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COMMENT ON SECRECY AND THE SUPREME COURT

J. WOODFORD HOWARD, JR.*

Sunlight is said to be the best of disinfectants

Louis D. Brandeis†

Is secrecy in the Supreme Court compatible with American democratic traditions? The authors are to be commended for airing this part of the perennial debate over the role of the Supreme Court in the American polity. Hedging neither their premise that the high court is a policy maker, nor their commitment to democratic norms, they champion the principle—albeit without recommending an implementing procedure—of open decisions, openly arrived at. While I share similar assumptions about the political functions of the nation's highest court, and agree that the adversary process leaves much to be desired as a mode of informing appellate judges and holding them to account, I remain unpersuaded by the basic argument that, on balance, the disadvantages of secrecy outweigh the advantages in Supreme Court decision making.¹

The historical, comparative, and symbolic arguments can be disposed of briefly. Whatever the motives of John Marshall in establishing the custom of collective decisions, the *seriatim* practices of courts of common law have little relevance to the public law tribunal the Supreme Court has become. Great issues of public policy are scarcely susceptible of resolution by shooting from the hip. Appellate practices in other nations also are not dispositive of the issue in the United States. Though these comparisons are healthy reminders of the many roads to truth, few if any of the tribunals that deliberate openly perform the pervasive and delicate functions in their societies that the Supreme Court does in ours. Judicial review in most of these countries is still aborning. Nor has open decision making invariably

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† OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 62 (paper ed. 1967).

1. See Howard, *Adjudication Considered as a Process of Conflict Resolution: A Variation on Separation of Powers*, 18 J. PUB. L. 339 (1969).

freed these tribunals from suspicion of holding secret caucuses. Swiss judges, for instance, have been rumored to hold private pow wows before deciding big cases.

Symbolically, though the work of Murray Edelman gives one pause, the argument that secrecy is necessary to maintain the mystique and therefore the power of the high court is a strawman easily over-killed.² For the argument is basically a Platonic lie at war with both the republican and rationalist traditions of American jurisprudence, and one little substantiated in empirical literature. If Dr. Gallup is to be believed, the mass public neither knows nor seems to care about specific Supreme Court decisions beyond whose ox gets gored. The symbolic issue of secrecy, like the larger debate over the democratic character of judicial review, may well be a courtwatcher's problem.³

As Karl Llewellyn suggests, "one can write some rather appealing music on such themes" as democracy and secrecy. But the basis of secret deliberations in the Supreme Court is entirely practical and should be judged accordingly.⁴ Does secrecy during and after decision aid or impair the functions of the Court in the American government? It must be conceded that we all are groping in the dark in assessing the practice pragmatically. Systematic empirical proofs are lacking to measure the effects of alternative procedures one way or another. The problem, however, requires more than lumping the Court with other legislative systems and demanding the abolition of secrecy. Even the most popularly responsible of our political institutions have never been able to live up to that standard under all circumstances. For judges as for other policy makers it is necessary to weigh real needs and dangers, mindful of the distinctive political tasks that the Supreme Court performs in our governmental scheme.

Apart from tradition, secret deliberations in the Court are said to be functionally necessary to prevent leaks, promote frank discussion, and secure judicial independence. In my view, these defenses are neither "ill-founded" nor based on conditions that have "ceased to exist." Neither do they exhaust the subject. Llewellyn is probably right

2. M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1964).

3. See Murphy & Tanenhaus, *Public Opinion and the United States Supreme Court: A Preliminary Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 *LAW & SOC'Y REV.* 357 (1968). See also S. GOLDMAN & T. JAHNIG, *THE FEDERAL COURTS AS A POLITICAL SYSTEM* 135-48 (1971).

4. K. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 325 (1960).

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that secrecy arose as a corollary of postponement in order to avoid misapprehension, speculation, and reprisals. Judicial history does not warrant conclusions that these dangers have disappeared. On the contrary, one of the cited episodes—*Dred Scott v. Sandford*⁵—well illustrates how premature disclosure may activate public wounds. One need only imagine the financial windfalls of leaks in the Penn Central merger, not to mention the political uproar surrounding open deliberations in *Brown v. Board of Education*,⁶ to grasp that these dangers are genuine. A concomitant of taking cases under advisement is secrecy until decision is rendered. The more potent the case politically, the more compelling may be the need for silence.

Preventing leaks, moreover, is only part of the larger purpose of encouraging careful deliberation. It should be remembered that holding decisions in the bosom of the Court results less from delay than from difficulty and demands for collegial reflection. Reflection is the essence of the appellate function as distinct from the trial judge's responsibility to make quick judgments. Presumably the Justices have exhausted the decisions that can be made quickly during initial screening of certiorari petitions. Granted that the Court over the years has been less instructive about its reasons for granting and denying certiorari than desirable, the remedy of open decision making may be too strong a tonic for reasons that cut deeply into the appellate process.

Promoting frank discussion is but one of the reasons for decisional privacy. A much-touted advantage of the adversary system is prevention of premature judgment. The papers of Justices Murphy and Burton, which include their notes of frank conference discussions, reveal several instances of persuasion and ripening judgment under the Court's mantle of privacy. For example, Justice Black changed his mind and the result in several civil liberties landmarks such as *Martin v. Struthers*⁷ and *Colegrove v. Green*.⁸ Justice Douglas did likewise in *Terminiello v. Chicago*.⁹ In a recent television interview, Earl Warren emphasized that the Court managed to reach unanimity in *Brown v. Board of Education* because the Justices did not polarize themselves by taking a vote on the great issue until week

5. 60 U.S. (19 How.) 393 (1857).

6. 347 U.S. 483 (1954).

7. 319 U.S. 141 (1943). For details in these and the following cases see J. HOWARD, MR. JUSTICE MURPHY: A POLITICAL BIOGRAPHY (1968).

8. 328 U.S. 549 (1946).

9. 337 U.S. 1 (1949).

after week of noncommittal discussion. One wonders whether strong-minded jurists could change their positions so readily, or make the necessary adjustments in collectively bargained language, if compelled to take their stands in public. Methods suited to free-wheeling legal exchanges at trial may well be incompatible with deciding appeals on collegial courts bearing final responsibility.

Another touted advantage of our legal system is incremental legal growth, case-by-case.¹⁰ The papers of several Justices—*e.g.*, Stone, Frankfurter, Murphy, and Burton—reflect the vigor of argumentation inside the Court. Among themselves, as in oral argument, Justices commonly debated by trimming issues and distinguishing cases, by proposing dicta and projecting principles onto hypothetical situations, all customary methods of separating wheat from chaff in the process of “reasoning by example.” In *Everson v. Board of Education*¹¹ for instance, Justices Frankfurter and Jackson bordered on absolutism rather than breach the high wall separating church and state, and Justice Rutledge proposed going the whole route by forbidding state aid to any private school whatsoever.¹² When the stakes are so high, one wonders whether the Justices could so freely expose their tentative conclusions about issues not yet before them. And even if they could, the gains for adversary process must be weighed against the risk of cutting too broad a legislative swath. Precisely because courts make law in pieces rather than whole cloth, Justices have reason not “to speak out frankly in open court and lay bear their minds” about policy problems only partially before them.

By like token, it is scarcely “shallow” to suggest that secret deliberations help to insulate the Court from popular pressures while grappling with pressing public problems. How much insulation is essential, of course, depends on the thickness of judicial hides. But the recent history of enforcing voting rights and school desegregation in the South generates little confidence that lifetime tenure with good behavior is sufficient. United States district court judges, some of whom buckled under parochial heat, enjoy the same security.

The distinctive political tasks of the Supreme Court, not “robism,” underlie my basic difficulty with the proposition that the time has

10. Shapiro, *Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?* 2 *LAW IN TRANS. Q.* 134 (1965).

11. 330 U.S. 1 (1947).

12. *Id.*

come to eliminate secret consultations as a relic of an elitist past. The Supreme Court is not an ordinary court or legislature; it is a super-legislature serving in a reflective capacity above the fray. Whether it registers the "sober second thoughts of the community," provides the "conscience of the country," or merely offers another chance for outsiders and losers at the polls to vindicate their federal rights, it serves as a more remote authority rendering policy decisions that more popularly responsible officials lack the power or will to make. So long as we accept those functions, and the authors appear to, procedures that insure remoteness and the capacity to reflect are part of the price.

Many Justices, discomfited by the personal isolation of the job, have made Charles deGaulle's discovery that the general dines alone. The political imperatives of "massing" the Court, as William Howard Taft called the urge for unanimity, also should not be underestimated. Richard E. Neustadt has written that the first prerequisite of presidential power is that presidential commands be clear and unambiguous.¹³ The same applies to the judiciary. However much *seriatim* opinions may appeal to the democratic spirit, effective leadership of a complex legal bureaucracy via case law hinges upon a clear voice from the top. Once that is admitted, private bargaining follows. Again, *Brown v. Board of Education* is a prime exhibit. Had positions stiffened at the point when Chief Justice Warren took the helm, the Court apparently would have commanded the country to dismantle school segregation by a 6-3 division—hardly a prescription for positive leadership in a great leap forward of social change.¹⁴

Risks obviously run when ultimate power is secret. It is hard to prove that secrecy is necessary for the power to be ultimate. Against the values promoted by privacy can be set the dangers of corruption and irrationality unexposed, of independent decision making unchecked by adversary process, even evidence of the "risky-shift" hypothesis that groups take greater risks than individuals.¹⁵ Against the dangers of leaks also may be set known instances when public exposure, or the threat of it, stifled potential breaches of the proprieties by Justices or, as in William Schneiderman's case, against them.¹⁶ But considered in its entirety, the evidence is thin that the Court has long

13. R. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 19 (1960).

14. Ulmer, *Earl Warren and the Brown Decision*, 33 J. POL. 689, 697 (1971).

15. S. ULMER, *COURTS AS SMALL AND NOT SO SMALL GROUPS* (1971).

16. *Schneiderman v. United States*, 320 U.S. 118 (1943).

failed to be responsive to dominant law-making coalitions, thinner still that secret deliberations are responsible for its lapses.¹⁷ Secrecy is perhaps more symptom than cause of the adversary system's inadequacies. So long as the Supreme Court's governmental functions are to remain, the needs and dangers justifying secret consultation are real enough to counsel caution before discarding the practice cavalierly on grounds of incompatibility with democratic theory. "Judicial review," Edward S. Corwin once observed, "represents an attempt by the American Democracy to cover its bet."¹⁸ So it is with the methods that the Supreme Court employs to perform that task.

In the main I have concentrated on the easier target of secret deliberations. The case for secrecy *after* decision is less persuasive, as Justice Frankfurter noted, and appropriate standards are more treacherous. A professional student of the judiciary like myself is hardly an unbiased observer concerning the proper time to expose the Supreme Court's inner workings. But I take this opportunity to raise briefly the issue of subsequent revelation, because the subject is in serious need of standards to prevent some lamentable practices such as destruction of records that belong to the public, scrambling for monopolistic control of papers on the part of archivists and scholars, and leaks via judicial papers that intrude on the Court's current operations.

Judicial biographies of varying degrees of frankness and quality have been written for generations. The Supreme Court survived. Indeed, most of our knowledge about how the Justices operate is largely a product of these works.¹⁹ Certain Justices are nervous, nevertheless, about the potential invasion of their privacy to the point of burning or threatening to burn their papers. My position is that the privilege of secrecy imposes on them a counterpart responsibility of ultimate exposure to the bar of history. Therefore, the judicial papers of deceased Justices should be left to the public, preferably in public depositories like the Library of Congress, under reasonable restrictions as to laws of libel, state secrets, and passage of time to prevent intrusion in the Court's current functioning. Note that the gravamen is not upholding the "upper court myth," much less preventing per-

17. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

18. Corwin, Book Review, 56 HARV. L. REV. 487 (1942).

19. See Howard, *Judicial Biography and the Behavioral Persuasion*, 65 AM. POL. SCI. REV. 704 (1971).

sonal embarrassments, so much as forestalling intrusion in *current* litigation. Scholars have no more business getting in the way of other people's lawsuits than they have in perpetuating myths. History, after all, can wait.²⁰

Reasonable men will differ about how much delay is necessary for this purpose. Justice Frankfurter imposed a sixteen-year restriction on publication of his papers. The subject is not free from difficulty, because even the standard diplomatic delay of 25 years would not prevent papers from occasionally flushing out the positions of Justices with long tenure on unsettled legal questions. Revelation in such instances would be unfair to the judges, who may have altered their views in the interim, and to the litigants, who may read cases but not biographies. While writing a biography of Justice Murphy, I faced that dilemma in several important cases before the courts and opted to withhold the information until a later day. As matters stand, the disposition and use of judicial papers depend entirely on such personal judgments. Far better that the Supreme Court and its scholarly constituency develop common standards to accommodate the claims of Clio and Themis.

20. For other views see, *e.g.*, A. BICKEL, *THE UNPUBLISHED OPINIONS OF MR. JUSTICE BRANDEIS* viii-ix (1957); A. T. MASON, *THE SUPREME COURT FROM TAFT TO WARREN* 200-13 (1958); Peltason, *Supreme Court Biography and the Study of Public Law*, in *ESSAYS ON THE AMERICAN CONSTITUTION* 215 (G. Dietze ed. 1964); Ulmer, *Bricolage and Assorted Thoughts on Working in the Papers of Supreme Court Justices*, to be published in the *Journal of Politics*; Dunham, Book Review, 24 *U. CHI. L. REV.* 794, 797 (1957).

