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SECRECY AND THE SUPREME COURT: JUDICIAL INDISCRETION AND RECONSTRUCTION POLITICS

BY PETER G. FISH*

INTRODUCTION

Of America's political institutions, the United States Supreme Court is the most remote and insulated. Its public work consists of little more than the oral presentations made before it by counsel for contending parties and of the written opinions penned by one or more of its members. Deliberations on individual cases, however, are held in the conference room of the Court, far from the public's gaze. There, the Judges ring down the "Purple Curtain" and consider pending cases in the utmost secrecy. Only the members of the Court are present; no record of the discussions is made; no messenger intrudes on their proceedings; no unauthorized person has access to the printed opinions until released by the Court itself. Absolute secrecy prevails, and "judicial lockjaw" characterizes the public responses of Justices to inquiries about intra-Court proceedings.

The rationale for this security-conscious atmosphere relates to the nature of the Supreme Court as a legal and political institution. "Before us," Justice Hugo Black once said, "there must eventually come most, if not all, of the problems of the nation."¹ Because of the politically charged character of many issues reaching the Court, spokesmen for the Bench and Bar have often emphasized the absolute necessity for insulating the judiciary from the vagaries of public opinion. Only in this manner, so the argument goes, can litigants secure justice and the Court as an institution be preserved and strengthened. Explained the late Justice Felix Frankfurter:

The secrecy that envelops the Court's work is not due to love of secrecy or want of responsible regard for the claims of a democratic society to know how it is governed. That the Supreme Court should not be amenable to the forces of publicity to which the Executive and the Congress are subjected is essential to the effective functioning of the Court.²

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1. Address by Mr. Justice Black, 13 Mo. B. J. 173 (1942).

2. Frankfurter, *Mr. Justice Robert*, 104 U. Pa. L. Rev. 311 (1955).

Prominent in Frankfurter's thinking is the assumption that excessive publicity of Supreme Court activities may engender damaging consequences. Rarely, if ever, are the exact character of these predicted ill consequences or their causes specified. Presumably, however, premature disclosures of pending Supreme Court decisions fall within the ambit of forbidden publicity. One might theorize that such advance knowledge of soon-to-be-released opinions, circulated as rumor, would somehow erode the integrity of the Supreme Court and have political repercussions unwarranted by the Court's real decision. By examining in detail a single politically important Supreme Court decision, this study seeks to determine whether there is any apparent relationship between excessive publicity in the form of a premature disclosure and subsequent consequences which prove deleterious for either the Court or for the affected parties, consequences which would not have occurred but for the leak of the particular judicial decision.

PRECEDENTS

Although the subject of this study is the Missouri Test Oath Cases,³ the early and unauthorized release of the Court's decision in them established no precedents. Premature disclosures were relatively common during the Nineteenth Century; neither prevailing custom nor ethical standards of the day militated against the practice.

During Justice Story's tenure, members of the Court discussed rather freely the outcome of pending cases.⁴ Normally, however, such advance information concerned decisions in private litigation of interest only to the immediate parties.⁵ In a similar category was Chief Justice Chase's secret notice to Treasury Secretary Boutwell⁶ of the Court's forthcoming decision in the *Legal Tender Cases*.⁷ The leak of so far-reaching a decision as that in the *Dred Scott Case*⁸ achieved, in contrast, great notoriety. It was widely rumored at the time that members of the Supreme Court had provided President Buchanan with foreknowledge

3. *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277 (1867); *Ex parte Garland*, 71 U. S. (4 Wall.) 333 (1867).

4. Cushman, *The History of the Supreme Court in Resume*, 7 Minn. L. Rev. 305 (1923).

5. Fairman, *MR. JUSTICE MILLER AND THE SUPREME COURT (1862-1890)* 122 (1939).

6. Boutwell, *REMINISCENCES OF SIXTY YEARS* 209 (1902); See also, Ratner, *Was the Supreme Court Packed by President Grant?*, 50 Pl. Sci. Q. 352 (1935).

7. *Legal Tender Cases*, 79 U.S. (12 Wall.) 457 (1871).

8. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857).

of the decision, as in fact Justice Catron had. Thus in his Inaugural Address, the President was able to note the Court's position on the critical issue of slavery in the territories.⁹

From these recorded instances of premature disclosures, it is impossible to conclude that either the affected parties or the Court suffered ill consequences solely because of the leak. With the exception of the *Dred Scott* disclosure, all others were publicized only among a highly restricted audience. Even the *Dred Scott* leak itself can be said to have had little or no effect on the Court as an institution or on the political fabric of the nation. It was the substance of the decision, not the fact that word of it leaked out in an irregular fashion, which brought down on the Court a barrage of criticism and stirred political passions throughout the North.

Superficially, the leak of the *Missouri Test Oath* decision¹⁰ would seem to belong in a class by itself. Of all the premature disclosures cited above, it alone would appear to justify the development of a tradition of judicial secrecy. Rumors of the Supreme Court's invalidation of the test oath provisions of the Missouri Constitution,¹¹ like those of the Court's position in *Dred Scott*, occurred in a tense political climate. The Civil War was over and the salient questions before the country were: who should govern the nation, the border states, and the states of the Old Confederacy. At issue, of course, was the ability of former Confederate sympathizers to participate in politics, to hold office, and, most importantly, to vote. The answers to these questions would determine the distribution of political power in many states and ultimately in the national government itself.

In the spring of 1866, their resolution rested, in part, with the Supreme Court of the United States. The following fall, critical congressional and state elections were scheduled and who voted and how they voted would intimately affect the balance of political power within some states as well as the prevailing deadlock between President Andrew Johnson and the Radical Republicans in Congress over Reconstruction policies.

9. Swisher, ROGER B. TANEY 495-502 (1935). Premature disclosures of Supreme Court decisions have not been combined to the Nineteenth Century. Political commentator Drew Pearson accurately "predicted" the decision in *United States v. Southeastern Underwriters Association*, 322 U. S. 533 (1944) and *Bridges v. California*, 314 U. S. 252 (1941). See, Alpheus T. Mason, HARLAN FISKE STONE: PILLAR OF THE LAW 625 (1956).

10. *Cummings v. Missouri* *supra* note 4; *Ex parte Garland*, *supra* note 4.

11. MO. CONST. ART. 2, § 3 (1865).

MISSOURI POLITICAL MILIEU

The elections of 1866 in Missouri would be decisive. There, as in the border states, the stakes included not only control of some congressional seats, but also the very fate of the nascent state Republican Party then controlled by the radicals under the leadership of Charles Drake.¹² Chances for the Party's survival in the event a reconstituted Democratic Party allied with conservative Whigs should emerge depended upon a loyalty oath requirement for all voters. Comprising Section Three of the notorious "Drake Constitution",¹³ this oath disenfranchised anyone,

who has ever been in armed hostility to the United States, or to the government of this state; or has given aid, comfort, countenance . . . or has ever, by act or word, manifested his adherence to the cause of such enemies, or his desire for their triumph over the arms of the United States, or his sympathy with those engaged in inviting or carrying on rebellion against the United States . . . or in any other terms indicating his disaffection to the Government of the United States.¹⁴

Union Democrats and Whigs as well as southern sympathizers, or "Snowflakes," recognized that the oath provision was aimed squarely at them, at depriving them of the right to participate in State affairs. To turn back the Radicals, moderate Republican Francis P. Blair and others of similar persuasion joined with alienated Whigs to create the "Conservative Union Party." In the words of Blair, it was a "party whose first principle shall be to stand by the principles of humanity and conservatism, enunciated in the policy and proclamations of President Johnson."¹⁵ Thus the conservative's battle in Missouri was Johnson's battle as well,¹⁶ for, as one of the President's informants reported, "The affairs in Missouri . . . present the designs, motives and character of the Radical party, that would in time subject the nation to the same despotism that now exists in Missouri."¹⁷

12. Barclay, *THE LIBERAL REPUBLICAN MOVEMENT IN MISSOURI: 1865-71*, 68 *et seq.* (1926).

13. *Supra* note 12.

14. *Ibid.* Section 9 extended the oath's application to ministers, teachers, and lawyers.

15. 2 Smith, *THE FRANCIS PRESTON BLAIR FAMILY IN POLITICS* 348 (1933).

16. Letter from Edward Bates to Andrew Johnson, July 12, 1866, *Andrew Johnson Papers*, on file in Library of Congress.

17. Transmitted in letter of W. T. Sherman to Andrew Johnson, August 9, 1866, *Andrew Johnson Papers*, on file in Library of Congress.

In spite of the voting oath, conservatives initially exuded confidence over the outcome of the November election,¹⁸ but their hopes dimmed in the face of the Radical's harassing tactics. Lincoln's former Attorney-General, Edward Bates, wrote President Johnson that the Drake clique had "prudently secured as much patronage and influence as possible, by foisting into office their unscrupulous partizans."¹⁹ Thereafter, Radical leaders initiated a state-wide uniform system of voter registration and secured faithful men to occupy the powerful posts of registration supervisors in each county.²⁰ These registrars, complained a fellow conservative, "proclaim their purpose to disenfranchise all who are not 'unmistakably loyal,' that is to say, all who do not propose to vote the Radical ticket."²¹

Fear of violence was widespread among conservatives. Charged one Blair supporter, "Everything points to the employment of force in our next election."²² To this assertion, the vitriolic Radical organ in Saint Louis, *The Missouri Democrat* answered: "The Constitution of Missouri will be maintained, if necessary by lead and steel, against the spirit of lawlessness."²³ Thus the late spring and summer of 1866 found the state pervaded by an atmosphere charged with emotion and sabre-rattling as the Governor threatened to invoke martial law while the Radicals industriously organized militia companies to respond to his call should it ever come.²⁴

IN OPEN COURT

In Washington the Supreme Court had managed to remain aloof from the contest for power among the political branches during its 1865 term. The *Milligan* decision invalidating military trials for civilians²⁵ and two cases involving the constitutionality of the Missouri test oath²⁶ had been postponed until the Court next convened in December 1866.

18. Letter from G. Gibson to Andrew Johnson, April 10, 1866, *Andrew Johnson Papers*, on file in Library of Congress.

19. *Cummings v. Missouri*, *supra* note 10.

20. Letter from Francis Preston Blair, Jr. to Francis Preston Blair, Sr., June 18, 1866, *Blair Papers*, on file in Library of Congress.

21. Letter from Thomas Gantt to J. Hogan, July 28, 1866, *Andrew Johnson Papers*, on file in Library of Congress.

22. *Ibid.*

23. *Missouri Weekly Democrat*, May 8, 1866.

24. *Sedalia Times*, June 22, 1866.

25. *Ex parte Milligan*, 70 U.S. (3 Wall.) 776 (1866).

26. *Cummings v. Missouri*, *supra* note 4; *Missouri v. Garesche*, 36 Mo. 256 (1865).

However, before adjournment in the spring of that year, the Court had heard Montgomery Blair, Reverdy Johnson, and David Dudley Field assail the oath's constitutionality. Challenging them were Radical Republicans, George P. Strong and Senator Henderson of Missouri who defended the oath.²⁷ When the 1865 Term drew to a close, members of the Court had considered some of the major political issues of the day, but had given little indication of their position on them. Hence, the summer of 1886 promised to be an exceptionally peaceful one for the circuit-riding Justices.

To hard-pressed conservatives in Missouri, the Court's evasive behavior seemed a blatant display of partisanship aimed at removing any threat to Radical disenfranchisement policies during the critical congressional campaign. Reacting to the postponement, Missouri Congressman John Hogan exclaimed:

Shame, shame on the Supreme Court of the United States! Its ermine is trailed in the dust. Ichabod is written on its face, and nobody in all America will ever pay any respect to it again. It has allowed nasty little partisan politics to control its actions where great principles were at stake.²⁸

One man, above all others, appeared responsible for this blow to the moderates' fortunes. That man was the former Radical Governor of Ohio, Chief Justice Salmon Portland Chase. Confident that Chase's close associations with the Radical cause boded ill for them, one conservative newspaper charged that

"the Missouri test oath would have been decided unconstitutional but for him, and finding he could not get a majority of the court to decide it constitutional, he used his influence to secure a reservation of the decision until next winter."²⁹

In fact, only the test oath provisions pertaining to lawyers and clergymen had actually been before the Court, but Counsel for both sides argued on the voter oath as well.³⁰ David Dudley Field had told the Justices: "that if imposition of this [oath] is repugnant to the Constitution or laws of the United States, the whole oath must fall, for all

27. *Id.* at 277, 282, 290, 293, 295, 307.

28. Saint Louis Speech of May 1, 1866, in Saint Louis Dispatch, May 2, 1866.

29. Saint Louis Dispatch, April 13, 1866.

30. *Cummings v. Missouri*, *supra* note 4, at 282.

parts of it must stand or fall together.”³¹ Defending the oath’s constitutionality, Counsel for the State, George P. Strong, likewise emphasized all its provisions including those restricting the franchise.³²

Strong was well aware that this issue would soon come before the Court because General Frank Blair had already begun a test case; one which was then pending before the Supreme Court of Missouri.³³ Thus, both sides believed the Court’s decision on the oath for lawyers and clergymen relevant to the oath for voters. Even if it failed to settle the validity of the voter’s oath, it would establish a strong, if not compelling, precedent for its future determination.

THE LEAK

Although conservatives resented postponement of the oath decision, they were heartened by word that the issue had, in fact, been decided in their favor. Congressman Hogan publicly announced the news in his Courthouse Speech at Saint Louis on May 1. To an enthusiastic crowd, he proclaimed:

I tell you the Supreme Court of the United States has declared that the oath of Missouri is unconstitutional.

You have not seen it published; you will say the Court has not made its decision. I grant it, the Court has not written it out and promulgated its decision; but I know that the opinion was made, and I know it from the very best of sources. I have it from the Judges of the Supreme Court themselves. That decision is now on record in the Court.³⁴

Frank Blair, then on the campaign trail, told an audience:

The Supreme Court of the United States [has] already decided that this Constitution is invalid and void. I was told so myself by one of the Judges of the Supreme Court in Washington.³⁵

This premature disclosure of the long-rumored decision created a sensation among the Radicals, although rumors of it had been sweeping

31. *Ibid.*

32. *Id.* at 293.

33. Blair v. Ridgely, 41 Mo. 63 (1867).

34. The Saint Joseph Morning Herald and Daily Tribune, May 15, 1866; The Saint Louis Dispatch, May 1, 1866.

35. Missouri Weekly Democrat, May 15, 1866.

Washington and Missouri for months.³⁶ Spokesmen for the Radical cause had rejected previous intimations of the reputed 5-4 division among the Justices of the Court because the unauthorized leaking of judicial decisions was "not their mode of doing business."³⁷ Now, the Radicals fought back vigorously. Their orators and newspapers repeatedly demanded identification of the source. The Hannibal *Courier* listed the members of the Supreme Court and challenged Congressman Hogan to produce the indiscreet Justice. "Which of these honorable gentlemen," it asked, "had ruined himself judicially and politically to gratify the overweening curiosity of political hucksters—lowered his character, and forever soiled the purity of the ermine he wears."³⁸ Other Radical editors questioned the veracity of Congressman Hogan's statement. Observed the Missouri *Enterprise*: "Anyone acquainted with John knows where the 'screw is loose.' John has told a 'whopper' for political effect."³⁹

Subjected to such blistering criticism the Saint Louis Congressman began to have self-doubts. In need of support, he wrote Reverdy Johnson: "Knowing that you were counsel in both cases,⁴⁰ I am anxious to have your views of the status of the matter for publication in Missouri."⁴¹ The Maryland Senator replied that a majority of the Court had indeed agreed with the arguments advanced by himself and Field "as was well known a few days before the close of the term."⁴² Conservatives hailed this verification of Hogan's contention. Said the *Dispatch*:

Reverdy Johnson's letter declaring that the Supreme Court *did* decide the Missouri Test Oath unconstitutional, seems to have closed the mouth of those who have imprudently attempted to deny the existence of such a decision.⁴³

Vexed Radicals began an investigation of their own. Senator Hender-

36. Silas Reed to Missouri Weekly Democrat, March 27, 1866; See also The Saint Louis Dispatch, July 9, 1866.

37. The Missouri Weekly Democrat, April 10, 1866.

38. Reprinted in Saint Louis Evening News, May 12, 1866.

39. Quoted in the Saint Louis Evening News, May 28, 1866.

40. Ex parte Garland, *supra* note 4 (Congressional Test Oath); Cummings v. Missouri, *supra* note 4 (Missouri Test Oath).

41. John Hogan to Reverdy Johnson, May 28, 1866, in Saint Joseph Morning Herald and Daily Tribune, June 9, 1866.

42. Letter from Reverdy Johnson to John Hogan, in Saint Joseph Morning Herald and Daily Tribune, May 30, 1866.

43. The Saint Louis Dispatch, June 5, 1866.

son, a counsel for Missouri in the *Cummings* case,⁴⁴ obtained access to the minutes of the Supreme Court and discovered that both the *Garesche*⁴⁵ and *Cummings* cases were "Held under advisement and continued to the next term of this Court." He reasoned:

If the cases are yet 'under advisement,' it is not possible that they are 'decided.' There is no other record in the Clerk's office than the above. If the cases had been 'decided' an order to that effect would have been entered on the records of the Court.⁴⁶

As the election campaign drew to a close in the Autumn of 1866, it became apparent that Radical prodding had forced Blair and Hogan to divulge the source of their information. These gentlemen, confessed Drake, "have everywhere publicly given Justice Grier as their authority for the assertion which no man can truthfully gainsay or deny."⁴⁷

Appointed in 1846 by President Polk, Justice Robert Grier became, during his more than two decades on the bench, not only senile and obstinate, but also a major disseminator of "inside" Supreme Court information.⁴⁸ On March 25, 1866, a week before the Court adjourned, Justice Grier and Senator Orville H. Browning of Illinois attended church together. There, the aged Justice remarked that the tribunal had unanimously decided the *Milligan* case against the Government and "that a majority of the Court vis: Justices Wayne, Nelson, himself, Clifford, and Field decided against the Missouri test oaths . . . but that Chief Justice Chase and Justices Swayne, Miller and Davis were for sustaining these oaths."⁴⁹ At that time he told Browning that the decisions in *Milligan*, *Garland*, and *Cummings* would all be announced before adjournment, but that the opinions themselves would be held over until the December Term.⁵⁰

INSIDE THE COURT

Despite endless rumors arising from Grier's indiscreet remarks, the

44. *Cummings v. Missouri*, *supra* note 4.

45. *Missouri v. Garesche*, *supra* note 26.

46. Letter from J. B. Henderson to W. P. Harrison, May 18, 1866, in the Saint Louis Dispatch, June 19, 1866.

47. Letter of C. D. Drake at Saint Joseph reprinted in the Saint Joseph Evening Herald and Daily Tribune, September 21, 1866.

48. Fairman, *Mr. Justice Bradley's Appointment to the Supreme Court and the Legal Tender Cases*, 54 Harv. L. Rev. 1128, 1135 (1941).

49. Browning, *The Diary of Orville Hickman Browning* 67 (1933).

50. *Ibid.*

Court remained relatively detached until Reverdy Johnson's letter to Congressman Hogan brought the crisis to a head in late May. In the letter Johnson had carefully explained:

"The failure to announce the decision was not because any one of the Judges constituting a majority then doubted upon the question, but I suppose that it was mainly owing to the fact that the Judge selected to deliver the opinion had not time before the close of the term to prepare such a one as the importance and gravity of the question required."⁵¹

Associate Justice Samuel F. Miller, a devoted Unionist, took note of Reverdy Johnson's letter and of its influence on the "very animated political contest . . . going on in the State of Missouri, between the Radicals and their opponents; the latter including every returned rebel in the state."⁵² He so informed Chief Justice Chase whose sympathy then lay with the Radical cause.⁵³ Chase took immediate steps to ascertain the source of the leak.⁵⁴

It seemed quite possible that members of the old Taney Court were covertly plotting behind the backs of their Republican colleagues. He suspected "a secret arrangement among five of the Judges that the Congress-Attorney oath case⁵⁵ should be postponed and that the Missouri oath case should be decided against the oath without any opportunity for faith consultation among the Judges."⁵⁶ From this premise Chase reasoned that if Johnson's contentions "that a Judge was [assigned] to prepare the opinion, this also must have been agreed to in the caucus! Is it possible? Can it be possible?" the bewildered Chief Justice asked Miller.⁵⁷

In a more sober moment, he reconstructed the Court's consideration of the oath cases. These cases had come before the Court late in the 1865 Term. The Missouri *Democrat* reported that both Garesche and Cummings had petitioned for consideration of their cases out of order.⁵⁸

51. The Saint Joseph Morning Herald and Daily Tribune, May 15, 1866.

52. Letter from Samuel F. Miller to Salmon P. Chase, June 5, 1866, *Salmon Chase Papers*, on file in Library of Congress.

53. *Ibid.*

54. Letter from Salmon P. Chase to Samuel F. Miller, July 3, 1866, *Salmon Chase Papers*, on file in Library of Congress.

55. Ex parte Garland, 71 U.S. (4 Wall.) 333 (1867).

56. *Salmon Chase Papers*, *supra* note 52.

57. *Ibid.*

58. Missouri Weekly Democrat, April 10, 1866.

Initially the Court had refused their applications and consented to receive them only after the Attorney-General had interceded in their behalf. Arguments on their cases were among the last heard by the Court which, at their conclusion, suspended all new business and sought to decide those cases already heard.⁵⁹

Time was running out when the oath cases came up for consideration in conference; several of the judges were anxious to begin their circuit tour before torrid weather arrived. Chief Justice Chase, who refused to sit in his Fourth Circuit post pending re-establishment of civil rule, was eager to escape from his burdensome judicial tasks and take up the torch of Negro suffrage.⁶⁰ Consequently, no one wished to wrangle over cases which could be readily postponed to the 1866 Term opening in December.

Nevertheless, the judge did discuss all the oath cases, but only the *Garland* case⁶¹ involving the constitutionality of the congressional test oath for lawyers was examined at length.⁶² No vote was ever taken, but Justice Miller informed his brother-in-law that "the court was nearly equally divided."⁶³ In fact, he observed that the Court stood four to four in *Garland* with Justice Field providing the margin of victory. Justice Field, reported Miller, had warned his associates "that if a vote was taken he should sustain the congressional oath, but should hold the Missouri oath which is almost identical void as in conflict with the federal Constitution!"⁶⁴ Not inclined to unravel their colleague's strange vicissitudes, Justices Wayne, Nelson, Clifford, and Grier joined in support of Field's motion to continue the *Garland* case until the following term.⁶⁵

Chief Justice Chase "then called the other cases and entered the opinion that as the first case had been continued these should be also."⁶⁶ Justice Field thought differently and made an earnest effort to obtain an immediate vote on the Missouri Test Oath.⁶⁷ Justice Miller, suspecting that

59. *Ibid.*

60. See, Hart, Salmon Portland Chase. Chps. XIII and XIV. (1899).

61. Ex parte *Garland*, *supra* note 55.

62. Letter from Salmon P. Chase to Samuel F. Miller, June 9, 1866, *Salmon Chase Papers*, on file in Historical Society of Pennsylvania, Philadelphia, Pennsylvania.

63. Letter from Samuel F. Miller to William P. Ballanger, July 31, 1866, Fairman, Mr. JUSTICE MILLER AND THE SUPREME COURT. (1862-1890) 131 (1939).

64. *Ibid.*

65. Letter of Salmon P. Chase, *supra* note 62.

66. *Ibid.*

67. Fairman, *supra* note 64, at 131.

Field's motive lay solely in undermining the Missouri Radical's position, energetically assailed any separate consideration of the *Cummings* and *Garesche* cases.⁶⁸ Since the majority, all Democrats, had sided with Field on the *Garland* continuance, Miller had to win over a non-Republican. He went to work on old Judge Grier and in a highly emotional personal appeal attached any consideration of the Missouri cases "under the circumstances and in the last hours of the term."⁶⁹ Justice Grier responded favorably and together with Chief Justice Chase and Justices Davis and Swayne joined in postponing action on the cases. This five to four vote ended all discussion.

Grier, however, soon became gripped by doubt.⁷⁰ Regarding both oaths as unconstitutional, he felt he had permitted himself, in an unexplainable moment of weakness, to succumb to the entreaties of one of the most Radical judges on the Bench. No sooner had he agreed to postpone the decision than he completely changed his mind.

Travelling to New York with Nathan Clifford several hours after the Court adjourned, Chief Justice Chase listened incredulously as his Senior Associate Justice related the tale of Grier's vacillation. Justice Clifford declared, the Chief Justice later recounted to Miller,

that . . . just before or immediately after we took our [places] on the Bench the last day . . . Judge Grier [decided] to withdraw his vote on postponement and that the case could therefore be decided to which he, Judge Clifford, replied that he should not have anything to do with disturbing what was already settled.⁷¹

Both Grier and Justice Nelson, who supported him, realized that any reconsideration of the case by virtue of the latter's vote meant a five to four majority against the Missouri test oath. Until the Court actually opened its session on that last day, Grier evidently presumed such a decision lay well within the realm of possibilities. In fact, it was absolutely certain. Congressman Hogan recalled that on the same day he learned the oath would be declared unconstitutional, "it was supposed the judgment would be rendered, and one of the Judges told me that in a few hours the announcement of the decision would be made in open Court."⁷² Although Justices Nelson and Grier sought such a develop-

68. Letter of Reverdy Johnson, *supra* note 43.

69. Letter of Salmon P. Chase, *supra* note 62.

70. The Saint Louis Evening News, May 28, 1866, at 69.

71. Letter of Salmon P. Chase, *supra* note 62.

72. C. D. Drake at Hillsboro, Missouri, June 18, 1866, quoting J. Hogan to C. D. Drake, May 2, 1866, reprinted in Missouri Weekly Democrat, July 3, 1866.

ment, only Grier felt so positive about his colleague's reception of his plan that he could give out gratuitous information even before consulting with all his associates.

THE COURT AND GRASS ROOTS POLITICS

Initially, Justice Grier's indiscretion merely involved the Court in gossip. Eventually, the Court was all but dragged into the Missouri election campaign. Chief Justice Chase spent the spring of 1866 fending off a steady stream of probing inquiries from prominent Radicals desperately seeking information to counter the rising conservative offensive. Wrote a former abolitionist and publisher of the *Chillicothe Spectator*:

What I desire to know is whether any decision has been made in the cases or not, or whether any consultation has ever been held upon the case if that is proper . . . and if proper I would like permission to use the information in such a way as would be of service in our fight here.⁷³

Chief Justice Chase's reply was not especially illuminating, for he merely contended that the Court's record spoke for itself. "The record," he noted, "says that the Missouri Test Oath cases were continued to next term under advisement, and I understand that a copy of the record has been published in Missouri."⁷⁴ In replying to Radical leader Charles Drake, he had earlier dismissed rumors of a "leak" as mere speculation and made it clear no decision had in fact been reached. In part he said:

So far as I am concerned I am quite certain that no one knows my opinion in any case not yet decided and announced and to the question which particularly interests the people of Missouri, I am [free] to say, I do not yet know it myself.⁷⁵

After Reverdy Johnson's letter gained widespread publicity, several Lincoln appointees, namely Miller, Davis, and the Chief Justice, in-

73. J. T. Asper to Salmon P. Chase, June 18, 1866, *Salmon Chase Papers* on file in Library of Congress, Washington, D. C.; also, Swisher, *Stephen J. Field: Craftsman of the Law* 144 (1930).

74. Letter from Salmon P. Chase to J. T. Asper, June 28, 1866, *Salmon Chase Papers*, on file in Historical Society of Pennsylvania, Philadelphia, Pennsylvania. Also, letter from J. B. Henderson to W. P. Harrison, May 28, 1866, reprinted in the *Saint Louis Dispatch*, June 19, 1866.

75. Letter from Salmon P. Chase to C. D. Drake, April 24, 1866, *Salmon Chase Papers*, on file in Historical Society of Pennsylvania, Philadelphia, Pennsylvania.

tensified their participation in grass roots politics. Stirred into action by the threat of a Radical defeat, Justice Miller suggested that Chase take the lead in refuting the charges made by Hogan, Blair, and Johnson. Specifically, he recommended that the Chief Justice undertake "such confidential communication between yourself and Senator Henderson, or [Senator B. Gratz] Brown, or General Logan as would at least enable them to claim as boldly as Hogan or Johnson assert."⁷⁶ Chief Justice Chase, however, displayed some reticence in according all-out support to the Radicals because, as he explained to Miller,

it seems to have been assumed that I am in favor of [sustaining] the test oath requirement as entirely consistent with the National Constitution and such an assumption would therefore be imputed to mere partizan help.⁷⁷

Justice Miller, on the contrary, held few qualms in coming to the assistance of those who had loyally stood with the Union and sought to govern it. He inquired of the Chief Justice:

Now shall this falsehood be permitted to work successfully its injurious effects or shall it be contradicted? . . . It seems to me that while we may well feel restrained from stating what did take place, there is nothing wrong, but a manifest propriety in contradicting the assertion that the Court has decided an important principle when it has done no such thing. I think if any of the Radicals . . . should ask me, I should feel bound to contradict the statement.⁷⁸

The Chief Justice, on this occasion, welcomed Miller's initiative, replying that he perceived "no reason why you should not state the facts that the case was never considered in consultation and never decided by the Court."⁷⁹

Two weeks later the Radical Missouri *Democrat* happily announced:

We have a letter in which one of the Judges positively declares that the Supreme Bench have had no consultation in the cases mentioned—and that Judge is not the Chief Justice.⁸⁰

76. Letter from Reverdy Johnson to John Hogan, May 30, 1866, in Saint Joseph Morning Herald and Daily Tribune, May 30, 1866.

77. Letter of Salmon P. Chase, *supra* note 62.

78. *Supra* note 77.

79. Letter of Salmon P. Chase, *supra* note 62.

80. Missouri Weekly Democrat, June 26, 1866.

Most likely it was Justice Miller.

At the same time Gustavus Koerner, a prominent Illinois Republican, communicated with Drake. He reported a conversation with one of the Associate Justices who had stated emphatically that the validity of the oath had not been decided by the Court and that "no vote had even been taken on it."⁸¹ Aware that fellow Lincoln-appointee, David Davis, was then holding circuit court in Illinois, Miller assumed Koerner had spoken with Davis. He wrote Davis:

I am rejoiced at the bold and courageous manner in which you have contradicted the falsehood which has been so largely circulated in Missouri for political effect.⁸²

By July, three of the four alleged dissenters on the Bench had rushed to the assistance of the Missouri Radicals. At that time, however, the Radical star had climbed so high that the unusual participation of Supreme Court members in grass root politics had little effect.

Although it had appeared in the spring of 1866 that rumors of the Supreme Court's loyalty oath decision would be a deciding factor in November, by mid-summer conservatives throughout the state realized the futility of their cause. Consequently, the Court's repudiation of the rumors begun by Justice Grier and transmitted by Hogan and Blair was of little real value except as additional propaganda. It did not significantly contribute to the Radical victory. In fact by August, moderates readily admitted that even an outright decision by the Court favorable to their cause would be useless.⁸³

By their foresight, the Radicals had sealed the fate of Johnson's allies. So effective were their measures that on the eve of the Missouri elections, one anti-Radical correspondent reported:

Our prospects for success in the approaching elections in this State are not very encouraging. Our friends are doing all that can be done, but it is hard to accomplish much against a state government that is so completely in the hands of the Radicals from the Governor to constables.⁸⁴

81. Missouri Weekly Democrat, July 3, 1866.

82. Letter from Samuel F. Miller to David Davis, June 28, 1866, in King, LINCOLN'S MANAGER: DAVID DAVIS 262 (1960).

83. "Petition of Missouri Conservatives," in letter from W. T. Sherman to Andrew Johnson, August 9, 1866, *Andrew Johnson Papers*, on file in Library of Congress, Washington, D. C.

84. Letter from J. S. Fullerton to Andrew Johnson, October 23, 1866, *Andrew Johnson Papers*, on file in Library of Congress, Washington, D. C.

Intimidated and disenfranchised, the moderates in Missouri went down in defeat that November.⁸⁵

CONCLUSION

The premature disclosure of the Supreme Court's position on the constitutionality of the test oath neither altered the political situation in Missouri nor materially changed the institutional status of the Court. Whatever its potentiality for damaging the affected parties the incident's effect, if any, can hardly be separated from the effect of other forces operating in the political milieu, for extreme partisanship and threats of physical coercion which characterized the turbulent politics of that border State all but obscured the consequences of the leak. One side in the heated political contest in Missouri, the conservative coalition, seemingly received a clear benefit from the leak. Yet that side suffered from other disadvantages so critical that "inside" information of any kind made no significant difference in its ultimate faith.

For the Supreme Court, the impact of the judicial leak was as negligible as it was for the Missouri conservatives. Still recovering from the blow dealt its prestige by the *Dred Scott* decision and its restricted role during the Civil War, the Court in the post-War era confronted an ideologically divided country. In a climate of bitterness, the significance of the premature disclosure of an opinion paled when contrasted with the consequences which followed the release of the written opinions themselves. The decisions on the constitutionality of military commissions⁸⁶ and of the test oaths,⁸⁷ all of which appeared to threaten the legality of Radical Reconstruction policies, brought forth vehement attacks on the Court. Eventually criticism of the court and fear of its treatment of the Reconstruction Acts would culminate in the removal of a portion of the Court's appellate jurisdiction.⁸⁸ Thus the Missouri Test oath leak, potentially damaging though it might have been, fails to support the "judicial lockjaw" theory. In itself it had little or no discernible impact on either the Court or the affected parties.

Instead, this episode reveals more about the status of the Supreme Court as an institution in a moment of crisis than about the necessity

85. Radicals won seven of nine Congressional seats. See, 2 Williams and Shoemaker, *MISSOURI: MOTHER OF THE WEST* 207, 208 (1930).

86. *Ex parte Milligan*, 71 U. S. (4 Wall.) 2 (1866).

87. *Ex parte Garland*, 71 U. S. (4 Wall.) 333 (1867); *Cummings v. Missouri*. 71 U. S. (4 Wall.) 277 (1867).

88. *Ex parte McCordle*, 74 U. S. (7 Wall.) 566 (1869).

for judicial secrecy. It illustrates the kind of conditions under which one might expect breaches of such secrecy, namely when there exists a lack of cohesion among the nine Justices of the Court. Functioning in a charged political climate, the Chase Court enjoyed low public esteem, suffered from ideological divisions among its members, and was encumbered with a highly partisan Chief Justice. Concerned with fostering Negro suffrage and with securing the 1868 Presidential nomination, he offered little effective leadership for a shattered Court. Institutionally weak, the Court, in turn, offered no clear focus for the loyalties of its members. Absence of group cohesion under these circumstances was not an unlikely condition.

However, the existence of one additional factor undoubtedly provided the catalyst for the leak. That factor was old age. In the case of Justice Robert Grier, advancing age was accompanied by senility and physical incapacity sufficiently serious to imperil the functioning of the Court. One consequence was the test oath disclosure; another was his hopeless vacillation in voting in the legal tender cases four years later.⁸⁹ Then, his indecisiveness threw the Court into turmoil and led to strong and successful pressure for his retirement.⁹⁰

Clearly, the absence of "judicial lockjaw" in the Civil War period was the product of rather unique multiple factors both within and without the Supreme Court. At other periods in the Court's history these same factors have arisen singly, but in the Chase era, they appeared in combination. The result was a weakened judicial institution. Leaks, in such circumstances were symptoms rather than causes of this institutional weakness.⁹¹

A strong and viable institution, composed of physically and mentally able Justices, constitutes a meaningful locus for the loyalties of its members. In such circumstances, the likelihood of premature disclosures of pending judicial decisions recedes.

89. *Hepburn v. Griswold*, 75 U. S. (8 Wall.) 603 (1860).

90. See, *Statement of April 30, 1870*, in Bradley, MISCELLANEOUS WRITINGS OF THE LATE HON. JOSEPH P. BRADLEY 73 (1901).

91. Compare Supreme Court as an institution under Chief Justice Harlan F. Stone when similar judicial "leaks" occurred. See, *supra* note 9.