



1980

# Book Reviews: The Brethren: Inside the Supreme Court

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### Recommended Citation

Davidson, Eugene J. (1980) "Book Reviews: The Brethren: Inside the Supreme Court," *University of Baltimore Law Review*: Vol. 9: Iss. 2, Article 9.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol9/iss2/9>

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## BOOK REVIEWS

THE BRETHREN: INSIDE THE SUPREME COURT. By Bob Woodward & Scott Armstrong. Simon & Schuster, New York, New York. 1979. Pp. 467. Reviewed by Eugene J. Davidson.†

*The Brethren*, a best seller from the day of its publication, will probably continue to be so for many months. This distinction is not surprising because the book contains all the elements (except for explicit sex and violence) that make for a best seller. Co-authored by one of the journalists of Watergate prominence,<sup>1</sup> the book purports to breach the United States Supreme Court's traditional veil of secrecy and to render an account of the inner workings of the Supreme Court during the first seven years (1969 to 1975) of the Burger Court.<sup>2</sup> United States Senator Charles McC. Mathias, Jr. of the Senate Committee on the Judiciary wrote, "the Supreme Court is the last temple of the Republic still veiled from the public gaze."<sup>3</sup> The authors' emphasis, however, is not on the workings of the Court in the broader sense, but rather on the alleged maneuvering, machinations, and politicking that prevail during the consideration of important cases as well as the alleged foibles, jealousies, and peccadillos of the nine men who inhabit that hallowed institution. All of the foregoing is presented as gospel because, so the authors assert, it came from interviews with those who should know — several Justices, many of their former law clerks, and former Court employees. The best seller potential is enhanced by the rumor, gossip, and tattle that dominate the book. This "information," largely composed of hearsay, suspicion, inference, and innuendo, is interwoven with actual events and judicial rulings in order to lend an air of plausibility to the authors' assessments and conclusions.

*The Brethren* is a muckraking book — but the jury is still out on the question whether it deserves a place alongside the great muckraking books of the early twentieth century, such as those by Ida Tarbell<sup>4</sup> and Lincoln Steffens,<sup>5</sup> to name just two highly respected muckrakers.

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1. Bob Woodward and Carl Bernstein co-authored *All the President's Men*, Warner Books, New York 1974, and *The Final Days*, Simon & Schuster, New York 1976.
2. The 1976 cut-off reflects the authors' self-imposed restraint so as not to "interfere with the ongoing work of the Court." (p. 2).
3. Comment on *Guide to the U.S. Supreme Court*, published by Congressional Quarterly, Inc. (1979).
4. I. TARBELL, *THE HISTORY OF THE STANDARD OIL COMPANY* (1904).
5. L. STEFFENS, *THE SHAME OF THE CITIES* (1904). See also L. FILLER, *THE MUCKRAKERS* (1968).

The reason for this hesitation is that the authors chose to hide behind the cloak of anonymity, leaving the reader to accept on faith what the authors report. This, of course, is something no lawyer worthy of that title can do. As the courts have repeatedly stated, there must be evidence having a rational probative force;<sup>6</sup> suspicion cannot be raised to the status of fact and inferences cannot be based on speculation;<sup>7</sup> conclusions must rest on probability, not mere possibility or conjecture;<sup>8</sup> and surmise and suspicion are insufficient.<sup>9</sup>

The authors recognized the difficulties that their lack of probative evidence might present and explained that "[v]irtually all the interviews were conducted 'on background,' meaning that the identity of the source will be kept confidential. This assurance of confidentiality to our sources was necessary to secure their cooperation." (p. 3-4). Assuming this confidentiality was desirable, and assuming the information given to the authors was accurate, the reader can neither ascertain the accuracy of the authors' reporting nor evaluate the interpretations and conclusions drawn from that information.

The authors state that *The Brethren* was based upon interviews with more than two hundred persons, "including several justices, more than 170 former law clerks, and several dozen former employees of the Court" (p. 3). The description of the authors' alleged exhaustive investigative effort would imply that the book's revelations *must* be true because they come from so many different, knowledgeable, and reliable sources. Yet, by the authors' own admission, the data used was verified in some instances by only one or two sources and at most by fewer than four sources (p. 4). If the reader is to accept pejorative judgments based upon so few sources, he has a right to know the identity of these few anonymous informants, their biases and prejudices, and what axe they had to grind by going public. As investigative reporters, the authors surely would demand answers to these and similar questions.<sup>10</sup> As long as

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6. Consolidated Edison Co. v. NLRB, 305 U.S. 197 (1938).

7. NLRB v. Sun Shipbuilding & Dry Dock Co., 135 F.2d 15 (3d Cir. 1943).

8. Magnolia Petroleum Co. v. NLRB, 112 F.2d 545 (5th Cir. 1940).

9. NLRB v. Goodyear Tire & Rubber Co., 129 F.2d 661 (5th Cir. 1942), *cert. dismissed*, 319 U.S. 776 (1943).

10. At least one of the Justices (Stevens) has alleged that the authors took statements out of context. N.Y. Times, April 8, 1980, at B13.

In addition, another Justice (Powell) has suggested that the recent publicity surrounding Court activities is at least in part the product of misperception. As that Justice recently observed:

There are two current myths about the Supreme Court which have been repeated so often that they have attained a life of their own. One is simply untrue; the other reflects a fundamental misconception of the court's role.

In the first myth, the nine justices often are portrayed as fighting and feuding with each other. . . .

the questions remain unanswered or until subsequent disclosures verify the book's gossip and tattle, the jury must remain out on the book's place in history.

The book opens with a prologue dealing with Burger's appointment as Chief Justice. The tone of this prologue sets the tone for the entire book — denigration of Chief Justice Burger's legal abilities and personal behavior.

The balance of the book is divided into seven parts, each part representing a court term. These parts seek to expose through a step-by-step process what is claimed to have transpired in selected cases as they moved through the Court to final decision.<sup>11</sup> The members of the Court are portrayed around this process. What is clear to this reviewer, although there may be some question whether the authors so intended, is that the Justices, including Chief Justice Burger, are not corrupt, and no real scandal can be laid at their doors. Their fault — if it be a fault — is that they are mortals, with mortal egos and weaknesses, including pride and prejudice.

What the reader perceives is that the Supreme Court's judicial process is not the objective application of legal principles predicated upon established legal doctrine (*stare decisis*), but rather the determination of cases through the Justices' individual perceptions of what is right or what the law should be. In short, each Justice is engaged in an attempt to impose his personal predilections through the Court onto the public.

We do indeed have strong professional differences about many of our cases. These are exposed for the public to see. Unlike, for example, the executive branch of government, we record fully our disagreements in dissenting opinions. Frequently the language of a dissent is not a model of temperate discourse. We fight hard for our professional views. But, contrary to what one may read, these differences reflect no lack of respect for the members of the court with whom we disagree. In the course of a given term, I find myself more than once in sharp disagreement with every other justice.

A more substantive misconception — the second myth — concerns the role of the Supreme Court and the way it functions. . . . [C]ommentators have said the court lacks strong leadership, and has no consistent judicial or ideological philosophy. Those who write this nonsense simply do not understand the responsibilities either of the Supreme Court or of the chief justice. . . .

In presenting my view of these misconceptions, I recognize the difficulty that the media may have in covering the court. Our work is important to the country, and the public needs to be informed about it promptly. But few of our opinions will ever make a best-seller list. Assuring that news stories about the court will be readable may well require some romancing about disagreements.

Powell, *What Really Goes on at the Court*, *The Sun* (Baltimore), May 7, 1980, § A, at 19, col. 3 (morning ed.).

11. While not so stated, the inference which the authors apparently have sought to convey is that what occurred with respect to the cases the authors selected is typical of the Court's handling of cases generally.

The book makes much about the initial positions taken by the various Justices concerning any specific case and their subsequent maneuverings to achieve consensus or to induce vote switching. The authors' concern at this may be understandable because they are laymen with limited experience in appellate decision-making. To lawyers and court watchers, consensus is desirable because it gives guidance to the lower courts.<sup>12</sup> Vote switching is a necessary part of the deliberative process; judges must be ready, able, and willing to listen with open minds to the differing views of their peers. In any event, as court watchers know, modifying an opinion to gain concurrence or to head off a dissent is a practice as old as the judicial system.

The authors are seemingly aghast at the Chief Justice's alleged tactics in attempting to control the assignments of opinion writing. Traditionally, the Chief Justice makes the assignment if he voted with the majority, otherwise the most senior Justice who voted with the majority makes the assignment. Since Mr. Justice Douglas, the most senior Justice following the retirement of Mr. Justice Black in September, 1971, frequently differed with Chief Justice Burger, it was inevitable that the two would conflict over the assignment issue. The Chief Justice, so it is alleged, would deviously withhold or change his vote to insure being with the majority. Justice Douglas' umbrage at the Chief Justice's attempt to shade the forthcoming result by usurping the right of assignment, even when he was in the minority, is described in detail. The Chief Justice's conduct, if it occurred, deserves censure. The book either overlooks or ignores, however, that efforts to influence the outcome of cases are not original with Chief Justice Burger. Indeed, as the authors indicate almost in passing, during Chief Justice Warren's tenure, a period the authors appear to rate highly, the debate at the Justices' conferences were "at times . . . a sham" (p. 57). Justice Brennan would sit "each Thursday with [Chief Justice] Warren preparing an orchestration for the Friday Conference," after which Brennan often told his clerks, "Well, guys, it's all taken care of." (p. 47).

It seems clear that the authors view the Court members with a degree of disdain, although some fare better than others. For example, Justice Brennan comes through with fairly good marks for ability and diligence while Justice Douglas is pictured as a quarrelsome, inconsiderate curmudgeon. Granted, neither the Chief

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12. Compare, for example, the press outpourings at the Court's failure to achieve consensus in connection with "open trials" of criminal cases in *Gannett Co. v. DePasquale*, 99 S. Ct. 2898 (1979).

Justice nor the Court as a whole will win accolades for legal brilliance. Previous Chief Justices and their Courts, however, were less than brilliant — the Vinson Court of the late 1940's and early 1950's to name just one.<sup>13</sup>

One must conclude that, based upon presently available evidence, the book's use of invective and character aspersion is disturbing. It does not rate well as either investigative journalism or as a useful tool for Supreme Court scholars. But then it is unlikely that the book was intended to be such. Rather, *The Brethren* was written for a public whose taste runs to the slightly sensational and whose fancy is for the story which titillates, particularly if it involves persons of high place or who are otherwise above the common horde. Unless subsequent events give credence to the book's gossip and rumor, the book is likely to be a passing happening that will fade into obscurity without having had any notable impact on the Court.

The general public should be fascinated by the recitals of the "behind the scenes" happenings. This fascination should keep their interest from flagging and ironically could result in the subconscious development of a better understanding of current legal principles. Insofar as the public is concerned, the book's legal errors are not important *and* probably will be passed over unnoticed. Literary purists, however, will undoubtedly growl in anguish and point to these errors to reinforce their adverse evaluation of *The Brethren*.

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13. When Fredrick Vinson was appointed Chief Justice in 1946, the Associate Justices were Owen Roberts, Hugo Black, Stanley Reed, Felix Frankfurter, William Douglas, Robert Jackson, and Wiley Rutledge. While Vinson was Chief Justice, President Truman appointed Harold Burton to fill the Roberts vacancy in 1945, Thomas Clark to fill the Murphy vacancy in 1949, and Sherman Minton to fill the Rutledge vacancy in 1949. See generally A. BLAUSTEIN & R. MERSKY, *THE FIRST ONE HUNDRED JUSTICES* (1978).