

Dissenting Opinion

A witness from inside the Supreme Court is not impressed.

CLOSED CHAMBERS

By Edward Lazarus.
The First Eyewitness Account of the Epic Struggles Inside the Supreme Court.
Illustrated. 576 pp. New York:
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By David J. Garrow

EVERY year the nine Justices of the United States Supreme Court each employ three or four recent law school graduates as clerks. The highly prized positions usually go to top-ranked students from the country's best law schools who already have clerked for a Federal court judge. In the summer of 1988, at the beginning of a term in which the Court was riven by disagreements over abortion, capital punishment and civil rights, Edward Lazarus, a Yale Law School graduate who had worked one year for a liberal Federal judge in California, began a 12-month clerkship with Justice Harry A. Blackmun. Justices William J. Brennan Jr. and Thurgood Marshall were still present; Antonin Scalia, who had joined the Court in 1986 at the same time that William H. Rehnquist had been promoted to Chief Justice, had greatly invigorated the Court's right flank, and Court watchers were wondering whether the newest member, Anthony M. Kennedy, would give Rehnquist and Scalia the consistently conservative fifth vote that, together with those of Byron R. White and Sandra Day O'Connor, would put the right wing in firm command.

Lazarus, now a Federal prosecutor in Los Angeles and the author of a previous book, "Black Hills/White Justice," a history of the Sioux Nation's struggle against the United States Government, found his year inside the Supreme Court both exciting and disquieting. He returns to his experience in "Closed Chambers," a valuable but often badly overstated critique of the Court for which he once worked.

"Closed Chambers" gives us excellent and accessible accounts of important but not well-known rulings involving the death penalty and habeas corpus jurisdiction. But most of the critical attention it is attracting is directed toward Lazarus's harshly negative evaluations of the Justices, their clerks and of the published opinions they collaborate in writing. And indeed, though Lazarus asserts that his book is "both an indictment" of how the Court has behaved over the past decade and "a hopeful plea" for change, his tone is almost exclusively denunciatory. "Both the liberal and conservative factions at the Court," he declares, have come "to abandon the Court's own deliberative processes and disregard basic tenets of the rule of law," and his intention is to tell how this came to pass.

Lazarus says that Brennan, who retired in 1990, had become "an often bitter and unyielding partisan," while Marshall, who stepped down in 1991, was "frequently disengaged" and by his final year "no longer up to his responsibilities, or even the appearance of being up to them. Without Brennan's lead to follow he made mistakes, some embarrassing." For example, during the Justices' private discussion of a capital case, "Marshall became so confused that, for the first

time in his career, he voted at conference to uphold a defendant's death sentence." When one of his clerks later realized the error, Marshall changed his vote. Lazarus is hardly kinder to O'Connor, whom he terms "far from the most intellectually secure Justice," or Kennedy, whom he classifies as "not a dazzling intellect." Justice John Paul Stevens, who spends considerable time in Fort Lauderdale, Fla., is labeled "the Fedex Justice."

Interestingly, little of "Closed Chambers" relates Lazarus's firsthand experiences — there is, for instance, hardly any discussion of even the day-to-day routine within Blackmun's chambers — but much of the book reflects poorly on clerks for other Justices, particularly clerks Lazarus categorizes as right-wingers. In the most troubling of these stories, it is alleged that a clerk to Kennedy, who had previously worked for Scalia, successfully manipulated Kennedy in *Patterson v. McLean Credit Union* (1989) to achieve a result that both the clerk and Scalia favored. But Lazarus never limits his denunciations to conservatives. "I see many of the Justices' opinions, on both sides," he grandiloquently declares, "not as just logically wrong and morally inadequate, but as fundamentally dishonest, either by design or through gross negligence."

It should be said that some of Lazarus's insider stories about open warfare between liberal and conservative clerks during the 1988-1989 term are both entertaining and memorable. At the end of the year, a "happy hour" in an outdoor courtyard degenerated into a shouting match between a Brennan clerk and an O'Connor clerk. "Not entirely sober, they traded taunts and epithets before graduating to shoves and swings that drove them into the courtyard fountain," Lazarus writes. "It was a fitting end to the term, a mismatch of vaguely pathetic liberal rage against the bully-boy swagger of ascendant conservatism." But Lazarus's writing is often better than his judgment. Clerks often suffer from an exaggerated sense of their own importance, and Lazarus's characterization of his own year as a term that "must rank with the New Deal watershed of 1937 and the year of Brown, 1954, as the most decisive in this century" is risible.

SUCH lapses risk obscuring the substantive merits of "Closed Chambers." As Lazarus accurately reports, during his term of service "the vast majority of opinions the Court issued were drafted exclusively by clerks." Justices review and sign off on the decisions that are issued in their names, but Lazarus stresses that "in wielding the enormous power of the first draft and, specifically, in the selection of words, structure, and materials," clerks exercise tremendous influence. "Rarely do the Justices disassemble the drafts they've been given to examine the crucial choices that went into their design," and some members of the Court, he says, function as no more than "editorial Justices."

But Lazarus's factual assertions cannot always be accepted at face value. He says clerks believed that "O'Connor so distrusted Brennan — for having hoodwinked her in some unnamed past case — that she refused to join any of his majority opinions for the Court," a statement the public record easily disproves. In Lazarus's year, O'Connor joined four Brennan majority opinions, and in the following year she joined seven. Likewise, in his discussion of *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the landmark 1992 abortion ruling, Lazarus charges

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that Chief Justice Rehnquist tried to delay any decision in the case until after the 1992 Presidential election: for "several weeks running (exactly how many is unknown)," Rehnquist "relisted" the case, he says, or held it for the next week's conference for further consideration. But the docket detailing such actions is publicly available, and Casey was relisted only once, as is standard practice when the Court reformulates the question that a case presents, as it did in Casey. Rehnquist may or may not have wanted to delay Casey, but he did not do what "Closed Chambers" says he did.

Some judges and scholars already have questioned the ethical propriety of any former clerk writing an "inside the Supreme Court" book, but Lazarus is not the first clerk to do so: the Chief Judge of the United States Court of Appeals for the Fourth Circuit, J. Harvie Wilkinson 3d, published a sanguine account of his clerkship with Justice Lewis F. Powell Jr., "Serving Justice," in 1974.

If ethical questions are to be asked, they should be addressed not to Lazarus but to other former clerks who allowed him to review copies of their Justices' private memos and notes. The chapter on the 1989 abortion case, *Webster v. Reproductive Health Services*, is based largely not on knowledge Lazarus acquired while working for Blackmun but upon copies of documents obtained from O'Connor's file. Similarly, Lazarus's account of *Planned Parenthood v. Casey* is largely informed by access to the papers of a Justice who did not join the opinion by Justices O'Connor, Kennedy and David H. Souter that controlled the outcome in the case. Former clerks have been known to keep their own copies of materials concerning cases upon which they worked, but never before have these records been used in so explicit or public a way.

Lazarus asserts repeatedly that the Court for which he worked was "an institution broken into unyielding factions" of right and left. The Court of the late 1980's and early 1990's was in fact often stridently and unhappily divided. But now Brennan, Marshall and Blackmun are gone, and the ideological warfare has abated and there is very little personal bitterness. Many of Lazarus's pronouncements apply only to the past, and his claim that "the current Court remains a place shattered" by decade-old events is incorrect. "Closed Chambers" is a worthwhile book for students of Supreme Court history, but it is not a book general readers should rely upon for an accurate and dependable contemporary portrait. □