

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)

JUSTICES AND JOURNALISTS

Justices and Journalists examines whether justices are becoming more publicity conscious and why that might be happening. The book discusses the motives of justices “going public” and demonstrates that the justices have become more newsworthy over the last decade.

The book describes the interactions justices have (and have had) with the journalists who cover them. These interactions typically are not discussed publicly by justices or journalists. The book explains why justices care about press and public relations, how they employ external strategies to affect press portrayals of themselves and their institution, and how and why journalists participate in that interaction.

Drawing on the papers of Supreme Court justices in the nineteenth and twentieth centuries, the book examines these interactions throughout the history of the Court. It also includes a content analysis of print and broadcast media coverage of Supreme Court justices covering a forty-year period from 1968 to 2007.

Richard Davis is a professor of political science at Brigham Young University. He is the author or co-author of several books on media and American politics, including *Electing Justice: Fixing the Supreme Court Nomination Process* (2005), *Decisions and Images: The Supreme Court and the Press* (1994), *The Web of Politics* (1999), *Campaigning Online* (2003, with Bruce Bimber), and *New Media and American Politics* (1998, with Diana Owen). He is past chair of the political communication section of the American Political Science Association.

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)

Justices and Journalists

THE U.S. SUPREME COURT AND THE MEDIA

RICHARD DAVIS

Brigham Young University



CAMBRIDGE
UNIVERSITY PRESS

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)

CAMBRIDGE UNIVERSITY PRESS

Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore,
São Paulo, Delhi, Dubai, Tokyo, Mexico City

Cambridge University Press

32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org

Information on this title: www.cambridge.org/9780521704663

© Richard Davis 2011

This publication is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without the written
permission of Cambridge University Press.

First published 2011

Printed in the United States of America

A catalog record for this publication is available from the British Library.

Library of Congress Cataloging in Publication data

Davis, Richard, 1955–

Justices and journalists : the U.S. Supreme Court and the media / Richard Davis.

p. cm.

Includes bibliographical references and index.

ISBN 978-0-521-87925-5 (hardback) – ISBN 978-0-521-70466-3 (pbk.)

1. Law in mass media. 2. Mass media – Law and legislation – United States.

3. United States. Supreme Court – Officials and employees. 4. Judges – United States.

I. Title.

K487.M43D38 2011

347.73'2634 – dc22 2010031683

ISBN 978-0-521-87925-5 Hardback

ISBN 978-0-521-70466-3 Paperback

Cambridge University Press has no responsibility for the persistence or accuracy of URLs for
external or third-party Internet Web sites referred to in this publication and does not guarantee
that any content on such Web sites is, or will remain, accurate or appropriate.

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)

*To my family, for their unfailing support
through good times and bad*

Contents

<i>Foreword by Adam Liptak</i>	<i>page ix</i>
<i>Preface</i>	xiii
1 External Strategies	1
2 The Pressure to Go Public	18
3 The Early Years	34
4 The Nineteenth Century	54
5 The Twentieth Century	82
6 Becoming Newsworthy	155
7 The Twenty-First Century and the Future	170
<i>Appendix: Methodology</i>	197
<i>Notes</i>	201
<i>Index</i>	237

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)

Foreword

Adam Liptak

In the late summer of 2010, Justice Stephen Breyer embarked on an extraordinary publicity tour.

He had just published a book called *Making Our Democracy Work: A Judge's View*, which was earnest and dry and worthy. It would have vanished without a trace had its author not sat on the Supreme Court.

Thus it was Justice Breyer's status, rather than his message, that propelled him onto the airwaves. Over a month or so, he appeared on CNN's *Larry King Live*, on PBS's *Newshour* and *Charlie Rose*, on NPR's *Fresh Air* and *Morning Edition*, on ABC's *Good Morning America*, on the *NBC Nightly News*, and on C-SPAN.

Justice Breyer was also profiled in *The New Yorker* and interviewed by, among others, the Associated Press, Bloomberg News, and *The Washington Post*.

And he appeared at countless discussions sponsored by the Aspen Institute, the National Constitution Center, book stores, law schools, libraries, and civic groups from coast to coast.

In many of these forums, there was the usual tension between journalist and subject, with the former pressing provocatively for fresh and newsworthy comments and the latter seeking to convey an array of stock talking points.

For the most part, Justice Breyer stuck to his main themes, and even a connoisseur of Supreme Court interviews would have difficulty distinguishing what he told, say, Charlie Rose from what he told Larry King.

Over and over again, Justice Breyer stressed that public support for the court is important so that even unpopular decisions are obeyed. The Supreme Court is not, he added more than once, made up of nine "junior varsity politicians."

But Justice Breyer got the occasional offbeat question, too.

He announced that he would attend the next State of the Union address, even as some of his colleagues expressed reservations about it in light of the comments President Obama directed at them in January 2010.

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)

Chief Justice John G. Roberts Jr. called the event a “political pep rally.” Justice Samuel A. Alito Jr., who had appeared to be mouthing the words “not true” as President Obama characterized the decision in *Citizens United v. Federal Election Commission*, said in October that “I doubt I will be there in January” of 2011.

Justice Breyer told Larry King, apropos a controversy in the news at the time, how he had felt seeing a flag burned in the Vietnam era.

“I had a physical reaction of revulsion,” Justice Breyer said. “I couldn’t stand it.”

He seemed perplexed when C-SPAN’s Brian Lamb asked him about an unfounded rumor.

“Some conservative talk show over the last month said Justice Breyer wants – I got to be careful, because I don’t remember the quote, but the essence of it was – that you are in favor of incorporating Sharia law,” Lamb proposed.

“I don’t know where that one came from,” Justice Breyer said. Lamb pressed on.

“I can’t remember ever saying anything,” a befuddled Justice Breyer responded. “I think maybe there was some issue on this in England. Maybe they’re mixing it up with England. My wife is English.”

Asked by George Stephanopoulos on *Good Morning America* about a Florida pastor’s plan to burn the Qu’ran, Justice Breyer mused about Justice Oliver Wendell Holmes’s 1919 opinion in *Schenck v. United States*.

“With the Internet, you can say this,” Justice Breyer said. “Holmes said it doesn’t mean you can shout ‘fire’ in a crowded theater. Well, what is it? Why? Because people will be trampled to death. And what is the crowded theater today? What is the being trampled to death?”

The answer, Justice Breyer said, “will be answered over time in a series of cases which force people to think carefully.”

Two kinds of criticism followed this last exchange. Some said Justice Breyer seemed to be prepared to revisit settled First Amendment principles. After all, if flag burning is constitutionally protected, ought not the burning of religious books be protected as well?

Others noted that Justice Breyer had been imprecise in his paraphrase of Justice Holmes, who wrote that “the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic.” The omission of the word “falsely” does alter Justice Holmes’s meaning; the addition of the word “crowded,” which seems part of the collective memory, less so.

Dahlia Lithwick, *Slate*’s lively and astute Supreme Court correspondent, said the exchange was illuminating for another lesson.

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)

Preface

One Sunday morning, Justice Antonin Scalia of the U.S. Supreme Court faced a phalanx of reporters as he left Mass at the Cathedral of the Holy Cross in Boston. A reporter asked Scalia, a devout Catholic, whether he should be considered impartial in matters of church and state given his religious affiliation and devotion. Scalia responded with a hand gesture that is unfamiliar to most Americans but is considered indecent by some Italians. The *Boston Herald* covered the incident, called the gesture obscene, and even included a photograph of Scalia making the gesture. Offended by the newspaper's characterization of his action, Scalia wrote a letter to the editor defending himself and defining the gesture as not obscene but merely expressive of his lack of concern for the reporter's question.¹

Scalia's church-steps encounter with the press followed on the heels of another news story about Scalia from earlier that month. In a question-and-answer session after a speech in Switzerland, Scalia had commented on the Bush administration's detainment of suspected terrorists, a topic that was closely related to a case pending before the Court. Criticism about Scalia's comments quickly followed, and a public effort was made to get the outspoken justice to recuse himself from the case. Scalia refused, initiating another round of publicity.²

These were not isolated incidents. Scalia became newsworthy because of his hunting trip with then-Vice President Dick Cheney while a case involving Cheney was before the Court, his stint as grand marshal of New York's Columbus Day parade that sparked protests from gay rights groups, and an apology he gave to two reporters after a federal marshal protecting Scalia demanded they erase tape recordings of his speeches because of Scalia's prohibition of recordings of his public appearances.³ In the Cheney case, newspaper editorials urged Scalia to recuse himself from participation in the case, which he again declined to do.

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)*Preface*

xv

speeches to be aired by C-SPAN. Clarence Thomas appeared on CBS News' *60 Minutes* to promote his autobiography. Antonin Scalia followed a year later with his own *60 Minutes* interview to talk about his new book on lawyers and judges.¹⁰

The justices also make news when they give televised speeches. Formerly, justices typically banned television cameras and even audio recording devices from the room while they spoke. That was David Souter's policy while he was on the Court.¹¹ However, justices increasingly are allowing television cameras to record their speeches. The recording of a speech allows reporters to know exactly what was said in order to quote the justice and write the story. Also, broadcast reporters obviously can use video or audio clips in news broadcasts, thus making the story more broadcast worthy.

Now it is easier for justices to make news when they speak – and they do. In one speech, Anthony Kennedy criticized how senators questioned Supreme Court nominees. He also dismissed the notion of activist justices with the comment that “an activist court is a court that makes a decision you don't like.”¹² John Roberts gained attention when he criticized President Barack Obama in a question-and-answer session with University of Alabama law students. Fully aware that his remarks were being recorded on C-SPAN and that he would make news, Roberts questioned whether the justices should even show up at the State of the Union speech with “one branch of government standing up, literally surrounding the Supreme Court, cheering and hollering while the court – according to the requirements of protocol – has to sit there expressionless.”¹³ Thomas made a similar statement that made national news when he explained in a speech to law students why he rarely attends State of the Union addresses. “I don't go because it has become so partisan and it's very uncomfortable for a judge to sit there,” Thomas said. He added that “one of the consequences is now the court becomes part of the conversation, if you want to call it that, in the speeches.”¹⁴

In fact, most of the justices – John Roberts, John Paul Stevens, Antonin Scalia, Stephen Breyer, Ruth Bader Ginsburg, Samuel Alito, and Sonia Sotomayor – sat for television interviews on C-SPAN during the first decade of the twenty-first century. By contrast, appearances by justices in the previous half century were rare. For example, only two justices gave a few television interviews in the 1950s and 1960s.

GOING PUBLIC?

Is something going on here? Are U.S. Supreme Court justices “going public”? Have the justices decided to become more visible to attract the attention of

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)

the press and the public? Has there been a conscious decision to raise their public profile? If so, why?

Any such change at the Court would appear to be a significant departure from the past. It also would alter general expectations about the behavior of justices. Former *New York Times* reporter Linda Greenhouse, who covered the Court for many years, once commented: “I see a Court that is quite blithely oblivious to the needs of those who convey its work to the outside world. . . .”¹⁵ That is how the Court is generally perceived.

Yet another journalist suggested that a change already has occurred. Tony Mauro, who also covered the Court for a long time, concluded that John Roberts was “lifting the veil, ever so slightly” and that, as a result of Roberts’ example, “a new somewhat more open climate seems to be unfolding at the nation’s highest court.”¹⁶ As mentioned earlier, in Roberts’ first year as chief justice, he appeared on broadcast television, held press conferences, and sat for interviews. All of that was a radical departure from his predecessor in terms of relations with the press. Roberts may have been an impetus for change on the part of other justices as well. Soon after he arrived on the Court a few months after Roberts, Samuel Alito gave an on-the-record interview to his hometown newspaper, and other justices began to give on-the-record interviews rather than the off-the-record interviews that had been more common.¹⁷

However, there is evidence that the justices’ approach to publicity was changing even before Roberts arrived. Two years prior to Roberts’ arrival at the Court, Stephen Breyer and Sandra Day O’Connor sat for an interview with the ABC News show *This Week*. The year before that, O’Connor published an autobiography. Antonin Scalia appeared on several televised forums early in 2005 while Rehnquist was still chief justice.¹⁸

Even though the timing of the change in public exposure, or Roberts’ possible role in stimulating it, may be debatable, the fact remains that Supreme Court justices, whom one would expect not to “go public,” seem to be doing just that. Yet the incidents beg the question: What incentive do they have to do so? As schoolchildren know, the justices have no constituency to court for reelection; they enjoy lifetime tenure – and that tenure is designed to insulate them from public response to their decisions and enhance their independence.¹⁹ One would assume that the lack of any necessity to “go public” would translate into a continued low public profile, with exceptions such as retirement, death, serious illness, or, in the rare case, scandal.

Moreover, it is not easy for a justice to “go public” as compared with an elected official. For one thing, justices do not have the regular electoral process that offers them an opportunity to gain public attention. There is no electoral link to the public, as exists with members of Congress or the president.

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)*Preface*

xvii

Constitutionally, they do not depend on the public for their position on the Court. In fact, the Constitution's framers designed judicial selection in a manner that excluded not only the public (i.e., through elections) but also the public's direct representatives (the House of Representatives). The president (elected by a set of elite electors) and senators (at that time, elected by the state legislatures) were themselves distant from the public. Moreover, once in office, they can only be removed for violating "good behavior." A Supreme Court justice has never been removed from office, and only one (Samuel Chase in 1803) has even been impeached.

In theory, the justices have little or no connection with the general public. Formally, they need not gauge public opinion when they make decisions. As a result, one would expect them to have little connection with the press. Hence, if they are unconcerned about public opinion, why would they need to even take account of press coverage of their decisions, much less attempt as individuals to get that coverage? Because the extent of their external constituency would seem to be the legal community, which is charged with implementing legal policy set by the Court, why would they need to communicate with any other constituency or even communicate with the legal community through means other than their written opinions?

Yet, as indicated earlier, justices today do interact with the press.²⁰ That interaction goes beyond being covered by the press for their judicial actions either collectively or individually. It also includes sitting for interviews with reporters, delivering speeches the press will cover, writing books or cooperating with others writing books about them, and participating in forums they know will receive press attention. Moreover, studies of the Court's interaction with the press demonstrate that the justices do follow press coverage of their own decisions and other actions and structure the Court's institutional relationship with the press to maximize press coverage in ways that reinforce the institution's legitimacy.²¹ Nor is this interaction necessarily recent. Scholarly evidence of the press' interaction with the Court dates back to at least the 1960s.²²

However, recent behavior by many of the justices prompts important questions: What would a justice gain by expressing himself or herself to the public, particularly beyond opinion writing? Why go public? Also, is this new behavior? Are the justices today suddenly "going public" in a way foreign to their predecessors? If so, what recent forces have contributed to the changed nature of justices' relations with reporters? These questions will be addressed in these pages.

The structure of the book is as follows: The first chapter describes why and how justices act as strategic actors in their relations with external constituencies, particularly the press and the public. It also offers several hypotheses that

Cambridge University Press

978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media

Richard Davis

Frontmatter

[More information](#)

xviii

Preface

will be tested in this study. Chapter 2 reviews general expectations of judicial behavior vis à vis the press and then offers explanations of recent factors that might contribute to a shift in justices' attitudes toward the press and the public. The next three chapters address the second question – that is, the extent to which justices in the past have engaged in public relations, particularly via the press, and whether the current justices are acting differently from their predecessors. Beginning with the Jay Court in 1790 and moving through the nineteenth and twentieth centuries, these chapters review interactions with reporters and editors as well as attempts by justices to affect press coverage, public policy, and public opinion through both their judicial activities and their extrajudicial efforts. Chapter 6 consists of the results of a content analysis of press coverage of the justices during a forty-year period – 1968 to 2007. The final chapter centers on twenty-first-century justices and the recent efforts by justices to “go public.” In addition, the chapter discusses the implications of justices' public profiles for the justices individually and the Court as a powerful institution of American government in the twenty-first century. It discusses three main questions: What are the effects of the behaviors of the justices on the Court as an institution? What are the effects on the role of the Court as an arbiter of decision making? Finally, if the justices are emerging from their monastic-style existence, what are the implications for their future interactions with other political players, particularly the public?

Cambridge University Press
978-0-521-87925-5 - Justices and Journalists: The U.S. Supreme Court and the Media
Richard Davis
Frontmatter
[More information](#)

JUSTICES AND JOURNALISTS