethren* is that it will enhance the purses of its authors and publishers, thus giving the lie to Iago's proposition that "he that filches from me my good name robs me of that which not enriches him."[29] H.L. Mencken records an old German proverb: "Little people like to talk about what the great are doing."[30] And the press has taken the opportunity to cash in on the mass interest in gossip. *The Brethren* is only an example of the general trend of the press to emphasize its function of reporting minutiae—especially embarrassing minutiae—about the high and the mighty in politics, entertainment, and sports. Even the once dignified *New York Times* now has its gossip columns. It also publishes the magazine *Us*, which, with Time-Life's *People*, affords slick mass-circulation weekly magazines providing nothing but such gossip. Together with its ordinary television fare, with its semipornographic magazines exploiting the interest in male and female nudity and sexuality, and its comic strips, the press, under the protection of the first amendment as interpreted by the Supreme Court, gives the public what it wants, if at a nice profit. In light of its product, it is difficult to understand its self-righteous attitudes. *The Brethren* fits the pattern of the newsman's notion of deep research about the nation's officials and their actions. The Court is no more demeaned—although the Justices may be more resentful; they do tend to be thin-skinned—than are the legislative and executive branches of officialdom. (On rare occasions, even this self-appointed overseer of American life and government, the press, is itself the subject of study and criticism, but almost never in the media itself).[31]

It must be conceded, however, that the Court's claim to im-

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[28] *See* Carmody, *Journalists Told 4 out of 10 in Poll Favor Stronger Limitations on the Press*, N.Y. Times, Jan. 18, 1980, § A, at 10, col. 5.

[29] W. SHAKESPEARE, OTHELLO, III, 3, 163. *Cf. id.* at II, 3, 254 ("Reputation, reputation, reputation! O! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial. My reputation, Iago, my reputation!").

[30] H. MENCKEN, A NEW DICTIONARY OF QUOTATIONS 479 (1962).

[31] *See, e.g.*, D. HALBERSTAM, THE POWERS THAT BE (1979).

munity from press invasion of its deliberative processes is now on more tenuous ground than ever. The Court's functions have become so politicized that whatever immunity once attached to judicial decisionmaking no longer affords firm justification. When I suggest that the Court has become politicized, I do not mean, of course, that the Justices have allowed party loyalties or affiliations to control their judgments, although the book's treatment of the Nixon appointees—in keeping with the attitude of much of the press—would suggest such political machinations. As with the so-called Roosevelt Court, however, the expectations that the appointees of a single President would act as a bloc in the effectuation of the President's programs have proved false. By politicization I mean only that the Court's function is no longer primarily the judicial one of resolving legal controversies between contesting parties, but the legislative one of making general governmental policies for the nation, and the executive one of enforcing the policies that it so declares. The meaning of the constitutional or statutory language or of judicial precedents no longer provides the principal guides to decision. Rather, each decision seems to represent a personal choice by the Justices preferring what they think is good over what they think is less good, or less bad over bad. And there is much in *The Brethren* that underlines what we already knew. The secrecy of the conference room and the chambers, therefore, may properly be proved to be a means of concealment of the real reasons for decisions. The reasons that are purportedly given in the opinions, the book suggests, are neither the real reasons nor even the Justices' reasons but those conjured up by the Court's staff to make its conclusions palatable. But *The Brethren* falls woefully short of proof on this score.

At about the time *The Brethren* was being serialized in the newspapers and magazines, Judge Irving Kaufman of the United States Court of Appeals for the Second Circuit delivered a speech—totally unrelated to the book—in which he beseeched the country to provide the judiciary with a protector against attack. He explained the need thus: "As courts have been compelled to assume certain legislative and executive functions, they have come under attack from many quarters."[32] Of course, the courts have not "been compelled to assume certain legislative and executive functions." They have usurped these functions. It may well be, therefore, that a governmental body acting in the legislative and executive mode should be subject to the same oversight, criticism, and review af-

[32] N.Y. Times, Dec. 6, 1979, § B, at 19, col. 3 (quoting Judge Kaufman).

forded the other branches of government, and treated in the press with the same skepticism if not cynicism that critics afford these other branches. Moreover, the Justices themselves are contributing to the erosion of their privacy and the decline of the concept of the opinion as the sole explanation of their judgment by making speeches purporting to explain their judgments in terms different from those in their opinions.

There is another question suggested by the politicization of the Court. If in fact the Court is making public policy rather than merely arbitrating disputes, the question is whether the machinery available to it for its promulgation of such public policy is adequate. The briefs of counsel, even when multiplied by lobbying groups who are self-termed "friends of the Court," cannot supply the necessary data on which judgment should rest. Moreover, most briefs are still couched in constitutional and statutory language and Supreme Court precedents. They are usually only collaterally and euphemistically directed to the social and political issues that the Court will address. And certainly, the "bright and beautiful" young people who serve as law clerks do not fill the gap. (*The Brethren* suggests that the clerks have the necessary self-assurance for the job; it also suggests more clearly that they don't have the talent, experience, or wisdom for it.) The question that is not answered, then, is whether the venerated adversary system ought to be modified even more than it has been if the Court is to perform its legislative role adequately.

The problem is not newly arisen. Almost forty years ago, Justice Robert H. Jackson noted:

> Judicial justice is well adapted to ensure that established legislative rules are fairly and equitably applied to individual cases. But it is inherently ill suited, and never can be suited, to devising or enacting rules of general social policy. Litigation procedures are clumsy and narrow at best; technical and tricky at their worst.
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> Custom decrees that the Supreme Court shall be composed only of lawyers, though the Constitution does not say so. Those lawyers on the bench will hear only from lawyers at the bar. If the views of the scientist, the laborer, the business man, the social worker, the economist, the legislator, or the government executive reach the Court, it is only through the lawyer, in spite of the fact that the effect of the decision may be far greater in other fields than in jurisprudence. Thus government by lawsuit leads to a final decision guided by the learning and limited by the understanding of a single profession—the law.

> It is no condemnation of that profession to doubt its capacity to furnish single-handed the rounded and comprehensive wisdom to govern all society. No more, indeed not nearly so much, would I entrust only doctors, or economists, or engineers, or educators, or theologians, to make a final review of our democratically adopted legislation. But we must not blink the fact that legal philosophy is but one branch of learning with peculiarities of its own and that judicial review of the reasonableness of legislation means the testing of the whole social process by the single standard—of men of the law.[33]

Another question implicitly rather than explicitly raised by *The Brethren* concerns the proper role of the law clerks. There is no doubt that the offices of most of the Justices have become bureaucratized with ever growing numbers of clerks. In part, the result seems to have been that each office is now a unit in itself, a bureau within a department. One consequence is a necessarily reduced collegiality among the Justices, as each of them concentrates on the management of his own chambers, with the suggestion that the conference room becomes a cockpit rather than a forum for framing opinions about which the Justices should have already exchanged views. *The Brethren* treats discussions among some of the Justices, which are really a necessary part of their function, as conspiratorial acts, and usually characterizes them as attacks on the Chief Justice. But according to Woodward and Armstrong, it is the law clerks who undertake missions from "their" chambers to those of the other Justices; it is the law clerks who caucus. The law clerks—at least those whose interviews are reported here—have clearly overstated their importance, with their revelations, however true, of lecturing Justices on what the proper role of a Justice is, of "delivering" their Justice's votes, of making deals as to the contents of opinions, of refusing to draft arguments with which they disagree, or refusing to send out to the other members of the Court a Justice's memorandum that the clerk disliked. Much of this is Walter Mitty daydreaming. The fact remains, however, that too much of the business of the Court is not conducted by the Justices but rather by their law clerks.

The cause is plain: there is too much work for the Justices to do. The consequence is that a single law clerk writes the memorandum on which five Justices must rely in determining whether to grant review. More importantly, more and more of the opinions are

[33] R. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY 288, 291-92 (1941).

written by the law clerks rather than their Justices. Probably, there should be no objection to this if the opinions are simply rationalizations of conclusions rather than explanations of the real reasons for them. The law clerks may be serving the function of a legislative reference bureau in choosing the words to give meaning to the legislature's will, or in manufacturing the equivalent of legislative history in an effort to sneak in a different meaning for statutes from that which secured the approval of the lawmakers.

And that again raises the question whether the Justices are judges or legislators. Certainly one of the misfortunes of the bureaucratization of the Justices' chambers is that the resulting opinions are frequently jejune and their extraordinary length—the current batches of opinions fill more and more pages, making Justice Frankfurter's frequent overlong opinions seem terse by comparison—confuses rather than elucidates the problems.

Enough seriousness. *The Brethren* is meant for cakes and ale. But its readers outside the bar, the public to whom the book is addressed, will find most of it dull and uninformative. While many will buy it, it is safe to say that only a very small number will try or be able to read it through. Except for the fact that the expletives are not deleted, it is not nearly so entertaining or informative as were the unvarnished presidential tapes. Perhaps the authors would have done better by their audience had they simply taped their interviews and then published them, especially if they were to name those whose words we are asked to accept at face value. How different would their stories be if they were deprived of the confidentiality they refused to give to the Court?