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The Other View of *The Other Government*

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BOOK REVIEWS

The Other View of *The Other Government:* A Reply

The first rule of authorship is not to reply to reviews. Who is surprised that an author likes his book better than a critic does? Hence, a book should stand or fall as written. Subsequent rebuttals and explanations by authors rarely serve any redeeming social purpose.

With *The Other Government: The Unseen Power of Washington Lawyers*, it has not proven especially difficult to comply with this unwritten rule. The book has been reviewed more favorably than it probably deserves (*e.g.*, Professor John Kenneth Galbraith in *The New York Times Book Review*, Joseph Califano in *The Harvard Law Bulletin*) and less so (*The Washingtonian, The Greensboro News*). In the end, it all approximately washes out.

With one exception. Daniel Polsby's review of *The Other Government* in the *Michigan Law Review* (November 1975) is so vituperative, one-sided and small-minded that it is a rule-breaker. It invites, indeed compels, a reply, in order that readers will not be misinformed and that Mr. Polsby may come to understand the difference between criticism and invective.

The difference traces to motive. Is the writer's purpose to weigh the good and bad of a work—the usual function of honest criticism—or is it to shoehorn all observations into a preconceived form? Polsby seems to find in the system of Washington law no defects, no unfairly influential actors; in *The Other Government* he finds not a page, a thought, a punctuation that has any merit. Such consistency is valued in a shortstop or clock, but not in a critic supposedly giving a balanced view of a book. Polsby's obvious one-sidedness raises the question of his motive or perspective. That he comes from one of the two law firms discussed in the book seems not irrelevant.

To appreciate Polsby's bias, let me discuss a few of his characteristic swipes. This approach risks boring all readers other than Polsby and me and perhaps our immediate families. But the only way to understand his technique is to stitch together small examples to reveal the larger pattern of his animus.

The reviewer's itchiness for the clever sally becomes apparent in his first paragraph. After quoting my opening sentences, in which a tourist bus drives by Washington's monuments but not its law firms, Polsby writes, "This is a particularly felicitous beginning for *The Other Government.* The Tourline bus company is fictional, and none of the many Washington tour bus companies has a route that follows Rock Creek Parkway. In short, Mark Green's Washington

could be the capital city of Franz Kafka's Amerika. Each book . . . subtly shifts the relationship between truth and fantasy, the real and the unreal." Hence, the review's opening subtitle, "The Greening of Amerika" and the equation of Green and Kafka. All this because of one tourist bus? Incidentally, this bus did take the precise route described on that summer's day in 1974 when I saw it crawling along full of curious citizens.

Another repeated technique is his use of selective references. While Polsby did not invent this device, he deploys it with much skill. He writes, for example, that "[Lloyd] Cutler appears to hold a strange fascination for Green, who compares him to Mao Tse-Tung (p. 55) but leaves it open whether Cutler is an 'evil genius' (p. 169) or a 'guiding genius' (p. 252)." First, *The Other Government* is a book, not a courtroom brief; where is Polsby's sense of humor, his tolerance of some poetic license? I, of course, did not literally compare Mao and Lloyd. After tracing the history of Wilmer, Cutler and Pickering, I wrote, "There may not be large, brooding posters of his visage on the walls, but Lloyd Cutler dominates the firm he helped found. Like Mao Tse-Tung, once a founding father, always a founding father."* Second, it was not I but Michael Pertschuk, Senate Commerce General Counsel, who called Cutler an "evil genius" because of his work on the 1966 Traffic and Safety Act; and it was Tom Barr, of Cravath, Swaine & Moore, who called Cutler "the guiding genius of the [Violence Commission]." By compressing all this into one sentence, Polsby both trivializes and overstates my point.

Consider also his discussion of one incident recounted in the book's analysis of the ITT merger cases (*Mich. L. Rev.* at 160):

> "Exactly who is Joseph Fazzano?" asks Green (p. 89). Unfortunately, *The Other Government* never answers this question . . . . All we are told about Fazzano is that he is a Hartford lawyer who was hired by ITT, apparently for the purpose of representing ITT's interest before the Connecticut Insurance Commission, when the conglomerate was attempting to acquire the Hartford Fire Insurance Company. . . . Henry Sailer, a Covington lawyer on the case, did not know who Fazzano was (pp. 89-90). Does this suggest the existence of impropriety? To me, it suggests nothing at all.

This is characterized as my "positive tropism toward malicious innuendo." But Polsby's description is *not* "all we are told about Fazzano." Significantly, he manages to omit my discussion of how Fazzano lobbied William Cotter, the Connecticut Insurance Commissioner, about ITT's acquisition of Hartford Fire. *The Other Government* describes how Cotter "first turned down the acquisition on December 14, 1969, and later reversed himself, upholding it on May 23, 1970. Between these two decisions, Fazzano, a long time friend of

* The reviewer is oddly uncharitable toward metaphors and allusions. He notes that I refer to Covington & Burling as the Everest of Washington and also later say,

Cotter's, stressed the benefits of the acquisition in some fifteen personal phone calls and luncheon tête-a-têtes" (p. 89). Unless my dictionary errs, that is not innuendo but a statement of fact. Covington lawyers with whom I spoke about this incident were shocked at Fazzano's *ex parte* activities, all undertaken without the knowledge of ITT's Washington counsel who were working on the same case. I think it takes a lot to shock Polsby.

There are also sporadic hints in the review that the book is conclusory and sloppy. "Criticisms are advanced *ex nihilo* or by third persons and seldom supported with reasons," he writes, later adding that "there is strong textual evidence that *The Other Government* was rushed into print"—the "strong" evidence being three alleged typographical errors in a 100,000 word book. I only wish the book *had* been rushed along. Instead, it was published nine months after the completion of the manuscript, the normal gestation period for manuscripts to reach print. Research for the book consumed healthy chunks of five years. *The Other Government*'s case studies and conclusions are supported by over 300 interviews and some 600 footnotes; prior to publication the manuscript was read for errors by four attorneys, Lloyd Cutler among them, who either are or were in the two major firms discussed. These things alone, of course, do not prove the book's accuracy, but they do reflect the care that went into writing and leavening the manuscript, a care which Polsby cannot or will not acknowledge.

Although Polsby conveys the impression that the book is pockmarked with errors, there are almost no examples offered to sustain his point. And one that is offered is itself wrong. I wrote that *Washington Post* executive editor Benjamin Bradlee thought Lloyd Cutler's phone call to him concerning American Airline's admissions of illegal corporate contributions was "excessive self-promotion." Polsby says he called Bradlee: "I read Bradlee the entire paragraph in which the excerpted sentence appeared and asked him, 'How does Mark Green know what you think?' 'Beats the shit out of me,' he explained. Elaborating, Bradlee told me he remembers having a conversation with Green but denies the thought about Cutler that Green attributes to him." Bradlee, it should be noted, did not deny

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"Great institutions come, peak and decline, from the British East India Trade Company to *Life* magazine to the New York Yankees, and it is only in retrospect that we learn that moment in time when events conspired to undo institutional inevitability." Polsby, predictably, then shoots his popgun. "Well, which is it to be? Tenzings on the Everest of powerlaw, or the Yankees on their way to the cellar? Since both propositions are expounded and neither is anywhere illustrated, it presumably does not matter."

Not illustrated? Did he read the book? Pages 16-31 carefully explain C&B's historical rise to the acknowledged top. And material on pages 33-44, as well as throughout the entire book, explain how C&B may *now* be inching downhill. This hardly constitutes a contradiction, except to those who jam in one sentence two references (Everest, Yankees) which appear 28 pages and many decades apart.

the fact of his phone conversation with Cutler. More importantly, my source for the Bradlee opinion of Cutler's activity is a prominent figure associated with the *Washington Post* who is close to Bradlee and who personally repeated Bradlee's quoted comments about Cutler. Especially after his experience with the Woodward and Bernstein articles and books, I am sure Ben Bradlee will respect the fact that this source—who spoke to both Ralph Nader and myself—wishes to remain confidential. In this instance, Bradlee simply does not recall a brief comment he made several years ago.

These small abuses of critical technique accumulate to cripple Polsby's ability to appreciate the book's thesis and documentation. In fact, he cannot see anything wrong with the process or practice of Washington corporate law. Time and again he asserts that Washington lawyers are not particularly powerful, as he occasionally gives examples of cases they have lost. "After a year's personal experience in government," he writes, giving us a glimpse at his underwhelming data base, "I am deeply skeptical of claims that the special access and charisma of super-lawyers exert much influence on government policy." He expresses umbrage at "outright accusations of personally and professionally disgraceful behavior." He gives a spirited defense of *ex parte* contacts.

These views would not be surprising in a Covington & Burling senior partner, who would probably have difficulty rendering an objective review of this book. But it is unusual to find one so unburdened by governmental and corporate experience writing as if Washington lawyers toiled in the City of God. Even given his one-sidedness, can Polsby really be unaware of the following:

* Even in cases Washington lawyers lose, they can win. Delaying a regulatory cut-off or sanction can enable a client to profit in the interim—as C & B's fifteen-month holding action in the *Panalba* case indicated.
* Of course, Washington lawyers do prevail in many actions. The extremely low tax rates of multinational oil firms and the large number of drugs labeled as unsafe or inefficacious by the National Academy of Sciences—and still on the market—indicate that these counsel are not invariably losers.
* The adversary process often fails to operate in political forums like Congress and many regulatory agencies. Businesses can afford ample and able counsel to promote their interests. But other than a small corps of public interest lawyers, opposing consumer interests often lack adequate representation. "Ninety per cent of the lawyers," former Attorney General Ramsey Clark has said, "represent just ten per cent of the public."
* Not only is the process of Washington lawyering institutionally defective, but there are also instances of personally improper behavior. Can Polsby seriously try to defend John McKay's admitted knowledge of the antitrust conspiracy of his client, the

Plumbing Manufacturer's Trade Association—a case study carefully examined in the book?

* If an average lawyer can gain an audience with Treasury Secretary John Connally, as Lloyd Cutler did on the American-Western Airlines merger case, or can claim authorship of the act under question, as H. Thomas Austern does with the 1938 Food, Drug and Cosmetic Act, then perhaps Washington lawyers do lack special influence and access. Major corporations, however, understand the special influence and impact of Washington lawyers—and pay accordingly. They seem to disagree with Mr. Polsby's thesis that they are wasting their money.

Polsby's absolutist view of the purity of Washington lawyers predictably leads him to dismiss my conclusions. He writes, "Green appears to believe that good and evil go around unmasked, equally obvious to all and that only greed and perversity can explain differences among people about the identity of each . . . . For Green, . . . the axis of decision is always substantive right and wrong; his conception of right is usually vivid and seldom unalloyed by doubt. Accordingly, the whole idea of regular process seems senseless to him." This rendition is so simplistic and misstated that it raises questions about the good faith and purpose of the reviewer. For I argue that, precisely because the process of Washington law is flawed by politics, favoritism, and lack of adversariness, it leads to substantive injustice. Polsby is apparently content with existing process; I am not. This conclusion, of course, exactly contradicts the assertion that *The Other Government* was indifferent about process.

My point about what is characterized as "good and evil" was that (a) a lawyer should recognize obligations to nonparty interests affected by his or her advocacy and (b) he or she was free in civil or legislative proceedings to reject retainers if, based on personal judgment, "the client desires tactics based on political influence or seeks a demonstrable though avoidable public harm." The reviewer's condensation fails to convey the context of this difficult issue, which is discussed for an entire chapter. "This new ethic is no Rosetta stone instructing all lawyers what to do in all situations," I write at one point. "Like any ethical judgment, it is subjective and personal, not universal, though the lawyer may wish others to follow his example. It is an ethic that throws the lawyer back on his own subjective preferences, his own view of 'the public interest'.. This is surely not new. What is the adversary process itself but a social judgment that legal combat is in the public interest because it leads to justice—a conclusion the author shares but one which, for example, China and Herbert Marcuse do not. Nor is it a neutral principle that lawyers will represent those who can pay and not represent those who cannot. This means-test effectively excludes a large class of Americans from access to legal services; it is very much a value choice. So is the ethic of conscientious refusal" (pp. 287-88). This and other elabora-

tions are omitted. Instead, Polsby parodies the point, and then attacks the parody.

Indeed, this technique runs throughout the entire review, for I did not recognize the book under discussion. Polsby's acid adjectives—"malicious . . . bratty"—say far more about himself than about his target.** It is painfully self-serving to say, as many of the lawyers in the firms discussed have privately said, that *The Other Government* is a careful and empirical analysis of the process and impact of the practice of Washington law. If you understandably discount the prior sentence as a child of bias, well, read the book. It is the best impeachment of Polsby's rantings.

What is the method to his badness? Being most charitable, one could argue that Polsby lacks *mens rea.* Former Wilmer, Cutler and Pickering attorneys have described Dan Polsby's widespread reputation as a jokester associate. It seems a fertile sense of humor would inspire him to send ficticious memoranda around the firm, of the following variety: "We have today retained Secretary of State Henry Kissinger in a libel action against Madame Chiang Kai Shek." Such humor raised a few eyebrows at the firm, but came to be accepted, even enjoyed, for its color among the greyness. So perhaps Polsby was extending his reputation as a satirist, writing a caricature of the poisonous review. In that, he succeeded. Or perhaps Polsby was engaged in his own form of primal therapy, since his review throws not a dart but a fit. In that, too, he succeeded.

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** About Polsby's yen for the *ad hominem*, the less said the better. It further reveals how nastiness can overwhelm judgment. Suffice it to say that while Polsby writes, "I do not, however, accuse Green of being totalitarian," he does call me "a demagogue" two sentences later. Thank goodness for implied compliments, as I would certainly prefer being a nontotalitarian demagogue to a totalitarian demagogue.