

THE BRETHREN. By Bob Woodward and Scott Armstrong. New York: Simon and Schuster. 1979. Pp. 467. \$13.95.

The purpose of the authors of *The Brethren*, as I understand it from their Introduction, is to open to public scrutiny the “deliberative process” of the Supreme Court, which has, through the secrecy of its deliberations, historically “controlled the way it is viewed by the public” to an extent permitted no other American institution.¹ This is presumably an important goal because “[m]uch of recent history, notably the period that included the Vietnam war and the multiple scandals known as Watergate, suggests that the detailed steps of decision making, the often hidden motives of the decision makers, can be as important as the eventual decisions themselves.”² The technique used in the effort to achieve this goal is a type of investigative journalism that is now a part of the product of all major news enterprises. Bob Woodward and Carl Bernstein described it in a case study of their Watergate work, *All the President’s Men*, and used it in their fascinating account (of unknown accuracy) of what went on in the White House prior to President Nixon’s resignation, *The Final Days*. The technique is heavily dependent on the use of both unidentified, protected sources—interviews conducted “‘on background,’ meaning that the identity of the source will be kept confidential”³—and mysterious documents, the nature or even authenticity of which cannot be checked, many of which appear to have been given to the authors in breach of confidential relationships. These factors create very serious problems in the application of this technique to the work of the Supreme Court.

In the first place, the accuracy, or at least the completeness, of the description of the secret nature of the Court’s work is very questionable. The Court is in most ways, as Renata Adler pointed out in her review of *The Brethren*,⁴ the most public of all decisionmakers. The cases brought before it consist of formal briefs and records that are virtually always totally and easily available to journalists, lawyers, and the general public.⁵ Oral arguments are not only public, they

¹ B. Woodward & S. Armstrong, *The Brethren* 1 (1979) [hereinafter cited by page number only].

² *Id.*

³ P. 3.

⁴ N.Y. Times, Dec. 16, 1979, § 7 (Book Reviews), at 1.

⁵ An exception is the Pentagon Papers case, *New York Times Co. v. United States*, 403 U.S. 713 (1971), which is discussed at some length in *The Brethren*, pp. 139-50. A substantial part of the discussion is based on the public record. There is a story included about a telephone call from James Reston of the *Times* to the Chief Justice, which is one of many illustrations of

are bugged; and the resulting transcripts and tapes are publicly available and were used in *The Brethren*. Decisions in cases given full hearings are almost invariably explained in opinions (excerpts from which are used at times in *The Brethren* without differentiating between public and other documents⁶) and are accompanied with distressing frequency by concurrences and dissents from other Justices. The only decisions that are not explained are summary orders on appeal and denials of certiorari, and even in such cases there are increasing numbers of dissenting and concurring opinions.⁷ Of course, given the workload of the Court, there is no conceivable way in which these decisions could all be individually explained, or even addressed; moreover, there is no need for any explanation in the vast preponderance of the cases.

There are many reasons for the "secrecy"—I would prefer the word "privacy"—of the Court's conferences and of the collegial work that goes into the production of the opinions of the Court, the concurrences, and the dissents. For example, the Court deals with many cases in which leaks and rumors about the probable result would have important effects in financial markets. Further, in all cases in which there is a division of the Court, the positions of the Justices are tentative, and should be, until the result is final. It is, after all, a principal purpose of a dissent to persuade members of the majority that they are making a mistake in the case, and of a concurrence to persuade the authors of the Court's opinion to modify or qualify it in some way

the frustration that attends use of the investigative reporting technique. No source is given for the story, of course, and a footnote states that Mr. Reston did not remember any such call, which suggests that (1) he had an extraordinary loss of memory about such an important matter, or (2) he did not tell the truth in the interview with whoever interviewed him (which is not disclosed), or (3) there was no such call. The matter is left unresolved. The story is written in such a way that it suggests at least triple hearsay—the Chief Justice to Justice Harlan to some clerk or other person who recounted the story to Mr. Woodward or Mr. Armstrong or one of their assistants—and there may, of course, have been other links in the chain. See pp. 148-49.

A more serious suggestion of an attempt to improperly influence a decision of the Court is in the story of approaches made by Thomas Corcoran, a Washington lawyer, to Justice Black and later to Justice Brennan about a petition for rehearing in *Utah Pub. Serv. Comm'n v. El Paso Natural Gas Co.*, 395 U.S. 464 (1969), rehearing denied, 399 U.S. 937 (1970). Pp. 79-85. It is the only episode in the book that comes anywhere near disclosing a scandal, and it is not a scandal about judicial behavior; there is no intimation whatsoever of any improper or even ambiguous behavior by any of the Justices. The book does not disclose whether Mr. Corcoran was asked about the matter. Justice Brennan recused himself on the petition for rehearing, although he had participated in the decision on the merits. P. 84.

⁶ E.g., p. 149.

⁷ See Linzer, *The Meaning of Certiorari Denials*, 79 Colum. L. Rev. 1227, 1255-77, 1291-99 (1979). For discussion, see Mr. Justice Stevens in *Singleton v. Commissioner*, 439 U.S. 940, 942-46 (1978) (commenting on the denial of certiorari).

before that opinion issues. The cases that come to the Court are difficult, and the intellectual ferment that goes into the deliberative process is necessary to permit members of the Court to do their best in judging them. In addition, there is no orderly means by which the public, or even counsel in a case, could respond to public deliberations; the Court could not work with an indefinite series of arguments and rearguments.

I take it that the authors would not quarrel with these points, so that the analogy to Vietnam and Watergate,⁸ matters in which what would have been required was public disclosure of governmental decisionmaking while it was going on, is not intended to be compelling. Instead their point must have to do only with disclosure after the fact. Since lawyers and legal academics spend much of their time trying to analyze what considerations lie behind the actions and opinions of the Court, I take it also that critics of *The Brethren* do not quarrel with efforts to understand fully the Court's decisionmaking process. The question instead is only whether the technique used in *The Brethren* really furthers that common enterprise. In answering that question, I am conscious of the need to curb tendencies to protect professional, and especially academic, turf. Nevertheless, I cannot escape the conclusion of most lawyers who study the work of the Court that the book is a small contribution, if any at all, to the history of the Court's product during the seven terms covered, and an even smaller contribution to an understanding of the Court's institutional role in the constitutional structure.

Part of the problem lies in the investigative technique itself. Since the authors assert that almost none of the information gathered could have been obtained without a pledge not to disclose the source,⁹ it is not possible to check the accuracy of anything except excerpts from oral arguments and from opinions. In most cases, of course, the information is so trivial that it makes little difference whether it is correct, except perhaps to the feelings of the individual Justices. But in those instances in which the information is of some interest, it is infuriating to have no way in which to form an independent judgment about its accuracy.

The only attempt I know of anyone to trace a story in *The Brethren* back to its source was made by Anthony Lewis in the *New York Review of Books*.¹⁰ The decision was *Moore v. Illinois*,¹¹ a doctrinally

⁸ See p. 1.

⁹ Pp. 3-4.

¹⁰ Lewis, *N.Y. Rev. Books*, Feb. 7, 1980, at 3.

¹¹ 408 U.S. 786 (1972).

unimportant decision requiring application of the rule of *Brady v. Maryland*¹² to the facts. Certiorari was granted apparently because it was a capital case (and this was the Term, and the volume of the United States Reports, of *Furman v. Georgia*¹³), but the grant included a question concerning the nondisclosure to the defense of evidence, said to be exculpatory, which was possessed by the prosecution. The conviction was affirmed in a five-to-four decision as to the nondisclosure question, although the judgment imposing the death sentence was reversed. After misidentifying Justice Brennan as the author of the *Brady* decision,¹⁴ the authors of *The Brethren* accuse him of refusing to change his decisive vote with the majority, even though he "understood" that the dissent of Justice Marshall was "correct," because he "felt that if he voted against Blackmun now, it might make it more difficult to reach him in the abortion cases or even the obscenity cases."¹⁵ The story as written appears to have come directly or indirectly¹⁶ from one of Justice Brennan's clerks; at least the statements as to what Justice Brennan "understood" and "felt" are plainly attributed to a conversation about the case that one of the clerks is supposed to have had with Justice Brennan. Mr. Lewis, at one time a very good investigative reporter himself, attempted to trace the story backward by interviewing not only the clerks for that term of Justices Brennan and Marshall, but all the clerks then serving with any Justice. He was unable to find any confirmation of the main point of the story—that Justice Brennan cast a vote he knew to be wrong because of concern about the effect of his vote on the possible behavior of Justice Blackmun in other, unrelated cases. There is in the story a highly uncomplimentary implication about Justice Blackmun's possible future behavior in those cases (or at least Justice Brennan's prediction of it), as well as about Justice

¹² 373 U.S. 83 (1963).

¹³ 408 U.S. 238 (1972).

¹⁴ The opinion of Justice Douglas was announced by Justice Brennan. 373 U.S. 83, 84 (1963).

¹⁵ P. 225. The ominous closing paragraph of this passage, which is also the closing paragraph of the chapter on the 1971 Term, reads "Brennan had his priorities. His priority in this case was Harry Blackmun. There would be no new trial for 'Slick' Moore." *Id.*

¹⁶ A direct quotation in the story, attributed to one of Justice Brennan's clerks, is the statement, "He won't leave Harry on this," supposedly made to one of Justice Marshall's clerks. *Id.* This leaves open the possibility that the authors wanted to give the impression of relying on information from the Marshall clerk, reciting what some Brennan clerk said to the Marshall clerk about what Justice Brennan said to that or some other Brennan clerk. Of course, there may be other links in any such chain of gossip. Wholly apart from the implications of the use of the familiar "Harry," the use of a direct quotation seems extraordinarily bold for a careful journalist under the circumstances.

Brennan's behavior in the *Brady* case itself. Whatever the ambiguities in whatever was said by whoever spoke to the authors of *The Brethren* about the matter, it is highly unsatisfactory, to say the least, to have it rest on such fragile and unverifiable sources. This instance makes it impossible to accept as true any similar material of even passing significance.

Another problem, perhaps the result of an understandable effort to write a popular success, lies in the authors' frequently treating as factual material that they could not possibly have known to be fact. I refer to the almost countless instances in which the authors purport to describe what went on in a Justice's mind at a particular time. It is conceivable, although barely so, that Justice Blackmun told one of the authors' sources that from his first day as a Justice, he "had felt unworthy, unqualified, unable to perform up to standard,"¹⁷ so that this portrayal of his feelings met the stated standard of being based on information coming "from the Justices themselves, their diaries or memoranda, their statements to clerks or colleagues, or their positions as regularly enunciated in their published Court opinions."¹⁸ It is even possible that the Chief Justice, who clearly did not talk to the authors himself, told other sources precisely what went on in his mind when he was "sitting in his chair at the end of the table"¹⁹ at the conference in which the *Holmes County* school case²⁰ was discussed in October 1969. It is not, however, credible that the authors had the kind of hard evidence they claim to have had by their own standard, for attribution to the Justices of "thoughts, feelings, conclusions, predispositions and motivations,"²¹ for all of the steady stream of such attributions in the book. It detracts from one's confidence in the entire work, and therefore from its usefulness as a part of the Court's history, to have permitted this kind of loose journalism to dilute the force of the other data.²²

¹⁷ P. 182.

¹⁸ P. 4.

¹⁹ P. 43.

²⁰ *Alexander v. Holmes County Bd. of Educ.*, 396 U.S. 19 (1969). Three sentences from the passage illustrate the problems: "The Warren Court had built much of its reputation on fifteen years of school desegregation cases. Now, Warren Burger, as Chief Justice, would guide the Court to its next milestone. It would be a test of his leadership." P. 43. Taken alone, the first sentence might be construed to be a statement of historical fact, but in the context of the whole paragraph, and particularly the two succeeding sentences, it is part of someone's mind-reading. Another example of reading the mind of Chief Justice Burger during the same conference occurs on page 48. And on page 25, the authors require us to believe that they obtained evidence of what the Chief Justice "vowed to himself."

²¹ P. 4.

²² In reading the book, I noted mind-reading, intruding on the mental processes of every Justice who served during the period, on the following pages, some of them containing multiple

These defects do not, of course, wholly destroy the usefulness of the book. The book does, I think, establish the fact, in case anyone had any doubt about it, that the Justices are nine individual men, with differing premises and priorities about the function of the Court, its relationship to other parts of the constitutional structure (especially the Congress, the state legislatures, the state courts), and the substantive content of the sweeping and general language of parts of the Constitution. The institutional necessity of deciding very difficult cases, and of trying to explain their outcomes in language that, if possible, is satisfactory to at least a majority of the Court in every case that is heard, makes interplay, bargaining, negotiation, coalition-forming, and general tactical and strategic ferment not only inevitable but necessary to the institutional commission.²³

The reason *The Brethren* adds so little to an understanding of the Court's processes is that it reveals the fact that the Justices work together in these ways without in any way supplementing that basic fact with analysis or insight about the Court's product, the problems it confronts, or, except in the most superficial way, the principles and premises of the individual Justices. It is not, after all, a new fact.²⁴

examples: pp. 21, 24, 25, 26, 43, 48, 53, 59, 65, 67, 73, 81, 82, 95, 283-84, 285, 313, 314, 379, 422 (Burger, C.J.); 46, 52, 53, 55, 57, 69, 90-91 (Harlan, J.); 37, 46, 60, 62, 80, 85, 140 (Black, J.); 46, 51, 105, 189, 231, 254, 310, 345, 360, 408, 419, 425 (Brennan, J.); 50, 51, 205, 208, 210, 221 (Marshall, J.); 54, 55, 73, 75, 100, 101, 103, 206, 209, 255, 256, 301, 379, 382, 430 (Stewart, J.); 82, 83, 85, 98, 106, 249, 396 (the passage on this page does not quite read Justice Douglas' mind, but does claim to describe something that happened when the Justice was alone in his chambers) (Douglas, J.); 173, 182, 267, 410 (Blackmun, J.); 185, 193, 392, 416, 428 (White, J.); 205, 212, 213, 214, 256, 257, 377, 432 (Powell, J.); 409, 427, 428, 429, 430, 435, 442 (Stevens, J.); 409-13 (Rehnquist, J.). On page 419, Justice Brennan is described as so "insulted," although refusing "to pass along the humiliation to his clerks," by Chief Justice Burger's assignment to him of a minor patent case, *Sakraida v. Ag Pro, Inc.*, 425 U.S. 273 (1976), that in a later, similarly minor case, *United States v. Hopkins*, 427 U.S. 123 (1976), he "decided to vote whichever way would leave him in the minority, 'so that bastard can't give me cases like this.'" P. 419. In fact, Justice Brennan voted with the majority in the case, which was decided per curiam with Justice Powell dissenting. See 427 U.S. at 124, 131.

²³ "But we act in these matters not by authority of our competence but by force of our commissions." *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640 (1943) (Jackson, J.). The rhythm of the phrase was repeated by Justice Jackson: "We are not final because we are infallible, but we are infallible only because we are final." *Brown v. Allen*, 344 U.S. 443, 540 (1953) (concurring in the result).

²⁴ Historical information, based upon sources and materials that can be checked, about the ways Justices have worked with each other on the Court, and the ways opinions have been put together at various times, exists in many forms. An unpublished paper by Laird Hart, Yale Law School 1980, analyzes some of the material, including what is in *The Brethren*, in terms of the political science perspectives about the median voter, coalitions and countercoalitions, and control of the flow of information. The sources about the Court's work that Mr. Hart used in his analysis include A. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis* (1957); T.

What *The Brethren* does is to popularize the fact, to make it available to a nonprofessional public, and to illustrate it over and over again. An addition to knowledge about the process requires at least one, and perhaps all, of three additional elements: an articulated and principled concept of how a Justice should behave in interaction with others on the Court, a comprehensive grasp of the issues at stake in the cases discussed, and an analytical framework within which to describe the behavior of individuals within a group like the Supreme Court. Given these elements, enormously enlightening and interesting work can be and has been done²⁵ with respect to the internal decisionmaking process in a particular case, a particular area of law, a particular period, or the work of a particular Justice. In fact, such work does not require any inside or behind-the-scenes information, although that might enrich the product. All that is really required, as is illustrated, for example, by Owen Fiss' analysis²⁶ of the *Dombrowski* case,²⁷ is a careful, intelligent, and imaginative reading of the published opinions of the Justices in an area.

The Brethren does none of these things. The most, the best, that it does is to provide data, that, if used carefully, may help others to write thoughtfully about the internal processes of the Court. Yet there is a disservice done that accompanies this service. The data presented were gathered almost randomly, depending on who would talk about what, and what written materials the authors were able to persuade former clerks or other sources to produce from the papers taken away after their work with the Justices. There is no understanding shown of the complex issues and policies at stake in the cases that are the subject of the courthouse gossip that is repeated. Worse, the book is written in such a way that the disagreements and differences among the Justices, and the efforts to accommodate them, could have

Marvell, *Appellate Courts and Lawyers: Information Gathering in the Adversary System* (1976); A. Mason, *Harlan Fiske Stone: Pillar of the Law* (1956); A. Mason, *The Supreme Court: Vehicle of Revealed Truth or Power Group, 1930-1937* (1953); W. Murphy, *Elements of Judicial Strategy* (1964); W. Murphy and C. Pritchett, *Courts, Judges, and Politics* (2d. ed. 1974); B. Schubert, *Judicial Behavior: A Reader in Theory and Research* (1964); A. Westin, *The Anatomy of a Constitutional Law Case* (1958); G. White, *The American Judicial Tradition* (1976); and numerous articles. On *Brown v. Board of Educ.*, 347 U.S. 483 (1954), see R. Kluger, *Simple Justice* (1976).

²⁵ For example, Laird Hart's piece, *supra* note 24, cites Bickel's work on Justice Brandeis, *supra* note 24, at 164, for the fact that Justice Peckham's major premise as a judge, translated into popular language by Justice Holmes, was "God damn it."

²⁶ See Fiss, *Dombrowski*, 86 *Yale L.J.* 1103 (1977).

²⁷ *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

been about personalities, or shares in a partnership, or political spoils, or any other standardless division of resources, instead of matters of deep principle and intellectual conviction. And that basic picture of the work of the Court, which I regret is the picture that the authors have sketched out, and perhaps the one that they believe reflects reality, is just plain wrong.

BURKE MARSHALL*

* John Thomas Smith Professor of Law, Yale University. A.B., 1944, LL.B., 1951, Yale University.