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Book Review

Eugene Gressman

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BOOK REVIEW

Super Chief: Earl Warren and his Supreme Court—A Judicial Biography. Bernard Schwartz. New York: New York University Press. 1983. Pp. xiii, 853. \$29.95.

Inside the Warren Court. Bernard Schwartz with Stephan Leshner. Garden City: Doubleday & Co. 1983. Pp. i, 299. \$17.95.

*Eugene Gressman**

These are court secrets primeval; the murmuring judges and the law clerks. These are what the publishers of *Super Chief* have touted as “the definitive record of the deliberations of the Warren Court” and “the first documented behind-the-scenes account ever published of how the Supreme Court decides cases.”¹ Indeed, these are documented and seemingly authentic reenactments of the Court’s “secret” decisional processes during the sixteen-term Warren period, 1953 to 1969.

Professor Schwartz has an impeccable record as a constitutional scholar and law professor; when he writes about the Supreme Court he knows whereof he speaks. In this instance, he has spoken twice at the same time. He speaks loudest and strongest in *Super Chief*, a self-styled unabridged edition of a shorter satellite version written with Stephan Leshner, entitled *Inside the Warren Court*. Mr. Leshner, a former *Newsweek* correspondent who covered the Supreme Court on his reportorial rounds, did most of the writing for that version, relying on the more scholarly *Super Chief* to supply the massive documentary and oral evidence of “what went on behind the scenes in the Warren Court.”² In the shorter version, the authors repeat many of the juicier judicial remarks that appear in more authenticated fashion in *Super Chief*.

And so back to *Super Chief*. Professor Schwartz notes in the preface that the Supreme Court’s conference lists and votes, as well as the individual discussions and notes of the Justices, are “normally not made public” and that the Court’s conferences “are, of course, com-

* William Rand Kenan, Jr. Professor of Law, University of North Carolina; co-author R. Stern & E. Gressman, *Supreme Court Practice* (5th ed. 1978, 6th ed. in preparation); law clerk to Justice Frank Murphy, United States Supreme Court, 1943-1948.

1. Press Release, New York University Press (1983).

2. *Introductory Note* to B. Schwartz & S. Leshner, *Inside the Warren Court* (1983). Mr. Leshner “researched and developed additional material concerning the contemporaneous events surrounding the Warren Court’s deliberations” as well as “most of the historic settings in which the Court’s operations unfold.” *Id.*

pletely private—attended only by the Justices themselves.”³ The secrecy of the conference, we are rightly told, “is, indeed, one of the great continuing Court traditions.”⁴ Unfortunately, the perpetuation of this tradition is shattered in the very next sentence, in which Professor Schwartz blandly asserts that he has “tried to reconstruct the conferences in most of the cases discussed, including all the important cases decided by the Warren Court.”⁵ So much for the tradition of secrecy.

How was this wall of secrecy breached? The preface candidly admits access by Professor Schwartz to the following: (1) private notes of the conference discussions, as well as the private records of votes taken at conference, compiled by Justices who were present (apparently not all of whom are deceased); (2) non-conference correspondence, diaries, memoranda and draft opinions of members of the Warren Court, “including, but not limited to” the papers of deceased members that have been deposited in library collections; (3) some documents and notes, most of which have never been published, that “were made available upon a confidential basis”; (4) oral sources in the form of the author’s personal interviews with “some thirty former law clerks of Chief Justice Warren . . . as well as clerks of other Justices” of the Warren period; (5) discussions with Chief Justice Warren E. Burger and “all the living members of the Warren Court, except Justice Thurgood Marshall”; and (6) a miscellany of non-judicial interviews and acknowledgements of help.⁶ Each of the non-confidential documents used in the book is identified in the footnotes, including its location and authorship.

Similar anti-secrecy devices were used by Woodward and Armstrong in writing *The Brethren*,⁷ which details the Court’s decisional secrets for six terms (1969-1975) following the Warren era. That book was based on interviews with several Justices, more than 170 former law clerks, and several dozen former employees of the Court, “unpublished material that was made available to [the authors] by dozens of sources who had access to the documents,” and “internal memoranda between Justices, letters, notes taken at conference, case assignment sheets, diaries, unpublished drafts of opinions and, in several instances, drafts that were never circulated even to the other Justices.”⁸ In sum, in the words of the two authors, “[b]y the time we had concluded our research, we had filled eight file drawers with thou-

3. B. Schwartz, *Super Chief: Earl Warren and his Supreme Court—A Judicial Biography* xi (1983).

4. *Id.*

5. *Id.*

6. *Id.* at xi-xii.

7. B. Woodward & C. Armstrong, *The Brethren* (1979).

8. *Id.* at 3-4.

sands of pages of documents from the chambers of eleven of the twelve Justices who served during the period 1969 to 1976," and "[i]n virtually every instance we had at least one, usually two, and often three or four reliable sources in the chambers of each Justice for each of the seven years we have covered."⁹

The most striking common denominator of *Super Chief* and *The Brethren* is the casting of the cloak of journalistic confidentiality on those associated in some way with the Court who supplied the authors with internal documents, memoranda and draft opinions, to say nothing of recalled oral conversations. To be sure, some of these items are available in library collections of the papers of deceased Justices, although prudence would dictate that papers relating to the internal operations of the Court not be open to public inspection until a reasonably lengthy time has elapsed. The critical point, however, implicitly acknowledged by all who demand anonymity when turning over material to outside reporters, is that these internal documents are and must be institutional in nature. When participating in the Court's decisional processes, no individual Justice acquires such a personal fee title to a collegial document or conversation as to permit release to the press. The repeated statements of Justices that maintenance of the secrecy of the conference is essential to the integrity of the decisional processes of the Court belie any individual freedom to undermine that integrity. The Court's pronouncement with respect to the presumptive presidential privilege in *United States v. Nixon*¹⁰ probably applies equally to the Court's claim of institutional confidentiality:

[T]he importance of this confidentiality [of communications between high Government officials and those who advise and assist them in the performance of their manifold duties] is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

. . . .
The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. . . . The privilege is fundamental to the operation

9. *Id.* at 4.

10. 418 U.S. 683 (1974).

of Government and inextricably rooted in the separation of powers under the Constitution.¹¹

Thus, to the extent that *Super Chief* is grounded on breaches of the "confidentiality of judicial deliberations," the very writing of the book raises most troubling problems. The media and the historians, of course, assert that there are no limits to the public interest in full disclosure of all that happens within a public institution, and that it makes no difference how such disclosure takes place. But that kind of public interest must be weighed against the kind described in the *Nixon* decision. History suggests that the balance favors the latter interest, particularly when one adds an additional factor that so often accompanies an outside scribe's attempt to reconstruct past collegial events within the Court. That factor is a compound of incompleteness, ignorance and inaccuracies on the part of a reporter or "judicial biographer" who played no role, even as a first-hand observer, in the decisional events as they occurred. Decision-making among nine Supreme Court Justices is a very complex and subtle drama, filled with constant subdramas on both individual and collective levels. It is doubtful that anyone can accurately recapture the development of any given decision by looking at someone else's file of correspondence and draft opinions relating to that case. After all, these Justices pride themselves on being fiercely independent of each other, particularly in terms of reaching their own judgments and decisions.

Still another troubling problem is the probability that many of the anonymous tattlers of judicial tales in this book were former law clerks. If that actually happened, as it certainly did in the preparation of *The Brethren*, such action borders on the unethical. Law clerks are not members of the Court. They have no moral authority, even after they leave the Court, to make public disclosure of documents, draft opinions or conversations of a decision-making nature that came to their attention in the course of their duties. At most, a law clerk can observe the whole of the collegial process only through the eyes and mouth of the one Justice for whom he works; what the Justice does not tell him, or what he is not otherwise privy to, the clerk knoweth not. The law clerk, in short, is not a very reliable witness to decisional motivations of the Justices. Nor, if he has any sense of loyalty to the Court or to the Justice for whom he works, is the clerk free to divulge confidential communications, memoranda or draft opinions that he observed while serving his Justice.

Super Chief is a well-written, interesting, but deceptive account of what went on behind the Court's red velour curtains during the years of Earl Warren's stewardship. It contains many gossipy insights into the personalities of the Chief Justice and of those who served with

11. *Id.* at 705-08 (emphasis added).

him. But I am troubled by the numerous revelations of conference discussions, changed votes, drafts and redrafts of opinions, and results that might have been. I am not certain that these accounts are totally accurate, fair or complete, particularly because they are shrouded in anonymous sources. Moreover, I am not convinced that all this after the fact tale-tattling makes any difference to the bar or to the public. Does it really advance our understanding of the law, or of how the Supreme Court operates behind the scenes? Why aren't we content to judge the Warren Court by what its reported opinions proclaim? Why not allow the things said in a tentative collegial context, some of which are not very tidy or nice, to rest in peace? There is nothing conspiratorial or unusual or even useful about them; they are what one might expect from any heated debate among nine people about some of the most difficult legal problems arising in our judicial system.

The bottom line is a feeling of embarrassment for the Court at this latest intrusion into its right of privacy in its internal deliberations. Will *Super Chief*, in conjunction with its shorter version and with the earlier *The Brethren*, chill the spirit of free, open and robust debate within the halls and conference room of the Supreme Court?

