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# Book Review: Much Ado About Nothing: The Brethren: Inside the Supreme Court

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Ayns: Book Review

**MUCH ADO ABOUT NOTHING:  
THE BRETHERN: INSIDE THE SUPREME COURT**

By Bob Woodward and Scott Armstrong  
Simon & Schuster, 1979 - 467 pp.

Reviewed by Richard L. Ayns\*

**J**UST IN TIME for the 1979 Christmas shopping season, Simon and Schuster published Bob Woodward<sup>1</sup> and Scott Armstrong's<sup>2</sup> *The Brethren*. The marketing strategy was well executed. Billed as a look at the Court's secret "deliberative process," the "hidden motives" of the Justices, and a revelation of the "implications of power and influence" in the nation's highest court,<sup>3</sup> the previews of the book offered the "titillating prospect of finding out court secrets,"<sup>4</sup> which made the publication of the book itself a "major event."<sup>5</sup> Success with the media was instantaneous. *The Brethren* made the cover and eleven inside pages of *Newsweek*;<sup>6</sup> was discussed in a segment of "60 Minutes,"<sup>7</sup> and was chosen as the main selection of the Book of the Month Club for December of 1979.<sup>8</sup> Even prior to the official publication date of December 17,<sup>9</sup> there was discussion as to both movie and paperback rights.<sup>10</sup>

Though Woodward himself was quoted as saying in many ways *The Brethren* was "boring,"<sup>11</sup> the initial reviews by the critics were far kinder. *Newsweek* characterized the book as "revealing" and spoke of "dramatic disclosures" which were said to be, even when "mildly put," "provocative for the Court and the nation."<sup>12</sup> Fellow journalist Lyle Denniston<sup>13</sup> hailed the work as one of "immense importance to the history of the Supreme

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<sup>1</sup> Mr. Woodward is the Assistant Managing Editor for Metropolitan News of The Washington Post. He co-authored ALL THE PRESIDENT'S MEN (1974) and THE FINAL DAYS (1976).

<sup>2</sup> Mr. Armstrong is a reporter for The Washington Post. He served as an investigator for the Senate Watergate Committee and assisted in work on THE FINAL DAYS (1976). See Lewin, 'Boring' Bombshell Drops on Brethren, The National Law Journal, December 17, 1979, at 16, col. 2.

<sup>3</sup> Book Jacket, THE BRETHERN.

<sup>4</sup> Lewin, *supra* note 2, at 16, col. 1.

<sup>5</sup> *Id.*

<sup>6</sup> NEWSWEEK, December 10, 1979, at cover and 76-91.

<sup>7</sup> Lewin, *supra* note 2, at 16, col. 1.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 1.

<sup>12</sup> *Supra* note 6, at 76, 78, 79.

<sup>13</sup> Mr. Denniston is a reporter who covers the United States Supreme Court for the Washington Star. *Some Critics Call Woodstrong Book "Gossip" by "Trust Us" Journalist*, National Law Journal, December 31, 1979 at 12, Col. 1.

Court"<sup>14</sup> and concluded that it was "invaluable to those whose work or avocation it is to follow the court."<sup>15</sup>

The extent to which *The Brethren* captured the attention of the reading public may be gauged not only by the reviews which have appeared in a variety of publications,<sup>16</sup> but also by the fact that responses to the book have been forthcoming from one party whose case was discussed;<sup>17</sup> from former law clerks who were interviewed by the authors;<sup>18</sup> from a former Justice of the Court;<sup>19</sup> and from one of the Justices presently sitting on the court.<sup>20</sup>

With such auspicious beginnings, *The Brethren* would appear to be a vital and important book which should be included upon the "required" reading list of those who wish to keep abreast of developments involving the Court and the evolution of constitutional law. Unfortunately, for anyone familiar with the decisions of the Court, the high expectations raised by *The Brethren* will not be met. Even when viewed in the most charitable light, the "insights" into the decision-making process to be gained from *The Brethren* are slight.<sup>21</sup>

The research for *The Brethren*, though perhaps tedious, was predictable. Limiting their study to the first seven years of Warren E. Burger's tenure as Chief Justice (1969-1976), Woodward and Armstrong "read as many of the cases and as much of the background material . . . as time would allow."<sup>22</sup> But, like others who had sought more direct information concerning the judicial system, they also utilized the time-tested interview—

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *E.g.*, NEWSWEEK, December 10, 1979. (Cover and pp. 76-91); Alder, *The Justices and the Journalist*, The New York Times Book Review, December 16, 1979, at 1; Leonard *Books of the Times*, The New York Times, December 7, 1979; Lewin, "Boring" Bombshell Drops on *Brethren*, The National Law Journal, December 17, 1979, at 1; MacKenzie, Book Review, The National Law Journal, December 31, 1979, at 12; *Some Critics Call Woodstrong Book "Gossip" by "Trust Us" Journalist*, National Law Journal, December 31, 1979 at 12.

<sup>17</sup> Letter to NEWSWEEK, January 7, 1980, at 5 by G. Scott Cuming, Senior Vice President and General Counsel for the El Paso Co. of Houston, Texas.

<sup>18</sup> *E.g.*, Letter to NEWSWEEK, January 7, 1980, at 5 by James E. Scarboro of Phoenix, Arizona, one of the former law clerks interviewed.

<sup>19</sup> Goldberg, *A Former Justice on "The Brethren,"* National Law Journal, January 21, 1980, at 14.

<sup>20</sup> Letter of Mr. Justice Potter Stewart to NEWSWEEK, December 21, 1979, at 7.

<sup>21</sup> Co-author Scott Armstrong assessed the importance of THE BRETHREN in terms of its contribution to understanding the Court's decision-making process:

If we've done our job well, people will see beyond the details to a better understanding of the process.

Lewin, *supra* note 2, at 17.

<sup>22</sup> B. WOODWARD & S. ARMSTRONG, THE BRETHREN 3 (1979). One recurring criticism has been that the authors failed to devote enough time and study to the published opinions of the Court. *E.g.*, Letter to The National Law Journal, January 28, 1980, at 14, col. 3 by Stanford Constitutional Law Professor Gerald Gunther.

a valuable tool honored in use by both journalists and lawyers.<sup>23</sup> It was the latter technique which produced “[m]ost” of the information for their book.<sup>24</sup> These interviews were said to involve more than two hundred people, including “several Justices, more than 170 former law clerks, and several dozen former employees of the Court.”<sup>25</sup> In addition to the oral information, the authors also indicate that they obtained documents “from the chambers of eleven of the twelve Justices” who were on the Court during the period in question.<sup>26</sup> These documents are said to include internal memoranda, letters, notes from the conferences of the Justices, case assignment sheets, diaries and unpublished and uncirculated draft opinions.<sup>27</sup>

Having satisfied themselves as to the reliability of their sources<sup>28</sup> the authors proceeded to examine selected cases which they believed offered “insight” into the internal decision-making processes of the Court.<sup>29</sup> After a short prologue which chronicles the appointment of Warren Burger as Chief Justice, Woodward and Armstrong proceed through seven chapters, one for each Court term commencing with 1967 and ending with the 1975 term.

Interspersed with the chronicle of the background of case decisions is a running commentary on what is purported to be the inside views and attitudes of the Justices. In most instances the scenes presented are far

<sup>23</sup> Examples of others who have utilized Law Clerks, Judges or other court personnel as sources for analyzing the judicial process include Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OREGON L. REV. 299 (1961); and MARVELL, *APPELLATE COURTS AND LAWYERS: INFORMATION GATHERING IN THE ADVERSARY SYSTEM* 6 (1978).

<sup>24</sup> B. WOODWARD & S. ARMSTRONG, *supra* note 22, at 3.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 4.

<sup>27</sup> *Id.* The documents are said to be composed of thousands of pages and to fill eight drawers. *Id.*

<sup>28</sup> *Id.*

The sources who helped us were persons of remarkable intelligence. They had unusually precise recall about the handling of cases that came before the Court, particularly the important ones.

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In virtually every instance we had *at least one, usually two, and often three or four* reliable sources in the chambers of each Justice for each of the seven years we have covered. Where documents are quoted, we have had direct access to the originals or to copies . . . (emphasis added.)

Focusing upon the emphasized language, one reviewer has criticized the authors for “vague enumeration” which simply indicated that Woodward and Armstrong “prefer . . . implications of massiveness to precise statements of simple facts,” Adler, *supra* note 16, at 1, 24.

<sup>29</sup> *Id.* at 2.

Examples of the type of cases treated include the abortion cases, *Roe v. Wade*, 410 U.S. 113 (1973); and *Doe v. Bolton*, 410 U.S. 179 (1973); Muhammed Ali’s selective service case, *Clay v. United States*, 403 U.S. 698 (1970); and the Nixon-tapes case, *United States v. Nixon*, 418 U.S. 683 (1974).

Based upon the authors’ index, it appears that they treated 179 cases in some fashion. The fact that no citation was provided for any of the cases referred to may be one indication that the book was targeted towards laymen rather than lawyers and judges.

from complimentary. With respect to the Chief Justice, the authors report Warren Burger's first draft opinion in the *Alexander v. Holmes County Bd. of Education* case<sup>30</sup> confirmed the "worst suspicions"<sup>31</sup> of Justice Stewart who later supposedly said that Chief Justice Burger was a "show" rather than a "real" leader for the Court.<sup>32</sup> Justice Douglas was said to be so sure of the Chief Justice's position upon issues before the Court that when his health was failing he assured his former law clerk that he could still function properly by simply "see[ing] how the Chief votes and vote[ing] the other way."<sup>33</sup> And Justice Powell, in reviewing Chief Justice Burger's draft of the decision in the Detroit segregation case<sup>34</sup> was quoted as saying: "If an associate in my law firm had done this, I'd fire him."<sup>35</sup>

Nor do the other Justices fair much better. Justice Brennan is accused of allowing an unfair murder conviction to stand in order to avoid offending Justice Blackmun.<sup>36</sup> Justice Douglas is portrayed as a man who tyrannized his clerks and tragically attempted to sit as a "tenth" Justice even after he had resigned from the Court.<sup>37</sup> Byron White is painted as a basketball court "bully" who likes to "muscle" out the clerks he plays with.<sup>38</sup> Justices Stewart and Marshall are both criticized for not being diligent in their work.<sup>39</sup> Justice Rehnquist is accused of deliberately distorting the facts of cases in order to reach the decisions he wants.<sup>40</sup> Only the then newcomer, Justice Stevens, seems to escape criticism.

In attempting to assess the value of *The Brethren*, two questions predominate. First, what information do Woodward and Armstrong give the reader that was not available before? Second, how useful is that information in either understanding or reforming the Court?

With respect to the first question, one might begin with consideration of the general conclusions which can be reached from the information presented by the authors.

The one explicitly articulated by Woodward and Armstrong is that,

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<sup>30</sup> 396 U.S. 19 (1969).

<sup>31</sup> B. WOODWARD & S. ARMSTRONG, *supra* note 22, at 54.

<sup>32</sup> The full quote attributed to Justice Stewart was:

On ocean liners they used to have two captains. One for show, to take the women to dinner. The other to pilot the ship safely. The Chief is the show captain. All we need now is a real captain.

<sup>33</sup> *Id.* at 391.

<sup>34</sup> *Milliken v. Bradley*, 418 U.S. 717 (1974).

<sup>35</sup> B. WOODWARD & S. ARMSTRONG, *supra* note 22, at 284.

<sup>36</sup> *Id.* at 225. Justice Brennan's clerks for that Term, the supposed source of the authors' information, have stated that the accusation made in *THE BRETHREN* is untrue. See note 51, *infra*.

<sup>37</sup> *Id.* at 433.

<sup>38</sup> *Id.* at 185.

<sup>39</sup> *Id.* at 270.

<sup>40</sup> *Id.* at 222.

in their opinion, the Court is ideologically divided and is led, not by the Chief Justice, but rather by a committee of "the center" composed of Justices Stewart, White, Powell, and Stevens.<sup>41</sup> To that may be added the summary of the conclusions former Justice Goldberg thought could be drawn from the book:

Justices are human, differ between themselves, are not often polite in their characterizations of each other and lobby strongly with their colleagues for support of positions they profoundly hold.<sup>42</sup>

Contrary to the promotions of the book, these are not the type of "disclosures" which were likely to surprise "any lawyer or other student of the Court."<sup>43</sup> These same conclusions not only could be drawn from a simple reading of the Court's opinions or reference to a review of the Court's decisions,<sup>44</sup> but almost identical conclusions actually were made in a survey of constitutional law professors conducted prior to the publication of *The Brethren*.<sup>45</sup> Hence, one of the major disappointments of *The Brethren* was its failure to generate any new, significant information concerning the overall operation of the Court.

On the other hand, when considering the information which Woodward and Armstrong claim to have obtained concerning specific cases and the actions of individual Justices, the information is certainly deserving of the adjective "new." The harder question is whether their claims are worthy of credit.

At the outset, the care with which the authors approached their subject is at least open to question. An examination of their introductory materials, as well as their subsequent treatment indicates at least the possibility that the authors never really understood the difference between proceeding in the Court by virtue of certiorari as opposed to appeal.<sup>46</sup> Further, demonstrable factual errors exist. In treating one case alone, the authors give an incorrect name,<sup>47</sup> have the case decided in the wrong year,<sup>48</sup> and at-

<sup>41</sup> *Id.* at 444.

<sup>42</sup> Goldberg, *supra* note 19.

<sup>43</sup> Adler, *supra* note 16, at 24, col. 3. See also Denniston, *supra* note 13.

<sup>44</sup> E.g., *The Supreme Court, 1978 Term*, 93 HARV. L. REV. Table I (B) & (C) 276-277 (1978).

<sup>45</sup> Lavine, *Profs Rate High Court as Average*, National Law Journal, December 13, 1979, at 1; *A Confused and Divided Court*, National Law Journal, January 21, 1980, at 6.

<sup>46</sup> B. WOODWARD & S. ARMSTRONG, *supra* note 22, at 2-3. Another who has put this conclusion even more strongly is Adler, *supra* note 6. For a general discussion of the differences see STERN & GRESSMAN, *SUPREME COURT PRACTICE* (5th ed. 1978), especially at 156-157, 162-165, 168-172, 503-504, 515, 540, 317-319, 1078-1079, 353-360.

<sup>47</sup> Listed as *Roth v. Bd. of Regents* rather than *Bd. of Regents v. Roth*, 408 U.S. 564 (1972). B. WOODWARD & S. ARMSTRONG, *supra* note 22, at 404.

<sup>48</sup> Said to be decided in 1971 rather than 1972. *Id.*

tribute language to Justice Stewart in that opinion which is simply not there.<sup>49</sup>

While these may seem like relatively minor errors, they do reflect a lack of care in treating easily identifiable and verifiable facts. In a work which relies upon anonymous sources for subjective information, this lack of care with objective information is one of the facts which the reader must weigh in deciding whether to credit the various accounts presented.

This is particularly true since the factual accuracy of portions of *The Brethren* has already been publicly challenged by the El Paso Company;<sup>50</sup> the former law clerks of Mr. Justice Brennan;<sup>51</sup> and Mr. Justice Stewart.<sup>52</sup>

The importance of such possible discrepancies is heightened by the fact that the authors not only use "confidential" sources, but that *all* of their sources remain anonymous. Thus, the reader is deprived of the usual opportunity to assess the reliability of the information based upon the source; the source's opportunity to know; the source's background and perspective; and other similar matters. Moreover, by keeping *all* sources hidden from view, the authors have made it impossible for the reader to judge the whole by a representative part. This approach has opened Woodward and Armstrong to the charge of "Trust Us" Journalism<sup>53</sup> and the claim that they have done nothing more than conclude that: "at least somebody said it happened, so maybe it really did."<sup>54</sup>

A related problem is the fact that it appears that the overwhelming

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<sup>49</sup> "Moreover, Stewart felt trapped by a phrase Rehnquist had convinced him to add to a 1971 opinion. Though it had seemed harmless to Stewart at the time, the phrase said that due process should be invoked *only* for rights specifically created by governments." (emphasis added) *Id.*

<sup>50</sup> The authors reported that Thomas G. Corcoran attempted to lobby the Justices to reconsider a case in which El Paso was involved and was acting on El Paso's behalf. *Utah Public Service Commission v. El Paso Natural Gas Co.*, 395 U.S. 404, 405 U.S. 1061 (1972). See *Id.* at 79-86. The El Paso Co. has denied that Thomas G. Corcoran was authorized to take any action in its behalf in seeking reconsideration in that case. *Supra* note 17.

<sup>51</sup> Relying upon a supposed conversation with one of Justice Brennan's law clerks, the authors maintain that Justice Brennan voted against his conscience in *Moore v. Illinois*, 408 U.S. 786 (1972), in order to curry favor with Justice Blackmun. Brennan's clerks for that term deny that any such conversation took place between them and the Justice. *National Law Journal*, January 28, 1980, at 35.

<sup>52</sup> *THE BROTHERS* maintains that Justice Stewart withdrew himself from consideration of possible appointment as Chief Justice in 1969 in part because his wife "had a drinking problem." B. WOODWARD & S. ARMSTRONG, *supra* note 22, at 16. Justice Stewart has publicly indicated that his wife has been a "complete teetotaler" since before 1963 and that his wife had no "problem" that affected his decision.

<sup>53</sup> Denniston, *supra* note 13, at 12.

<sup>54</sup> Leonard, *supra* note 16.

See also Jerold Auerbach, author, *quoted supra* note 53 at col. 1:

What bothers me about the Woodstrong approach is the belief that the minute you can find two sources who can testify to the same thing that thing must therefore have happened. To a historian that makes no sense at all; it proves only that two people have said the same thing.

bulk of the information came from the same source: former law clerks to the Justices.<sup>55</sup> In fact, the view of the Justices' clerks is so pervasive that the book might well have been entitled *The Law Clerks* rather than *The Brethren*. A flavor of this perspective can be illustrated from the accounts in *Furman v. Georgia*<sup>56</sup> and *Miller v. California*.<sup>57</sup>

While the Court's clerks certainly have a unique vantage point from which to view the Court, their use as sources is not without its hazards. First, it should be emphasized that the Clerks' are not in the conference room with the Justices.<sup>58</sup> Hence, much of the information relied upon is "secondhand." The mere repetition of the "story" may give rise to innocent misunderstanding. Second, the Justices themselves, in relating incidents from conference, may well present the information in such a way that it places them in the most favorable light and detracts from those with whom they may have disagreed on a given day.<sup>59</sup>

Third, those who have studied the law clerk/judge relationship have noted that the vast majority of clerks tend to hold opinions of their judges that almost reach "hero worship" and that when interviewed they typically praised their own judges and criticized the other judges on the court.<sup>60</sup> If this same phenomena occurs with clerks to Supreme Court Justices, then it would tend to make one cautious about crediting accounts that are either praiseworthy of the Justice for whom a given clerk worked, or critical of any Justice for whom the clerk did not work.

Fourth, one must consider the "reliability" of the law clerks who provided Woodward and Armstrong with what appears to be confidential

<sup>55</sup> B. WOODWARD & S. ARMSTRONG, *supra* note 22, at 3. Of some 200 people interviewed, more than 170 were said to be former law clerks.

<sup>56</sup> 408 U.S. 238 (1972). The narrative after Justice White supposedly informed his clerks that he would vote to strike down the death penalty in the *Furman* case includes the following at page 218:

The clerks took a copy of the opinion back to their office . . .  
His clerks found it ironic . . .  
Still, the clerks were satisfied . . .  
. . . The clerks thought . . .

<sup>57</sup> 413 U.S. 15 (1973). Concerning the drafting of that opinion, Woodward and Armstrong, at pages 250-251 write:

Burger's clerk delivered each successive draft to White's chambers with an apology for its tone. The clerk said he had done his best to harness and control the Chief . . .

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Almost ritualistically, White's clerk would secure White's suggestion that certain language be dropped, and then would feed the edited version back to Burger's chambers

. . . .

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In Powell's chambers, his two liberal clerks kept up the pressure on their boss to join Brennan . . . ."

<sup>58</sup> Goldberg, *supra* note 19.

<sup>59</sup> *Id.*

<sup>60</sup> MARVELL, *supra* note 23, at 91.

information.<sup>61</sup> Given the historic confidential relationship between law clerk and judge, the fact that it appears that at least some clerks breached confidentiality may be significant in assessing their credibility. One might conclude that those who *did* give supposedly confidential information to the authors are the very people in whose credibility one would be least likely to rely.<sup>62</sup>

Fifth, it appears that at least some of the authors sources have succumbed to that all-too human tendency to attribute more importance to one's role than it really has. In spite of several explicit examples where Woodward and Armstrong portray the clerks as being unable to convince the Justices to change their opinions, there is nevertheless an impression created by much of the book that it is the clerks, and not the Justices, who really decide the cases. This, of course, raises the historic debate as to whether law clerks have too much "power" over the Justices.<sup>63</sup> In fact, "rumors" have "persisted" that certain Justices rely upon their law clerks too much. In the past such rumors attached to Chief Justice Vinson, Justices Murphy, Burton, Black, and Clark.<sup>64</sup>

Although the debate will no doubt continue, it is difficult to believe that a "highly skilled, middle-aged judge, with years of practice and judicial experience behind him; having read the briefs of the parties and discussed the case with his colleagues on the bench," is going to be swayed by the "personal philosophy" of a recent law graduate, no matter how well educated s/he may be.<sup>65</sup> This view has been attested to by studies concerning the lower court which indicate that, from the perspective of both the judges and the law clerks, the law clerks change the minds of the judges very seldom and, when they do, it is a change based upon new information concerning the facts or the law and *not* upon philosophy or judicial doctrine.<sup>66</sup>

As if the foregoing methodological complications were not enough, the authors attempted to go beyond the "facts" and tried to "attribute thoughts, feelings, conclusions, predispositions and motivations to each of

<sup>61</sup> For considerations of the debate over whether there was a breach of confidentiality, and if so, its extent, *see, e.g., Breach of Court Secrecy Angers Former Clerks*, *The National Law Journal*, December 17, 1979, at 17; Press, Ma, Howard & Kasindorf, *Does the Book Go To Far?*, *NEWSWEEK*, December 10, 1979, p. 78; Editorial, *The Court's New Clothes*, *The National Law Journal*, December 17, 1979 at 18; Scarboro, *supra* note 18.

Far more serious breaches of confidentiality by law clerks involving advanced disclosure of the results of cases have occurred in the past, one of which resulted in an indictment of a United States Supreme Court law clerk, *see Newland, supra* note 23, at 310; Sweeney, *In [The] United States Court of Appeals*, 33 *ALA. LAWYER* 171 (1972); *MARVELL, supra* note 23, at 9.

<sup>62</sup> "... another serious subtext is the patronizing, self-infatuated trivialization, by recent clerks' of the relation of clerkship—. . ." Adler, *supra* note 16, at 25, col. 2.

<sup>63</sup> *E.g., Rehnquist, Who Writes the Decisions of the Supreme Court*, *U.S. NEWS & WORLD REPORT*, December 13, 1957, at 74.

<sup>64</sup> Newland, *supra* note 23, at 315. As to Justice Black, *cf. Dennis, Overcoming Occupational Heredity at the Supreme Court*, 66 *A.B.A.J.* 41, 42 (1980).

<sup>65</sup> Johnson, *What Do Law Clerks Do?* 22 *TEX. B.J.* 229, 261 (1959).

<sup>66</sup> *MARVELL, supra* note 23, at 91-96.

the Justices.”<sup>67</sup> This resulted in an approach, not unlike a historical novel, in which the authors attempt to bring the reader into the mind of each of the Justices: “Stewart knew . . .”<sup>68</sup> “Stewart thought . . .”<sup>69</sup> “The Chief was now angry.”<sup>70</sup> Stewart and Black were worried.”<sup>71</sup> Brennan felt”<sup>72</sup> “Rehnquist realized . . .”<sup>73</sup> The examples are numerous.<sup>74</sup>

Having concluded that the general portrait of the Court as presented by *The Brethren* is one which was already known, and that the more specific information set forth is presented in such a manner that the reader cannot fairly form an opinion as to whether it should be credited or not, the question still remains whether the book has any “usefulness.” If we assume the truth of the view presented by the authors, what can or should we do?

Out of the “Watergate” scandal revelations were made which produced action. Special prosecutors were appointed; criminal prosecution commenced; and impeachment proceedings initiated. In the long run those who were exposed were removed from positions of power. Institutionally a standing office of the special prosecutor was created;<sup>75</sup> and statutes were enacted to cover the disposition of presidential records.<sup>76</sup>

In marked contrast, in *The Brethren*, no information is provided from which any wrong-doing can be inferred, nor upon which any institutional reform can be predicated. In fact, the only criticism of the current Court as an “institution” seems to be a feeling that the Justices are sometimes involved in “shading votes” and making “deals” on cases rather than voting their personal convictions.<sup>77</sup>

But the surprising fact is not that this may occur, but that anyone would expect a Court composed of nine individuals to be able to reach any consensus without compromise.<sup>78</sup> As Llewellyn has noted, in order for the opinion of a multiple-member Court to be a “group expression,” there must be a process of “consultation” which “goes some distance to smooth the unevenness of individual temper and training into a moving average more

<sup>67</sup> B. WOODWARD & S. ARMSTRONG, *supra* note 22, at 4.

<sup>68</sup> *Id.* at 54.

<sup>69</sup> *Id.* at 55.

<sup>70</sup> *Id.* at 321.

<sup>71</sup> *Id.* at 85.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 411.

<sup>74</sup> A review of Adler’s list of such phrases includes: “Burger was furious.” “Harlan was furious.” “Brennan was furious.” Adler, *supra* note 16, at 25.

<sup>75</sup> 38 Fed. Reg. 30739 (1974) as amended by 38 Fed. Reg. 32805 (1974). See also 28 U.S.C. § 591 *et. seq.* (Supp. 1980).

<sup>76</sup> 44 U.S.C. § 2101 *et. seq.* (Supp. 1980).

<sup>77</sup> NEWSWEEK, *supra* note 6, at 76.

<sup>78</sup> “. . . the Justice might, in deference to the Justices, add to or subtract from the opinion or make ambiguous what had been explicit; for the need to hold a majority was an ever-present consideration.” Brudney & Wolfson, *Mr. Justice Rutledge—Law Clerk’s Reflections*, 25 IND. L.J. 455, 458 (1959).

predictable than the decisions of diverse single judges.”<sup>79</sup> Indeed, the adoption by the Supreme Court of the practice of attempting to offer one institutionalized opinion (as opposed to each Justice offering a separate opinion in every individual case) with the resulting necessity of compromise has generally been seen as one of the major contributions that Chief Justice John Marshall made to forming the Court into a national institution capable of performing its role under the Constitution.<sup>80</sup>

Thus, rather than being a sign of concern, the fact that consensus decision-making is utilized is a sign that the system is working as it was designed.<sup>81</sup> Closely related to the “bargaining” concern, is the fascination with the account of the Nixon tapes case in which authorship of the opinion was supposedly taken away from the Chief Justice by a committee of the Court.<sup>82</sup> This is thought to reflect poorly upon the leadership and intellectual abilities of the Chief Justice. But even accepting *The Brethren’s* outline of events as true, other interpretations are possible.

For example, with so many competing interests it may have been simply impossible for any *one* Justice to prepare an opinion which could command an unanimous Court. Indeed, one might well conclude that the Chief Justice is to be commended because, rather than stubbornly insisting upon his own product, he was willing to accept alternative versions, which did incorporate much of his original work, for the sake of unity on an important and monumental decision.

Moreover, it should be noted that Woodward and Armstrong have uncovered nothing extraordinary in this “committee” process. To the contrary, for over 30 years it has been a matter of public record that a “committee” composed of Justices Stone, Butler, and Van Devanter “authored” the decision in *Meyers v. United States*<sup>83</sup> which bears the name of Chief Justice Taft. It appears that this “committee”, like that in *United States v. Nixon*, was formed after its members concluded that the numerous revisions made by the Chief Justice were simply not going to be satisfactory to the majority.<sup>84</sup> Though Chief Justice Taft is said to have accepted that effort with a little more grace than *The Brethren* attributes to the current Chief Justice, the fact remains that the phenomena is not new; it has not been hidden from the public eye; and it offers no suggestion for reforming the institution.

Nor are the findings of “human frailties” likely to be any more fruit-

<sup>79</sup> LLEWELLYN, *THE COMMON LAW TRADITIONS DECIDING APPEALS*, 26 (1960).

<sup>80</sup> *E.g.*, LEONARD BAKER, *JOHN MARSHALL: A LIFE IN LAW*, 414-417 (1974).

<sup>81</sup> This is not meant to imply that this is the only way the system could work. For example, the Justices could each be required to issue separate opinions without consultation. The point is that under the current practice they are doing that which is thought to be proper.

<sup>82</sup> B. WOODWARD & S. ARMSTRONG, *supra* note 22, at 287-347.

<sup>83</sup> 272 U.S. 52 (1926).

<sup>84</sup> See generally McCormick, *A Law Clerk’s Recollections*, 46 COL. L. REV. 710, 711 (1974).

ful. Indeed, the proper assessment of the significance of the specific incidents related by *The Brethren* is likely to lie somewhere between former Justice Goldberg's "so what's new"<sup>85</sup> and reporter Adler's "So what?"<sup>86</sup> A summary of the faults attributed to the individual Justices puts one in mind of Dean Atcheson's humorous account of a book which made a direct attack on the integrity of the Supreme Court in the 1950's:<sup>87</sup>

Every once in a while it apparently is discovered . . . that human institutions, devised by human beings and operated by human beings, disclose the human touch. This discovery is a very surprising one apparently to those who make it.

It is particularly surprisingly when the objects of the discovery are judges and courts, and it becomes most surprising, devastatingly so, when the subject or the object of the discovery is our highest Court . . . is an institution conducted over a great many years by human beings, but by very depraved human beings. [Laughter.]<sup>88</sup>

Of course, in *The Brethren* there were no charges of "depravity." But, if Woodward and Armstrong's sources are to be credited, then the indictment for displaying human frailties is certainly sufficient to withstand a motion to dismiss. Indeed, the alleged conduct of the many of the Justices is exactly what one might expect of a small group of individuals with strong political and philosophical differences, who are forced to work together over long periods of time in order to reach majority decisions over controversial issues of national importance.<sup>89</sup> Other than indicating that perhaps Presidents should nominate Supreme Court Judges who will be more polite to their peers and confide less in their law clerks, *The Brethren* offers no information about the individual conduct of the Justices which would be useful in considering institutional reform.

Thus, the "disclosures" made by *The Brethren* are neither dramatic nor productive. The high expectations raised by the promotion of the book have not been met. Perhaps the major reason for this failure to live up to the expectations held forth is that the authors themselves begin with a mistaken premise. That premise—the only one held by the authors which

<sup>85</sup> *Supra* note 19.

<sup>86</sup> Adler, *supra* note 16, at 26, col. 1.

<sup>87</sup> FRED RODELL, *NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955* (1955). Reviewed by Senator George Wharton Pepper, 41 A.B.A.J. 1146 (1955).

<sup>88</sup> Atcheson, *Recollections of Service with the Federal Supreme Court*, 18 ALA. L.J. 355, 356 (1957). See also LEWELLYN, *supra* note 79.

The place to begin is with the fact that the men of our appellate bench are human beings. I have never understood why the cynic talks and thinks as if this were not so. *Id.* at 53.

<sup>89</sup> "... the Supreme Court behaves like any other committee with which I've had any acquaintances. Its scruples are relative; its personalities clash; its many pairs of eyes are on the main chance, the good opinion of prosperity, the boss, the clock, and sometimes the Constitution". Leonard, *supra* note 16.

they explicitly reveal—is that the Court is “final and unreviewable;”<sup>90</sup> that the court has “by and large escaped public scrutiny”<sup>91</sup> and, most of all, that the Court makes its decisions “in absolute secrecy.”<sup>92</sup>

But, contrary to Armstrong and Woodward’s perception, the decision-making Supreme Court, like other appellate courts, “is actually quite open compared with that at the top level of many organizations.”<sup>93</sup>

Unlike decisions of the other branches of government, or even of the editorial staff of the Washington Post, everyone has free access to a record of the facts that was created in a public courtroom. Any interested person can weigh the deliberations of the Supreme Court against the public decisions of at least one and often other lower courts in the same case. Each of the parties has presented a brief covering both the law and the facts which is also freely accessible to the public. Oral arguments at the Court are open and the questions of the Justices are reported not only in professional journals<sup>94</sup> but also in the popular media.

Finally, there is the Court’s published opinion. As one journalist has perceptively noted, the Court, unlike other institutions, “identifies its sources.”<sup>95</sup> The legislature can make something “the law” simply by saying it is. A journalist can say: “These are the facts and I need not tell you who told me so.”<sup>96</sup> But

The Court says: This is the law . . . and, under our system, we are obliged to tell you why.<sup>97</sup>

Of course, if any of the Justices may be tempted to say something other than the truth, then there is sure to be some dissenter to call the matter to the public’s attention.<sup>98</sup> Thus, the failure to Woodward and Armstrong to

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<sup>90</sup> B. WOODWARD & S. ARMSTRONG, *supra* note 22, at 1. But the Court itself can and does reverse its own decisions. *E.g.*, *Monell v. Department of Social Services*, 436 U.S. 658 (1978) *overruling* *Monroe v. Pape*, 365 U.S. 167 (1961). It has also been overruled by Congress, *e.g.*, compare *Alaska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975) with 42 U.S.C. 1988 (as amended Pub. L. 94-559 (1976)); and constitutional amendments. *E.g.*, compare *Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857) with fourteenth amendment; *Pollock v. Farmer’s Loan & Trust Co.*, 157 U.S. 429 (initial decision), 158 U.S. 601 (on rehearing) (1895) with the sixteenth amendment; *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874) with the nineteenth amendment; and *Oregon v. Mitchell*, 400 U.S. 112 (1970) with the twenty-sixth amendment.

<sup>91</sup> *Id.* But both the academic community and the media give wide-ranging critiques of the court’s decisions.

<sup>92</sup> *Id.*

<sup>93</sup> MARVEL, *supra* note 23, at 7.

<sup>94</sup> *E.g.*, *United States Law Week* (BNA).

<sup>95</sup> Adler, *supra* note 16, at 1.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *E.g.*, *Holtzman v. Schlesinger*, 414 U.S. 1321 (1973). (Douglas dissenting over the Court’s using *in seriatim* telephone calls to reach a decision rather than meeting in conference.) See also LLEWELLYN, *supra* note 19, at 26.

In real measure, if breach threatens, the dissent by forcing or suggesting full publicity,

find any matters of significance was preordained: the public disclosure had already been made — by the Court itself.<sup>99</sup>

In spite of lack of dramatic disclosures, some have expressed fears that the very publication of *The Brethren* may have an adverse effect upon the Court as an institution. Former Justice Goldberg has taken a different approach and suggested that Woodward and Armstrong may have served a vital public service: their failure to turn up any scandal may be seen as attesting to the integrity and honesty of the members of the Court. Indeed, after reading *The Brethren*, the former Justice—notwithstanding his disagreement with certain decisions of the present Court—concluded that the Court remains a “Palladium of Liberty,” “A Citadel of Justice,” and “the guardian of our freedoms.”<sup>100</sup> One need not have such exalted faith in the protective role of the Court<sup>101</sup> to surmise that an institution which has survived not only the “self-inflicted” wounds<sup>102</sup> of *Scott v. Sandford*,<sup>103</sup> *The Slaughterhouse Cases*,<sup>104</sup> *Plessy v. Ferguson*,<sup>105</sup> *Lochner v. New York*,<sup>106</sup> *Korematsu v. United States*,<sup>107</sup> *Stone v. Powell*,<sup>108</sup> and *Stump v. Sparkman*,<sup>109</sup> but sustained criticisms by leading constitutional scholars<sup>110</sup> would not be much affected by *The Brethren*. Given this reviewer’s perspective that the book offers little that is new and less that is productive, one may conclude that it is “Much Ado About Nothing.”

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rides herd on the majority, and helps to keep constant the due observance of that law.

<sup>99</sup> “For one of the many things this book says to me is what the justices say in print is pretty much what they think and say behind the velvet drapes.” Mackenzie, *The Court Still Stands Tall*, *The National Law Journal*, December 31, 1979, at 12 col. 1.

<sup>100</sup> See Goldberg, *supra* note 19.

<sup>101</sup> For a different view, consider, TRIBE, *AMERICAN CONSTITUTIONAL LAW* iii (1978):

... I do not regard the ruling of the Supreme Court as synonymous with constitutional truth. As Justice Robert Jackson once observed of the Court, ‘We are not final because we are infallible, but we are infallible only because we are final.’ And the Courts that held slaves to be non-persons, separate to be equal, and pregnancy to be non sex-related can hardly be deemed either final or infallible. (Emphasis in original.)

<sup>102</sup> Hughes, 46 COLUM. L. REV. 707, 710 (1946).

<sup>103</sup> 60 U.S. [19 How.] 393 (1857). (Holding in part, that a freed slave could not be a citizen of the United States.)

<sup>104</sup> 83 U.S. (16 Wall.) 36 (1873). (Stripping the privileges and immunities clause of the Fourteenth Amendment of the protection it was designed to offer citizens against state encroachment.)

<sup>105</sup> 165 U.S. 537 (1896) (Upholding “Jim Crow” legislation for segregated cars on railroads and establishing the “separate but equal” doctrine).

<sup>106</sup> 198 U.S. 45 (1905) (Invalidating state law setting maximum hours for bakers because the Court felt it was “unreasonable”).

<sup>107</sup> 323 U.S. 214, 220 (1944) (Upholding Congressional authorization for detention and relocation of persons of Japanese ancestry, including native-born American citizens, during World War II).

<sup>108</sup> 428 U.S. 465 (1976) (Closing the federal courts to the fourth amendment claims of state habeas corpus petitioners).

<sup>109</sup> 435 U.S. 349 (1978) (Extending the doctrine of judicial immunity to instances in which the trial judge unlawfully ordered sterilization of minor children without notice and a hearing).

<sup>110</sup> E.g., BERGER, *GOVERNMENT BY JUDICIARY* (1977).