OATH-BREAKERS

BY MATTHEW STOWE*

"Oath-breaker." In the mystical and now-familiar world of J.R.R. Tolkien's fantasy, a person's word was his bond. An oath, once uttered, could gain a transcendent power of its own, bonding the oath taker to the oath's object. Men and women ignored that power only at their extreme peril; a broken oath could even condemn the swearer to living death—an eternity of wandering the earth, pursued by furies, unable to find final rest until the swearer atoned, and the broken oath was ultimately fulfilled. "Oath-breaker" was accordingly one of the harshest insults that could be leveled against an individual, an invective spat out against people the speaker deemed to be the truly lowest of the low.

In the real world, however, has "oath breaker" become no more than an archaic insult, as likely to elicit laughter from the object of the curse as to cause them any real offense? In today's society, are oaths literally "made to be broken?"

That is essentially the upshot of the argument of an anonymous group of Supreme Court law clerks. The individuals in question expressly and intentionally broke the oath of secrecy they took when they accepted their positions as law clerks not to reveal the inner workings of the Supreme Court, by purporting to tell the "real story" of the Florida Recount litigation to David Margolick, Evgenia Peretz, and Michael Shnayerson, all authors of a recent article in Vanity Fair.[1] According to *Vanity Fair's* cutting-edge journalists, the "real" story of the Florida recount litigation was that it was a "crassly partisan" affair, in which the Supreme Court, divided into two warring liberal and conservative factions of law clerks and Justices, each tried to politically out-maneuver the other to reach a particular outcome, running roughshod over the law (at least whenever they encountered it) in the process. According to *Vanity Fair*, individual law clerks engaged in rows in which curse words were exchanged, and individual Justices, who were too politically "naive," were "taken to the cleaners."[2] In short, during *Bush v. Gore,* the Supreme Court as an institution was on the brink, tearing itself apart in a partisan battle in an attempt to steal democracy and an election away from the American people.

No doubt, that version of the Supreme Court (which even the authors acknowledge is "lopsided, partisan, speculative, and incomplete," albeit burying that confession in a footnote) is the one that sells the most magazines.

However, the Supreme Court described in the article is not the entity with which I am familiar. The *Vanity Fair* authors, and their anonymous law clerk sources, seem to think that *Bush v. Gore* was the first important and politically-charged case ever to darken the steps to the Supreme Court chambers. Nothing could be farther from the truth. Every few terms, the Supreme Court decides redistricting or ballot access cases that may impact, or entirely determine, which political party controls Congress, or who may win a given governorship, Senate seat, or even the Presidency. In these cases, the Justices' votes rarely, if ever, break along "party" lines. And determining the identity of the next president is hardly the most important political or social decision undertaken by the Supreme Court in recent memory. Presidents come and go every four years or so. The Supreme Court is in the business of deciding things like the legality of abortion, affirmative action, and the death penalty—things which, once decided, are decided for all time. The system that has meticulously dealt with the legality of these weighty issues for over a century did not suddenly collapse under the strain of *Bush v. Gore*—no matter what you may read in *Vanity Fair*.

Of course, in that respect, you'll have to take my word for it. Like many of my colleagues, I will not break my bond by revealing any of the inner workings of the Court. I cannot respond to their specific factual allegations.

Perhaps the defenders of the Court, with necessarily broad and vague denials, are less compelling to any listener than an anonymous account that contains specific details. This difficulty is illustrated poignantly by the case of Kevin Martin, a former Scalia clerk mentioned in the *Vanity Fair* piece and accused of uttering curse words in the course of discussing the case—by an anonymous co-worker.[3] I'm personally familiar with Kevin Martin, and as I know him, he's an honest, even-tempered, and hardworking man. Asked to confirm or deny the story, Kevin properly refused to comment (either choice would reveal something of the Court's workings), and the authors were quick to hint that his failure to issue a denial was an indication that the allegations were true. This is perhaps the most pernicious effect of their decision to reveal confidences; there is no way for the faithful to undo the harm done by specifically correcting any erroneous factual statements they make.

The harm here is great, though neither the oath-breakers nor the authors of the article seem to appreciate it. They disagreed with the duly deliberated decision of the Justices of the Supreme Court. So what? By undermining the legitimacy of the Supreme Court, they directly assaulted one of the most basic institutions of democracy. They sought to threaten the independent nature of the Court by bringing the pressure of public opinion against it; to have the outcry over the "partisan" nature of the Court's decision force the Court to jettison its chosen approach and adopt their preferred outcome instead. The very reason the Supreme Court exists is to protect against the tyranny of the majority, and to protect the minority against the very sways of temporary public opinion that the oath-breakers sought to use as a weapon to destroy it. Fortunately, the Supreme Court has endured—this time. But will the precedent they have set provide the incentive for future such acts by everyone who perceives themselves aggrieved by a Supreme Court decision? Because one thing is for sure — in the world of law, as in the world of politics, there will never be any shortage of sore and bitter losers.

In a footnote, the authors of the article acknowledged the existence of the clerks' oath, and the fact that the clerks broke that oath intentionally, and offered this justification – "by taking on *Bush v. Gore* and deciding the case as it did, the Court broke its promise to them." [4] Reading that, I can't help but think back to my time working in the prosecutor's office in Dorchester, Mass., where I often heard a less elegantly-articulated version of the same defense: "I didn't want to hit her, officer, but the *@#!$ just wouldn't listen!"

Not only was their response entirely disproportionate and inappropriate in light of the wrong that they perceive was done to them, but the fact is the Supreme Court never made, much less broke, any promise to them or anyone else in the first place. The Supreme Court is an institution, and as such it doesn't make promises. The Justices' thereof have taken only one oath: To protect and defend the Constitution, which, even accepting as true all the attacks contained in the article, was a promise they undeniably kept.

In reflecting on the issue, consider that every important government official, in this country and others, has helpers who, in the course of assisting them, become privy to confidential communications and conversations—many of which would be damaging if disclosed to the public. President Bush has chauffeurs that no doubt overhear his phone calls with foreign leaders on occasion, even during times of foreign crisis. But has Bush's disgruntled driver ever spilled the beans to the press when he disagreed, say, with the decision to go to war in Iraq? Each day, bodyguards, cooks, waiters, housekeepers, secretaries, file clerks, janitors, interns, and thousands of others manage to work with or around important government officials. Yet all of these individuals get up, do their job, and go home without divulging any of the important government secrets they may have stumbled across in the course of their day—and all without having ever taken any oath to do so.

What would motivate one to set aside this oath? The answer, to quote Al Pacino from *Devil's Advocate*, is "[v]anity . . . my favorite sin." When they go to work, President Bush's drivers probably always remember that they are the President's drivers, not the President himself. The same apparently cannot be said of some law clerks, who take their jobs and seem to believe that they are the most qualified people to be making the decisions. One would think that their very job title, "clerk," ought suffice to disabuse them of this notion.

If the precedent set by this incident spreads, it will be up to the legal community to fashion a response. Certainly, it seems to me that evidence that an attorney broke an oath made to a Supreme Court Justice would be strong evidence that the person in question does not have the character and fitness to join a state bar, or if they are already a member, I think such evidence should suffice to support the filing of a complaint relating to the attorney's character and fitness. Perhaps soon, states or state bar associations will step in to provide teeth for the oath the Supreme Court is currently unable to enforce with anything other than unofficial censure.

The reaction of the mainstream Supreme Court legal community to the oath-breakers' actions was one of uniform outrage, and, for now, that may be the only remedy available. Dozens of former Supreme Court clerks and practitioners, including such respected legal minds as Jan Baran and former Solicitors General Ken Starr and Ted Olsen, signed a response that was printed in the *Legal Times* on September 28, 2004. The response explained that:

> Although the signatories below have differing views on the merits of the Supreme Court's decisions in the election cases of 2000, they are unanimous in their belief that it is inappropriate for a Supreme Court clerk to disclose confidential information, received in the course of the law clerk's duties, pertaining to the work of the Court. Personal disagreement with the substance of a decision of the Court (including the decision to grant a writ of certiorari) does not give any law clerk license to breach his or her duty of confidentiality or "justif[y] breaking an obligation [he or she would] otherwise honor." "Path to Florida," *Vanity Fair*, at 320.

I don't think I could put it better myself.

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Footnotes

[1] *See* David Margolick, Evgenia Peretz, and Michael Shnayerson, *The Path to Florida*, VANITY FAIR, Oct. 2004, at 310.

[2] *Id.*, at 357.

[3] *Id.*, at 322.

[4] *Id.*, at 320 n.*.