Buffalo Law Review

Volume 22
Number 3 *Judicial Secrecy: A Symposium*

Article 6

4-1-1973

Secrecy and the Supreme Court: On the Need for Piercing the Red Velour Curtain

Arthur Selwyn Miller
George Washington University National Law Center

D. S. Sastri
George Washington University (Student)

SECRECY AND THE SUPREME COURT: ON THE NEED FOR PIERCING THE RED VELOUR CURTAIN

ARTHUR SELWYN MILLER* and D. S. SASTRI†

> Everything degenerates, even the administration of justice, nothing is safe that does not show it can bear discussion and publicity.
> Lord Acton**

INTRODUCTION

The secrecy that envelops the Supreme Court's work," Justice Felix Frankfurter once said, "is not due to love of secrecy or want of responsible regard for the claims of a democratic society to know how it is governed."[1] The reason for it, he went on to say, is that the Court could not function effectively if amenable to the forces of publicity to which the Executive and the Congress are subjected.[2] To the extent that this position has received consideration from judges and commentators, it has met with virtually unanimous approval. While not intended as an exhaustively documented study, this article examines the historical and contemporaneous basis for this view, and suggests a thorough reexamination of and an end to the opacity which enshrouds Supreme Court operations.

Our thesis may be simply stated: basic democratic theory requires that there be knowledge not only of *who* governs but of *how* policy decisions are made. Only if it can be demonstrated that certain other fundamental values are jeopardized or transgressed should secrecy continue to be the norm. We maintain that the secrecy which pervades Congress, the executive branch and the courts is itself the enemy.

By quirk of fate, by design or by a bold, raw grab for power by

* Professor of Law, George Washington University National Law Center. A.B., Willamette University, 1938; LL.B., Stanford Law School, 1949; J.S.D., Yale Law School, 1959.

† B.L., Andhra University, 1957; LL.M., George Washington University, 1971; S.J.D. Candidate, George Washington University.

** LORD ACTON AND HIS CIRCLE 166 (A. Gasquet ed. 1906).

1. Frankfurter, *Mr. Justice Roberts,* 104 U. PA. L. REV. 311, 313 (1955).

2. *Id.*

Chief Justice John Marshall, the Supreme Court has enormous power. Through the votes of a bare majority, it can invalidate the actions of any segment of federal or state government, or place its imprimatur upon governmental actions. Moreover, it is the ultimate court of statutory interpretation and administrative review. The Court sits, thus, as a continuing constitutional convention—interpreting the great generalities of the fundamental law, validating constitutional change, and permitting often nebulous statutory language to be applied to the rapidly changing circumstances of American life. In addition it sometimes acts as a "national conscience," a norm-setter for the people; and it is also a court of law.[3] In short, the Supreme Court is, as Frankfurter put it, "a very special kind of court."[4] It is this special character which demands rigid reexamination of the premises on which the Court operates, one of which is the secrecy of its internal operations. For all we know, the Justices engage in some sort of latter-day intellectual haruspication, followed by the assignment of someone to write an opinion to explain, justify or rationalize the decision so reached. The process is upset, of course, when dissenting or concurring opinions are filed, as they so often are. The oracle then speaks with multiple tongues, to the amusement of some and perplexity of others—particularly those who take seriously the proposition that ours is a "government of laws and not of men."

That the opinion (s) cannot be fully persuasive, or at times even partially so, is a matter of common knowledge among those who make their living following Court proclamations. Many think that these decisions have a large impact upon American behavioral patterns and mental attitudes. Indeed there may be at least a modicum of truth in that position, although there have been few definitive studies on either the general proposition or the specific decisional areas that occupy the attention of the Justices.

That the Supreme Court makes law is so truistic that it need not be argued here. Of course it does, whether that lawmaking is merely interstitial, as Holmes long ago maintained, or "wholesale," as in the era of the Warren Court. As Justice Byron R. White stated in his dissenting opinion in *Miranda v. Arizona*:[5]

3. *See* R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT (1955).

4. Frankfurter, *The Supreme Court in the Mirror of Justices*, 105 U. PA. L. REV. 781, 785 (1957).

5. 384 U.S. 436 (1966).

> [T]he court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what is must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.[6]

But knowledge that the Justices are law-creators (whether in constitutional or statutory questions) merely gives the result. In the few dozen annual decisions "on the merits," one or more opinions obtain. That these opinions are not intellectually satisfactory has been repeatedly stated in recent years; indeed many, perhaps most of them, are not. They fail to explain; they ramble; they slur over major problems; they restate the issues and set the restatement out as reasons; they fail to come to grips with important questions. They are all too often "desperately negotiated documents":[7] the end-products of a process of bargaining among the Justices. This does not make them different from opinions of any previous era of the Court. Since the beginnings of the Republic the Justices have contented themselves with drafting opinions that law students can—and often do—pull apart with dispatch and ease. That provides stimulation and cachet for the students, happiness for those who do not like the results, and at times anguish for judges—provided, of course, that the case analyses are published.

The annoyance is that the opinion often obscures as much as it enlightens, particularly when there are multiple opinions. If the office of the opinion is to make decisions palatable to those who peruse them, the lamentable fact is that often they do not explain. But it is plausible that they are not intended to explain in any systematic or complete fashion. Whatever conclusion one draws on that score, it is clear enough that the murky nature of many opinions has led a number of commentators to call for a better judicial effort. In essence, this demand—at times plaintive; at others raucous—seeks opinions that are "principled" or in accord with "neutral principles" or "enduring and impersonal principles." Otherwise, so we are warned, decisions (such as

6. *Id.* at 531.

7. Bickel & Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3 (1957). *See also* A. MASON, HARLAN FISKE STONE: PILLAR OF THE LAW (1956); W. MURPHY, ELEMENTS OF JUDICIAL STRATEGY (1964).

Baker v. Carr[8]) are more politics than law; more fiat than reasoned decision.[9]

These complaints should be taken seriously. They are being made by observers who are often considered to be the luminaries of a select profession. In our judgment, however, the observers profoundly misunderstand the situation and misconstrue the nature and function of the Supreme Court. They are, in final analysis, determined that the Justices act as would the ideal judge under the Blackstonian theory of the judicial process. The judge is "sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one."[10]

Yet judges do not so operate. According to J. Braxton Craven, Jr., all are "result oriented," whether they admit it or not.[11] They are interested in the consequences of their decisions, however difficult it may be for them to assess those consequences. If that be so, and surely the evidence of history tends strongly to buttress Judge Craven's position, the problem becomes not one of asking for the impossible—"principled decisions" or "neutral principles"—but of determining and revealing the values (the preferences, the predilections, the philosophies) of judges. That done, judges must be held accountable; not as described in the Frankfurter dichotomy—with the full glare of publicity to which the Executive and Congress are allegedly subject—but to the bar of thoughtful public opinion and history.

Ideally, the judicial opinion should provide a basis for understanding both *why* and *how* a decision was reached, as well as a means for predicting the outcome of future controversies. The ideal is seldom realized. One of the most intense and often baffling controversies in American jurisprudence is centered on the requirement of adequate judicial reasoning. Three sources of decision—values, rules and facts—combine in the act of deciding. How judges reach their decisions and formulate their reasoning into opinions is a psychological phenomenon. It is this process—the "cause of decision" and of the determination as to how to explain it in an opinion—which lies at the root of judicial criticism. But since we "cannot explore the minds of

8. 369 U.S. 186 (1962).
9. Neal, *Baker v. Carr: Politics in Search of Law*, 1962 SUP. CT. REV. 252, 327.
10. 1 W. BLACKSTONE, COMMENTARIES *69.
11. Craven, *Paean to Pragmatism*, 50 N.C.L. REV. 977 (1972).

Justices, and what they do not put on paper we do not know,"[12] we are kept in the dark about *how* policy decisions of the judiciary are made. Moreover, it is obvious that in litigation two or more major premises which embody conflicting interests can always be formulated. Thus the process of decision making is a deliberate act choosing one major premise and adopting it as the departure point for writing the opinion.[13] Judges seldom reveal publicly why a major premise was chosen while other available premises were discarded. The unavoidable conclusion is that there is more to adjudication than what the judges choose to say, either in their opinions or in their extrajudicial utterances. Holmes said it well when he observed that "[t]he very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, considerations of what is expedient in the community concerned."[14] Elsewhere he declared that in doubtful cases which present "a conflict between two social desires" and for which precedent offers no solution, "judges are called on to exercise the sovereign prerogative of choice."[15]

An explicit recognition of the existence of a choice between two premises is evident in the dissenting opinion in *Mapp v. Ohio*,[16] wherein Justice Harlan complains that the majority fails to explain the choice of its premise. *Mapp* is typical: where there are dissenting opinions and, therefore, conflicts as to the applicable major premise, the majority rarely mentions and never explains alternative premises which may be available.

Some scholars, frustrated by the lack of information on the process of decision making, have produced explanatory theories such as game theory and scalogram analysis. These have been appropriately described by Professor Alan Westin as "scholarly astrology."[17] While

12. Brown, *Quis Custodiet Ipsos Custodes?—The School-Prayer Cases*, 1963 SUP. CT. REV. 1, 32.

13. Miller, *On the Choice of Major Premises in Supreme Court Opinions*, 14 J. PUB. L. 251 (1965). Justice Douglas made the same point in his dissenting opinion in Environmental Protection Agency v. Mink, 93 S. Ct. 827, 845 (1973): "The starting point of a decision usually indicates the result."

14. O. W. HOLMES, THE COMMON LAW 35 (1881). *See also* Lochner v. New York, 198 U.S. 45, 74 (1905) (Holmes, J., dissenting). In *Lochner*, Holmes stated that "[t]he decision will depend on a judgment or intuition more subtle than any articulate major premise." *Id.* at 76.

15. O. W. HOLMES, COLLECTED LEGAL PAPERS 239 (1920).

16. 367 U.S. 643, 672 (1961) (Harlan, J., dissenting).

17. A. WESTIN, THE SUPREME COURT: VIEWS FROM INSIDE 7 (1961).

these theories merely substitute one alchemy for another, the very fact that students of the Court exhibit a desire to gain a better understanding of the Court is ample proof that the opinions are inadequate to explain the decision making.

That decisions are often hammered out on the anvil of compromise is a second reason for the failure of the judicial opinion to disclose the decision-making process. Such opinions are likely either watered-down substitutes for the original drafts or documents filled with the ambiguities of language incidental to such compromise. Justice Robert H. Jackson suggested this when he observed that *dissenting* opinions "have a way of better pleasing those who read as well as those who write them. . . . Opinions which must meet the ideas of many minds may in comparison seem dull and undistinguished."[18]

A third reason for the failure of an opinion to depict the process may be found in the probability that judges work back from conclusions to principles rather than "forward" from principles to conclusions. Jerome Frank once said that this conception of the judicial process is so heretical that it seldom finds expression.[19] The "so-called opinions," he explained, will not reveal anything remotely resembling a statement of the actual judging process because decision takes place by an intuitive flash rather than conscious application of formal logic of ratiocination. This intuitive approach to decision making, by nature and definition, precludes full explanation of the decision-maker's experience, for it is not made up of "little bricks of sight, sound, taste, and touch."[20] Somewhat akin to a Bergsonian element of intuition, the judges' work consists of ordering facts, choosing premises, and restating principles, plus grasping societal trends, in order to make policies and state social norms. Such psychological insights into the judicial process, if that they are, have been occasionally furnished by a few judges. These rare insights emphasize the failure of judges to make coherent explanations of the decisional process among themselves. Given this fact, opinions cannot reveal the process of decision but can only offer reasons purportedly explaining the decisions. Frankfurter confessed that

18. Address by Justice Jackson, Brandeis Memorial Dinner, June 23, 1943, in 9 VITAL SPEECHES OF THE DAY 665 (1943).

19. J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 170 (1949).

20. *Id.*

> [t]he power of searching analysis of what it is that they are doing seems rarely to be possessed by judges, either because they are lacking in the art of critical exposition, or because they are inhibited from practicing it. The fact is that pitifully little of signifiance has been contributed by judges regarding the nature of their endeavor.[21]

The secrecy which surrounds the decision-making process compounds the difficulty in understanding how policy decisions are made. The public is deprived of the opportunity to gain insight which the judges themselves seem unable to provide.

Having made bland assertions that secrecy is absolutely essential for the performance of their tasks, the Justices have not proferred a cogent explanation of the reason for the essentiality. Justice Tom Clark maintained that without absolute secrecy, decisions would become prematurely known and "the whole process of decision destroyed."[22] But this does not explain why maintenance of secrecy must be continued after the decision is taken or why judges suffer from "judicial lockjaw."[23] Justice W. J. Brennan states that the conferences are carried out in "absolute secrecy" for "obvious reasons"[24] and avoids any further elucidation of the matter. These assertions suggest that there is in the secrecy of the Supreme Court something of a semi-holy arcanum, something untouchable on which the very efficiency of the Court's functioning depends. It is the validity of that notion that is challenged in this article.

All of this tends to be ancient learning, warranting no present restatement were it not for the fact that there still has been no sufficient jurisprudential effort in the United States—other than, perhaps, the policy-science or configurative jurisprudence of Lasswell and McDougal—since the legal realists first ripped the facade from the Blackstonian conception of the judicial process several decades ago. The pretense is still, as Dean Edward Levi noted a quarter-century ago,[25] that judges apply known law to accepted factual descriptions in

---

21. Frankfurter, *Some Observations on the Nature of the Judicial Process of Supreme Court Litigation,* 98 AM. PHILOSOPHICAL SOC. PROCEEDINGS 233 (1954).

22. Address by Justice Tom Clark, American Bar Association Annual Dinner in Honor of the Judiciary of the United States, Aug. 27, 1956, in 19 F.R.D. 303, 305 (1956).

23. Frankfurter, *Personal Ambitions of Judges: Should a Judge "Think Beyond the Judicial"?* 34 A.B.A.J. 656, 658 (1948).

24. Brennan, *Working at Justice, in* AN AUTOBIOGRAPHY OF THE SUPREME COURT 300 (A. Westin ed. 1963).

25. E. LEVI, INTRODUCTION TO LEGAL REASONING 2 (1949).

reaching their results—in short, Blackstone anew. This remains the prevailing ideology of lawyers, as Judith Shklar pointed out,[26] as well as the reigning conception among those who edit casebooks for law school use. American law and legal process still await a theorist who will build upon the shambles left by the legal realists and construct a viable jurisprudence for the age of science and technology.

It would be of some aid in that effort if scholars were able to determine exactly how judges operate after the ritual of trial or appellate argument (or written presentation) has been performed. To the extent that the Supreme Court is a law-maker, disclosure would aid in the indispensable initial task of understanding the process.

Judicial secrecy should be viewed as part of our larger governmental system. Speaking contextually, the penchant of American government, despite protestations to the contrary, is toward more and more secrecy. For example, about one-third of all congressional committee sessions are secret. Despite the Freedom of Information Act,[27] the desire for secrecy within the bureaucracy is only too evident. Modern government is not open in any reasonably adequate sense of that term. Open it may be when compared with totalitarian nations, but when measured against the ideal, it falls well short. There may be reasons for this, not all of which are invalid. Carl J. Friedrich, for instance, asserts that some secrecy is "functional" in a democratic polity.[28]

I. The Way Secrecy Came to the Supreme Court

Those who maintain that secrecy is essential to the judicial process have lost sight of its historical origins in the deliberations of the Supreme Court. A recapitulation of that history is made here to show that secrecy has survived as a vestige, having more symbolic than functional significance. During colonial days, ultimate appeal from the colonial courts was to the Privy Council in England.[29] The Council in many respects paralleled the appellate jurisdiction now vested in the Supreme Court of the United States. Decisions of the Privy Coun-

26. J. Shklar, Legalism (1964).
27. 5 U.S.C. § 552 (1970).
28. C. Friedrich, The Pathology of Politics 179 (1972).
29. R. Pound, Organization of Courts 63 (1940). *See also* G. Radcliffe & G. Cross, The English Legal System 215 (2d ed. 1946).

cil were those of the majority of judges expressed as unanimous advice to the Crown. No dissents were permitted, for the King had to speak with a single voice.

The House of Lords, on the other hand, served as the supreme appellate court for cases arising in England. This tribunal, in contrast to the unanimous opinions of the Privy Council, published the opinions of their Lordships *seriatim*. However, because the House of Lords was a wing of the legislature discharging judicial functions, the early prohibition of the publication of the reports of Parliament applied equally to the judicial decisions of the Lords. Their opinions, therefore, were not readily accessible to the public in England or the colonies.

These two courts were the final courts of appeal, but most cases were actually concluded in the King's Bench, Court of Common Pleas, or the Exchequer chamber. In these courts, the opinions of the Justices were delivered *seriatim*, a practice common to all common-law courts. And, save in an exceptional case where judgment was reserved for further consideration, the opinion of the Justices was delivered at the conclusion of argument. A small notation "C.A.V."[30] appeared in the reports to denote cases in which the delivery of opinion was postponed.

When Lord Mansfield became Lord Chief Justice of the King's Bench in 1756, he introduced a new practice: decisions were arrived at during brief conferences of judges and the unanimous opinions of the court were delivered immediately thereafter. His biographers[31] reveal that this practice was developed to avoid the postponement of a decision and the repeated rehearing of a case—a notorious evil requiring drastic remedy. After Lord Mansfield retired in 1793, Lord Kenyon—who never agreed with him[32]—became Lord Chief Justice and promptly abolished the practice. Except for this brief interlude "in common law history the centuries of the Year Books rest on a practice of conference, consultation, and decision going on in open court before the ears and eyes of counsel, the bar at large, and the apprentices . . . ."[33]

30. "*Curia advisari vult.* Literally, 'The court wishes to consider the matter.'" 25 C.J.S. *Curia* at 41 (1966). Earlier American reports contain the notation *Cur. ad. Vult.*, which is another form of passing the order for postponement of decision.

31. 2 J. CAMPBELL, THE LIVES OF THE CHIEF JUSTICES OF ENGLAND 399-401 (1849).

32. *Id.*

33. K. LLEWELLYN, THE COMMON LAW TRADITION 324 n.308 (1960).

The first Justices of the Supreme Court seemed to have drawn upon the customs of the English courts, particularly the King's Bench, since early decisions were announced *seriatim* by all the Court's members.[34] There is some evidence that in *Brown v. Barry*,[35] Chief Justice Ellsworth delivered "the opinion of the Court" and no other opinions were filed. In *Bas v. Tingy*,[36] Mr. Justice Chase observed that he did not prepare an opinion because the judges had unanimously agreed; thus suggesting a departure from the previous practice. But it was Chief Justice Marshall who introduced the practice of Justices conferring at a meeting and arriving at a decision to be subsequently announced in open court.[37]

Thomas Jefferson objected to Chief Justice Marshall's habit of "caucusing opinions" and "his practice of making up opinions in secret and delivering them as the orders of the court," irrespective of whether there was a majority of one or more.[38] Jefferson's criticism of this practice stemmed from his belief that the "'cooking up of a decision and delivering it by one of their members as the opinion of the court without the possibility of our knowing how many, who, or for what reasons each member concurred . . . completely defeat[ed] the possibility of impeachment by smothering evidence."[39]

The Jeffersonian criticism of Marshall's approach indicates that the secrecy of the conference room was a strategy adopted by the Chief Justice to thwart the threat of impeachment and to strengthen the Court by rendering it immune from the attacks of Jefferson and Madison in the wake of the impeachment trial of Justice Samuel Chase in 1804. A letter from Justice Johnson to Jefferson stated that he was

> a little surprised to find our Chief Justice in the Supreme Court delivering all the opinions . . . . But I remonstrated in vain; the

34. ZoBell, *Division of Opinion in the Supreme Court: A History of Judicial Disintegration*, 44 CORNELL L.Q. 186, 192 (1959). *See also* Rule, 2 U.S. (2 Dall.) 411 (1792) (in which the Court considers the procedures of King's Bench and Chancery in England—which afford outlines for the practice—and indicates that the Court will alter its practice from time to time when modification is necessitated by the circumstances).

35. 3 U.S. (3 Dall.) 365, 367 (1797).

36. 4 U.S. (4 Dall.) 35, 41 (1800).

37. 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 16 (1919). *Contra*, 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 655 (rev. ed. 1935) (Warren seems to think that the change in Court practice originated prior to Marshall's accession to the bench).

38. Extracts from letters of Thomas Jefferson in 1 C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 653-54 (rev. ed. 1935).

39. *Id.* at 654.

> Answer was he is willing to take the trouble and it is a Mark of Respect to him. I soon however found out the real Cause. Cushing was incompetent. Chase could not be got to think or write—Paterson was a slow man and willingly declined the Trouble, and the other two (Marshall and Bushrod Washington) are commonly estimated as one judge.[40]

The practice established by Marshall was described by his biographer, Albert Beveridge, as "one of those acts of audacity that later marked the assumption of power which rendered his career heroic."[41] When Marshall disqualified himself, the Justices delivered opinions *seriatim;* no conference appears to have taken place in those cases. The conclusion is inescapable that the conference of Justices in *strict secrecy* originated with Chief Justice Marshall for reasons now lost in antiquity and which are no longer germane to the United States. Although Marshall believed that unanimity lent prestige to the Court and that the indecency of public disagreement resulted in loss of reputation, in his own term of office as Chief Justice he dissented in at least nine cases.[42] Since then, the "dissenting Justice" has become only too common. During the past forty years, divisions of opinion among the Justices have increased to the point where unanimity in cases decided on the merits is unusual. As a consequence, the current situation parallels the English practice of filing *seriatim* opinions, yet the secrecy of the conference room persists. At the same time, it must be admitted that the conference of judges has failed to secure the ends envisioned by Chief Justice Marshall.

Those who believe that the Court cannot arrive at a decision openly should ponder the words of Karl Llewellyn:

> It is well to remember that neither secrecy of the court's deliberation or [*sic*] later secrecy about what went on during that deliberation rests in the nature of things or in any ordinance of God. The roots of each are either practical or accidental, and it is only either ignorance or tradition which makes us feel that we have here something untouchable, a semiholy arcanum. We tend to forget that in common law history the centuries of the Year Books rest on a prac-

---

40. Levin, *Mr. Justice William Johnson, Creative Dissenter,* 43 MICH. L. REV. 497, 516 (1944); Comment, *Mr. Justice William Johnson and the Constitution,* 57 HARV. L. REV. 328, 333 (1944).

41. 3 A. BEVERIDGE, THE LIFE OF JOHN MARSHALL 16 (1919).

42. Machen, *Dissent and Stare Decisis in the Supreme Court,* 45 MD. S.B. ASS'N 79, 91 (1940).

> tice of conference, consultation, and decision going on in open court before ears and eyes of counsel, the bar at large, and the apprentices; and most of us do not know that the Supreme Court of our first neighbor to the South still works out its conferences in this same solid common law fashion. I personally suspect that our own secrecy practice began when decision began to be postponed beyond the close of argument, with an eye to avoiding misapprehension and disappointment, and then to avoiding financial speculation. And I suspect the carryover into later secrecy about past deliberations to represent partly a closing of ranks to protect the court from criticism or attack, and in later years a similar closing to allow free discussion with no possible repercussions in a re-election campaign. Thus the storied sanctity of the conference room represents to me as pragmatic and nonmystic a phase of appellate judicial work as the handling of the docket. Our modern fetish of secrecy reminds me of the shock German lawyers displayed at the notion of such dangerous things as published dissenting opinions.[43]

II. Courts in Other Nations

A comparative study of the conventions observed by the highest courts in other nations highlights different techniques of judicial decision making. In the most primitive type, no reasons are given by the judge and no appeal is provided against his decision. In such instances the litigants or members of the public have no way of knowing how or why the decision was reached. History is replete with examples of such grants of arbitrary judicial power. Our conscience is shocked by them; they are denounced as "muslim curb stone disposition[s]";[44] and we assure ourselves that such barbarian and autocratic judicial power has no place in our society.

Contemporary practice of the highest courts in several countries conforms to three different modes of arriving at decisions. Under the first mode, the highest court decides in strict secrecy and expresses the final decision unanimously—irrespective of any conflict of opinion among the various members of the court. Dissent is simply suppressed.

---

43. K. Llewellyn, The Common Law Tradition 324 n.308 (1960).

44. G. Hazard, Research in Civil Procedure 8-9 (1963). *See also* Terminiello v. Chicago, 337 U.S. 1, 8-13 (1949) (Frankfurter, J., dissenting). The Turkish judges (qadi), observed Francesco Guicciardini, judged with closed eyes. After studying their decisions, this Florentine historian came to the conclusion that their probability of error was no greater than that of Tuscan judges of his day. P. Calamandrei, Procedure and Democracy 21 (1956).

This method is the norm of continental courts.[45] The second pattern also involves secret determinations, but judges who are unable to agree with the majority are allowed to state their reasons in dissenting opinions. The third method is distinguished from the first two in that the decision is arrived at in open court and the judges are allowed to state their views publicly. We believe that a study of these three methods would destroy the notion that secrecy is absolutely essential to decision-making, and would indicate that no peculiarly cherished values are preserved by maintaining such secrecy.

A. *Swiss Federal Court and Mexican Supreme Court*

The Swiss Federal Court[46] and the Mexican Supreme Court are examples of tribunals which arrive at their decision at a public conference. The Swiss Federal Court, the highest court in Switzerland, consists of twenty-six judges organized into divisions of seven or five depending upon the nature of the case. Seven judges comprise the public law division. Parties or counsel do not appear before the court to argue their cases; these are submitted by mail. The presiding judge appoints one of the judges to serve as a reporter to prepare a summary of the case, the arguments of the parties, the issues involved in the case, and his conclusions thereon. These are circulated to the other judges who communicate their views to the presiding judge and comment upon the report informally. On the designated date for decision, the judges assemble in the courtroom, where newspapermen, lawyers, and the public are present. The judge-reporter reads his written report to the court. If any judge has communicated an opposing view to the presiding judge, he then states his views on the matter publicly, after which a discussion among the judges takes place. After all of the judges have expressed themselves, the reporter makes a reply to the opposing judge's remarks and the discussion then takes the form of questions and answers. At the end of the discussion, the reporting judge proposes a vote to be taken on his motion and the presiding judge puts the proposition to vote by show of hands. The Registrar then pre-

45. *See, e.g.*, J. CALAMANDREI, *supra* note 44 at 45-46; Kommers, *The Federal Constitutional Court in the West German Political System*, in FRONTIERS OF JUDICIAL RESEARCH 81 (J. Grossman & J. Tanenhaus eds. 1969).

46. Morrison, *The Swiss Federal Court: Judicial Decision Making and Recruitment*, in FRONTIERS OF JUDICIAL RESEARCH 139 (J. Grossman & J. Tanenhaus eds. (1969); W. RICE, A TALE OF TWO COURTS (1967).

pares a written report of the conference to communicate to the parties—dissenting votes are not recorded. The entire decision-making process takes place in public and dissent is not suppressed.

The Mexican Supreme Court[47] also conducts its conferences in public. In a courtroom filled with spectators, the reporting judge is called upon by the presiding judge to read the draft of the decision he has prepared and to lead the discussion. The various judges express their views openly and the reporting judge meets criticism by giving a final reply. Each judge then announces his vote. If the majority votes in favor, the draft opinion prepared by the reporting judge is adopted by the court. Otherwise, another reporter is appointed, a new draft prepared, and the process is repeated.

B. *Federal Constitutional Court of West Germany and Its Cousins*

The other extreme example is the Federal Constitutional Court of West Germany.[48] This court has power over cases involving constitutional disputes between the federation and the states, as well as between citizens and governments. It follows the well-known continental tradition of pronouncing "institutional" decisions. The judges labor in anonymity and their deliberations are required by law to be absolutely secret. Dissents are not published nor are the votes of the various judges disclosed. In the first stage of the decisional process, the reporter-judge prepares a full statement of the facts and arguments and a recommended decision. This report is circulated among the other judges in the panel. At a conference, which takes place in absolute secrecy, the judges cast their votes; this is the second stage of the decisional process. In the third stage, the reporter-judge, irrespective of whether he is in the majority or minority, prepares the opinion to reflect the consensus of the judges. The fourth and final stage is a further conference held to discuss the opinion and edit it to obtain maximum consensus. Only then is the decision announced.

The Supreme Court of Japan[49] succeeded the *Daishin-in,* which followed the continental practice of delivering per curiam opinions without expressing dissent. During American occupation following

47. P. CALAMANDREI, *supra* note 44; R. DE PINA, TEMAS DE DERECHO PROCESAL 101-08 (2d ed. Mexico 1951).

48. Kommers, *supra* note 45, at 73-83.

49. Danelski, *The Supreme Court of Japan: An Exploratory Study,* in COMPARATIVE JUDICIAL BEHAVIOR 121, 132-37 (G. Schubert & D. Danelski eds. 1969).

World War II, a new court with three divisions was organized. When a party presents his case, a research official of the court prepares a meticulously detailed case report which is examined by a judge who is assigned to the case by the Chief Justice. The reporting judge sets a date for the case to be considered at a secret conference of the division. If it is decided that the case will be heard, the parties are asked to file briefs and argue the case. During argument, the judges "sit like Buddha until the lawyer is finished," without putting any questions; then the case is scheduled for a second conference. The designated judge usually prepares the opinion, which is discussed and voted upon. The final decision of the court is expressed in an anonymous opinion. Although traditionally the Japanese despise dissent, occasionally a dissenting opinion is delivered by the justices of the modern Supreme Court.[50]

In the English and Commonwealth courts of appeals, cases are heard without any advance preparation by the judges:[51] there are no briefs to read, and the judges learn of the case from the oral arguments of counsel. The questioning of counsel during oral argument tends to be extensive; and the trend of the judges' thought is revealed in the course of a Socratic dialogue. Often questions are directed to fellow justices. The judges become involved in reality "immediately, consciously and deliberately," in reaching a decision while the argument is in progress. The decision is usually delivered upon the close of the argument. Each judge states his own opinion extemporaneously. If an alternative ground of decision or dissent is to be expressed, it is done without any reservation. The "whispered conversation" lasting a minute or two on bench while arguments are in progress, or while walking in the corridor before entering or leaving the courtroom, is the only conference that takes place in most cases. On occasion, a decision may require more deliberation or reflection. In such cases, the decision is reserved and delivered later. However, there is no conscious and deliberate effort to obtain a consensus or bargain for a result.[52]

The House of Lords—the highest court in England—hears cases in a very informal atmosphere. Judges wear contemporary business

50. Kawashima, *Individualism in Decision-Making in the Supreme Court of Japan*, in COMPARATIVE JUDICIAL BEHAVIOR 103, 104-09 (G. Schubert & D. Danelski eds. 1969).

51. D. KARLEN, APPELLATE COURTS IN THE UNITED STATES AND ENGLAND 93 (1963).

52. *Id.* at 98-99.

suits, not wigs or robes. They sit not on a dais, but on ordinary chairs behind plain tables arranged in a row. The barristers, however, wear robes and wigs while appearing before the Lords. Oral argument follows the same pattern as in the Court of Appeals, but with the arguments sometimes lasting for twenty days. Unlike the Court of Appeals, an immediate decision is rarely reached after the conclusion of the oral argument. Each judge writes his opinion and circulates it to the other judges, who may or may not meet to reconcile their views. It is unusual to reach a consensus to be expressed in a per curiam opinion.[53] Each judge expresses his own views. When all the judges are prepared, a special sitting of the House of Lords is convened. The Lord Chancellor sits on a woolsack dressed in full regalia, while the other judges wear their regular business suits. After prayers led by a bishop, each judge proceeds to read his opinion. Finally, the Lord Chancellor puts the question to which the judges answer "content" or "not content," and the case is disposed of.

The Privy Council, on the other hand, follows a slightly different procedure, even though with a few exceptions, the judges who sit in the House of Lords also sit as the Privy Council. Because the decision of the Privy Council is in the nature of advice tendered to the Crown, the judges are required to express their decision unanimously. Therefore, after a designated judge prepares the draft of the judgment, it is circulated to the other judges who—by discussion, conferences, and redrafting—strive for a consensus.[54] If a minority continues to differ, they remain silent, and only the opinion of the majority is made public. Only the last paragraph of the opinion is read aloud in the informal court without the splendor attendant to the House of Lords.

The foregoing summary tends to show that robes or business suits, unanimity or dissent, deliberation or immediate decision, lengthy or brief argument, secrecy or openness, neither promote nor destroy decision making: they are not essential to that process. The practices of courts in many lands are diverse. Whether the secrecy of the Supreme Court's conference need be maintained must be decided by the values furthered or hindered by that maintenance, not by flat assertion.

---

53. *Id.* at 127.

54. Address of Rt. Hon. Lord Morton, P.C., M.C., Canadian Bar Association Annual Meeting, Aug. 31, 1949, in 32 PROCEEDINGS CAN. BAR ASS'N 107, 115 (1949). Rumor has it that the Privy Council split 3-2 in the Wagon Mound Case, [1961] A.C. 338. *See* HALDANE SOCIETY, THE FORESIGHT SAGA 3 (1962).

III. The Values Purportedly Furthered By Secrecy

The Supreme Court of the United States is, of course, not merely a court of law. America, a nation of constitution worshipers, regards the fundamental law as a sacred covenant; and the Supreme Court, as its guardian and keeper, is touched with its divinity. As Lerner explained, the Justices of the Supreme Court cannot help playing the role of a sacerdotal group as tenders of the scared flame.[55] Chief Justice Taft, commenting on the values of judicial folkways, observed that

> [J]udges should be clothed in robes, not only that those who witness the administration of justice should be properly advised that the function performed is one different from, and higher than that which a man discharges as a citizen in the ordinary walks of life; but also, in order to impress the judge himself with constant consciousness that he is a high-priest in the temple of justice . . . .[56]

That, at best, is dubious. Even a casual observer of the practice of the House of Lords and Privy Council, as has been seen, cannot fail to observe that their Lordships hold court in business suits in a country where wigs, bands and silk gowns are worn by judges and lawyers at every level of the judicial system, and that this does not detract from the importance of their position as the ultimate arbiters in England and some Commonwealth countries.

A parallel can be drawn between Chief Justice Taft's insistence on robe-wearing as essential to the discharge of the judicial function, and the observance of strict and absolute secrecy in decision making by the Supreme Court. Somewhere in the depths of the minds of the

---

55. 1 M. Lerner, America As A Civilization 442-43 (1957). Bacon long ago declared that

> Judges ought to remember, that their office is *Jus dicere,* and not *Jus dare;* to interpret law and not to make law, or give law. Else will it be like the authority, claimed by the Church of Rome, which under the pretext of exposition of Scripture, doth not stick to add or alter; and to pronounce that which they do not find; and by show of antiquity to introduce novelty.

Bacon, *Of Judicature,* in Essays, Advancement of Learning, New Atlantis and Other Pieces 155 (R. F. Jones ed. 1937). The idea that authoritative interpreters of written documents exert influence like that of a priesthood's is an ancient one.

56. A. Mason, William Howard Taft: Chief Justice 58 (1965). *See also* Frank, *Cult of the Robe,* Saturday Rev., Oct. 13, 1945, at 12: "The Robe as a symbol is out of date, an anachronistic remnant of ceremonial government . . . . The cult of the robe should be discarded."

Judges must reside the belief that the "inspired revelation"[57] about "the will of the law" emerges exclusively in the confines of the secret conference room.

This position is untenable. If the will of the law is not the product of "inspired revelation," but rather flows from negotiation, bargaining and compromise, it is obvious that the Justices fear that the Court's stature as an infallible finder of truth would be undermined by this disclosure. As Max Lerner put it, the Constitution and the Court are symbols of ancient sureness and forthcoming stability.[58] Those who plead for a continuation of these myths ignore the fact that the founding fathers were—and the Supreme Court Justices are—human (notwithstanding the Mormon assertion to the contrary).[59] The Constitution is not an inspired document and its interpreters are but mortals. This "sureness and stability" argument is as shallow as the argument of several continental jurists that the International Court of Justice should not permit the expression of dissent because countries at the losing end may not feel bound to obey the decisions of a divided court.[60] Experience in the past has shown that in an area so nebulous as international law, where widely divergent opinions exist as to fundamental legal questions, expression of dissent has not undermined the authority of the court and that fears of loss of prestige have proved to be ill-founded.[61] One jurist even opined that the divergent views stirring and seething in that court must be visible to all the world. The world ought to know the grounds and the contest on which the decision was taken. It should also know the limits

---

57. B. CARDOZO, LAW AND LITERATURE AND OTHER ESSAYS AND ADDRESSES 11 (1931).

58. *See* Lerner, *Constitution and Court as Symbols*, 46 YALE L.J. 1290 (1937). The image of the Supreme Court in the minds of the American public is portrayed in an account by the actress Sada Thompson. She recalled a humorous incident which occurred when her daughter was a child.

> I took her to the Supreme Court. I told her about the Chief Justice at the center place and the men around him and how sacred the place was to our American Institutions. I looked down at her and—she was kneeling . . . .

Washington Post, Dec. 24, 1972, § C, at 2, col. 2.

59. "We stand for the Constitution of the United States as having been divinely inspired." Deseret News (Salt Lake City), July 1, 1968, at 14, *quoted in* C. MILLER, THE SUPREME COURT AND THE USES OF HISTORY 182 n.41 (1967). *See also* Witcover, *We Birchers Are Trained to Look for Patterns*, NEW REPUBLIC, May 8, 1965, at 8, *quoting* Reed Benson: "We believe that the Lord helped raise up the Founding Fathers to establish the Constitution . . . ."

60. J. VERZIJL, THE JURISPRUDENCE OF THE WORLD COURT 405 (1965).

61. *Id.* at 416.

of the viability of international adjudication: whether it will ultimately prove to be more than a "great illusion."[62]

The Supreme Court was not handicapped in the past by revelation of the decision-making process. We already have a portrayal of how particular justices and their ideological confreres approach their task, what they consider relevant to decision and how they strike the four or five major balances of competing values which every sensitive justice consciously makes. Judges may (and do) change their votes after deciding, because an opinion "won't write" or because of the persuasiveness of a dissenting opinion.[63] Justices Black, Douglas, and Murphy changed their minds publicly in the flag-salute cases.[64] During Justice Joseph Story's tenure, members of the Court discussed rather freely the outcome of pending cases.[65] Chief Justice Chase, "in strict secrecy," gave advance notice to Treasury Secretary Boutwell of the Court's decision in the *Legal Tender Cases;*[66] President Buchanan was given foreknowledge by Justice Catron of the Court's decision in the *Dred Scott Case;*[67] and there is a vivid account of a leak of the Supreme Court's position in the *Missouri Test Oaths Cases.*[68]

Apart from the assertion that secrecy is essential for traditional reasons, a further ground on which it is justified is the independence of the Court. Secrecy of deliberations, it is argued, tends to preserve the independence of the Justices because they speak out frankly to their brethren, without the outside influence of groups or individuals. This argument is shallow when subjected to criticial analysis, for the judges have no reason not to speak out frankly in open court and lay bare their minds. As lifetime appointees, they have security of tenure. If security is not their concern, then what is passing through their minds about the vital issues that are brought before them is a matter of which the public has a right to know. The ideas rejected by them

62. Prof. Verzijl refuted the arguments favoring secrecy. *Id.*

63. Freund, *An Analysis of Judicial Reasoning,* in LAW AND PHILOSOPHY: A SYMPOSIUM 288 (S. Hook ed. 1964). *See also* R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 15 (1955).

64. Jones v. Opelika, 316 U.S. 584, 623-24 (1942).

65. Cushman, *The History of the Supreme Court in Resumé,* 7 MINN L. REV. 305 (1923).

66. 79 U.S. (12 Wall.) 457 (1871). G. BOUTWELL, REMINISCENCES OF SIXTY YEARS 209 (1902).

67. 60 U.S. (19 How.) 393 (1857); C. SWISHER, ROGER B. TANEY 495-502 (1936).

68. Fish, *Secrecy and the Supreme Court: Judicial Indiscretion and Reconstruction Politics,* 8 WM. & MARY L. REV. 225 (1967).

are as important for public enlightenment as the ideas advocated in their opinions. The other part of the justification for secrecy, founded on escape from outside influences, also does not bear scrutiny. By deliberating cases in open court, the Justices would inform the public not only that such influence is absent but also that it is unwelcome. When deliberation is cloaked in secrecy, the public has no way of knowing who exerts influence over decisions. The persistent inquiries about who decides applications for certiorari[69]—whether a committee of Justices or the law clerks—notwithstanding the Justices' assertions that they alone decide them, is an example of the lingering public doubts concerning the decision-making process. In the Marshall era, rumors were rife that decisions pronounced as those of the Court were in fact Marshall's own decisions or products of a minority which suppressed majority viewpoints.[70] It was also believed that Justices decided cases at the behest of Marshall, even when he disqualified himself on account of personal interest.[71] Such unpleasant and unpalatable rumors could have been eliminated by open deliberation.

Several reasons which justify secrecy as an essential element of the judicial process have thus emerged: (1) tradition; (2) prevention of "leaks"; and (3) necessity as an element of decision making which promotes frank discussion and insulates from external pressure. All are ill-founded and have either ceased to exist or conflict with democratic theory. Secrecy of the decisional process remains only as a myth-justified vestige in the evolution of the institution. It came into

69. Clark, *How Cases Get Into the Supreme Court,* in AN AUTOBIOGRAPHY OF THE SUPREME COURT 291, 297 (A. Westin ed. 1963): "[The] idea of the law clerks' influence gave rise to a lawyer's waggish statement that the Senate no longer need bother about confirmation of Justices but ought to confirm the appointment of law clerks."

70. *See* J. SHIRLEY, THE DARTMOUTH COLLEGE CAUSES AND THE SUPREME COURT OF THE UNITED STATES 309-10 (1877). In 1822, Justice Johnson wrote that Marshall delivered the opinion of the Court even when contrary to his opinion and vote. Morgan, *Mr. Justice William Johnson and the Constitution,* 57 HARV. L. REV. 328, 333 (1944).

71. *See, e.g.,* G. MYERS, HISTORY OF THE SUPREME COURT 273 (1912):

> Chief Justice John Marshall and his brother managed to get legal hold of the much desired "Leeds Manor," by a decision of his own court, handed down by an Associate Justice whose fraudulent case, involving such immense interests, had been decided favorably by Marshall three years previously. Story's decision revealed an amazingly comprehensive intimacy with all twists and turnings of ancient Virginia laws, legislation and practices—a knowledge which no other member of the Supreme Court but Marshall had. In fact, it has never been disputed that Story, in his Supreme Court career, was a complete satellite of Marshall, and registered into decisions the species of law dictated by Marshall; Story himself practically acknowledged this.

existence at a time when the Court was a weak, infant institution. Its contribution to the evolution of a strong Supreme Court is doubtful.

IV. Cracks in the Adversary System: The Murky Stream of Communication to the Decision Maker

The process of informing the judicial mind of the data for decision has undergone a radical change since the inception of the Court. The complicated nature of the cases that are brought before it and the creative role of the Court in adjudication require departure from the traditional adversary system. In making policy decisions and weighing considerations of social advantage, the Court has to inform itself beyond the narrow interests of the partisans involved in a "case" or "controversy." Yet, the parties who bring the cases before the Court have no obligation to provide those insights to the Justices. Justices, therefore, supplement the information obtained from records, briefs, and oral arguments with independent research[72] and personal experience. A pertinent but unanswerable question concerns the extent to which independent research may proceed before transgressing the "case" and "controversy" limitations. Justice Frankfurter once remarked that he did not know that the Justices "could not read the works of competent writers."[73] But can the Court ignore writings which are critical of judicial determinations? Can the Justices acquire the "sociological wisdom" which the law requires by doing independent research? Or do they convey the existence of such wisdom by quoting scholars to justify their conclusions in an opinion?

Moreover, the parties who bring a "case" or "controversy" before the Court, thus creating the opportunity to make policy decisions, should be entitled to rebut independent findings of the Justices if the adversary system's premise that adverse evidence must be subjected to the scrutiny of partisans is to be treated at least as a token obligation of the decision maker. Does the moral force of a judgment weaken if the Justices venture beyond the materials presented by the

72. Brennan, *Working at Justice,* in An Autobiography of the Supreme Court 303 (A. Westin ed. 1963).

73. W. Murphy & C. H. Pritchett, Courts, Judges and Politics 318 (1961), *quoting* Justice Frankfurter's comment in the oral argument of Brown v. Board of Educ., 347 U.S. 483 (1954).

parties, explore critical social problems and prescribe solutions, while pretending merely to decide "cases" or "controversies?"[74] Finally, but of equal importance, do the Justices have the expertise to embark upon such expeditions? Assuming they do, what data should the parties provide? What principles should be parties formulate for selection of the correct evaluative criteria? How would the judges react to the data furnished and how do they use it to make policy decisions?

While knowledgeable people realize that the adversary system of providing information for the judicial mind is proving inadequate, design of an alternative system is hampered by a lack of exact knowledge about the decisional process. If the veil of secrecy were to be lifted, a more functional system could be devised. Cardozo lamented that "we have had courts and recorded judgments for centuries, but for lack of an accepted philosophy of law, we have not yet laid down for our judges the underlying and controlling principles that are to shape the manner of their judging."[75] The lack of an adequate philosophy of law can in part be attributed to the failure to comprehend better the operation and limitations of the judicial decision-making process.

There are, of course, other ways to inform the judicial mind. The orthodox conception permits only adversarial input plus the nebulous idea of judicial notice—although, as has been seen, some independent research is conducted. How much input into the process comes from law clerks or other sources remains unclear. After serving as a clerk to Justice Robert H. Jackson and practicing law for a few years, William H. Rehnquist wrote: "I do not believe it can be debated that the possibility for influence by the clerks exists" when a Justice votes on a certiorari petition. He went on to maintain that where unconscious slanting of the material by the law clerks occurs, it is toward the "left" or "liberal" side of the spectrum.[76] Rehnquist's article, published in *U.S. News & World Report,* is atypical; most law clerks apparently have drummed into them the need for keeping the internal operations of the Court secret. A little leaks out now and then, in informal talks with former clerks, but after a year's judicial brain-washing about secrecy, most clerks are so circumspect as to make Rehnquist's article notorious.

74. L. FULLER, THE PROBLEMS OF JURISPRUDENCE 707 (1949).
75. B. CARDOZO, THE GROWTH OF LAW 144 (1924).
76. Rehnquist, *Who Writes the Decisions of the Supreme Court?,* U.S. NEWS & WORLD REPORT, Dec. 13, 1957, at 74-75.

It is said, furthermore, that two Justices once directed that a room in the Supreme Court building be set aside and the admiralty books from the Library of Congress be assembled there, so that the law clerks could extract from every volume anything that might possibly bear on the subject of the case in hand.[77] Sometimes help must come from outside, the law clerks proving inadequate. On one occasion, the Solicitor General effected the assignment of the country's best legal historian to the Court for a year to write the history of treason.[78] Another example of outside input is illustrated by the so-called Patman Indictment,[79] in which Representative Wright Patman charged that authors of many of the materials considered by the Supreme Court had been partisan and that prominent scholars had been hired by antitrust defendants to promote the views of big business in law and economics review articles. Whether Patman was (or continues to be) correct cannot be determined; but the American people are entitled to know.

Judicial notice is a particularly troublesome aspect of the informing process. The rule of thumb is that notice may be taken of matters of general knowledge—but what may general knowledge to one judge may be, in Judge Jerome Frank's pungent terminology, mere cocktail party gossip[80] to another. Frankfurter asked during oral argument in *Brown v. Board of Education*[81] whether judicial notice could be taken of Gunnar Myrdal's *An American Dilemma.* But that is hardly a valid conception, unless and until we are told the criteria by which notice is taken and, further, unless the adversaries are given the opportunity to introduce "expert" testimony to support their clients' points of view. In *Dennis v. United States,*[82] the case upholding "thought control" under the first amendment, Frankfurter strayed far afield in seeking support for his conclusion that the Communist Party of America, as exemplified by Dennis and his cohorts, was a menace to the nation.

When judges admittedly use such diverse means of informing

77. J. FRANK, MARBLE PALACE 114 (1961).
78. *Id.* at 115.
79. 103 CONG. REC. 16159-69 (1957). *See also* Newland, *The Supreme Court and Legal Writing: Learned Journals as Vehicles of an Anti-antitrust Lobby?,* 48 GEO. L.J. 105 (1959).
80. Frank, *The Lawyers Role in Modern Society: A Round Table,* 4 J. PUB. L. 8, 16 (1955).
81. 347 U.S. 483 (1954).
82. 341 U.S. 494, 521 (1951) (concurring opinion).

themselves, it becomes obvious that the adversary system has broken down in part. It further becomes obvious that the stream of communication to the Justices *qua* policy-makers should be cleansed, so that all who wish to know can know in fact what is relevant to the decisional process. Secrecy now makes the stream so murky that it is only by informed guesses that a lawyer (or a commentator) can determine what in fact was important to a given Justice. Perhaps one of the reasons that "the average level of oral advocacy in the Court is . . . disappointingly low"[83] is the very failure of the Justices to make clear just what it is they consider important in a given case. In any event, the flow of communication is not known. It should be.

V. The Values Furthered by Disclosure

In a polity that considers itself to be democratic, secrecy should be the exception and openness and disclosure the rule. Only if it can be demonstrated that there is a pressing public need for secrecy—as in certain national security matters—should it be permitted. The point is applicable wherever governing power is exercised. Members of priesthoods traditionally wish to withhold their rituals and other arcanae from the public at large, perhaps as a way of maximizing their power. But that is scarcely a valid reason to support judicial secrecy in a nation that prides itself on being both democratic and enlightened.

Disclosure of the mysteries of Supreme Court decision making would aid in the achievement of a fuller understanding of the Court; and through that understanding, improve the process of judicial policy-making. More subtly, but of great importance, it would be a means of furthering the democratic ideal. Unless one believes with Alexander Hamilton that the people are a "great beast," then they

83. Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court 42 (1972). The Report, issued by a study group chaired by Professor Paul Freund of the Harvard Law School, calls for the establishment of a "national court of appeals" to screen certiorari petitions as a means of alleviating what is alleged to be a crushing workload on the Justices. Absent, however, full information about how the Justices in fact routinely work—something kept from the public by the secrecy syndrome of the Court—no one can really make a dispassionate analysis of the problem. Compare, in this connection, Freund, *Why We Need the National Court of Appeals,* 59 A.B.A.J. 247 (1973) with Gressman, *The National Court of Appeals: A Dissent,* 59 A.B.A.J. 253 (1973). (The present authors agree with Mr. Gressman on the need for such a court.)

should be considered to have the internal fiber and moral stamina to withstand knowing the internal operations of the governing process. It may, for that matter, decrease the amount of cynicism already extant. As matters now stand, the federal judiciary stands *last* among the three branches of government in public esteem.[84] The situation could not be worsened if the red velour curtain were to be swept aside, so that all could know the operations of the Court. We believe that in fact public esteem would rise if there were to be widespread dissemination of the intricacies and difficulties, the workload and the burdens of the nine Justices. Latter-day intellectual haruspication will no longer suffice.[85]

---

84. A national opinion sampling conducted by Gallup Organization in 1972 had the following result:

Question: How much trust and confidence do you have in (a) the Executive branch (b) the Legislative branch (c) the Judicial branch of the federal government?

Answer: Executive 67
Legislative 62
Judicial 60

STATE OF THE NATION 241 (W. Watts & F. Free eds. 1973).

85. Chief Justice Burger said in a footnote in the Pentagon Papers case, that he has little doubt about the inherent power of the Court to protect the confidentiality of its internal operations—by whatever judicial measures may be required. 403 U.S. 713, 752 n.2 (1971) (dissenting opinion). We are not here arguing about the *power* of the Court to keep its operations secret; rather, we question the desirability of such a practice. However, we doubt the claim of inherent power; it has no warrant in logic, history or democratic theory.

We may also mention that we disapprove of the burning of late Justice Hugo L. Black's "bench notes," contained in more than 600 green covered looseleaf binders, after his death, as directed by him. Justice Black is reported to have taken the view that the notes he made during discussions with the other Justices and the votes as he recorded them were private and must be destroyed after his death. Schweid, Hugo Black's Alexandria Home for Sale, Washington Post, Dec. 1, 1971, § A, at 24, col. 1. This view is untenable as the records pertained to his performance of public duties as an Associate Justice of the Supreme Court of the United States and should have been not only preserved but also made available to members of the public who might have been interested in them.