Introduction

The U.S. Supreme Court is one of the most secretive and yet one of the most public institutions in American government. It is remarkably effective in shielding its decision-making process from the public's view, while its products, the opinions themselves, are lengthy tomes filled with detail about the justices' decisions and the rationales behind them. Ironically, the justices are the most verbose of public officials, while also acting as the most sheltered from public attention.

In recent years, however, that tightrope act of publicizing the product but masking the decision-making process behind it has become more difficult for the Court. The justices have become objects of press attention from their role in deciding a presidential election to their decision regarding a president's signature legislative reform. Their own actions have contributed to this higher profile. Unlike their predecessors, most justices give news media interviews. Moreover, these interviews appear not only in legal publications. For example, Justice Ginsburg has given interviews to *USA Today*, *Oprah* magazine, and the *New York Times*. Justice Scalia has been interviewed by *CBS Evening News*, the *Laura Ingraham Show*, and BBC radio. In addition, Justice Breyer has appeared on many media outlets, including *Larry King Live*, the *NBC Nightly News*, and FOX News.

At the same time, the Court has not altered the secrecy of its decision-making process. A press report in 2012 that Chief Justice John Roberts may have switched his vote in the case of *National Federation of Independent Business et al v. Sebelius* may suggest the shroud around decision making is being lifted. However, such breaches of the Court's secrecy have occurred in the past, albeit rarely. Indeed, it is the rarity of such disclosures, even in the face of extensive media coverage of high profile cases and enhanced coverage of the Court and justices generally, that suggests the Court remains

successful in its media strategy of directing the public's attention to its product and not to its decision-making process.

How does the Court achieve its press goals, particularly in an age of increased transparency, 24-hour cable news coverage, and the plethora of Internet news and information? What are the routines of press reporting on the Court in the Internet age? As justices have become more visible, has press coverage focused more on individual justices? How has the Court's role in high profile social issues affected its press coverage and public image? How is new communication technology affecting the Court?

These are all questions that political science, communication, and legal scholars seek to answer. Scholars have addressed these questions in various formats such as law reviews, as well as political science and communications journals. This volume brings together scholarly and journalistic perspectives on these questions. The purpose of this book is to illuminate the relationship between the Court and the press by examining the nature of press coverage of the Court and its effects on public opinion, the functioning of the Court, and the Court's interaction with its various public constituencies. It accomplishes that purpose by organizing aspects of the relationship between the Court and the press and then presenting new research by academics describing and explaining those aspects. Additionally, it offers journalistic perspectives, primarily from current members of the U.S. Supreme Court press corps, on the job of covering the Court.

The volume begins with a brief overview of the historical relationship between the Court and the press while also emphasizing developments in national politics, the Court, and the press occurring in the twentieth century that heightened the relationship. Next, we turn to the nature of media coverage of the institution. Tyler Johnson discusses the type of media coverage devoted to the Supreme Court today and addresses the causes of the Court's media portrayal.

News coverage of the docket is the subject of the following three chapters. Terri Towner and Rosalee Clawson discuss which cases receive more attention from the press and specifically focus on one type of case – civil rights – to analyze media framing of these cases. Vincent James Strickler compares coverage of two cases two decades apart to show the changes in press coverage of the Court caused by the Internet. He also speculates on how these developments will affect the future of news media coverage and what they mean for how citizens will acquire news about the Court. Richard Vining and Phil Marcin investigate intermedia coverage of decisions to determine the factors that affect a wide array of media coverage despite audience fragmentation.

Then, Eric N. Waltenburg and Rorie Spill Solberg focus on media coverage of one particular justice, Harry Blackmun. Through their extensive analysis of *New York Times* coverage of Blackmun, they offer insights into how a medium reports on the various facets of a justice's public work – from Blackmun's role in oral arguments to his opinions to his personal life.

Two chapters shift to the Court, news media, and public opinion and examine the Court from two different perspectives in that relationship. Nicholas LaRowe and Valerie Hoekstra examine the role of media coverage in shaping diffuse support for the Court as well as public opinion towards specific Court actions. Joseph Ura examines how the Court has shaped the issue attention of national media outlets through its decisions. He demonstrates how *Brown v. Board of Education* served as a catalyst to public discussion of desegregation.

Then we move to the view from the pressroom. *Los Angeles Times* reporter David Savage, a twenty-eight-year veteran of the Supreme Court press corps, explains how new media such as the Internet and blogs have affected reporter routines. Then, Dahlia Lithwick, former Supreme Court reporter for *Slate*, describes the Court's struggles to adapt to or resist new media changes, as well as the difficulties of new media reporters in covering an institution wedded to traditionalism.

Finally, we get the justices' perspectives on their relationship with the press. Laura Moyer and Matthew Thornton review justices' public statements about the press corps that reveal their attitudes about press coverage while expressing their willingness to engage the press. Additionally, two biographers of justices relate views about the press as gleaned from personal interviews with the justices while they served on the Court. Seth Stern recounts Justice William Brennan's ambivalence toward a press he championed in opinions, but whom he derided personally due to his negative experiences with some reporters. John Paul Stevens' biographer Bill Barnhart describes Stevens' distance from, but not complete disinterest, in the press – both in terms of the cases Stevens handled as well as his personal interactions with reporters. Both chapters provide readers with an inside look at justices' views about the press corps that covered them.

1

The Symbiotic Relationship Between the U.S. Supreme Court and the Press

RICHARD DAVIS

INTRODUCTION

Soon after the U.S. Supreme Court ruled that the Affordable Care Act passed by Congress in 2010 was constitutional, CBS News reporter Jan Crawford aired a story claiming that Chief Justice John Roberts had switched his vote. Crawford reported that Roberts had changed while he was writing an opinion for the majority of conservative justices, and that Justice Anthony Kennedy led the effort to redeem Roberts' vote with the conservatives. The story was unusual because Crawford cited "two sources with specific knowledge" about the incident. That suggested the justices themselves might have been sources. While one of the references was to an unidentified source the other was explicitly, although perhaps indirectly, attributed to a justice: "And so the conservatives handed him their own message which, as one justice put it, essentially translated into, 'You're on your own.'" CBS News anchor Scott Pelly termed the story a "rare insight."[1]

Indeed, such a story is rare. As scholars of the Court know, inside information about the process of decision making for a specific case does not reach the public, except in unusual circumstances. Typically, the Court's norm has been to maintain the secrecy of the decision-making process.

Nevertheless, there are indications that such stories may become more common. U.S. Supreme Court justices have become public in a way that would have been unimaginable even thirty years ago. Moreover, the press has undergone an evolution in its approach to the Court. Reporters have become less willing to view the justices as above political scrutiny, personalize Court

[1] Jan Crawford, "Roberts Switched Views to Uphold Health Care Law," *CBS News*, July 1, 2012, at /www.cbsnews.com/8301-3460_162-57464549/roberts-switched-views-to-uphold-health-care-law/.

coverage, and cover the Court with less formality than in the past. What has led to this change in the relationship between justices and the press?

The thesis of this chapter is that the justices and the press operate within a symbiotic relationship that is marked by public tension, but also by frequent accommodation of each other. That relationship is defined and examples of accommodation on the part of the press towards the Court and the Court towards the press are described. Finally, three recent developments affecting the relationship are discussed. These are more extensive interaction between justices and journalists, increasing scrutiny by the press, and greater judicial acceptance of press norms.

SYMBIOSIS

With the possible exception of the federal bureaucracy, the conventional wisdom is that there is no national institution needing the press less than the Supreme Court. The justices serve life terms, do not stand for re-election, and often issue decisions that are blatantly countermajoritarian. Similarly, the press should be disinterested in the Court because the justices fail to abide by press norms, such as routinely making themselves available for interviews, speaking on the record, holding press conferences, or writing brief decisions stripped of legalese (perhaps in the form of press releases).

It is true that the justices are the least visible of national policymakers and the Court as an institution is the least covered of the three branches of government, which would suggest the absence of much of a relationship between justices and journalists. Nevertheless, the institution possesses certain incentives to interact with the press that Alexander Hamilton realized when he predicted that the Court would lack the power of enforcement: "It may truly be said to have neither Force nor will, but merely judgment."[2] The power of that judgment would depend on the acceptance by other political players – the executive, Congress, and the public. Another power the Court lacked was a mechanism to communicate to those players in order to gain deference to the Court. The Court's ability to communicate that judgment, and therefore build respect for it, also would be dependent upon other players, particularly the press. The Court, then, possessed a strong incentive to utilize the press to convey certain images that reinforced the significance of its role in the minds of others with power over the Court's role.

[2] Federalist no. 78.

Many individual justices also have reason to pursue press relations. These include influencing their colleagues, shaping public attitudes about legal issues, or writing their own historical records. In addition to autobiographies, biographies (some written by journalists), and, of course, their own written opinions, some justices use interviews with reporters to achieve their own individual aims.

In addition, the press itself has powerful incentives to forge a relationship with the Court. The Court is an influential decision maker in public policy with the capability to shape the agendas, attitudes, and behavior of the president, the Congress, the bureaucracy, interest groups, and the public. Moreover, the Court occasionally addresses high profile issues that reporters cover and the public thinks and talks about. Decisions about controversial issues such as health care reform, gay marriage, gun control, and abortion affect ordinary Americans, but also correspond to existing media and public agendas.

Publicly, the symbiotic relationship between the Court and the press is marked by tension. Justices often describe their distance from the press and occasionally criticize press coverage as shallow and incapable of reporting effectively on Court action. Simultaneously, journalists complain about that distance and their inability to cover the Court as they do other beats. The press often describes the justices as inflexible and unwilling to satisfy press demands for greater transparency and accessibility. In reality, the relationship is marked by accommodation on both sides.

Press Accommodation to the Court

The approach to the Court by the press is dissimilar from the press's treatment of other beats because the justices themselves are unique among national governmental players in their norms, practices, and traditions. In order to cover the Court, news organizations must recognize and adapt to the Court's institutional peculiarities. That is what they have done, even though these norms fly in the face of traditional newsgathering approaches.

One example of accommodation is adherence to the unique rules of the Court. One of those is press access to the decision makers – the justices who possess information reporters want. Unlike other institutions, the Court severely limits press access to those individuals – the justices – who, in another setting, such as Congress, would have frequent interaction with reporters.

Limitations on press access are not unique to the Court. For example, White House reporters understand where they can and cannot go in the White House. Journalists covering Congress are not allowed on the floor of the House or Senate or in congressional cloakrooms.

However, Supreme Court rules are more restrictive. Even physical proximity to the justices is more limited than for other institutions. Reporters covering Congress move freely among congressional offices and committee rooms. White House reporters see the president at photo-ops and press briefings where they can ask questions, and usually are able to walk around in the White House Press Secretary's office. But at the Supreme Court, reporters are not allowed to visit the floors where the justices work, unless they have an appointment with a specific justice, and their only regular contact with the justices is in the courtroom, where they obviously cannot ask questions.

In addition, the White House press corps has potential sources both in and out of the White House to obtain information about White House activities and processes. Moreover, leaks are common and even officially sanctioned. None of that is true for the Court. There is no sanctioned leak process. Most interactions with the press are off the record, not even on background. Moreover, justices' clerks are prohibited from releasing information and could well lose their jobs if they did so.

Reporters rarely chafe against the rules of the Court. They typically do not seek to violate those rules to uncover scoops about the Court. Rather, they rely on the official information provided by the Public Information Office and on what they observe in the courtroom. For example, when Tim O'Brien, an ABC News reporter, picked up a piece of paper from the ashes of the fireplace in the conference room during a photo shoot there, the justices discussed in a subsequent conference what action to take against O'Brien. One wanted O'Brien banned from the building. However, Justice John Paul Stevens suggested that O'Brien would not use any material he had obtained because he "will decide that the news value of what he may have seen is not worth the loss of our good will. . ."[3]

Stevens was right. O'Brien did not use the material, whatever it was. The good will of the justices is a carrot that encourages accommodation, rather than journalistic entrepreneurship, by reporters who might be inclined to follow their journalistic instincts to get a good story.

Breaking the rules is uncommon because members of the Supreme Court press corps generally have accepted the Court's practice of concentrating attention on the opinions of the justices rather than the justices themselves or the processes by which they reach those decisions. Adherence to the Court's norms may have diminished somewhat in the wake of the Thomas nomination, but reporters still are careful about shifting their focus to the

[3] Quoted in Davis, *Justices and Journalists*, p. 136.

individual justice, even when it is an attractive story. For example, one broadcast reporter confidentially related to the author that his producers had asked him to investigate the sexual life of one of the justices because of rumors about homosexuality. This request came in the wake of the Bork and Thomas nominations when judicial nominees' private lives became part of the public record. The reporter replied that he was uncomfortable doing so because he felt he should not report on the justices' private lives. His producers backed off when he expressed his reluctance to pursue such a story.

Reporters who cover the Court also accommodate to the Court by changing basic journalistic routines. Since on-record interviews are rarely available, reporters rely on documents to write stories. Stories about cases and decisions are typically about the legal principles of the case more than the personalities of the parties. That may be changing, particularly on television, but reporters covering the Court must adapt to their inability to use the standard journalistic tools of interviewing and observation of decision-making processes to understand and explain what the Court is doing. Instead, they must be willing to pore over stacks of legal documents in the form of writs, oral argument transcripts, and written opinions.

New York Times reporter Linda Greenhouse once described the difference between her previous beat covering New York state government and the Supreme Court this way: "Compared with the frenzied drama of the New York Legislature, the quiet of the Supreme Court press room was the silence of the tomb. In place of the easy banter with politicians that had made the Albany beat so engaging, there was an almost suffocating paper flow."[4]

Still another type of accommodation is news organizations' reliance on specialists to cover the Court. For most of the Court's history, reporters who covered the Court had no specialized training beyond journalism. In the 1950s, Justice Felix Frankfurter urged the *New York Times* to hire reporters with legal training. Frankfurter reportedly told a *New York Times* editor that the *Times* would not consider assigning a reporter to cover a New York Yankees game with as little understanding of baseball as *Times* reporters had about the Court. As a result, *Times* executives sent Anthony Lewis to law school for a year and then assigned him to cover the Court.[5]

Today, such legal training or even a law degree is more common in the Supreme Court press corps. Recent or current Supreme Court correspondents

[4] Linda Greenhouse, "2,691 Decisions," *New York Times*, July 13, 2008, at www.nytimes.com/2008/07/13/weekinreview/13linda.html?pagewanted=all&_r=0.

[5] David L. Grey, *The Supreme Court and the Media*, Evanston, IL: Northwestern University Press, pp. 52–53.

with law degrees have included Adam Liptak (*New York Times*), Jess Bravin (*Wall Street Journal*), Dahlia Lithwick (*Slate*), Tim O'Brien (ABC News), Marcia Coyle (*Legal Times*), and Jan Crawford (CBS News).

Not all reporters approve of the trend. Some reporters believe a legal background has the potential of increasing deference to the Court. SCOTUSblog reporter Lyle Denniston suggested, "If a reporter hangs around judges and lawyers too long he begins to smell like them. A journalist has his own smell and he should never trade that aroma for someone else's."[6] Nevertheless, journalists with legal training, such as Jan Crawford Greenburg, Adam Liptak, Dahlia Lithwick, and Jess Bravin, write critically of the justices.

The press has adapted its practices to align with the culture of the Court. It has done so in order to report on the Court's decisions more accurately and effectively. In the case of the use of legal specialists, it did so as a direct result of a justice's suggestion. In other cases, the press corps has accepted the Court's norms in order to maintain access to the Court as an institution and to the justices individually, but also due to a sense of protectiveness toward the Court in its constitutionally-assigned role. Regardless of the reason, the press has accommodated to the Court as well as the Court to the press.

Pressure to alter the press corps' approach to the Court has tested such accommodation. *Washington Post* reporter Bob Woodward urged the Supreme Court press corps to cover the "courts as a political institution" in line with a critical analysis approach to political institutions that emerged with "new journalism" in the 1960s.[7]

At first, coverage of the Supreme Court was unaffected by this analytical approach. Then, *The Brethren* appeared. An account of the court then headed by Chief Justice Warren Burger, *The Brethren* was an inside look at an institution that rarely received inside looks. The fact that the book's coauthor was Bob Woodward, an icon in American journalism who had uncovered Watergate, made it all the more compelling. The book, which appeared in 1979, followed the justices as they decided controversial cases from 1969 to 1974. Those years were pivotal in the Court's jurisprudence, as they decided cases regarding executive power, abortion, school busing, and freedom of the press.

The Brethren was not the first book-length attempt to humanize the justices. *The Nine Old Men*, a 1936 book by Drew Pearson and Robert Sharon Allen, treated the justices with a mix of humor and derision during

[6] Quoted in Mitchell J. Tropin, "What, Exactly, Is the Court Saying?" *The Barrister* (Winter 1984): 14.
[7] Quoted in David Shaw, *Media Watch*, New York: MacMillan, 1984, p. 120.

the New Deal era.[8] However, *The Brethren* was more substantial in its treatment of individual decision-making processes. Unlike the vast majority of prior books about the Court, *The Brethren* treated the highest court as primarily a political institution and the justices themselves as individuals adopting political methods to achieve their goals.

Through anonymous sources, Woodward and his coauthor, Scott Armstrong, revealed the justices' attempts to lobby one another, their personal animosities towards each other, and the influences of current events and public opinion on their decisions. It was a rare examination of a secretive institution and exposed the justices as political players, as much as legal arbiters. Woodward and Armstrong purposely sought to portray the justices as human beings who, despite the official public image of the Court, were driven by personal passions and strong political considerations.

The aim of *The Brethren* was not entirely new. William O. Douglas once admitted, "We all have subconscious parts, we're not entirely rational in our decisions."[9] But such candor was rare. Woodward sought to make transparent that to which Douglas alluded. He also encouraged other journalists to do the same. In fact, he publicly chastised the press for not being aggressive enough in covering the Court. Woodward hoped to shape future coverage of the Court by asserting, "The courts are a political institution and we [the press] don't cover them as such."[10]

Like *All the President's Men*, *The Brethren* had a significant impact on journalists. Following Woodward's lead, some other reporters began to view the Court as an institution full of individuals with political goals. At the *New York Times*, Stuart Taylor paid close attention to the justices' speeches, not just their decisions. Similarly, ABC News reporter Tim O'Brien sought to scoop his peers by digging for unreleased information he could report. Richard Carelli, an Associated Press reporter, felt that the personal context of a justice's opinion was important for the public to understand: "When Justice Stevens writes an opinion about parental rights, we can put in the story that this author is himself the adoptive parent of two children. It adds something for the readers, an appreciation of where this guy is coming from."[11]

Not all reporters shared the Woodward and Armstrong approach. Some believed that even if they received a draft of an opinion before it was

[8] Drew Pearson and Robert S. Allen, *The Nine Old Men*, New York: Doubleday, Doran, and Co., 1936.
[9] Transcript, Knight-Ridder interview, October 29, 1973, Box 621, William O. Douglas Papers, Manuscript Division, Library of Congress, Washington, D.C.
[10] Quoted in David Shaw, *Media Watch*, New York: MacMillan, 1984, p. 120.
[11] Quoted in Davis, *Decisions and Images*, p. 103.