Buffalo Law Review

Volume 22
Number 3 *Judicial Secrecy: A Symposium*

Article 7

4-1-1973

Irreverent Questions about Piercing the Red Velour Curtain

Eugene Gressman

IRREVERENT QUESTIONS ABOUT PIERCING THE RED VELOUR CURTAIN

EUGENE GRESSMAN*

It has been noted that from our earliest national beginnings, including the deliberations in Philadelphia in 1787, some degree of secrecy has always surrounded the decisional processes of our public servants.[1] But the "most confidential proceeding in all of government is probably the conference of the Justices of the Supreme Court,"[2] a conference that constitutes the core of the Court's overt decisional processes.

Professor Miller and Mr. Sastri have dared to challenge the secrecy that envelops virtually all that precedes the promulgation of formal opinions by the Justices of the Supreme Court. It is healthy that such a challenge has been made. But before we rush to enact the Judicial Anti-Secrecy Act of 1973, certain assumptions, techniques and goals in piercing the red velour curtain should be examined or reexamined. Hopefully that examination will be forthcoming in another Miller-Sastri article. It is with that hope in mind that I pose the following problems, as yet unsolved, that naturally flow from the Miller-Sastri challenge.

To begin with, precisely what secret judicial processes should be uncovered, or are capable of being uncovered, if we accept the Miller-Sastri thesis? From my own observation of the Supreme Court processes, acquired during a five-year stint as a law clerk to a Supreme Court Justice, those processes are pentagonal:

The first and probably the most significant aspect of the institutional decisions of the Court is not really institutional or collective in nature. That factor is the internal, psychological and mental decision-making process that takes place within each of the nine fiercely in-

---

* Member, District of Columbia Bar. A.B., University of Michigan, 1938; J.D., 1940. Co-author of R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE (4th ed. 1969). Served as law clerk to Supreme Court Justice Frank Murphy, 1943-48.

1. Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers,* 120 U. PA. L. REV. 271, 273-74 (1971), *quoted in* United States v. Marchetti, 466 F.2d 1309, 1316 (4th Cir. 1972).

2. Henkin, *supra* note 1, at 274.

dependent Justices. Each must go through his own process, in his own way, before he casts his vote or utters any definitive conclusion. Yet, as the Miller-Sastri article seems to concede, we "cannot explore the minds of the Justices." If that be true, how can we ever dare hope to strip the secrecy surrounding the most elemental and basic part of the decisional process? It is obviously impossible to assign qualified psychiatrists to the Court, on the alert to probe nine different personalities contemporaneously with, or immediately following, each formulation of a judicial opinion. Perhaps the Justices themselves are not conscious of all the intangible factors of experience, personality, bias, outlook and philosophy that enter into their personal judicial decisions.[3] Yet he who would truly understand the decisional process would have to know the impact of these nine separate packs of intangibles.

The second important ingredient of a Supreme Court decision takes place at the conference of the nine Justices that follows on the heels of the oral argument in a given case. There the critical group discussion of the case takes place and the tentative but usually critical votes are cast. But how can this conference be exposed to public view? Is it to be transferred to the public courtroom and conducted in the presence of counsel, newsmen and tourists, in the manner of the Swiss and Mexican high courts? Or should the discussions in the private conference room be recorded and played back to interested persons? Or would it be enough to compel the Chief Justice or the Clerk of the Court to keep and publish full and accurate minutes of the discussions? And if one of these options were to be selected, could we be certain that the Justices' discussion would not quickly deteriorate into monosyllabic and unenlightening casting of tentative votes, with a minimum of meaningful debate? Has the Swiss or Mexican experience shown that the public conference of justices is anything more than a public posturing of decisions previously reached via more secret means? In short, the danger implicit in public conferences is (a) an institutional retreat to more private techniques of decision making, or (b) a destruction of the valuable interplay of individual viewpoints that should precede a collective judgment.

A third decisional factor is to be found in the pre-conference and post-conference interchange of decisional thoughts and suggestions

3. "The great decisions of human life have as a rule far more to do with the instincts and other mysterious unconscious factors than with conscious will and well-meaning reasonableness." C. JUNG, MODERN MAN IN SEARCH OF A SOUL 69 (1933).

among the Justices, an interchange that can be both oral and written in nature. But these interchanges are frequently tentative, sporadic and highly individualized, many of them being totally irrelevant to any understanding of how the collective judgment was reached. Yet are we to tie a microphone around the necks of the Justices as they go about their appointed tasks, in the hope of picking up some significant comments from them? And who is to decide what is relevant and irrelevant from among this mass of oral comments, bench notes, memoranda, written comments and suggestions, critiques of draft opinions, notations respecting typographical or grammatical errors in opinions, and perhaps certain acid or adulatory comments about fellow Justices? To take but one example of a post-conference note from one Justice to another, it may be asked how important and how relevant it is to uncover and publish the following:

> Re your dissent in this case. (1) You have noted, no doubt, that the word "add" in line 6, 2d full paragraph on p. 4, should be "adds." (2) The most convincing thing to one who had doubt, as I did, is your statement at the end of p. 4 relating to messengers. If it were not so late, I would suggest that you elaborate and emphasize this point. (3) While no doubt bullets will be fired they cannot penetrate the steel of your logic and sound policy, but (4) I am asking that the case go over so that I can reflect on it further and perhaps give you a chance for further revisions.

Literally thousands of such notes have been exchanged over the years. While many may have been more pertinent in revealing decisional motivations, the gross output is by and large composed of incidental chit-chat and comments on the minutiae of opinion-formulation. Many, including the truly significant notes, are torn up and destroyed the moment they are read. Must we have some sort of waste retrieval system to regain and preserve such throw-aways? And without amassing all the notes and conversations emanating from all and each of the nine Justices, can we be certain that the true decisional picture has been reconstructed? Even the decisional notes of one Justice, however complete, may reflect only that individual's viewpoint of how the particular decision was or should have been reached; and the whole truth may be gained only by recasting the viewpoints of all nine Justices.

Still another pre-decisional forum is each Justice's chambers, where a plethora of oral and written communications flow between

the Justice and his law clerks. On occasion, the clerks may make a valuable contribution to a Justice's evaluation of a case or to an opinion that he may write. Indeed, to the horror of the judicial elitists, some of the work products of the law clerks creep into some of the opinions of the Court or of the Justices for whom they work. In these respects, therefore, the law clerks play a role in the decisional processes. But if we are to be complete in our uncovering of those processes, must we not also expose the backgrounds, the motivations, the oral and written commentaries, and the influences cast by the thirty or so law clerks who each year serve their judicial masters? By what methods could these matters be made a part of the public record?

Finally, a large and undefinable source of judicial motivation may be discovered in a wide variety of experiences, remarks and writings, on or off the bench, that constantly swirl about the Justices. In addition to the courtroom dialogues between the Justices and counsel who argue particular cases (which presently are made matters of public record), the Justices are inevitably subject to subtle influence from informal and chance confrontations (a) between themselves, (b) with their law clerks or other Court employees, (c) with their friends and relatives, and (d) with the limitless outpourings of writings and commentaries in all forms of the public media. The impact of such confrontations would be virtually impossible to assess, even if they could be fully catalogued. But where do we stop in our search for full disclosure of all the tangible and intangible contributions to the Court's decisional processes?

Obviously some picking and choosing will have to be done from among the foregoing factors. Not all the factors are capable of discovery or publication. But in the course of making such choices, we must ask whether complete and compelled disclosure of that which can be disclosed will really be worth the effort. Might not such disclosure dry up all visible expressions of decision-formulation? Might not we be left with a sterile public record stemming from even more secret and unrevealable modes of decision making by the Court? The making of decisions, even collective decisions, may involve or at least start with such highly personal and subjective thoughts, created and developed within one's own mind or in conjunction with one's institutional equals, that some degree of privacy for such maturation is humanly inevitable.

Moreover, would we really know much more about decision making and opinion formulation were we to compel disgorgement of all that is now secret? True, legal historians and judicial biographers would have a bonanza collecting and evaluating the revealed cross-fires among the Justices. And perhaps some memoranda and notes would provide significant insight into how or why a particular decision was reached. But can we be certain that such pre-decisional disclosures, even discounting the irrelevant and the incomplete, would tell the legal profession or the public significantly more than the written opinions now reveal?

It is possible, in other words, that the opinions of the Court and of the individual Justices do reflect, so far as humanly possible, much of the capturable and relevant motivations. If some opinions fit the Miller-Sastri description of having been "hammered out on the anvil of compromise," those opinions will state and reflect the compromise, perhaps with ambiguous language. But it is the compromise that is relevant to the legal profession and the public; and the fact that some Justices may have harbored a no-compromise position or that the original draft of the Court's opinion was more forceful is only of incidental concern to the legal analysts and historians. Strongly held no-compromise positions are generally the subjects of concurring and dissenting opinions and thus are not likely to be lost from public view. But as to the more frequent no-compromise opinions of the Court, my five-year observation as a law clerk compels me to state that the Court's opinion writers generally and accurately incorporate the significant suggestions of their colleagues. Those suggestions, I think, are the pivotal ones that might be uncovered in their pre-decisional form by the Miller-Sastri investigation. But to what avail?

The floor is yours, Professor Miller and Mr. Sastri.