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COMMENTS ON "SECRECY AND THE SUPREME COURT"

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I undertook to read and comment upon the Miller and Sastri manuscript with a sympathetic, liberal, non-elitist view of the question of secrecy in public institutions. That is to say I believed that secrecy should be the exception and not the rule, that the pitiless glare of publicity was a necessary check on arbitrary government decisions these days, and that, in general, public officials ought to be more candid about the policies they follow and the thinking behind those policies. Of course this was an ideal. No one could expect—or would want—to know everything that goes on in government. My views on this subject were no doubt heavily influenced by my views on the Indochina war and several events associated with it—the *Pentagon Papers case*[1] and the trial of Ellsberg and Russo, the disturbing signs of attempts to constrain press coverage of important events, a reading of Halberstam's tour de force on Vietnam policymaking, *The Best and the Brightest*,[2] and, most recently, the failure of our government to explain satisfactorily the reasons for resumed bombing of North Vietnam as a way of achieving peace.

But closer to the subject at hand I had already expressed somewhat similar views in print. My focus was judicial selection rather than internal judicial decisionmaking, but my concern was similarly with the relationship of citizens to their governors in a democratic society and the level of public confidence in the judiciary. I did note that there was some evidence supporting the view that secrecy and mystery promoted the mystique of courts and added to their legitimacy. But, on balance, it seemed that public confidence would be enlarged by greater popular knowledge about judicial institutions and participation in choosing judicial personnel.[3]

I am therefore disappointed to have to report that Miller and Sastri's arguments not only are unpersuasive but even engendered a

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1. New York Times Co. v. United States, 403 U.S. 713 (1971).
2. D. HALBERSTAM, THE BEST AND THE BRIGHTEST (1972).
3. Grossman, *A Political View of Judicial Ethics*, 9 SAN DIEGO L. REV. 803 (1972).

slight negative feedback. If this is the best case that can be made for opening a peep-hole or two in what used to be called the Purple Curtain, then perhaps we ought to move on to more fruitful subjects.

I find their argument unconvincing in a number of ways. First, they have failed to meet the burden of showing how basic democratic theory *requires* full publicity for the judicial conference. They contend that the burden of proof rests on those who wish to *defend* judicial secrecy. Maybe! But they spend most of their time giving reasons why the burden is not theirs, instead of trying to formulate positive arguments in favor of the position they are advancing. This roundabout procedure suggests at least that positive arguments are hard to come by, and leads to my second objection: often there is only the most tenuous connection betwen the basic premise of the authors and some of the arguments they advance.

Let me give a number of examples. Certainly I agree with Miller and Sastri when they argue that in a democracy there should be a maximum knowledge of who governs and how policy is made. There is an implicit linkage to the "secrecy in foreign policy decisionmaking" issue, and a suggestion that the Supreme Court's power is so enormous, and the available checks and balances so weak, that, as with questions of war and peace, only intense public scrutiny will meet the need of effective countervailing power. But comparing the Supreme Court's power over domestic public policy with the more irreversible power to make war does not convincingly support the argument for comparable openness in decision-making procedures. Supreme Court decision-making seems to me already more open than what goes on in the higher echelons of the foreign policy-defense establishment. Second, not only are the basic premises of Supreme Court decisions relatively open, but Supreme Court decisions, once made, allow at least some time for counteraction. By contrast, a secret decision to mount a military invasion or unleash our arsenal of weapons is considerably less reversible by ordinary political processes. Underlying our shock at the revelations in the Pentagon Papers is the spectre of secret plans to unleash a nuclear war whose consequences *would* be irreversible. The potential impact of such a decision is so much greater than any decision the Supreme Court could make that safeguards developed to protect against the former seem like so much overkill with the latter. The public spotlight may in fact be the only really effective check on potential warlike actions by the executive branch of government, but

it seems much less necessary and less efficacious when applied to the Supreme Court. The existing political checks on Supreme Court policy-making, complemented by studies showing the diffuse impact of many Supreme Court decisions, seem more than an adequate check on runaway judicial power.

The implicit comparison to the Pentagon Papers affair thus seems to me too much arguing by emotion. At another point the authors refer to a dangerous *trend* toward secrecy in American government. But their own data shows that the closure of the Supreme Court conference, and the deviation from the English model of *seriatim* decisions delivered extemporaneously from the bench, was essentially accomplished during the time of John Marshall. If there is any trend in this regard, it is toward greater openness about how and why Supreme Court decisions are made. Certainly the great recent proliferation of dissenting opinions and justifications for that practice have done much to inform the interested public about the values and attitudes of the Justices. Of course it does not provide total knowledge, but can anyone really make the case that open conference deliberations would provide such information? I think that public information about Supreme Court decisions could be easily improved. But there certainly is no *trend* toward secrecy.

At a number of other points the authors fail to persuade despite their angry assertions about the evils of secrecy on the Supreme Court. For example, they reiterate the widespread assertion that Supreme Court opinions are sometimes opaque, often confusing, and rarely achieve the level of judicial craftsmanship of previous "great" Justices. Yet is there any evidence that conferences open to the public will remedy this situation? Are clarity or craftsmanship related to secrecy? Are some Supreme Court opinions "desperately negotiated documents" because they are contrived in secret or because of the need for democratic bargaining and compromise in the resolution of controversial policy questions? Surely efficiency and clarity, though desirable, are not the primary goals for public decision-making in a pluralist society.

Miller and Sastri also seem to lament the fact that the mystique of mechanical decision-making still reigns if it does not rule. They object to what must be the least closely guarded political secret since President Nixon's "Southern Strategy"—that judges tend to be result oriented. But is this due to secrecy? Will it be alleviated or even significantly changed by more open decision-making? I doubt seriously

that any judge today believes in the "inspired revelation" of the law, although many judges, politicians and scholars may respect the functional aspects of a decision-making mystique. Certainly defrocking the judges and the removal of other symbols, plus some decrease in secrecy, would serve to demystify and desanctify the Court. But whether this would lead to greater public confidence in the Court or acceptance of its decisions seems problematical at best. It is undeniably true that lack of information frustrates some scholars and occasionally forces them to resort to techniques of analysis which Miller and Sastri—and others—find unsatisfactory. I agree that Justice Black's decision to have his conference notes destroyed after his death is a regrettable if not deplorable act.[4] But surely the needs and interests of scholars is not much of a public argument for less secrecy.

At another point the authors seem to be arguing that an open conference will produce less arbitrary and autocratic decisions. Yet there is no effort even to link this innuendo to anything which the Supreme Court has done. There are many examples of khadi justice. But are such cases typical of *Supreme Court* justice and/or related to the question of secrecy in that context? Of course the Supreme Court has made decisions which some have regarded as hasty or arbitrary. But would the incidence of such decisions be reduced by the public gaze?

The judges may occasionally transgress the strict limits of the adversary system by relying on facts or opinions of third parties. Yet the evils of this practice seem far outweighed by the public good achieved by encouraging judicial breadth of vision. It might prove slightly more satisfying to litigants if they could, as Miller and Sastri suggest, rebut the findings of the justices in their independent research. But for the system to work best public decisions should not only be informed, but should come to a point where they are authoritative even if not perfect. There is good documentation of the efforts by southern states to build a "scientific" case against the premises of the *Brown* decision.[5] But how long would the Court have to wait for

4. Unlike the many "public" documents which recent Presidents have spirited away to their memorial libraries, a Justice's conference notes are clearly private. Commenting on the richness of the Taft papers compared with the relative uselessness of the "pruned" Hughes papers, Walter Murphy once noted the utility to scholars of Justices dying with their robes on. But if they enter into their wills provisions similar to those of Justice Black then only if they die intestate would their papers be preserved.

5. I. NEWBY, CHALLENGE TO THE COURT (1967).

the presentation of such evidence? At what point could the Justices decide that there is sufficient evidence to support a decision, or that they have taken adequate account of all the possible consequences of their decisions? I agree that justices—and other public-policymakers—should be better informed; but the mechanism for achieving this goal seems to me largely unrelated to what Miller and Sastri have proposed. Their proposal seems to me to have all of the shortcomings and few of the virtues of the judicial procedures they take to task.

The best argument in favor of "full disclosure" of the Supreme Court's procedures and decisions is the abstract contention that somehow it would be more in keeping with democratic principles. Especially where you have a nonelected court staffed by judges with lifetime appointments, knowing as much as possible about what these judges are doing makes a certain amount of intuitive sense. In a polity where the usual form of legitimation—elections—is absent for the federal courts, a genuine openness is appealing, improved communication between the Court and the people a must. But it is then incumbent on us to provide adequate prescriptions for achieving this goal. If the true goal were communication and public understanding, disclosure by itself wouldn't mean much. Not many more people would really understand the Supreme Court than do today, although those better educated elites already in the know would know a little more.

Really improved communication with the general public would almost certainly have to embrace the electronic mass media, as Levine and Becker have already suggested.[6] But whether or not some viable application of the media to the Supreme Court can be developed, greater openness should be encouraged. I for one doubt that an openness less apparent than real would emerge simply from requiring the Supreme Court to deliberate in public. The most likely result would be substitution of new internal norms which would continue to allow the Justices to debate and bargain among themselves before submitting their personal and collegial decisions to the test of public scrutiny. Casual conversations in chambers and at social gatherings would replace discussion at the conference table. The conference would serve primarily to ratify prior agreements already arrived at. Justices would be more reluctant than at present to reveal their inner doubts and working hypotheses to each other—to say nothing of the general pub-

6. Levine & Becker. *Toward and Beyond a Theory of Supreme Court Impact,* 13 AM. BEHAVIORAL SCIENTIST 561 (1970).

lic. Of course I don't have any empirical evidence for these assertions, although I do have some experience, as a faculty member of a university which must operate under a state anti-secrecy statute, which suggests their plausibility. These possible negative consequences seem to me at least as plausible as the extremely probabilistic benefits of disclosure which Miller and Sastri predict.

My final point relates to the assertion that since the Supreme Court stands "last" in public esteem, tinkering with its procedures could not make things any worse. But there is here both a problem of data analysis and a logical flaw. The reported spread of confidence levels between the Executive and the Supreme Court, with Congress in-between, is only seven percentage points. This is probably not statistically significant, and it hardly seems an adequate basis for major reform. Further, it is only a matter of speculation whether these figures reflect lack of information about what the Court has been doing or opposition to those decisions which have come to public attention. There is much circumstantial evidence, including the results of the 1972 presidential election, which suggests that the latter is correct. Giving people more knowledge about what the Court is doing while at the same time undercutting the Court's mystique might have exactly the opposite results. It is both a logical and empirical possibility that public esteem for the Court might decrease.