Certain judicial procedures are properly screened from the public eye. The reason is the same one that prompted members of the Constitutional Convention to keep their deliberations secret. Privacy of the conference room, at least while the case is pending, is a must. Later on, however, the work of Supreme Court justices, no less than the deliberations of any other branch of government, aided by the research of responsible scholars, should be subjected to public scrutiny. There is a very special reason for such studies. Supreme Court justices alone are politically nonresponsible. Because they are not directly restrained by the voters, the justices should be restrained by the informed verdict of history.

Nor has the Court suffered from such investigations. Documented research to date demonstrates the accuracy of Charles Evans Hughes's observation: "In the conferences of the Justices of the Supreme Court of the United States, there is exhibited a candor, a comprehensiveness, a sincerity, and a complete devotion to their task that I am sure would be most gratifying to the entire people of the Union, could they know more intimately what actually takes place."[16]

"I have no patience," Justice Stone commented, "with the complaint that criticism of judicial action involves any lack of respect for the courts. Where the courts deal, as ours do, with great public questions, the only protection against unwise decisions, and even judicial usurpation, is careful scrutiny of their action and fearless comment on it."[17] Authoritative research seems to confirm Justice Brandeis's claim that "the reason the public thinks so much of the Justices of the Supreme Court is that they are almost the only people in Washington who do their own work."[18]

Karl Llewellyn's caustic wit demolishes the purblind notion that judicial proceedings should be shrouded with an impenetrable veil of secrecy:

> It is well to remember that neither secrecy of the Court's deliberation nor later secrecy about what went on during that deliberation rests in the nature of things on 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. . . . . 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.[19]

---

teaching, he said with satisfaction, 'Now I have a majority' " (Paul A. Freund, *On Understanding the Supreme Court* [Boston, Mass.: Little, Brown and Co., 1949], p. 74).

[16] Quoted in William L. Ransom, *Charles E. Hughes: The Statesman as Shown in the Opinions of the Jurist* (New York: E. P. Dutton & Co., 1916), pp. 13–14.

[17] Quoted in Mason, *Harlan Fiske Stone*, p. 447.

[18] Charles E. Wyzanski, Jr., "Brandeis," *The Atlantic*, November 1956, p. 71. For Wyzanski, "opinions of the Supreme Court are among the great sources of the education of the citizenry. . . . The total effect of judicial power in constitutional cases is to make the voter more knowledgeable and more responsible" (idem., "Judicial Review in America: Some Reflections," in *Constitutional Government in America*, ed. Ronald K.L. Collins [Durham, N.C.: Carolina Academic Press, 1980], p. 489).

[19] Karl Llewellyn, *The Common Law Tradition* (Boston, Mass.: Little, Brown and Co., 1960), p. 324n.

Political Science Quarterly
Summer 1980

Critical review of The Brethren
by Alpheus Thomas Mason

It is ironical, indeed, that Chief Justice Burger, outspoken critic of *authorized* studies of the Court's internal workings, should have himself become the victim of hit-and-run vilification by the use of *unauthorized* sources. By keeping a tight lid on their papers or destroying them, the justices themselves invite books like *The Brethren.* Its authors may have been egged on by the fact that the Supreme Court has been less disposed than elected officials to "allow its decision-making to become public" and "has by and large escaped public scrutiny."[20]

Although the time is past when any body of men, including Supreme Court justices, can be set on a pedestal and decorated with a halo, there is certain advantage in maintaining the public image of the Court as somehow above the fray. Human nature seems to crave an object of veneration; mystery and mysticism are its handmaidens. America, unlike England, has no king or queen on the throne. Yet, like any free society, we can profit from a symbolic element. English publicist Walter Bagehot reminds us that those elements in the governing process that "excite the most easy reverence are theatrical elements—that which is mystic in its claims; that which is occult in its mode of action; that which is brilliant to the eye."[21] The Supreme Court occupies vis-à-vis the people a position not unlike that of the British crown. The difference—a big one—is that the Court wields power. With neither purse nor sword it can bring presidents, Congress, state legislatures, and governors to heel.

Judicial review, along with federalism, America's major contribution to the so-called science of politics, is in response to an imponderable. James Wilson, member of the Constitutional Convention of 1787, later Supreme Court justice, noting that "superiority of the Constitution" means "control in *act* as well as *right*," declared: "To control the power, and conduct of legislatures by an overruling Constitution was an improvement in the science and practice of government reserved for the American states."[22]

John Locke, sometimes identified as the Karl Marx of American constitutionalism,[23] had postulated that the legislative, though supreme, in his imaginary civil society, would be bound by both the laws of nature and "promulgated established Laws." But Locke provided no organ of government for resolving conflicts between the two levels of law. Confronted with this imponderable, the apologist for Britain's Glorious Revolution took refuge in circular reasoning:

[20] Woodward and Armstrong, *The Brethren,* p. 1.

[21] Walter Bagehot, *The English Constitution* (New York: A. Appleton and Co., 1914), p. 76.

[22] Quoted in Jonathan Elliot, ed., *The Debates of the Several Constitutional Conventions on the Adoption of the Constitution,* 4 vols. (Washington, D.C.: Jonathan Elliot, 1836), 2: 406.

[23] Louis Hartz holds that Locke "dominates American thought as no thinker anywhere dominates the political thought of a nation" (*The Liberal Tradition in America* [New York: Harcourt Brace, 1955], p. 140). Jefferson's appraisal is closer to the mark: "Locke's little book on government is perfect so far as it goes" (Jefferson to T.M. Randolph, Jr., 30 May 1790 in *The Papers of Thomas Jefferson,* 18 vols., ed. Julian P. Boyd (Princeton, N.J.: Princeton University Press, 1950–), 16:449. Locke's contributions may be measured in terms of insights and ideas, especially during the revolutionary period. On the institutional side, he was of limited usefulness.

As there can be no
either the Executiv
design, or go abou
this, as in other cas
parently a euphem

The Constitutior
the Supreme Court
thus institutionalizi

Revolution is Ar
No. 41, "the only l
as a Nation."[25] Sin
the right of revolut
tame it. Thanks to
tions, all so designa
surgency, the Civil
tion, and Nixon's r
confrontations the
Court's ill-fated att
Union issues.

John Marshall re
ing Convention w
Madison.[26] Less wel
judicial review as a
of a judiciary," he
ner, without sheddi
force? . . . To what

[24] John Locke, *Two T*
University Press, 1967),
Omission of a common
in light of the fact that ur
to enjoy the advantage of
his civil society would see
some private Mens Cases
what by unlawful force i
contest, where they are s
Significantly, for both
of Rights was the "legal c
15 March 1789). Madison
8 June 1789, argued: "I
justice will consider then
Mason, *The States Rights*
Availability of a forum
possibly vindicated discou

[25] *The Federalist,* vol. 1

[26] Elliot, *Debates,* vol.