

THE BRETHREN AT LAW AND AT WAR: AN ESSAY

by

ZANE E. FINKELSTEIN

“Psst, Psst. Hey you! Want to buy some dirty pictures? They’re cheap.” In response to this invitation, I have recently spent several rewarding hours in the trash cans behind those great bronze doors and Corinthian pillars at One First Street, Northeast, Washington, D.C., where beneath a marble banner proclaiming “Equal Justice Under Law” the US Supreme Court discharges its responsibilities pursuant to Article III of the US Constitution. The invitation, issued by Bob Woodward and Scott Armstrong, both associated with *The Washington Post* and the sensational “expose” of the death throes of the Nixon Administration—*The Final Days*—is contained in their widely noticed book *The Brethren: Inside the Supreme Court* (New York, Simon & Schuster, 1979).

The Brethren is a chronological narrative dealing with the docket of the US Supreme Court from October 1969 through July 1976. With respect to genre—poetry, prose, fiction, nonfiction, etc.—I can with some degree of confidence report that the book is prose and not bad prose at that. Concerning whether the book is fiction or nonfiction, however, I speak with far less confidence. The authors tell us,

Most of the information . . . is based on interviews with more than 200 people, including several Justices, more than 170 former law clerks, and several dozen former employees of the Court. Chief Justice Warren E. Burger declined to assist us in any way. . . . We had . . . thousands of pages of documents from the chambers of eleven

of the twelve justices who served during the period. . . . The sole exception was the chambers of Justice John P. Stevens. . . .”

With the foregoing as sole bibliographic background, and in the complete absence of notes or other evidence of scholarship (there are a few asterisks), one cannot but feel uncomfortable with “quoted” conversations, particularly those involving the Chief Justice, who, according to the authors, declined to assist and whose chambers were apparently not bugged. There are conversations that Chief Justice Burger purportedly had with his wife, his clerks, and himself. Similarly, long detailed conversations are reported in unauthenticated and unattributed direct quotations stemming from the Court’s confidential conference discussions. These may be accurate, but it does put a strain on credence. The late J. Fred Buzhardt, when confronted with similar treatment of his personal ruminations as contained in Woodward and Bernstein’s *The Final Days*, is reported to have said, “They wrote about my thought process. I don’t know how they can derive that for honestly I can’t myself.” A traditional means of testing credibility and measuring reliability is to weigh the known against the assertions and to use the probative scale thus developed to test the accuracy of those assertions for which there are no knowns. This kind of credibility calculus is systems analysis gone rampant, and I won’t play that game. No useful purpose would be served by developing a complete catalog of the known hits, runs, and errors contained in *The Brethren*. Suffice it to bring to the

surface several lapses of particular interest to the military professional:

- *Ex parte Quirin* involved the trial and conviction by military commission of eight Nazis who landed surreptitiously on US shores from U-boats, trained, equipped, and ordered to sabotage major American civilian and military facilities. The Court reviewed the commission's procedures and held that they met the requisite due process standards applicable to wartime spies, saboteurs, and terrorists. *The Brethren*, in stark contrast, reaches this remarkable conclusion: "The Justices had pretended that eight United States residents of German heritage had no Constitutional guarantees when they were found guilty of attempted sabotage. . . ."

- *Spock v. Greer* upheld a post commander's regulation of partisan political activity, including speeches and demonstrations, on the basis that military installations, unlike municipal streets and parks, are not places for public assembly and free communication. Military posts serve another purpose; they can, at the commander's discretion, be kept wholly free of entanglement in political activity. *Flower v. United States* had previously held that if the commander converts a post street into an unregulated public thoroughfare, free speech cannot be abridged. *The Brethren* points an accusing precedent at Mr. Justice Stewart, the author of both opinions, for issuing a "declaration that two very similar cases were different." They are, in fact, very different. *Flower*, decided without brief or oral argument, dealt with a post where the commander had "abandoned any claim of special interest." *Greer*, however, dealt with a commander's asserted claim of a special interest. The facts are thus indeed different. There is an old courthouse joke about the trial judge's response to an appeals judge's expression of regret over a recent reversal of the trial judge: "Oh!" said the trial judge, "Was that my case? From the way you stated the facts, I didn't recognize it." At any rate, Messrs. Armstrong and Woodward to the contrary, *Greer* restated the right of a commander "in the American Constitutional

tradition of a politically neutral military" to insulate his installation from the appearance or the reality of partisan activity.

- *Trop v. Dulles* dealt with the congressionally mandated expatriation of a member of the armed forces who was convicted of wartime desertion. *The Brethren* implies that the Court had "held" such action to be "cruel and unusual" punishment based upon "the evolving standards of decency that mark the progress of a maturing society." Unfortunately or fortunately, *Trop* "held" nothing. In this 1958 case, four justices did express the opinion that such punishment was "cruel and unusual" and barred by the Eighth Amendment. Four others, led by Mr. Justice Felix Frankfurter, opined directly to the contrary. A concurring opinion by Mr. Justice Brennan deals with the question of a nexus between the wrong and the punishment. I am not sure anyone actually knows what Mr. Justice Brennan was talking about, but clearly it was not "cruel and unusual" punishment within the meaning of the Eighth Amendment.

- *Relford v. Commandant* dealt simply with the retroactivity of *O'Callahan v. Parker*. The serviceman O'Callahan objectified the late Mr. Justice Douglas's misguided sentimentality for uniformed criminals. In *O'Callahan*, a narrow majority of the Court established a convoluted formula for determining when a serviceman could be tried under the UCMJ with all its protections and shortcomings, and when he must hire a lawyer and throw himself on the ignorance of some local police court. Unfortunately for the military commander, the effect of *O'Callahan* was to deprive him of peacetime, off-post, off-duty authority over his troops, but to leave him with responsibility for their conduct. *The Brethren* complains that the Supreme Court has been ready since *Relford* in 1970 to reverse *O'Callahan*. If so, the Court has failed to avail itself of more than a few opportunities. Let's hope, however, that the authors prove to be prophets, albeit unwilling ones.

These errors and others are not such serious flaws as to deprive the work of worth,

but they do indicate, at least to me, that the authors have failed to meet their factual burden of proof.

If, then, *The Brethren* shows many of the earmarks of fiction, is it good fiction? I would, on balance, say yes. It is a good hot historical novel. It clearly demonstrates in the best tradition of accusatory journalism that one man—even one justice—with courage and conviction can make a majority; that decisions are sometimes made on a narrowly pragmatic basis rather than on a broad plateau of principle; and that all justices are not equally skilled, disciplined, prudent, or brilliant. Likewise, the reader can drool with the stately gentlemen of the Court over pornography and its meaning; learn that incontinence is odoriferous even on the bench; share the anguish of a judicial husband whose wife drinks too much; and ponder what causes the Court's only black, in occasional bursts of horseplay, to assume the roles of Mr. Bones or Mr. Bojangles for the amusement of his fellow justices.

Through the bifocals of my military and legal training, I have been intrigued by the procedural and substantive similarities between the Joint Chiefs of Staff in the "Tank" and the Court in conference. Dedicated, intelligent, principled men with habits of vision and concern—developed over a lifetime—confronting, cajoling, cooperating, and conflicting with other men with equal and opposite visions and concerns, but with somewhat congruent dedication and intelligence. It doesn't take a *kama sutra* scholar to know that there is more than one right way. Likewise, both in the JCS and on the Court, the difference between professionalism and doctrinaire parochialism is often little more than the difference between you and me. Men with open minds learn from each other. Old dogs do learn new tricks; only dead ones don't. The real spirit of liberty, Judge Hand once implied, is not to be too sure that one is right. Sometimes well-meaning justices and even soldiers are wrong. The most intelligent ones know this, and they learn from their colleagues. That this is true

on the Court seems to surprise the authors. I doubt that it would surprise many of *Parameters'* readers. American judges are mothered by the Constitution and sired by service to nation. Thus, these siblings call themselves brothers. Soldiers have an equal claim to this fraternity. Soldiers and judges both know that the difference between a founding father and a terrorist depends in the final analysis on definitions imposed by the outcome of the last battle. The authors of *The Brethren* seem to glimpse this reality only fleetingly, if at all.

Similarities between the Court and the "Tank" are offset by pronounced differences. Justices, according to *The Brethren*, are often "upset," "happy," "pleased," or "disturbed." They are sometimes "tormented," "troubled," "elated," or even "shocked." More often, however, they are simply "furious." Members of the JCS traditionally deny themselves these emotions. The Memorandum of Policy (MOP—great acronym) used to provide, as I recall, that the JCS members do not "feel" or even "think." They only "believe."

Another fundamental difference is the nature of the staff support rendered the two entities. Highly professional, technically proficient, experienced staff officers and

Colonel Zane E. Finkelstein is Director of International Law Studies in the Department of National and International Security Studies at the US Army War College. He did his undergraduate work and earned the J.D. degree at the University of Tennessee. Colonel Finkelstein's overseas tours have included Germany, Taiwan, Vietnam, and Korea. He has taught in the Department of Law of the US Military Academy and in the Military Justice Division of The Judge Advocate General's School, Charlottesville, Virginia. From June 1970 to March 1971 he was a Judge of the US Court of Military Review in Washington. Subsequent assignments included four years of service as Legal Advisor and Legislative Assistant to the Chairman of the Joint Chiefs of Staff, and two years in Korea as Judge Advocate of the United Nations Command and Eighth US Army.



former commanders serve the individual members of the JCS and assist them in the discharge of their responsibilities. These are men tempered by both battle experience and responsibility. The Court, on the other hand, is served by clerks—bright young men and women—who seldom have served a client or tried a case. With dangling coif keys, bright eyes, and bushy tails, clerks one year out of law school are like Christmas help. *The Brethren* is written basically from their perspective. These young lawyers, chosen generally from the law review boards of the justice's own law school or state, labor in the fanciful vineyard of theoretics and not in the real world of responsibility. Like generals' aides, they are intelligent, motivated, dedicated, and (until the appearance of this book) believed to be loyal. A history of the Supreme Court written from their perspective is as likely to be accurate as a history of Operation Overlord written by those bright young lieutenant "dog-robbers" who served Generals Eisenhower, Smith, or Tedder.

The lasting major impact, if any, stemming from the treatment of the Supreme Court and its work by *The Brethren* may very well be on the clerks. The use of such assistance is neither universal (most other nations provide robed assistance for their highest courts, i.e. other judges) nor ancient (the practice has developed in the last 100 years or so). The use of judges or professional staff is already being discussed. Given the choice between bright, eager, and highly trained young clerks and the kind of professional assistance rendered by commissioners to the Court of Military Appeals, I, for one, would choose the bright idealist rather than the jaded ideologue. If the clerks have indeed the influence that the authors suggest, it may well be that their appointment should be submitted to the close scrutiny of the Senate Judiciary Committee and the "advice and consent" process.

It is also important in reading this book to recognize the mind-set of the authors. Not much is known about Mr. Armstrong, but Mr. Woodward, the son of an Illinois judge (he should thus know better), attended Yale on a Naval ROTC scholarship. I am told that upon commissioning he served two years on

the alternate National Military Command Center afloat and is reported to have made an appreciable effort to avoid the Vietnam "death trap" (his term, not mine). The anti-war preconceptions implied by this authorial background add color and hue to their tapestry, explaining perhaps the tendentious treatment afforded the Pentagon Papers case and the effort by Ms. Holtzman and several Air Force officers to enjoin American military activities in Southeast Asia. *The Brethren's* narrative of Ms. Holtzman's effort, for example, is amazingly devoid of insight into the potential chaos that legislation by judicial fiat could bring.

Here is the story. On 25 July 1973, the plaintiffs persuaded Orrin G. Judd, a New York Federal District Court Judge, that Congress had not authorized the bombing in Cambodia. He not only declared the war unauthorized, unlawful, and unconstitutional, but also enjoined the President and US military authorities from continuing such activity after 1600 hours on the 27th of July 1973! On the 27th, a three-judge panel of the Court of Appeals for the Second Circuit, upon urgent request from the government, delayed the injunction and set argument for the 13th of August. Ms. Holtzman, then a newly elected Congresswoman from New York, requested that Mr. Justice Thurgood Marshall, as Circuit Justice for the Second Circuit, undo the action of the Second Circuit. In a carefully considered opinion dealing with congressional power, presidential responsibility, and judicial arrogance, he refused to do so. Ms. Holtzman's attorney then sought relief from the late Mr. Justice Douglas. The attorney reportedly flew to Seattle, drove five hours toward Goose Prairie (population less than 100), and walked the last mile through the woods to deliver the appeal to Douglas's rustic mountain hideaway. Mr. Justice Douglas accepted the petition and agreed to hear oral argument in Yakima, Washington the next morning. Douglas's written opinion nodded politely, ever so politely, to Marshall's prior judgment; referred to US activities in Southeast Asia as the "Cambodian Caper"; passionately alleged that "denial of the application . . . would

catapult our airmen as well as Cambodian peasants into the death zone''; and vacated the stay issued by the Court of Appeals. Thus, as of Saturday morning, 4 August 1973, a United States Supreme Court Justice had, in fact, ordered the President to terminate military activities in Southeast Asia!

The federal bureaucracy was energized in a way seldom seen. As a result of Mr. Nixon's Saturday night massacre, former Solicitor General Bork was now the Attorney General (on this Saturday he was answering his own phone and doing his own typing). Pentagon and State Department lawyers were scurrying around in a frenzy. An immediate petition to the Supreme Court was lodged with the Chief Justice. He referred it to Mr. Justice Marshall. Meanwhile, affidavits, classified and unclassified, were being prepared by and for the Secretary of State, the Secretary of Defense, and the Chairman, Joint Chiefs of Staff; preparation for oral argument was expedited. Mr. Justice Marshall, however, without further argument or affidavits, polled the Court's seven other members, and in a remarkable divergence from his liberal friend and colleague summarily reversed Mr. Justice Douglas that same day, 4 August 1973. Four days later, on the 8th of August, the Court of Appeals for the Second Circuit, after hearing and argument, reversed Judge Judd and found ample congressional support for our Southeast Asian policy. Congress had provided literally billions of bullets for that effort; thus, it either approved the war or thought there was one gigantic bingo game going on out there. The drama of a major constitutional confrontation is lost, however, in Woodward and Armstrong's doctrinaire narrative uncritically supporting Mr. Justice Douglas's position.

This book is not, publicity to the contrary notwithstanding, the first inside story on the Supreme Court, nor is it the first written

from a clerk's perspective. Even the US Army War College Library, not generally known for its collection on legal scholarship, contains some 61 relevant titles, running from Abraham's *The Judiciary* through John Frank's *Marble Palace* and Fred Rodell's *Nine Men* to Steven Wasby's *Continuity and Change*, most of which cover the same general period. But there is a difference. The difference lies in *The Brethren's* profusion of intimate, behind-closed-doors detail. Of course, strong-minded men with deep-seated constitutional responsibilities don't always share benign opinions of each other. Messrs. Woodward and Armstrong, however, go much further in dealing with the justices' interpersonal relationships, at least on the surface, than anyone has before.

The authors' intimate glimpses, apparently gleaned from purloined documents and violated confidences, are undeniably stimulating. The real issue, however, is what impact, if any, the book will have on the Court's ability to command the respect of the American people, which ultimately is its only power. The chaos and disorders of the 70's have had a profound impact on the fabric of American political life. I doubt that this book will add to or subtract from that impact. This examination of the flora and fauna of Supreme Court activities reflects a degree of Court incompetence and an unevenness in performance ranging from the untenable to the imbecilic. *If believed*, this chaos and confusion would cause popular dismay and undermine public trust in the Court as an institution. I doubt that much will be believed. On the other hand, compared to recent congressional scandals of booze, booty, and broads, not to mention Watergate, the authors have revealed quiet competence, not chaos, at the Court. I doubt this was their intention, but I thank them for it.

