

## The Selling of the Brethren

*The Brethren: Inside the Supreme Court.* By Bob Woodward & Scott Armstrong. New York: Simon and Schuster, 1979. Pp. 467. \$13.95.

Reviewed by Victor S. Navasky†

For months, the legal profession indulged eager (or dread) anticipatory gossip about what was rumored to be the first systematic breach of Supreme Court secrecy. With the publication of *The Brethren*,<sup>1</sup> chock-full of jurisprudential anecdotage, authors Bob Woodward and Scott Armstrong indeed appeared to have leaped into the breach. But no sooner did the book surface than the vast majority of the bar condemned it. What was not initially clear was whether the objection was that Woodward and Armstrong had gotten it wrong—that Supreme Court decisions are not the end-result of a political process of wheeling and dealing and bargaining and bickering—or, worse, that they had gotten it right and revealed the dirty little secret that the profession had successfully kept from laymen for all these years.

The public, on the other hand, bought hundreds of thousands of copies and kept the book atop the bestseller list for months.

Why the disjunction?

### I. The Critical Attack

When a book's distinctive contribution purports to be its insider-perspective, informed by advanced (albeit mysterious) investigative-reporting techniques, credibility would seem to be essential to success. The early reviewers of *The Brethren*, however, blew the whistle on its pretensions to accuracy. In her *New York Times Book Review* critique, Renata Adler compiled a litany of misstatements, incongruities, and legal errors that riddled the book.<sup>2</sup> Writing in *The Washington Post Book World*, Professor Walter F. Murphy presented a similar catalog of mistakes.<sup>3</sup> Although Murphy conceded that the abundance of errors

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1. B. WOODWARD & S. ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT (1979) [hereinafter cited by page number only].

2. Adler, *The Justices and the Journalists*, N.Y. Times, Dec. 16, 1979, § 7 (Book Review), at 1, 24.

3. Murphy, *Spilling the Secrets of the Supreme Court*, Wash. Post Book World, Dec. 16, 1979, at 1.

## The Brethren

does not undermine the authors' central theses (that is, the villainy of the Chief Justice, the location of power at the Court's center, and the importance of decisional negotiation),<sup>4</sup> he observed that the errors "cast some doubt" upon the reliability of unverifiable assertions.<sup>5</sup>

A particularly severe critique came from *New York Times* columnist Anthony Lewis, who did some investigative reporting of his own.<sup>6</sup> Lewis focused on the most shocking—if true—revelation in *The Brethren*: that Justice Brennan voted to affirm the murder conviction of "Slick" Moore<sup>7</sup> in order to curry the favor of Justice Blackmun in other pending cases.<sup>8</sup> In other words, the authors in effect charge that Justice Brennan was willing to trade a man's constitutional rights for the good will of a fellow Justice.

On the surface, the accusation seems credible. "Marshall needed only one more [vote] to take away Blackmun's majority. His friend Brennan would surely provide the fifth vote. Brennan, after all, was the author of a landmark 1963 decision (*Brady v. Maryland*) that required prosecutors to turn over all exculpatory evidence to the defense."<sup>9</sup>

After noting several critical errors in those portions of the account that involved public information,<sup>10</sup> Lewis sought to discover or discredit the authors' anonymous source. The passage in question purported to rely upon a conversation between Justice Brennan and an anonymous law clerk of his.<sup>11</sup> Lewis identified that clerk as Paul Hoerber, now Acting Professor of Law at the University of California at Berkeley.<sup>12</sup>

Hoerber categorically denied that he or Justice Brennan had made the remarks attributed to them by Woodward and Armstrong. According to Lewis, Hoerber contacted the three other Brennan clerks from the 1971 Term; all agreed that they had had no such conversation with

4. *Id.* at 10.

5. *Id.* at 11.

6. Lewis, *Supreme Court Confidential*, N.Y. REV. OF BOOKS, Feb. 7, 1980, at 3.

7. *Moore v. Illinois*, 408 U.S. 786 (1972) (opinion of Blackmun, J.).

8. P. 225.

9. *Id.* (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

10. Lewis noted that Justice Douglas, not Justice Brennan, had written the *Brady* opinion. Lewis, *supra* note 6, at 3. Moreover, contrary to Woodward and Armstrong's assertion, *Brady* had not required the prosecutor to turn over *all* exculpatory evidence to the defendant; rather, the Court had held that "[t]he suppression by the prosecution of evidence . . . is material either to guilt or to punishment." *Id.* (quoting *Brady v. Maryland*, 373 U.S. at 87). The issues in the *Moore* case "were precisely whether there had been an adequate defense 'request' for certain evidence and whether the evidence was 'material'—whether, that is, it would have made any difference. The two Supreme Court opinions [Blackmun's and Marshall's] differed on the facts of the latter question." *Id.*

11. P. 225.

12. Lewis, *supra* note 6, at 3.

the Justice. The Brennan clerks then contacted twenty-nine of the remaining thirty clerks of that Term; none confirmed the report, and none knew of any clerk "shocked" or "shaken" by Brennan's attitude in the case. Hoerber contended, moreover, that Woodward and Armstrong exaggerated the importance attributed to *Moore*; it was decided on the frantic last day of the Term, along with a number of momentous opinions, among which *Moore* was a "pebble on the beach."<sup>13</sup>

Lewis's research, of course, is no more conclusive than Woodward and Armstrong's unsupported assertion. Any clerk disloyal enough to breach Justice Brennan's confidence in the first place presumably would be devious enough to lie to his fellow clerks or to Lewis in the second place. Justice Brennan, moreover, has not commented publicly. Finally, the fact that several "more important" cases were handed down along with *Moore* cuts both ways: if neither Justice Brennan nor his clerks was focusing on *Moore*, then perhaps, as Woodward and Armstrong claim, the Justice used that "pebble" to construct a sturdier alliance on other matters. My own guess is that the Blackmun factor was one among many variables that Justice Brennan took into account, consciously or unconsciously, in determining Slick Moore's fate.

Lewis's essay is important, not for the accuracy of its account, but because it represents another instance of a legal sophisticate, in a prestigious forum, undermining quite spectacularly the accuracy of a Woodward and Armstrong account. Presumably critiques such as Adler's, Murphy's, and Lewis's have a multiplier effect: if the verifiable portions of *The Brethren* are so vulnerable, how can we trust the vast majority of the accounts, which are unverifiable?

Critics have faulted *The Brethren* for more than just inaccuracy. On occasion, Woodward and Armstrong invade privacy in ways unrelated to any legitimate literary or social purpose. For example, they report that, near the end of his tenure, Justice Douglas was incontinent: "the unpleasant odor filled the room."<sup>14</sup> That item says more about the sensibilities of the authors' sources than about the authors' capacity for mobilizing the relevant detail.

A more controversial invasion of privacy is the account of Justice Stewart's self-removal from the ranks of Chief Justice Warren's possible successors. According to Woodward and Armstrong, Justice Stewart justified his withdrawal to President Nixon on the ground that elevation of a sitting Justice would damage relations among the brethren;

13. *Id.*

14. P. 392.

yet Justice Stewart's true motive was purportedly to prevent public disclosure of his wife's drinking problem.<sup>15</sup>

This incident, like many others in the book, turns on questions of fact; when the rumor first surfaced, Justice Stewart wrote to *Newsweek* to point out that his wife had been on the wagon for eight years.<sup>16</sup> Even if the account is accurate, though, should it have appeared? As Aryeh Neier recently observed in *The Nation*, the customary justification for such intrusions on privacy—that they are the price that public figures pay for seeking the limelight—is inapplicable here. “If Woodward and Armstrong are accurate . . . Stewart gave up a more prominent spot in the public eye in order to preserve this bit of privacy.”<sup>17</sup> What standard governed the authors' decisions as to what to reveal? “As best I can tell,” Neier concluded, “they were guided by the fact that the information had not been disclosed previously. Another way of saying this is that they had no standard.”<sup>18</sup>

## II. The Popular Response

“Nonlawyers,” predicted an early lawyer-reviewer of *The Brethren*, “will find the book extremely hard to read.”<sup>19</sup> In fact, she wrote, it might well be retitled “Woodward & Armstrong, *Cases and Materials on the Supreme Court*.”<sup>20</sup> There seemed to be good cause for what amounted to a dire sales projection. *The Brethren's* structure has no built-in tension. The book is boringly organized term-by-term from 1969 (when Burger became Chief Justice) to 1975 (an arbitrary cutoff date), with no criteria set forth to explain the selection of cases discussed. Contrary to advance hype, the book contains little personal gossip; for example, what Justice X's first wife thought of Justice Y's latest wife, which Justices were in therapy, who was sleeping with whom. The book does not seriously attempt to profile either the Justices or their jurisprudence, beyond the sketchiest of thumbnail sketches and conclusory characterization of Justices as liberal or conservative. The authors make no effort to trace the trend of decisions over time, presenting the manner in which the Burger Court has whittled away at

15. Pp. 16-17.

16. NEWSWEEK, Dec. 31, 1979, at 7.

17. Neier, *The Brethren: A Symposium*, THE NATION, Feb. 2, 1980, at 118. Neier, in fact, hesitated to repeat the story about Mrs. Stewart. His doubts were resolved when he noticed that THE BRETHREN had become the number one national best-seller. The damage to the Stewarts' privacy had already been done.

18. *Id.*

19. Adler, *supra* note 2, at 24.

20. *Id.*

the decisions of the Warren Court.

Yet no sooner did *The Brethren* appear on the shelves than it zoomed to the top of the bestseller lists. Within two months of publication, its publisher had printed 600,000 copies and predicted that the book would outsell even Woodward's Watergate works,<sup>21</sup> *The Final Days*<sup>22</sup> and *All the President's Men*.<sup>23</sup>

The phenomenon of unfavorable reviews followed by record-breaking sales is not uncommon in the world of escapist fiction. Yet *The Brethren's* sole claim to distinctiveness is thought to be its cornucopia of new jurisprudential fact. Why has the public embraced so vulnerable a study so eagerly?

Gossip alone cannot be the answer. It is not that the book lacks gossip; Woodward and Armstrong have managed to collect numerous poison portraits of the Justices by their brethren. But even the indiscreet intra-judicial gossip is not very sensational; rather, it might be called "process-gossip"—that is, rumor that has as much to do with the bureaucracy, strategy, and politics of the opinion-writing process as it does with the personalities involved. This material is *The Brethren's* center and is both its most valuable and its most troubling aspect.

The advance hype, and Woodward's fame as a chronicler of Watergate, guaranteed visibility, but not the blockbuster status that *The Brethren* has achieved. Nor can one attribute the book's popularity to its unique penetration of the Court's deliberative process, for that penetration is not in fact unique. Others have looked behind the printed opinions to explain the politics of judicial negotiation.<sup>24</sup> Yet despite such literature, and despite the decades-old insights of the Legal Realists, the backstage matter of opinion negotiation is still ignored in most constitutional law courses and invisible in high school civics texts.

Although the pettiness, the intrigues, the raw nature of the interaction between the Justices may be tediously familiar to those schooled in the scholarly literature, little of that information has filtered out beyond the bar. Can it be that much of the popularity of *The Brethren* is attributable to the failure of legal scholars to reveal to the public that which they have known all along: that Justices bicker and deal and hate to pull the switch; that often there is no right legal answer? Should

21. TIME, March 10, 1980, at 48.

22. B. WOODWARD & C. BERNSTEIN, *THE FINAL DAYS* (1976).

23. B. WOODWARD & C. BERNSTEIN, *ALL THE PRESIDENT'S MEN* (1974).

24. See, e.g., A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS: THE SUPREME COURT AT WORK* (1957); R. KLUGER, *SIMPLE JUSTICE* (1976); A. MASON, *HARLAN FISKE STONE: PILLAR OF THE LAW* (1956); W. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964); F. RODELL, *NINE MEN* (1955).

## The Brethren

we really be surprised at the national suspicious curiosity about nine men in black robes who preside over a fundamental federal institution that has the last word on so many aspects of our lives?

In some respects, the authors' method undermines their message. Their scholarly utility and ultimately their credibility have been weakened by the same literary artifice that has broadened their audience, namely, the technique of, not merely protecting, but ignoring the source, of reporting as-told-to's as fact, and of saving the reader the drudgery of weighing conflicting versions of the same episode. Presumably, the authors have heard the conflicting versions, winnowed and sifted, and presented us with the one that they believe to be true; hence the omniscient narrative voice, the graduation of rumor into fact. The disinclination to provide even such clues as "according to two former clerks" or "one of Justice X's male clerks charged" diminishes the possibility of judging a source's veracity, prejudice, or perspective. The authors venture to the more distant shores of the New Journalism when they enter the minds of Justices (some of whom refused to be interviewed) and tell us how they felt.

Although such techniques keep the reader in the evidentiary dark and contribute to the mystique of the investigative journalist, they also function to demystify the Court. The fast-paced narrative, the authoritative voice, and the ability to penetrate the minds and hearts of their characters lend the narrative the appeal of ultimate insiderism—a tour through one of the few institutions in our society that is licensed to transform American policy yet that has managed largely to maintain its myth of impartiality. The Court, *The Brethren* tells the reader, is what he suspected it was after all: a *political* institution. This "insight" accommodates the prejudices of the know-nothings while confirming the orientation of more sophisticated laymen who distrust the above-the-battle image of the Court frequently reflected in the media.

The distortion in this apparent glimpse at men of power exercising power stems from the journalist's mistaken notion that anything that is secret is significant. The secrecy surrounding the Court's deliberations may make specific revelations about particular decisions "news,"<sup>25</sup> but it does not make such material significant in understanding the truth about how the Court makes up its collective mind.

Some critics have objected that *The Brethren* presents a clerk's-eye view of the Court.<sup>26</sup> The reader, however, should have little difficulty

25. Woodward and Armstrong have unearthed interesting information, for example, on recent capital punishment decisions, pp. 205-20, and abortion decisions, pp. 165-72.

26. *E.g.*, Murphy, *supra* note 3, at 11.

figuring that out for himself, given the authors' near-obsession with the clerks.<sup>27</sup> There would be no harm in presenting the clerks' perspective if it were identified as such. The clerks may have as good a perspective as anyone on such elements of adjudication as revision of opinions. The real question is, what has been left out? The reliance upon clerks' recollections of the draft revisions provides the reader with little sense of how these negotiations rank in importance as compared to briefs, oral argument, jurisprudential perspective, the trend of cases over time, the political climate, and, as they used to say, what the Justice ate for breakfast.

### Conclusion

There is value in recycling the Legal Realist thesis in terms that a new generation can understand and in focusing on a negotiating process that is too often ignored in formal legal curricula and analyses. To the extent that the case histories are true, *The Brethren* represents a fantastic piece of reporting. If we treat Woodward and Armstrong's factual assertions as hypotheses to be tested, they offer valuable data for future historical evaluation. But because the authors have chosen to present their conclusions as narrative assertions, without allowing the reader to view the reasoning process that preceded them, reading this book is almost as unsatisfactory as reading a per curiam opinion. Because the Court's negotiations are abstracted from any historical context, Woodward and Armstrong seem to imply that, since behind-the-scenes bargaining, linguistic compromise, and vote-trading are at odds with the Court's image, they are wrong.

Ironically, the main contribution of *The Brethren* is at odds with this implication. If the book has any value beyond its specific "factoids,"<sup>28</sup> it is to bring lay and professional images of the Court into closer congruence with each other. Such an enterprise would seem to be a precondition for any serious attempt to evaluate the way in which the Court makes up its mind and its impact on our society.

That said, it should be noted that nothing in this book is so shocking

27. Woodward and Armstrong use the Justices' attitudes toward clerks, for example, almost as a litmus test of judicial character. The authors claim that Justice Douglas had no faith in Justice Brennan's willingness to fight for principle because Justice Brennan had once fired a radical clerk under pressure from conservatives. P. 77.

28. See N. MAILER, MARILYN 18 (1973). Mailer coined the term "factoid" to deal with the difficulty of distinguishing facts from fiction in rumors about Marilyn Monroe. Factoids, he wrote, are "facts which have no existence before appearing in a magazine or newspaper, creations which are not so much lies as a product to manipulate emotion in the Silent Majority." *Id.*

## The Brethren

as what may have been its most tangible impact on the Court itself. Two months after *The Brethren* was published, the Court announced its decision in the case of Frank Snepp, author of an unauthorized book on the CIA.<sup>29</sup> Without even considering oral or written arguments in his behalf, the Court deprived Snepp of at least colorable First Amendment rights in an opinion that, according to one critic, manifested “contempt for the rule of law.”<sup>30</sup> We cannot know what Woodward and Armstrong so often pretend to know—how the Court made up its mind. But is it implausible that *The Brethren’s* disclosure of the Court’s secrets explains the language in *Snepp* permitting government agencies to punish current or former employees who leak information to the press? Have the Justices sent a signal to their clerks that the first *Brethren* will be the last?

29. *Snepp v. United States*, 48 U.S.L.W. 3527 (U.S. Feb. 2, 1980) (Nos. 78-1871, 79-265).

30. Lewis, *A Lawless Decision*, N.Y. Times, Feb. 21, 1980, at A23, col. 1.



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