THE BRETHREN: Inside the Supreme Court, by Bob Woodward and Scott Armstrong. Simon & Schuster, 467 pp., $13.95.

Has the Supreme Court a right to privacy?

NAT HENTOFF

*IN ONE OF MANY DISDAIN*ful dismissals of this first hugely popular book on the Supreme Court, Anthony Lewis has noted in the *New York Review of Books* that since no corruption was found by these ardent muckrakers, *The Brethren* is a clear and shoddy illustration of what Earl Warren once called "exposure for exposure's sake." The implication is that the nation and the Court would have been far better served if Woodward and Armstrong had not chosen to try to bring this "lofty institution down to the unheroic level of all others in these inglorious times." After all, what did they find? No more than "that Supreme Court Justices are human in their faults and ambitions."

In her lead dissection in the *New York Times Book Review,* Renata Adler judged the book hollow and mocked these laymen (she is a journalist with a newly acquired law degree) for their inaccuracies, their bungling legal analysis, and for having disclosed "no important secrets" or "scandals" about the inner workings of the Court.

Like Anthony Lewis, Adler—and a good many other reviewers—scornfully attacked the authors for making all their sources anonymous. In *The Nation,* Aryeh Neier, former executive director of the American Civil Liberties Union, ascribed errors he noted in the book to this massive use of faceless sources. But worse yet are "the moral implications of soliciting betrayals of confidences on matters such as those reported in *The Brethren.* . . . Funny, isn't it," Neier added, "that many journalists attach great significance to protecting the confidentiality of their sources but think nothing of getting their sources to violate other people's confidences."

I would only note, as a journalist, that the primary reason we use confidential sources is in the knowledge that they *will* betray information that has been hidden, one way or another, from the citizenry. And we maintain the confidentiality of our sources so they won't get fired—as the Supreme Court clerks questioned by Woodward and Armstrong surely would have been if their names had been listed on a page of credits in this book.

But this is the Supreme Court, not the local waterworks or board of education. In a speech printed on the front page of the *New York Law Journal,* a distinguished attorney, Arthur Liman, attacked *The Brethren* as "the greatest assault in the history of the bar on [the] tradition of [lawyers'] confidentiality, and a threat to the deliberative processes of our courts. I refer, of course, to the wholesale disclosure by law clerks of the secrets of Supreme Court Justices' chambers."

Throughout the country, a sizable number of law professors have shared Liman's outrage. How would the justices ever again—or at least for some years to come—be able to engage in the wholly open exchange of views that is possible, in judicial matters, only when absolute secrecy is guaranteed? On the other hand, these are not cases at trial before juries, when "leaks" from chambers could prejudice other stages in the appellate process. At this ultimate level, fundamental principles of constitutional law are being decided that will affect not only the person whose name is on the case but thousands, maybe millions, more.

I will acknowledge that if I were a justice, I would not want my clerks circulating my preliminary drafts, intra-Court notes, or recollections of my characterizations of the other justices. But as a citizen, I can hardly censure Woodward and Armstrong for letting me know—for the first time, in any extensive sense—how decisions are reached on the High Court.

THERE ARE, TO BE SURE, inaccuracies in the book, but few are of any weight. And the authors' legal analysis does show, as I later confirmed in a conversation with them, that they lack, to say the least, a profound understanding of the history and continuing dynamics of constitutional law. But they are lucid reporters of the interrelationships among the justices during the terms of 1969 through 1975, as well as of the basic facts of the cases that reached the Court in that period.

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And not even the most negative reviews of *The Brethren* have been able to successfully question the credibility of the book's foundation. The clerks did more than tell tales about the icons: They made available to Armstrong and Woodward "internal memoranda between Justices, letters, notes taken at

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conference, case assignment sheets, diaries, unpublished drafts of opinions and, in several instances, drafts that were never circulated even to the other Justices."

Several lawyers who practice frequently before the Court told me (on the promise of confidentiality) that based on their experience and their sources on the inside, they have no doubt that *The Brethren* is basically accurate as to the convoluted processes of decision making. I asked them about the clerks' characterizations of the justices. "Sure," said one lawyer, "some of it is colored by a particular clerk's ideological views, let's say, or by how a justice treated him, but none of it is that far off. The important thing though is that you really get to know how these decisions come into being—the trading of votes for later cases, the worry about how the country is going to react, the compromises most of them make (although Douglas usually refused to)."

In agreement is Michael Meltsner, dean of Northeastern University Law School. Formerly a public-interest lawyer in New York, he has appeared before both the Burger and Warren courts, and wrote in *The Nation*: "Despite its failure to give the reader the perspective necessary to evaluate the evidence, lawyers who watch the Burger Court will be persuaded by Woodward and Armstrong's story."

Alan Dershowitz, a Harvard Law School professor and an active civil-liberties lawyer, applauded the book in the *Saturday Review* for shattering "a conspiracy of silence designed to keep the American people in the dark about internal dynamics of the High Court. . . . The Justices themselves have been the worst offenders. They have insisted on secrecy for secrecy's sake, and have not been selective about what is properly the business of the public and what may appropriately be kept from it. They have, in certain cases, refused to disclose some of the most important rules that governed their actions; at least one time they covered up unethical conduct by a member of their own bar [the story is in *The Brethren*]; and they have declined to make public the processes by which they decide cases."

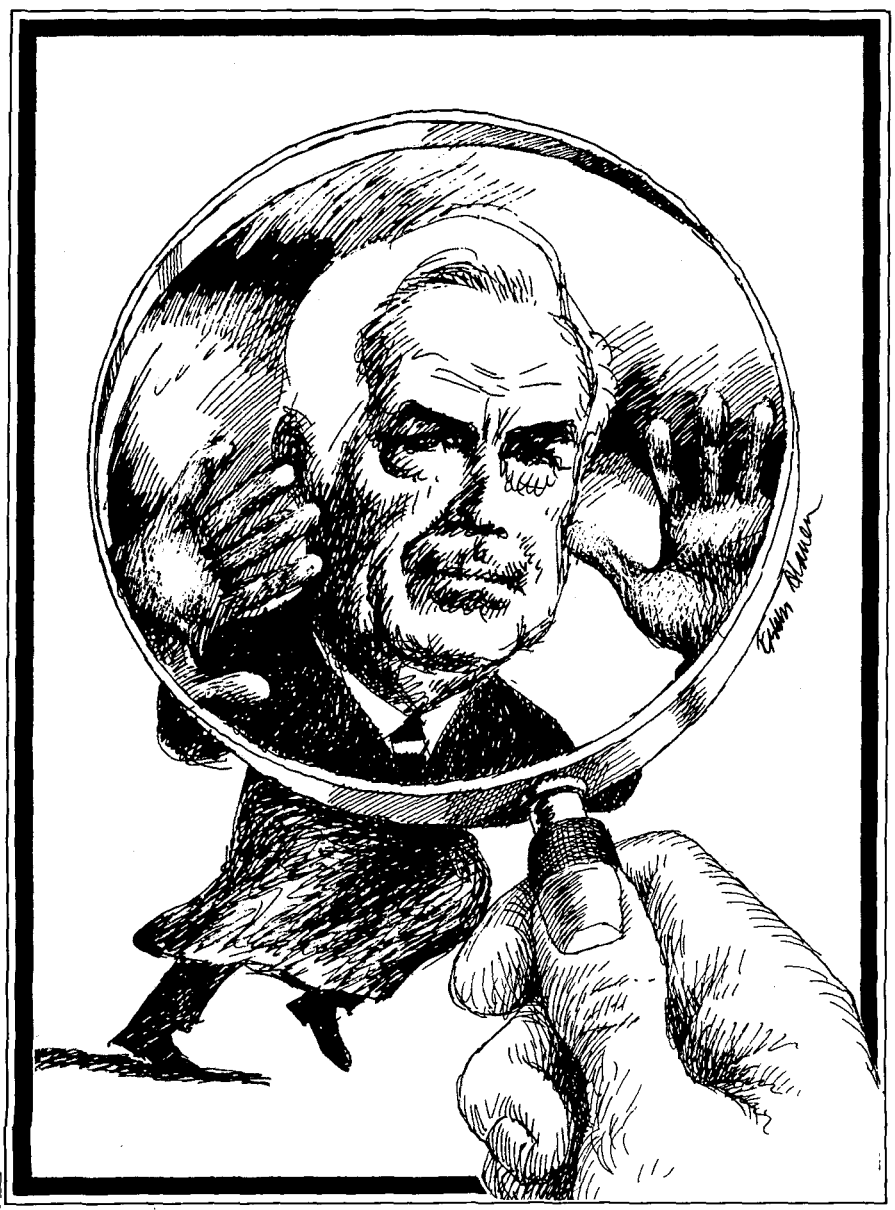
Woodward and Armstrong obviously took care with the epigraph for their book, hoping to prevent some of the invasion-of-privacy attacks they have received. But except for Dershowitz and a few others, most reviewers have ignored the epigraph: "A court which is final and unreviewable needs more careful scrutiny than any other. Unreviewable power is the most likely to self-indulge itself and the least likely to engage in dispassionate self-analysis. . . . In a country like ours, no public institution, or the people who operate it, can be above public debate."

That democratic credo was written on September 4, 1968, by Judge Warren E. Burger of the circuit court of appeals—nine months before he was named chief justice of the United States.

Anthony Lewis does attempt to deal with this question of "more careful scrutiny" by insisting that after all, the Court publishes all its decisions. We can all read how the justices arrived at their conclusions. And, Lewis concludes with a flourish, "The Court stands—or falls—on what it says in its printed opinions, not in its private discussion."

I FIND IT DIFFICULT TO imagine anyone other than Lewis, however, reading this book without deciding early on that those printed opinions can be quite misleading. Not in terms of what they *say*, but with regard to the hidden politicking that produced them—which can well lead a justice to take otherwise surprising half-turns and even full turns a year or more down the line in a related case. (See the sections dealing with school desegregation, abortion, the death penalty, obscenity, and the Fourth Amendment "exclusionary rule" concerning evidence obtained illegally by law-enforcement officers.)

While Chief Justice Burger, for instance, has been in the majority on several major school desegregation cases, judging by his preliminary drafts and his remarks at the justices' conferences that are published here, those decisions do not reflect his true views. Burger will sometimes join the majority on these



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and other cases only so that he, as the highest ranking justice in the majority, can select the writer of the opinion and thereby water it down. Or he will sometimes leave the minority, where he really yearns to be, if it is so small that his "image" as leader of the Court will be weakened in the nation at large.

Also, for anyone curious as to where Potter Stewart may come out on a number of issues, his already printed opinions will give far fewer clues than his unpublished drafts and memoranda during the vote-trading in those very cases. The same would appear to be true of most of the others, even William Brennan.

What of principle in all this bargaining over constitutional law? Well, according to *The Brethren,* John Paul Stevens, by the end of his first term, had become "accustomed to watching his colleagues make pragmatic rather than principled decisions—shading the facts, twisting the law, warping logic to reconcile the unreconcilable. Though it was not at all what he had anticipated, it was the reality. What Stevens could not accept, however, was the absence of real deliberation."

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But this book, despite its reputation as a harsh "exposure" of the Court, does not bear out Stevens's conclusions. Actually, as Anthony Lewis has pointed out, though the nimbuses are now gone, "On the whole the justices appear as serious, committed men—imperfect, inevitably unequal to their extraordinary legal-political function, but struggling, careful, never cynical."

Some of them do twist the law—notably William Rehnquist—and some are less intensely involved in the issues than others. But most of "the brethren," even with the curtains drawn aside, merit a measure of respect, if not adulation, although there is a grave question as to whether they possess the analytical intelligence and exceptional integrity that the job requires. (Actually, only the Chief, the Cowardly Lion of the book, does not.)

As Lewis and Adler, among others, have emphasized, there are indeed no scandals, no corruption, in *The Brethren.* Then why do they suppose it is one of the fastest selling books in the history of Simon and Schuster? The gossip factor? How titillating can gossip be about nine elderly men, five of them over seventy? Even the gossip that has to do with character is not likely to have mass appeal when the context is how this play of temperaments affects the way these men interpret the First, Fourth, and other amendments rather than their lives away from the Court.

COULD IT BE THAT THE Brethren is selling so well because more citizens than most law professors and judges ever thought possible are really intrigued by how the Constitution works? Virtually all of these pages deal with deliberations—and internal lobbying—about actual cases, many of them quite complex. Because Woodward and Armstrong know how to construct a swift narrative line, even the most difficult cases take on dramatic form, and legitimately so. There's practically no hype. More than half a million readers would appear to be sufficiently curious about serious matters to enjoy *The Brethren* even though venality and Watergate-style skulduggery are entirely absent.

A further question the book raises, therefore, is where these readers are going to continue to find illuminating material on the Court. Each term, there are a number of cases of absorbing interest—from police procedures to libel to yet another attempt to define "obscenity." But reporting on the Court, in the printed press or on television, is brief, fragmented, and confused because of the rush to make daily deadlines. Only most infrequently is a case followed in detail and perspective on its way to the Court. Rarely can the public develop enough knowledge to get involved in a case as an ongoing story. Furthermore, when a case is decided, it's a one-day item, skimpily explained. Or distorted, as in the newspaper headlines BAKKE WINS, to announce that pivotal affirmative action ruling. The deciding vote was that of Lewis Powell, who actually held that race *can* be a factor in graduate school admissions—not quite what Bakke had asserted.

One way to begin to deal intelligently with the popular interest in the High Court shown by *The Brethren*'s success is suggested by Bob Woodward: "There should be much more thematic coverage. Extensive pieces exploring a basic constitutional issue—abortion, school library censorship, police searches—by connecting cases already decided with those on the way up to the Court. This is important not only for the readers but for the Justices as well. They do read the papers. You have to remember that they're isolated." Or, as Mr. Justice Brennan put it in a speech at Rutgers University last October: "The Court has . . . a need for the press, because through the press the Court receives the tacit and accumulated experience of the Nation."

"It *is* possible," Woodward says, "to redirect their attention. While we were working on the book, we saw a lot of evidence that when careful, extensive newspaper accounts of a pending case were available, the Justices, or some of them, paid close attention to those pieces. Sure, *they* have to decide the constitutional issues, but they want to know what the perceptions are out there. These nine men are out on the edge, and they really don't want so vast a distance between them and the country. That's why it was a number of the Justices themselves who opened the door for us

in terms of the book, and then encouraged their clerks to talk to us. They want the actual work of the Court to be better known."

Since no justice is talking about *The Brethren*, there is no way of knowing whether they had in mind this particular method of getting the Court's actual work better known. In any case, no reporting in the entire history of the Court has so brightly revealed what does go on there.

But what of the widespread claim, especially among law professors, that this reduction of the Court to the level of the rest of us will greatly harm it, for the High Court will no longer be seen as a wholly sanctified institution?

"Truth," Alan Dershowitz answers, "has its own claims, especially in a democratic society. If an institution cannot survive disclosures about its internal dynamics, then serious questions are raised about the legitimacy of that institution—or at least of its current membership."

The Court will survive *The Brethren*. It might even be improved by the possibility that someone some day may do a second volume. ❑

SOVIET INTERVENTION IN CZECHOSLOVAKIA 1968: Anatomy of a Decision, by Jiří Valenta. Johns Hopkins University Press, 208 pp., $12.95.

How Moscow decides to invade

VLADIMIR V. KUSIN

*THE FIRST RULE OF COM*munism is that you don't let go of what you have. The second is that what you have you protect from infection. There are various ways of going about both. Fraternal assistance, sometimes given the name military intervention, is the *ultima ratio*. When the Czechoslovaks attempted to stage a peaceful transition from Communism to democratic socialism in 1968, Moscow put an end to the experiment.

In the present book, Jiří Valenta puts together bits and pieces of information about the attitudes and developments that went into the making of the Brezhnev Politburo's decision to intervene on the night of August 20, 1968. He then formulates a hypothesis about the Kremlin's decision-making process in general. This is an important book for historians, as well as for the politicians of today; with the military thrust into Afghanistan, it could not have come at a more opportune moment.

There are obvious differences between Czechoslovakia in 1968 and Afghanistan in 1979.

Not that it compares the two invasions. Valenta wrote long before the juggernaut set out across the Soviet-Afghan border. Neither should one work overtime trying to distill from the two invasions a model of Soviet decision making that would serve as some kind of obligatory master key to understanding Soviet foreign policy. Differences between Czechoslovakia in 1968 and Afghanistan in 1979 are obvious, despite certain similarities in rhetoric and other superficial coincidences. Nonetheless, the fact remains that twice within the less than sixteen years of its existence the Brezhnev regime has sent troops abroad to salvage a revolution it considered was going haywire. The motivations for such "fulfillment of internationalist duty" derive not only from momentary and unique situations, but also reveal rooted concepts—in terms of both ideology and power politics—that Soviet leaderships harbor as a matter of course. The processes that transform interventionist motivation into the reality of a Politburo decision are not just pragmatically tailored to each critical decision anew, but rather anchored in established Soviet practice. In identifying a methodical device ("a paradigm") which allows us to understand as best we can the Soviet decision to invade Czechoslovakia, Valenta has rendered a broader service to observers of the Kremlin's enigmatic ways.

Model-building is a tricky undertaking in any circumstance. Where the input of information is substantial, you tend to chop off too many bothersome details that appear to stand in your way, often ending up with an abstract torso of vacuous generalities. Where there is a dearth of hard facts, you are tempted to avail yourself of convenient hearsay or a thrice-chewed speculation that becomes no more reliable by being quoted in venerable journals. The resulting conceptual edifice may then look solid from afar, but on closer inspection it is only as water-tight as its most porous building stone. Decision making in the Soviet Politburo is an example of the latter situation: We simply do not know enough, and rumors are legion.

Valenta has on the whole avoided the attendant pitfalls. The "paradigm" he applies (not new, one should hasten to say, but still elaborated here with unprecedented consistency) provides an adequately plausible framework. According to Valenta, critical decisions of the Soviet leadership are reached through a process of consensus building in the Politburo and the Central Committee bureaucracies. In debating alternatives, the members of these upper political strata come together in groups, some of them ad hoc, some with a more permanent character. They evaluate the importance of the perceived payoffs, of the coalition setups that may be created, and of the possible bargains they will have to strike on the road to consensual decision. It is a fluid process before the decision is reached, and the players shift their stands. Brezhnev's importance as a stable and durable general secretary lies in his ability to avoid finding himself on the side of those whose attitudes will not eventually determine the critical decision. He is the consensus builder, not a partisan of one or another faction.

IN THE COURSE OF THE conflict that developed between the Czechoslovak reformers and the Soviet leadership there was a fairly long period of contest among various Soviet bureaucracies with differing perceptions of the Prague Spring. Essentially, and somewhat simply put, while virtually all groups that comprised and upheld the Moscow leadership agreed that the

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