In support of *Closed Chambers*

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Closed Chambers, Edward Lazarus's 500 page account of his year as a clerk for Justice Harry Blackmun in 1988-1989, has landed him in hot water with the judicial establishment, especially with some leading lights of the Federalist Society. The editor of this very publication, Prof. Richard Painter, has suggested in the Wall Street Journal that Lazarus be prosecuted for theft of government property. Judge Alex Kozinski of the Ninth Circuit, according to *Legal Times*, has said "I have nothing but contempt" for Lazarus and has announced he will walk out of the courtroom if Lazarus dares appear before him.

The cause of all this rightist indignation is that Mr. Lazarus reveals in his book supposedly confidential information learned or acquired as a result of his clerkship. According to Kim Eisler in *Legal Times, Closed Chambers* is "the first kiss-and-tell book to ever come from the tight community of former clerks." As for Prof. Painter, he thinks "Lazarus has sacrificed the dignity of the Supreme Court and the privacy of the justices in order to write a sensationalistic book."

I respectfully dissent. In the first place, *Closed Chambers* is hardly "sensationalistic". It is a generally well written, thoughtful account of the author's term at the Court, and, more broadly, the Court's role in our federal system. The author does succumb to the human temptation to magnify the importance of one's own experience, here Lazarus's debatable contention that factionalism at the Court during his term was comparable in importance and intensity to the 1930s, when the "Four Horsemen" overturned much New Deal legislation and provoked FDR's infamous court-packing scheme. But if the events of Lazarus's tenure were less cosmic than he imagines, they were interesting nonetheless, and *Closed Chambers* will inform a wide audience about the process of judging at the very highest level.

The first step in evaluating the book is to decide what it is: journalism, memoir, or history. We can eliminate history first, since the footnotes cite almost exclusively secondary sources, and many the book's most controversial claims are undocumented. Written at a remove of several years (and published a decade after the events it describes), the book lacks the immediacy of journalism. So call it a memoir, and let it stand, where it can, as a primary source description of events that Mr. Lazarus witnessed during his year at the Court. Some of the book does not meet even that description. Although the reader pretty much has to deduce this fact himself, the last hundred pages recount events after Lazarus's clerkship ended, and his narrative in that part of the book may be less persuasive as a result.

To get to the essence of Kozinski et al.'s grievance, *Closed Chambers* purports to quote from internal Justice-to-Justice correspondence that was not, and was never intended to be, a part of the public record. To that I say "Bravo!" The correspondence in question was not personal or private in any meaningful sense. It was instead documentation of an official decision-making process, the same material that judges force businessmen to produce in discovery every day. His critics cry out that Lazarus violated a confidentiality agreement that was a condition of his employment as a clerk. Although Prof. Painter has tried to transform that into a criminal violation, the true, if unstated, theme of most of the critics is that Lazarus committed an ethical violation, something akin to a breach of the attorney-client privilege.

That analogy has some surface appeal. Justice Blackmun hired Mr. Lazarus, a lawyer, to furnish legal services, and in the course of that engagement Lazarus was privy to "confidential" internal Court correspondence. But who was Lazarus's client? I submit it was not Justice Blackmun, and certainly not the Court as a whole.

The better analogy would be to a law firm, with Blackmun a partner and Lazarus an associate. The client is the public, who pays the bills and in return expects the most powerful court in the world to provide reasoned, principled decisions. To the extent Lazarus shows the public did not get what it paid for, he is to be commended for his candor and zeal. Any so-called "agreement" that would compel him to conceal evidence of judicial dissembling is the real ethical problem. I entirely agree with Lazarus that whatever obligation of confidentiality he had about what he observed at the Court ended with his clerkship, and that the only sanctions available for later revealing that information are social ones, as invoked by Judge Kozinski with his epithets and his threatened courtroom walk-out.

What secrets does the Lazarus book lay bare? One internal Court matter that Lazarus discusses at length is not really a secret at all: Lazarus contends that jejune, twenty-something law clerks generally draft opinions for the Court, and the Justices merely edit them. A colorful example that offends Prof. Painter is Lazarus's alleged "claim that Justice Marshall watched soap operas while his clerks wrote opinions". In fact, Lazarus himself makes no such claim, but he does cite an assertion to that effect made in *National Review*, without disagreeing with it. That anecdote provokes the somewhat irreverent question: just what do Supreme Court Justices *do* all day? Although not intended as an answer, a passage in Lazarus's book describing goings-on in the Blackmun chambers while Justice O'Connor was preparing an abortion opinion gives some idea:

> The anxiety was paralyzing. I recall more than one afternoon sitting alone with Justice Blackmun in his office. Neither of us said a word. We just sat there, subdued, in a half-light filtering through the blinds, wondering which way the pendulum would swing, and how far.

Note that this catatonic encounter occurred during working hours, and on more than one occasion. The greatest legacy of *Closed Chambers* may be to demolish forever the myth that Supreme Court Justices are in any sense overworked. Lazarus gives the impression that Justices, like many law firm partners, spend much of their time plotting with each other about issues of power and personality, while the groundlings do the real work.

This "plotting" theme has much offended court insiders, for it does indeed diminish "the dignity of the Supreme Court," as Prof. Painter has lamented. But if what Lazarus says is true, the Justices are properly due for some deflation. Judge Kozinski, a former clerk for Justice Kennedy, is put out that Lazarus has revealed some of Kennedy's thought processes, but the portrait of Kennedy that emerges is of a Justice more intellectually honest than some of his well known colleagues, both left and right.

According to Lazarus, after the defeat of the Bork nomination, a conservative cabal of clerks was determined to take revenge, and their holy grail was to overrule *Roe v. Wade*. The conservative clerks were unsure of Justice Kennedy's devotion to the cause, and they devoted much effort to making sure he stayed on the reservation. They were, in the end, unsuccessful.

The book recounts how Justice Kennedy's position "evolved" (a term used more memorably by Justice Thomas when he told his clerks "I ain't evolving") from an inclination to overrule Roe to a decision to join Justices O'Connor and Souter in *Planned Parenthood v. Casey*, a 1992 decision that affirmed Roe but gave states more latitude in restricting abortion prior to viability.

Lazarus quotes internal memoranda among various Justices, which reflect Kennedy's changing thoughts, and these leaks, which came from persons at the Court after Lazarus had left, particularly gall Prof. Painter and Judge Kozinski. The upshot of these disclosures is the following: (a) Chief Justice Rehnquist wrote a draft majority opinion in *Casey* eviscerating *Roe* without actually

saying so, and his dissent in that case expressly calling for *Roe's* repeal resulted solely from the loss of Kennedy's fifth vote for the sub rosa evisceration; and (b) the reason for Kennedy's defection was either judicial statesmanship or a pathetic desire to be liked, depending on which page of *Closed Chambers* you are reading.

That Lazarus made public a Rehnquist draft that Rehnquist himself would have made the law of the land, if only he had one more vote, hardly seems to justify the fervid condemnations Lazarus has received. More shocking than anything he says about Rehnquist or Kennedy is his claim, apparently derived not from confidential sources but the late Justice's public papers, that liberal icon William Brennan was prepared to invent a totally specious claim of defective pleadings to dismiss a plaintiff's appeal in a discrimination case, simply because he could not command a majority for the liberal position. Brennan's proposed opinion would hold, according to Lazarus, "that, if only Patterson had gotten her pleadings right, she would have been entitled to prevail on the facts of her case." Lazarus expressly concedes "Brennan himself did not really think her pleadings fatal to her case". Imagine the hapless lawyer trying to convince his client that the Supreme Court really didn't mean it when it said she lost because he didn't know how to draft a complaint. And, according to Lazarus, all so that St. William could "keep control of the case". If Kozinski and Painter want to make an example of someone, perhaps they should go after the unidentified law clerk who, Lazarus claims, persuaded Brennan to adopt this egregious ploy.

Any lawyer who goes often to court is acquainted with intellectually dishonest judges. Most of us have seen the municipal magistrate who never doubts the word of a police officer, and the appellate judge who feels free to ignore precedent because his opinion will be unreported and supreme court review is unlikely. Lazarus confirms that the same shenanigans occur at the very highest level, without the excuses of threatened tenure or burdensome workload that may account for shoddy work in lower courts. Prof. Painter is concerned that, as a result of disclosures like those in *Closed Chambers*, "judges [will be] unable to confide in each other and in their law clerks, [and] courts will be more vulnerable to outside political pressures". That might be so if a law clerk disclosed his boss's thinking while a decision was pending, something Lazarus surely never dreamed of doing. But revealing to the public, years after the fact, that our highest judges will stoop to petty deceptions and intellectual fraud in order to get their way is a salutary exercise of First Amendment freedoms, and a caution to those who smugly acclaim "the rule of law" in America.

Jeremy Bentham, in an essay on "judicial fictions," contended that court decisions premised on lies are morally equivalent to obtaining money by fraud:

> Now, every power thus acquired is in its essence arbitrary; for, if to the purpose of obtaining anything valuable - call it money, call it power - allowance is given to a man, on any occasion, at pleasure, to come out with a lie; which done, the power becomes his, what is it he cannot do?

To devotees of Critical Legal Studies, Bentham's proposition is an irrelevant truism, since they see all law as derived from power and deception. No "crit" himself, Lazarus nonetheless concedes that some of the behavior he observed lends credence to the "crit" analysis. It is no answer to that charge to ignore it and bewail Lazarus's intrusion into "the dignity of the Supreme Court and the privacy of the justices," as Prof. Painter has done.

Mr. Lazarus may think it small consolation after Judge Kozinski has walked out on him, but I would gladly shake his hand.