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Judicial Transparency:

Communication, Democracy and the United States Federal Judiciary

A dissertation submitted in partial satisfaction of the  
requirements for the degree Doctor of Philosophy

in

Communication

by

Katrina Hoch

Committee in charge:

Professor Robert Horwitz, Chair  
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Professor Alan Houston  
Professor Michael Schudson

2009

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Chair

University of California, San Diego

2009

## **DEDICATION**

To my parents, Mary and Chris Hoch.

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## **ABSTRACT OF THE DISSERTATION**

Judicial Transparency:  
Communication, Democracy and the United States Federal Judiciary

by

Katrina Hoch

Doctor of Philosophy in Communication

University of California, San Diego 2009

Professor Robert Horwitz, Chair

Government transparency is understood to be a bedrock principle of American democracy, yet the judiciary branch is often exempted from this ideal. Secrecy exists in all branches of government, but in the judiciary it's often viewed as essential for proper ethics rather than as a threat to them. The judiciary has some important transparency traditions such as published opinions and open trials. However, the judiciary has held back from many modern transparency practices. This dissertation explores how the federal judiciary has been partially exempted from the modern expectation of

transparency. The current understanding is that more information is always better for democracy, but the ambivalent relationship between this formulation and the judiciary suggests the story is more complicated.

Katrina Hoch addresses this puzzle by looking at the history of government transparency, both as a concept and as a set of policies and practices, and by analyzing three judicial realms: Supreme Court confirmation battles, the debate over cameras in the courtroom, and the Supreme Court Justices' public image. This research includes hearing transcripts, case law, legislation, news reports, historical records from the American Bar Association and the Judicial Conference, field visits to the Supreme Court and Supreme Court press office, popular books about the Court, entertainment media and secondary sources.

While government transparency and the federal judiciary were always structured around different principles, contemporary transparency practices have sharpened the tension between them. New developments in journalism, media economics, technology, political culture and political institutions have reshaped the meaning and practice of transparency, and the resulting new forms include the “personalization of politics,” and the “performance of transparency.” The judiciary has been resistant to these changes because courts operate differently from other government institutions and judges have a unique role. However, several recent developments have contributed to the personalization of the judiciary. This personalization is linked to a new mode of legitimation, one based on engagement with the public. This shift has characterized the way all public officials seek legitimation, but it is a much bigger change for the judiciary, because judges have traditionally cultivated distance rather than familiarity.



## **INTRODUCTION**

Government secrecy is viewed as antithetical to democracy in the contemporary United States, but all branches of government guard information. Though secrecy sometimes covers up wrongdoing, as when corporations secure sealed settlements in product liability suits, secrecy also protects principles we value, such as personal privacy, the dignity of institutions, national security, law enforcement and unfettered discourse. Despite this, in the elected branches openness is prized and secrecy is criticized. Transparency is viewed as essential for democracy. Even when secrecy is accepted as necessary, this acceptance is grudging. We view those withholding information with suspicion. Secrecy must be justified; we need a good reason for it. Furthermore, government silence is often hard to maintain and can be ineffective as a means of achieving the goals it is thought to support. Officials frequently cultivate support by disseminating information rather than hiding it.

The federal judiciary, particularly the Supreme Court, has a different relationship with secrecy and with transparency. While courts and judges can't avoid being affected by the rest of the political culture, they have held back from it. Judges communicate less with the public than officials in the other branches do, and more of their work is shielded from view. Most importantly, judicial resistance to sharing information is viewed with less suspicion. This is sometimes explained with reference to the need for judges to maintain dignity and unfettered deliberation, two values the other branches also seek. However, in the judiciary these reasons are usually

considered sufficient. In fact, some types of information dissemination other officials engage in – such as appearing on Sunday news shows – would be viewed as unseemly for judges. The judiciary has been partly exempted from the expectation of transparency that is such a strong force in the other branches. The contrast is not a sharp one; the legislative and executive branches hide information and the judiciary has some important transparency traditions such as published opinions and open trials. However, the judiciary has held back from many modern transparency practices the other branches participate in.

This dissertation explores how the federal judiciary has been partially exempted from the modern expectation of transparency. Rather than framing this as an examination of judicial secrecy, I am addressing the tension between the judiciary and transparency. This approach spotlights government transparency, a popular and ubiquitous term in contemporary American politics and culture. The current understanding is that more information is always better for democracy, but the ambivalent relationship between this formulation and the judiciary suggests the story is more complicated.

I approach the question of how the federal judiciary has been exempted from the expectation of transparency along two tracks: I explore both transparency and the federal judiciary. First, I look at transparency, both as an idea and as a set of practices. I don't offer an exhaustive history or theory of transparency; rather, I focus on aspects that have brought it into conflict with the judiciary. In this exploration I rely on secondary sources, bringing together many realms that have bearing on the idea that

citizens should know what their government is doing and on the practices that enact this idea. I'm concerned with both how transparency works and how people understand it. Ideas about transparency – the arguments used to support or critique it – are important even though they sometimes mask very different concrete realities. The arguments people use show what they think is important and what principles have resonance in American life. I'm also concerned with concrete transparency practices, the historical forces that have shaped them, and the ways in which the arguments and practices diverge. The concrete practices through which transparency is enacted shape the information people receive and their relationship to government.

In approaching transparency as a set of policies, practices and ideas that support giving citizens more information about government, I am attempting to broaden the lens typically used to look at transparency. Many familiar debates about transparency concern war and national security, areas where the American government has traditionally been most secretive. Most post-war Presidential administrations have been criticized for withholding information pertaining to military actions and national security measures. From this fact and from other public debates about withholding information, some stipulate that we live in a time of dangerous government secrecy. However, when we view transparency as encompassing all the information about government available to citizens, and the entire framework of expectations and institutions that support this, it's clear that transparency is a central element in our political culture. The question is how this information is shaped and used by its

disseminators and its recipients, and how this influences democratic values and practices.

After looking at transparency, I turn to the federal judiciary, focusing on three areas in which federal courts and judges come into contact with the concept and practice of transparency: Supreme Court confirmations, the debate about allowing cameras into federal courts, and the Supreme Court justices' public images. In each area I look at how federal courts and judges have eschewed transparency, even as it has become more central to American political culture, how this is changing and what these changes mean. In this research I bring together a variety of source materials that include hearing transcripts, case law, news reports, American Bar Association records, Congressional debates, speeches, interviews, field observations of the Supreme Court and Supreme Court press room, and secondary sources.

I have omitted several realms of debate about judicial secrecy and transparency. These include sealed settlements in civil cases, the privatization of dispute resolution in the growing use of ADR (alternative dispute resolution) and unpublished opinions. While these certainly constitute instances of secrecy in the judiciary, I believe they are best left to another study. I have chosen to focus on confirmations, cameras in the courtroom, and judges' public images because these three realms share some common elements. They are animated by conflicts between the judiciary and the contemporary instantiation of transparency, which includes several distinctive elements: an orientation towards the public, the centrality of the mass media, and practices such as personalization and performance. Part of what I

want to argue is that the three realms I've focused on are connected, and should be viewed as part of a larger phenomenon – the tension between the judiciary and transparency – rather than as separate entities.

I focus on the federal judiciary because I believe it has a unique relationship with transparency that deserves to be studied on its own. While similar issues arise in state courts, these institutions do not have the same role as the federal judiciary and they are less insulated from majoritarian concerns.

Some may read this looking for an argument about whether transparency is good or bad in each of the realms I've chosen to explore. I provide some thoughts about this in the conclusion, but this is not my purpose here. My goal is to describe the nature of the conflict between the judiciary and transparency, to explain how it has developed, and to identify the stakes on either side. In doing this, I will address some frequent criticisms made of transparency and secrecy in the judiciary and I will attempt to assess these claims and to offer more context for understanding them. Thus, this study could be helpful background for those who want to make decisions about transparency policies, but my ultimate goals are descriptive and analytical rather than normative.

Political scientists, legal scholars and journalists have produced an avalanche of writing about Supreme Court confirmations, cameras in the courtroom, and the public images of the Supreme Court justices. They've pored over many of the relevant records. This work usually focuses on one of the three realms. My approach is different in that I bring these three realms under one umbrella, highlighting their

commonality as sites of a larger tension between the federal judiciary and the ideal and practice of government transparency.

Many of the debates about the judicial realms I've identified center on arguments about media and technology, and I will spend a lot of time on these subjects. However, I'm skeptical of approaches that attribute a primary causal role to media or technology and that treat these forces as though they act independently. My approach foregrounds the recognition that media and technology are shaped by politics and culture just as much as they do any shaping, and they can produce different results depending on the specific practices they're attached to. This recognition comports with my view of transparency as a broad set of ideas, practices and policies of which media and technology form only one part. This is especially important to bear in mind when searching for villains and solutions to problems. It sometimes appears that barring media will end the less savory aspects of the modern transparency dynamic, but the reality is more complicated.

Chapter One examines government transparency as a matter of theory – the way it is understood, the arguments that undergird it. The basic principle is that government actions and decisions should be visible and understandable to citizens. Although its routine implementation and institutionalization is more recent, this idea is at least 200 years old. It was articulated during the 18<sup>th</sup> century fight against arbitrary government in Europe, particularly in England, when it was linked to the idea of developing “public opinion” as a counterweight to government power. The idea that citizens should know what their government is doing was developed further in liberal

democratic theory, playing an important part in the thinking of Thomas Paine, John Stuart Mill, John Dewey and Jurgen Habermas, among others. These thinkers' ideas are evident in transparency advocates' arguments today. Government transparency is understood to help make self-rule meaningful and to limit government power by doing several things: creating informed citizens, making government legitimate, promoting accountability, and preventing corruption.

However, this principle has also highlighted the persistent question of whether the type of communication imagined by democratic theorists is actually possible.

Walter Lippmann argued that none of the components involved in democratic communication – government, information, media, and citizens – can be trusted to perform the way many democratic theorists have assumed in emphasizing the centrality of communication to democracy.

The real-life practices and policies that constitute government transparency often contradict the vision in democratic theory, but Chapter One aims to show that, even if transparency worked in practice as described in theory, it would still have an uneasy relationship with the judiciary. This is because the United States Constitution is constructed in part around the tension between the elected branches' subservience to majorities and the judiciary's curtailment of them. The federal judiciary provides a counterweight to majoritarianism. Judges' decisions are supposed to be guided by facts and law rather than public opinion, and they have to uphold limits on government power and guarantees of individual rights that majorities can't eliminate. These decisions sometimes contravene voters' wishes.

Thus, the judicial branch is structured more by constitutional principles than by democratic ones. Constitutionalism fixes certain rules and relationships, taking them out of democratic play. Transparency, however, often favors democratic dynamics – those that respond to citizens’ wishes, in other words, those that *are* in democratic play – because it creates a link between citizens and government. Thus, the majoritarian principles transparency often serves don’t comport with the judiciary’s decision-making process or constitutional role. Even as a matter of theory, the judiciary has an uneasy relationship to transparency.

Some benefits of transparency lauded in democratic theory do apply to the judiciary. Transparency can help build judicial legitimacy and prevent corruption. These dynamics are supported by published opinions and open trials. Transparency can thus work for the judiciary when it serves to diminish arbitrary power, but not when it serves to strengthen the link between citizens’ wishes and government actions. The public may observe and feel confidence in the justice system, but cannot exert influence or checks.

Chapter Two looks at how transparency has been enacted in practice. Though many early American writers, printers and thinkers believed it was important that government be visible, this belief was not supported or protected by many concrete policies during the United States’ first 100 years. This is partially because the United States at its birth was more of a republic, in which government powers are separated into branches that can check each other, than a democracy, in which government is directly controlled by and responsive to the public. This chapter tracks two sets of



changes that have shaped the modern practice of transparency. First, as more democratic structural features have been incorporated into the United States government, the surrounding political culture has grown more democratic as well, and new policies and practices have made information about government available to citizens. Second, as government transparency has increased, developments in culture, politics and the economy have changed its shape and meaning so that it has sometimes veered away from the ideal imagined by democratic theory.

The contemporary instantiation of transparency is characterized by the centrality of the mass media, the importance of public opinion and public appeals, and two dynamics I refer to as “personalization” and “performance.” Personalization, in my scheme, refers to two things: the tendency to treat public officials as individuals with their own agendas, rather than as representatives of parties or institutions, and the tendency to focus on politicians’ private lives and personalities in addition to their policy agendas. Performance, in my scheme, means the move towards controlling public perceptions through strategic public narratives sometimes derogatorily called “spin” rather than just through secrecy. This managed dissemination of information is often framed as a form of transparency, but it requires that the real work of governing be pushed further into the background. This contemporary version of transparency took shape after World War II, but its roots reach back to the late 19<sup>th</sup> century.

Though the mass media have not been the sole cause of these changes, they have played a role. New forms of media, such as radio, network television, and cable television, have enabled a rise in the volume, intensity and intimacy of information

people receive about government. However, some of the problems people attribute to particular mediums or technologies are more accurately linked to the increasingly commercial, competitive media structure in the United States, a structure that spans different types of media. The enactment of government transparency is often inseparable from this media landscape. Entertainment formats have become ubiquitous, even in public affairs programming, and these formats often emphasize scandal and personalities over issues of policy. The news media have also become more interpretive and more partisan.

In addition to these changes in the mass media, changes in political culture, particularly the decline in the power and salience of political parties, have shaped contemporary transparency practices.

The modern instantiation of transparency has had unanticipated consequences. First, it has come with trade-offs. While the public receives more information than before, the government has also acquired new avenues to persuade and sometimes to manipulate. While government processes have incorporated new windows for citizens to observe and levers for them to exert influence, the current climate in which public approval is necessary for officials to take action can stymie decisions about complex subjects. Another unanticipated consequence is that modern transparency practices often seem to address the public as passive, malleable, even irrational subjects rather than the rational, engaged stake-holders that many transparency advocates describe. Finally, modern transparency practices sharpen the conflict between transparency and

the judiciary. Even in theory, transparency was not a perfect fit for the judiciary, but trends such as personalization and performance make this fit worse.

Chapter Three moves the discussion to the most well known point of contact between transparency practices and the federal judiciary: Supreme Court confirmations. This chapter examines confirmation history and recent confirmations through the lens of their relationship with modern transparency practices, and finds that the results are mixed and some frequent criticisms are misguided. During the past fifty years, confirmations have evolved with the rest of American politics and culture. They've become more oriented towards the public and engender personalization of the candidates. However, because of judges' unique role and decision-making processes, the changes in confirmations have been slower than in the rest of politics, and some have been resisted altogether.

The resistance flows largely from the fact that the United States government is structured by both democratic and constitutional principles. The legislative and executive branches stress democratic principles, which are centered on majoritarianism. The judicial branch is the primary upholder of constitutional principles, which set out a framework that guarantees individual rights and delineates government powers, sometimes in the process restraining majorities. The tension between majoritarianism and constitutionalism is often condensed into shorthand as the tension between law and politics.

While constitutional principles are most important in judges' work from the bench, confirmations provide the best and most appropriate opportunity for a

democratic check on the judiciary, and the contemporary democratic ethos has made this check especially important. For the past several decades, this democratic check has often brought with it swirls of modern transparency practices, many of which have an uneasy relationship with the judiciary. Supreme Court appointments have always been imbued with politics and ideology. The modern political environment, in which politics is conducted in the open, has made the politics of the appointment process more explicit and apparent.

Transparency is a double-edged sword in confirmations. It can help legitimize justices and the practice of judicial review, which is important in a political environment that prizes public opinion and places the Court at the center of important debates. However, it can also hurt judicial legitimacy by emphasizing the political or subjective aspects of judges' decisions to the detriment of institutional, doctrinal, professional and intellectual considerations that also structure them. I understand judging to be both political and principled. Judging often enacts judges' common sense notions and policy preferences, but it is also influenced by professional expectations and institutional role, and judges' legitimacy to some extent rests on their adherence to consistent and principled standards of logic. It's important for judges' public image to convey a sense of this balance, and this can be especially difficult in the context of modern transparency practices.

In the modern political environment in which public opinion is crucial to official actions, Presidents and Senators seek to convince the public that they have made the correct decision in nominating or voting for or against a nominee. This can

be a thorny endeavor because constitutional and statutory interpretation forms a realm of expert knowledge that requires translation into different terms to be engaged in the public sphere. This translation can blunt the nuances of jurisprudence and create a caricature.

The need to persuade the public leads Senators to put on performances in the hearings, in which they often seem to be grandstanding in the quest for airtime rather than attending to the business at hand. These performances are mocked by journalists, comedians and politically savvy people in general. I understand these criticisms and have some of my own, but I do think these performances serve a democratic purpose. If we are to have a system in which politicians must persuade their constituents of the soundness of their decisions, and in which a realm as complex and esoteric as Supreme Court jurisprudence is to be essentially put to a public vote, then translation is needed, and these performances, scripted and sometimes distorting though they may be, help fill this role. Senators of both parties use these performances to explain and push for their vision of what the Constitution means and to translate legal cases and judicial philosophies into the terms of public discourse. The Senators are essentially performing reason giving, turning confirmations into an exercise in a sort of performative democracy.

Nominees put on performances as well. Making promises about what one will do once in office is an important aspect of seeking most posts in a democracy, but the judicial role and method of decision-making make it impossible for nominees to make promises or predictions about future decisions (although they *can* provide their current

views on issues, something they usually pretend they can't do). This creates two problems. First, it means nominees often refuse to answer questions for strategic reasons that overlap indistinguishably with principled reasons. Second, it makes Senators' performances more important. Though many Senators, legal scholars and other observers can usually fairly accurately predict what a nominee's future decisions will look like, the records these predictions are based on are not usually easily understandable to the public. Our political culture prizes revelations from the nominee in the hearings, but these are rare, so Senators must justify their actions through their performances. Occasionally, the difficulty of doing this can make it hard for them to take actions they believe to be right.

Many people complain that we learn nothing new in the hearings and imply that things used to be different. Some blame the television cameras. However, the lack of revelations stems from the combination of judicial ethics and political strategy, and no nominee other than Robert Bork has been very forthcoming. Furthermore, while it's true that little previously unknown information about nominees' views and record emerges in the hearings, these events do serve a purpose. They provide a space for the performance of reason giving by the Senators, which is, in its own warped way, part of transparency. While these hearings ostensibly exist to achieve republican transparency (branch to branch), the purpose they serve is closer to democratic transparency (government to public).

The tension between transparency and the judiciary also animates the debate about cameras in the courtroom, the subject of Chapter Four. Still and video cameras

are currently prohibited in most federal courts, and many have argued that this policy should be changed. In this debate, policymakers have had to grapple with the implications of modern transparency practices for democracy and for the judiciary.

I examine the events and ideas that have shaped federal courts' policies about cameras for the past century. In analyzing the discourse surrounding this policymaking, I discern three types of arguments against cameras. One set of arguments holds that cameras will create problems *inside* the courtroom and will thus influence trial fairness. Another set points to problems cameras will cause *outside* the courtroom, in the depictions they'll produce of particular trials. The third category is made up of broader arguments about how allowing cameras into courtrooms will influence public perceptions of the judiciary. The debate about cameras in the courtroom is often described as a conflict between "free press and fair trial," but these three types of argument show that, while trial fairness is an important component, it's not the only one. The last two categories of argument concern effects cameras are thought to have outside the courtroom and often after a trial is over. This underlines the important roles that judicial legitimacy and perceptions of media effects play in this debate.

Federal judges are not legitimized by elections; their legitimacy is largely based on their mode of decision-making and image of independence and impartiality. The debate over cameras in the courtroom is partly a debate about whether modern transparency practices will help or hurt these endeavors.

The cameras in the courtroom debate is also a debate about a particular technology and medium. Many blame television for the reticence to allow cameras into courtrooms, but the ban has been in place since the 1930s, at least a decade before television existed. Many of the arguments levied against television today were used against still cameras in the 1930s. Furthermore, text and audio often cause the same problems for which images are blamed, and images don't make problems inevitable. Images and television do cause problems, but they don't *always* cause problems and they don't do so *alone*. Some of the arguments about images are based on myths about media effects, common sense notions that, while not entirely false, don't tell the whole story.

Photographic images do have distinctive communicative properties, notably the impression they often give of unmediated communication, making people feel like they've experienced an event first hand. Images raise concerns in part because they're associated with irrationality and emotions. These concerns are heightened by the fact that images imply wide public access. These issues are especially potent in relation to the judiciary because of its role as a bulwark for constitutional rather than majoritarian principles. However, the effects associated with images often flow not from images themselves, but from the competitive commercial newsgathering and production practices that often embed images. These practices are not tied to a particular medium.

In some ways, image-based communication has come to stand for modern transparency practices. People treat images as though they're responsible for or symbolic of the complications inherent in democratic communication and government



transparency outlined by Walter Lippmann. The debate over cameras in the courtroom is in part a debate over the impact of visual and electronic media, the competence of ordinary citizens and the possibility and value of government transparency.

Chapter Five looks at the Supreme Court Justices' public images, and argues that several phenomena that have emerged during the past few decades and have become especially pronounced during the past few years can be viewed as contributing to the "personalization of the judiciary." Justices are increasingly viewed as individuals rather than as representatives of the institution they serve, and their personalities and private lives have received more attention.

The personalization of politics in general has closed the distance between the conventions of politics and the conventions of entertainment celebrity, in some cases closing that distance completely. However, I view personalization as a less extreme dynamic than celebritization, and while there is some movement in this direction, the Supreme Court Justices are not celebrities. Something slightly more subtle is going on, and I think it's best described as personalization.

The judiciary has traditionally resisted the trend towards personalization because judges' roles call for them to maintain at least the partial appearance that they are neutral arbiters of the law, insulated from both the public and their own preferences – in some ways, non-persons. However, several recent developments have highlighted judges' individuality and in some cases have emphasized their personal lives.

I argue that a few developments both inside and outside the court can be viewed as linked because they all contribute to the personalization of the judiciary: the justices' increasingly frequent communication with the lay public, the personalizing depictions of the justices in journalism and popular culture, and the justices' recent tendency to write many separate opinions, highlighting their individual views rather than speaking as an institution. These are separate developments but they're mutually reinforcing. This personalization can be viewed as a form of transparency, because these practices reveal justices' thoughts outside of their published opinions.

Several factors have encouraged the personalization of the judiciary. First, the factors that paved the way for the modern instantiation of transparency and the personalization of politics have played a role. These include the commercial media structure, adversarial journalism, cynicism towards authority, scandal politics and the necessity of public appeals. Second, the Court's role in American politics and culture has changed. Since the 1930s there has been a stronger recognition that law is made rather than discovered by judges, and influenced by their views. In the 1950s and 1960s, the Warren Court's jurisprudence imbued constitutional interpretation with a commitment to social justice, equality, and individual autonomy, in the process extending rights to individuals where they previously weren't recognized and asserting that social reform could be enacted through courts. Many of these cases, and those that later continued the Warren Court's tradition, touched a nerve in the country, particularly in the conservative movement, and this led to harsh criticism of the Warren Court's approach and sometimes to criticism of judges in general. The court's

opponents have been passionate and vocal, and the resulting battles have sharpened and made more apparent the tension between constitutional and majoritarian principles.

The final factor that has encouraged the personalization of the judiciary grows from the combination of the first two. The contemporary political atmosphere creates the expectation that officials will engage with the public to present their views and if necessary will defend themselves in public forums. In some cases, following harsh criticism, the justices have been venturing out into the world, both physically and rhetorically, in self-defense. Their legitimacy has been questioned in public discourse, and the way to regain one's legitimacy today is to make a public appeal.

The personalization of the judiciary should not be condemned. It's helpful to acknowledge that judges are individuals and have different styles of jurisprudence that will lead them to different results. If citizens understand this they'll bring a realistic perspective to the confirmation process, where their opinions may influence their Senators' decisions. However, some nuance is necessary to preserve an understanding of the dual nature of judging – the fact that it has both political and principled aspects.

Those who bemoan the personalization of the judiciary are to some extent fighting a losing battle. The Court exists within the new political and cultural environment I've been describing. This environment includes the attitude that more information is always better, the drive to peel back the curtain cloaking authority figures, and the necessity of gaining public support for official actions. While judges aren't tied to the public in the same way as elected officials, their constitutional role

requires that the public respect their decisions. In the contemporary United States, the way to gain this respect is to address the public directly and explain yourself. This tendency represents a change in strategies of legitimation for all officials during the past several decades, but it is a much bigger change for the judiciary, because judges have traditionally cultivated distance rather than familiarity. This new form of legitimation puts justices in a bind: it can hurt their image of impartiality, but it's also necessary to forge respect for it.

## **CHAPTER ONE:**

### **THE IDEAL OF GOVERNMENT TRANSPARENCY AND THE JUDICIAL ROLE**

The ideal of government transparency -- the principle that government processes and decisions should be visible and understandable to the public -- is generally embraced as an unqualified good and a fundamental tenet of American democracy. This ideal is evident when it's breeched because the breeches are criticized and litigated. A whole constellation of interest groups track government secrecy practices. Both major political parties laud government transparency; legislation to strengthen the *Freedom of Information Act* has been sponsored by both Democrats and Republicans. However, government transparency is more complicated than many of its advocates suggest. It works better in some institutions than in others. Furthermore, the concrete practices through which transparency is enacted don't always line up with its purported goals, and sometimes directly contradict them.

This chapter explores transparency as a matter of theory. I have two main goals here. First, I describe the main arguments transparency advocates make for the importance of this ideal and discuss these arguments' roots in struggles against arbitrary government and in liberal democratic theory. This is important because in the next chapter and throughout the dissertation I'll describe transparency's implementation in concrete practices and policies, and I'll discuss the ways in which transparency practices today are sometimes different from the vision painted by liberal

democratic theorists and contemporary advocates. My second main goal for this chapter is to explain why, even if transparency in practice were always as useful as it can seem in theory, it still would not be a perfect fit for the federal judiciary.

Transparency often brings government and the public closer together, and this can be a problem for courts and judges, whose constitutional role sets them apart from the public.

### **What is government transparency?**

The term government transparency can be understood using simple metaphors from everyday life. We can see a flower inside a glass paperweight because the glass is transparent. The gears of clear plastic watches and the wires of clear plastic telephones are visible because the plastic is transparent. We can see the shapes and colors of the wires and gears, where they go and how they work. Similarly, the term “government transparency” implies that, if government is transparent, we can see what is going on inside it. The term has come to mean not only that we can see what the government is doing, but also that we can see which people and organizations are involved, what their motivations and intentions are, and what processes are used to conduct government business. If a particular process or relationship is transparent, that means that the participants and their motivations and intentions are visible.

A different definition of transparency is often used in relation to technology. In this usage, transparency indicates *invisibility*, and this is often desirable. For example, if I log onto an airline booking web site and type in departure and destination cities

and a date, the software connected to the web site perform many actions that I, the user, never see. My request is checked against databases of seats and prices and dates, taking into account special conditions for that day and the reservations already made by other people. All I see is the final result: a list of the available seats and their prices. The processes that produced this result have been invisible, or transparent, to me. Making these processes visible would clutter the experience of using the technology, like placing plumbing and wiring outside of walls. So, the process is made as seamless, or transparent, as possible. If this definition of transparency were applied to the paperweight example above, the glass would represent the processes that are invisible. The glass is transparent, so we look right through it, seeing only the end result, or what is on the other side: the available seats or the flower.

So, in the political context, making a process transparent means revealing its inner workings, while in the technological context, making a process transparent means hiding its inner workings to create an impression of seamlessness and ease of use. In the political context, the point is to show the seams.

This can take many different forms. It may mean revealing who was present at a meeting and who was consulted beforehand. It may mean requiring written reasons for a decision or a custom that officials discuss their reasons in interviews with the press. It may involve providing access to campaign finance and lobbying records to determine whether certain interests were given undue attention or what organizations bought ads supporting a particular position in a state referendum.

Making government transparent can be viewed as showing the government's "back stage." In *The Presentation of Self in Everyday Life*, Erving Goffman introduces this concept as part of his framework for analyzing social interactions from a dramaturgical point of view. Goffman's basic suggestion is that we view interactions, even the most mundane, as performances. Our socialized selves are made up of the performances we put on. People present themselves to others in such a way that they can shape the impressions others form of them. They accentuate some aspects of their activities and conceal other aspects. In doing this, people create and maintain a particular definition of the situation they're in. They use techniques of impression management to avoid disruptions that may alter the definition of the situation they're trying to maintain.<sup>1</sup>

In Goffman's framework, a performance team is a set of people who cooperate to create a particular impression for an audience – the people they're interacting with. They accomplish this by managing front and back stages. A front stage is a place where a performance is presented. A back stage is a place where a performance is prepared, and where the actors may act in ways that contradict the impression fostered by the performance. Different language and behavior are appropriate in each region. To fully manage the impression produced, the audience must be prevented from accessing the back stage. Goffman points out that the line between the back stage and

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<sup>1</sup> E. Goffman, *The Presentation of Self in Everyday Life* (Woodstock, New York: The Overlook Press, 1973).



the front stage is very important in our society. This is the line, for example, between the living room and the bathroom.<sup>2</sup>

So, we might think of the ideal of government transparency as encouraging citizen access to a government's back stage. This ideal suggests that we need to see more than the performance – we need to see why and how the performance has been created. Ideally, of course, the front and back stages will be harmonious. But the ideal of transparency implies that this is sometimes not the case, and that citizens should have an opportunity to find out when it is not.

### **Pre-democratic roots**

The idea that states' actions and decisions should be communicated to or knowable by the people ruled by them began to take shape during European struggles against despotism in the 17<sup>th</sup> and 18<sup>th</sup> centuries. Calls for making government operations visible were tightly interwoven with calls for the right to publish without government interference and to criticize the government publicly. These claims were made in the context of broader struggles to end the arbitrary exercise of government power and to carve out spaces for collective life outside of the home but beyond the reach of the state.<sup>3</sup> During these early struggles, there weren't any democracies in existence. The ideal of government visibility and openness came more from a desire to limit tyranny than from a desire to make the government do the bidding of the majority.

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<sup>2</sup> Ibid.

<sup>3</sup> J. Keane, *The Media and Democracy* (Cambridge, UK: Polity Press, 1991). J. Keane, *Democracy and Civil Society* (London: Verso, 1988), J. Keane, ed., *Civil Society and the State* (London: Verso, 1988).

Articulations of the right to freedom of the press first emerged in Britain. During the English Revolution, writers penned defenses of liberty of the press and printers fought against state control of their operations. This struggle continued through the 18<sup>th</sup> century. The monarchy abandoned its licensing system in 1694 and the first daily newspaper was launched in 1702. The government's legal authority to issue general warrants for seditious charges was abolished in 1760.<sup>4</sup> Calls for liberty of the press entailed and assumed access to information about affairs of state, because politics was the primary subject discussed in the newspapers and pamphlets. Thus, defenses of liberty of the press often included references to the benefits of learning information about government. Calls for access to information about government were also linked to ideas about the importance of developing "public opinion," understood as a manner of thinking that relied on humans' use of reason to make and evaluate public arguments and that eschewed traditional, dogmatic beliefs. Early modern advocates of liberty of the press argued that laws and government policies should be judged and criticized by public opinion, and this made information about governments vital.<sup>5</sup>

As these arguments gained force, a rhetorical association between despotism and secrecy became common. A despotic government was understood to be one that exercised power in an arbitrary manner and unlimited capacity, unseen and unknown by its subjects. Some 18<sup>th</sup> century European rulers, seeking to distinguish themselves from the negative connotations of despotism, began to provide basic information about

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<sup>4</sup> Keane, *The Media and Democracy*.

<sup>5</sup> *Ibid.*

wars, treaties, and other actions. Royal edicts were published along with long preambles to justify them. Ministers produced pamphlets defending their decisions. While governments were taking these steps, social groups involved in science, art, literature and religion campaigned for more information about governments, producing printed materials to advocate for their positions. These endeavors strengthened the association between secrecy and bad government.<sup>6</sup> In Weberian terms, this was a transition from traditional authority to rational authority, which required the giving of reasons rather than the assertion of power simply because one could do so.

John Keane, in chronicling the early history of liberty of the press, emphasizes that the visions put forward by its early proponents were largely utopian, and were often thwarted in practice by stamp taxes, regulation of distribution, arrests of printers, and sedition trials in England, and by even more forceful suppression of the press in the American colonies. Poverty and illiteracy kept many from participating in this new form of communication. However, the arguments published by groups agitating against despotism demonstrate that a new framework of ideas was developing. The seeds of many future justifications for open government can be found in the pleas of these early campaigners. These seeds include the belief in human beings' capacity to use reason, the emphasis on the importance of public debate and public opinion formation, and the goal of limiting the power that governors could exercise over the

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<sup>6</sup> Ibid.

governed.<sup>7</sup> Enlightenment ideas were absorbed into historical movements against absolutist rule, and opposition to government secrecy was central to these ideas and movements.

As ideas about democracy, and democracies themselves, began to emerge, more complex and varied arguments about why governments should be visible were proposed. Arguments made by 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> century democratic thinkers form parts of our contemporary lexicon about government transparency and its importance to democracy. When advocates today explain why transparency measures should be passed or preserved, they often use reasons suggested by democratic theorists long before such measures existed. In the next section, I'll describe the primary categories of arguments for transparency and explain how these arguments have been presented in several democratic thinkers' frameworks. These thinkers are not exhaustive of transparency theorists, but they show this ideal's roots and they highlight the aspects that are important to contemporary arguments.

### **Arguments in favor of transparency**

Proponents of government transparency make four main types of arguments about why and how it is valuable to democracy. They argue that transparency creates informed citizens, bolsters government legitimacy, strengthens accountability and prevents corruption.

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<sup>7</sup> Ibid.

### Transparency creates informed citizens

Some argue that transparency is important because information about government is essential to the ideal of the informed citizen. Government transparency gives citizens information with which to make informed decisions when they participate by voting, petitioning the government, or publishing their opinions. Though the ideal of the rational citizen has not always been paramount in American politics, the idea that humans are capable of rational thought and are able to make sound self governing decisions animated early democratic theorists whose ideas influenced the development of democratic institutions.

In the mid-19<sup>th</sup> century, British political theorist John Stuart Mill argued that informing citizens is vital to making democracy work. Mill's understanding of democracy has been referred to as "developmental democracy" because it emphasizes that self-governance helps develop people's virtue and intelligence.<sup>8</sup> In *Considerations on Representative Government*, Mill contends that for any form of government to be successful, the people ruled by it must be able to perform the duties required by it, and thus must have the qualities necessary for those duties. Government institutions alone are not enough, he argues; their proper functioning depends on the skills, habits, and beliefs of citizens. Thus, the most important criterion of a good government is its ability to promote the virtue and intelligence of those governed.<sup>9</sup>

Mill was writing during the 1860s, when people both in England and the United States were worried about the extension of the vote to men of lower means and

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<sup>8</sup> C.B. MacPherson, *The Life and Times of Liberal Democracy* (Oxford: Oxford University Press, 1977).  
D. Held, *Models of Democracy* (Cambridge: Polity, 1987).

<sup>9</sup> J. S. Mill, *Considerations on Representative Government* (Amherst, NY: Prometheus Books, 1991).

social class, and many viewed these men as irrational and driven by class interests alone. This treatise appears to reflect some of that anxiety. However, Mill argues throughout that participation itself would make these men more fit for self-governance, by developing their intellects and virtues.

Mill writes that governments work in two primary modes: they influence and educate human minds, and they conduct public business. He argues that popular representative government is the form best suited to fulfilling these functions because self-governance promotes an active character, in contrast to the negative character promoted by despotism. This active character helps people stand up for their rights, creates prosperity, and promotes morality. Mill argues that fulfilling public duties is a form of moral education because it encourages people to think about the interests of others.<sup>10</sup> According to Mill, one possible defect in representative government is that the government may not succeed at improving and making use of peoples' faculties. The solution to this problem is to provide the most possible publicity and liberty of discussion. Making government operations known to the people and allowing them to discuss their merits enhances peoples' participation in government, and the more they participate, the more the process will educate them.<sup>11</sup>

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<sup>10</sup> Ibid. 26-80.

<sup>11</sup> Ibid. 120-143.

### Transparency bolsters government legitimacy

Government transparency is also understood to bolster government legitimacy. A democratic government is legitimate if the public consents to its rule, and this consent is meaningful if citizens know what they are consenting to. Thus, a government must be visible to be legitimate. This legitimacy gives a government the authority to exercise power.

Thomas Paine's arguments against hereditary rule and in favor of limited constitutional government place government visibility at the center of government legitimacy and underline his view that ordinary people can understand public affairs. Paine emigrated from England to the American colonies in 1774 and wrote and published several pamphlets defending the French and American revolutions. He used a popular vocabulary and a writing style that appealed to common people, reinforcing the idea that politics is the business of ordinary people, not just those with official positions.<sup>12</sup> In *Common Sense*, he emphasizes the fact that ordinary people were his audience, writing, "I am offering simple facts, plain arguments, and common sense."<sup>13</sup>

Paine argued that once a nation grows large in size, representative mechanisms are necessary, and it is important that representatives share and act on their constituents' concerns. He takes up this idea in the *Rights of Man*, in which he argues against Edmund Burke's claim that government should act as a trustee, making decisions for citizens rather than acting on citizens' decisions. Paine argues that

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<sup>12</sup> P. Collins, *The Trouble with Tom: The Strange Afterlife and Times of Thomas Paine* (New York: Bloomsbury, 2005); Keane, *The Media and Democracy*; B. Kuklick, "Introduction," in *Political Writings*, ed. B. Kuklick (Cambridge: Cambridge University Press, 1989).

<sup>13</sup> T. Paine, "Common Sense," in *Political Writings*, ed. B. Kuklick (Cambridge: Cambridge University Press, 1989).

frequent elections will help ensure representatives' faithfulness to their constituents' wishes. If they stray from these wishes, he says, they should not be re-elected.<sup>14</sup>

Paine emphasizes that individuals should know the origin and rationale for their government, and that the limited constitutional state he espouses should be visible and understandable to its citizens. He argues that only the republican form of government will withstand this scrutiny, because it is based on principles that are easy to defend. Monarchical governments must put on a show to deceive their subjects, lest any learn that there is no defensible basis for their authority. Hereditary succession requires belief beyond reason, and can only be established through ignorance. This is why, before the American and French Revolutions, government was seemingly made up of mysteries, understandable only to a few. The fact that the "old governments" keep their origins secret implies that they are dishonorable. The origins and rationales of the "new governments" are known and understood because they are honorable and based on reason.<sup>15</sup> Thus, according to Paine, a government's legitimacy is linked to the feasibility of making its rationales known.

Jurgen Habermas also links government openness to government legitimacy. In the *Structural Transformation of the Public Sphere*, he argues that government legitimacy is bolstered when citizens can discuss government policies, rationalizing them and forming public opinion.<sup>16</sup> These discussions create something more than the aggregation of individuals' desires: they identify or approach the idea of the common

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<sup>14</sup> T. Paine, "Rights of Man (Parts 1 and 2)," in *Political Writings*, ed. B. Kuklick (Cambridge: Cambridge University Press, 1989).

<sup>15</sup> Ibid.

<sup>16</sup> J. Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. T. Burger and F. Lawrence (Cambridge, MA: MIT Press, 1991).



good. Habermas argues that these discussions take place in the public sphere, where private persons act as a public, discussing matters of public concern in a context in which freedom of speech is protected. When the public is too large for this discussion to occur face-to-face, it can occur through mass media. In principle, this sphere is open to anyone, all voices are given an equal hearing, and each argument is judged on its rationality rather than the speaker's status. Public opinion can only be formed if a public engages in rational discourse about questions of the common and criticizes state power, and access to government information is necessary for these discussions to take place.

According to Habermas, these ideal conditions were present in the bourgeois public sphere that existed in late 18<sup>th</sup> century Western Europe. He situates this formation in the context of a historical progression of three types of publicness corresponding to three different modes of providing information about government. The first type of publicness existed during the High Middle Ages. In this pre-bourgeois social structure, there were no separate public and private spheres. The feudal lord was not a public or private figure, but "representative publicness" inhered in his concrete existence. He displayed himself before his subjects as the embodiment of authority and power. The subjects were an audience for the display of power rather than a public.<sup>17</sup>

The second type of publicness structured the bourgeois public sphere, which appeared in the 18<sup>th</sup> century as bourgeois society was emerging. The separation of

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<sup>17</sup> Ibid. 5-12.

spheres was vital to this process. By the end of the 18<sup>th</sup> century the feudal powers had disintegrated and separated into private and public elements. Religion became a private matter and the state bureaucracy, the military, judicial administration and parliament emerged as elements of public power. Occupational status groups developed into bourgeois society, a private domain. The first modern constitutions, created during this time, listed citizens' guaranteed rights, and the ideals they expressed helped shape the idea of society as a sphere of private autonomy confronting public power. Publicness no longer referred to the power vested in the concrete person of the feudal lord, but rather referred to an entire sphere of power, that of the state. The private persons subject to this public power formed the public, which mediated between these two spheres, rationalizing state power through criticism and debate. In so doing, Habermas maintains, they created public opinion, a mode of thinking and set of ideas about the common good.<sup>18</sup>

In this understanding of the public sphere, which Habermas refers to as the Liberal Model, citizens' access to information about government is paramount, because it allows them to discuss and criticize the state. Thus, there is a push against government secrecy embedded in this framework as well as a demand that the state give reasons for its exercises of power, legitimating state power by preventing arbitrariness.

Habermas argues that the Liberal Model of the public sphere is important as a framework from which to make normative claims rooted in "institutional requirements

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<sup>18</sup> Ibid. 14-26.

of publicness,” but that it does not for the most part describe actual relationships within industrially advanced, mass welfare democracies. Ideological and social factors crucial to the Liberal Model have changed, leading to the third stage of publicness, the stage stretching up to the present. According to Habermas, crises in the economy caused private persons to seek protection from the state, and states took up issues previously considered private. This led the public and private spheres to mutually infiltrate each other, resulting in what Habermas calls the “refeudalization of the public sphere.”<sup>19</sup>

Additionally, as the original 18th century democracies transitioned into mass democracies in industrially-advanced welfare states, the public expanded beyond the bourgeoisie, losing its social exclusivity and cohesion, and the public sphere became a sphere of competition between different interest groups, characterized by confrontation and compromise rather than consensus achieved through public discourse. Today, Habermas writes, it is social organizations rather than individuals who act in relation to the state in the public sphere. Large organizations make compromises with the state and each other, often in secret, and then attempt to secure approval from the population through a staged form of publicity. There is no longer any appeal to rationality, only appeals to interests. Thus, the critical functions of the public sphere are considerably weakened in welfare-state democracies. Today publicness often takes the form of “publicity,” which is used to gain prestige and acceptance for the secretly crafted policies of interest groups. The recipients of this

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<sup>19</sup> Ibid. 141-150.

information are treated as an audience, or as manipulable consumers, rather than as a rational, critical public.<sup>20</sup>

Habermas contends that the public sphere, and thus the functioning of democracy, can be saved. He writes that if “the requirement of publicness” is extended to the organizations acting in relation to the state, they will constitute a “public of organized persons.” The attributes that once characterized the public sphere of individual persons must be applied to these organizations, and among these attributes is transparency. In this way, a new kind of public sphere will be formed, and this will give political compromises legitimacy.<sup>21</sup>

#### Transparency promotes accountability

Transparency is also understood to help citizens hold representatives accountable and to help officials hold each other accountable. Mark Bovens defines accountability as “a relationship between an actor and a forum in which the actor has an obligation to explain and justify his or her conduct, the forum can pose questions and pass judgment, and the actor may face consequences.”<sup>22</sup> We might distinguish between “soft accountability,” which involves effects on one’s reputation, and “hard accountability,” which involves concrete sanctions such as removal from a position. We can also distinguish between “democratic accountability,” which means government is accountable to citizens, and “republican accountability,” which means

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<sup>20</sup> Ibid. 159-174.

<sup>21</sup> Ibid. 404.

<sup>22</sup> M. Bovens, "Analysing and Assessing Accountability: A Conceptual Framework," *European Law Journal* 13, no. 4 (2007).

one branch of government is accountable to another. Citizens can hold their legislators and some executive officials accountable by voting them out of office or protesting their actions. The press can hold officials accountable by asking them to justify their decisions and blaming them for failures. Legislators hold executive branch officials accountable by asking them to testify at hearings to explain their actions.

Transparency is a tool with which to create accountability. Some practices, such as subpoenaing officials to testify at Congressional hearings, produce both accountability and transparency. The principles are similar but have different emphases: transparency emphasizes providing information and accountability emphasizes making a judgment with that information to assign responsibility, blame, or punishment. Bovens characterizes this difference by arguing that although transparency is an aid to accountability, it is not enough to create it, because transparency does not involve scrutiny by a specific forum.<sup>23</sup>

In *Considerations on Representative Government*, John Stuart Mill links government transparency (which he calls “publicity”) to accountability in several ways. He argues that popular assemblies should ultimately control government operations, but should only do what they can do well. A popular assembly is well suited to deliberation, not action. Public administration requires knowledge and experience, and should be conducted by ministers rather than parliament. Although this means that representative bodies don’t literally govern, Mill says that their job is to watch and control those who are governing, to cast the light of publicity on their

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<sup>23</sup> Ibid. 453.

actions and to ask them to justify these actions.<sup>24</sup> This is an example of republican accountability aided by transparency.

On the question of whether representatives should make pledges binding them to the instructions of their constituents, Mill argues that representatives should seek to achieve a balance between their constituents' opinions and their own wisdom, thus placing himself between Thomas Paine, who argued that representatives should carry out their constituents' wishes, and Edmund Burke, who argued that representatives should make decisions in their constituents' interests. Mill trusts the people and their ability to gain wisdom by participating in government, but he argues that members of Parliament, because of their higher occupational status and level of education, will be wiser, and that this wisdom should be put to use. Transparency plays a role in this dynamic, helping to create democratic accountability. Mill argues that candidates and members of Parliament must justify their actions and describe the opinions that guide them so that citizens can use this knowledge when they vote.<sup>25</sup>

Mill argues that executive departments should each be the responsibility of one individual, rather than a group. This is because if a group makes a decision, it is impossible for citizens to know how it was made, who voted for it, and who is ultimately responsible for it. "Boards are screens," he writes, and they do not produce responsibility and accountability. An executive official should seek counsel from a variety of advisors, but the advice and the reasons for it should be made known to both Parliament and the public. Mill writes that this information will produce better

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<sup>24</sup> Mill, *Considerations on Representative Government*. 97-119.

<sup>25</sup> *Ibid.* 233-248.

accountability and more thoughtful advice.<sup>26</sup> In this example, Mill is arguing that both democratic and republican accountability are aided by transparency.

Mill also argues that citizens' votes should be public because this will ensure that votes are made for the public good rather than for selfish reasons. Votes will be more thoughtful because people will have to defend their choices. This idea, of course, is very different from *government* transparency, because it puts the burden of openness on citizens themselves. However, supports the claim that with openness comes accountability.<sup>27</sup>

#### Transparency decreases corruption

Finally, government transparency is understood to decrease corruption, or government officials' use of their public positions for private gain. This argument holds that if government procedures and officials' decisions, associates and sponsors are visible, officials will be less likely to engage in corrupt activities because of the possibility of getting caught and losing their position or reputation. Secrecy is understood to provide an incentive or temptation to engage in wrongdoing because it reduces the risk of censure. Some advocates position transparency as synonymous with fighting corruption. The organization Transparency International states that eliminating corruption is its main goal,<sup>28</sup> and many organizations that provide

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<sup>26</sup> Ibid. 261-285. This is the opposite of the contemporary thinking in the United States regarding Presidential advisors, which holds that advice given to the President must be confidential to ensure that it is wise and that there is no "chilling effect."

<sup>27</sup> Ibid. 205-228.

<sup>28</sup> The organization's web site states, "Transparency International, the global civil society organisation leading the fight against corruption, brings people together in a powerful worldwide coalition to end the

information about government focus on information that is most useful in detecting corruption, such as campaign finance and lobbying records.<sup>29</sup> The anti-corruption argument for transparency dovetails with the argument that we should strengthen free speech protection because of the “checking value of the First Amendment.” This argument holds that freedom of expression is valuable in a democracy because it helps check the abuse of power.<sup>30</sup>

So, proponents of government transparency make four main claims: transparency creates informed citizens, enhances accountability, strengthens government legitimacy, and decreases corruption. Some separate the justifications for transparency into two categories: consequentialist and normative.<sup>31</sup> These can also be described as focused on, respectively, good governance and democracy. Consequentialist or good governance justifications are those that point to a practical result that will be brought about by transparency. Normative or democratic justifications are those that posit that transparency is a democratic good in and of itself. However, these two categories are not mutually exclusive and most justifications of transparency bleed into both.

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devastating impact of corruption on men, women and children around the world. TI’s mission is to create change towards a world free of corruption.” (<http://www.transparency.org>).

<sup>29</sup> See [www.contractormisconduct.org](http://www.contractormisconduct.org), [www.earmarkwatch.org](http://www.earmarkwatch.org), [www.followthemoney.org](http://www.followthemoney.org), and [www.opensecrets.org](http://www.opensecrets.org).

<sup>30</sup> V. Blasi, "The Checking Value of the First Amendment" *ABF Res. J.* 521 (1977).

<sup>31</sup> M. Fenster, "The Opacity of Transparency," (Social Sciences Research Council, 2005).



## Questioning the possibility of government transparency

Although liberal democratic theory often lauds government transparency, the transparency ideal highlights some fundamental tensions in liberal representative democracy and in the role communication is understood to play in it. In placing communication at the center of the democratic dynamic, many assume that communication will work smoothly – that information will be accurate and meaningful, that it can be widely disseminated by a neutral entity that won't change it, and that citizens will comprehend it in a particular way. In the 1920s, journalist Walter Lippmann argued that these assumptions were faulty, and that communication should not hold the exalted status it holds in democratic theory. Lippmann's claims were disputed by American philosopher John Dewey, and their disagreement set the contours of an ongoing debate about the possibility and value of communication in a democracy, and thus, of meaningful government transparency.

The argument between Dewey and Lippmann concerned how democracy could meet particular challenges becoming apparent when they were writing in the 1920s. Among the many cultural changes that took place during the last two decades of the 19<sup>th</sup> century and the first two decades of the 20<sup>th</sup> century, several had direct bearing on the way people thought about democracy. The industrial revolution brought mass migrations to cities, and the consequent rootlessness and breakdown of more intimate community bonds prompted observations about the “metropolitan personality”<sup>32</sup> and

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<sup>32</sup> G. Simmel, "The Metropolis and Mental Life," in *On Individuality and Social Forms*, ed. D. N. Levine, *The Heritage of Sociology* (Chicago: University of Chicago Press, 1903). The “metropolitan personality” is Simmel's understanding of the psychology of urban living, created by the rush of new external stimuli that cities produce and the difficulty of maintaining one's individuality in this

fears about the irrationality of the crowd or mob.<sup>33</sup> Technological advancements and the growth of large corporations made society more complex, which suggested to many that governance required sophisticated technical knowledge. Advocates of progressivism argued that governance should be guided by efficiency and neutral expertise rather than loyalty and partisanship, as it had been in the 19<sup>th</sup> century.<sup>34</sup> All of this suggested that self-governance could be a difficult task for ordinary citizens.

Many Americans in the 1920s worried that democracy was in crisis.<sup>35</sup> The growth of the mass media and the use of propaganda during World War I helped feed these fears. Newspapers had existed in some form for two centuries, but news photography emerged at the turn of the 20<sup>th</sup> century and tabloids became a more prominent part of the printed landscape. Additionally, new forms of mass media were making instantaneous communication over long distances possible, separating communication from transportation. The telephone and the telegraph were invented in the 19<sup>th</sup> century, facilitating person-to-person communication, and radio was invented in the early 20<sup>th</sup> century, allowing one-to-many communication.<sup>36</sup> Radio was used for propaganda purposes in World War I, and this encouraged fears of its effects. The

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environment. The metropolitan personality is characterized by a “calculating mind” and a purposefully “blasé attitude.”

<sup>33</sup> M. Schudson, *Discovering the News* (Basic Books, 1978). 126-130.

<sup>34</sup> M. McGerr, *The Decline of Popular Politics* (New York: Oxford University Press, 1986). R. Wiebe, *The Search for Order: 1877-1920* (New York: Hill and Wang, 1967).

<sup>35</sup> Schudson, *Discovering the News*.

<sup>36</sup> R.B. Horwitz, *The Irony of Regulatory Reform: The Deregulation of American Telecommunications* (Oxford University Press, 1988). D. J. Czitrom, *Media and the American Mind: From Morse to McLuhan* (University of North Carolina Press, 1983).

public relations industry was born in the early 20<sup>th</sup> century, creating new avenues for influencing the public.<sup>37</sup>

These new forms of media, along with fears about new forms of urbanized social life, created concerns about the media's power and effect on democracy. Emblematic of this type of concern was the "hypodermic needle theory," also known as the "magic bullet theory," which posited that the media "inject" messages into people's minds untempered by skepticism or rationality.<sup>38</sup> New developments in psychology suggested that the irrational and the unconscious played a large role in peoples' thinking, fortifying doubts about whether the public could be trusted to make good self-governing decisions.<sup>39</sup> These perspectives on human behavior and information processing created problems for the ideal of government transparency because they questioned whether people could understand it adequately and raised the possibility that information from and about the government did more harm than good.

In *Public Opinion*, written in 1921, Lippmann echoes this despair over the state of democracy and the possibility and desirability of government transparency.<sup>40</sup> Lippmann writes that democratic theory is built around the assumption of an "omnicompetent citizen," able to make sound, rational decisions about public affairs if given enough information.<sup>41</sup> This accords with the confidence and optimism that Paine, Mill, Habermas and other democratic thinkers display about democratic

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<sup>37</sup> Schudson, *Discovering the News*. 123-143.

<sup>38</sup> S. Lowery and M. L. DeFleur, *Milestones in Mass Communication Research* (New York: Longman, Inc., 1983). 85-112, 233-295.

<sup>39</sup> Schudson, *Discovering the News*. 123-143.

<sup>40</sup> W. Lippman, *Public Opinion* (New York: Simon and Schuster, 1997). 18.

<sup>41</sup> *Ibid.* 173.

citizens' ability to understand and participate in governance. Lippmann describes this set of ideas as the "intolerable and unworkable fiction that each of us must acquire a competent opinion about all public affairs."<sup>42</sup>

Lippmann provides several sets of reasons for his skeptical stance. Peoples' access to facts is limited by many factors. They don't have the time necessary to adequately follow public affairs and most simply don't have the interest. The information people do learn is distorted by government propaganda and censorship. Lippmann's experiences as a journalist and intelligence officer during World War I showed him how easy it is to manipulate public opinion. He writes that the "manufacture of consent" was supposed to have died with democracy but it didn't; manipulation is still common.<sup>43</sup> Furthermore, newspapers are businesses, and news – episodic bursts of information fitted to conventions and preconceptions – is not the same thing as truth.<sup>44</sup> However, for Lippmann, completeness and accuracy of information would not be enough to solve the problem. The more intractable problem concerns how people form opinions, the very nature of human perception and communication.

We know our world only indirectly, Lippmann argues, because we adjust to our environment through fictions, or mental images, shaped by each of our experiences. He calls this organizing, mediating layer between human beings and their environments the "pseudo-environment."<sup>45</sup> Each person's pseudo-environment is

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<sup>42</sup> Ibid. 19, 161-174.

<sup>43</sup> Ibid. 158.

<sup>44</sup> Ibid. pp. 226-230.

<sup>45</sup> Ibid. 10.

useful because it provides a set of categories to organize information and perception. However, the pseudo-environment prevents us from knowing our world directly, and thus it is both productive and destructive of meaning. There will always be a disjuncture between the pseudo-environment and the real environment.

Lippmann argues that because people have inaccurate pictures in their heads, they cannot make sound judgments about public affairs. Public opinion, he says, is created by the human processes of moralizing, codifying, generalizing, personalizing and dramatizing, and is not a good guide to policy decisions.<sup>46</sup> He argues that democrats treat the challenge of creating public opinion as one that can be met by providing civil liberties such as freedom of discussion. However, the truth is not reached through discussion, because the pseudo-environment interferes with this process.<sup>47</sup> Not only does this contradict Habermas' vision of the liberal public sphere, but it also contradicts the early 20<sup>th</sup> century First Amendment jurisprudence developed in Oliver Wendell Holmes' and Louis Brandeis' dissenting and concurring opinions, which would later become the law of the land. These opinions adopt an argument presented in John Stuart Mill's *On Liberty*, positing that unfettered discourse will uncover the truth about an issue.<sup>48</sup>

What is needed, Lippmann argues, is reliance on the interpretations of experts rather than journalists or regular citizens. Lippmann describes expertness as “a multiplication of aspects we are prepared to discover, plus the habit of discounting our

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<sup>46</sup> Ibid. pp. 80-100.

<sup>47</sup> Ibid. 202.

<sup>48</sup> *Abrams v. United States*, 250 U.S. 616 (1919); *Whitney v. California*, 274 U.S. 357 (1927). J.S. Mill, *On Liberty* (Cambridge, MA: Hackett Publishing Company, Inc., 1978).

own expectations.”<sup>49</sup> Again contradicting Habermasian ideas, Lippmann argues that common interests will not be discovered by public opinion and can only be arrived at by experts, who can develop a realistic understanding of the world because they have direct rather than mediated knowledge of their domain of expertise. While the mass media distort information, experts will create clarity and accuracy. Lippmann suggests a two-step process: first, experts organize facts and submit them to representatives and policy-makers, and then these officials make decisions based on this information.<sup>50</sup> Citizens, who don’t have the time, attention or ability to digest this information, can make judgments and claims about the decision-making procedures but not the substance. All of this paints a bleak picture of government transparency. Lippmann argues that accurate information is necessary for governance, but he does not believe the public can achieve the necessary understanding.

In *The Public and Its Problems*, written in 1927, John Dewey articulates a different understanding of the crisis in democracy.<sup>51</sup> Unlike Lippmann, he is optimistic about peoples’ ability to understand and participate in public affairs. He begins from the proposition that human activity has consequences, and these consequences can be private – affecting only those involved, or public—affecting those not directly involved. A public, for Dewey, is those affected by significant indirect consequences of human activity and who therefore have shared interests in regulating this activity. The public must recognize its common interests and organize itself to address them through political institutions and representatives. A good state is

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<sup>49</sup> Lippman, *Public Opinion*. 76.

<sup>50</sup> *Ibid.* 239-249.

<sup>51</sup> J. Dewey, *The Public and Its Problems* (Athens, OH: Ohio University Press, 1954). 123.

one that can effectively organize the public and one whose officials care for the public interest.<sup>52</sup>

Dewey writes that the democratic public is unarticulated and unorganized, scattered into many different publics. Because there is confusion about the public interest, political representatives are not accountable to the electorate.<sup>53</sup> To understand this problem, we “need to look at the conditions out of which popular government issued.”<sup>54</sup> Dewey writes that the conceptual framework of democracy was developed in a context characterized by face-to-face relationships and stable, homogeneous communities. The “machine age” has been accompanied by more impersonal relationships because modern technology facilitates interaction that is not face-to-face. The problem, according to Dewey, is that our politics and our technology need to be coordinated. We need new ways of conceptualizing democracy that fit with the more mobile, fluid, dynamic, and heterogeneous state of our communities and with the transportation and communication our new technologies allow.

Part of this reconceptualization of democracy, Dewey writes, is an emphasis on communication to discover shared meanings and interests. Dewey agrees with Lippmann that the “omnicompetent citizen” is an illusion, but he argues that this is the case because knowledge is a function of association and communication. The most important conditions for organizing the public are knowledge and insight, and unlike Lippmann, Dewey believes these conditions can be achieved. This will require freedom of expression and openness. Dewey writes, “There can be no public without

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<sup>52</sup> Ibid. 3-36.

<sup>53</sup> Ibid. 121-122.

<sup>54</sup> Ibid. 110.

full publicity with respect to all consequences which concern it.”<sup>55</sup> Social institutions should be investigated and analyzed and the results should be disseminated to all citizens. As part of this process, the news media must be reoriented to foster community and help the public discover and identify itself. Dewey argues that rule by experts would be disastrous because experts are far removed from the peoples’ needs and because they would become tools of economic interests.<sup>56</sup>

Dewey echoes Lippmann in contending that people need accurate knowledge about public affairs in order to be good citizens, but he does not think this is impossible. For Dewey, government transparency is valuable for the role it can play in the larger process of supporting the formation of a public and he believes human beings are capable of understanding this information. Furthermore, Dewey believes that mass media can be a liberating force because they can explain public affairs in such a way that they help form new connections among people, while Lippmann sees mass media as more likely to be agents of manipulation. The debate between Dewey and Lippmann illuminates some of the potential problems posed by the centrality of communication to democracy and its dependence on a competitive, commercial media system. As we will see in the following chapters, these potential problems animate contemporary debates about transparency practices and their deviations from the democratic ideal.

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<sup>55</sup> Ibid. 167.

<sup>56</sup> Ibid. 205-208.



## Exceptions to the expectation of transparency

Aside from the broad concerns about the possibility and value of government transparency illuminated by the debate between Dewey and Lippmann, there are also many arguments against transparency today that focus on special exceptions for particular kinds of information or particular situations.

The most well known exceptions concern information pertaining to national security and war. The argument is that transparency in these instances may endanger American citizens or destroy the tactical advantage of secrecy on the battlefield.<sup>57</sup> Similarly, there is a general acceptance that sources and methods for intelligence and law enforcement must be kept secret.<sup>58</sup> In all of these situations, the secrecy of the activities is a large part of their value. If battle plans or informants' identities become known, they lose their value. Another element that ties these exceptions together is that they all assume and seek to prevent the possibility that the information will fall into the wrong hands. In these cases, there are different possible uses for information – right uses and wrong uses. Transparency advocates may seek national security information so citizens can debate it and hold their leaders accountable, but criminals or adversaries may seek the same information in order to do harm. As pundit George Will said on *This Week* in April 2009, “the problem with transparency is it’s transparent for the terrorists as well.”<sup>59</sup>

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<sup>57</sup> Justice William Brennan, in his opinion in *New York Times Co. v. United States* named troop movements on the battlefield as an exception to the imperative of government transparency. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>58</sup> Official exemptions from the *Freedom of Information Act* were granted for CIA and FBI sources and methods in the form of amendments to that law.

<sup>59</sup> *This Week*, April 19, 2009.

This question of who will get their hands on information and whether they will have ulterior motives can be traced through other exceptions to transparency. This same concern is evident in the issue of witness testimony in courtrooms. In some cases, it would be valuable for jurors to see a particular witness, but some people watching the trial from the audience may wish to seek retribution on the witness for speaking up. A similar conflict occurs when journalists are asked to reveal their sources. For citizens reading their stories, it's useful to know whom the sources are so they can understand how the news was created and judge it accordingly. This makes the news process transparent. However, the audience for the outing of sources may also include the sources' employers, who may take action against them for revealing information. In both of these examples, as in the cases of national security, military operations, intelligence and law enforcement, the appropriateness of making information public is connected to the imagined receivers of the information and their motives.

Personal privacy is also raised as an objection to transparency. The ability to keep the details of one's personal life secret is understood to be a component of personal liberty. This is linked to the general principle that, in a democracy, the balance of power should lean towards citizens, not the government. Government must be transparent but citizens can choose what to reveal about themselves. The right to privacy is also connected to the separation of public and private spheres, a development that paralleled the emergence of the ideal of government transparency

during the 17<sup>th</sup> and 18<sup>th</sup> centuries. The counterpart to the idea that government must be open was the idea that there is a private sphere that should be off limits to government.

The right to privacy comes into direct conflict with the ideal of government transparency when citizens' lives are intertwined with government processes and providing information about government will thus also reveal citizens' private information. Administrative agencies and courts keep records related to personal histories, including details about finances, family relationships, and medical conditions, and complete transparency in these institutions would reveal this information. Thus, personal privacy forms one exemption to the *Freedom of Information Act*, and court documents are sometimes sealed and trials closed for this reason. Information about businesses can also be interwoven with government information, and this creates a conflict when businesses want to keep secrets to maintain a competitive advantage.<sup>60</sup>

Some also criticize transparency for creating additional costs and inefficiency to government processes. Documenting a process or providing information to requesters adds an extra layer of procedures, for which new rules, new staff members, and new technologies are often necessary. Some federal agencies dislike the *Freedom of Information Act* because they experience it as a burden.<sup>61</sup>

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<sup>60</sup> H. N. Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act* (Westport, CT: Greenwood Press, 1999).

<sup>61</sup> Ibid, A. G. Theoharris, "The Freedom of Information Act Versus the FBI," in *A Culture of Secrecy: The Government Versus the People's Right to Know*, ed. A. G. Theoharris (Lawrence, KS: University Press of Kansas, 1998); A. G. Theoharris, ed., *A Culture of Secrecy: The Government Versus the People's Right to Know* (Lawrence, KS: University Press of Kansas, 1998).

Another exception to the principle of government transparency is often referred to as “the sanctity of the deliberative process.” This is the proposition that candid and productive deliberation can only take place if participants know their contributions will be kept secret. The best example of this logic is the fact that the Constitution was written in secret to prevent grandstanding and allow bargaining. This logic also underlies the secrecy of the Supreme Court Justices’ conference and of jury deliberations, and the argument that presidential advisors should not have to testify about the advice they give the President, lest a “chilling effect” be created. Some relationships are so prized that the law protects the confidentiality of the parties’ discussions: doctor/patient, psychiatrist/patient, and lawyer/client (but not, as many wish, journalist/source). Here, too, the argument is that if parties to these relationships thought their conversations would be repeated, they might not be as candid.

### **The judiciary as a model of transparency**

The judicial branch presents a special case for government transparency. In some ways, the judiciary is a model of transparency. However, some principles important to judges’ work clash with the principles underlying the ideal of transparency.

Transparency is central to some judicial procedures. Courtrooms are presumptively open to the public and judges publish written opinions providing reasons for their exercises of power. Keeping trials open to the public is a longstanding norm in the common law system. Secret trials have historically been

understood to invite arbitrariness, corruption, disregard for defendants' rights and the use of courts as instruments of persecution. Allowing third parties to view the proceedings is understood as a way to prevent these abuses of judicial power.<sup>62</sup> Some argue that if trials are open to bystanders, witness testimony will be more trustworthy and additional witnesses may choose to come forward, aiding the goal of reaching the truth.<sup>63</sup> English and American common law history suggests the assumption that spectators will be educated by the proceedings and will develop confidence in the court system and respect for the law.<sup>64</sup> People not directly involved in a trial may be affected by the results, and open trials alert them to how they can avoid legal trouble themselves, helping them to plan their affairs.<sup>65</sup>

Legal scholar Judith Resnik uses a broader lens in discussing the public dimensions of courts. She writes open courts can “provide insights into power” and “generate and reflect democratic norms.”<sup>66</sup> Echoing Habermas' description of the transition from representative publicness to the liberal model of publicness, Resnik describes a chronology of modes of publicness in courts. She writes that the tradition of openness in Renaissance courts served to demonstrate rulers' power and maintain order by showing people the rules they must follow. For this reason, these courts were located on the ground floor of buildings with windows opening to the street so people

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<sup>62</sup> H. L. Cross, *The People's Right to Know: Legal Access to Public Record and Proceedings* (New York: Columbia University Press, 1953). 155-156, 164. *In Re Oliver*, 33 U.S. 257 (1948).

<sup>63</sup> Cross, *The People's Right to Know: Legal Access to Public Record and Proceedings*. 156, 163. *Tanksley v. United States*, 145 F.2d 58 (1944).

<sup>64</sup> Cross, *The People's Right to Know: Legal Access to Public Record and Proceedings*. Pp. 156-164.

<sup>65</sup> *Ibid.* p. 164.

<sup>66</sup> J. Resnik and D.E. Curtis, "From 'Rites' to 'Rights' of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes," in *Representation of Justice*, ed. A. Masson and K. O'Connor (Brussels: P.I.E. - Peter Lang, 2007).

outside could look in. Courts also functioned as repositories of information, storing documents so those not present could later verify facts.

Though public trials originally served to buttress rulers' power, rulers could not contain the effects of the system they had created. Setting up conflict resolution as a public process shaped public attitudes, contributing to the understanding that the audience has a role in trials. As democratic practices gained currency in Europe and countries began to guarantee individual rights, public trials became "embedded in the language of entitlements," and the public gained the power to demand access to trials. Thus, public trials evolved from "rites" to "rights."<sup>67</sup>

Resnik points out that the value of public trials was reinforced by guarantees in the 6<sup>th</sup> Amendment to the United States Constitution and a range of state constitutions and international agreements, and was also recognized by the Federal Rules of Civil Procedure instituted in the 1930s.<sup>68</sup> However, she notes that the openness provided for by these documents is waning. For a variety of reasons, including efficiency, cost, and a perception of over-litigiousness, there is an effort to resolve most cases out of court. Instead of being resolved in public trials with due process requirements, many legal disputes are delegated to administrative agencies or to private venues. Court procedures have been reworked so judges frequently address litigants in their managerial, rather than adjudicatory, capacities, often encouraging Alternative Dispute Resolution and settling out of court. The new methods and venues do not have the

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<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

same transparency stipulations as courts, and often include specific non-disclosure requirements.<sup>69</sup>

Resnik argues that if courts' authority is going to devolve to other bodies, the new venues do not have to be secret and perhaps transparency requirements should be developed for them. While some concerns about public trials are legitimate, it's also clear that companies being sued often push for secrecy measures to avoid bad press and prevent similar lawsuits. In these cases, transparency would not damage personal privacy or trade secrets.<sup>70</sup>

Resnik argues that the benefits of making dispute resolution public go beyond due process. Public trials help people perceive patterns in judgments about right and wrong, and see links between trials and their own lives. In this way, public trials can create and strengthen democratic norms. Resnik argues that, while there are other ways of creating records and amassing documents – such as Congressional inquiries and commissions appointed by Presidents – these processes usually occur when something out of the ordinary has happened, such as the attacks on the World Trade Center and the Pentagon in 2001. While these instances create valuable information,

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<sup>69</sup> J. Resnik, "Uncovering, Disclosing and Discovering How the Public Dimensions of Court-Based Processes Are at Risk," *Chicago-Kent Law Review* 81, no. 521 (2006).

<sup>70</sup> Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act*; Resnik, "Uncovering, Disclosing and Discovering How the Public Dimensions of Court-Based Processes Are at Risk"; Resnik and Curtis, "From 'Rites' to 'Rights' of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes"; J.P. Freeman, "The Ethics of Using Judges to Conceal Wrongdoing," *South Carolina Law Review* 55, no. 829 (2004). R. Zitrin, "Legal Ethics: The Case against Secret Settlements (or, What You Don't Know Can Hurt You)," *J. Inst. Stud. Leg. Ethics* 2 (1999). As I explained in the Introduction, sealed settlements and alternative dispute resolution are both forms of secrecy in courts, but I won't be discussing them in this dissertation. I believe these forms of secrecy stem from a combination of courts' funding and workload and corporations' litigation and public relations strategies, and thus they are issues of the political economy of courts and litigation rather than the conflict between government transparency and the role of courts, which is my focus.

courts provide something different, which is not provided by any other entity. Courts instruct citizens about democratic norms such as individual dignity by publicly addressing a large volume of mundane matters rather than solely high profile, exceptional cases. Instructing citizens about democratic values helps ensure that those commitments are honored.<sup>71</sup>

Resnik's arguments show both that transparency is important to the judiciary and also that the judiciary is an important agent of transparency. Despite these linkages between judicial procedures and the ideal of transparency, however, there are significant divergences. Many of these are rooted in the broad principles that structure the judiciary and the role that courts play in American culture and its constitutional structure.

The contradictions between the judiciary and transparency are more fundamental than in the other branches. With national security information and many of the exceptions to transparency discussed above, the justification for secrecy often rests on the concern that the wrong people will look at the information for the wrong reasons (for example, harming the United States or breaking the law rather than promoting public debate or holding representatives accountable). In the case of the judiciary, however, publicizing certain forms of information is sometimes considered wrong, even for the right people and the right reasons. Sometimes even the right reasons – such as democratic accountability – are not right for the judiciary.

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<sup>71</sup> Resnik and Curtis, "From 'Rites' to 'Rights' of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes."



## **Transparency and the judicial role**

Many justifications for transparency, particularly those that emphasize the need for government accountability, are linked to the principle of majoritarianism, the idea that government decisions should be based on the preferences of the majority. If citizens are to influence officials' thinking, they need information about what government is doing in the first place. However, federal judges' relationship with the public is different from other officials' relationship with the public. The United States is a constitutional democracy, structured by a balance between majoritarian principles and constitutional principles, which define and limit government powers and thus also restrain majorities. The federal judiciary is the main bulwark for constitutional principles.

To facilitate this, federal judges are appointed rather than elected and hold their offices for life. Their role is to represent the Constitution and the laws rather than a particular group of constituents. Thus, federal judges' basis of decision-making is different from that of other officials. Their decisions are supposed to be structured by legal rules drawn from precedent, statutes and the constitution. When the rules aren't clear, judges make new ones, drawn from their interpretation of legal texts. Judges don't make decisions determined by these texts alone; their own experiences and ideologies guide their interpretations of them. However, the judicial mode of decision-making is nevertheless different from decision-making in the other branches, because judges must justify their decisions with reference to these legal texts. Judicial decisions are constrained, though not determined, by these rules.

Sometimes judges' decisions necessarily contravene the wishes of majorities and elected officials. The principle of judicial independence holds that judges should not consult public opinion. This makes the justifications for transparency in a democracy less meaningful for the judiciary and sometimes harmful. Transparency provides an avenue to help citizens more effectively assert power and shape the direction of governance. Judges, however, must be insulated from this public influence and from the wishes of officials in the other branches.

The principles structuring the judicial role are laid out in the *Federalist Papers*. Alexander Hamilton, James Madison and John Jay wrote this series of essays in 1788 to defend the United States Constitution against critics and urge ratification.<sup>72</sup> In Federalist 51, discussing the separation of powers, James Madison writes that although this principle dictates that officials in each branch should be elected by the people rather than appointed by the other branches, this is not “expedient” for the federal judiciary for two reasons. First, the “peculiar qualifications” necessary to judges should be the most important factor in selecting them. This implies that the electorate is not in the best position to determine who has those qualifications. Second, appointing judges is less dangerous than appointing other types of officials because federal judges' permanent tenure means they are not beholden to the executive officials who appoint them.<sup>73</sup>

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<sup>72</sup> R.P. Fairfield, "Introduction," in *The Federalist Papers*, ed. R.P. Fairfield (Garden City, New York: Anchor Books, 1961). vii-xii.

<sup>73</sup> J. Madison, "The Federalist Number 51," in *The Federalist Papers*, ed. R.P. Fairfield (Garden City, New York: Anchor Books, 1961). 159.

Alexander Hamilton takes up the issue of judicial tenure in Federalist 78. He defends the Constitution's provision that federal judges hold their offices for life, or "in good behavior," explaining that this provision will help prevent the legislative and executive branches from encroaching on the judiciary's prerogatives and will maintain the "steady, upright, impartial administration of the laws." As long as separation of powers is maintained, the judiciary will always be the "least dangerous" of the three branches because, having no command over the sword or the purse, judges have "neither force nor will," only "judgment."<sup>74</sup> As a consequence, the judiciary is the weakest branch, and must be able to withstand attacks from the other branches. Lifetime appointment helps maintain judicial independence because it ensures that federal judges will not be dependent on legislative or executive officials. Hamilton argues that judicial independence is especially important in limited constitutional governments, where legislative authority is limited to specific areas. When legislatures venture outside of their constitutionally designated powers, the courts must declare these acts to be void.<sup>75</sup>

Critics protested in 1788, as they do now, that this power of judicial review places the judiciary above the legislature. Hamilton defends this power. Because it represents the intentions of the people, the Constitution is the highest form of law, and must supersede statutes, which represent the intentions of the legislature. The legislature cannot be expected to judge the constitutionality of its own acts and this

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<sup>74</sup> A. Hamilton, "The Federalist Number 78," in *The Federalist Papers*, ed. R.P. Fairfield (Garden City, New York: Anchor Books, 1961). 227.

<sup>75</sup> *Ibid.* 228.

task falls to the courts, which must therefore also determine the Constitution's meaning.<sup>76</sup>

Hamilton writes that individual rights, particularly those of minority group members, will sometimes be threatened by what he calls "ill humors" or "momentary inclination(s)" disseminated among the people. The electorate may pressure their representatives to enact laws influenced by these prejudices. In these instances, the legislature's actions will be tempered by the knowledge that the judiciary will evaluate their acts by constitutional standards, and if this is not enough to stop them, the judiciary can invalidate unconstitutional laws. Judges need extreme tenacity to withstand pressures from the majority.<sup>77</sup> Hamilton writes that temporary appointments would create "too great a disposition to consult popularity."<sup>78</sup>

James Boyd White argues that judicial review is defensible because only the Court has the resource of judicial opinions, the form in which justices make reasoned public judgments based on established authority and precedent.<sup>79</sup> He roots this argument in a discussion of *McCulloch v. Maryland*, the 1819 case in which the Marshall Court held that Congress has the constitutional power to establish a national bank and Maryland could not tax it. The decision also sought to justify the Court's claim to have the authority to determine the constitutionality of state and federal laws.

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<sup>76</sup> Ibid. 229.

<sup>77</sup> Ibid. 230-231.

<sup>78</sup> Ibid. 232.

<sup>79</sup> J. B. White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: University of Chicago Press, 1984).

*Marbury v. Madison* had established this in 1803, but *McCulloch* allowed the Court to make a more definitive statement.<sup>80</sup>

In *McCulloch* Justice Marshall builds his argument around the superiority of the Constitution. He argues that because the Constitution emanates from “the people,” not the states, the origin of national power is “the people,” and this suggests the need for a generous interpretation of national power in relation to state power. The Constitution is an act defined by the people’s “one great collective act of self-constitution,” and thus is a “testamentary trust” with some qualities of a sacred text. A Constitution is different from a legal code in that a Constitution requires a more expansive form of engagement; it requires “expounding,” not “explicating.” The mythic constitutional authors knew they would not always be present to administer the execution of their document, so they left it as a sort of trust to be expounded.

Marshall argues that only the Court can expound the Constitution and do the people’s will because only the Court can give it the reading it requires. The Court can expound the text in a pure and disinterested way. Justices do make choices, but they speak as though they have no will of their own and are obedient to the text, reason, and “the people” in a timeless sense rather than in the sense of specific constituents. White explains that judicial review is justified in this case by the proposition that the Court can offer what no one else can: “the development over time of a self-reflective, self-correcting body of discourse that will bond its audience together with a common

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<sup>80</sup> H. A. Johnson, *The Chief Justiceship of John Marshall, 1801-1835* (Columbia, SC: University of South Carolina Press, 1997); *Marbury v. Madison*, 1 Cranch 137 (1803); *McCulloch v. Maryland*, 4 Wheaton 316 (1819); White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*.

language and set of practices.” White writes, “The most prominent feature of the judicial opinion is that it is not an isolated exercise of power, but part of a continuous and collective process of conversation and judgment.”<sup>81</sup>

Thus, the court guides the constitutional discourse in a highly formal way, reaching conclusions based on explicit arguments. This means that the Court’s primary form of transparency, the written judicial opinion, justifies its potential to override the majority’s wishes. This form of transparency is based on allegiance to the constitution, not majority power.

Because federal judges are appointed for life and pass judgment on the constitutionality of the elected branches’ actions, they can temper or thwart the majoritarian bent of the other branches, providing either a balance or a barrier, depending on how one sees it. Judges usually follow existing legal rules but they sometimes create new ones, and this sharpens the tension with democratic legitimacy rooted in voters’ preferences. However, this function allows the judiciary to protect democratic elements other than majoritarianism, such as individual rights and the separation of powers. The judiciary may contradict the majority’s wishes without being held accountable for this in any concrete way, a seemingly undemocratic possibility, but they can also protect a baseline of constitutionally guaranteed rights and power limitations that majorities may not touch.

Alexander Bickel posed this issue as the “countermajoritarian difficulty,” touching off a long-running discussion in constitutional law.<sup>82</sup> Bickel argues that

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<sup>81</sup> White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community*.

judicial review presents a problem of democratic legitimacy. He points out that acts of judicial review, unlike actions by other unelected officials such as admirals, generals, or members of the Federal Reserve Board, are not reversible by legislative majorities. A “coherent, stable, morally supportable government,” he writes, is only possible “on the basis of consent.” Furthermore, judicial review may cause the legislature to perform poorly, paying less attention to the constitutionality of its legislation and leaving it to the Court to constitutionally clean it up. Bickel thus concludes that judicial review is a “deviant institution” in American democracy.<sup>83</sup>

Bickel set himself the task of proposing a basis on which to defend judicial review. He writes that judicial review “represents a choice that men have made, and ultimately, we must justify it as a choice in our time.”<sup>84</sup> The primary justification he proposes is the contention that the judiciary is best suited to articulate the ultimate ends of government. Any government action has two sets of effects: immediate, intended, practical effects, and longer term, unintended effects on “enduring values.” The second set of effects is not always evident, and must be “continually derived and enunciated.” While legislators are best suited to acting on expediency, or addressing

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<sup>82</sup> A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, CT: Yale University Press, 1986); R. L. Brown, "Accountability, Liberty and the Constitution," *Columbia Law Review* 98, no. 3 (1998); S. Calabresi, "Textualism and the Counter-majoritarian Difficulty," *George Washington Law Review* 66 (1998); B. Friedman, "The Counter-Majoritarian Problem and the Pathology of Constitutional Scholarship," *Northwestern University Law Review* 95 (2001); M. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *Studies in American Political Development* 7, no. 35 (1993); A. M. Martens, "Reconsidering Judicial Supremacy," *Perspectives on Politics* 5, no. 3 (2007); I. Somin, "Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the Central Obsession of Constitutional Theory," *Iowa Law Review* 89 (2004); M. Tushnet, "Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty," *Michigan Law Review* 94 (1995).

<sup>83</sup> Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. 16-22.

<sup>84</sup> *Ibid.* 16.

the first set of effects, judges are best suited to acting on principle, or addressing the second set of effects.<sup>85</sup>

Judges' capacity to act on principle rather than expediency comes from the fact that they have the training and insulation from the public necessary to consider the long term interests of government and they're aided by "habits of mind" and "institutional customs." Unlike legislators, judges don't deal with abstractions or speculation about the future, but rather, with the "flesh and blood of actual cases." They're better able to discern the evolution of important principles because they have the opportunity to derive and test them in concrete situations, an opportunity legislators don't have.<sup>86</sup>

Bickel explains that judicial review is best understood as three types of power. Judges can strike down legislation, legitimate legislation by upholding it, or do nothing. The first type creates the countermajoritarian difficulty. The second type, the function of legitimation, is not sufficient to justify judicial review, but it is still important.<sup>87</sup> The third type of power, the power to do nothing, may be the most important, because it "allows leeway to expediency without abandoning principle," thus making a principled government possible. Bickel reviews a variety of jurisdictional doctrines courts can use to avoid deciding cases: "standing," "case or controversy," "ripeness," and "political question." All of these doctrines create a

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<sup>85</sup> Ibid. 24-25.

<sup>86</sup> Ibid. 26.

<sup>87</sup> Ibid. 69-70.



system in which a court is the last place a dispute lands and other processes have already been allowed to take their course.<sup>88</sup>

Many have criticized Bickel's paradigm, arguing that the judiciary's countermajoritarian role is not a difficulty that needs to be justified or overcome, but rather, it has an important purpose in our constitutional structure. Rebecca Brown proposes that, instead of viewing judicial review as a "deviant" practice because it does not provide direct accountability to majorities, we should take note of the fact that majoritarianism is not the only, and in her opinion not the primary, constitutional value.<sup>89</sup> Brown argues that in the United States, representation has historically been understood not as a way for people to participate in government, but rather, as a way for people to protect themselves from government. The ultimate goal of government in this system is to protect individual rights. Thus, American democracy is meant to be primarily tyranny-minimizing, not utility-maximizing. Part of this tyranny-minimizing comes from the existence of a judicial branch that can protect individual rights. The elected and unelected branches of government should be understood as balancing each other out.<sup>90</sup>

Brown argues that the assumptions underlying Bickel's paradigm – that judicial review is illegitimate and that legal scholars must search far and wide for a justification – have been damaging. These assumptions have been used to engender suspicion about the act of judging, transforming this important democratic act into a

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<sup>88</sup> Ibid. 70-116.

<sup>89</sup> Brown, "Accountability, Liberty and the Constitution." 533-534.

<sup>90</sup> Ibid. 535-538.

“value imposition.” The most extreme suspicions have led to skepticism about rights, because rights are “determined by some metric other than the peoples’ current preferences.”<sup>91</sup> Thus, Brown argues that we should view majoritarianism as just one constitutional value, not as the only source of democratic legitimacy. From this perspective, we could say that referring to the judiciary’s “countermajoritarian” role should not be a criticism; it should simply be a description.

Applying Brown’s paradigm to the relationship between the judiciary and transparency, we might say that, when transparency serves a “tyranny-minimizing” function, it’s appropriate for the judiciary. When it serves a “preference-maximizing” function, it’s not. Of course, it’s not always easy to cleanly delineate which function a particular transparency measure serves. However, it appears that the tradition of open trials qualifies, on balance, as a tyranny-minimizing practice. It’s meant to prevent corruption and abuse. When transparency measures serve to facilitate popular participation and strengthen government accountability, they become less appropriate for the judiciary.

Because judges to have to be able to withstand popular pressure, independence – essentially, the opposite of direct accountability to the electorate and the elected branches – is a vital quality for judges. Judges also strive for impartiality. Rather than approaching a problem with the needs of particular people in mind, a judge must treat all claims and litigants with equal deference. This imperative is symbolized by the classic image of a blindfolded woman holding scales, representing “blind justice.”

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<sup>91</sup> Ibid. 533-539.

Judges are human beings who cannot shed their own views, and this makes blind justice an impossible ideal in a literal sense. However, it's an important norm because the attempt to approach it differentiates judging from the work of the other branches.

Because of the importance of these qualities, judges play a unique role in the constitutional structure and in American culture. They try to avoid showing favoritism to any person or group. Courts are supposed to be spaces of universality where people are heard on the basis of their legal claims rather than their social position, and judges are agents of this universality. Thus, judges in some ways strive to be “non-persons.” They don't highlight their personal or political partiality. Ignoring all personal and political opinions is not possible, but this is an ideal that judges strive for. Judges do make choices and value judgments, but these judgments are made within a structure that includes jurisdictional and doctrinal constraints, and this makes judicial decisions different from brute exercises of power.

### **Transparency and the judiciary**

This chapter has shown that, although some important judicial procedures uphold the ideal of transparency, the judiciary has a different relationship to transparency than the other branches have. Many of transparency's purported benefits in the other branches do not apply in the same ways to the judiciary, because the judiciary does not have the same link to majoritarianism. This judicial role creates an ambivalent relationship between transparency and the judiciary because transparency creates a link between government officials and the public.

In the next chapter, I'll argue that as the United States has become more democratic in its structure and culture, transparency has increased, while at the same time modern transparency practices have often strayed away from the ideal laid out in democratic theory. These modern transparency practices have often been especially problematic in the judiciary, as we will see in Chapters Three, Four and Five. However, this first chapter has proposed that, even without these modern practices, transparency and the judiciary have an ambivalent relationship at the level of theory. The modern instantiation of transparency characterized by personalization, performance, commercial media and public appeals by politicians, has made this relationship worse. Modern transparency practices accentuate the democratic or majoritarian aspect of transparency, and this is the aspect the federal judiciary has tried to avoid.

## **CHAPTER TWO: MODERN TRANSPARENCY PRACTICES:**

### **PERSONALIZATION, PERFORMANCE, MASS MEDIA AND THE PUBLIC**

Although the ideal of government transparency is embedded in the principles that shaped the American government's design, this ideal has not always guided actual practices and policies in the United States. Additional ingredients have been necessary to put it into practice. This chapter tracks two sets of changes in the development of the modern version of transparency. First, as the United States has added more democratic – as opposed to republican – structural features, the culture has also become more democratic, and this includes communication practices. The information about government available to citizens has gradually expanded during the 20<sup>th</sup> century. Second, as transparency has expanded, political, cultural and economic forces have shaped the way it is understood and practiced. Modern transparency practices have made democracy more meaningful by facilitating citizens' engagement with government, but have also had several unanticipated consequences that contradict the expectations about transparency built into democratic theory. These contemporary practices have also sharpened the tension between the federal judiciary and transparency.

Two themes stand out in the contemporary version of government transparency. The first is personalization, which I view as composed of two parts: a trend towards providing information about individual government officials rather than

parties or institutions, and a trend towards discussing officials' personality, character and private lives. While it's possible that this trend is at some level inherent in American democracy<sup>7</sup> and government transparency, it has been magnified and accelerated by cultural, political and economic developments in the 20<sup>th</sup> century United States. Personalization deviates from the arguments for transparency made by many democratic theorists and transparency advocates. The arguments that transparency creates informed voters, strengthens government legitimacy, bolsters accountability and prevents corruption assume that the subject at hand is usually policy, and that when the subject is individual politicians, it's their official actions.

The second trend that stands out is the performance of transparency. Political and media culture in the 20<sup>th</sup> century have enabled and encouraged politicians to control information not just by maintaining secrecy, but also by engineering communication – what has become known colloquially as “spinning”. In this effort, they often claim the mantle of government transparency, presenting themselves as keeping constituents informed. Yet often accompanying these practices is a dynamic in which the actual work of governance retreats further back out of sight, and what is made visible to the public is performance rather than deliberation. In Goffman terms, the line between back stage and front stage shifts, and what was once a back stage, at least relative to other government stages, becomes a new front stage. Like personalization, the performance of transparency may be inherent in democratic politics and government transparency, but its late 20<sup>th</sup> century manifestation is increasingly organized, institutionalized, and aggressive. The performance of

transparency also conflicts with traditional justifications for transparency because it works in the mold of publicity, or representative publicness, rather than the mold of the liberal public sphere. The recipients of information are cast as passive, irrational, manipulable audiences engaged primarily in consumption, rather than as an informed, rational public, engaged in self-governance.

This chapter will discuss how government transparency has increased as the United States' political structure and culture have become more democratic and how concurrent changes in politics, culture and the economy have encouraged trends such as personalization and performance in the contemporary practice of transparency. I don't attempt to document every policy or practice that expanded government transparency, and in fact I leave many out. Instead, I illustrate general trends that have bearing on the conflict between the federal judiciary and the modern instantiation of transparency. I discuss this conflict in Chapters Three, Four and Five.

In this chapter, I focus on three primary domains that I believe matter most to the amount and type of information citizens receive about government: political structure and culture, internal government organization, and journalistic practices and media economics. Political structure shapes transparency because it determines the way power is allocated and influences the principles that organize political life. As more people have been allowed to participate in government and as new avenues for participation have been created, the principle of majoritarianism has become more important, and this has strengthened the push for transparency. I understand political culture to mean the practices, shared assumptions and values that make up politics and

that give life and meaning to the official procedures and rules. Our political culture includes elements such as customary practices of giving or withholding information in certain situations, shared understandings of what information is important to learn, and campaign styles. I believe elections are good events to look at to understand what transparency means, because elections show what types of information are considered important for citizens to know and what citizens are thought to be able to understand and to care about.

Internal government organization influences transparency because the way government bodies operate sets the parameters for the types of information created by their activities and the parts that will be made public. Journalistic practices and media economics are important to a discussion of government transparency because the news media are the primary disseminators and interpreters of information about government, and what they produce is shaped by their methods of information gathering and decisions about resource allocation.

### **Government transparency in the early republic**

Government transparency had an ambiguous status during the revolutionary period and the early republic. Many accepted and even praised the idea. Thomas Paine's *Common Sense* was a virtual bestseller, selling over 100,000 copies. The Constitution and the Bill of Rights, both part of the liberal democratic project of limiting state power and imbued with the Enlightenment faith in human rationality, have strong intellectual links to the ideal of government transparency. Many leaders of



the American Revolution and framers of the Constitution professed support for the idea that citizens should be informed about their government so they can participate thoughtfully and guard their liberty.<sup>92</sup> Printers put this principle into practice, publishing books and pamphlets that discussed government. However, official policy did not often back up popular sentiments or actions on this issue; there were few government measures promoting transparency.

This ambivalence towards transparency was linked to a tension in American democracy that survives to this day even though its center of gravity has shifted. The United States constitutional structure is shaped by both democratic and republican traditions of thought. The guiding principle of the democratic tradition is the principle that the people – however the boundaries of that group are understood-- should rule themselves. In ancient Greece rule by the people meant direct rule, in which all people participated directly in making laws, while in the 17<sup>th</sup> and 18<sup>th</sup> centuries it meant rule through elected representatives.<sup>93</sup>

The republican tradition of thought includes distinct strains, but they all share the notion that a balance of different bodies is necessary in a constitution. This tradition places emphasis on the internal institutional structure of the government rather than on rule by the people. Though republicanism is not antithetical to democracy, its enthusiasm for rule by the people is tempered by the idea that human corruption, conflict and factionalism are inevitable, and that these tendencies should be kept in check through the internal structure of the government. The more

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<sup>92</sup> H. N. Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act* (Westport, CT: Greenwood Press, 1999).

<sup>93</sup> R. Dahl, *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1989). 13-33.

aristocratic or conservative strain of republicanism held that people are divided into democratic, aristocratic, and monarchical elements and that a constitution must balance these interests by setting up a mixed government of democracy, aristocracy and monarchy.<sup>94</sup> The democratic strain of the republican tradition was skeptical of the idea of balancing those three interests, holding that only the democratic element has a legitimate claim to represent the community. This tradition proposed a government composed of three separate powers – legislative, executive and judicial – each housed in a different institution and with the ability to check the others. In this type of system, the Constitution’s task was to balance the three powers and to prevent them from becoming concentrated in one person or institution.<sup>95</sup>

Thus, democratic principles favor enabling popular majorities to control government, while republican principles favor limiting government power through internal checks. The United States’ original constitutional design was structured by both, but was more strongly shaped by republican principles than by democratic ones. Democratic principles were represented by citizens’ rights to directly elect their congressional representatives, and were tempered by the provision for indirect election of Presidents and Senators and by mechanisms such as the filibuster that served to constrain majorities. The federal judiciary’s lifetime appointments and power of judicial review also limit majority power. Perhaps the most important limitation on the democratic character of the new government was the fact that only aristocratic white men could be citizens, meaning that the majority of adults were not represented.

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<sup>94</sup> Ibid.

<sup>95</sup> Ibid.

It seems reasonable to suppose that, because representative democracy – stripped of its aristocratic and monarchical elements – was new, it was frightening to at least some of the founders. Their narrow definition of citizenship, excluding women, poor men, and anyone who wasn't white, reflected ideas about who was fully human and capable of rationality. The layers of institutions and procedures placed between voters and power were in part expressions of fear of mob rule. Many feared that self-rule put the government at the mercy of demagogues and peoples' passions, and could threaten order. In Federalist 49, Madison warned that public appeals would lower the dignity and respect accorded government and would call upon passions rather than reason.<sup>96</sup>

Over time, more democratic features were added to the constitutional structure, including direct election of Senators and the extension of voting rights to previously excluded groups. As people gained more power vis-à-vis government, transparency measures were instituted to facilitate this participation. In the beginning these measures were scarce and were present more in spirit than in letter. Some early transparency mechanisms seem attributable to the republican balance of power; those that came later are more clearly connected to victories of democracy.

The Constitutional Convention was held in secret, and participants were barred from discussing the proceedings with anyone not present.<sup>97</sup> This reflected wariness towards popular sovereignty and ambivalence towards transparency. Publicizing

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<sup>96</sup> J. Madison, "The Federalist Number 49," in *The Federalist Papers*, ed. R.P. Fairfield (Garden City, New York: Anchor Books, 1961).

<sup>97</sup> M. Schudson, *The Good Citizen* (New York: The Free Press, 1998).

proceedings was understood to degrade the quality of deliberation and the final product.

No phrase in the Constitution explicitly lays out a “right to know,” but a few parts provide for some information recording or dissemination. Article I Section 5 requires that Congress keep a record of its proceedings and “from time to time publish them,” although it also provides that they may “excerpt . . . such parts as in their judgment require secrecy.”<sup>98</sup> Article II Section 3 requires that the President “from time to time” give Congress “information of the state of the union,” the inter-branch character making this a republican transparency measure. The Bill of Rights only contains one provision necessitating transparency: the Sixth Amendment guarantee of a public trial. Several other guarantees, though they don’t require transparency, are strengthened by it. The First Amendment guarantees of the right to freely speak, publish and petition the government for redress of grievances are more meaningful if citizens know something about what their government is doing.

Citizens who lived in or traveled to the capital in the early republic could watch their legislators debate.<sup>99</sup> Open public galleries were built in the House of Representatives in 1789 and in the Senate in 1795.<sup>100</sup> Senators initially feared that opening the Senate to the public would encourage demagoguery rather than thoughtful

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<sup>98</sup> Proceedings, roll calls, debates, and other records were recorded in *The Debates and Proceedings in the Congress of the United States* (1789–1824), the *Register of Debates in Congress* (1824–1837), or the *Congressional Globe* (1833–1873). After 1873, they were published in the *Congressional Record*, which is still published today. Today, the *Congressional Record* allows legislators to “revise and extend” their remarks, thus creating a report of what they wished they had said rather than what they said. S. Frantzich and J. Sullivan, *The C-SPAN Revolution* (Norman, OK: University of Oklahoma Press, 1996), www.gpoaccess.gov/crecord.

<sup>99</sup> Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act*.

<sup>100</sup> Frantzich and Sullivan, *The C-SPAN Revolution*.

deliberation, but they eventually relented. Article I Section 5 of the Constitution allows each house to “determine the rules of its proceedings.” Any member of either house can call for a secret session, during which the doors of the chamber are closed and everyone except employees and members of Congress are cleared from the chamber and galleries. Secret sessions are rare today, but the Senate met entirely in secret until 1794.<sup>101</sup>

The press was the primary channel through which people could learn about politics in the 18<sup>th</sup> century, but newsgathering was haphazard. Individual printers usually controlled newspapers, and most printers did not seek out news but rather printed what came to them. They were commentators on government rather than reporters of it, and news was often filtered through strong political viewpoints of editors.<sup>102</sup>

The right to criticize government is related but not identical to government transparency. Even after the passage of the First Amendment, there were laws on the books banning seditious libel, or speech critical of government. However, newspaper editors regularly flouted them, scathingly criticizing government officials.<sup>103</sup> The understanding that the First Amendment protected criticism of government emerged after 1798, when Jeffersonians used this argument to defend themselves against the Sedition Act passed by the Federalists.<sup>104</sup>

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<sup>101</sup> M. Amer, "Secret Sessions of the House and Senate," (Congressional Research Service, 2008).

<sup>102</sup> Schudson, *The Good Citizen*.

<sup>103</sup> L. W. Levy, *Emergence of a Free Press* (New York: Oxford University Press, 1985).

<sup>104</sup> T. Eastland, "Introduction," in *Freedom of Expression in the Supreme Court*, ed. T. Eastland (New York: Rowman & Littlefield, Inc., 2000). 19.

Because the United States in the 18<sup>th</sup> century was more a republic than a democracy, transparency measures directed at informing the public and giving them power were few. Printers' actions suggest that some supported the idea of disseminating more information, and some government measures pointed in this direction, but the group of people who could make use of information by voting was very small. This would change in the 19<sup>th</sup> century.

### **Nineteenth century democratic gains and political partisanship**

During the 1820s and 1830s the right to vote in state and federal elections was opened to all white males, regardless of land ownership, adding a significant new democratic dimension to politics. This necessitated integration of large numbers of new, non-elite voters into the political system, and political parties largely took on this task, becoming central institutions for fielding candidates and organizing participation. Parties had existed since the country's founding, but the founders feared their effects and sought to temper their influence. However, as the Democratic Party was organized as a support structure for Andrew Jackson in 1828 and 1832, parties took on a more central role and their structure and organization became more developed.<sup>105</sup>

This democratic shift did not yield immediate concrete gains in terms of transparency, because the model for mass participation was linked more to party loyalty than to decision-making based on information. However, at the end of the 19<sup>th</sup>

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<sup>105</sup> Schudson, *The Good Citizen*. 112; W.N. Chambers, "Party Development and the American Mainstream," in *The American Party Systems: Stages of Political Development*, ed. W. N. Chambers and W. D. Burnham (New York: Oxford University Press, 1975).

century, reformers would argue that these new voters should be making decisions based on information.

During the first two decades of the 19<sup>th</sup> century, both newspapers and subscriptions to them multiplied. Eighteenth century newspapers had served mostly elite readers, but during the 1830s newspapers began to serve the middle and working classes. The “penny press,” which emerged in northern cities in the 1830s, boasted political independence and covered everyday life more than politics. Michael Schudson writes that the penny papers essentially invented the concept of news, which was defined chiefly by timeliness.<sup>106</sup> According to Dan Schiller, the penny press trumpeted many of the themes written about by Thomas Paine fifty years earlier: natural rights, practical common sense, and the importance of equal access to information.<sup>107</sup> Outside the particular form of the penny press, however, fervent partisanship rather than political independence characterized the 19<sup>th</sup> century press. Newspapers increasingly allied themselves with particular parties and functioned as party mouthpieces.<sup>108</sup>

The expansion of voting rights and the new party system ushered in an exuberant style of politics in the mid-19<sup>th</sup> century, characterized by partisanship and visual spectacle. Parties sought victory by amassing as many supporters as possible and cultivating their loyalty. Candidates rarely campaigned. Instead, parties organized spectacular parades and rallies that served as entertainment and as rituals of solidarity.

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<sup>106</sup> M. Schudson, *Discovering the News* (Basic Books, 1978).

<sup>107</sup> D. Schiller, *Objectivity and the News* (Philadelphia: University of Pennsylvania Press, 1981). 47-75.

<sup>108</sup> M. McGerr, *The Decline of Popular Politics* (New York: Oxford University Press, 1986). 17-21; Schudson, *The Good Citizen*. 110-116.

People voted out of party loyalty rather than based on individual assessments of candidates or their policy proposals. Voting was a public activity. It often entailed delivering a ticket pre-marked with a particular party's candidates and visible for all to see. Voters sometimes received monetary compensation for voting for their party's candidates, and parties distributed jobs to loyal followers when they were in power.<sup>109</sup>

In this atmosphere, voting was not a sober, contemplative, rational, individual activity. Politics was conducted by parties, and parties focused on getting the faithful to the polls rather than on persuading undecided voters. This made government transparency somewhat beside the point.<sup>110</sup>

### **Late nineteenth century liberal reforms and educational politics**

The years between the Civil War and World War I brought a series of transformations in American society that had bearing on the concept and practice of government transparency even though they did not include many affirmative transparency measures. In the late 19<sup>th</sup> century, corrupt party bosses and machines dominated politics in many cities, making apparent the potential problems with the partisan style of politics. Liberal reformers began to propose measures to clean up politics, and the solution that emerged was weakening the parties. Reformers wanted politics to revolve around individual, rational, informed decisions by voters rather than emotional spectacles and communal solidarity. This attitude made government transparency more relevant to politics.

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<sup>109</sup> McGerr, *The Decline of Popular Politics*. 12-41; Chambers, "Party Development and the American Mainstream."

<sup>110</sup> McGerr, *The Decline of Popular Politics*, Schudson, *The Good Citizen*. 145.



Not all reformers were guided by purely democratic motivations. The upper-class, educated New Englanders known as Mugwumps were concerned that that “best men” – men like themselves – were not being elected because of the expansion of the franchise, immigration, fraud, corruption and ruthless party machines. After failed attempts at limiting suffrage and restricting immigration, these reformers resorted to the strategy of marginalizing the parties.<sup>111</sup> The push for reform, however, was not limited to Mugwumps. Groups from many sectors of society and regions of the country voiced grievances with political parties.

Reformers advanced a new, less partisan style of politics that encouraged reasoned, independent thinking about voting choices and political campaigns that distributed policy documents rather than organizing exciting community events. In the 1880s, they successfully pushed for passage of civil service reforms to limit the patronage system, a secret ballot initiative, and laws banishing campaign activities from polling places.<sup>112</sup> These measures underscored the idea that voting should be based on information and individual preferences rather than on loyalty.

Parties responded to these efforts by changing the style of campaigns, focusing more on providing information than on building solidarity. This political style, which Michael McGerr calls “educational politics,” cultivated a sense of personal contact between voters and candidates and diminished the importance of the relationship

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<sup>111</sup> McGerr, *The Decline of Popular Politics*. 42-67; Schudson, *The Good Citizen*. 145-147.

<sup>112</sup> Schudson, *The Good Citizen*. 153-168; McGerr, *The Decline of Popular Politics*. 77-99; R. Hofstadter, *The Age of Reform* (New York: Vintage Books, 1955). 8-10.

between voters and parties.<sup>113</sup> This model of voting encouraged a political framework based on informed voters, and this fit with the idea of government transparency.

### **Two new styles of journalism and two ways of informing citizens**

As machine politics waned, the partisan style of journalism became less prevalent. High speed presses, cheaper newsprint, larger circulations and revenues from advertising turned newspapers into lucrative businesses, allowing them to break free from their financial dependence on parties. This paved the way for two new press models: professional journalism and sensational journalism. The two types of journalism presented two approaches to informing the public.

Professional journalism was based on what Michael Schudson calls the “information model,” and developed at newspapers such as the *New York Times* that were willing to spend money gathering news and became advocates for government transparency. These newspapers presented information about politics and business and their main readers were the educated middle and upper classes. Central to this model was the professional reporter, a figure who, beginning in the 1880s and 1890s, received a salary rather than being paid by inch of writing.<sup>114</sup>

During this time, journalism became a self-conscious occupation whose practitioners developed a common set of ideas about the best way to do their work.<sup>115</sup> Like doctors, lawyers and social workers in the 1880s, journalists formed professional associations and set standards that emphasized fact over opinion. Professional

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<sup>113</sup> McGerr, *The Decline of Popular Politics*. 42-106; Schudson, *The Good Citizen*.

<sup>114</sup> Schudson, *Discovering the News*.

<sup>115</sup> R. Wiebe, *The Search for Order: 1877-1920* (New York: Hill and Wang, 1967). 111-132.

journalists' sympathies often lay with the liberal reformers; they advocated independent political choices aided by objective news.<sup>116</sup> This positioned them as agents of transparency and gave them a professional stake in it. Newspapers began to give more space to news than to editorials so that readers could draw their own conclusions.

The sensational journalism of the 1880s, based on what Michael Schudson calls the "story model," expanded on the style pioneered by the penny press of the 1830s. This model was marked by scandalous or human-interest topics, simple language, and a lack of attention to politics. Story journalism's main readers were the middle and working classes, and this model was associated with the traits ascribed to these groups: emotions, irrationality and self-indulgence.<sup>117</sup>

### **Advertising techniques and personalization**

The declining power of the parties and the liberal reformers' efforts had ushered in "educational politics," a campaigning style rooted in the notion that voters needed information about candidates' policy plans to make good decisions. In the 1890s, a new political style emerged that provided information about candidates as people, and became a precursor of the personalization of transparency that accelerated in the 20<sup>th</sup> century. Heavily influenced by advertising, this new style used product-marketing tactics to sell candidates, emphasizing personality rather than policy or party. Individual candidates began to campaign more. The 1896 Presidential contest

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<sup>116</sup> McGerr, *The Decline of Popular Politics*. 107-137.

<sup>117</sup> Schudson, *Discovering the News*.

between William Jennings Bryan and William McKinley illustrated several elements of the new campaign style: careful packaging of the nominee, an emphasis on personality traits and the use of pictures and slogans. Often, rather than passing out documents, campaigns began to plant information that they wanted potential voters to see in the press.<sup>118</sup>

The educational and advertising styles both continued into the 20<sup>th</sup> century. Though different, these styles both emblemized elements of the modern understanding and practice of transparency: the attempt to engage voters with information, the importance of the mass media in disseminating this information, and the emphasis on individual candidates over parties. These campaign styles increasingly relied on mass media because they weren't rooted in community events. In the Presidential campaign of 1912, all three candidates had publicity offices. Instead of producing literature they cultivated the press, distributing copies of speeches to journalists before they were delivered. Campaigns started to advertise on billboards, electric signs, sides of buses, and film. Most importantly for this discussion, candidates began reveal elements of their personal lives, such as their families and churches.<sup>119</sup> They presented themselves as human beings who could connect with voters on an emotional level rather than just standing in for a party or presenting a set of policies.

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<sup>118</sup> McGerr, *The Decline of Popular Politics*. 138-150; Wiebe, *The Search for Order: 1877-1920*. 76-110.

<sup>119</sup> McGerr, *The Decline of Popular Politics*. 159-183.

### **Progressivism, democratic responsiveness and transparency**

In the last few decades of the 19<sup>th</sup> century, social transformations touched almost every corner of American life. The Gilded Age was characterized by industrialization, massive immigration, and vast inequalities in wealth and power.<sup>120</sup> At the same time, the courts began to favor a laissez-faire economic outlook, appearing to many to be deeply influenced by class biases.<sup>121</sup> By 1900, many of these changes had inspired the efforts of a new set of reformers.<sup>122</sup> Loosely tied together by the ideas associated with progressivism, they sought many of the same goals as the reformers of the 1880s, but for different reasons. Progressives believed that politics and society should be made more efficient, and championed the use of experts and scientific management.<sup>123</sup>

Progressives introduced reforms in many societal realms, but most important for this discussion are the ideas and policies that sought to make the United States more democratic and that bolstered the ideal of government transparency. Progressive reformers sought to make politics more efficient and more responsive to individual preferences. They promoted measures to institute primaries, initiatives, recalls, referendums and popular election of Senators, all geared towards giving more decision-making power to individual voters and weakening parties.<sup>124</sup> This focus on individual decision-making implied the need for information.

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<sup>120</sup> Wiebe, *The Search for Order: 1877-1920*. xiv, 10; Hofstadter, *The Age of Reform*. 1-12.

<sup>121</sup> Wiebe, *The Search for Order: 1877-1920*. 80-83; Hofstadter, *The Age of Reform*. 252.

<sup>122</sup> Hofstadter, *The Age of Reform*. 5.

<sup>123</sup> Wiebe, *The Search for Order: 1877-1920*. 171.

<sup>124</sup> Hofstadter, *The Age of Reform*. 257; McGerr, *The Decline of Popular Politics*. 177.

The relationship between the journalistic profession and the progressive movement was an ambivalent one. Both groups lauded neutral expertise and lack of partisanship.<sup>125</sup> However, professionalism entailed respectfulness and respectability, and these norms would not condone the tone of moral outrage put forward by the muckrakers.<sup>126</sup> Furthermore, for progressives, news was important not just because it was interesting, but because it could educate people and bring about reforms. This progressive goal often clashed with the newly professionalized journalists' impulse to dramatize stories to make them more engaging to readers.<sup>127</sup>

With the end of World War I came the end of the progressive movement and the onset of a phase of disenchantment with democracy. Wartime propaganda and the growth of public relations highlighted the fact that information could be manipulative and led people to wonder whether voters could make good decisions based on information. People feared that newspapers and radio could spread misinformation and mold opinions. Journalist Walter Lippmann argued that the "omnicompetent citizen" was a fantasy and that all human perception was flawed. New developments in psychology emphasized the irrational in human consciousness, and social scientists gave voice to fears about the crowds or "mobs" associated with urbanization.<sup>128</sup> All of these factors combined in the 1920s to create the understanding that humans are not inherently rational and are subject to manipulation, thus threatening the basis for the

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<sup>125</sup> M. Schudson, "The Sociology of News Production Revisited," in *Mass Media and Society*, ed. J. Curran and M. Gurevitch (New York: Edward Arnold, 1991).

<sup>126</sup> D. M. Ryfe, *Presidents in Culture* (New York: Peter Lang Publishing, Inc., 2005).

<sup>127</sup> *Ibid.* 21.

<sup>128</sup> Schudson, *The Good Citizen*. 195.

liberal democratic tenets that underlay many progressive reforms and the ideal of government transparency.

This type of worry about the pernicious influence of the mass media and about citizens' competence has continued to haunt debates about transparency, and we will see some examples of this in the discussions of Supreme Court confirmations and cameras in the courtroom in Chapters Three and Four. The counterarguments advanced today still follow the basic contours of the arguments advanced by John Stuart Mill, who wrote that information could improve citizens' intellect and virtue and make them fit for self-governance, and by John Dewey, who argued that the mass media could help people rise to the task of self-governance by helping them understand their connections to each other. This debate about human rationality and information also influenced the practice of journalism.

### **Maturing professional journalism and government messages**

Although journalists started to conceive of themselves as a profession during the 1870s, it was not until the early 20<sup>th</sup> century that they matured as a profession, gaining the corresponding confidence, legitimacy and repertoire of practices and shared ideas. Michael Schudson argues that the ideal of objectivity in journalism arose during the 1920s and 1930s as a reaction to skepticism about facts and human perception,<sup>129</sup> Reporters needed a set of standards to help them do their work and engender confidence, and the concept of objectivity filled this need. It provided them

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<sup>129</sup> Schudson, *Discovering the News*.

with a set of methods that was professionally certified to remove opinion from fact. Though journalism in the late 19<sup>th</sup> century had emphasized the importance of “facts,” the modern understanding of objectivity was more developed, linked to the notion that reality is difficult to discern and that subjectivity can creep in if one does not guard against it. Journalists realized that objectivity was a goal beyond reach, but it was an ideal to strive for and this advanced the notion that transparency and informed citizens are possible and desirable.<sup>130</sup>

Professional journalists’ symbiotic relationship with government officials also laid the groundwork for transparency to be useful to politicians who wanted to transmit specific messages to constituents. Although they rejected the partisan cheerleading of the 19<sup>th</sup> century press, early 20<sup>th</sup> century professional journalists were hesitant to challenge politicians. Journalists often kept politicians’ confidences, allowing them to decide which of their statements could be printed. Dan Hallin describes this relationship as the trade-off of professionalization.<sup>131</sup> As journalists came to be accepted as a profession they gained increased access to politicians, but they also had to rescind the ability to make truth claims of their own or to speak in a political voice. Professionalism meant ensuring that their criticism was respectable and respectful. In this relationship, which still exists to some extent, both sides need each other – politicians rely on journalists as a way to disseminate their views, while journalists rely on politicians to provide them access.

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<sup>130</sup> D. Hallin, "Commercialism and Professionalism in the American News Media," in *Mass Media and Society*, ed. J. Curran and M. Gurevitch (New York: Oxford University Press, 2000), Schudson, *Discovering the News*.

<sup>131</sup> D. Hallin, *The Uncensored War* (Berkeley, CA: University of California Press, 1986).



Thus, though professional journalism is often imagined to entail an opposition between journalists and politicians, this is not completely accurate. Hallin argues that professionalization rationalized the link between journalist and politician rather than severing it. Once journalism was accepted as a profession, politicians didn't need to control the press. They could count on journalists to refrain from intemperate criticism, not because of externally imposed pressure but because of the principles with which they had been professionally socialized.<sup>132</sup> Thus, professional journalists' role as a conduit for information about government also makes them channels for targeted messages from politicians, laying the groundwork for a dynamic I call the performance of transparency.

Two new types of interactions between government officials and journalists, the interview and the regular press conference, were emblematic of the rationalization of their relationship and also of the growing focus on individual politicians rather than parties. These formats are both staged encounters. Rather than observing the activities of governance or reading the documents produced in the course of governing, reporters are participating in set-up encounters with politicians in which they ask about their reactions to various events. These events are set up solely for the purpose of communication.

The interview, the practice of asking a public figure questions and then producing a story incorporating the answers, emerged in United States in the 1860s, and was a common practice by the 1890s. Before interviews, "reporting" meant

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<sup>132</sup> Ibid.

printing the text of official documents and speeches.<sup>133</sup> The interview contributed to transparency's evolution because the practice enabled the provision of a relatively new type of information about government. Rather than emphasizing solely a politician's actions and official speeches, the interview proposed that the public would be interested in knowing what a politician thought about these things, emphasizing that they were individuals rather than just office-holders. This seems to parallel what Richard Schickel describes as a shift in the 19<sup>th</sup> century from focusing on what public figures did to what they felt.<sup>134</sup>

The focus on politicians' explanations and interpretations also fits with the Habermasian notion of legitimizing the exercise of authority through reason giving, particularly because the journalist is seen as the representative of the public. However, the trusting relationship between politicians and professional journalists meant that politicians could control which quotes made it into print.

Woodrow Wilson institutionalized the Presidential press conference, a practice in which the President stood before a gathering of reporters and publicly answered their questions. This form continued many themes embedded in the form of the interview. The press conference suggests the expectation that it's legitimate to ask public officials to comment on policies or events, and they should be expected to respond. Wilson's press conferences were grim events. He viewed the press's tendency to focus on political gamesmanship and personality as trivializing his role, and often refused to answer questions that were about political conflict rather than

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<sup>133</sup> M. Schudson, *The Power of News* (Cambridge, MA: Harvard University Press, 1995).

<sup>134</sup> R. Schickel, *Intimate Strangers: The Culture of Celebrity* (Garden City, New York: Doubleday & Company, Inc., 1985). 19.

policy.<sup>135</sup> However, Wilson did not shun public relations. His press conferences were emblematic of the rationalization of the relationship between reporters and officials. Reporters had easier access to the White House, but this access had become more formal, and it was easier for the White House to manipulate the information that got out. News had become a policy rather than an event.<sup>136</sup> I call this linkage between informing the public and delivering carefully crafted, public relations-style messages the performance of transparency.

### **The presidentialization of politics and personalization**

As society and governance became more complex in the first two decades of the twentieth century, the federal government took on more tasks.<sup>137</sup> The imperatives of governance also shifted leadership from Congress to the President, and this further encouraged the personalization of politics by giving the public and the press a single actor to focus on as the driver of government actions. Congress – large, slow moving and deliberative -- was not equipped to assess a variety of complicated needs, prioritize them, act on them rapidly, and monitor them continuously. The executive branch was better suited to these tasks.<sup>138</sup> The 1921 *Budget and Accounting Act* concretized this reality, giving the President more responsibility for and control over legislation. In the 1930s, President Roosevelt continued the trend toward strong Presidential leadership.

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<sup>135</sup> Ryfe, *Presidents in Culture*.

<sup>136</sup> Ibid. 48-56.

<sup>137</sup> Wiebe, *The Search for Order: 1877-1920*. 193.

<sup>138</sup> Ibid. 189.

The President was not just a person holding an office, but a policy-maker and leader with his own agenda.<sup>139</sup> After 1900, journalists started to refer to the President by name in their writing rather than as “the President.” During the 1910s and 1920s, journalists started to refer to the President as the leader of the nation, not just the leader of a particular party.<sup>140</sup> As the parties’ importance declined, the President was the one who could still exercise leadership. In 1907, Teddy Roosevelt traveled down the Mississippi and made a series of speeches in which he lauded conservation, land-grant universities and regulation of corporations. David Ryfe points out that, while Presidents had made trips like that before, this was the first such trip to be focused on executive, rather than party or congressional, policies.<sup>141</sup>

Roosevelt’s fireside chats, in which he discussed the causes of the Great Depression and his policy solutions, exemplified the positioning of the President as a person rather than just an officeholder, the need to engage the public with information, and the growing management of news. The fireside chats allowed Roosevelt to communicate in an intimate, direct way to the public rather than speaking through reporters. He spoke in a soothing, reassuring voice, presenting himself as a friend, a father and counselor.<sup>142</sup> These chats were highly produced. Roosevelt’s publicity team helped him project his personality to the public, crafting the chats like a movie. The writers included signals for different vocal intonations, and special touches were

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<sup>139</sup> Schudson, *The Good Citizen*. 207.

<sup>140</sup> Schudson, *The Power of News*. 60-61.

<sup>141</sup> Ryfe, *Presidents in Culture*. 30.

<sup>142</sup> *Ibid.* 63.

designed to depict Roosevelt as a regular person. In one that he paused to take a sip of water, and in another he talked about his vacation plans.<sup>143</sup>

### **Transparency measures in the new administrative state**

The first two decades of the 20<sup>th</sup> century saw two significant democratizing measures: the 17<sup>th</sup> Amendment's provision for direct, popular election of Senators in 1913 and the 19<sup>th</sup> Amendment's extension of the vote to women in 1920. Between the two world wars, several transparency measures were enacted, creating new windows onto the three branches of government. The Senate had held open sessions since 1795, but executive sessions – those concerning nominations and treaties – were closed. A set of Senate rule changes enacted in 1929 included the provision that these debates be opened. This new rule, combined with the passage of the 17<sup>th</sup> Amendment, meant that citizens could monitor their Senators' speeches and actions on nominations and treaties and could threaten electoral retaliation for acting contrary to their wishes.<sup>144</sup>

The executive branch was also made more transparent. Government regulation surged in the 1930s during the Roosevelt Administration. Before then, government records had been stored in a haphazard way and were sometimes difficult to locate. As the administrative state took shape, there was a greater need for dependable records. In

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<sup>143</sup> Ibid. 71-83.

<sup>144</sup> J.A. Maltese, *The Selling of Supreme Court Nominees* (Baltimore, MD: Johns Hopkins University Press, 1995). Rule 29 now states that Senate consideration of treaties should be secret unless majority votes to open it (which they usually do) and Rule 31 states that all nominations should be considered in open session unless a majority votes to do so in secret (which they usually don't).  
<http://rules.senate.gov/senaterules/>

1935 the *Federal Register Act* was passed, creating a daily publication of all executive branch activities and all documents generated by the executive branch.<sup>145</sup>

The courts too adopted transparency measures in the 1930s. In 1938, the Judicial Conference adopted the Federal Rules of Civil Procedure, which set out rules governing civil litigation.<sup>146</sup> Among other innovations, these rules invented the obligation of discovery – the production and exchange of information and documents – and simplified filing, both of which enhanced public access to information about legal disputes. Everything relating to a trial was to be “on the record.” This served the underlying principle that conflicts must be resolved through due process, which includes public information exchange and public findings of fact and conclusions of law.<sup>147</sup>

By the beginning of World War II, the political and cultural environment in the United States was more amenable to the ideal of government transparency and to the practices that would come to define it than it had been 100 years earlier. Voting was understood to be based on information. Journalism was considered a profession, and its practitioners saw their task, at least in part, as informing citizens about government and asking politicians for explanations. Politicians worked to manage the news journalists produced and the information the public received, and this often involved

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<sup>145</sup> L. E. Feinberg, "Mr. Justice Brandeis and the Creation of the Federal Register," *Public Administration Review* 61, no. 3 (2001).

<sup>146</sup> The *Rules Enabling Act* of 1934 gave the judicial branch the power to create judicial rules through the Judicial Conference of the United States, the policymaking body of the federal judiciary, established in 1922.

<sup>147</sup> J. Resnik and D.E. Curtis, "From 'Rites' to 'Rights' of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes," in *Representation of Justice*, ed. A. Masson and K. O'Connor (Brussels: P.I.E. - Peter Lang, 2007).

providing information. Officials were viewed as individuals with their own policy agendas rather than the leaders of parties, and the public took an interest in their personal lives. These changes formed the roots of the primary forces in the modern instantiation of transparency: a focus on the need for democratic transparency (government giving information to citizens), the centrality of the mass media to this process, and the shaping of government information towards personalization and performance. After World War II, cultural, political, economic and technological developments magnified and accelerated these forces and produced more concrete transparency measures, leading to the creation of the version of transparency we're familiar with today.

### **Post World War II reforms and the growing salience of transparency**

In the 1960s and 1970s a new set of government reform movements were instituted, many of which involved making the government more democratic and expanding government transparency. Two trends that emerged at the turn of the 20<sup>th</sup> century, personalization and performance, continued and were magnified by the changes in the second half of the 20<sup>th</sup> century.

Though some of the groundwork had been laid by the transformations of the progressive era, several new factors propelled the post-war wave of transparency-related reforms. In some instances, politicians and civil society groups came together with the explicit goal of creating reforms, either for their own sake or to help achieve substantive policy changes. These endeavors sought, in different ways, to make

government institutions more responsive to citizens. At the same time, the Cold War pitted the United States against the Soviet Union in a battle of arms buildup, spheres of influence and ideology. In the ideological battle, the United States projected itself as the force for human freedom, and the necessity of maintaining this image encouraged domestic policies that bolstered it. However, government officials engaged in many secretive practices related to the Cold War, and when revealed, these practices put the problem of secrecy on the national agenda. Further secrecy during the Vietnam War and Watergate led to a distrust of institutions, and the press and the public began to assume that politicians were always lying or corrupt. International organizations after World War II promoted transparency and this exerted some influence on domestic politics.<sup>148</sup> Openness and personal revelation were touted in the surrounding culture, and this shaped the direction of government transparency. Finally, new technologies brought new ways to learn about government.

### **Executive Branch Secrecy after World War II**

During the 20<sup>th</sup> century the United States got more involved internationally than it previously had, joining wars in progress in World War I and World War II and forming alliances with European nations. After World War II, during the Cold War, the United States began to define its interests globally, intervening more frequently in foreign crises in an attempt to contain Soviet power.<sup>149</sup>

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<sup>148</sup> D. Frank, A. Hironaka, and E. Schofer, "The Nation-State and the Natural Environment over the 20th Century," *American Sociological Review* 65 (2000).

<sup>149</sup> A. G. Theoharris, "Introduction," in *A Culture of Secrecy: The Government Versus the People's Right to Know* (Lawrence, KS: University Press of Kansas, 1998). 1; J. X. Dempsey, "The CIA and



This new focus changed the President's role in foreign policy-making.<sup>150</sup> Until World War II, Congress had a central role in foreign policy decisions, debating treaties and military interventions. During the Cold War, Presidents began to act alone more frequently in foreign policy-making, taking steps without involving Congress. To aid these operations, the Central Intelligence Agency (CIA) was created in 1947 and the National Security Agency (NSA) in 1952. The Congressional hearings on the establishment of the CIA were held in secret and both house of Congress went into executive session to consider the legislation.<sup>151</sup> Though the NSA was created in 1952, Congress did not find out about it until 1958.<sup>152</sup>

The CIA's official role was to find out what was going on in countries all over the world, to learn where the Soviet Union was spreading its influence. However, the CIA also used clandestine operations with secretly bestowed authority to shape elections and policies in other countries, and sometimes to overthrow governments.<sup>153</sup> The FBI, created in 1908, was employed to combat the perceived Soviet threat within the United States. Cold War presidents secretly authorized the FBI to monitor American communists and other activists viewed as helping the Soviet Union or undermining national unity. The FBI collected intelligence on domestic groups using

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Secrecy," in *A Culture of Secrecy: The Government Versus the People's Right to Know*, ed. A. G. Theoharris (Lawrence, KS: University Press of Kansas, 1998).

<sup>150</sup> Theoharris, "Introduction." 1-2.

<sup>151</sup> Dempsey, "The CIA and Secrecy."

<sup>152</sup> Theoharris, "Introduction."

<sup>153</sup> Dempsey, "The CIA and Secrecy."

illegal wiretaps and break-ins, and instituted secret programs to track organizations such as the Black Panthers and writers, artists, musicians and trade unionists.<sup>154</sup>

Athan Theoharis writes that a “culture of secrecy” developed during the Cold War and was legitimated by it.<sup>155</sup> Some secrecy was required for the sake of national security, but domestic concerns also played a large role. Acting secretly allowed presidents to avoid domestic debate on their foreign interventions and to use the intelligence agencies to gather information about their domestic political opponents.<sup>156</sup> Many of these activities were disclosed in the 1970s, when special House and Senate intelligence committees (the Church and Pike Committees) conducted inquiries. These revelations fueled anger at both the substance of the policies and the secrecy with which they had been carried out.

### **The Freedom of Information Act**

In addition to authorizing clandestine operations, Cold War Presidents introduced policies to restrict information, continuing the censorship that had accompanied World War II. President Eisenhower created the Office of Strategic Information, which created a new, undefined category of information called “strategic data” that the government could restrict even though it was not classified. This department also pressured the press to “voluntarily” suppress publication of certain information. In 1955, Secretary of Defense Charles Wilson ordered government officials and defense contractors to clear information with the Department of Defense

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<sup>154</sup> Theoharris, "Introduction." 3.

<sup>155</sup> Ibid. 11.

<sup>156</sup> Ibid. 4.

before releasing it for publication. Eisenhower justified these policies with the contention that the United States' enemies could use any information released, so anything of potential use to them would have to be kept secret. This often included withholding information from Congress. These policies led to battles between the Eisenhower Administration and both the Democratic Congress and the press.<sup>157</sup>

Congress responded by creating the Subcommittee on Government Information, headed by California Democrat John Moss, to investigate executive branch secrecy. The committee staff interviewed executive branch agency officials and distributed a questionnaire to determine the agencies' information policies: what information was kept from which groups and on what basis, and how the classification and appeals processes worked. The subcommittee then held hearings about newspaper suppression. The findings from these efforts painted a picture of excessive government secrecy.<sup>158</sup>

Congress' drive for information had begun with an emphasis on inter-branch transparency, but as the public became aware of the conflict, the national mood grew more critical of government secrecy and the focus shifted to the accessibility of information to citizens. The 1956 Democratic Party platform condemned government secrecy and stated that the federal government should share information when it did not concern weapons or national security. However, the Eisenhower Administration did not change its secrecy practice, and the Kennedy Administration continued many of them.

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<sup>157</sup> Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act*.

<sup>158</sup> Ibid.

After World War II, the press, too, had begun pushing back against peacetime secrecy and advanced the doctrine of the citizen's "right to know." In the 1950s, the American Society of Newspaper Editors formed a Freedom of Information Committee to push for the right of access to government information. ASNE hired newspaper lawyer Harold Cross to write "The Peoples' Right to Know," a book-length report on federal, state and municipal information policies. Cross argued that the press must be given special access to information because they are the best conduit to the people.<sup>159</sup>

Following their fact-finding efforts, and encouraged by the efforts of the press, the Moss Committee resolved to create a statutory basis for the right to know. They drafted the *Freedom of Information Act* (FOIA), which provided that any individual can request any document from any executive branch agency, and that citizens can sue if the government does not comply. All agencies must make records available promptly, except in specific cases delineated by nine exemptions to the law. Lyndon Johnson signed the *Freedom of Information Act* into law in 1966, but his support for the law was qualified. He issued a signing statement that expressed his concern about possible encroachment on executive prerogatives and gave a restricted reading of the act.<sup>160</sup>

The executive branch agencies opposed FOIA from the start. The first version of the bill had no deadlines for compliance and no penalties for violation, and the

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<sup>159</sup> Ibid. 18. H. L. Cross, *The People's Right to Know: Legal Access to Public Record and Proceedings* (New York: Columbia University Press, 1953).

<sup>160</sup> *Freedom of Information Act*, 5 U.S.C. Section 552; Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act*. 43.

agencies took advantage of this, creating delays and imposing high fees.<sup>161</sup> However, popular and Congressional demands for government transparency were mounting in the wake of Watergate. A FOIA reform bill was passed in 1974, and Congress overrode President Ford's veto. This new version reduced charges to document requesters, permitted courts to review materials to determine if they had been withheld for legitimate reasons, mandated that documents be released after segregable parts were deleted, narrowed the exemptions, and established a response time.<sup>162</sup>

The 1974 FOIA reform law ensured that FOIA would cover FBI and CIA records other than those specifically relating to national security and law enforcement.<sup>163</sup> The release of agency documents under this new law revealed how Presidents had used the intelligence agencies to pursue secret foreign policies and had authorized illegal programs.<sup>164</sup> However, this information breakthrough was limited. Presidents and the agencies developed strategies for limiting access to their records: broad interpretation of exemptions, overclassification, measures to ensure Presidential "deniability," truncated meeting minutes, and "do not log" procedures, which ensure that certain notes are not indexed and can be destroyed quickly.<sup>165</sup>

During the late 1970s and 1980s, FOIA requests rose. Businesses realized that FOIA could be useful to gain information about their competitors. As a result, corporations began suing the government to prevent the release of their confidential

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<sup>161</sup> Ibid.

<sup>162</sup> *The Privacy Act of 1974*, 5 U.S.C. Section 552a. Ibid.

<sup>163</sup> Theoharris, "Introduction." 24.

<sup>164</sup> Ibid. 6.

<sup>165</sup> Ibid. 25.

business records to third parties. These suits, which often cited the *Uniform Trade Secrets Act*, were called reverse FOIA suits.<sup>166</sup>

President Reagan reversed the trend towards bolstering freedom of information. In 1982 he issued an executive order that weakened FOIA, increased the cost to information requesters, and expanded the exemptions. Reagan's Department of Justice defended agency denials of information in court. In 1984 Congress complied with a Reagan Administration proposal, passing the *CIA Information Act*, which affirmed the application of FOIA to the CIA but exempted "operational files."<sup>167</sup>

This CIA loophole soon grew larger. In 1977, the watchdog group Public Citizen submitted a request to review unclassified files from a CIA program called MKULTRA that had operated from 1953-1966. This program included a subproject in which LSD was secretly administered to unwitting subjects, at least two of whom were killed in the process. The CIA refused to release the information, citing not FOIA exemption 1, for national security, but FOIA exemption 3, which protected information exempted from disclosure by statute. The CIA was referring to the 1947 *National Security Act*, which created the CIA and which states that the CIA director must protect "sources and methods" from disclosure. The case reached the Supreme Court in 1985, and in *CIA v. Sims*, the Court ruled that the "sources and methods" language of the *National Security Act* allows withholding information even if it is unclassified.<sup>168</sup> Sources and methods have become a blanket exemption for the CIA.

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<sup>166</sup> Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act*.

<sup>167</sup> *The CIA Information Act of 1984*, 50 U.S.C., Title VII.

<sup>168</sup> *Central Intelligence Agency v. Sims*, 47 United States 159 (1985).

The FBI then requested its own exemptions for ongoing investigations, informants, intelligence, counterintelligence, and international terror. In 1986 Amendments to FOIA negotiated between the political parties, Republicans got some FBI exemptions and Democrats got FOIA fees made fairer.<sup>169</sup>

FOIA is the most well known of a larger set of concrete transparency measures enacted after World War II. Congressional oversight has led to the release of many executive branch documents. The *Presidential Records Act* of 1978 defined Presidential records as public property and established a process for public access.<sup>170</sup> Special oversight boards have been set up to ensure the release of documents pertaining to specific sets of events such as Guatemalan human rights abuses.<sup>171</sup> Nevertheless, executive branch secrecy has continued, most commonly in the areas of national security, intelligence and war. Presidential administrations often argue that releasing such information would harm the United States, but the reality is often that they want to avoid criticism.<sup>172</sup>

The battles over executive branch secrecy and over creating, amending and interpreting FOIA produced a body of thought and a set of civil society groups supporting the notion that the public is entitled to see records pertaining to every detail of government activities. This includes meeting minutes and participants, visitor logs,

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<sup>169</sup> Foerstel, *Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act*.

<sup>170</sup> Theoharris, "Introduction." 8.

<sup>171</sup> A. G. Theoharris, ed., *A Culture of Secrecy: The Government Versus the People's Right to Know* (Lawrence, KS: University Press of Kansas, 1998). *Presidential Records Act*, 44 U.S.C. Sections 2201-2207.

<sup>172</sup> D.A. Demac, *Keeping American Uninformed* (New York: Pilgrim Press, 1984); D.P. Moynihan, *Secrecy: The American Experience* (New Haven: Yale University Press, 1998).

expense reports, campaign finance reports, internal memos and emails. These advocates' arguments often reference ideals advanced by democratic theorists: that openness will prevent corruption and ensure meaningful popular sovereignty, that citizens should be making rational decisions based on information, and that decisions made in secret are illegitimate. In the 1960s and 1970s these arguments were deployed to institute concrete transparency measures. The revelations of secret policymaking had inspired a deep distrust in government, and it began to appear that the process through which a decision was reached was just as important as its substance.

### **The right to know and the press**

The Supreme Court has never recognized a constitutionally based right to know. However, a few decisions have recognized related rights. The Supreme Court recognized the right to receive information in 1943 in *Martin v. City of Struthers*, which protected the right to distribute and receive literature. In *Lamont v. Postmaster General* in 1965, the Court held that a postal restriction violated the free speech rights of those prevented from receiving banned literature. In *Griswold v. Connecticut* in 1965, the court ruled that freedom of speech and the press includes the right to receive information. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* in 1976, the Court argued that freedom of speech includes protection of willing recipients of speech.<sup>173</sup>

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<sup>173</sup> *Griswold v. Connecticut*, 381 U.S. (1965); *Lamont v. Postmaster General*, 381 U.S. 301 (1965); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council* 425 U.S. 748 (1976).



The Supreme Court has also provided support for the conception of the press as a watchdog whose role is to uncover government wrongdoing so the people can hold government accountable. The Court held a law in violation of freedom of the press for the first time in 1931, in *Near v. Minnesota*.<sup>174</sup> In this case, the state had persuaded a judge to enjoin a newspaper from continuing to publish a series of stories alleging state officials were corrupt. The Supreme Court held that injunctions are prior restraints and that prior restraints are presumptively unconstitutional under the free press clause of the First Amendment. The majority added that certain circumstances, such as wartime publication of military plans, might warrant a prior restraint. Five years later, in *Grosjean v. American Press Co.*, the Court gave the press another victory, holding that a tax designed to silence the press was also an unconstitutional prior restraint.<sup>175</sup> In *Grosjean*, the Court explicitly affirmed the press' special role in informing the citizenry of government misbehavior. In both of these cases, the newspaper had published information that was embarrassing to government officials. The fact that the Court protected the newspapers made it clear that this was the press' appropriate role.

*New York Times Co. v. Sullivan* in 1964 and *New York Times Co. v. United States* in 1971 were emblematic of the rising prestige of the press and the support for its role as government watchdog. In *Sullivan*, the Court ruled that, because freedom of the press often necessarily includes harsh criticism of public officials, libel complaints made by public officials must show "actual malice," thereby clearing a higher hurdle

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<sup>174</sup> *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>175</sup> *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

than libel complaints brought by private citizens.<sup>176</sup> In *New York Times Co. v. United States*, the Supreme Court was asked to determine whether the *New York Times* and the *Washington Post* could be enjoined from publishing portions of a secret history of the Vietnam War known as the Pentagon Papers.<sup>177</sup> The government argued that this case fell under the wartime exception to the presumption against prior restraints set out in *Near*, but the Court declined to accept this argument, stating that the government had not met the “heavy burden” of justifying the prior restraint. This lent credence to the understanding that the press was the public’s agent and was tasked with uncovering government secrets.

### **Adversarial journalism and distrust of authority**

The political environment right after the Great Depression and World War II was hospitable to journalistic professionalism. There was high public confidence in political leaders and institutions, and a strong sense of the need to transcend partisanship. In this environment, journalists strove for objectivity and took official statements at their word. However, this trust broke down as people became disaffected by Vietnam and Watergate. Journalists and the public became skeptical towards official pronouncements and towards institutions in general. This strained the journalistic conventions of objectivity and led to a more adversarial tone and approach.<sup>178</sup>

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<sup>176</sup> *New York Times Co. v. Sullivan*, 403 U.S. 713 (1964).

<sup>177</sup> *New York Times Co. v. United States*, 403 U.S. 713 (1971).

<sup>178</sup> Hallin, *The Uncensored War*.

The Vietnam War was more thoroughly reported than any previous wars because for the first time, journalists had official accreditation without military censorship. Before Vietnam, accreditation was usually exchanged for accepting military control over the information reported. In Vietnam, military censorship was almost impossible to institute, because The United States had not formally declared war. Thus, journalists could cover the war almost as freely as they could events in the United States. The coverage was also more intense than in other wars because it included television.<sup>179</sup>

In the early years of the war, there was little dissent among officials and soldiers – journalists’ main sources -- so dissenting views rarely got into the news. However, as officials and soldiers in the field became more pessimistic and critical, the news reflected this. When there was disagreement among policy-makers, there was more leaking. At the same time, journalists grew frustrated when they suspected they were being lied to. The Kennedy, Johnson, and Nixon Administrations were all evasive about changes in policy, particularly escalations and bombing campaigns. However, journalists did not start to voice skepticism regularly until after 1968, when multiple contradictions appeared between what the administration was saying and what soldiers on the ground and dissenting policy-makers were saying.<sup>180</sup>

After the Tet offensive in 1968, policymakers, journalists and the public began to doubt the optimistic projections they had been hearing. Journalists began to insert negative editorial comments and expressed skepticism towards Administration claims.

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<sup>179</sup> Ibid.

<sup>180</sup> Ibid.

They stopped basing entire reports on official statements at press conferences, and sought other views.<sup>181</sup>

Although the Vietnam War led journalists to become skeptical of American foreign policy, the popular conception that the press was a crusading force that turned the public against the war and the corresponding conception that the Vietnam War drove journalists and politicians apart are unfounded. Dan Hallin notes that the public and government officials started to turn against the war before the press displayed any sign of dissent, and that journalists eventually presented criticism of the war because the official sources they relied on had become critical.<sup>182</sup>

This qualification of the conventional wisdom is significant in this story because it indicates that even during this event seen as the archetypical example of an antagonistic watchdog press, the press was conveying the divisions that existed among officials and the public. The growing distrust of authority was not a product of the press but of the culture more generally. Even as the press became more adversarial, it still functioned as part of American politics rather than standing outside it, and this has continued. The press serves as both a watchdog and as the conduit through which officials talk to each other and to the public. Journalists are agents of government transparency, but this includes helping government officials to project the performance of transparency.

Though journalists' symbiotic relationship with politicians was not destroyed by the Vietnam War, it was badly frayed, particularly with President Nixon. Many

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<sup>181</sup> Ibid.

<sup>182</sup> Ibid.

journalists were hostile towards Nixon because his administration continuously lied to them and he perceived the press as his enemy. Nixon began to go over the heads of the press, holding fewer press conferences and giving more prime time speeches.<sup>183</sup>

The series of scandals known as Watergate increased the animosity between President Nixon and the press and sharpened the focus on the links between secrecy and corruption. The discovery that the Nixon Administration had been so baldly duplicitous intensified journalists' adversarialism and shifted the national mood from skepticism to cynicism.<sup>184</sup> Here too, the news media's role has been mythologized. While the press did play an important role in bringing Watergate to light, this would not have been possible without the officials who leaked documents, and the scandal would not have been fully uncovered without the FBI investigation, federal prosecutors, grand juries and Congressional Committees. Groups like Common Cause also worked to keep the spotlight on the scandal. These players were all part of an apparatus that had grown up to investigate government wrongdoing.<sup>185</sup> Though journalists did not single-handedly "bring down a President," their important and highly visible role contributed to the profession's growing status. Watergate also brought two journalists personal fame, and as journalism grew in prestige, more journalists became celebrities.

After the Vietnam War and Watergate, journalists were less willing to trust official accounts of events. Newspapers introduced more interpretive features,

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<sup>183</sup> Ibid. p. 85.

<sup>184</sup> M. Schudson, "Watergate and the Press," in *The Power of News* (Cambridge, MA: Harvard University Press, 1995).

<sup>185</sup> Ibid.

institutionalizing the understanding that the facts would not speak for themselves. New journalistic styles emerged, including the “new journalism,” which aimed for emotional impact, and investigative journalism, which echoed the aims of the muckraking tradition.

At the same time, government officials increasingly managed the news.<sup>186</sup>

Despite the adversarial turn, most journalists still accepted the relationship they had with politicians, and the principle that statements by government officials were news. This meant that they could not completely escape being conduits for the increasingly honed messages coming out of increasingly well-staffed communications teams. The public and press had come to value government transparency and to demand it, but in practice it was hard to disentangle from the performance of transparency.

### **Congressional reforms and government transparency**

A wave of reforms leading to increased transparency also swept Congress in the 1970s. These reforms were the result of efforts that began decades earlier. From the late 1940s to the late 1970s, a coalition of politicians and civil society groups worked to make Congress more accountable, responsive and transparent by pushing through a series of laws and rule changes.<sup>187</sup>

The reform coalition sought to dismantle the legislative system in place during the early 20<sup>th</sup> century, which they judged to be insufficiently democratic. This system, known as the committee system, had been instituted by earlier reformers seeking to

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<sup>186</sup> Schudson, *Discovering the News*.

<sup>187</sup> J. E. Zelizer, *On Capitol Hill : The Struggle to Reform Congress and Its Consequences, 1948-2000* (New York: Cambridge University Press, 2004).

end the intense partisanship of the late 19<sup>th</sup> century by moving the center of power from parties to Congressional committees. In the committee system of the 1930s and 1940s, partisanship was restrained, committee chairs had great power, and most legislative business was conducted in secret. The public could observe debate on the floors of both chambers, but most committee meetings, where many of the most important decisions were made, were closed to the public, and committee reports were usually hard to find.<sup>188</sup>

The congressional reform coalition that emerged in the late 1940s viewed the committee process as a barrier to passing civil rights legislation because many committee chairmanships were held by long-serving conservative southern democrats who used their procedural powers to block civil rights legislation. Because political parties had been so weakened, the more liberal northern and western democrats could do nothing to change this. The committee process that created this situation encompassed a broader set of arrangements than just the power of committees. It also included seniority, secrecy in deliberations, filibuster rules, campaign finance arrangements, allocation of districts and many other norms and rules that affected how legislation was produced. The reformers argued that conservatives' power was built on procedural advantages rather than popular support, and they sought to advance civil rights legislation by creating a new style of politics that was more partisan, majoritarian, and transparent.<sup>189</sup>

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<sup>188</sup> Ibid.

<sup>189</sup> Ibid.

The reform coalition put its goals on the national agenda by creating an association between procedural reform and civil rights. Several well-publicized battles brought a media spotlight. After the passage of the *Civil Rights Act* of 1964 and the *Voting Rights Act* of 1965, civil rights was viewed as a less urgent issue, and the coalition lost its unifying goal. Many groups that joined the reform coalition after the mid-1960s valued reforming the political process for its own sake, rather than as a means to achieve specific legislative goals. These new members believed that it was all political elites, not just the Southern Democrats, whose power had to be limited. They focused on eliminating corruption and making Congress more transparent and democratic.<sup>190</sup>

Changes in the surrounding culture created a hospitable environment for the proposed changes in Congress. In the 1960s climate of skepticism towards authority, criticism of established ways of conducting politics found resonance. Vietnam, Watergate, and the revelations about secret foreign policy-making churned frustrations about secrecy and corruption. A new generation of legislators elected in 1970 prioritized procedural reform, and they were aided by a new set of public interest groups.<sup>191</sup>

In the early 1970s, journalists covered a barrage of stories about campaign finance improprieties, including those attached to Watergate, and these revelations helped stoke the public's desire for campaign finance reform. Advocates viewed transparency as a necessary component of reform. In 1972 and 1974, Congress passed

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<sup>190</sup> Ibid.

<sup>191</sup> Ibid.



laws that capped campaign contribution and spending, instituted public financing for Presidential elections, strengthened disclosure requirements and set up an independent commission to investigate and monitor campaign activities. Until the 1960s there had been little information available to the public about how campaigns were funded and this legislation helped bring this information to light.<sup>192</sup> The information generated by campaign finance reforms led to a string of negative stories about Congress, feeding a growing assumption that politicians are easily corrupted.<sup>193</sup>

Between 1970 and 1974 Congress adopted several measures that limited the power of committee chairs and placed more control in the hands of parties. The coalition aimed to consolidate party power while at the same time ensuring that parties would be responsive to their rank and file. Thus the reforms they favored simultaneously acted as centralizing and decentralizing forces. Many of these reforms involved eliminating secrecy so the public could see which legislators were responsible for which decisions and could exert pressure on them to act in accordance with their wishes. The *Legislation Reorganization Act* of 1970 forced committees to make recorded votes public and instituted several changes that offset committee chairs' power.<sup>194</sup>

The coalition made reform an issue in the 1972 and 1974 elections, focusing on ending secrecy, opening up committee meetings, and electing committee chairs. Public interest groups adopted new strategies, such as asking candidates to fill out

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<sup>192</sup> Ibid.

<sup>193</sup> T. Patterson, *Out of Order* (New York: A. Knopf, 1993); M. Schudson, "Congress and the Media," in *The American Congress*, ed. J. E. Zelizer (Boston: Houghton Mifflin Company, 2004).

<sup>194</sup> Zelizer, *On Capitol Hill: The Struggle to Reform Congress and Its Consequences, 1948-2000*.

checklists indicating their opinions about reform and publishing booklets about candidates' histories regarding reform. Both elections brought more new legislators who had run on reform platforms and pursued reform aggressively once elected, refusing to be constrained by the Senate's tradition of seniority. Members of the reform coalition had become the mainstream. In 1975, Democrats adopted rules allowing votes on committee chairs, and this helped lead to the removal of three powerful chairmen. Congress was becoming more majoritarian. In 1975, the Senate began to allow the public to attend most hearings.<sup>195</sup>

By 1976, the committee system had been weakened, and momentum and support for reform were waning. Many members of the reform coalition were now in positions of power and were less interested in challenging the status quo. Furthermore, the reforms had some unintended consequences. The new legislative process made it difficult to pass legislation, and Congress was frequently engulfed in scandal politics.

### **Congressional scandals and publicizing personal lives**

In the 1970s, the news media began to cover Congress more aggressively and publicized several Congressional scandals. Journalists had become comfortable digging up details that politicians would have preferred stayed secret. The early 1970s were unique in that scandal stories were linked to calls for institutional reform. Scandals made procedural problems more understandable and interesting. However, by the late 1970s, scandals began appearing without any link to proposed institutional

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<sup>195</sup> Ibid.

reforms, deemed to be newsworthy for their own sake. This had been the case in the past, but in the 1970s the scandals were more public and more frequent. Politicians began to regularly use scandal to bring down rivals. Investigative organizations dedicated to uncovering scandal focused on individual misbehavior rather than the institutional context that encouraged it.<sup>196</sup>

By the early 1980s, scandals were frequent and easy to produce. A whole infrastructure had grown up to investigate corruption, including the Office of the Independent Counsel, congressional oversight, ethics committees, and dedicated public interest groups. Previously, secrecy, powerful committee chairs who could stop investigations, and a respectful and at times compliant press had prevented scandals. The dismantling of the committee era and of the clubby relationship between reporters and journalists opened the door to increased partisanship and scandal warfare.<sup>197</sup>

The growing skepticism about politicians extended to their personal lives, which became fodder for political reporting. This new trend became prominent after the massive coverage of a 1969 accident in which Ted Kennedy drove a car off a bridge and his companion died. Kennedy then lied about having sought help immediately. This incident, known as Chappaquiddick, underlined the fact that politicians' private lives were fair game for reporters, and brought the personalization of politics to a new level.

Several factors combined to open politicians' private lives to scrutiny. Public attitudes towards sexuality had been liberalized during the 1960s, making it a more

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<sup>196</sup> Ibid. Patterson, *Out of Order*, Schudson, "Congress and the Media."

<sup>197</sup> Zelizer, *On Capitol Hill : The Struggle to Reform Congress and Its Consequences, 1948-2000*.

acceptable topic for conversation and reporting. Conservative evangelicals argued that politics was a moral undertaking and that politicians' personal behavior therefore mattered. The feminist movement made the argument that power was reproduced and enacted in the private sphere as well as the public sphere, and thus the private sphere was relevant to public life. Courts were beginning to accept the argument that issues such as sex, family and schooling had ramifications for political rights, thus widening the definition of rights to include these issues and emphasizing the permeability of the public/private divide. Michael Schudson has used the phrase "culture of public frankness" to describe a general trend towards cultural openness in the second half of the twentieth century, in which people are willing and even eager to speak publicly about cancer, sexuality, divorce, addiction and other problems previously considered taboo.<sup>198</sup>

John Thompson argues that scandals have several essential characteristics. They involve transgressions of norms or moral codes, they involve an element of secrecy or concealment but are known to some non-participants, some non-participants disapprove and express this disapproval publicly, and the disclosure and condemnation may harm the reputations of the individuals responsible. Thus, scandals are linked to transparency in an important way. An act of lawbreaking or indecency is not necessarily a scandal; to be a scandal, it must be made public. A scandal is characterized by the "drama of concealment and disclosure."

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<sup>198</sup> M. Schudson, "The Good Citizen and the Illusion of the Political Public Sphere," (Speech given at the Copenhagen Business School, 2005).

Even though scandals have existed for centuries, they became more frequent and more significant in the late 20<sup>th</sup> century in part because the ethos of transparency and the modern electronic media have made politicians much more visible.<sup>199</sup> Television allows political leaders to speak to the public in a more intimate mode than they could before, presenting themselves as human beings and addressing their constituents as though they were friends. This intimacy encouraged people to evaluate politicians based on personal qualities such as trustworthiness and integrity. This facilitated stronger bonds between politicians and the public, but it also gave the issue of character more power in public life, and this opened up politicians to a new, more personal type of criticism.<sup>200</sup>

Although it's tempting to blame the explosion of political scandals entirely on the electronic media, Thompson writes that they are only partially to blame. Equally important is the postwar shift away from "ideological politics," or traditional, class-based politics based on sharply opposed belief systems. In place of this ideological system is a growing emphasis on the "politics of trust." As the strength of political parties waned, people focused more on credibility and trustworthiness as evaluative criteria for leaders, and this shift gave scandals a larger role.<sup>201</sup>

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<sup>199</sup> J. B. Thompson, *Political Scandal: Power and Visibility in the Media Age* (Cambridge: Polity Press, 2000). 13-19.

<sup>200</sup> Ibid. 39-41.

<sup>201</sup> Ibid. 262.

## **Congressional Television**

The final Congressional reform was the introduction of television cameras on the House and Senate floors, ushering in an important component of the contemporary instantiation of transparency. Both houses had previously allowed occasional television coverage of Congressional hearings.<sup>202</sup> The first hearing with television cameras was a 1948 hearing held by the Senate Armed Services Committee about universal military training. Later that year, House Un-American Activities Committee hearings about communist infiltration of the United States government and Hollywood were televised.

The Kefauver hearings, in 1951, were a major television event. They were held by a special senate committee investigating organized crime, and lasted from January to March. There was a large television audience, and people held television parties and organized listening clubs. Senator Kefauver received a great deal of notoriety. The Kefauver hearings inspired a debate about the purpose and effects of televising hearings, which followed the contours of previous debates about the possibility and value of government transparency. The hearings produced few proposals for dealing with organized crime, and it appeared that the public was treating them like entertainment. Legal scholars and journalists criticized the hearings for catering to morbid curiosity and sensationalism. Some praised the hearings' accessibility to average citizens, but others questioned whether they had really created a more

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<sup>202</sup> R. Garay, *Congressional Television: A Legislative History* (Westport Connecticut: Greenwood Press: 1984).

informed public. People said the senators asked ridiculous questions because of the cameras.<sup>203</sup>

Adding to the problems, two convicted gamblers had refused to testify before the committee, claiming the presence of cameras violated their constitutional rights. They were issued contempt citations, but a federal court struck them down. The judge ruled that in this case television had violated due process rights by creating psychological stress and privacy violations for witnesses, but the decision did not provide a basis for preventing televised hearings.<sup>204</sup> The Kefauver skirmish highlights some themes that also emerged in debates about cameras in the courtroom debate and Supreme Court confirmations. Televised proceedings are associated with entertainment, frivolity, and irrationality. They're accused of debasing public affairs and helping publicity-hounds to seek the limelight. There is concern that fact-finding and deliberation will be hampered by the presence of cameras and that it's inappropriate for politicians to become celebrities.

In the 1960s, television became American's primary news source, and the three major television networks had a monopoly on television news. Entertainment was more lucrative than news, and thus the networks broadcast only a limited amount of political news each day. In the 1970s, deregulation and technological improvements

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<sup>203</sup> Ibid.

<sup>204</sup> *United States v. Kleinman*, 107 F. Supp. 407 (1952).

allowed cable to break the broadcast networks' monopoly.<sup>205</sup> The proliferation of channels carried by cable enabled channels devoted solely to news.

Brian Lamb, the creator of C-SPAN, conceived the idea of a cable channel to present long-format public affairs coverage. He had been critical of the networks for twisting news and prioritizing entertainment and ratings over public affairs, and wanted to create a way for people to observe the political process for themselves. Presenting public affairs events without analysis or editing became the mission of the channel Lamb developed. Cable made this possible. Lamb didn't want his station to be dependent on advertising or government money, so he convinced cable operators to fund C-SPAN as a public service.<sup>206</sup>

In the 1970s, Lamb and the networks lobbied the House of Representatives and the Senate to allow television cameras to cover floor debate. When the idea was first introduced, members of Congress argued that the work of Congress does not lend itself to television, that cameras would make members act differently, and that broadcasters would distort Congress' work. Eventually, the national focus on government transparency and lawmakers' desire for publicity caused Congressional leaders to relent.

Television was at that point much more willing to cover the president than Congress, because the President presented a clear main character and a human interest angle, while legislative battles were often dull, slow and complex. Members of

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<sup>205</sup> R.B. Horwitz, *The Irony of Regulatory Reform: The Deregulation of American Telecommunications* (Oxford University Press, 1988); Zelizer, *On Capitol Hill : The Struggle to Reform Congress and Its Consequences, 1948-2000*.

<sup>206</sup> Frantzich and Sullivan, *The C-SPAN Revolution*.



Congress began to welcome C-SPAN as a way to maintain their stature in the public mind relative to the president. They also wanted to maintain their visibility to their local constituents. Local media had always covered their own legislators, but audiences were switching to national media, which did not guarantee individual members coverage. Media cynicism and negativity also gave politicians a reason to accept an alternative means to get out their message.<sup>207</sup> It's significant that the advent of C-SPAN, an ardent and earnest advocate of transparency, was enabled by politicians' desire for publicity. Transparency and its performance arrived together.

C-SPAN coverage of the House began in 1979. Congress wanted to maintain control over the cameras, but the broadcast networks insisted that this violated principles of journalism, and that they should have control. C-SPAN struck a deal whereby Congress officially controlled the cameras on the floor of each house, but these cameras would not move, and would focus on the person speaking. C-SPAN would simply pick up the feed. When coverage of committee meetings was later added, C-SPAN retained control over those cameras.<sup>208</sup>

The Senate did not allow C-SPAN cameras until 1986. Opponents feared that Senators would put on performances and deliberation would be sacrificed for showmanship. These were the same concerns over "oratorical pyrotechnics" voiced 200 years earlier in the debate over whether to create public viewing galleries in the Senate.<sup>209</sup> Some argued that Senators would no longer be able to defend deeply held beliefs because they would always have an eye on the voters. In other words,

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<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid.

transparency would give majoritarianism stronger force. However, proponents pointed out that television was necessary for the Senate to maintain equal standing with the House.<sup>210</sup> Many Senators were concerned that the House was getting more attention and that Americans recognized House leader Tip O'Neil but did not recognize the Senate leadership.<sup>211</sup>

Thus, C-SPAN fulfilled more than one function. Reformers wanted to open up Congress and allow the public to monitor their representatives, but at the same time, lawmakers saw C-SPAN as an opportunity to gain stature and notoriety and to transmit messages they wanted the public to hear. It was thus both a monitoring tool and a communication tool, enabling both transparency and publicity.<sup>212</sup> Just as in the open courtrooms of early modern Europe described by Judith Resnik, transparency can help both citizens to monitor power and leaders to project power.<sup>213</sup>

Advocates had long argued that transparency mechanisms would make Congress less hierarchical, but they did not predict the consequences this would produce. C-SPAN helped Newt Gingrich rise to power in the 1980s. Gingrich and a group of young conservative Republicans legislators called the Conservative Opportunity Society (COS) attacked the Democratic majority for shutting them out of the political process, and used C-SPAN to communicate directly to the public.<sup>214</sup> They used the one-minute floor speeches at the beginning of each day and the longer

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<sup>210</sup> Zelizer, *On Capitol Hill : The Struggle to Reform Congress and Its Consequences, 1948-2000*.

<sup>211</sup> Frantzich and Sullivan, *The C-SPAN Revolution*.

<sup>212</sup> Zelizer, *On Capitol Hill : The Struggle to Reform Congress and Its Consequences, 1948-2000*.

<sup>213</sup> Resnik and Curtis, "From 'Rites' to 'Rights' of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes."

<sup>214</sup> Zelizer, *On Capitol Hill : The Struggle to Reform Congress and Its Consequences, 1948-2000*.

Special Order speeches at the end of the day to attack Democrats, coordinating the themes of their speeches. These were powerful weapons for the minority party, which received little coverage from the networks. C-SPAN allowed them to go around the traditional media.

COS speakers sometimes criticized Democrats by name and then asked them to respond. No one ever did, because these speeches occurred at the end of the day, when the chamber was empty. In May 1984, enraged by this practice, Speaker O’Neil ordered the camera to pan the chamber during one such speech, showing the public that the person speaking was just pretending the seats were full. Republicans were furious with O’Neil for breaking the agreement to keep the camera on the person speaking, and the incident became known as “camscam.”<sup>215</sup>

C-SPAN developed a style that allowed viewers to get a different sense of the political process than network or cable news allowed. They provided no commentary and did virtually no editing.<sup>216</sup> Hearings were played in the evenings after floor debate was over, and the main editorial decisions concerned what hearings to cover. In covering a hearing, C-SPAN tries to approximate what a viewer would see if they attended in person. They start with a wide shot of the committee room, go to a medium shot of the dais, and then go to tight shots of the speakers. In one way, watching C-SPAN is better than being there, because viewers see both witnesses and questioners from the front.<sup>217</sup>

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<sup>215</sup> Ibid.

<sup>216</sup> Ibid.

<sup>217</sup> Frantzich and Sullivan, *The C-SPAN Revolution*.

C-SPAN provides a way for people to gain a large amount of information about government and to make their own decisions about what is important. Of course, C-SPAN does make gatekeeping choices, such as which hearings to show. But with so much unedited information and no commentary, the gatekeeping function common to the news media is diminished. The real warping effect that we have come to expect from mass media comes not from C-SPAN's techniques, but from politicians' use of this channel of communication. Public access makes public opinion more salient. The coverage is distorting because we can never have a clear window onto Congress: the cognizance of public access influences lawmakers' actions and words, producing the performance of transparency. Some have criticized C-SPAN's approach of just letting the cameras roll, because it allows rumor and innuendo to be broadcast, as when Republicans used special order speeches to make an issue of Bill Clinton's college trip to Moscow. However, others laud the fact that C-SPAN is designed around the idea that citizens are capable of understanding governance, and performance is better than no information.

### **The 24-hour news environment**

CNN went on the air in 1980, introducing another form of continuous live television news. It played half-hour segments about entertainment, sports, politics and business news, often live, throughout the day. CNN showed headlines every half hour, and interrupted programs with live breaking news.<sup>218</sup> Fox News, another 24-hour news

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<sup>218</sup> Zelizer, *On Capitol Hill : The Struggle to Reform Congress and Its Consequences, 1948-2000*. 219.

channel, was launched in 1985. NBC followed this model, launching CNBC in 1989 and MSNBC in 1996. These 24-hour news channels expanded the transparency dynamic in two directions, providing more opportunities for people to learn about government and more opportunities for politicians to communicate to the public.

With so many hours of political news each day, cable television enabled politicians to appear on television more easily and more often than before. Politicians began to think of television as a crucial tool for communicating with the public and garnering attention for the issues they favored, and thus journalists found they could usually get someone to talk to them about breaking news. Because it began happening in real time, news became more of a political force, able to affect events. Legislators used television to build support for bills, and this shaped debate and votes. At the same time, the new media environment was difficult to predict and impossible to control. The 24-hour news cycle necessitated fast reaction times. Politicians could be unexpectedly pushed into the spotlight, or asked to comment on an issue before they had time to develop a good articulation of their position.

The line between politics and news began to blend during the 1980s and 1990s as people involved in politics began to conduct interviews and analyses. Figures such as Pat Buchanan moved back and forth between political and media worlds. Television appearances turned many journalists into celebrities, and being telegenic became a necessity for the job.

The political information produced in this new environment bore new patterns of selection and emphasis. Certain types of stories were better for television and

politicians designed their policy strategies with an eye to how their actions would play on camera. They used visual aids to get the public's attention and hired media staff to help make leaders look better on television. The competition among media outlets was intense, so television news put a lot of effort into attracting viewers. Producers made sure stories had visual components, colorful personalities, and conflict, and made them easy to follow. Television also began to focus on blunders and small misstatements by legislators.<sup>219</sup>

Television did not cause these changes alone, but acted in concert with the trends towards adversarial journalism, majoritarian politics and personal revelation. The switch from network television to cable in many ways meant more than the switch from newspapers to television. It was not so much the fact that images of politics were being broadcast that made the difference, but the ways these images were used.

### **The new procedural era and transparency's unintended consequences**

The changes championed by the Congressional reform coalition – more transparency and majoritarianism, more power to parties and less to committee chairs and seniority, less hierarchy -- ushered in a new procedural era that has had several unanticipated consequences. Compromise has become more rare. Virtually all aspects of Congress – legislation, confirmations, rule changes, ethics investigations – are partisan battlegrounds. However, the new partisanship is different from that of the 19<sup>th</sup> century, because there is much less connection between citizens and the parties.

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<sup>219</sup> Ibid. 230; A. Hamilton, "The Market and the Media," in *The Press*, ed. G. Overholser (Oxford: Oxford University Press, 2005).

Growing numbers of people don't identify with either party, and many don't vote at all.

Despite the new tools to institute party discipline, leaders in the post-reform era don't have much room to maneuver because of the fragmenting, decentralizing aspects of the new system. The dethroning of the all-powerful committee chairs was not accompanied by the creation of a new, centralized source of Congressional authority. New norms that strengthened subcommittees, caucuses, mavericks and congressional minorities created multiple competing power centers. This made it difficult for parties to enact bold legislation. The Clinton health care bill failed in part because of the fragmented legislative process and the new avenues for attacking a bill.<sup>220</sup>

Another result that the reformers did not anticipate was the success that conservatives would have with the procedural reforms. The reform coalition had assumed that the public wanted progressive policies, and that once Congress was made more responsive to their wishes, those policies would be enacted. They didn't count on the fact that the electorate was more conservative than they had imagined, and Republicans would become deft operators within the new legislative environment. Virtually every reform – ethics rules, televising debate, redistricting, procedural tools of the party caucus, the new campaign contribution system – was used skillfully by conservative Republican leaders. Liberals could not control the system they had put in place.

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<sup>220</sup> Zelizer, *On Capitol Hill : The Struggle to Reform Congress and Its Consequences, 1948-2000*.

In the early 1990s, Congressional Republicans used one-minute televised speeches, press releases and briefings and ethics charges to bring down powerful Democrats. They conducted continuous investigations of the Clintons, culminating in the Whitewater investigation and impeachment proceedings. In 1994, the Congressional Republicans took over the House and Senate based on the Contract with America. This document, drafted and rolled out with the help of market research, surveys, polls, and consultants, called for 10 changes during the first 100 days of a Republican-controlled Congress. Republican legislators dramatically signed the document in a ceremony covered by all the networks. Newt Gingrich became Speaker of the House, and used the new majoritarian tools to enact welfare reform and deficit reduction.<sup>221</sup>

The procedural reforms did not increase public satisfaction with Congress. The public disliked the partisanship and scandal warfare, and the influence of money on politics. John Hibbing and Elizabeth Theiss-Morse write that, while the public claims they want more transparency, they often don't like to see the conflict and debate that it shows them.<sup>222</sup> These dissatisfactions revolve around procedure, but they can influence the framing of substantive policies. Conservatives built on the growing cynicism about politics, arguing that government programs were inevitably inept and corrupt.

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<sup>221</sup> Frantzich and Sullivan, *The C-SPAN Revolution*, Zelizer, *On Capitol Hill : The Struggle to Reform Congress and Its Consequences, 1948-2000*.

<sup>222</sup> J. R. Hibbing and E. Theiss-Morse, *Congress as Public Enemy* (Cambridge, UK: Cambridge University Press, 1995).



One lesson we can draw from this story is that procedural reforms have unintended consequences. The partisanship and scandal-obsession of the current era may create as many problems as the secret clubbiness of the committee era. Another lesson is that transparency and publicity are hard to separate. The Congressional reformers' stated goals fit squarely with the argument that government should be open so that citizens can monitor their representatives and demand accountability. However, the results sometimes contradicted these tenets. Most information about government is filtered through a commercial media system to reach citizens. The strategic use of scandals can hamper governance and distract the public from substantive issues. Finally, many moves to improve transparency were calculated to improve politicians' stature.

### **The decline of journalistic professionalism**

Dan Hallin has called the 1960s and 1970s the era of "high modernism" in professional journalism. During this period, it was understood that although television was a business, television news was not *just* business. Journalists and network executives believed that they had a duty to serve the public interest. However, by the 1980s, this logic began to change and the culture of professionalism declined.<sup>223</sup> The professional model still exists and many journalists strive to follow its guidelines, but it does not have the dominance it once had. Since the 1980s journalism has been characterized by an increasingly porous border between news and entertainment and

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<sup>223</sup> Hallin, "Commercialism and Professionalism in the American News Media."

journalists' uncertainty about their role and point of view.<sup>224</sup> This shift was enabled by changes in the economics of the news media and in political culture.

Starting in the 1980s, both newspapers and television news became more business-oriented. Newspapers were increasingly publicly owned, intensifying the need for profits. They increasingly shaped content around market research findings and tried to make newspapers more appealing as products, introducing shorter stories, color, graphics, more lifestyle features, and less public affairs. Professionalism declined even more in the world of television. By the mid-1980s, the television networks had more competition from cable channels and Ronald Reagan's FCC appointees had removed regulations requiring that a certain amount of time be devoted to public affairs.<sup>225</sup> As networks were bought by increasingly large corporations, news divisions had their budgets cut. In an attempt to keep viewers interested, networks increasingly combined news and entertainment and covered topics like celebrity scandals.<sup>226</sup> Many news networks have been acquired by companies with significant holdings in the entertainment business, and thus news stories about entertainment celebrities is a corporate synergy strategy.<sup>227</sup> James Hamilton writes that there has been a shift in news from covering what people need to know as voters to covering what they want to know as consumers.<sup>228</sup>

Changes in political culture also contributed to the decline of journalistic professionalism. The lessons from Vietnam and Watergate that officials could not

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<sup>224</sup> Ibid.

<sup>225</sup> Horwitz, *The Irony of Regulatory Reform: The Deregulation of American Telecommunications*.

<sup>226</sup> Hallin, "Commercialism and Professionalism in the American News Media."

<sup>227</sup> D. Thussu, *News as Entertainment: The Rise of Global Infotainment* (London: Sage, 2008). 2-7.

<sup>228</sup> Hamilton, "The Market and the Media." 351.

always be taken at their word made the conventions of objective journalism look like capitulation, and journalists began to provide more interpretation. While professional news styles had tried to hide the journalists' voice, journalists in the 1980s began to reveal their emotions and opinions.<sup>229</sup> These changes influenced the output for government transparency. People had ever-expanding opportunities to learn about government, but this information was often presented in an entertainment idiom and often focused on personalities over policy.

### **Elections, majoritarianism and personalization**

Since the 1960s, parties' power in elections has further waned, and voters' power has grown. This has increased the focus on informing voters, making the news media more important to the process. The transformations in the economics of the news industry and in the political culture have also influenced election coverage. Though the information received in campaigns is different from government transparency, because it often concerns what candidates want to do in the future rather than what they have already done, it has bearing on transparency because it reflects the growing need for politicians to communicate with voters and the ways the information voters receive is shaped. Elections reflect the personalization of politics and transparency more generally.

In the 19<sup>th</sup> century, parties decided on their nominee and presented him to the electorate. Progressive reformers pushed for primaries in the early 20<sup>th</sup> century, but

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<sup>229</sup> Hallin, "Commercialism and Professionalism in the American News Media."

few states actually held primaries and they were not determinative. They existed largely for candidates to prove their viability, and party leaders at the nominating conventions made the ultimate decision. The 1968 Democratic Convention revealed the potential problems with this system, as party leaders chose Hubert Humphrey even though he had not even entered the race and was associated with President Johnson's unpopular Vietnam policy. After Nixon beat Humphrey, Democrats unhappy with what they perceived to be an undemocratic process demanded that it be changed. A new system was designed, in which primaries and caucuses elected state delegates, who then voted for candidates. This gave voters more power relative to parties and thus necessitated giving voters more information.<sup>230</sup>

Candidates now have to make direct appeals to voters during primaries, and this has increased the influence of the media, which provides opportunities for these appeals. This also requires that voters make choices among primary candidates from the same party, whose policy positions are often similar. To create distinctions between candidates that voters can understand, both the press and the candidates emphasize personality and character to a greater extent than before.<sup>231</sup> This adds to the general trend of personalization in the information people receive about politics.

The personalization of election coverage is also encouraged by the "game frame." Since the 1960s, journalists have increasingly presented elections as a strategic game, describing candidates as strategic actors whose every move is designed to help them win. Candidates' statements are described as likely to be deceptive,

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<sup>230</sup> Patterson, *Out of Order*.

<sup>231</sup> *Ibid.*

uttered only to gain electoral points, rather than as genuine assertions of beliefs or policy preferences. The press' job is defined as exposing these lies, and coverage of candidates has become primarily negative. Thomas Patterson argues that this constant negativity, often over fairly inconsequential matters, encourages a deeply antipolitical bias – the idea that politicians can't ever be trusted. It also leads to campaigns devoid of substance, as the press emphasizes the issue of credibility over policy.<sup>232</sup> This is the same shift that has happened in the coverage of politics in general, in which transparency is viewed as a way to monitor issues of character rather than a way to monitor policy decisions.

The game frame is useful to the ideal of independent journalism because it allows journalists to interpret campaigns without being partisan. They can talk about whether candidates are credible or appealing to voters rather than whether their policy plans have merit. However, the prevalent style also deviates from the ideal of independent journalism because interpretation takes precedence over reporting.<sup>233</sup> The game frame also serves news organizations' bottom line. Good stories necessitate drama and controversy. The game frame provides a character-driven narrative, presenting the election as a personal battle rather than a battle between issues or groups.<sup>234</sup>

The focus on strategy made it difficult for candidates to transmit messages to voters, and candidates began looking for ways to go around the press. During the 1980s, they started to conduct fewer press conferences and to rely more heavily on

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<sup>232</sup> Ibid.

<sup>233</sup> Ibid.

<sup>234</sup> Ibid.

political advertising, making their communication more scripted and less spontaneous. In the 1990s, candidates began to appear in “soft news” venues such as morning shows, talk shows, and late night comedy shows, where they had more access to voters and were portrayed less negatively.<sup>235</sup> These programs further personalized the candidates’ images.

### **Blending governance and campaigning: the reign of public opinion**

The end of the secretive political culture did more than just make information about government available to citizens. It also made the communication to the public integral to governing. Along with the need and opportunity to edify the public came the need to seek the public’s support. In the new political atmosphere, public approval became important not just to win elections, but also to successfully implement policies.

Nowhere is this dynamic more evident than in what political scientist Sam Kernell calls “going public.”<sup>236</sup> This is a set of activities that Presidents engage in to present themselves and their policies favorably to the public in order to increase their chances of success in Washington. This usually takes the form of making speeches to organizations, at events, or on prime time television. Public opinion is a tool for pressuring legislators to accept proposals. If a President can build strong popular support for an initiative, legislators who oppose it may risk losing voters and donors. Going public is an alternative to bargaining, which entails offering legislators a chance

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<sup>235</sup> Ibid. H. Kurtz, *Media Circus* (New York: Times Books, 1993). 267-294.

<sup>236</sup> S. Kernell, *Going Public: New Strategies of Presidential Leadership* (Washington, D.C.: Congressional Quarterly, 1997).

to influence legislation or win favors in exchange for their support for a bill.

Bargaining necessarily happens in secret, and thus flourished when Congress was a more closed institution.

Some Presidents went public in isolated instances during the first half of the twentieth century. Woodrow Wilson's unsuccessful whistle-stop tour to drum up support for the League of Nations and Franklin Delano Roosevelt's fireside chats were early examples. Many Presidents used targeted leaks to defend their policies or trial balloons to determine the public's reaction to certain ideas. However, going public has only been used routinely since President Kennedy, who first allowed his press conferences to be broadcast live, and it didn't fully blossom until President Reagan, who gave an unprecedented number of direct public addresses to promote specific policies.<sup>237</sup>

As with so many other elements of the modern version of transparency, media and technology helped make it possible for presidents to go public, but could not have done so without changes in political institutions and culture. Communication and transportation technologies made it more possible for the President to speak directly to constituents. The changes in how Presidential candidates are nominated have meant that the winners are effective personal campaigners who are inclined to use these skills in office. As the political parties have been weakened, divided government has become more common, coalitions are looser and politicians are more individualistic, all of which make bargaining more difficult. Politicians have fewer loyalties to groups

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<sup>237</sup> Ibid.

and are more self-reliant. In this atmosphere, politicians are more vulnerable to public opinion, and thus are more focused on cultivating their constituents than their colleagues. Governing and campaigning have become blended.<sup>238</sup>

As public opinion became more important to policy-making success and governing began to resemble a permanent campaign, new institutions and techniques were developed to control information. Officials use information management, or spin, rather than just secrecy. All 20<sup>th</sup> century Presidents engaged in some sort of message management, but prior to President Nixon, the coordination of these efforts was ad hoc. Nixon created the White House Office of Communication as part of the President's personal White House staff. During his 1968 campaign, he had closely managed the news, tailoring his messages with the help of daily polls, and the following year he institutionalized these activities with the creation of the new department. The WHOC has remained a fixture in the White House, creating public relations strategies and arranging for the President to communicate directly with the people, both in person and on television. Messages are crafted using focus groups and polling data. Sound bites are written into officials' prepared remarks so that they will be repeated in the media, and the line of the day is made mandatory for all officials allied with the President, inserted into interview answers, press releases, and press briefings.<sup>239</sup>

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<sup>238</sup> Ibid. See also S. Blumenthal, *The Permanent Campaign* (New York: Simon and Schuster, 1982). N. Ornstein and T. E. Mann, eds., *The Permanent Campaign and Its Future* (Washington, D.C.: The American Enterprise Institute and the Brookings Institution, 2000).

<sup>239</sup> J.A. Maltese, *Spin Control: The White House Office of Communications and the Management of Presidential News* (Chapel Hill, NC: University of North Carolina Press, 1994).



The techniques of going public and managing news were used first and most aggressively by Presidents, but legislators now use them as well. Members of Congress hire communications staff and coordinate communications strategies, including lines of the day. Televised Congressional hearings have become forums for legislators to speak to the public. In the current political environment, all politicians are vulnerable to public opinion and all can gain political power through public support.

These efforts to impart messages to the public have resulted in an onslaught of information from government. Politicians are eager to give interviews and hold press conferences. These events sometimes serve the Habermasian function of reason giving, but their scripted nature puts them closer to publicity than to the classic image of transparency. This dynamic is the performance of transparency. In Goffman's terms, it means that, while information may be framed as a glimpse of the back stage – the explanations and motivations lying behind governance – in fact this is a new front stage.

Ralph Negrine points out that the transformation has occurred in other countries, writing that the “public relations state” developed in Britain in the 1980s. Since television cameras began filming the House of Commons' Question Time, this event ceased to be an opportunity for ministers and MPs to debate each other and became a scripted marketing opportunity for each party. The promotion and marketing of government, Negrine writes, has become a “central activity of modern statecraft.” There is some debate among scholars about whether this development should be

referred to as “Americanization,” but Negrine asserts that the public relations state has an American origin.<sup>240</sup>

### **Political comedy and highlighting the performance of transparency**

The conventions of professional journalism make it hard for journalists to address the performance of transparency. While journalists take skeptical stances and produce interpretive reports, most still strive for professionalism, and this, as Dan Hallin writes, is a trade-off. Journalists are given access to politicians, but in response they must be measured and respectful. When politicians use interviews as part of their message machine, journalists are somewhat hamstrung by the conventions of objectivity. They often cannot point out that a politician’s answer is the line of the day, repeated verbatim by other officials, but must treat the statement as a real thought from that official. They’re put in the position of pretending that this is a frank and spontaneous answer.

In this atmosphere, comedians have been able to cut through spin in ways that journalists cannot. *Saturday Night Live*, *The Tonight Show*, and *The Late Show* have all contributed to this trend, but *The Daily Show with John Stewart* and *The Colbert Report* have emerged as the most effective practitioners. Billed as “fake news,” these shows are hybrids of news, politics and entertainment. Geoffrey Baym argues that the label “fake news” allows the show to violate the conventions of objective

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<sup>240</sup> R. Negrine, *The Communication of Politics* (London: Sage Publications, 1996). 10-11, 62-3, 147.

journalism, while at the same time performing a task that journalism claims to perform – unmasking the pretensions of the powerful.<sup>241</sup>

*The Daily Show* contains many elements of news shows, often dealing with substantive foreign and domestic policy issues. However, the *Daily Show*'s use of video clips of politicians reveals the performance of transparency in ways that conventional journalism often does not. *The Daily Show* inserts an element of subjectivity, with the host John Stewart interrupting officials' statements with his own reactions. Stewart speaks in the voice of a regular person frustrated by what he recognizes as spin. Perhaps the *Daily Show*'s most effective use of video clips is juxtaposition. In one version of this technique, the show presents several different members of an administration or political party uttering exactly the same line. This reveals the strategy of disseminating a sound bite, highlighting the performance of transparency.

### **Conclusions: Personalization and Performance**

During the past two hundred years, as the United States has gained more democratic structural features, the ideal of government transparency has been popularized and put into practice. Citizens receive more and more information about government and have come to expect this. At the same time, the shape and meaning of government transparency have changed in concert with the surrounding circumstances. The modern instantiation of government transparency is characterized

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<sup>241</sup> G. Baym, "The Daily Show: Discursive Integration and the Reinvention of Political Journalism," *Political Communication* 22 (2005).

by personalization and performance. Other types of information are available, but personalization and performance characterize most of the information citizens receive. Both of these trends deviate from the traditional justifications for transparency.

By personalization, I mean a two-part trend: the trend towards providing information about individual politicians rather than about parties or institutions, and the trend towards providing information about politicians' personality, character, and private lives rather than just their official duties and policy positions. Personalization became evident in the election of 1896 with the advent of advertising politics. It was strengthened by the progressive movement's actions to weaken political parties and their corresponding championing of primaries, which necessitated that voters make distinctions based on something other than party. The 1972 changes giving voters rather than parties control over nominations greatly magnified this trend.

Personalization is also related to the presidentialization of politics during the Great Depression and the Cold War. Additionally, as politicians and candidates have operated as individuals rather than figureheads for parties, they have attempted to speak directly to the public in a variety of ways – political advertising, appearances on talk shows, radio addresses – all of which have contributed to casting them as real people.

Media practices have enhanced this personalization. The ability to transmit politicians' voices and images has enabled more intimate portraits of public figures, and the blending of news and entertainment has made human-interest elements more important in political stories. The need for visuals makes personalities easier to cover

than processes, issues or institutions. The rules of professional journalism make character easier to analyze than policy, because it can be done in a non-partisan way. The general cultural trend towards frankness about private issues in public life has also contributed to the personalization of politics. The rise of celebrity culture, and the illusion of intimacy it creates between the public and famous people, has also played a role.<sup>242</sup>

In some ways the possibility of personalization is inherent in American politics. In the British Parliamentary system, voters choose members of parliament, and the leader of the party with a majority becomes the Prime Minister. Thus, voters choose a party in order to choose a Prime Minister. In the American system, however, the President is elected separately from Congress, and thus citizens can choose Presidents, Representatives and Senators from different parties. This leads to the possibility of focusing on individuals separately from their party affiliations. This did not always happen. When the political parties played a large role in politics, the primary relationship was between voter and party, but it is now a relationship between voter and candidate. However, David Swanson and Paolo Mancini argue that personalization is becoming predominant in all democracies, both presidential and parliamentary, suggesting that the American system is just an extreme example, and

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<sup>242</sup> Schickel, *Intimate Strangers: The Culture of Celebrity*.; D.J. Boorstin, *The Image: A Guide to Pseudo-Events in America* (New York: Athenium, 1987); J. Gamson, *Claims to Fame: Celebrity in Contemporary America* (Berkeley: University of California, 1994); M. Orth, *The Importance of Being Famous: Behind the Scenes of the Celebrity-Industrial Complex* (New York: Henry Holt and Company, 2004).

that something not specific to one country is at work.<sup>243</sup> Thus, personalization may be linked to something more fundamental in the drive to engage large numbers of ordinary people in politics, often through competitive, commercial mass media channels.

The personalization of transparency contradicts democratic theory's traditional reasons for transparency. Paine's insistence that governments must justify themselves to be legitimate, Mill's argument for citizen education and checking corruption, Dewey's argument for increased citizen participation through information, and Habermas' argument for a public sphere all assumed that the information would concern government policies and decisions more than the personalities.

There has also been a broad move towards controlling information through information management or spin, encouraged by the fact that public opinion has become essential to governing. As practices and policies changed to make government more visible, politicians took the opportunity to bombard the public with scripted information. I call this the performance of transparency, because these practices are often framed as keeping the public informed regarding what government is doing and what officials are thinking, but the information produced is designed to create a particular impression and does not reveal frank thoughts or details of governance. Many types of government information couched in the rhetoric of transparency -- such as officials' participation in interviews, televised Congressional hearings -- are also arenas of publicity, opportunities for politicians to get across what

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<sup>243</sup> D. Swanson and P. Mancini, "Patterns of Modern Electoral Campaigning and Their Consequences," in *Politics, Media and Modern Democracy: An International Study of Innovations in Electoral Campaigning and Their Consequences*, ed. D. Swanson and P. Mancini (London: Praeger, 1996).

they want the public to know. Even the *Congressional Record* is a sort of vehicle for publicity, or captive of the public relations way of thinking. Members of Congress can revise and extend their remarks in the record. We do learn something from all of these performances and they can be better than no information at all, but they are performances nonetheless.

This situation could be described as the trade-off of transparency, just as Dan Hallin described the trade-off of the professionalization of journalism. In exchange for a chance to see what government was doing, we opened ourselves up to being told what they wanted us to hear. Many factors contribute to the performance of transparency: the political process that makes public support a necessary part of governance, the weakening of the parties and subsequent vulnerability of individual candidates and politicians, the relentless 24-hour news environment, and the cynicism of journalists.

This dynamic creates information about government that is severed from the Habermasian apparatus that includes rational debate, government accountability, and concern for the public interest. This new model of information sometimes appears to treat the audience as manipulable consumers rather than rational stakeholders. This more closely resembles the Habermasian model of publicity than the liberal model of publicness. It also constitutes a return to representative publicness, in which leaders represent their power before the people, rather than representing the people.

In Erving Goffman's terms, we can say that politicians pretend to be showing the back stage – the actual work of policymaking or what an official thinks—but are

still behaving in a scripted, front stage manner, and the real decision-making has retreated further into the background. The line between front stage and back stage shifts further back, and politicians make the real policy decisions out of sight.

Of course, the expectation of guileless information is unrealistic. An absolute back stage doesn't exist, and we shouldn't pretend there can be a pure version of transparency that includes no publicity or performance. This is another way of saying that governance will always be altered by transparency, that transparency will always lead to some kind of a show. Legal scholar Mark Fenster shows that even the requirement of providing meeting minutes changes the way local, state and federal departments operate.<sup>244</sup> Officials worried about the record that will be left behind sometimes decide not to hold a particular meeting, not to take notes, or not to discuss a particular issue.

So, transparency will always cause some changes in behavior. What is notable about the contemporary instantiation of government transparency is that certain events – such as Congressional hearings – have become front stages *relative to what they were before*. We can say that officials probably put on performances for each other in secret meetings, but when meetings are open, the performances are oriented towards the public. Furthermore, an increasing number of events have no purpose *except* performance. Very often, governance means communication. Finally, the performance of transparency has become more organized, institutionalized, and professionalized.

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<sup>244</sup> M. Fenster, "The Opacity of Transparency," (Social Sciences Research Council, 2005).



As information about government has become more available – and more specifically directed at citizens, rather than at other officials -- it has been shaped by personalization and performance. There is a tendency to attribute these changes entirely to the news media and communication technologies, because they are the most visible (and maybe the most direct and immediate) causes. They provide a stage for performance and they use personalization to engage viewers. However, we need to look further to fully explain these phenomena. The news media have often been as much influenced by cultural, economic and political changes as they have been influencers.

These other ingredients have been essential. The commercial structure of the news media, rather than the media themselves, shapes many media practices. The progressive era embrace of educational politics and the model of the rational voter, which still inform politics today, emphasize the need for information. The decline of the political parties and the individualization of politics necessitate information about specific politicians. The distrust of institutions engendered by the Vietnam War and the Watergate scandal was joined but not entirely caused by the press. The importation of techniques from advertising and public relations into politics has contributed to personalization and performance. The weakening of the parties and the conventions of objective journalism contributed to a focus on credibility rather than policy. Finally, many individuals and groups have used scandals to further their political goals. This long list of factors shows not only that the modern instantiation of transparency has had multiple influences, but also that its roots go back to the late 19<sup>th</sup> century.

The results of these changes have been mixed. The flood of information unleashed by FOIA, the 1970s congressional reforms, C-SPAN, adversarial journalism and the 24-hour news environment sometimes does fulfill the goals lauded by transparency proponents: creating informed citizens, holding politicians accountable, enabling debate, uncovering corruption. These are undoubtedly benefits for democracy. However, much of the information available is trivializing and manipulative. The trade-off of transparency is that it lets this in. On top of this, opening up processes to the public can cripple governance, because it provides multiple opportunities for attacks. When public approval is needed for each official decision, it can be impossible to take action, especially when the issues are complex and require expert knowledge to understand, and when the benefits of certain actions won't be evident in the short term. Finally, although the ideal that our leaders must be constantly watched is one that people across the political spectrum agree with, the outgrowth of this idea -- that politicians are inherently untrustworthy and that government is inherently corrupt -- have some substantively conservative results. If government can never be trusted, then a whole set of policy solutions, such as government-provided social services, are impossible. Thus, the push for transparency has come with good and bad results.

### **Modern transparency practices and the federal judiciary**

In Chapter One, I explained the traditional justifications for government transparency and the ways in which these justifications are in tension with some of the

federal judiciary's organizing principles. Giving information to citizens enables and encourages them to influence outcomes, and the federal judiciary's constitutional role, requiring insulation from the public, makes this potentially problematic. In the current chapter, I described how the concept of government transparency has been concretely enacted in policies and practices, and how the meaning and practice of transparency have been shaped by the surrounding culture. The modern instantiation of transparency, characterized by personalization and performance, has often failed to live up to the tenets of transparency advocates' and democratic theorists' arguments for transparency. Moreover, this modern instantiation of transparency conflicts with judicial principles, making transparency in practice even more jarring for the judiciary than transparency in theory is. Often this is because modern transparency practices increase the majoritarian aspects of transparency – they bring the public closer.

The personalization of politics does not fit well with the role of federal judges. Their need for impartiality and for the appearance of impartiality means that in some ways they must represent themselves as “non-persons.” This is never fully possible but the ideal is important. Nor does the performance of transparency work for the federal judiciary. Though many have noted the theatrical nature of trials, what goes on in a courtroom can never be completely for show. Because a trial only happens once, it has to be the real thing. There is no replay later behind closed doors. The witnesses and lawyers are there to persuade the jury, the judge or the justices – not the public. So, a trial cannot function like a press conference or an interview or even a Congressional hearing.

The next three chapters will explore arenas in which the federal judiciary comes into contact with the modern instantiation of transparency. In each arena – Supreme Court confirmations, the debate over cameras in the courtroom, the public image of Supreme Court Justices -- the federal judiciary has resisted the transparency dynamic. However, complete resistance has not been possible, and thus the judiciary has had to negotiate a changing relationship with modern transparency practices.

## **CHAPTER THREE: PERFORMATIVE DEMOCRACY:**

### **SUPREME COURT CONFIRMATIONS AND TRANSPARENCY**

We saw in the last chapter that as the United States' government structure became more democratic, or more oriented towards popular participation and control, the ethos and practice of government transparency expanded. More types of information about government have become available to the public. However, a significant portion of this information is characterized by personalization and performance. Because public opinion is important to governance, the information released is tightly managed and oriented towards imparting specific messages. This set of dynamics is part of the modern instantiation of transparency, which doesn't always match up with the justifications for transparency represented by such concepts as the "checking function" of the first amendment or the Habermasian notion of a public sphere characterized by rational debate about public affairs. Modern transparency practices do sometimes fulfill these goals and thus expand democratic norms. However, they also constitute a performance that accommodates rather than realizing these norms. These dynamics create a sort of performative democracy, in which real popular influence and access do exist, but are transmitted through layers of showmanship that people have come to expect and accept.

In this chapter, I explore how the Supreme Court confirmation process operates in the context of this modern version of transparency and the performative

democracy it supports. In many ways, the confirmation process has evolved in tandem with the rest of politics, becoming more open and more oriented towards the public. However, many changes have been slower in coming to this arena than elsewhere, and some have been resisted altogether. At a general level, this is because the federal judiciary is structured by both constitutional and democratic principles, but prioritizes constitutional ones. Modern transparency bolsters the democratic orientation of any process, sometimes at the expense of constitutional concerns, and thus can create problems for the judiciary.

Confirmations have always been political, or linked to ideological and partisan considerations, but the modern process makes these politics more explicitly articulated. This articulation is complicated by the fact that law is an expert realm with its own specialized language, and it often requires translation to be engaged in the public sphere. Furthermore, while nominees' records are usually fairly accurately predictive of their future jurisprudence, the modern version of transparency puts a premium on revelations in the hearings, and these are essentially impossible to get. Judges' unique role and decision-making process allow candidates to withhold information for reasons that are often simultaneously principled and strategic. All of this means that confirmations proceed on two levels: a back stage level where insiders consider nominees' benefits and drawbacks and a front stage level where officials perform a version of this assessment and translate its terms for the public.

Although transparency causes problems in confirmations, these problems are subtler than usually acknowledged by critics. The transparency of the modern process

also has important benefits and I believe that ultimately it's more helpful than harmful. In Part I of this chapter, I explain how the judicial role and method of decision-making produce an ambivalent relationship between the judiciary and modern transparency practices. In Part II, I describe how the confirmation process has changed over the course of 200 years, becoming more democratic and transparent, and I address some criticisms of the modern process. In Part III, I discuss what I believe to be the significance of the changes in the process. Transparency's implications are subtler and more difficult to evaluate than many frequent criticisms imply. In Part IV, I take a closer look at President George W. Bush's three nominees in order to explore the complications created by the confluence of judicial norms and the modern version of transparency. I end with some brief thoughts on the nomination and confirmation of Sonia Sotomayor in 2009.

### **Part I: Transparency and the Judicial Role**

The judicial branch has an ambivalent relationship to transparency because of its constitutional role as a check on majorities and because adjudication is different from representation and policymaking. The other branches' moves towards more democratic norms have been somewhat organic because these branches have always been tied to the electorate's wishes by the mechanism of elections. Twentieth century democratizing steps, such as the 17<sup>th</sup> Amendment and the post-1972 election reforms, made that tie more direct and inclusive. Although the judicial branch is also tied

indirectly to the wishes of the electorate through the confirmation process, their work from the bench is structured by different norms.

Federal judges hold their positions for life so they can check the majoritarian forces embodied by the other branches. Political scientist Michael Comiskey writes, “The American constitutional system is a constitutional democracy that combines democratic elements, whose core principle is majoritarian rule, with constitutionalism, or limits on what the majority may do.” The judiciary embodies this balance: federal judges embody democratic principles in the way they are selected, but once on the bench they are the primary carriers of constitutional principles, particularly in the power of judicial review.<sup>245</sup>

The judicial method of decision-making is also unique. Federal judges’ opinions – their exercises of power – are disciplined by legal texts, rules and precedent, rather than by public approval and control. Judges are charged with basing their decisions on assessments of the facts and law in each case rather than what they, the public, or other officials want. This means that they base decisions on specific cases rather than generalities. It also means they attempt to diminish the extent to which their decisions reflect their inevitable human partiality.<sup>246</sup> This is meant to make a courtroom a space of universality, in which social standing does not determine success. Some value judgments are inevitable; they come into play in decisions about how and why to apply rules. However, they shouldn’t lead directly to outcomes. Cass

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<sup>245</sup> M. Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees* (Lawrence, KS: University Press of Kansas, 2004).

<sup>246</sup> “ABA Model Code of Judicial Conduct,” (American Bar Association, 2007).



Sunstein writes that judges' decisions fall on a continuum between absolute discretion and absolute ruleboundedness.<sup>247</sup>

Judicial decision-making is also important in terms of the appearance it creates. Judges' legitimacy is based on part on their mode of decision-making: rule-bound, case specific, and independent. The integrity, consistency and impartiality of the decision-making process are understood to legitimate federal judges' unaccountable position and promote confidence in the legal system. The ABA's Model Code states that a judge should "act at all times in a manner that promotes public confidence" in the independence, integrity and impartiality of the judiciary, and should thus avoid not just "impropriety" but also "the appearance of impropriety."<sup>248</sup> To this end, judges "should expect to be the subject of public scrutiny that might be viewed as burdensome if applied to other citizens."<sup>249</sup> The judicial mode of decision-making sometimes places judges at odds with the preferences of the electorate and thus creates an uneasy relationship with the move towards more democratic governance and the transparency that accompanies it.

Judicial legitimation is also based in part on the democratically inflected process of judicial selection. During the appointment process, the two elected branches must reach some sort of consensus on a nominee (albeit one weighted towards the President). The appointment process creates a democratic check on the judiciary by ensuring that democratic forces shape the judiciary's makeup. Thus, this process also

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<sup>247</sup> C.R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996).

<sup>248</sup> "ABA Model Code of Judicial Conduct." Rule 1.2, "Code of Conduct for United States Judges," (United States Judicial Conference).

<sup>249</sup> "ABA Model Code of Judicial Conduct." Rule 1.2 Comment 2, Canon 3.

empowers and authorizes the judiciary.<sup>250</sup> For this democratic check to be meaningful in today's political environment, some transparency practices are necessary.

However, the norms of judicial decision-making mean that transparency operates differently in confirmations than in other processes. Most candidates for office, whether for elective or appointive office, are expected to provide information about what they plan to do once in office. However, judges don't have the same type of agency that other officials have and this makes it harder for them to specify what they'll do. They wait until cases come to them rather than seeking them out. When a case does come to court, a judge must start by determining whether they have jurisdiction to decide it, allowing other government processes to first take their course.<sup>251</sup>

The case-specific nature of judicial decisions also prevents judges from making promises. Other officials can make decisions based on their abstractions, or principles that aren't bound to a particular situation, such as "I'll never vote to raise taxes." Judges have to look at each case individually rather than making decisions based on abstractions.<sup>252</sup> Courts build the common law incrementally through concrete cases. While general principles may be used as a lens through which to look at concrete cases, or a way to determine how to apply rules to concrete cases, a court

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<sup>250</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*.

<sup>251</sup> A. Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, CT: Yale University Press, 1986). 69-115; Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States, England and France* (New York: Oxford University Press, 1993); Sunstein, *Legal Reasoning and Political Conflict*.

<sup>252</sup> Sunstein, *Legal Reasoning and Political Conflict*.

cannot make a decision without a concrete case.<sup>253</sup> Decisions must turn on particular sets of facts, which can never be known in advance. For this reason, judicial candidates cannot talk about what they plan to do in specific, substantive terms.

Candidates for other offices often make promises. This information helps voters decide how to vote and provides a yardstick by which to measure performance. Our political culture places a premium on meeting one's commitments (sometimes to a fault), and presents changing one's mind as a sign of a character flaw. The judicial process renders impossible the promises integral to other types of selection, and this limit colors the type of transparency possible in judicial confirmations.

Thus, the two elements of judicial legitimation – judges' democratic appointment and their rule-bound, case specific method of decision-making – have different relationships to transparency. Transparency is important to democratic legitimation, but it can encroach on judges' constitutional role and decision-making. The two-pronged basis of judicial legitimacy, rooted in both democratic and constitutional principles, means transparency can be both helpful and harmful. The next section discusses the way the confirmation process has evolved in tandem with transparency practices.

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<sup>253</sup> Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. 26; Sunstein, *Legal Reasoning and Political Conflict*. 30-31.

## **Part II: Changes and Consistency in the Confirmation Process**

Like other American political processes, the confirmation process has become more oriented towards the public, more visible, more stage-managed, more performative and more personalized during the past 200 years, particularly during the past fifty. However, confirmations have not precisely tracked other political processes. The confirmation process highlights tensions between majoritarian and countermajoritarian principles, and transparency is often at the center of these tensions.

### Advice, Consent and Ideology

Article II Section 2 of the Constitution gives the President the power to appoint Supreme Court Justices, but dictates that he must do so with the “advise and consent” of the Senate.<sup>254</sup> This has come to mean that the President nominates candidates and the Senate evaluates the President’s choices and votes to confirm or reject them.

Presidents and Senators have always made decisions about Supreme Court appointments based on nominees’ party affiliations or ideological leanings.<sup>255</sup> Elena Kagan has defined “judicial ideology” as a judge’s “understanding of the role of courts in our society, the nature of and values embodied in our Constitution, and the proper tools and techniques of interpretation, both constitutional and statutory.”<sup>256</sup> A particular judicial ideology does not ensure particular policy results, but does make

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<sup>254</sup> *The Constitution of the United States*, Thirteenth Edition, 1991. Published by the Commission on the Bicentennial of the United States Constitution, Washington, D.C.

<sup>255</sup> H. J. Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court* (New York: Oxford University Press, 1992). 66.

<sup>256</sup> E. Kagan, "Confirmation Messes, Old and New," *University of Chicago Law Review* 62 (1995).

certain policy results more likely. For example, a judge who interprets the phrase “interstate commerce” in the Constitution expansively will be more likely to uphold the *Endangered Species Act* than a judge who interprets it narrowly. Appointments have always hinged on how nominees’ expected judicial approaches are likely to affect concrete political outcomes. Nominees’ legal qualifications have also played a large role, but ideology has almost always been paramount, and most rejections have included ideological reasons.<sup>257</sup>

Until the late 19<sup>th</sup> century, ideological concerns shared space with geographic concerns. Supreme Court Justices were expected to hail from the same circuit as the justice who had just resigned because their duties included circuit riding. This tradition required each justice to serve on the courts of a particular circuit, and thus to travel around that circuit for several months each year. Additionally, regional loyalties, often linked to personal rivalries and patronage, played a frequent role in nineteenth century Senators’ votes on confirmations.<sup>258</sup> When Congress abolished circuit riding in 1891, regional representation on the court was diminished as a concern, and ideology remained as the most important factor in Supreme Court appointments.<sup>259</sup>

Despite the 200-year history of ideological appointments, the contemporary confirmation process looks to some like it is more political than in the past because the way politics is conducted has changed. Politics in the late twentieth century is

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<sup>257</sup> Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*. 41-42.

<sup>258</sup> *Ibid.* 27-28.

<sup>259</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*, J.A. Maltese, *The Selling of Supreme Court Nominees* (Baltimore, MD: Johns Hopkins University Press, 1995). 125.

conducted in the open and is more oriented towards the public. Interest groups and the news media are more important.

Confirmations may also appear to be more ideological today because the current period is characterized by what Michael Comiskey calls “broken constitutional consensus.” When ideological rifts in the country were less deep and less all-encompassing, ideological confirmations did not entail much conflict. Even during times of sharp ideological debate, this debate shapes the confirmation process only when the opposition is powerful enough to have an impact and believes the Supreme Court is an important place to exert pressure. Since the 1950s, many contentious political issues have been linked to Supreme Court decisions, and confirmations have often been proxy fights about these issues. Often underlying these battles are debates about what the Constitution means, and thus about individuals’ relationships with the government and with each other. As the final interpreter of the Constitution, the Supreme Court is a central figure in these debates.

Some contemporary observers argue that ideologically based appointments are inappropriate because they threaten judicial impartiality.<sup>260</sup> However, I am more convinced by those who argue that ideology is an appropriate criterion. Ideological scrutiny doesn’t necessitate prejudging cases, as I’ll discuss further below. Moreover, ideological appointments have important benefits. They make the democratic check at the appointment stage meaningful, helping legitimate the judiciary and judicial review

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<sup>260</sup> S. J. Carter, *The Confirmation Mess: Cleaning up the Federal Appointment Process* (Basic Books, 1994); R. Giles and R.W. Snyder, eds., *Covering the Courts: Free Press, Fair Trials and Journalistic Practice* (New Brunswick: Transaction publishers, 1999); *Judicial Roulette -- Report of the Twentieth Century Fund Task Force on Judicial Selection* (Priority Press Publications, 1988).

by ensuring that judges' approaches to the law are loosely in line with the ideological makeup of the elected branches.

Supreme Court appointments are the least intrusive way to insert a democratic check on the Court.<sup>261</sup> Other possible majoritarian checks on the judiciary are more problematic. Congress may impeach and remove justices, change the number of justices on the court, withdraw certain types of cases from the Court's jurisdiction (called "court-stripping"), and reverse Court decisions through constitutional amendment. All of these methods are heavy-handed and diminish the stature and legitimacy of the judiciary, while scrutinizing justices' ideologies during the confirmation process creates many benefits without causing the same harm to judicial authority.<sup>262</sup>

Ideological confirmations also bolster the separation of powers, allowing the Senate to share the appointment power with the President. For Senators to have actual input into the process, they must be able to make ideologically based decisions. It is the knowledge that the Senate can and does reject nominees for ideological purposes that leads some Presidents to temper their nominations, creating a compromise candidate when the Senate and President are at odds.<sup>263</sup>

### Changes in the level and form of conflict

Though the confirmation process has always been ideological, the amount of deference given to the President and the amount of conflict between the parties have

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<sup>261</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*.

<sup>262</sup> Ibid.

<sup>263</sup> Ibid. 20.

fluctuated. The current era is not unprecedented. What is new is the way conflict is carried out.

The first three American Presidents made a total of 18 Supreme Court nominations, of which only one was rejected. John Rutledge was nominated by George Washington in 1795 and rejected by the Senate because he was opposed to the Jay Treaty, which sought to normalize relations between the United States and Britain. His rejection was the culmination of a rancorous campaign by his opponents, who published harsh and sometimes misleading attacks on him in federalist newspapers. Other than the Rutledge nomination, the first three Presidents saw little opposition to their nominees.<sup>264</sup>

The years between 1811 and 1894 formed a period of frequent conflict over Supreme Court appointments. The Senate rejected 18 of the 63 candidates nominated during this time, due to ideological disagreements, regional loyalties and concerns related to patronage and senatorial courtesy.<sup>265</sup> However, these conflicts looked very different from conflicts today. They took place out of public view, among Senators and between Senators and Presidents. Senators were chosen by state legislatures rather than by popular election and Senate debate on nominations was presumptively closed, so the public could exert little pressure on the process. Scrutiny of nominees was often cursory, partially because Senators based their evaluations on what they already knew about a nominee and partially because they paid less attention to the Supreme Court

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<sup>264</sup> Maltese, *The Selling of Supreme Court Nominees*. 23-35; Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 9.

<sup>265</sup> Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*.



than they do today. Nominees did not testify at the hearings, which were short and closed to the public when they were held at all.<sup>266</sup>

Interest groups began to participate in the confirmation process at the end of this period. In 1881, Stanley Matthews became the first Supreme Court nominee to be defeated by organized interest groups. Because he had represented railroads as a lawyer and had proposed legislation beneficial to them as a Senator, his nomination sparked controversy among farmers' groups opposed to the extortionate rates charged by railroads. These groups lobbied Senators and publicized their views through sympathetic newspapers. The nomination died in the Senate Judiciary Committee at the end of session.<sup>267</sup> Interest groups participated sporadically in the confirmation process after 1881, but this participation was not routine because it was difficult to pressure Senators.<sup>268</sup>

The years between 1894 and 1968 formed a period of relative harmony in Supreme Court confirmations, during which Presidents were given more deference than they had been given during the previous 80 years. Just one of 46 nominees was rejected during this time, and the conflict over most nominees was restrained. Though ideological disagreements did exist, particularly over the New Deal and regulation of business, combatants didn't wage their battles through confirmations. President Franklin Delano Roosevelt caused a furor with his court-packing plan, but when vacancies opened up on the Court, he had little trouble getting his nominees

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<sup>266</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*, Maltese, *The Selling of Supreme Court Nominees*.

<sup>267</sup> Maltese, 37-41

<sup>268</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*, Maltese, *The Selling of Supreme Court Nominees*. 37.

confirmed. Only two of the 36 nominations between 1897 and 1954 were made during divided government (when the President and the Senate majority come from two different political parties), making conflict much less likely.<sup>269</sup>

During this early 20<sup>th</sup> century period of relative calm in confirmations, a few shifts began to lay the groundwork for the modern process. The 17<sup>th</sup> Amendment, ratified in 1913, provided for direct, popular election of Senators. Senate rule changes passed in 1929 opened Senate deliberation about confirmations to the public and the press.<sup>270</sup> These changes meant that citizens and interest groups could monitor Senators' actions on nominations and threaten electoral retaliation. In 1930, President Herbert Hoover's nomination of John Jay Parker was defeated with the help of the AFL and the NAACP. Parker was the only nominee rejected between 1894 and 1968.<sup>271</sup>

President Woodrow Wilson's 1916 nomination of Louis Brandeis to the Supreme Court stands out from most of the nominations in this period because, although Brandeis was confirmed, the process was relatively contentious. Brandeis was known to be a friend of labor, and thus, business leaders and pro-business politicians vehemently opposed his nomination, while organized labor groups and their allies championed it. Brandeis was the first Jewish Supreme Court nominee, and

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<sup>269</sup> G. Jacobson, *The Electoral Origins of Divided Government: Competition in the U.S. House Elections, 1946-1988*. (Westview Press, 1990).

<sup>270</sup> The Senate had held open sessions since 1795, but executive sessions – those concerning nominations and treaties – were closed until 1929. The new rule stated that all nominations should be considered in open session unless a majority votes to do so in secret. "Executive Session - Proceedings on Nominations," (United States Senate).

<sup>271</sup> Maltese, *The Selling of Supreme Court Nominees*. <http://rules.senate.gov/senaterules/>

this also elicited opposition to his candidacy.<sup>272</sup> The Brandeis confirmation contained elements of both the early 20<sup>th</sup> century deferential process and today's more conflictual process.

Spanning five days, Brandeis's confirmation hearings were the longest held for any Supreme Court nominee at that point.<sup>273</sup> Interest group leaders were quoted in news stories about the nomination, but none testified at the hearings. The witnesses were all people with whom Brandeis had a professional relationship, either as a colleague or legal adversary.<sup>274</sup> Senators had been popularly elected for three years, and although some strongly opposed Brandeis, many had constituents for whom he was a hero. The Judiciary Committee voted to make the hearings public for the first time. However Brandeis did not appear at his hearings and neither he nor President Wilson made any public statements about the nomination.<sup>275</sup> The process was starting to become more open, but the changes were cautious and incremental.

After the Brandeis appointment, nominees began to play a more visible role in the process. In 1925, Harlan Fiske Stone became the first nominee to testify at the hearings. He did so by choice, wishing to explain some controversial decisions he had made as Attorney General.<sup>276</sup> In 1939 Felix Frankfurter testified reluctantly to respond to allegations that he was not a citizen.<sup>277</sup> After *Brown v. Board of Education of*

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<sup>272</sup> "Senate Softens toward Brandeis," *New York Times*, January 30 1916.

<sup>273</sup> Maltese, 99.

<sup>274</sup> Maltese, *The Selling of Supreme Court Nominees*. 51; "Brandeis Charges Voiced by Barron," *New York Times*, February 11 1916; "Committee to Sift Brandeis Charges," *New York Times*, February 1 1916.

<sup>275</sup> Maltese, *The Selling of Supreme Court Nominees*; P. Strum, *Louis D. Brandeis -- Justice for the People* (Cambridge, MA: Harvard University Press, 2984). 293-295.

<sup>276</sup> Maltese, *The Selling of Supreme Court Nominees*. 101.

<sup>277</sup> *Ibid.* 107.

*Topeka*, the 1954 Supreme Court decision that outlawed segregation in schools, many Senators, particularly Southerners, wanted to question nominees. William Brennan was asked to testify at his confirmation hearings in 1957, and after that, all nominees were required to testify. Nominees in the late 1950s and early 1960s were always asked about their thoughts on desegregation and *Brown*, and since then nominees have been asked about a variety of cases and political issues. Most nominees have evaded these questions.<sup>278</sup>

#### The modern process takes shape

The changes gradually accumulating in the confirmation process reached a critical mass in 1968, initiating a period characterized by more frequent conflict, intense scrutiny of nominees, public involvement, and institutionalization of interest group participation. The *Brown* decision, with its positioning of the Court at the center of an ideological rift in the country, was an essential ingredient in these changes. However, it was not until 1968 that the contours of the modern process took shape.<sup>279</sup> Since 1968, seven of the twenty-two Supreme Court nominations made have failed to win confirmation. The Senate rejected four, and three were withdrawn before the Senate acted on them.<sup>280</sup> Several nominations that ultimately won confirmation

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<sup>278</sup> Ibid. 108-110, Carter, *The Confirmation Mess: Cleaning up the Federal Appointment Process*

<sup>279</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 9.

<sup>280</sup> The Senate rejected Abe Fortas, Clement Haynsworth, G. Harold Carswell and Robert Bork. Lyndon Johnson withdrew his nomination of Homer Thornberry, who was to replace Abe Fortas as Associate Justice when Fortas became Chief Justice, because Fortas was rejected. Ronald Reagan withdrew his nomination of Douglas Ginsberg after it became known that he had smoked marijuana relatively recently. George W. Bush withdrew his nomination of Harriet Miers after questions were raised about her preparedness for the job and conservatives protested that she was not certain to be a reliable conservative vote.

inspired hard-fought political battles, and even relatively uncontroversial nominees are usually subjected to intense scrutiny.

In the modern process many observers outside the Senate scrutinize nominees. The ABA began evaluating nominees in 1952, and since the 1960s, a wide variety of interest groups have campaigned for and against nominees and have testified in the hearings.<sup>281</sup> The time separating the initial announcement of a nomination from the start of the hearings has grown from weeks to months, giving groups more time to organize and journalists more time to conduct research, and the hearings have grown from hours to days. The arguments made about nominees have been increasingly oriented towards the public, because persuading the public is the way to pressure Senators.<sup>282</sup> Since 1981 the hearings have been televised. These changes paralleled the post-1970s procedural reforms that made Congress more open, democratic, and partisan.

The White House has grown increasingly involved in confirmations, running them like elections or policy initiatives and orienting their arguments towards the public. Administrations use handlers, spokespeople, lines of the day and other forms of communications management, aided by an array of institutional resources created since the 1950s – The Office of Congressional Liaison, the Office of Communication, and the Office of Public Liaison.<sup>283</sup> President Reagan created special committees

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<sup>281</sup> Maltese, *The Selling of Supreme Court Nominees*; "The ABA Standing Committee on the Federal Judiciary: What It Is and How It Works," (American Bar Association, 2007).

<sup>282</sup> Maltese, *The Selling of Supreme Court Nominees*.

<sup>283</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*; Maltese, *The Selling of Supreme Court Nominees*. 116-140; J.A. Maltese, *Spin Control: The White House Office of*

within the White House staff and the Department of Justice to screen potential nominees for their judicial philosophies, and with some minor changes these have remained in place. President Reagan was also the first President to systematically “go public” on behalf of his nominees, often advocating for them in televised speeches.<sup>284</sup> All nominees are given crash courses on constitutional law and practice for the hearings before “murder boards.”

In addition to these changes in political practices, the period after 1967 has been one of “broken constitutional consensus” and has often been characterized by divided government, which creates a higher likelihood of contentious confirmations and rejections.<sup>285</sup> Many contemporary ideological battles since the 1960s have been centered on Supreme Court. Warren and Burger Court decisions broadening the understanding of rights have angered social conservatives who want to stem social changes and judicial conservatives who want to institute a closely circumscribed reading of the constitutional text. These battles over the Constitution are fought through confirmations.

### Post-1967 Nominations

The modern conflictual period was inaugurated by Lyndon Johnson’s nomination of Abe Fortas to be Chief Justice after Earl Warren’s resignation in 1968.

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*Communications and the Management of Presidential News* (Chapel Hill, NC: University of North Carolina Press, 1994).

<sup>284</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*; Maltese, *The Selling of Supreme Court Nominees*. 116; S. Kernell, *Going Public: New Strategies of Presidential Leadership* (Washington, D.C.: Congressional Quarterly, 1997).

<sup>285</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*; Jacobson, *The Electoral Origins of Divided Government: Competition in the U.S. House Elections, 1946-1988*.

Johnson's nomination of Thurgood Marshall the year before had drawn opposition and some racist smears,<sup>286</sup> but this confirmation did not look like the modern process. The main signs of conflict were the Southern Senators' harsh questioning and demeaning treatment of Marshall in the hearings.<sup>287</sup> However Marshall had a distinguished record as Solicitor General, and he was confirmed 69 to 11. The Fortas nomination exploded into a larger battle, in part because President Johnson had already announced he would not run again and was thus considered a lame duck. Republicans wanted Nixon, whose campaign was by then in full swing, to appoint Warren's successor.<sup>288</sup>

In his confirmation hearings, Fortas was questioned at length and at times with some hostility, and was asked to answer for the Warren Court's unpopular rulings, particularly those regarding defendants' rights. Many Senators believed that some payments Fortas had accepted created ethical problems, and some objected to what appeared to be an inappropriately close relationship between Fortas and President Johnson. The nomination was defeated by a filibuster on October 1, 1968. Lyndon Johnson had been assured in private conversations with his allies in the Senate that Fortas would win confirmation, but the old style of politics centered on backroom deals didn't work as well anymore. After Johnson withdrew the nomination, allegations about Fortas' ethical improprieties continued to surface, often aided by the

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<sup>286</sup> Carter, *The Confirmation Mess: Cleaning up the Federal Appointment Process*

<sup>287</sup> F. P. Graham, "Marshall on the Stand," *New York Times*, July 30 1967.

<sup>288</sup> Maltese, *The Selling of Supreme Court Nominees*. 87.

Nixon Administration's maneuvering, and on May 14, 1969, Fortas resigned from the Supreme Court.<sup>289</sup>

Nixon made opposition to the Warren Court a theme of his 1968 campaign, vowing to appoint "strict constructionist" judges. His first nominee, Warren Burger, won easy confirmation, but the Senate rejected Nixon's next two nominees, Clement Haynsworth and G. Harold Carswell.<sup>290</sup> Some Senators opposed Clement F. Haynsworth, and appeals court judge, because of his apparent opposition to organized labor and civil rights. However, his fate was not sealed until the hearings revealed conflict-of-interest improprieties. Many Republican Senators felt they had to reject him lest they appear hypocritical for having railed against Fortas' ethical breeches. The Senate rejected Haynsworth 45-55.<sup>291</sup> Political scientist John Maltese calls the Haynsworth nomination the turning point in terms of interest group participation. While one group had testified in the Marshall hearings and four had testified in the Fortas hearings, twelve testified in the Haynsworth hearings.<sup>292</sup>

Nixon's next nominee, G. Harold Carswell, fared no better. Reporters uncovered remarks he had made pledging support for the "principles of White Supremacy" and learned that, as a United States Attorney in Florida, he had helped to privatize a public golf course to avoid its mandatory desegregation. Senators and law school deans also began to contend that his qualifications were mediocre and his experience meager. The Senate rejected him 45-51. Nixon then nominated Harry

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<sup>289</sup> L. Kalman, *Abe Fortas -- a Biography* (New Haven, CT: Yale University Press, 1990). 331, Maltese, *The Selling of Supreme Court Nominees*. 71.

<sup>290</sup> Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*. 13-14.

<sup>291</sup> Ibid; Maltese, *The Selling of Supreme Court Nominees*. 72.

<sup>292</sup> Maltese, *The Selling of Supreme Court Nominees*. 87.



Blackmun, who was judged to be competent, ethical and moderate and won confirmation 94-0.<sup>293</sup>

Nixon next nominated Lewis Powell, who won easy confirmation. William Rehnquist, Nixon's next nominee, stirred opposition because he was known as an ideologue, but as the rest of his credentials were strong, he was confirmed 68-21. President Gerald Ford successfully John Paul Stevens to the Court in 1975. Ronald Reagan appointed Sandra Day O'Connor in 1981, and she was also easily confirmed. When Ronald Reagan elevated Rehnquist to Chief Justice in 1986, Rehnquist again encountered opposition, this time in the form of long and contentious hearings, but was ultimately confirmed. The Senate, weary of combat, confirmed the ideologically extreme but reputedly brilliant Antonin Scalia right after Rehnquist. A year later, however, the Senate was again ready for a fight. When Lewis Powell, widely viewed as the Court's swing vote, resigned, Reagan nominated Robert Bork, whose extremely conservative legal views made him impossible for many to accept.

President Reagan nominated Bork in the late spring of 1987, and the hearings did not take place until October. During the intervening summer, progressive interest groups waged an intensive campaign to convince the country and the Senate that Bork was so conservative as to be outside the judicial mainstream. Twenty groups testified in the hearings.<sup>294</sup> Ronald Reagan spoke publicly on Bork's behalf over thirty times -- an unprecedented number -- and both the White House and interest groups lobbied Senators relentlessly. During the hearings, Bork was questioned about his method of

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<sup>293</sup> Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*, Maltese, *The Selling of Supreme Court Nominees*. 15-18.

<sup>294</sup> Maltese, *The Selling of Supreme Court Nominees*.

constitutional interpretation and his views on past Supreme Court cases, and, unlike other nominees before or afterwards, he provided lengthy and detailed answers. His nomination was then voted down in the Senate.<sup>295</sup> The Bork appointment demonstrated that providing detailed information is detrimental to a nominee's confirmation chances.

Reagan's next pick, Douglas Ginsberg, withdrew after his recent marijuana use became known. Anthony Kennedy, Reagan's third try, represented more of a consensus between the President and the Senate, and was confirmed easily. President George H. W. Bush's first nomination to the Supreme Court was David Souter, a little known New Hampshire judge who was perceived to be moderate and was confirmed.

Bush's nomination of Clarence Thomas in 1991 led to a contentious and dramatic confirmation battle for two main reasons. First, Thomas was to replace Thurgood Marshall, the first black Supreme Court Justice and a civil rights hero. Thomas is also black but had demonstrated a commitment to conservative ideals and a profound disenchantment with the logic of the civil rights movement. Many liberal groups were divided over the nomination, with some chapters arguing in favor of Thomas because the next nominee may be just as conservative but not black, while others argued that Thomas' conservative views were beyond the pale and that any nominee with his views should be opposed. The Bush Administration stoked these

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<sup>295</sup> J. Carey, "Political Ritual on Television: Episodes in the History of Shame, Degradation, and Excommunication," in *Media and Public: Rethinking the Part Played by People in the Flow of Mass Communication* ed. J. Curran and T. Liebes (Routledge, 1998); M. Pertschuk and W. Schaetzel, *The People Rising: The Campaign against the Bork Nomination* (Thunder's Mouth Press, 1989). E. Bronner, *Battle for Justice: How the Bork Nomination Shook America* (New York: Norton, 1989).

tensions, courting African-American interest groups and media in order to split the liberal advocacy community.<sup>296</sup>

The confirmation was also contentious and dramatic because Anita Hill, a law professor who had once worked as Thomas's assistant, reported that Thomas had sexually harassed her. The story broke right after the hearings were finished and several days before the planned vote in the full Senate, and the vote was delayed so that a second round of hearings could be held. These hearings included explicit, personal testimony about sexual harassment. Thomas denied the charges and denounced the confirmation process, asserting that it was imbued with racism. Many Senators admitted that both Thomas and Hill were credible, yet gave Thomas the benefit of the doubt. Thomas was confirmed 52-48.<sup>297</sup>

President William Clinton's appointments of Ruth Bader Ginsberg and Steven Breyer in 1993 and 1994 won easy confirmation. Both were well-qualified moderates whom top Republicans on the Judiciary Committee had said they could support. After Steven Breyer's nomination in 1994, there were no retirements from the Court for 11 years, an uncommonly long interval, which raised the level of excitement and anxiety attached to Justice Sandra Day O'Connor's resignation on July 1, 2005.

President Bush nominated John G. Roberts, a Judge on the Court of Appeals for the D.C. Circuit, who was known as a brilliant, conservative hard worker. The

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<sup>296</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 110. J. Mayer and J. Abramson, *Strange Justice: The Selling of Clarence Thomas* (Boston: Houghton Mifflin Company, 1994); T. M. Phelps and H. Winternitz, *Capitol Games- Clarence Thomas, Anita Hill and the Story of a Supreme Court Nomination* (Hyperion, 1992).

<sup>297</sup> Phelps and Winternitz, *Capitol Games- Clarence Thomas, Anita Hill and the Story of a Supreme Court Nomination*. Mayer and Abramson, *Strange Justice: The Selling of Clarence Thomas*.

hearings were postponed when Chief Justice Rehnquist died on September 4.

President Bush then nominated Judge Roberts to the position of Chief Justice and a month later Roberts was confirmed 78-22.

On October 3, President Bush nominated White House Counsel Harriet Miers to replace Sandra Day O'Connor. Miers had held several staff positions at the White House and had worked as Bush's personal lawyer in Texas, leading some to charge that she was a crony, nominated for her loyalty rather than her credentials. Miers' views on constitutional issues were largely unknown, and this infuriated many conservative intellectuals and activists, who believed that Bush should nominate a candidate whose conservative judicial ideology had been proven. Some also questioned Miers' competence and qualifications. After weeks of criticism, Miers asked President Bush to withdraw her nomination.

President Bush then named Samuel Alito, a conservative appeals court judge. Alito's confirmation was more contentious than Roberts' had been, largely because his conservative views were more frankly and unambiguously documented in job applications and memos from his service in the Reagan Administration, and after conservatives had revolted against Miers for being an insufficiently dependable conservative, their embrace of Alito seemed to confirm this picture. However, the Senate confirmed Alito 58-42. Democrats were in the minority and were deterred from filibustering by Republican threats of the "nuclear option," a proposal to remove the filibuster option with a rule change. Furthermore, both John Roberts and Samuel Alito had excellent legal credentials and professional and ethics records.

On May 26, 2009, President Barack Obama nominated Judge Sonia Sotomayor from the Court of Appeals for the Second Circuit to fill the vacancy left by David Souter's retirement. Conservative groups and media put up a fight, but Sotomayor's confirmation was all but assured by the Democrats' 60 Senate seats. The Senate voted 68-31 to confirm her, making her the first Latina and third woman to serve on the Court.

### Blaming the Process

The post-1967 confirmation process has produced a monumental amount of criticism from politicians, lawyers, scholars and journalists.<sup>298</sup> Many critics refer to the Bork and Thomas confirmation battles, arguing that the open, conflictual process is inappropriate because it overpoliticizes confirmations and that the news media magnify trivialities. These criticisms are partially accurate but they don't tell the whole story. The most common criticisms are misguided in a few ways: they mistakenly identify the Bork and Thomas hearings as representative of the modern process, they identify transparency as a causal factor in the politicization of the process, and they usually portray the politicization of the process as completely negative, failing to acknowledge the need to balance both democratic and constitutional principles.

Since 1968 there have been many non-acrimonious and relatively smooth Supreme Court appointment processes. The Bork and Thomas battles were outliers,

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<sup>298</sup> *Judicial Roulette -- Report of the Twentieth Century Fund Task Force on Judicial Selection*

and they were predictable ones. Confirmations are generally successful and amicable when Presidents nominate ethically unimpeachable, highly competent, ideologically moderate nominees. Acrimonious confirmation battles and rejections have usually surrounded nominees who were ideologically extreme or who had mediocre qualifications or ethical lapses. This dynamic is compounded when more than one of these problems is present or when the President is politically weak or faces a Senate controlled by the other party.<sup>299</sup> The predictable consequences of these factors often temper Presidential choices, in keeping with the Constitution's design. Thus, Presidents bear a great deal of responsibility for the most criticized confirmation processes.

Bork is the only modern nominee to have been rejected for purely ideological reasons, and some have claimed that his views were mischaracterized. Although many Senators and groups engaged in hyperbole and inflammatory rhetoric, Bork's views were correctly judged to be outside of the judicial mainstream and made him an unrealistic choice for an appointment that had to be acceptable to a President and Senate representing opposing parties. Michael Comiskey writes,

On the basis of his extensive prenomination record and his Senate testimony, which he has reaffirmed in subsequent writings, Bork would have been more than just a very conservative justice. He would have been a revolutionary conservative willing to discard several decades – arguably two centuries – of precedent and doctrine whose reversal would anger and astonish most Americans today.<sup>300</sup>

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<sup>299</sup> C.M. Cameron, A. D. Cover, and J. A. Segal, "Senate Voting on Supreme Court Nominees: A Neoinstitutional Model," *American Political Science Model* 84 (1990); Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*.

<sup>300</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 58.

In his testimony and in his writing, Bork made clear that he did not believe that the 14<sup>th</sup> Amendment should be applied to gender discrimination, did not believe the liberties safeguarded by the bill of rights should be incorporated into the 14<sup>th</sup> Amendment, and saw no right to privacy in the Constitution. This was not a consensus choice.<sup>301</sup> Comiskey continues,

We must also remember that the Bork and Thomas nominations were conspicuous for the audacity of the President's challenge to a Senate controlled by the other party ... Bork was the sort of nominee the Senate had been contesting and rejecting for two hundred years.<sup>302</sup>

All of this means that the furor over the Bork nomination was not entirely caused by the modern confirmation process.

Clarence Thomas was also too conservative to be a consensus candidate in an opposition-controlled Senate, but he had additional problems. The ABA judged his qualifications to be thin and gave him a very low rating. The sexual harassment charges made Thomas' nomination especially contentious and idiosyncratic. These types of allegations are always ugly, because sexual harassment is ugly. Of course, in the pre-1960s political culture, these allegations may never have come out, but that wouldn't have been an improvement. While the Senate Judiciary Committee proceedings were hardly the best venue to evaluate the accusation, ignoring this issue would have been worse, and scrutinizing the allegations behind closed doors would have given even more control to spinners on both sides.<sup>303</sup> Thus, the acrimonious Thomas confirmation was as much the fault of the President's choice and the

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<sup>301</sup> H. J. Abraham, *Justices, Presidents and Senators: A History of the U.S. Supreme Court Appointments from Washington to Clinton* (Lanham, MD: Rowman and Littlefield, 1999). 298.

<sup>302</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 83.

<sup>303</sup> *Ibid.* 104-132.

idiosyncratic character of the nomination as it was of the openness, politicization and public orientation of the process.

Thomas and his supporters made a concerted attempt to blame the process, tapping into the public's frustrations with politics, particularly with Congress.<sup>304</sup> The Senate's transformation into a more open and more partisan institution during the previous two decades made the institution vulnerable to these charges. John R. Hibbing and Elisabeth Theiss-Morse argue that complaints about these processes are complaints about democracy itself. They contend that Americans have contradictory political desires: they want to know that all views are welcome and that they have the right to information, but don't actually want to see the clash that this open meeting of disparate views inevitably causes.<sup>305</sup> This is one reason why the ideal of bipartisanship is so strong.

The conflictual nature of the modern process is not unprecedented. While one in five nominees was rejected in the 20<sup>th</sup> century, one in three was rejected in the 19<sup>th</sup> century.<sup>306</sup> Nor are political motivations new; they have characterized Supreme Court appointments since the nation's founding.<sup>307</sup> What is new is not the politics or the conflict, but the way they're carried out. As people have demanded more information, officials have sought to distribute information in order to persuade them. The arenas in which political battles are waged are now visible, and public support is vital to

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<sup>304</sup> Ibid. 125-126; J. C. Danforth, *Resurrection: The Confirmation of Clarence Thomas* (New York: Viking, 1994).

<sup>305</sup> J. R. Hibbing and E. Theiss-Morse, *Congress as Public Enemy* (Cambridge, UK: Cambridge University Press, 1995).

<sup>306</sup> Abraham, *Justices and Presidents: A Political History of Appointments to the Supreme Court*. 39.

<sup>307</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 55.



combatants. The news media are important to this process because they create a means to reach the public. This suggests that today politics and conflict invite the modern instantiation of transparency, rather than transparency inviting politics and conflict, as is often alleged.

This new political culture is not unique to confirmations. While critics often complain that Supreme Court confirmations have become similar to elections,<sup>308</sup> in fact all of politics is like an election. The open, publicly oriented, performance driven political style characterizes all decisions by the elected branches, from passing budgets to going to war. However, the question remains of what the contemporary instantiation of transparency means specifically for Supreme Court confirmations. In today's political environment confirmations have become performances that are both necessary and duplicitous. While these performances are a feature of much of modern politics, they are magnified in the confirmation context.

### **Part III: What contemporary transparency practices mean for confirmations**

#### Expectations of information and public involvement

As the government structure and political culture surrounding Supreme Court confirmations have become increasingly democratic, these events have incorporated many elements of the contemporary version of transparency. They're imbued with the expectation that information will be made available to the public. Congressional

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<sup>308</sup> D. M. O'Brien, "Judicial Roulette: Report of the Twentieth Century Fund Task Force on Judicial Selection " (Twentieth Century Task Force, 1988).

hearings, floor debate and votes are open and televised. Releasing records from nominees' careers is understood to be essential. Public opinion has become more important, and Presidents, nominees, Senators and interest groups make appeals to the public. These appeals are common in today's political environment. However, another factor is at work: public interest in Supreme Court appointments has been heightened by the fact that constitutional law has become more relevant to peoples' everyday lives, and touches more controversial issues.<sup>309</sup> This has raised the pertinence of public appeals and underlined the demands for information about nominees.

The increased expectation of information has created new features in confirmations. Because nominees testify at the hearings, there is a focus on learning information directly from the nominee. Before the 1950s, Supreme Court appointments were motivated by ideology, but rather than asking nominees directly about this, Senators and other participants assumed nominees' ideologies based on their records. Today, revelations in the hearings are paramount, largely because they'll be seen on television and can therefore be used to persuade the public.<sup>310</sup> In 1916, when conservatives were concerned that Louis Brandeis was too sympathetic to labor, Brandeis made no public appearances, and this did not matter, because people knew Brandeis' positions from his career. Today, many make assumptions about

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<sup>309</sup> M.X. Delli Carpini and S. Keeter, *What Americans Know About Politics and Why It Matters* (New Haven: Yale University Press, 1996). Polling data show that, while Americans' knowledge about government in general did not change much from 1945-1990, their familiarity with the Bill of Rights has risen considerably.

<sup>310</sup> This is the same dynamic that made former Secretary of State Condoleeza Rice's statement in a televised hearing that the Bush Administration had received a memo entitled "Bin Laden determined to attack inside U.S." more powerful and convincing than a news story describing the report would have been.

nominees' ideologies based on their careers, but these assumptions aren't considered firm without confirmation in the hearings, which is usually impossible to get.

The focus on questioning nominees publicly has been accompanied by the development of arguments about what questions are appropriate and what answers are sufficient. Nominees are supposed to refrain from prejudging or appearing to prejudge cases, and they don't answer questions that would suggest this. This sub-debate about judicial ethics wasn't necessary when ideologies were simply assumed, and didn't require verbal, public verification by nominees.

Thus, although confirmations have always turned partly on ideology, our contemporary political culture makes the ideological stakes more explicit. Transparency has become more democratic (directed at the public) rather than republican (shared between branches), and the ideological concerns that drive the confirmation process are filtered through this new, public-oriented dynamic. Ideological stakes have to be spelled out for the public in ways that are not necessary for insiders. Whereas the witnesses at Louis Brandeis' confirmation hearings were all people with whom he had worked and were asked only about his professional competence, witnesses today often discuss nominees' ideologies in their testimony.

#### Contemporary confirmations and performance

The expectation of information and the necessity of persuading the public lead to performative transparency practices – practices that stage manage a process taking place in the glare of publicity rather than showing the public what goes on behind the

scenes. Because they present a means to reach the public, the news media are the primary channel for such performances. Senators, Presidents and interest groups stage press conferences and distribute documents that they count on the press to publicize. Spokespeople appear on television to deliver arguments they want the public to hear. Nominees, Senators and witnesses deliver performances in the hearings.

A lot of criticism is focused on the televised hearings. However, the heavy conflict, group participation and public orientation of the modern process started before the hearings were first televised in 1981. The contentious confirmation processes for Fortas, Haynsworth and Carswell were not televised. Television did not cause the politics or conflict; its implications are subtler.

The televised hearings exemplify the performance of transparency. They are spaces where the work of evaluating the nominee is purportedly done. However, once the hearings were opened to the public, they presented opportunities to distribute messages through journalists to the public. Televising the hearings made them even better conduits of information. Thus, once they were opened to public view, the hearings were transformed from back stage to front stage arenas. The participants in the hearings seek to build support or opposition to the nomination and advocate for their positions on constitutional issues. Some Senators are, or claim to be, influenced by nominees' answers and witnesses' testimony in the hearings. However, little of the information conveyed is new, and it's pitched almost entirely to the public. The front stage work has become the hearings' primary purpose.

The performances that the televised hearings elicit are mocked by journalists, scholars and comedians. Many accuse the Senators of pomposity and narcissism and of being so focused on addressing the television audience that they neglect their constitutional duty to evaluate the nominee. A typical piece criticizing the Senators' performances, titled "How to save the Senators from themselves," speculates that, "had Senators been deprived of the camera," we "would have been spared" the long speeches, rhetorical questions and brandishing of charts, among other things.<sup>311</sup> In coverage of the Roberts confirmation hearings in 2005 on *The Daily Show*, comedian John Stewart showed four Senators talking on a four-way split screen, with sped-up clocks in the corner of each quadrant, minute hands zooming around the clock faces, conveying the message that the Senators were droning on needlessly.

The Senators do put on performances in the hearings, often silly, self-important ones, and sometimes deceptive ones, and most base their votes on what they knew before the hearings. However, these performances do serve a democratic purpose. Many criticize the cameras for making participants act differently, but knowing one is watched can have good as well as bad effects on one's behavior. The cameras make Senators more likely to show up, stay for the duration of the hearing, and make a formal opening statement. Senators come better prepared to delve into constitutional issues and they ask more questions.<sup>312</sup> The cameras thus make the hearings more serious and substantive. One of the traditional democratic justifications for transparency introduced in Chapter One was the prevention of corruption. This

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<sup>311</sup> T. A. Frank, "How to Save the Senators from Themselves," *The New Republic Online*, (2005).

<sup>312</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 78.

argument posits that, if officials know they are being monitored, they'll be more likely to behave ethically. The assumption that officials will act differently when they know they are visible is precisely the point. Senators' behavior is not "authentic" or unguarded in the hearings, but this has some benefits.

When people say the cameras make Senators act differently, they usually mean that Senators posture and make speeches about constitutional issues, rather than getting on with "the business at hand" – evaluating the nominee.<sup>313</sup> It's true that hearings would be shorter if they were closed, but it may be that we should understand the performances as part of the business at hand. In these performances, Senators make arguments about the political stakes attached to different modes of constitutional interpretation and in doing so, describe the type of national community they want and the types of legal claims they view as valid. This is spin, but it's also translation; it converts legal language, which is not always decipherable to non-experts, to the language of the public sphere. Thus, it has a dual character. In some ways, it's a culmination of the century-long battle by transparency advocates to gain access to Senate debate in order to determine how each Senator was voting and why. The problem now is that public access to this information is also Senators' platform. This does serve a democratic purpose: people who learn why their Senators intend to vote for or against a nominee can make more informed voting choices, engage in public debate about the issue, and hold their Senators accountable. This is scripted reason

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<sup>313</sup> *Judicial Roulette -- Report of the Twentieth Century Fund Task Force on Judicial Selection* makes this criticism.

giving, but its still reason giving. This process is part of a dynamic of performative democracy.

The language of the public sphere can caricature judging, making it sound like political decision-making. Sometimes Senators' performances present judging as entirely formalistic and devoid of content, but these too often refer to specific political results. Though these caricatures can be misleading, nominees' different approaches to the law do make certain political outcomes more likely than others, and public awareness of this makes the democratic check at the appointment stage more meaningful. For better or worse, public approval is a requirement for many government decisions including confirmations. The translation produced by Senators' performances in confirmation hearings is an inevitable part of making proceedings related to an expert realm public.

#### Contemporary confirmations and personalization

The confirmation process has also become more personalized, or more focused on individual nominees as people. Nominees became central players in their own confirmations during the 20<sup>th</sup> century, as a result of the increased expectation of information and the heightened interest in the court. Before 1925, nominees stayed out of sight. Today, even though Senators can investigate nominees' records without their testimony, nominees are required to testify. The personal appearances allow Senators to ask them questions about how they think about their past work. This is a way for Senators to bring this record to the attention of the public, but it has an

additional result. The quest to learn “how the nominee thinks” further emphasizes nominees’ personhood. Nominees usually successfully evade questions about broad constitutional issues and individual cases, and some think these questions are inappropriate. Stephen Carter recommends that Senators avoid questions about cases and constitutional issues, and instead undertake an inquiry into nominees’ “moral instincts.”<sup>314</sup> Some Senators attempt this. While questioning John Roberts about his view of end of life decisions, Senator Diane Feinstein explained, “I’m trying to see your feelings as a man.”

There has been an increasing emphasis on nominees’ personal lives in all stages of the process. Nominees discuss their childhoods and families in their opening statements in the hearings. When possible, the White House highlights nominees’ backgrounds to make them more sympathetic. This strategy was exemplified by the first Bush Administration’s “Pin Point strategy,” which emphasized Clarence Thomas’ roots in rural Pin Point, Georgia, to make his rise an inspiring story. To bolster the narrative that Thomas had risen from poverty through hard work, they arranged for the nuns from the catholic school he had attended as a child to testify.<sup>315</sup> Similarly, President Obama emphasized Sonia Sotomayor’s Puerto Rican heritage, her childhood in the Bronx and her father’s death when she was a child. The news media pick up on these themes, analyzing nominees’ spouses and private lives for the light they might shed on their future jurisprudence. Many discussed whether John Roberts’ wife’s

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<sup>314</sup> Carter, *The Confirmation Mess: Cleaning up the Federal Appointment Process*

<sup>315</sup> Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Clarence Thomas to Be Associate Justice of the United States*, September 10 - October 13 1991.



membership in Feminists for Life might help predict how he would rule in a case involving abortion.<sup>316</sup>

Televising the hearings furthered the trend towards emphasizing nominees' human selves by projecting their voices, faces and mannerisms. Television also offers a glimpse of nominees' family members sitting behind them in the hearings. During Justice Samuel Alito's hearings, his wife began crying when Senator Lindsay Graham, a supporter, asked him rhetorically if he was a bigot. News organizations covering the hearings showed this incident again and again, as a personal drama makes better television than the clash of ideas. Comedian Stephen Colbert satirized this incident by pretending to weep over it, wailing, "It's not supposed to be about the *Constitution* ... It's supposed to be about a man... and a woman..."

Although this focus on nominees' human selves comes partly from how the press, particularly television, covers the stories, it can't be blamed entirely on television. The personalization of politics emerged in the 1890s and has been slowly gaining force through the 20<sup>th</sup> century, exploding in the 1970s after Chappaquiddick. This trend thrived on television, but was also encouraged by other factors, including the commercial media structure, changing journalistic practices, the decline of the parties as central organizing forces in political life, and ideas about the value of personal revelation.

Many criticize the emphasis on nominees' human selves, especially their televised appearances in the hearings, because it makes being photogenic and likable a

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<sup>316</sup> E. Thomas and S. Taylor, "Judging Roberts," *Newsweek*, August 1 2005.

prerequisite for winning confirmation. Some claimed that the public turned against Robert Bork because his beard was unappealing, and because, as a smoker who was prevented from smoking during the hearings, his personality was sharper than usual.<sup>317</sup> Marketing nominees through their personal lives can also be misleading, as a particular childhood story doesn't predict future jurisprudence.

Personalization can also conflict with the image of a judge as a figure who can set aside his or her personal views and create a space of universality in the courtroom. It emphasizes a judge's human traits and can highlight the partiality of judgment. This doesn't have to be a bad thing; the public should understand that judges are influenced by their human traits, but shouldn't be led to believe judges are only politicians. Of course, there are also double standards at work in determining whose human traits will influence them too much. In Sonia Sotomayor's 2009 confirmation hearings, Senators spent a disproportionately large amount of time emphasizing and dissecting her previous statements about how her background influenced her thinking, leaving the impression that her being female and Latina made her biased and emotional. However, all personalization, whether based on categories such as race and gender or on other factors, enables the understanding that judges have different points of view and that this will influence their decisions.

Some personal information is more directly translatable into speculation about future jurisprudence. The discovery in 1937 that Hugo Black, who had just won confirmation, had previously been a member of the Klan caused concern that he would

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<sup>317</sup> Carey, "Political Ritual on Television: Episodes in the History of Shame, Degradation, and Excommunication."

not support racial equality. Black was able to persuade most of his critics to overlook his earlier membership by addressing it directly in a speech on the radio, in which he pledged his commitment to racial equality. G. Harold Carswell was criticized for having made a speech supporting White Supremacy, and he wasn't able to convince most people that he had repudiated that philosophy, particularly because he had taken recent actions to prevent desegregation. The sexual harassment charges against Clarence Thomas raised the question for many observers of how Thomas could be impartial in a case involving sexual harassment. These predictions are not always accurate. Some thought Thomas' identity as a black man and roots in poverty would lead him to rule in favor of the poor and minorities, but that doesn't appear to have happened.

Personalization in confirmations doesn't go as far as it goes in other realms. Nominees only address the public in a few customary circumstances. Their opening statements in the hearings allow them to speak to the public via televised images, though under the guise of addressing the Senators. Nominees meet with Senators in their offices, but they don't hold press conferences, give speeches, sit for interviews, or otherwise campaign. Black's radio address to the public was a rare instance of a nominee speaking directly to the public, and he was technically no longer a nominee at the time.<sup>318</sup> Thus, although confirmations exhibit some contemporary transparency practices, there are still pockets of resistance that defer to the differences between the judicial role and other officials' roles. It is true that the process has become more like

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<sup>318</sup> It may be telling that this rare public address was spurred by concerns about how his personal views would affect his jurisprudence, underlining the link between personalization and public appeals.

election, but this transformation is incomplete because the judicial role requires more distance and less intimacy with the public than elections require.

### Transparency, democracy and constitutionalism

Despite all of the ways in which the confirmation process has evolved in tandem with American politics, there is some resistance to these changes in the confirmation process. Much of this resistance revolves around questions about what form of transparency is appropriate. The resistance to the modern instantiation of transparency in confirmations stems from the tension between the democratic and constitutional principles that structure the judiciary. Once seated, judges play a constitutional, countermajoritarian role, but the democratic check in the appointment phase helps to legitimate this role.

This interplay of democratic and constitutional features mirrors the dual nature of the law itself. Law is shaped by the individuals who make, execute and interpret it, and by historical forces that include social, economic and political power relations. However, there is also an element of the law that is separate from sheer power relations. Law has to bear some correspondence to basic ideas about fairness, because this is where its legitimacy comes from. Historian E.P. Thompson describes this dual nature of law in *Whigs and Hunters: The Origins of the Black Act*.<sup>319</sup> He writes that law mediates class relations to the advantage of the powerful and it legitimates these relations. However, it does this through the forms of law, which have their own

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<sup>319</sup> E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (New York: Pantheon Books, 1975).

characteristics, history and logic. Thompson writes, “It is inherent in the especial character of law, as a body of rules and procedures, that it shall apply logical criteria with reference to standards of universality and equity.”<sup>320</sup>

If law is too obviously unjust or inconsistent with its own criteria, it will lose its power. Moreover, law is not just a hypocritical system to effectuate this legitimation and control; rulers must believe in the principles and procedures of law to make it work as a system. While law can mask the realities of power, it does this through legal forms that also constrain the actions of the powerful. Even the powerful sometimes lose in court. If this were not true, law would have no legitimacy and thus no authority. Thus, Thompson writes, “the rhetoric and rules of a society are something a great deal more than a sham.” Thompson is writing about 18<sup>th</sup> century England, but argues that American aspirations for what law should be are in part inherited from that cultural moment. It is this extra-political aspect of law that allows the judiciary to support constitutional principles.

Judicial legitimacy is thus aided by two forces that are sometimes at odds: the judiciary’s apolitical stance and the democratic check that comes from the political appointment process. The democratic check requires transparency but the apolitical stance is sometimes stymied by it. Thus, part of the resistance to transparency comes from the two-pronged basis of judicial legitimacy.

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<sup>320</sup> Ibid. 262.

#### **Part IV: The Bush Nominees and the Performance of Transparency**

The confirmation processes for President George W. Bush's nominees show us some results of the intersection of the contemporary instantiation of transparency and the confirmation process. While some say transparency has politicized the process, the results are subtler. In this section I'll discuss the confirmation processes for John Roberts, Harriet Miers and Samuel Alito. I present these as examples of the modern process rather than aberrations from it.

##### Principles and politics in the hearings

One result of the heightened expectation of transparency in confirmations is the frequent debates about providing information. Typical questions concern what documents from the nominee's career must be released and what questions are appropriate in the hearings. In this situation, the amount of information one pushes for has strategic political implications. The more information released about a nominee, the more there is to criticize, and the more likely that interest groups, legislators and members of the public will oppose the nominee. Maintaining ambiguity about a nominee's views is a central part of selling them, because it gives all stakeholders hope that the nominee shares their views on some topics. The Bork nomination underlined this; Bork's definitive and detailed testimony about his views harmed his chances because it confirmed some of the claims of his opponents. Because of this, members of the President's party generally stress the need for the nominee to remain

circumspect, while members of the non-nominating party advocate more vigorous questioning.<sup>321</sup>

In his hearings, Judge John Roberts often declined to answer questions directly, explaining his reticence by referring to the judicial method of decision-making – the need to make case-specific decisions and to refrain from prejudging issues. These reasons point to legitimate concerns, but they’re also available as a strategic shield to nominees. All nominees except Robert Bork have used these reasons to justify not answering questions. These reasons for withholding information are both principled and strategic.

The heightened expectation of transparency makes it necessary to provide reasons for withholding information. However, the more visible and explicit politics of the process make the reasons related to the judicial role sound cynical, because it’s clear that they are also strategically advantageous. This situation is striking when we compare it both to non-judicial selections and to past judicial confirmations. Candidates for other offices are expected to say what they’ll do and what they think of specific policies, and they don’t have noble reasons available to shield them from transparency requirements. In past confirmations, less information was expected, and the information that was necessary wasn’t expected to come from hearings. Michael Comiskey writes that nominees’ records usually provide accurate guides to their rough positions on a left-right spectrum, though they don’t indicate how they will vote in specific cases. In fact, newspaper descriptions of nominees’ ideologies on the day

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<sup>321</sup> Maltese, *The Selling of Supreme Court Nominees*. Carter, *The Confirmation Mess: Cleaning up the Federal Appointment Process*

they're nominated usually prove to be fairly accurate descriptions of their eventual jurisprudence.<sup>322</sup>

Today, many want likely outcomes spelled out in the hearings, and nominees and their supporters try to promote the understanding that there is some uncertainty and ambiguity in this prediction. Because the politics of the process are articulated so openly, this uncertainty and ambiguity about nominees' future jurisprudence sometimes have the appearance of a charade. Nominees perform the judicial role, exaggerating it at times to excuse themselves from answering questions, but at the same time paying heed to and instructing the public about principles of judicial decision-making. The coexistence of principled and strategic reasons for refusing to answer questions mirrors the duality of law and the judicial role, its principled and political aspects. The performances are charades but not entirely fraudulent.

#### Questions and Answers in the Roberts Hearings

John Roberts' hearing, like almost all Supreme Court confirmation hearings, provided virtually no previously unknown information about Roberts. In his testimony before the Senate Judiciary Committee, Roberts said he would provide answers about general principles, but not about issues or cases that might come before him on the bench. However, questions that were too general were out of bounds as well, because justices need a specific set of facts to make a decision. When Senators asked for his views on contemporary political and legal issues or on past cases, he almost always

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<sup>322</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 139; J. Segal, A. D. Cover, and C. M. Cameron, "The Role of Ideology in Senate Confirmation of Supreme Court Justices," *Kentucky Law Journal* 77 (1989).



justified not answering by referring to the special qualities of the judicial role. This is the approach almost all previous nominees have taken.<sup>323</sup>

Judge Roberts declined to answer most questions about constitutional issues because the questions posed were too abstract. When Senator Feinstein asked Roberts, “Do you believe that the federal courts should be involved in end of life decisions?” he answered, “I can’t answer that question. I have to answer that on the basis of the parties’ arguments, on precedent, on the facts. I can’t say abstractly. It has to wait for the litigation in that case.”<sup>324</sup> For Senators, asking questions using the language of political issues such as “end of life decisions” was useful because this language is meaningful to the public, but for Roberts, using this language could imply that he had made up his mind on an issue before an actual case was before him. A direct answer would also expose him to criticism from one side. The decision not to answer is both principled and strategic, and the principles are performed. Similarly, when Senator Kennedy asked Roberts whether he had any disagreements with the 1982 version of the Civil Rights Act and referred to a Reagan era memo in which Roberts had criticized one section of it, Roberts replied, “My hesitancy is that it may come up before me and I don’t know what those parties will be arguing.”<sup>325</sup>

Judge Roberts often answered questions about specific issues by explaining the types of reasoning that could be used to decide a case involving those issues. In these

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<sup>323</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 136-137; Carter, *The Confirmation Mess: Cleaning up the Federal Appointment Process*; Maltese, *The Selling of Supreme Court Nominees*. 89-155; Kagan, "Confirmation Messes, Old and New."

<sup>324</sup> Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States*, September 12-15 2005.

<sup>325</sup> *Ibid.*

answers, he did not state how he would apply the reasoning, but instead outlined the considerations that would be relevant on both sides. When Senator Specter asked him whether he thought overruling *Roe v. Wade* would subvert the court's legitimacy and authority, Roberts said,

It is a jolt to the legal system when you overrule a precedent. Precedent promotes stability and evenhandedness. It is not enough that you may think the prior decision was wrongly decided. You need to look at other factors – settled expectations, is the precedent workable. But there are situations where that price has to be paid. *Brown* overturned *Plessy*, *West Coast Hotel* overturned *Lochner*.<sup>326</sup>

When Senator Leahy asked, “Do you believe the President as Commander in Chief overrides the law prohibiting the use of torture?” Roberts answered,

No one is above the law, including the President. There are often issues when there is a conflict between the legislative and executive over executive authority. The *Youngstown Sheet and Tube* case is an example. The framework set forth in Jackson's concurring opinion analyzes the issue in terms of three categories...<sup>327</sup>

Roberts then went on to describe the three categories Jackson laid out, but did not say how he would apply this reasoning to answer the question. This approach helped make Roberts' answers palatable to Senators of both parties. The reasoning could lead to different rulings depending on how it was applied.

Many legal scholars have argued that nominees should provide more information than they do about their views, and that this need not breach ethics. They argue that there is a middle ground of information that provides more detail than the recitation of legal maxims such as the need to “keep an open mind,” yet not so much

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<sup>326</sup> Ibid.

<sup>327</sup> Ibid.

detail and certainty that the nominee appears to have made an advance decision about future cases. Ronald Dworkin argues that this permissible middle ground should include a nominee's "method of legal reasoning," or the way he or she determines what the law is. The language of the Constitution is often abstract and requires interpretation. Words like "liberty" and "unreasonable" need to be defined and fleshed out.<sup>328</sup> However, the Senators could get little out of Roberts about how he would interpret the law. He often said he would take a "pragmatic" approach, using different interpretive methods in different instances.

Many scholars propose that the middle ground of permissible information should include nominees' views on past cases.<sup>329</sup> Law professor Vikram David Amar writes, "The only – I repeat, only – way to understand a Supreme Court nominee's approach to deciding big cases is to dig beneath general labels and look at past specific big cases themselves to see what the nominee says in or about these actual legal disputes." If these types of questions are not allowed, he writes, "there is little point in even having a hearing."<sup>330</sup> Many law professors and Senators have endorsed this view.

However, Roberts declined to answer questions about most past cases, saying that the issues they presented may come before him in the future. When Senator Specter asked him whether the precedent established by *Roe* had been eroded at all, he answered, "I want to stay away from particular cases that may come before the Court

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<sup>328</sup> R. Dworkin, "Judge Roberts on Trial," *The New York Review of Books*, October 20 2005.

<sup>329</sup> D. V. Amar, "Casing John Roberts," *New York Times*, July 27 2005. R. Post and R. Siegel, "Questioning Justice: Law and Politics in Judicial Confirmation Hearings," *Yale Law Journal (The Pocket Part)* (2006).

<sup>330</sup> V. D. Amar, "It's the Specifics, Stupid... A Commentary on the Kind of Substantive Questions the Senate Can and Should Pose to Supreme Court Nominees," *FindLaw's Writ*, August 4 2005.

again.” When Senator Kennedy asked whether he had any reservations about the constitutionality of the *1964 Civil Rights Act*, Roberts said, “I’m cautious about talking about issues that may come up before the Court.”<sup>331</sup>

Roberts made exceptions for a few iconic cases such as *Griswold v. Connecticut* and *Brown v. Board of Education of Topeka*, which he explained he could speak about because the issues at stake in those cases were well settled. Senator Schumer protested that for a nominee to say he cannot discuss issues that may come before him is to provide no standard, because anything could conceivably come before the court. Even *Griswold*, he pointed out, could be challenged in court. Judge Roberts replied, “I don’t think the issue in *Griswold* is likely to come before the Court.”<sup>332</sup> That is true, but the distinction Roberts drew is also politically convenient. Today, *Brown* and *Griswold* are so widely known and accepted that it is mandatory for nominees to state that they agree with them. Similarly, *Korematsu* and *Lochner* are so widely known and reviled that it’s necessary for nominees to denounce them. This has become part of the standard script for confirmations, and nominees sometimes strain to explain how these positions comport with their records. To refuse to answer questions about these cases would cause more controversy than answering them. Thus, though nominees cultivate ambiguity and uncertainty about most of their views, they affirm specific, well-known cases as part of their performance. The strategic reasons for these distinctions are more apparent than the ethical reasons.

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<sup>331</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States.*

<sup>332</sup> *Ibid.*

Nominees do differ in terms of the information already available about their views from other venues. Ruth Bader Ginsburg discussed her views on *Roe* because she had written about those views, but she refused to answer questions about other issues such as the death penalty and gun rights. Roberts differed only in that he had not published much, and thus, following the “Ginsburg rule” meant there was little he needed to discuss. Critics note that, in this environment, having published extensively and having “taken risks” in making arguments decreases one’s chances of being nominated or confirmed.<sup>333</sup> Solicitor General Elana Kagan has pointed out that if nominees could be compelled to answer questions about their substantive views, which she favors, then those who had never published would have no advantage over those who had.<sup>334</sup>

Roberts explained that he couldn’t answer questions about cases or issues because he could not make promises that would undermine his independence and his capacity to change his mind. He told Senator Biden, in answer to a question about *Moore v. East Cleveland*, a case about public housing, “Judges go on the Court without commitments, but as justices who will approach cases with an open mind. Litigants have a right to expect that.” When Biden asked him why he couldn’t answer whether he thought there was a liberty right to privacy in the 14<sup>th</sup> Amendment, he said, “I have to decide cases with an open mind, on the basis of precedent and the rule of law, not on the basis of commitments I have made.”<sup>335</sup> This implies that expressing a

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<sup>333</sup> Carter, *The Confirmation Mess: Cleaning up the Federal Appointment Process*

<sup>334</sup> Kagan, “Confirmation Messes, Old and New.”

<sup>335</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States*.

view would bias his future thinking or would bind him to that view. Several Republican Senators defended this position, warning that many questions were simply requests for promises, which the judicial role prohibits.<sup>336</sup>

However, stating one's present view is not the same as making a promise. This distinction is important for several reasons. First, the decisions judges make on the bench are based on more than their views at the time of their confirmations; they also turn on the specifics of each case and the arguments presented. Second, all of the Supreme Court Justices have, in the opinions they write and sign onto, expressed opinions on issues that will come before them, and they are still considered well suited to hear future cases. Finally, both sitting Justices and nominees talk about their views on past cases in other venues, such as speeches and law review articles. As David Vikram Amar puts it, "the relevant distinction is between an informed prediction (which permissibly may be sought) and a promise (which should not be sought or given)."<sup>337</sup> The refusal to "make promises" is part of the performance of the judicial role: it exaggerates an ethical limitation for strategic reasons.

It's possible that, although a view expressed in a hearing is not binding, it could take on that appearance and wouldn't be good for the Court's public image. However, that public image isn't helped by the appearance that nominees are evading permissible questions. Michael Comiskey argues that justices may feel psychological pressure to adhere to views they expressed in their confirmations, thus diminishing

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<sup>336</sup> Ibid. Law professor and former Solicitor General Charles Fried has also taken this position, C. Fried, "The Strange Case of Justice Alito: An Exchange," *The New York Review of Books*, April 6 2006.

<sup>337</sup> Amar, "It's the Specifics, Stupid... A Commentary on the Kind of Substantive Questions the Senate Can and Should Pose to Supreme Court Nominees"; Dworkin, "Judge Roberts on Trial"; Post and Siegel, "Questioning Justice: Law and Politics in Judicial Confirmation Hearings."

their independence, impartiality and ability to learn from experience once on the court.<sup>338</sup> However, this applies to decisions made from the bench as well.

The strongest argument against nominees providing their views on past cases holds that constitutional rights are often unpopular, and that if we mandated that nominees reveal their understanding of these rights, we could never appoint justices who would uphold rights the public often opposes, such as criminal defendants' rights.<sup>339</sup> This goes directly to the federal judiciary's constitutional role, to its ability to counteract the "tyranny of the majority." However, the confirmation process is the primary democratic check on the judicial branch and this check is meaningless without knowing a nominee's views. Ronald Dworkin writes that if Presidents choose nominees based on ideology then the public should know what these ideologies are.<sup>340</sup>

*Republican Party of Minnesota v. White*, a Supreme Court case decided in 2002, shed some light on this issue.<sup>341</sup> This case concerned judicial elections, not Supreme Court nominations, but it addressed concepts that are relevant to confirmations. In *White*, the Court struck down a Minnesota statute that had prohibited candidates for judicial election from announcing their views on "disputed legal or political issues." The Court noted that, while judges could provide their views, they could not make pledges, thus giving credence to this distinction. The Court also argued that excluding discussion of issues that are "likely to come before the Court" would exclude everything, because any topic could come before the Court. As a result

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<sup>338</sup> Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 147.

<sup>339</sup> Carter, *The Confirmation Mess: Cleaning up the Federal Appointment Process*

<sup>340</sup> R. Dworkin, "The Strange Case of Justice Alito," *The New York Review of Books*, February 23 2006.

<sup>341</sup> *Republican Party of Minnesota v. White*, 536 United States 765 (2002).

of this case, the ABA added the following to the prohibition of pledges in their Model Code: “Pledges, promises or commitments must be contrasted with statements or announcements of personal views on legal, political or other issues, which are not prohibited.”<sup>342</sup>

Despite all of these reasons for nominees to provide their views, they don’t have to do so to get confirmed. Unlike candidates for other positions, they have principled reasons available to them for withholding their thoughts. They exaggerate these reasons, but this has come to be an accepted part of confirmation performances. The result is a recitation of legal doctrines and maxims but no new information.<sup>343</sup> The hearings serve primarily to educate the public about the political stakes involved in confirmations. They present a performance of the judicial role and of the Senators’ decision-making processes, or at least the aspects that participants want the public to see.

This means the hearings serve much more of a front stage function than a back stage function; only a small amount of the work conducted would be valuable even if it remained invisible to the public. In fact, it may be that Supreme Court confirmations are more fully front stage performances than are other congressional hearings, because of the principled arguments the judicial role provides for nominees to withhold their views. In other types of congressional hearings, it’s harder for the witnesses to hide

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<sup>342</sup> "ABA Model Code of Judicial Conduct." Rule 4.1, Comment 3.

<sup>343</sup> Michael Comiskey points out that nominees have occasionally given testimony that indicated their views on legal issues such as the proper methodology for defining the “liberty” protected by the Fifth and Fourteenth Amendments, the use of legislative history in statutory interpretation and the meaning of the Ninth Amendment, but these are exceptions. Furthermore, this information can help paint a picture of the nominee’s general approach to judging, but doesn’t provide their views on contemporary issues that matter to the public. Comiskey, *Seeking Justices: The Judging of Supreme Court Nominees*. 138.



behind axioms such as the prohibition of promises. Thus, in other hearings, it's more likely that some new information will be revealed amidst the performances. Though Senators often try to elicit Supreme Court nominees' views on particular issues, these attempts seem directed more at creating a visual sound bite that will reach a wide audience than at discovering information to be used in making their own decision. This doesn't mean the Supreme Court confirmation hearings are useless; it means they're useful in a different way than the participants purport them to be.

Because most nominees' views are understood fairly well before the hearings, Senators could evaluate them without their testimony. However, the publicly oriented, majoritarian bent of contemporary politics means Senators must justify their decisions to the public, and this makes nominees' appearances necessary. Questioning nominees in the hearings allows Senators to try to persuade their constituents to agree with their decision regarding confirmation, and in doing so, to make a case for their understanding of the constitution. It also allows Senators to criticize or praise the President for making the nomination in the first place.

Convincing the public can be difficult, both because nominees can avoid answering questions by referring to judicial principles and because most people are not versed in issues of constitutional interpretation and legal doctrines, and thus don't understand the implications of some aspects of nominees' records. Senators try to overcome these difficulties in their performances in the hearings.

### Translation in the Roberts hearings

In the Roberts hearings, Senators attempted to translate legal language into recognizable political issues to explain why the makeup of the Supreme Court is relevant to these issues. This translation into familiar terms is common in our publicly oriented political culture, but it is particularly necessary when an expert realm such as the Supreme Court is addressed in a way that includes the public. There are other expert realms in government, but few of them figure as centrally in familiar, public, ideological debates. For example, while understanding macroeconomics and monetary policy requires specialized knowledge, the confirmation of Federal Reserve Chairman does not receive as much public attention as Supreme Court confirmations and thus requires less translation.

In the Roberts hearings, Senators highlighted the connection between the confirmation and contemporary political issues, seeking to remind the public that this event was relevant to their lives. Senators Kennedy and Leahy both drew connections between the Court's work and the government's response to the recent devastating hurricane. Senator Feinstein mentioned the relevance of the Supreme Court's decisions to concerns about high gas prices.

Senators from both parties asked Roberts for his thoughts on contemporary political issues. Senator Feingold posed the question, "Are there any elements of our government's response to 9/11 that you think we will look back on in 50 years and regret?" and then asked, "Do you have any concerns about extraordinary rendition?" Senator Coburn asked Judge Roberts whether he agreed that the presence of

brainwaves and a heartbeat signifies life, and explained that this would be important to remember in cases involving abortion. In these questions, the Senators were explaining their stances on issues in order to define themselves, but were also highlighting the links between these issues and the make-up of the Supreme Court. It was entirely predictable that Roberts wouldn't answer these questions, but this wasn't the point.

Many Senators explained recent Supreme Court cases and their reasoning, purportedly to ask Roberts for his views on these cases. However, it was clear that Roberts wouldn't answer the questions, and they served as ways of alerting the public of Court decisions the Senators found disturbing. Senator Kyl explained that in a recent case, *Roper v. Simmons*, the court ruled that it was unconstitutional to execute a man who had committed a murder at age 17 and that "25% of the opinion was spent discussing the laws of other countries." Senator Feinstein said, "Many of us fear the Court will take away from Congress the grounds on which we base environmental legislation," explaining that the Rehnquist Court had curtailed Congressional power. Senator Specter said, "I'm concerned about the Court's denigration of Congress's authority," and provided several examples, including the Court's invalidation of some parts of the *Violence Against Women Act*. Senator Cornyn, discussing a case about public displays of the 10 Commandments, stated, "The current judgment standards have the effect of hostility to religion."<sup>344</sup> These statements were all attached to

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<sup>344</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States.*

questions, but they really sought to impart information to the public rather than extracting it from Roberts.

Senators also described parts of Roberts' record that they found troubling, translating the legal language into language that was easy for laypeople to understand. This wasn't necessary for the questioning, but it was part of the performance of reason giving for the public. Senator Leahy said, "When you were a lawyer in the Reagan White House, you objected to a bill that would give preference [for pensions] to soldiers who had served in Lebanon. You wrote that the difficulty of such a bill is that it recognizes a role for Congress in when to terminate the Lebanon operation. I find that troubling." Senator Kennedy did the same: "You said Section 2 of the *Voting Rights Act* was constitutionally suspect ... you also said there is no evidence of voting abuses supporting the need for this. No evidence? I was there at the extensive hearings..."<sup>345</sup>

In addition to referring to cases and issues they cared about, Senators used the hearings to present their views of the proper approach to interpreting the Constitution. The primary fault line separating the Senators' positions is generally the question of whether one agrees or disagrees with the Warren Court's jurisprudence, which expanded the definition of rights and focused on strengthening social equality. The Warren Court ventured into realms previously untouched by constitutional law, such as libel law and schooling, asserting that constitutional guarantees are relevant to these areas.

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<sup>345</sup> Ibid.

Conservative Senators generally describe the Warren Court's decisions as having overstepped the Court's appropriate jurisdiction and as having invented rights rather than adhering to the text of the Constitution. They emphasize the importance of tradition in delineating rights and often assert that it's both possible and necessary for judges to disregard their personal and political views in making decisions. Liberal Senators are more supportive of the Warren Court's rulings and legacy, arguing that the Constitution's terms should be interpreted to comport with social changes and with the pluralism of American life. Supporters of the substantive liberalism of the Warren Court's major decisions usually acknowledge that judges' perspectives will inevitably influence them and stress that courts should be a refuge for the powerless and the unpopular.

Senators in the Roberts hearings argued for these different visions of the Constitution, folding their arguments into explanations of what judging necessitates, framed as introductions to their questions to Roberts. Democrats emphasized equality of opportunity and the need to interpret the Constitution using contemporary standards. Senator Kennedy said to Roberts, "We must ask if you have demonstrated dedication to the principles of increasing opportunity for all citizens." Senator Kohl said, "A judge must have a sense of compassion. The law is more than an intellectual game or exercise." Senator Biden said, "The Court should be adapted to the various crises in human affairs... We have always had to struggle against those who see the

Constitution as frozen in time ... We need to know if you think the constitutional journey must continue.”<sup>346</sup>

The Republicans countered by pressing for their framework, which emphasizes a more static, pared down understanding of the Constitution, and which they argue is devoid of value judgments. Senator DeWine said, “Byron White said the role of the Supreme Court was to decide cases. This means they need to avoid the temptation to set broad policy.” Senator Kyl said, “It’s not your function as a judge to decide how best to advance freedom and progress. These are decisions that all Americans have to be involved in making. Senator Graham said, “I disagree with Senator Kennedy that we are looking at whether you will embrace a certain set of policy decisions.” Senator Hatch said, “Some of my colleagues want a justices to promote justice and equality – but that doesn’t sound like modesty. Can you assure us that you’ll stay on your side of the line?”<sup>347</sup> In these statements, the Senators were arguing for their vision of the Constitution. Robert’s presence was almost irrelevant.

The terms in this debate over constitutional law have become familiar components of public discourse, and they’re sometimes used to signify specific political issues without mentioning them. Perhaps the best example of this practice is the words of President Bush, who long maintained that he intended to appoint “strict constructionists” to the bench. Taken at face value, these words appear to indicate an approach to constitutional interpretation. However, in the context of Bush’s Presidency, they can be understood to mean justices who don’t believe the

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<sup>346</sup> Ibid.

<sup>347</sup> Ibid.

Constitution protects the right to an abortion. When Richard Nixon used this same phrase during his 1968 campaign to describe the types of justices he would appoint to the Supreme Court, abortion was not yet a familiar topic of political debate and was not mentioned in the confirmations of any of Nixon's Supreme Court nominees. In the context in which Nixon was speaking, the phrase "strict constructionists" connoted justices who would make "law and order" decisions rather than decisions favoring criminal defendants.

During the Roberts hearings, Senators similarly used phrases that denoted politically neutral forms of judicial reasoning but that connoted political issues. Senator Sessions stated that his constituents were concerned about "judicial activism." Legal scholars have used this term to signify different things, but in public debates about the Court, it often refers to the legal results the speaker does not agree with. In political discourse in 2005 it was often associated with the constitutional protection of same sex marriage. By aligning themselves with purportedly neutral forms of constitutional reasoning, Senators pitch their views to the public as constitutionally mandated and their opponents' as constitutionally flawed. Though both parties do this, conservatives have made it the centerpiece of their approach to confirmations, because it comports with their framework for describing constitutional interpretation as entailing only strict adherence to the constitutional text.

### The Miers nomination

After John Roberts was confirmed as Chief Justice, President Bush nominated Harriet Miers to replace Sandra Day O'Connor. Members of the President's party and conservative groups usually allied with him were skeptical of Miers to begin with, and grew increasingly critical as time went on. President Bush withdrew her nomination a month after announcing it, before hearings were held. The failed Miers nomination underscored the fact that most of the real information gathering and decision making in confirmations – the back stage work – happens before the hearings rather than in them.

Participants across the political spectrum criticized Miers for her apparent lack of intellectual distinction and her lack of experience addressing constitutional issues. Many perceived her as a crony of the President, as she was his close friend and had worked in the White House. However, neither of these critiques was enough to stop the nomination before the hearings. What accomplished this was Miers' political unreliability in the eyes of conservatives. As her professional history came to light, conservative grassroots activists, columnists, bloggers and intellectuals began to voice their displeasure that she was not demonstrably committed to the positions and methods of jurisprudence that they favored. Many in the religious conservative movement expressed frustration that she had no discernible record on abortion, gay rights or religious expression.<sup>348</sup>

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<sup>348</sup> "Bush Nominates Counsel as Choice for Supreme Court -- Longtime Advisor," *New York Times*, October 4 2005. "Bush's New Supreme Court Pick: A Loyal Aide with a Scanty Record," *Wall Street Journal*, October 4 2005. "The Right Sees a Strong -- and Wrong-- Signal," *Los Angeles Times*, October 5 2005.



Conservative columnist Charles Krauthammer eventually proposed a way out for Bush: he suggested in a column that Senators demand certain documents from Miers' work at the White House and that the Bush Administration refuse to turn them over, on the grounds of executive privilege. Miers could then withdraw, claiming she didn't want her nomination to jeopardize executive branch prerogatives. Whether or not the Bush Administration got this idea from Krauthammer's column, they played out its proposed scenario precisely. Miers asked Bush to withdraw her nomination, and Bush did so, releasing a statement that said her decision "demonstrated deep respect for this essential aspect of the constitutional separation of powers."<sup>349</sup>

The mantra that nominees cannot prejudge issues and must be able to change their minds has played an important role in nominees' refusal to answer questions in their hearings. However, some conservatives argued that Harriet Miers was unacceptable because she was not sufficiently committed to conservative principles and might change her mind once on the court. At a press conference, President Bush pleaded, "I know her heart," and "she won't change."<sup>350</sup> However, many conservatives argued that too much ambiguity remained about how she would decide cases, contradicting the refrain repeated in confirmation performances that certainty is not possible or desirable. This issue produced a fissure between social conservatives, who cared more about concrete outcomes on issues such as abortion, and judicial

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<sup>349</sup> J.C. Greenburg, *Supreme Conflict: The inside Story of the Struggle for Control of the United States Supreme Court* (New York Penguin Press, 2007); C. Krauthammer, "Miers: The Only Exit," *Washington Post*, October 21 2005.

<sup>350</sup> Presidential press conference, October 4, 2005.

conservatives, who were trying to make the argument that it was liberals who cared about outcomes, and that conservative judging was all about process.<sup>351</sup>

James Dobson, leader of Focus on the Family, pronounced himself satisfied by information he had learned in talking to Miers, which he wouldn't divulge. This prompted Democratic Senators to protest that a nominee should not be evaluated based on private conversations or "winks and nods."<sup>352</sup> On the PBS *NewsHour*, Senator Specter, the Chairman of the Senate Judiciary Committee, said, "This has been a chaotic process because of the conference calls, backroom conversations... we're conducting inquiries on collateral matters like who was in on the conference call."<sup>353</sup>

This process demonstrated that making the hearings public did not lift the curtain on the back stage. The back stage takes place in other venues. The hearings are important because they perform the task of securing public opposition or support, but nominees' views can be roughly predicted before the hearings, and in the case of Miers, this was enough to halt the process.

### The Alito Confirmation

After withdrawing Miers' nomination, President Bush nominated Samuel Alito to fill Justice O'Connor's seat. Alito was confirmed, but his confirmation process was more rancorous and his confirmation vote closer than Roberts' had been. This was

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<sup>351</sup> Greenburg, *Supreme Conflict: The inside Story of the Struggle for Control of the United States Supreme Court*.

<sup>352</sup> "New Questions from the Right on Court Pick," *New York Times*, October 6 2005. "Endorsement of Nominee Draws Committee's Interest," *New York Times*, October 9 2005.

<sup>353</sup> PBS *NewsHour*, October 19, 2005

partly because of the way the politics of the process had been laid bare in the Miers episode; the rejection of Miers before the public hearings took place made the existence of an unseen back stage hard to deny or ignore. The conservative groups who had argued that Miers was not a committed enough conservative were elated about Alito. Additionally, Alito had a more demonstrably conservative record than Roberts. He had made speeches advocating the “unitary executive theory,” which held that the President has unrestricted power when he acts as Commander in Chief, and can therefore override Congressional prohibitions on actions such as domestic spying and torture. In a 1985 job application to Reagan’s Office of Legal Counsel, Alito had written that he “very strongly” believed that the constitution “does not protect the right to an abortion,” and that he was motivated to pursue a career in the law by “deep disagreement” with the Warren Court.<sup>354</sup> Analyses conducted by the *Washington Post* and by legal scholar Cass Sunstein placed Alito to the right of the majority of Republican-appointed judges.<sup>355</sup>

Alito’s confirmation hearings were no more informative than Roberts’ were. He said his statements in the Reagan era memos were not his real views, but rather, were just his attempt to fit the administration’s mold, and he declined to provide his views on past cases or legal doctrines. Senators and commentators treated his statements that he couldn’t answer questions because of judicial ethics as more of a charade than they had Roberts’. The performative nature of the exercise had been laid

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<sup>354</sup> Greenburg, *Supreme Conflict: The inside Story of the Struggle for Control of the United States Supreme Court*. 305.

<sup>355</sup> C.R. Sunstein, "Letter from Professor Sunstein on Alito's Dissents," *New York Times*, January 10 2006. "Which Side Was He On?," *Washington Post*, January 1 2006.

bare by Miers' withdrawal without hearings. Ronald Dworkin wrote, "Alito's own argument for refusing to offer opinions about principles that might come into play in cases before the Court sounded like a parody: 'It would be wrong for me to say to anybody who might be bringing any case before my court... I'm not even going to listen to you; I've made up my mind on this issue; I'm not going to read your brief; I'm not going to listen to your argument; I'm not going to discuss the issue with my colleagues. Go away.' ... The justices now on the Court have all taken explicit positions on recurring issues; they are not telling anyone to go away."<sup>356</sup>

Some expressed frustration for another reason. Bruce Fein, a prominent conservative who had served in the Reagan Administration, published an opinion piece in the *Washington Post*, criticizing Roberts and Alito for disowning their strong conservative views in the hearings and stating that they did not have opinions on *Roe* when it was clear from their records that they did. Fein argued that this was intellectually dishonest and that conservative nominees should publicly discredit *Roe* in order to enable "a conservative legal philosophy" to "become orthodox and dominate constitutional law." This view did not give credence to the performances required of nominees: they can express agreement with *Brown* and *Griswold*, and perhaps disagreement with *Korematsu* and *Lochner*, but must say they are undecided about all other cases. The argument about the Constitution played out in the hearings cannot include certainty about the nominees' views on controversial cases.

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<sup>356</sup> Dworkin, "The Strange Case of Justice Alito."

While many Democrats believed that Alito's record warranted a filibuster, they couldn't build enough support for this action. Some thought it wasn't right to stop a nomination with a filibuster, and some were nervous about the "nuclear option," the Republican threat to eliminate the filibuster with a rule change. However, Democrats' hands were also tied by the requirement of securing public support for any decision. For a Senator to take a dramatic action such as a filibuster, it's necessary to persuade constituents that this is necessary. Without revealing testimony by a nominee – the kind that Bork had provided – this was difficult to achieve. Ronald Dworkin writes that Alito "provided no headlines that would alert Americans to the very real danger that he will join" the right-wing legal revolution.<sup>357</sup>

This was in part a problem of communication. In this situation, three elements—nominees' ability to avoid revealing their views, Senators' need to secure public support for a decision, and the difficulty of translating legal concepts into issues the general public cares about – combined to make it difficult for Democrats to act on what they could see from the nominee's record. The requirement of publicness makes action difficult in many situations, not just confirmations, but the expert nature of Supreme Court jurisprudence and the accepted lack of candidness from judicial nominees exacerbates this dynamic. However, this wasn't *entirely* a problem of communication. Even with candid, prime time testimony, this would not have been identical to the Bork nomination. President Bush's party controlled the Senate, so he

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<sup>357</sup> Ibid.

had more constitutionally provided leeway to appoint whomever he wanted to the bench than Reagan had in 1987.

### The Sotomayor confirmation

Sonia Sotomayor's confirmation hearings in July 2009 revealed as little about her views as the confirmation hearings for Roberts and Alito had about theirs. Sotomayor steadfastly refused to opine on any cases or to describe a judicial philosophy, saying her only philosophy was "fidelity to the law." The Senators talked about their favored constitutional issues but didn't seem to expect answers from her.<sup>358</sup>

Even more than with the Bush nominees, the Sotomayor hearings seemed to work as a forum for arguments about the meaning of the Constitution and of judging rather than a forum to evaluate her suitability for the Court. Republican Senators focused on speeches in which Sotomayor had grappled with the ways in which gender and ethnicity influence judging, but she answered, again and again, that a judge's background and experiences don't and shouldn't influence judging, at least not outside of the need to be aware of them in order to better avoid being influenced by them. She described judging as necessitating only the text of the constitution, statutes and precedent, and eschewed substantive conceptions of justice and acknowledgement of changing standards of constitutional interpretation. She also rejected the contention, expressed by President Obama when he nominated her, that judges should have "empathy." Sotomayor's speeches indicate that she has a more nuanced view of

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<sup>358</sup> Senate Judiciary Committee, *Nomination of Sonia Sotomayor*, July 13-16 2009.

judging, incorporating the acknowledgement that judges' decisions are based on more than just legal texts. However, her performance in the hearings supported the more traditional, formalistic understanding of judging and law.

This was in some ways a triumph for judicial conservatives, who had spent the past thirty years making the points she kept repeating. Some conservatives expressed glee that Sotomayor had described judging formalistically and had called the Constitution immutable and not living. Some liberals expressed disappointment.<sup>359</sup> One conservative blogger described Sotomayor's answers as a "major victory for conservatism."<sup>360</sup> Sotomayor's approach was understandable because this was the confirmation script that had worked in the past, and she was under more pressure than most to claim the mantle of complete objectivity because some still suspect that a woman of color is inherently emotional or biased. However, it did not help liberals who supported her towards their goal of educating the public about their understanding of the Constitution. Some Democratic Senators did use the hearings to present a contrary position, arguing that reasonable people can interpret constitutional provisions in different ways, that "judicial activism" is often in the eye of the beholder and that conservatives' preferences for "strict constructionism" and "judicial modesty" is itself value laden, or based on preferences for specific substantive outcomes.

It's possible to view liberals' dismay at Sotomayor's testimony as similar to Bruce Fein's dismay at Alito's testimony. In both instances, observers want judges to engage in the constitutional debate rather than performing (and hiding behind) the role

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<sup>359</sup> J. Toobin, "Answers to Questions," *The New Yorker*, July 27 2009.

<sup>360</sup> J. Copland, "Deconstructionism Takes a Hit," *Bench Memos*, July 15 2009.

of a judge. In both instances, the nominees stayed in character, realizing that the performance expected of them was different from the performance expected of the Senators. However, the two situations are different in that Alito declined to provide views on specific cases, while Sotomayor declined to validate an entire view of judging. It appears that the conservative, formalistic view of judging has captured the debate and is the standard for nominees' performances.<sup>361</sup>

Like other political processes today, Supreme Court confirmations are filtered through modern transparency practices. The public expects more information about nominees and must be persuaded to support them. Nominees are personally more involved in the process, and their human selves are more on display. Opening the process, particularly televising the hearings, has provided not only a way for the public to learn about the nominee, but also a way for Senators to distribute messages about the nominee and about constitutional law. This has turned the hearings into an exercise in performative democracy. Nominees perform the judicial role, explaining that judicial ethics prevent them from answering any substantive questions, a stance that combines principled and strategic motivations. Senators perform an inquiry into nominees' qualifications and judicial philosophy, presenting a scripted version of their decision-making process, which has most likely taken place behind closed doors rather than being based on information learned in the hearings. Nominees' ability to withhold their views with few repercussions and the expert, complex, often esoteric nature of

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<sup>361</sup> This pair of criticisms – of Sotomayor and of Alito – suggests, somewhat paradoxically, that the current standard for judicial performances in the hearings entails a general understanding of judging associated with conservatism alongside a denial of detailed conservative positions on cases, such as opposition to *Roe*.



constitutional law both compound the performative nature of these processes. Both of these factors make Senators' performances more important.

Many denounce confirmation hearings as useless because they produce little new information. However, the hearings do serve a democratic purpose. If Senators' decisions are to be monitored and influenced by the public, the public needs to understand their Senators' reasons. The speeches and exchanges between nominees and Senators, scripted though they maybe, present dueling visions of the constitution and of many aspects of citizens' relationship to their government and the branches' relationships to each other. At times, these exchanges are deceptive, even manipulative, but this can be said of almost all political discourse. Participants often contest each other's assertions, providing patient observers with the opportunity to gain multiple perspectives on an issue. Of course, in today's increasingly partisan and commercial media environment, only snippets are shown, but these may be better than nothing. Thus, the hearings are a charade, but they're not a sham. They're part of a process of performative democracy that, while it doesn't live up to the Habermasian vision of publicness, does perform democratic work.

## **CHAPTER FOUR: DIGNITY, FAIRNESS, AND MODERN MEDIA:**

### **THE DEBATE ABOUT CAMERAS IN COURTS**

The tension between contemporary transparency practices and judicial principles seen in the confirmation process also animates the debate about cameras in the courtroom. Today, cameras are allowed in many state courts, but in almost no federal courts. Though many refer to television when explaining the reticence towards cameras in the courtroom, the federal ban has been on the books since the 1930s, before television existed. Many of the arguments made today against televised trials have been made about still photography of trials since the 1920s and 1930s. In this chapter, I probe some of the underpinnings of these arguments.

In making rules about courtroom photography, policymakers have had to grapple with the implications of modern transparency practices for judicial administration and the rule of law. In this debate, they have often treated images, photography and television as symbolic of or responsible for the complications inherent in democratic communication and government transparency more generally. Participants in this debate often speak as though images themselves or the technology of photography were responsible for the problems they perceive. Images do have distinct communicative properties and these sometimes bring them into conflict with judicial principles. For viewers, images can create the impression of unmediated representation, and for subjects, images can create the cognizance of a mass audience

for one's physical likeness. Both of these factors, in a sense, bring the public closer, and the judiciary branch tries to stand apart from the public to perform its constitutional role. However, images don't always cause problems and they don't cause them alone. Rather, it is often the commercial and competitive newsgathering practices that cause the problems and these can be attached to many forms of media.

In Part I, I lay out the basic issues in the debate and the reasons it's significant. In Part II, I discuss the policy developments related to the question of whether to allow cameras in federal courtrooms and the arguments surrounding these policies. In Part III, I analyze the primary charges made against cameras in the courtroom and what they mean for government transparency and the judiciary. My goal here is not to argue for or against cameras in the courtroom, but rather to describe the stakes in this debate and the nexus of events and ideas that have enabled the judiciary to resist cameras.

## **Part I: Components of the debate**

### Public trials

The concerns about cameras in courts are usually concerns about reproduction and mass mediation of trials – part of the modern version of transparency – not about whether trials should be visible or accessible to citizens at all. Trials in the common law system are presumptively open to the public and this is considered integral to trial fairness.

Judith Resnik writes that the tradition of public trials predates democratic governance, beginning at least as far back as 16<sup>th</sup> century Europe, when open courts served to display rulers' power and to instruct subjects about the norms they were expected to comply with. As governments became more democratic and ideas developed about citizens' rights, the tradition of openness was transformed into an expectation that citizens should be able to watch dispute resolution to ensure that power was not being abused. In this way, open courts were transformed "from rites to rights."<sup>362</sup> Public trials still have this dual nature: they both display and check government power. Today, the right to a public trial is understood to belong to both criminal defendants and the public: it gives defendants assurance that their trial will be fair, and it gives the public assurance that their legal system is fair.<sup>363</sup>

Journalists' organizations and some lawyers and politicians argue that allowing cameras into courtrooms enhances these benefits. However, many judicial policymakers doubt that cameras provide the informational benefits that text provides and worry about the additional dimensions cameras introduce. The modern version of publicness is more complicated than physical access. In deciding whether cameras should be allowed in courtrooms, policymakers have had to grapple with how to assess these complications.

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<sup>362</sup> J. Resnik, "Uncovering, Disclosing and Discovering How the Public Dimensions of Court-Based Processes Are at Risk," *Chicago-Kent Law Review* 81, no. 521 (2006); J. Resnik and D.E. Curtis, "From 'Rites' to 'Rights' of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes," in *Representation of Justice*, ed. A. Masson and K. O'Connor (Brussels: P.I.E. - Peter Lang, 2007).

<sup>363</sup> H. L. Cross, *The People's Right to Know: Legal Access to Public Record and Proceedings* (New York: Columbia University Press, 1953). Pp. 155-164. *Richmond Newspapers, Inc., Et Al. v. Virginia Et Al*, 448 U.S. 555 (1980).

### Levels of meaning created by trials

The debate about cameras in the courtrooms in the United States is usually described as a conflict between free press and fair trial. Many books on the subject use this exact phrasing in their titles.<sup>364</sup> This formulation implies that the sole problem with televising trials is that what goes on inside the courtroom – the fairness of the trial – will be affected by photography. Trial fairness is an important consideration, but it's not the only thing at stake. An examination of this debate from the 1920s to the present suggests that the ban stems not just from concerns about photography's impact *inside* the courtroom, but also from concerns about photography's impact *outside* the courtroom – in the information the public receives about specific trials and the judiciary in general.

The policy debate suggests that trials create meaning on at least three levels and all three are implicated in the questions of whether to allow cameras. In other words, the three levels of meaning created by trials correspond to the three categories of rationales offered for the ban. Each level provides a different answer to the question: What's wrong with cameras in courts? The different types of argument are often intertwined, but each raises its own issues. They are:

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<sup>364</sup> S. Barber, *News Cameras in the Courtroom: A Free Press – Fair Trial Debate* (Boston: Emerson College, 1987); J. Bruschke and W. E. Loges, *Free Press v. Fair Trials: Examining Publicity's Role in Trial Outcomes* (Mahwah, NJ: Lawrence Erlbaum Associates, 2004); C.R. Bush, ed. *Free Press and Fair Trial: Some Dimensions of the Problem* (Athens: University of Georgia Press, 1970); R. Giles and R.W. Synder, eds. *Covering the Courts: Free Press, Fair Trials and Journalistic Practice* (New Brunswick: Transaction Publishers, 1999); P.E. Kane, *Murder, Courts and the Press: Issues in Free Press / Fair Trial* (Carbondale, IL: Southern Illinois Press, 1992); P. C. Reardon and C. Daniel, *Fair Trial and Free Press, Rational Debate Series* (Washington: American Enterprise Institute for Public Policy Research, 1968).

1- What happens inside the courtroom, and whether it influences the trial result:

This refers to the meanings produced for the trial participants themselves. Are clicking cameras distracting the jurors? Is being photographed making witnesses nervous? Will the prospect of being photographed cause witnesses to refuse to show up, or help pressure defendants to accept a settlement or plea bargain? Will the cognizance of mass viewership make the judge or jury more affected by public opinion, or will it make attorneys, judges or witnesses act more flamboyantly? This is mostly about events inside the courtroom, but also includes outside events if they influence the trial result. For example, will the “climate in the community” influence the jurors’ thinking?

2- How the trial is presented to and understood by the public outside the

courtroom: Here, “the public” is the mass media audience. This is about what the audience outside the courtroom sees, reads, or hears about the trial. How is it narrated, edited, contextualized? Will the audience be misled? What is emphasized? This includes assessments of the differences between images, audio and text. Sometimes information transmitted outside the courtroom is described as significant because of its possible influence on the jury, but often, concerns about how the media audience understands the trial are described as significant in their own right and aren’t relevant to trial fairness.

- 3- How the trial contributes to the meaning of the judiciary in society: This is the perception created of courts, judges, and legal system. It's shaped by both events inside the courtroom and their representation outside. Is the law portrayed as fair, universal, neutral, in other words, not politics? Are judges portrayed as impartial and independent? This level is about maintaining judicial legitimacy and includes questions about whether cameras cast the judiciary in a bad light.

#### Images and modern transparency practices

Making decisions about cameras in the courtroom entails assessing the difference between text-based and image-based transparency. This debate illustrates the assumptions people make about how photography and television function in democratic discourse. Some of the assumptions make sense, but many are rooted in folk theories about media effects and blame specific technologies for problems they did not cause alone. People speak of a medium as a technology when they are really speaking of a set of practices that embed the technology. The tabloidization that judicial policymakers bemoan is linked to the commercial media structure, not particular technologies. Images can be incorporated into different formats. Judicial policymakers should be wary of cameras, particularly television cameras, but there is a need for clarification and rethinking of the reasons to be wary. Fears of the loss of judicial legitimacy and trial fairness are not idle, but these concerns are often linked to assumptions about the strong effects of images that don't always withstand scrutiny.

There are some instances when the fact of photographic representation creates a discrete problem, such as when a witness in a trial fears retribution for testifying. Furthermore, specific technologies do have particular communicative attributes: photographic images, particularly moving images, are often perceived as reality and are thus more believable than text and often create visceral reactions. However, in this debate, images are often treated as representative of, or as the cause of, modern transparency practices that have broader and more multifaceted causes. People sometimes treat images as though without them, modern transparency practices -- such as aggressive, partisan or sensational journalism -- would go away. These practices are born of much broader economic, political and cultural forces.

The concerns about cameras in the courtroom in some ways stand in for more general concerns about government transparency through mass media in a mass democracy. Television and photographs permit more people -- including those with presumed less education, social status and money -- to experience a trial. These concerns echo the criticism of the public nature of media-saturated confirmations. They also recall Walter Lippmann's emphasis on the need to put expertise ahead of participation in a democracy, and his criticism of the concept of the omnicompetent citizen.

#### Why does all of this matter more in the judiciary?

These questions about image-based communication are especially potent when the subject to be represented is the judiciary, which is characterized by a certain level



of insulation from the public. In other government forums such as Congressional debate, images are often denigrated but are ultimately allowed. In the case of the judiciary these concerns are given teeth in the form of a ban. The assumptions made about images clash with expectations about courts and judicial legitimacy.

Furthermore, judges don't have the same incentives Congress has to allow cameras because they're not elected and don't have to build popular support for their decisions in the same way. The personalization of politics, closely linked to television (but not entirely caused by it), does not fit well with courts. Because courts maintain their legitimacy in a different way than other institutions, the relationship between courts and image-based transparency practices is particularly fraught.

Another way to view the tension between courts and images is to consider that, in other areas of government, official proceedings can serve as performances and the real work can be pushed into the background, while that is not true for courts, at least not trial courts. Congressional hearings can be staged for show, and the real decision-making can take place behind the scenes. While what happens in a courtroom is relevant to the public, it matters for more than public show. The substance of the proceedings matters profoundly to the task at hand. Although jurors deliberate in secret, the information they receive comes only from the trial. There is no back stage conversation between jurors, witnesses and attorneys, and jurors are forbidden from consulting outside sources. What matters is what happens in the trial itself. This means the stakes of changing the dynamics of a jury trial are particularly high. This point, however, is less applicable to appellate courts. In appellate courts, the real work of

collecting information and decision-making can be pushed into the back stage, and may often be.

## **Part II: Policy changes and rationales**

All three types of rationales for banning cameras in the courtroom -- the meaning of the trial for those inside the courtroom, the meaning of the trial for those outside the courtroom, and the meaning of the judiciary in society -- have been discussed since the beginning of the policy debate in the 1930s. Many specific arguments advanced today about television were raised in the 1930s about still photography. And while television is the main concern expressed today, still cameras continue to be prohibited in most federal courts. The persistence of the three categories of rationales shows that trial fairness is not the only thing at stake. The public's understanding of trials and the judiciary's image in society are also important. This is a debate about balancing civil liberties and defining due process of law, but it's also a debate about how to assess modern transparency practices and how the judiciary should strive to maintain legitimacy.

### Before Canon 35

Photographs have been taken in trials in the United States since at least the first decade of the 20<sup>th</sup> century. Until the mid-1930s, the rules governing cameras in courts

were a patchwork, with different judges issuing different orders.<sup>365</sup> In *People v. Munday* in 1917, the Illinois Supreme Court advised state courts not to permit still or motion cameras but declined to lay down a rule of law. The plaintiff claimed his case had been prejudiced by the fact that photographs were taken of him and of the jury, and that photographers had disrupted the court proceedings. The Court partially dismissed these claims by pointing out that the defendant had consented to this photography. However, the court continued,

Whether or not the parties consented to the taking of the photographs, and without regard to whether such acts were prejudicial, the court should not have permitted it. It is not in keeping with the dignity a court should maintain, or with the proper and orderly conduct of its business, to permit its sessions to be interrupted and suspended for such a purpose.<sup>366</sup>

This passage indicates that although fairness to the defendant was an important concern, the dignity accorded to the court was also viewed as important, and photography was viewed as undignified.

After World War I, news photography became more common, spurred by the growth of tabloid newspapers.<sup>367</sup> In 1925, the Chicago Bar Association proposed a rule banning cameras from courtrooms. The *Chicago Evening American* editorialized against it, arguing that journalists, not courts, should determine what was printed. The American Judicature Society disagreed with this argument and released a statement explaining why: “We submit that such pictures are no part of genuine judicial

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<sup>365</sup> S. Barber, *News Cameras in the Courtroom: A Free Press - Fair Trial Debate* (Boston: Emerson College, 1987).

<sup>366</sup> *People v. Munday*, 280 Illinois 32 (1917).

<sup>367</sup> R. B. Kielbowicz, "The Story Behind the Adoption of the Ban on Courtroom Cameras," *Judicature* 63, no. 1 (1979).

publicity. They tell nothing of the trial whatsoever. They merely flatter certain officials or cater to a morbid and moron [sic] interest in sensational crime.”<sup>368</sup> This statement exemplifies the argument that photographs are not truly informative, and thus cannot serve the ideal of government transparency, and that they cater to peoples’ irrational tendencies. The problem is not just with the conduct of the trial but also with its representation.

The first court ruling against cameras came in 1927, in *Ex parte Strum*. William Strum, a *Baltimore News* photographer, was charged with contempt of court for surreptitiously taking photographs of a murder trial after the judge had expressly prohibited it. The Court of Appeals stated that the judge could prohibit photography to protect the defendant’s rights and to preserve decorum and the dignity of the trial. It’s significant that this case involved a photographer disobeying a judge, because this theme runs through the history of this issue. Photography is associated with aggressive, unethical journalistic practices.<sup>369</sup>

In 1937, the American Bar Association adopted Canon 35, titled “Improper Publicizing of Court Proceedings,” as part of its Code of Judicial Ethics. Canon 35 stated:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room ... and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create

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<sup>368</sup> Ibid. "Chicago Judges Adopt Rule Barring Cameras from Courtroom," *Journal of the American Judicature Society* 9, no. 18 (1925).

<sup>369</sup> Kielbowicz, "The Story Behind the Adoption of the Ban on Courtroom Cameras."

misconceptions with respect thereto in the mind of the public and should not be permitted.<sup>370</sup>

The wording of the Canon indicates that both the conduct of the trial and the public's perception of it were concerns, and photography and broadcasting were viewed as dangerous to both. After the ABA adopted Canon 35, many judges stopped allowing cameras in their courtrooms. Canon 35 was the product of a year long process during which an ABA commission was convened to discuss press coverage of trials. This was motivated in part by the trial for the kidnapping of Charles Lindbergh's infant son. This trial, which sent Bruno Hauptmann to his death, was notoriously raucous and riddled with improprieties, and these problems were attributed to press coverage.

#### The trial of Bruno Hauptmann

In 1929, Charles Lindbergh became the first pilot to fly from Paris to New York, making him a national hero. His wife, Anne Morrow Lindbergh, was the daughter of a Senator and a celebrity in her own right. On the night of March 1, 1932, the couple's 20-month-old son disappeared from his crib in their New Jersey home, and kidnapping was suspected. The investigation, filled with chaos and ineptitude, dragged on for several years. The public was fascinated by the crime, and newspapers frequently ran front-page stories about the search for the kidnapers and the latest clues. Two months after the kidnapping, the Lindberghs received a ransom note and delivered the requested money. In exchange, they received a note describing where the

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<sup>370</sup> R. T. McCracken, "Supplementary Report of the Standing Committee on Professional Ethics and Grievances," (American Bar Association, 1937).

baby was, but it was a trick: they didn't find the baby. Soon afterwards, a truck driver discovered the baby in a shallow grave on the Lindbergh's property. The baby had apparently been dead since the night of the kidnapping. Some of the marked ransom bills were traced to Bruno Hauptmann, a German carpenter living in the Bronx, and on September 18, 1934, he was arrested and charged with kidnapping and murder.<sup>371</sup>

The public was captivated by the trial because of the Lindbergh's celebrity, the anti-German sentiment in the country, and the strangeness of the crime. People from all over the country traveled to Flemington, New Jersey, where the trial was held, to watch the proceedings or to wait outside with the crowds, hoping for a glimpse of the trial's famous participants. Spectators packed the courtroom, filling the aisles, standing on tables and occasionally laughing and applauding. Each night, policemen had to clear a space in the throng outside so the jurors could get from the courthouse to their hotel across the street. People in the crowd yelled advice to the jurors as they passed, often to the effect that Hauptmann should burn.<sup>372</sup>

The media covered the trial intensively. Telegraph and telephone lines were run up the side of the courthouse and a special gallery was set up overlooking the courtroom from which the wire services could send out news. Print reporters sent messengers scurrying out with fresh copy throughout the trial. Photographers, newsreel cameramen and radio broadcasters disobeyed the judge's orders regarding when they could take photographs and record, occasionally doing so surreptitiously.

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<sup>371</sup> G. Waller, *Kidnap: The Story of the Lindbergh Case* (New York: The Dial Press, 1961). A. K. Dutch, *Hysteria: Lindbergh Kidnap Case* (Philadelphia: Dorrance & Company, 1975).

<sup>372</sup> O. Hallam, "Some Object Lessons on Publicity in Criminal Trials," *Minnesota Law Review* 24, no. 4 (1940). Waller, *Kidnap: The Story of the Lindbergh Case*. Dutch, *Hysteria: Lindbergh Kidnap Case*.

Many newspaper pieces floated outrageous rumors and shriekingly advocated the death penalty. Attorneys on both sides gave statements to the press, sometimes forecasting evidence.<sup>373</sup>

Bruno Hauptmann was found guilty, lost his appeal and was executed. The trial was widely criticized for its “improper publicity and professional misconduct.”<sup>374</sup> In the years since, books and documentaries have analyzed the trial, pointing out flaws in the prosecution’s case and in the conduct of the proceedings. Although photographers were no more unruly or disruptive than the rest of the press and the public, a mythology has grown up around the problems caused by cameras in this trial.<sup>375</sup> The objections to the Hauptmann trial were much broader than opposition to cameras, but cameras have since been treated as representing these broader concerns.

### The ABA’s Canon 35: Debate and Adoption

At its 1935 convention soon after the Hauptmann trial, the ABA created a committee to study the issue of “trial publicity” – media coverage of trials -- and draw up rules. The committee was headed by Oscar Hallam, a former Minnesota Supreme Court Justice. The Hallam Committee, as it was known, wrote a report recommending

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<sup>373</sup> "Bar to Boston," *Time Magazine*, September 7 1936. Hallam, "Some Object Lessons on Publicity in Criminal Trials"; Waller, *Kidnap: The Story of the Lindbergh Case*. T. Mauro, "The Supreme Court and the Cult of Secrecy," in *A Year in the Life of the Supreme Court*, ed. R. Smolla (Raleigh, NC: Duke University Press, 1995); J. Schuetz, *Communicating the Law: Lessons from Landmark Legal Cases* (Long Grove, Illinois: Waveland Press, Inc., 2007).

<sup>374</sup> Hallam, "Some Object Lessons on Publicity in Criminal Trials"; Waller, *Kidnap: The Story of the Lindbergh Case*."

<sup>375</sup> For example in Congressional testimony in 2000, Judge Edward Becker argued that cases like the Hauptmann trial (along with O.J. Simpson’s trial and others) show how dangerous cameras can be.

16 rules for regulating attorneys' behavior, trial procedures, and the activities of the press.

The Hallam report described in detail the problems caused by high public and media interest in the Hauptmann trial. The report conceded that a public trial is necessary to avoid "Star Chamber practices" but said that the Hauptmann trial had gone further than this. "The presence of a crowd of people impelled by morbid curiosity is not the publicity which the ends of justice require." The Hallam report also criticized "theatrical devices" used in newspaper stories and headlines expressing strong ideas about guilt or innocence. The report condemned the practice of "arguing the case out of court," pointing out that English courts prohibit the publication of any "argumentative comment" during a trial. The report recounted the fact that photographers took pictures when they were not supposed to, adding, "Our own opinion is that a courtroom is not a proper place for clicking cameras or photography at any time and that such practices should be strictly forbidden." Ironically, the implication that photography is disruptive because of the clicking is contradicted by the complaint that photographs were taken surreptitiously. The committee's 16 recommendations included bans on still and motion photography and sound recording in trials. The report ended by recommending that the ABA work in cooperation with journalists to come up with regulations.<sup>376</sup>

In January 1936, the American Bar Association appointed a new committee composed of representatives from the ABA, the American Newspaper Publishers

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<sup>376</sup> O. Hallam, "Hallam Report (Unpublished)," (1936). Hallam, "Some Object Lessons on Publicity in Criminal Trials."



Association, and the American Newspaper Editors Association, and known as the Baker Committee, after its Chairman, Newton Baker. This joint press/bar committee was tasked with reaching agreement on standards that both media and attorneys should follow in trials. The report outlining this committee's discussions ultimately proposes 7 rules for ABA to adopt.<sup>377</sup> However, before these suggestions, and taking up twice as much space, is a discussion of problems in the legal and journalistic worlds. This background discussion sheds light on the concerns that shaped attitudes towards cameras in courtrooms and formed the context for the ban.

The legal system, the report says, has become:

inextricably entangled in politics, and the tradition of a learned, dispassionate, and detached judiciary often fails badly when judges are chosen by popular election, and judicial tenure, as well as legitimate aspirations for judicial advancement depend not upon capacity or character, but rather upon subservience to popular opinion which, in the nature of the case, can have no knowledge of the demands of judicial office but in fact responds to adroitness in the arts of political appeal.  
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This indicates a concern that the judiciary is losing its independent, apolitical character. The concern about judicial elections applies only to state courts, because federal judges are all appointed, but today many people nevertheless express the concern that federal judges will play to the public if cameras are allowed. The report continues,

To this we must add a frank recognition of the change which has come about in the legal profession itself. The historical position of the law, as one of the three learned professions, has been changed by the

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<sup>377</sup> "Report of the Special Committee on Cooperation between Press, Radio and Bar as to Publicity Interfering with Fair Trial of Judicial or Quasi-Judicial Proceedings," (New York: American Bar Association, 1937).

<sup>378</sup> Ibid.

multiplication of professions and the wide dissemination of education on relatively high academic levels. The Bar is no longer a caste governed by an internal discipline applying traditional rules of behavior and requiring character and education qualifications which set it apart. The multiplication of day and night schools has opened up opportunity for entrance into the profession which did not exist when young lawyers were trained in old lawyers' offices...<sup>379</sup>

As a consequence, the report states, many cities are full of young, inexperienced lawyers, "who are unfamiliar with the traditions which used to restrain the members of the profession." The report states that some lawyers seek publicity for their cases in order to build their careers. Meanwhile, advertising has increased in volume, and makes "spectacular and clamorous appeals." While bar tradition prevents direct advertising, many lawyers advertise indirectly by seeking publicity for their cases. Much publicity for sensational cases, the report states, is caused by attorneys vying for the spotlight.<sup>380</sup>

These complaints describe a concern that neutrality, expertise, and professionalism are losing out to crass commercialism. The perceived decline is described as linked to the democratization of the profession and the platform provided by mass media's wide dissemination of information. These concerns echo those that inspired the establishment of many of the ABA's canons at the turn of the 20<sup>th</sup> century, an enterprise often infused with class, ethnic and religious prejudices. In the early 20<sup>th</sup> century, the ABA was closely aligned with Wall Street law firms and the corporations they served, and made up entirely of white Protestant men. New working class immigrants, usually either Catholic or Jewish, pursued law degrees in night schools

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<sup>379</sup> Ibid.

<sup>380</sup> Ibid.

and, since law firms wouldn't hire them, worked as solo practitioners. Many practiced negligence law, representing workers injured on the job against employers. As their working class clients could not afford up front fees, they worked on a contingency basis. Their survival depended on constantly drumming up new business. The charges of commercialism and unprofessional or unethical behavior leveled at these new attorneys by members of the corporate bar were often expressions of uneasiness with the democratization of the profession.<sup>381</sup> In the 1930s, more professional opportunities opened up for non-WASP lawyers, particularly in the Roosevelt Administration, but some older ideas about commercialism remained.

Class prejudices and legal ethics are not coterminous, but they sometimes overlap. The mass media drew out these prejudices because they made the legal system more accessible to the wider public and to commercial motives. There are good reasons to insulate trials from public opinion and to regulate contingency fees and advertising by lawyers, but these reasons became entangled with class-tinged fears.

The Baker report goes on to describe the state of the news media, which consisted primarily of newspapers and radio. The goal of conducting a business, the report states, sometimes causes newspapers to try to make subjects exciting "beyond their intrinsic import" and to disregard the "highest ethics of the news profession."<sup>382</sup>

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<sup>381</sup> J. Auerbach, *Unequal Justice: Lawyers and Social Change in America* (London: Oxford University Press, 1976).

<sup>382</sup> "Report of the Special Committee on Cooperation between Press, Radio and Bar as to Publicity Interfering with Fair Trial of Judicial or Quasi-Judicial Proceedings."

This is an argument against sensational coverage, indicating that not all information “prevents star chamber proceedings” or leads to rational thought.

The report goes on to explain the harms media coverage can create. It can threaten the presumption of innocence by influencing the jury’s thinking. Although members of the jury are not supposed to see or hear news during the trial, they’ll be surrounded by “an audience that has made up its mind and whose attitude . . . creates an atmosphere of which even a blind jury could not remain unconscious.”<sup>383</sup> The concern with prejudicing the jury illuminates the fact that transparency must be structured in a particular way in a trial. Many arguments for government transparency assume that more information means a greater chance of reaching the truth, but in trials reaching the truth is also understood to depend on limiting information. Trials involve judicial decisions about admissible arguments, evidence and testimony. Unlimited information is understood to thwart truth and fairness.

The committee criticizes lawyers who give interviews, forecast evidence, or comment on previously introduced evidence, and states that these practices are particularly dangerous over the radio. An “on air trial” has no safeguards—no cross examination, no rules of evidence, no rules to ensure full presentation of both sides. Furthermore, the report says, the on air audience will reach a conclusion, and if the

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<sup>383</sup> This report implies that news coverage can prejudice a jury mainly by prejudicing the trial’s live audience, whose attitude the jury might pick up during the trial. Subsequent critics have pointed to other ways news coverage can affect juries: if not sequestered, jurors may see or hear news coverage at home and may be affected by talking to friends and family. Pre-trial coverage can make it difficult to empanel an impartial jury, and coverage of the trial can make it difficult to empanel a second jury if there is a retrial. Newspapers can be just as dangerous as television in this regard, but television is understood to present higher risk. P.E. Kane, *Murder, Courts and the Press: Issues in Free Press / Fair Trial* (Carbondale, IL: Southern Illinois Press, 1992).

jury reaches a different conclusion, the audience may come to distrust the legal system: “The evil here referred to, of course, is the larger evil of a breakdown in public confidence in judicial processes.” The possibility that the audience will grow cynical about the legal system if they disagree with the verdict is still cited today as a potential problem with televised trials.<sup>384</sup>

The report also expresses concern about media’s effect on judges, stating “the position of the judge in a criminal trial entitles him to a very high degree of consideration during the progress of the trial.” Judges, like any public officials, can be criticized, but during the trial the judge should not make defensive replies to criticisms, because this can diminish their detachment. The report implies that media coverage and criticism will tempt judges to step out of their proper role and demeanor.

This discussion forms the backdrop for the ban and suggests that these are the concerns that made it seem necessary. After laying out these concerns, the report presents seven recommendations. The third states,

(3) That no use of cameras or photographic appliances be permitted in the courtroom, either during the session of the court or otherwise. That no sound registering devices for publicity use be permitted to operate in the courtroom at any time. That the surreptitious procurement of pictures or sound records be considered contempt of court and be punished as such.<sup>385</sup>

The report notes that bar and press representatives disagree about the precise contours of this recommendation. Despite its wording, both groups believe cameras

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<sup>384</sup> Judge Nancy Gertner made this point in her testimony before the Senate Judiciary Committee on September 6, 2000. Subcommittee on Administrative Oversight and the Courts - Committee on the Judiciary, *Allowing Cameras and Electronic Media in the Courtroom*, 106th Congress, Second Session, September 6, 2000.

<sup>385</sup> "Report of the Special Committee on Cooperation between Press, Radio and Bar as to Publicity Interfering with Fair Trial of Judicial or Quasi-Judicial Proceedings."

should be allowed under some circumstances. The lawyers believe cameras should be allowed with the consent of the trial judge and both parties, and the journalists believe cameras should be allowed with just the consent of the trial judge. This division of opinion continues today. Transparency advocates argue today that the consent of the judge should be enough and that requiring consent of the parties ensures cameras will never be allowed. An Arkansas defense attorney suggested this could be the case, saying in an email that in his state, the consent of both parties is necessary, and he always objects.<sup>386</sup> The National Association of Criminal Defense Lawyers' (NACDL) argues today that in trial courts, the consent of both the judge and the parties should be necessary.<sup>387</sup> Representatives of the NACDL argue that judges won't know the background of cases well enough to determine if cameras will intimidate witnesses.<sup>388</sup> Three state judges in New Mexico, where only the consent of the judge is necessary, said in interviews that they almost never said no to cameras.<sup>389</sup> The current law governing federal courts in the United States is stricter than either suggestion: cameras are banned and consent makes no difference.

The lawyers, the Baker report explains, argue that taking pictures of the accused and of witnesses poses an unnecessary hardship. The accused has the

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<sup>386</sup> Personal correspondence with the author, October 9, 2007.

<sup>387</sup> Senate Judiciary Committee, *Cameras in the Courtroom*, November 9 2005. Phone interview with NACDL President Barbara Bergman, March 22, 2007.

<sup>388</sup> Ibid. Phone interview with NACDL Legislative Affairs Director Kyle O'Dowd, April 2, 2007. Mr. O'Dowd argues that if cameras are allowed at the discretion of the judge but not the parties, this becomes a source of litigation. Each side must make arguments and may appeal, and this is a misuse of time and resources. Furthermore, if parties have to make their case to the judge about why cameras should not be allowed, they may be forced to disclose facts they don't want to disclose and would not otherwise have to.

<sup>389</sup> Phone interviews on March 29, 2007 and March 30, 2007. One judge explained that the parties' arguments about cameras will be based on strategic considerations – trying to win – and thus the judge is in the best position to make a fair decision.

presumption of innocence and thus has the right not to be photographed. For women and children, photography will heighten the humiliation of being associated with a criminal trial, and will invite gossip about their appearance. Photography is associated here with guilt, humiliation, and gossip; it signifies unserious, undignified communication. Though photography does capture appearance, this is hardly confined to photography; a print journalist can create prejudice towards defendants and describe witnesses' appearance in a gossipy manner. The journalists, the report states, argue that the public has the right to as much information as possible, and that pictures are just as informative as words. These arguments describe two understandings of transparency – one that views information as inevitably helpful, and another that views information, particularly images, as depriving its subject of dignity and as conducive to irrationality.

The concerns laid out in the Baker report and forming the backdrop for the cameras ban indicate that while trial fairness was an important issue, it was not the only issue. Also important were professional standards, the stature of judges, the orderliness of the trial, and the dignity of the participants. Members of the Baker committee viewed photography as threatening to these principles.

The Baker committee delivered the report to the ABA's House of Delegates at its 1937 meeting with an appended a letter stating that the committee had not been able to agree on the issue of photography and suggesting that the House of Delegates vote on other recommendations and let the committee continue to discuss the cameras issue to try to resolve the differences. The House of Delegates accepted this

recommendation on the day it was made.<sup>390</sup> However, three days later, the House of Delegates ratified without discussion a flat prohibition on cameras in the courtroom submitted by the Committee on Professional Ethics and Grievances, and this became Canon 35. The Ethics Committee's language was harsher than the language considered by the Baker committee. It said that taking photographs in court is "calculated to detract from the essential dignity of the proceedings, degrade the court and create misperceptions with respect thereto in the mind of the public."<sup>391</sup>

The press representatives felt badly snubbed by this action; one stated that he felt like he had been "kicked in the groin."<sup>392</sup> The absolute ban soured the relationship between the press and bar that had been carefully cultivated in the Baker Committee. After the passage of Canon 35, all the states except Colorado and Texas adopted the ban.<sup>393</sup> The Baker committee continued to meet under a new chairman, but their main goal had been preempted by the passage of Canon 35. The committee was disbanded in 1941.<sup>394</sup>

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<sup>390</sup> "House of Delegates Proceedings," (American Bar Association, 1937).

<sup>391</sup> "Supplemental Report of the Standing Committee on Professional Ethics and Grievances," (American Bar Association, 1937).

<sup>392</sup> Hallam, "Some Object Lessons on Publicity in Criminal Trials."

<sup>393</sup> Barber, *News Cameras in the Courtroom: A Free Press - Fair Trial Debate*.

<sup>394</sup> M. Lane, "Report of the Special Committee on Cooperation between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings," (American Bar Association, 1938). "ABA Assembly Proceedings - Fourth Session - Thursday Afternoon," (American Bar Association, 1938)., G. Patterson, "Report of the Special Committee on Cooperation between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings," (American Bar Association, 1939).



Federal judicial rules: The prohibition gains the force of law

A decade after the ABA's adoption of Canon 35, the first ban on cameras in federal courtrooms with force of law was introduced, as part of the Federal Rules of Criminal Procedure drawn up by a rulemaking committee of the Judicial Conference of the United States. Congress established the Judicial Conference in 1922 to function as the main policymaking body for the administration of U.S. courts. This body is made up of judges from all over the country.<sup>395</sup> In 1940, Congress authorized the Supreme Court, with the assistance of the Judicial Conference, to suggest rules that should guide the operation of the federal courts. Congress subsequently tasked the Judicial Conference with conducting a continuous study of the rules and recommending amendments.<sup>396</sup>

The Judicial Conference developed a set of committees and procedures to guide the creation of judicial rules. Five advisory committees, dealing respectively with criminal procedure, civil procedures, appellate procedure, bankruptcy, and evidence, meet twice each year to discuss suggestions for rule amendments, and submit suggestions to the Standing Committee, which must approve them.<sup>397</sup> To ensure that rules are considered carefully and publicly, the rulemaking process is composed of seven stages: initial consideration of a suggestion by an advisory

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<sup>395</sup> Today it is comprised of the Chief Judge of every judicial circuit, the Chief Judge of the Court of International Trade, and a district judge from each regional circuit, with the Chief Justice of the United States serving as the presiding officer. "Conference Membership," <[http://www.uscourts.gov/judconf\\_membership.htm](http://www.uscourts.gov/judconf_membership.htm)>.

<sup>396</sup> The Rules Enabling Act replaced the original statute in 1988. "Federal Rules of Criminal Procedure - Historical Note," (2006), *Rules Enabling Act*, (December 1, 1988). "Federal Rulemaking." "Foreword to the Federal Rules of Criminal Procedure," (2006).

<sup>397</sup> These committees are composed of federal judges, lawyers, law professors, state Chief Justices, and Department of Justice representatives. "Federal Rulemaking."

committee, publication of the proposed change and a period of public comment, reconsideration in light of comments and possible alterations, approval by the Standing Committee, approval by the entire Judicial Conference, approval by the Supreme Court, and approval by Congress.<sup>398</sup>

The first set of Federal Rules of Criminal Procedure was ratified by Congress in 1944 and put into practice in 1946.<sup>399</sup> This original set included one entitled “Regulation of Conduct in the Courtroom,” which read: “The taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings shall not be permitted by the court.”<sup>400</sup> This rule, known today as Rule 53, gave the force of law to the ABA’s Canon 35. In 1972, the Judicial Conference adopted a revised version, which prohibited broadcasting, televising, recording and photographing in courtrooms, and applied to both civil and criminal proceedings.<sup>401</sup> This prohibition, which still exists, only applies in federal courts.

### The ABA continues to discuss Canon 35

The ABA continued to study the issue of cameras in the courtroom during the 1950s and 1960s. In 1952, Canon 35 was expanded to include television.<sup>402</sup> In 1954, the ABA realized that media organizations were trying to change Canon 35 at the local

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<sup>398</sup> Ibid.

<sup>399</sup> "Federal Rules of Criminal Procedure -- Historical Note."

<sup>400</sup> This rule was originally Rule 56, but since 1963 it has been Rule 53. Advisory Committee on Criminal Rules, "Final Report," (1943).

<sup>401</sup> In 1990, the policy on cameras in the courtroom was taken out of the Code of Conduct for United States Judges and moved into the Guide to Judiciary Policies and Procedures (Volume I, Chapter 3, part E), where it is located today.

<sup>402</sup> H. S. Drinker, "Report of the Standing Committee on Professional Ethics and Grievances," (American Bar Association, 1952), "Proceedings of the House of Delegates - Annual Meeting," (American Bar Association, 1952).

level by persuading individual state judges that it violated freedom of the press. They created yet another joint committee to try to reach an agreement with journalists, but these deliberations, like the earlier ones, ended in a stalemate.<sup>403</sup> The committee's 1958 report concludes, "No solution of the problem is possible except as a result of an extended scientific investigation by an independent, impartial and respected agency."<sup>404</sup> This suggestion indicates a hope that more information would lead to an agreement, a hope that has animated many studies of cameras in the courtroom. However, more information does not necessarily lead to agreement. People disagree over how to interpret results, and some concerns such as loss of dignity and public confidence are not easily measurable.

The ABA also changed the wording of Canon 35 in the 1950s. The restatement included references to the need to maintain "a manner conducive to undisturbed deliberation, indicative of [the court's] importance to the people and the litigants" and "an atmosphere that bespeaks the responsibilities of those who are charged with the administration of justice." It stated that photography and broadcasting introduce factors that "have a detrimental psychological effect on the participants and divert them from the proper objectives of the trial."<sup>405</sup> This wasn't a substantive change. The main difference was the additional details describing the optimal trial atmosphere.

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<sup>403</sup> W. M. Bastian, "Report of the Special Bar-Media Conference Committee on Fair Trial-Free Press," (American Bar Association, 1958).

<sup>404</sup> Ibid.

<sup>405</sup> "Proceedings of the House of Delegates - Midyear Meeting," (American Bar Association, 1958).

At their 1958 meeting, the ABA appointed a new committee to conduct research for several years.<sup>406</sup> This committee solicited the opinions of media representatives and bar associations. They held hearings in 1962, during which they heard testimony from law school deans, judges, public officials, journalists, and lawyers.

During the 1962 hearings, many journalists and some judges and public officials testified against the ban. Journalists called it “arbitrary,” “biased,” and “stigmatizing,” and said it “prohibits us from pursuing our calling in the public interest.” The President of the Radio Television News Directors’ Association (RTNDA), Richard E. Cheverton, argued that the print press makes people just as nervous, and that cameras and microphones create more accuracy.<sup>407</sup> Several bar presidents and judges from Texas and Colorado, the two states that had never accepted the ban, described their experiences with televised trials and the regulations they used to prevent disruptions, and advocated relaxing Canon 35.

FCC Chairman Newton Minow testified in favor of lifting or modifying the ban. As a lawyer, he said, he would not support anything that would harm trial fairness or the dignity of courts, but he said the profession must accept new technological developments. “Radio and television are today basic parts of the press of this country, performing a public service in a responsible manner.” He argued that Canon 35 is based on unsupported assumptions and unfair characterizations of the press; they do not degrade or decrease dignity. He pointed out that FCC hearings had been covered

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<sup>406</sup> "Report of the Board of Governors on Judicial Canon 35," (American Bar Association, 1958).

<sup>407</sup> J. H. Yauch, "Report of the Special Committee on Proposed Revision of Judicial Canon 35," (American Bar Association, 1962).

by the electronic media and had not been impaired, and that there were benefits to having an eyewitness account.

Several judges testified that allowing televising at the discretion of the trial judge would subject judges to pressure from media organizations. They pointed out that state judges are often elected and need media support, so they would not want to anger journalists by denying them access. Erwin Griswold, the Dean of Harvard Law School, said, “Insofar as a decision against broadcasting and televising is unpopular in certain quarters, the brunt of the decision should be taken by the profession as a whole, and should not be shifted to individual judges. If no judge can allow broadcasting, then no judge can be criticized ... when there is no broadcasting from his court.” These points underscore the difference between judges’ and other officials’ relationships with the media. Many politicians enact transparency measures to please the press, but judges’ decisions regarding the conduct of trials shouldn’t be influenced in this way.

Many lawyers and judges mentioned trial fairness, pointing out that the right to a “public trial” belongs to the defendant, not the public. Judge Henry Stevens stated, “Courts are open to insure fairness,” not for “education and entertainment.” Many pointed out that witnesses would be reluctant to testify or would be nervous and that this would affect the trial result.

Some participants said that photography and television would turn trials into entertainment. P.H. Carey, an Oklahoma attorney, stated,

The courtrooms are for the administration of justice and not for the entertainment of the public. The intrusion of television cameras during

the actual trial is bound to adversely affect the administration of justice in many respects. Not only would it interfere with the orderly trial of cases, but it would also force the court, the lawyers, the parties and the witnesses to become actors on the TV screen without their consent or compensation, and for the pecuniary profit of the news media. It would not be long until the television people would be selling this time to some toothpaste or other commercial company ... Certainly conduct such as this could never be justified by our committee.

The theatrical metaphor was repeated. "A courtroom is not a stage," said Dean Erwin Griswold, "and witnesses and lawyers and judges and parties are not actors. A trial is not a drama, and it is not held for public delectation."<sup>408</sup>

Many comments referred to the way photography and television would shape the information reaching the public. They accused cameras of distortion, sensationalism, and commercialism. Attorney R.C. Garland pointed out that television would focus on "sensational portions" of any trial, creating "false impressions." Nebraska State Bar President Ralph Svoboda said that removing Canon 35 would add a "Hollywood aspect" to the publicity that existed around trials, "trenching on the solemn and orderly character of the proceedings." Kansas attorney Willard L. Phillips said, "When one observes the way other events of interest are handled by the television media, it is not difficult to imagine that with television a trial, instead of being a procedure for the protection of human rights, might easily degenerate into a circus with frequent interruptions in order that the manufacturer of dog food could get in a plug." Pennsylvania attorney Russell O'Malley said, "One wonders, too, how the production will be edited. One momentary lapse by a witness, during which he may

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<sup>408</sup> Ibid.

appear amusing or even ridiculous... could well be thought newsworthy ... and thus the individual might be held up to great public ridicule as his reward for performing his duty as a citizen.” Those in the courtroom, he said, would have seen the lapse in its context, with the good and the bad.<sup>409</sup>

After the hearings, the committee’s final report recommended changes in the Canon’s language but not in its substance. It stated that no sound techniques exist to evaluate the effect of photography on trials. The report proposed deleting the assertion in the original Canon that photography and broadcasting are “calculated to detract” from the dignity of the proceedings, making the ban less accusatory towards the media. The ABA House of Delegates adopted the proposed language changes and kept the ban intact.<sup>410</sup>

#### Supreme Court cases about cameras in the courtroom

By the 1960s, in addition to the federal ban, all states except Colorado, Texas and Oklahoma were following the ABA’s nonbinding guidelines by banning cameras in state courts. However, the Supreme Court hadn’t yet ruled on the constitutionality of cameras in courtrooms. The Supreme Court addressed the subject in *Estes v. Texas* in 1965, but did not make a definitive statement did not come until *Chandler v. Florida* in 1981.

In *Estes v. Texas*, Billy Sol Estes, a Texas businessman and contributor to Lyndon Johnson’s campaigns, was indicted for swindling and the case was heavily

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<sup>409</sup> Ibid.

<sup>410</sup> "Proceedings of the House of Delegates - Midyear Meeting," (American Bar Association, 1963).

publicized before trial. In a pre-trial motion, Estes attempted to prevent broadcasting and photography of the trial. The pre-trial hearing where he argued this was itself broadcast live, and during its two days duration, the 12 camera operators and their equipment created a chaotic atmosphere. Estes' motion was not completely successful, but he won a few concessions: the judge ordered that a booth be built to house the camera operators and equipment, only opening and closing statements and the return of the jury's verdict could be carried live, and videotaping without sound was allowed in the rest of the trial. Estes was found guilty and appealed, arguing that the cameras in the pre-trial hearing and the trial had denied his due process rights.<sup>411</sup> The Supreme Court reversed his conviction, holding that televising courtroom proceedings over the defendant's objections, when there is widespread public interest in the case, infringes on the right to a fair trial guaranteed by the due process clause of the 14<sup>th</sup> Amendment.

Justice Clark, writing for the majority, argued that freedom of the press is limited by the need to maintain fairness in judicial proceedings and that current television technology was detrimental to the atmosphere necessary for a fair trial. In this situation, he wrote, it is enough to show the probability of prejudice. Justice Clark details the ways television can cause unfairness. It can improperly influence, distract and harass jurors, witnesses, judges, and defendants. Knowing a trial will be televised enhances public interest and creates "intense public feeling," which puts pressure on jurors. Pre-trial publicity can influence the trial by creating a mood in the community. Justice Clark concedes that some of these dangers could be caused by newspaper

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<sup>411</sup> *Estes v. Texas*, 381 U.S. 532 (1965).



coverage as well, but writes, “the circumstances and extraneous influences intruding upon the solemn decorum of a televised trial are far more serious.” Additionally, Justice Clark pointed out that the public’s right to be informed about court proceedings is protected by allowing citizens and journalists to attend the proceedings and report on them later. He said that the right to a public trial belongs to the accused, not to the public or the press (though the Court reversed course on this point 15 years later).

The *Estes* majority’s focus on trial fairness makes sense because the Supreme Court was tasked with determining whether constitutional rights were violated, not determining the desirability of cameras. However, additional points in the majority opinion and the concurrences help flesh out what a fair trial is and show how this imperative is related to broader concerns such as the judiciary’s image. The majority argued that trial fairness requires not just certain procedures, but also a certain atmosphere – calm, solemn, orderly, and respectful. This is necessary to impress upon participants the seriousness of the proceedings and to convey to spectators that the justice system is working in an orderly way. Justice Clark writes that to perform its highest function in the best way, “justice must satisfy the appearance of justice.”

The Court stated that while a fair trial has to be public, this does not mean everyone who wants to can attend. The audience should be not too small and not too big. There should be some people there, or an opportunity for some to be there, because this protects against abuses. But if the audience is too big – for example, if the trial is held in a stadium – the crowd will not provide what a public trial is supposed to provide. At a certain point, trial spectators start playing a bad role rather than a good

one. This is because trial participants will change their behavior if they know many people are watching them. Being on trial in a stadium is not the same thing as being photographed, but in both cases, the defendant and other trial participants will know many people are watching them. Clark points out that distraction does not just mean physical distraction – it also means awareness that one is being watched by a mass audience, which causes self-consciousness and uneasiness.

Chief Justice Earl Warren, in his concurrence, describes a trial in Cuba under Castro, before 18,000 spectators. This is the essence of the “show trials” associated with Communist regimes. Warren writes that the proponents of cameras in the courtroom say televised trials will serve an important educational function, but a trial’s purpose is ascertaining the truth and achieving justice – not education. When a trial is meant to provide an object lesson, its integrity is diminished.

Today, the term “show trial” is sometimes used to denigrate the integrity of a trial result. President George W. Bush often referred to Vice Presidential aide Scooter Libby’s trial for obstruction of justice as a “show trial,” casting it as a partisan witch-hunt. This strategic usage attempted to discredit a process that was harmful to the President’s associates, while Chief Justice Warren’s usage was part of an attempt to elaborate the requirements of a fair trial, yet both uses make a connection between instructional intentions and questionable integrity. However, the oft-mentioned necessity of meting out not only justice but also the appearance of justice suggests that it’s assumed instruction and integrity are not mutually exclusive and are in fact linked. The question isn’t whether trials impart messages, but rather, whether these messages

are manufactured for the audience or whether they derive from the proceedings' actual operation. Trials can't be purely performances as some other government proceedings can be, because in trials, there is no replay in the back stage. However, Judith Resnik argues that trials play an important socializing function, teaching citizens about democratic principles.<sup>412</sup>

In addition to highlighting the possible effects of mass viewership and instructional intentions, Chief Justice Warren also fleshes out the import of the image conveyed outside the courtroom. He writes that a televised trial invites commercialism, which courts shouldn't be associated with; broadcasters will emphasize personalities for dramatic flair and the trial will be interspersed with soft drink commercials. Trials will be selected for coverage because of their sensational features, not because of their true purpose. Warren also argues that order and solemnity are important elements in the constitutional conception of a trial; dignity is essential to integrity.

Significantly, one in the five-person majority, Justice Harlan, concurred subject to the reservation that the case dealt with a highly notorious trial rather than a routine one. He stressed that notoriety makes threats to trial fairness more serious, and therefore, in a trial like this one, it was not necessary to show actual prejudice had occurred; the probability of prejudice was enough. The other four members of the majority would have made it unnecessary to show actual prejudice in any televised trial, not just a notorious one. Harlan did not agree; he said the decision he was

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<sup>412</sup> Resnik, "Uncovering, Disclosing and Discovering How the Public Dimensions of Court-Based Processes Are at Risk." Resnik and Curtis, "From 'Rites' to 'Rights' of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes."

making applied only to notorious trials. Justices Stewart, Black, Brennan and White dissented, arguing that televising this trial did not violate *Estes*' rights. Justice Brennan emphasized that only four members of the majority viewed televised criminal trials to be constitutionally problematic regardless of the circumstances.<sup>413</sup>

*Estes* failed to produce a broad constitutional rule about cameras in courts because Harlan maintained that the holding turned on the atypical nature of the case. Because of the window left open by *Estes*, combined with the dogged efforts of news organizations, state courts began to experiment with cameras in the 1970s. *Richmond Newspapers v. Virginia* in 1980 did not address the issue of cameras in courts, but affirmed that trials are presumptively open and that the constitutional right to a public trial belongs to both the public and the defendant. The majority elaborated that open trials help ensure fairness and discourage perjury, and help the criminal process to "satisfy the appearance of justice."<sup>414</sup>

*Chandler v Florida*, decided in 1981, produced a definitive statement that cameras do not inherently violate defendants' rights. At issue was Canon 3A (7) of the Florida Code of Judicial Conduct, which permitted cameras in Florida state courts at the discretion of presiding judges. A group of police officers were charged with a crime that attracted media coverage, and petitioned to have Florida's Canon 3A (7) declared unconstitutional. Their claim was rejected and they were found guilty.

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<sup>413</sup> *Estes v. Texas*.

<sup>414</sup> *Richmond Newspapers v. Virginia*. Since then, the Supreme Court has held that the right of public access applies also to pretrial proceedings, when this does not compromise trial fairness and individual safety. *Press Enterprise Co. v. Superior Court*, 464 United States 501 (1986), *Waller v. Georgia*, 467 United States 39 (1984).

The Supreme Court affirmed their convictions with a six-person majority, two concurrences, one justice not participating, and no dissents. The court held that the Constitution does not prevent a state from experimenting with televising and photographing trials. The majority said that *Estes* had not said that cameras inherently deny due process. They pointed out that the “evolving technology” at issue was “in its relative infancy in 1964.” The majority argued further that Florida’s program included adequate safeguards to ensure that due process was not violated. They argued that a general danger of juror prejudice is not enough to merit a ban; rather, a defendant must make a specific showing that media coverage influenced the jury’s decision.<sup>415</sup> After *Chandler*, more states began experimenting with cameras in courts and some created permanent rules allowing them.

The reasons for the Court’s evolution from *Estes* in 1965 to *Chandler* in 1981 have been much debated. Some justices claimed that the law was being applied in the same way in *Estes* and *Chandler* and that the change in the facts caused the change in outcomes. Other justices (including the dissenters from *Estes*) said that *Chandler* was explicitly overturning *Estes*. Some commentators have argued that, as the facts are not distinguishable in any important way, something else must have changed. Harvard Law professor Charles Nesson, who was Harlan’s clerk at the time of *Estes*, has written that the change in the law occurred because of the Justices’ changing views of the news media and their perceptions of whether it would help or hurt courts’

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<sup>415</sup> *Chandler Et Al. v. Florida*, 449 U.S. 560 (1981).

image.<sup>416</sup> In other words, the Court issued a more permissive ruling in 1981 because the justices were more comfortable with television and had come to see it as potentially helpful to courts' image. Thus, although on one level these cases are about how to achieve due process of law, on another level they are about courts' relationship to modern transparency practices.

### Eliminating Canon 35

In 1969, the ABA began a process to update its canons, which resulted in the Code of Judicial Conduct replacing Canons of Judicial Ethics in 1972. In the new code, cameras were addressed by Canon 3A(7).<sup>417</sup> In 1982, a committee convened to study the issue recommended that the existing Canon 3A(7) be amended to allow states to authorize camera coverage under the authority of each state's highest court.<sup>418</sup> The committee stressed that it was not taking a position on the merits of cameras in courts; rather, its recommendation followed from two developments. First, more and more states were experimenting with cameras and electronic media; by 1982 thirty-six states allowed some form of this coverage. Second, in *Chandler* the Court had declined the opportunity to create a broad constitutional rule against cameras in courts. The 1982 ABA committee pointed out that they, like the Supreme Court, were

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<sup>416</sup> C. R. Nesson and A. D. Koblenz, "The Image of Justice: *Chandler v. Florida*," *Harvard Civil Rights - Civil Liberties Law Review* 16 (1981).

<sup>417</sup> B. J. George et al., "Report to the House of Delegates - Standing Committee on Association Standards for Criminal Justice, Standing Committee on Ethics and Professional Responsibility," (American Bar Association, 1982); "Joint Commission to Evaluate the Model Code of Judicial Conduct - Background Paper," (American Bar Association, 2005).

<sup>418</sup> They also recommended that a new guideline, Standard 8.3, be added to the ABA Standards for Criminal Justice, saying essentially the same thing.

expressing neither an endorsement nor an invalidation of cameras in courts. They were rather stating that professional ethics do not necessitate a ban, that each state's highest appellate court should be able to create guidelines, and that individual state judges should make determinations under those guidelines.<sup>419</sup> The ABA accepted these suggestions, and the 45 year-old ban was dropped.

From 1988 to 1990, the ABA conducted yet another study of its canons, and removed the canon addressing cameras and broadcasting from the Code of Judicial Conduct, based on a decision that this was an administrative issue rather than an ethical issue and should be dealt with by rules in each state. This remains the ABA's stance.<sup>420</sup> Throughout the 1980s more states adopted policies permitting cameras. The state policies vary widely in terms of what kinds of trials can be shown, whether witnesses can opt out, whose objection can keep cameras out, and many other issues.<sup>421</sup>

### The Judicial Conference considers changes

After the *Chandler* decision, the ABA's elimination of its ban, and a stream of petitions by media organizations, the Judicial Conference created a committee to revisit the issue. In 1984, the committee recommended keeping the ban, but in 1988,

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<sup>419</sup> George et al., "Report to the House of Delegates - Standing Committee on Association Standards for Criminal Justice, Standing Committee on Ethics and Professional Responsibility."

<sup>420</sup> "Joint Commission to Evaluate the Model Code of Judicial Conduct - Background Paper"; M. T. Johnson and C. Kraftka, "Electronic Media Coverage of Federal Criminal Proceedings," (Federal Judicial Center, 1994). The ABA's current policy is in "The Reporter's Key" Rights of Fair Trial and Free Press," which is available on the organization's web site.

<sup>421</sup> "Cameras in the Court: A State-by-State Guide," *Radio Television News Directors Association and Foundation* (2007), <http://www.rtnda.org/foi/scc.shtml>.

the committee's second incarnation recommended that the Judicial Conference modify the ban to allow a three-year pilot program in selected federal courts, and the Conference gave its permission.<sup>422</sup> The pilot program was run by the Federal Judicial Center, the research arm of the federal courts. Lasting from July 1, 1991 to June 30, 1993, the program allowed members of the news media to photograph, record, and film civil trials in two appellate and six district courts. The Judicial Conference created guidelines. Any individual judge who did not want to participate could continue to prohibit cameras in his or her courtroom. Only one video camera and one still camera were allowed in any trial, and the media were responsible for making pooling arrangements. Jurors could not be photographed or filmed, and any witness could opt out.<sup>423</sup>

The Federal Judicial Center assessed the pilot program in several ways. Participating judges were interviewed and filled out questionnaires. Attorneys, court employees, and members of the media also filled out questionnaires. Finally, the Federal Judicial Center commissioned the Center for Media and Public Affairs to conduct a content analysis of the television coverage of trials enabled by the pilot program.<sup>424</sup> Participants' impressions were mixed but mostly favorable. Judges reported minor effects on participants and on the conduct of the trial. Researchers from the Federal Judicial Center wrote up a report concluding that the Judicial Conference should change its policy to allow cameras in courtrooms.<sup>425</sup>

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<sup>422</sup> Johnson and Kraftka, "Electronic Media Coverage of Federal Criminal Proceedings."

<sup>423</sup> Ibid.

<sup>424</sup> Ibid.

<sup>425</sup> Ibid.



The report conceded some problems in the evaluation. It had measured perceived effects of cameras, not actual effects. The latter would have been impossible, because since no two trials are alike, comparisons would not be significant. Furthermore, the pilot included only civil trials and only courts that had volunteered and whose judges were therefore already favorably inclined towards cameras. Nevertheless, the Federal Judicial Center researchers concluded that the pilot program showed the ban was not needed.

Before the end of the experiment, the Judicial Conference's Advisory Committee on Criminal Rules began to discuss a proposed amendment to Rule 53 of the Federal Rules of Criminal Procedure to allow cameras in federal courtrooms. Citing the "lack of horror stories" from the pilot program, the committee decided to submit this proposal, and the Standing Committee approved it. The Judicial Conference considered the proposed amendment to Rule 53 at their biannual meeting, but voted against it.<sup>426</sup>

While the Judicial Conference's meeting minutes are not public, subsequent statements made by its representatives made clear that they did not interpret the results of the pilot project in the same way that the authors of the Federal Judicial Center report did.<sup>427</sup> The authors of the report interpreted the results in a positive light for cameras, but members of the Judicial Conference read these same results to indicate

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<sup>426</sup> "Advisory Committee on Criminal Rules - Report to the Standing Committee" (1993); "Minutes of the Advisory Committee on Federal Rules of Criminal Procedure" (1994); "Minutes of the Advisory Committee on Federal Rules of Criminal Procedure" (1993); "Minutes of the Advisory Committee on Federal Rules of Criminal Procedure" (1992); "Rules of Criminal Procedure Published for Public Comment" (1994).

<sup>427</sup> E. R. Becker, "Statement of Chief Judge Edward R. Becker on Behalf of the Judicial Conference of the United States" (2000).

that cameras would threaten trial fairness. They argue that *no* influence on the behavior of trial participants, no matter how small, is acceptable. For example, the questionnaires had determined that 46% of district judges thought that to at least “some extent,” cameras made witnesses less likely to appear in court, 64% thought cameras made witnesses more nervous, 64% thought they caused attorneys to be more theatrical, and 44% thought they caused judges to avoid unpopular decisions. Appellate judges and attorneys gave roughly similar answers.<sup>428</sup> The Federal Judicial Center had interpreted these results favorably for cameras, because the majority of respondents thought cameras did these things only “to some extent” or not at all, rather than to a “moderate,” “great,” or “very great” extent. The Federal Judicial Center researchers regarded “to some extent” as acceptable. The Judicial Conference did not regard “to some extent” as acceptable, and saw these results as supportive of the ban on cameras. Judge Edward R. Becker, testifying before Congress in 2000, stated,

Carefully read, the Federal Judicial Center study does not reach the firm conclusions for which it is repeatedly cited ... In reality, the recommendations of the study reflect a balancing exercise which may seem proper to social scientists but which is unacceptable for judges who cannot compromise the interests of the litigants, jurors and witnesses.<sup>429</sup>

The Judicial Conference was also unhappy with the results of the content analysis. The long formats used by C-SPAN and CourtTV had allowed anchors to explain some of the legal details of trials, and often played trial participants’ own words, making the programming somewhat informative about the legal system.

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<sup>428</sup> Johnson and Kraftka, "Electronic Media Coverage of Federal Criminal Proceedings."

<sup>429</sup> Becker, "Statement of Chief Judge Edward R. Becker on Behalf of the Judicial Conference of the United States."

However, local news stations did not use any audio from trials. They had simply used footage as background for short voiceovers that explained nothing about the legal aspects of the trials. The Judicial Conference concluded that all the talk about the educational benefits of cameras was overblown.<sup>430</sup> The Judicial Conference's official statements focused on fair trial issues, but in testimony before Congress, their representatives also discussed judicial legitimation and appearance.

A few years later, the Judicial Conference budged slightly. On September 6, 2000, the Conference passed a resolution allowing federal circuit courts of appeals to make their own decisions regarding cameras and microphones. Only the 9<sup>th</sup> and 2<sup>nd</sup> Circuits have taken them up on this, allowing cameras in limited circumstances.<sup>431</sup> Cameras are still prohibited in all federal district courts and almost all federal courts of appeal.

### The Supreme Court's policies

The Supreme Court makes its own rules, and has never allowed broadcasting or photography. The only known photographs of the sitting court were taken in 1932 and 1937 by spectators using cameras hiding in clothing and handbags. That would be impossible today. Visitors to the Supreme Court must deposit all bags, coats and personal items in lockers and go through several layers of security before entering.

The Supreme Court has made small, incremental changes throughout the years regarding audio recording. In 1955, Chief Justice Earl Warren began to allow

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<sup>430</sup> Ibid.

<sup>431</sup> Ibid.

audiotapes to be made of Supreme Court oral arguments. These tapes were then sent to the National Archives, where they were processed and filed, and were available for people conducting “serious scholarly and legal research” to listen to about one year after each oral argument had taken place.<sup>432</sup> In 1981, journalist Fred Graham obtained a copy of the argument in the Pentagon Papers case and broadcast excerpts on CBS Radio for that case’s 10<sup>th</sup> anniversary. Chief Justice Warren Burger was furious, and tried unsuccessfully to pressure the ABA not to grant Graham its Gavel Award that year. Burger stopped sending the tapes to the National Archives for five years, but the practice was then resumed.<sup>433</sup>

The emergence of C-SPAN in the late 1970s presented a model and a means for televising the court. Chief Justice Warren Burger had been adamantly opposed to televising the Court, believing television to be undignified, but when Justice William Rehnquist was appointed to replace Burger in 1986 a new opportunity seemed possible. On February 8, 1988, C-SPAN wrote to Chief Justice Rehnquist offering C-SPAN’s services to televise oral arguments on a dedicated Supreme Court channel in the network’s characteristic style: every oral argument, gavel-to-gavel, with no commentary or analysis. Rehnquist politely declined.<sup>434</sup>

However, Rehnquist permitted a low-key demonstration of how cameras could work in the Supreme Court. Three Justices attended this demonstration, held on

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<sup>432</sup> Mauro, "The Supreme Court and the Cult of Secrecy."

<sup>433</sup> F. Graham, *Happy Talk: Confessions of a TV Newsmen* (New York: W.W. Norton and Company, 1990). 94-98.

<sup>434</sup> B. Collins, "C-SPAN's Long and Winding Road to a Still Un-Televised Supreme Court," *105 Mich. L. Rev. First Impressions*, <http://www.michiganlawreview.org/firstimpressions/vol105/collins.pdf> (2007); R.P. Fairfield, ed., *The Federalist Papers* (Garden City, New York: Anchor Books, 1961); Mauro, "The Supreme Court and the Cult of Secrecy."

Saturday, November 21, 1988, along with a few representatives of C-SPAN and other media organizations. Two cameras the size of lipstick tubes were set up in the Court, one facing the Justices and one facing the lectern where the lawyers stand. There was no camera operator. A monitor and switching equipment, along with a producer, were located outside in the hallway. Inside the Court, the three Justices who attended sat in their usual seats behind the bench, and a C-SPAN representative stood behind attorneys' lectern. They had a short discussion while the cameras filmed it, and then they all watched it on the monitor in the hallway. Nothing ever came of this experiment.<sup>435</sup>

Until 2001, the only way for most people to learn about an oral argument was to stand in line at six in the morning to attend as a tourist or to read or listen to accounts by journalists who had attended. In 1993, Political scientist Peter Irons made copies of several famous Supreme Court oral arguments recordings kept at the National Archives and packaged them, edited and narrated, as a tape-and-book ensemble called *May It Please the Court*. Irons had written to Rehnquist about his project and had received an encouraging response from his administrative assistant. However, it appears that this was a mistake on the assistant's part, because the Court threatened to sue him for not having gotten permission to use the tapes in this way. They dropped the threat after receiving a torrent of press criticism, but Rehnquist told the Supreme Court bookstore to black list all of Irons' tapes and books.<sup>436</sup>

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<sup>435</sup> Collins, "C-SPAN's Long and Winding Road to a Still Un-Televised Supreme Court"; Mauro, "The Supreme Court and the Cult of Secrecy."

<sup>436</sup> Personal communication with Professor Irons.

Supreme Court journalist Tony Mauro speculates that the Court did not like losing control over its representation and objected to the association with commercialism.<sup>437</sup> The Court has not objected to – and in fact publicizes on its web site – some other projects that make audio recordings of oral arguments widely available. Professor Jerry Goldman of Northwestern University created a website called the Oyez Project, which makes available the audio from a variety of cases, digitized from the National Archives' copies. He has also created a collection of oral argument recordings on CD-ROM titled *The Supreme Court's Greatest Hits*, which sells for \$39.95.<sup>438</sup> It appears that the Justices don't object to these projects when they are first cleared with them. Professor Irons says that the distinction between his project and Professor Goldman's may be that *May It Please the Court* was created from excerpts of oral arguments, while Goldman's projects play the oral arguments in their entirety.<sup>439</sup>

The Court's decision to hear the cases that would decide the 2001 Presidential election led C-SPAN to decide that it was worth another try to get permission to broadcast. In November 2000, C-SPAN, the Radio-Television News Directors Association (RTNDA) and other news organizations wrote to ask Chief Justice Rehnquist to allow live television and radio coverage of the election cases, *Bush v. Gore*, and *Bush v. Palm Beach County Canvassing Board*.<sup>440</sup> Rehnquist denied their request, but he agreed to release the audiotapes directly after oral argument. After

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<sup>437</sup> Mauro, "The Supreme Court and the Cult of Secrecy."

<sup>438</sup> <http://www.oyez.org>

<sup>439</sup> Personal communication with Professor Irons.

<sup>440</sup> *Bush v. Gore*, 531 U.S. 98 (2000); *Bush v. Palm Beach County Canvassing Board*, 531 U.S. 70 (2000).

this, news organizations began to request immediate release of audio for cases with high public interest, with mixed results; the Court allows this only for selected cases.<sup>441</sup>

In October 2005, C-SPAN wrote to the new Chief Justice Roberts, offering to provide gavel-to-gavel camera coverage of every oral argument, but Roberts declined. In June 2006, C-SPAN requested simultaneous release of audio for all oral arguments. Again, Justice Roberts declined. The Court does not provide reasons for denying a request for immediate release of audio or for refusing to allow camera coverage. When individual Justices are asked about this in interviews, they usually reference the misleading or politicizing coverage that would probably result.

#### Congressional attempts to change policies

Since 1999, members of Congress have argued that legislation would be a legitimate way to open federal courtrooms to cameras. Some have introduced bills to do this, but no bill has ever made it to a final vote. The legislation generally falls into two categories. The first type applies to all federal courts, including district courts, circuit courts of appeals, and the Supreme Court, and authorizes individual judges to allow camera coverage of trials in their courtrooms if they so choose. These proposals provide safeguards for jurors and witnesses.<sup>442</sup> The second type of proposed legislation applies only to the Supreme Court. It's more confrontational than the first

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<sup>441</sup> Fairfield, ed., *The Federalist Papers*.

<sup>442</sup> L. H. Tong, "Televising Supreme Court and Other Federal Court Proceedings: Legislation and Issues," (Congressional Research Service, 2006). One example is *A Bill to Permit Media Coverage of Court Proceedings*, 108th Congress, S.544.

category in that it requires rather than authorizes the Justices to allow oral arguments to be televised unless they decide, by a majority vote, that one of the parties' due process rights would be violated by the cameras.<sup>443</sup>

These bills' patterns of support are idiosyncratic; they don't break down along party lines. Some members of Congress believe that this type of legislation is a constitutionally suspect encroachment on another branch or that cameras in the courtroom are inappropriate or potentially harmful, and others disagree. The Senate Judiciary Committee held hearings on the issue in 2000 and 2005, during which Senators, judges, attorneys and representatives from journalists' organizations presented their views. The classic positions were asserted on both sides. Supporters stressed the need for government transparency and asserted that cameras provide a more complete picture than print. Opponents voiced concerns about fairness: witnesses made nervous, litigants and defendants pushed to settle, jurors and judges swayed by public opinion. Senator Orrin Hatch said, "Judges are not politicians; they should not be making speeches from the bench." Many argued that the safeguards provided were not enough. Participants also raised questions about how television would present trials, arguing that it would create the potential for misinterpretation. They also mentioned privacy and security concerns. Some were simply unwilling to contravene the expressed opinion of the Judicial Conference.<sup>444</sup>

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<sup>443</sup> Tong, "Televising Supreme Court and Other Federal Court Proceedings: Legislation and Issues." An example of this type of bill is *A Bill to Permit the Televising of Supreme Court Proceedings*, 110th Congress, S.344.

<sup>444</sup> *Allowing Cameras and Electronic Media in the Courtroom, Cameras in the Courtroom.*



Today, cameras are allowed in all fifty states' courts in some instances. They're allowed occasionally in the 2<sup>nd</sup> and 9<sup>th</sup> circuit courts of appeals, but not in any other federal courts. Though attitudes seem to be increasingly permissive towards cameras and the prohibition may be further eroded, it is notable that the federal judiciary has held out for so long when cameras are ubiquitous in society and government. This debate illuminates the tension between the federal judiciary and modern transparency practices and shows that this tension is based on what happens both inside and outside the courtroom. Judges maintain their legitimacy in a different way than other officials, and this it's understood to be threatened by the practices through which transparency is enacted. The stakes attached to trials and the information limitations they require make mass-mediated public access potentially problematic in a way that does not occur in other contexts. This debate also reflects anxieties and myths that center on image-based communication in a democracy, and debates about how to assess the impact of mass media in general and images in particular. In the next section, I discuss many claims made against cameras and what they mean for democracy, transparency and the judiciary.

### **Part III: Assessing image-based transparency in trials**

This debate is in part a debate about the impact of visual and electronic media, and about how to assess this impact. Print and visual media have different communicative properties, and in some instances images create problems. However, many of the arguments made against cameras rest on questionable folk theories about

media effects, and blame cameras for changes rooted in a much broader set of forces. In some ways, images have come to stand for modern transparency practices more generally – public access and influence, personalization and performance, sensationalism and infotainment. Often, it's the newsgathering and production practices that embed images, rather than the images themselves, that create the coverage viewed as dangerous to courts.

Both sides of the debate about cameras in the courtroom wield myths about the power of visual and electronic media. Cameras are sometimes blamed for problems that they did not cause alone. They are also sometimes *credited* for things they did not cause alone. There is an understanding that images, helpful or harmful, have a unique power. In fact, many complaints made about television today appeared in the 1930s as grievances against still photography. This suggests a general suspicion of photographic representation. The more permissive rules for audio in the Supreme Court also suggest a suspicion of images. Releasing audiotapes could do some of the things people say television would do, such as allowing people to play misleading, decontextualized clips of oral argument.<sup>445</sup> Radio in the United States has been a popular and partisan medium, with many of the attributes feared in video, but audio causes less concern.<sup>446</sup>

There are of course differences between audio and video. Audio doesn't provide the Justices' visual likeness and is less immersive. It's somehow less

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<sup>445</sup> D. Lithwick, "Listen Up," *Slate*, November 28, 2006, <http://www.slate.com/toolbar.aspx?action=print&id=2153935>.

<sup>446</sup> Earlier there was fear of the demagogic voice, which was a backdrop to Congress' worry about early radio broadcasting. S. Lowery and M. L. DeFleur, *Milestones in Mass Communication Research* (New York: Longman, Inc., 1983).

damning. Today there is a genre of videos that are rapidly and widely disseminated on the internet because they're viewed as proving something important: President George W. Bush hearing about hurricane Katrina before it hit, James Comey testifying that Alberto Gonzalez tried to pressure John Ashcroft to approve a controversial program while Ashcroft was in the hospital, Condoleezza Rice verifying that President Bush received a memo entitled "Al Qaeda determined to attack inside US." These moments would not have been as significant if captured in text or audio.<sup>447</sup> Video is more damning because it's more believable and has more emotional punch. This is related to the idea that vision is the favored sense in our age, or as Donna Haraway writes, the privileged knowledge source of western epistemology.<sup>448</sup> There is a generalized anxiety about the visual, but also an attraction or magnetism. None of this is an argument for keeping cameras out of courtrooms; it rather acknowledges that images have distinctive communicative properties.

Below I'll discuss the charges made against cameras in the courtroom and the underpinnings of these arguments. It's often the case that text accounts can do exactly what it's alleged that images do, and images don't always do these things. In these cases, images are more feared, perhaps because they are more immersive and give the impression of less mediation, or perhaps because they provide easier access to a larger, presumed less rational, group of people.

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<sup>447</sup> There are some damning audio clips, such as Enron contractors laughing as they discuss the fact that turning off California's power was going to kill some "grandmothers," but it's more common to email a video clip than an audio clip.

<sup>448</sup> D. Haraway, "Situated Knowledges," in *Simians, Cyborgs and Women* (New York: Rutledge, 1991). See also M. Sturken and L. Cartwright, *Practices of Looking: An Introduction to Visual Culture* (Oxford: Oxford University Press, 2001).

Cameras will lower dignity and degrade the court

The ABA's original Canon 35 charged that photographs and broadcasting "are calculated to detract from the essential dignity of the proceedings" and "degrade the court."<sup>449</sup> This referred in part to the concern that the noise and commotion accompanying clunky cameras would detract from the hushed air of reverence in the courtroom. However, the charge persisted long after cameras became much smaller, virtually silent and able to use available light, and after television emerged. Today, some state regulations regarding cameras in the courtroom say that a trial judge may decide to exclude cameras "to protect the dignity of the court."<sup>450</sup> The guidelines for the pilot program in the federal courts stated that a judge could limit coverage "in the interest of justice to protect the rights of parties, witnesses, and the dignity of the court."<sup>451</sup>

The degradation concern today includes a focus on the way courts will be portrayed on television. This is partly rooted in an association between television and trashy, unserious programming. Newspapers too can be trashy and unserious, and television can be serious, as evidenced by C-SPAN or the BBC. It's not the visual mode, but the norms and practices that embed it that cause the undesired qualities.

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<sup>449</sup> "Supplemental Report of the Standing Committee on Professional Ethics and Grievances."

<sup>450</sup> The Radio-Television News Directors Association keeps a list of all state regulations regarding cameras on their web site. The rules for Arkansas, Maryland, Mississippi and Texas specifically note the need to bar cameras if they threaten the "dignity" of the court, and other state rules mention that cameras may "degrade" the court or harm "decorum."

<sup>451</sup> Johnson and Kraftka, "Electronic Media Coverage of Federal Criminal Proceedings."

Not everyone shares the view that televised images of trials will lower their dignity. A former prosecutor said in an interview that he thinks allowing cameras in federal courts would *convey* their dignity. He argued that state courts are unimpressive – in their architecture, décor, tone, atmosphere, rituals, customs, and the cases they hear -- and that showing only state courts on television diminishes the judicial system’s public image. Federal courts, he argued, have a more sober tone and subject matter, and televising them could convey the “majesty of the law” that is not seen in state courts.<sup>452</sup>

#### Cameras threaten decorum and order

Another frequently made claim is that cameras ruin order or decorum. Order is understood to promote both trial fairness and respect for the court and judge. Disorder can distract jurors and thus can influence the trial result. There is an association implied between cameras and bad behavior. It originated when cameras caused physical disturbances because of their sound, lighting needs and multiple operators, but it too has extended past those days. In addition to improvements in camera technology, many state regulations have neutralized these concerns. The federal pilot program guidelines stipulated that there could be only one television camera with one operator and one sound person, and only one still camera. Media personnel were required to arrive early and were not allowed to move around. Many states have similar regulations.

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<sup>452</sup> Interview on April 4, 2007.

It seems that the reputation for indecorousness has clung to cameras because of other behavior associated with them. Cameras' presence creates excitement among spectators because they know they're close to notorious events and they may be captured on camera as well. Cameras are also associated with aggressive newsgathering tactics, as photographers may misbehave to get shots. These complaints can apply to text as well, but cameras generate greater concern.

Order requires that all trial participants obey the judge. The trial participants must treat the judge not as a person but as a representation of public authority and the collective conscience. Several judges and lawyers said in interviews that federal judges had better order in their courts than state judges. One state judge said that cameras don't affect participants if judges maintain good order in their courts. She tries to do this by prohibiting "speaking objections" ("objection, hearsay!"), which she said are often designed to impress the jury and can create a dramatic atmosphere.<sup>453</sup> Some people argue that the O.J. Simpson murder trial was out of control partially because the trial judge did not maintain order.<sup>454</sup> Camera proponents argue that in federal court this would never have happened, with or without cameras, because the judge would have had more control. A former prosecutor said in an interview, "There is no Lance Ito on the federal bench."<sup>455</sup> This sounded at first like he was saying that federal judges are somehow a different, better breed, but there is another way to understand his point. Federal judges, because they are appointed for life, have greater

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<sup>453</sup> Interviews on March 29, 2007, March 30, 2007, and April 7, 2007. The use and effect of speaking objections could be attributed to the indirect influence of television law dramas.

<sup>454</sup> On the OJ Simpson case, see J. Toobin, *The Run of His Life: The People v. O.J. Simpson* (New York: Random House, 1996).

<sup>455</sup> Interview on April 7, 2007.

independence and higher status, and thus have more control over trials. This perspective suggests that some problems attributed to cameras in the OJ Simpson case and other famous cases were not solely the fault of the cameras, but were caused by a combination of factors including judges' ability to set a tone.

Trial decorum entails limits on expression. Speaking out of turn shows disrespect for the court and can create an impression that may sway the jury. Additionally, participants may only speak about the proper subject matter. Defendants and witnesses are prevented from using the platform of the trial to make speeches about their political, religious or personal beliefs.<sup>456</sup> Any media coverage produces a larger audience for off-topic speeches, and coverage that focuses on them and magnifies them presents a particularly powerful megaphone. This can happen with audio, text or images. Live, gavel-to-gavel television coverage of an event creates an extra dimension because it means journalists don't exercise as much choice in what is included, and everything that happens in the frame gets in.<sup>457</sup>

Rules of trial decorum can be framed dramaturgically using Erving Goffman's analysis of the performance of everyday life. When people participate in a trial, they become performers in a particular kind of production. One objective of the rules of performance is to sustain a particular definition of the production, in this case the trial.

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<sup>456</sup> Zacarias Moussaoui, convicted conspirator in the September 11, 2001 attacks on the United States, used his opportunity to make a statement to speak about why he hates the United States, but the judge stopped him before he could say much. N. A. Lewis, "One Last Appearance, and Outburst, from Moussaoui," *New York Times*, May 5 2006.

<sup>457</sup> In this vein, many claim that live, continuous television coverage of confirmation hearings allow interest groups to use the proceedings as a platform to reach the public. On a similar note, in 2007, television cameras allowed members of anti-war group Code Pink to broadcast anti-war messages from Congressional hearings by sitting in the live audience, behind the witnesses and in view of the cameras, holding anti-war signs.

When people break the rules of a performance, the definition of the event can't be sustained. John Murray Cuddihy recounts that, during 1968 trial of the Chicago Eight, Abbie Hoffman was unruly and kept loudly interrupting. The judge postponed the trial until Hoffman would behave, but he wouldn't. It was finally decided that he would not be able to attend his own trial—normally understood to be a requirement for a fair trial. Bobby Seale's outbursts had also led to his being bound and gagged in the trial and then severed from the trial altogether. Thus, Cuddihy writes, there is a cultural requirement – civility – for citizenship. Legal rights depend on social rites. While this type of limit may not happen often, it underscores the importance of order and behavior to a trial.<sup>458</sup>

Although trial participants must behave to sustain a particular definition of the proceedings, a jury trial can never be just a performance in the way that a Congressional hearing can be. Many political performances purport to show a government decision being made that has really been made elsewhere, behind closed doors. However, jurors are supposed to base their decision only on what they see and hear in the public trial. A trial may be a performance, but it also has to be the real thing.<sup>459</sup>

Cameras are treated as though they symbolize the problems attached to mass public access and the behavior associated with this platform. By creating a representation that includes emotion, facial expression, body language and dress, cameras become more compelling vehicles for performances than text is. However,

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<sup>458</sup> J. M. Cuddihy, *The Ordeal of Civility* (New York: Basic Books, 1974).

<sup>459</sup> P. Auslander, *Liveness: Performance in a Mediatized Culture* (New York: Routledge, 1999).



the magnification – and thus, possibly the encouragement – of outbursts is not distinctive or inevitable to the visual mode.

### Cameras make trial participants act differently

Related to the concern about decorum is the concern that trial participants, even if well behaved, will act and think *differently* than they otherwise would. Many of the concerns about cameras' influence on trial fairness center on the idea that cameras create the cognizance of a mass audience, and this knowledge makes trial participants act differently, potentially influencing the trial result. Cameras may make witnesses nervous and thus look untrustworthy or refuse to testify. They may also lead some witnesses to exaggerate their testimony. Similarly, it's feared that the cognizance of a mass audience will lead lawyers to incorporate dramatic flourishes to gain fame or new clients. The knowledge that many people are watching can make judges and jurors more conscious of public opinion.

Though the presences of print reporters signifies that one may be written about, this usually doesn't cause as much excitement or trepidation as the knowledge that one's physical appearance will be reproduced. This is related to the idea that seeing a photograph or video is in fact seeing the actual events or people in it. Furthermore, a television audience is different from spectators in the courtroom, because it's potentially unlimited and is invisible to those being watched.

In many cases, the potential that participants will be influenced by the cognizance of mass viewership and thus change their behavior is problematic in trials

because, as I discussed in the last chapter, the judiciary doesn't serve a primarily majoritarian role. What the public wants isn't supposed to determine outcomes in court. Cameras don't automatically cause deference to the public, but they can make the public feel like they're actually watching an event, and the knowledge of this can influence those being watched. Cameras bring the idea of the mass public closer.

### Cameras lead to sensationalism

Cameras are also blamed for creating "sensational" coverage. Mark Harrison writes that the term sensationalism "functions as a pre-packaged media critique," meaning that it's rarely well defined but evokes negative associations.<sup>460</sup> This charge has been leveled since the elite papers of the 1830s denounced the penny press, before newspapers had photographs.<sup>461</sup> There's often a tone of moral outrage that accompanies these criticisms.<sup>462</sup> While much has changed over time and across different media, the media products that garner this label have usually had a few things in common. They focus on social and private life more than political and economic life, emphasizing shocking or taboo-breaking material about crime, sex, scandals, and celebrities. They present individual events rather than processes, and lack structural explanation, sustained analysis, or proposals for reform. Their style and idiom are more oriented towards entertainment than information. Many critics argue that this

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<sup>460</sup> M. Harrison, "Sensationalism, Objectivity and Reform in Turn-of-the-Century America," in *Turning the Century: Essays in Media and Cultural Studies*, ed. C. A. Stabile (Boulder, CO: Westview Press, 2000). 55.

<sup>461</sup> M. Schudson, *Discovering the News* (Basic Books, 1978). 12-60; D. Schiller, *Objectivity and the News* (Philadelphia: University of Pennsylvania Press, 1981). 47-75.

<sup>462</sup> C. Sparks and J. Tulloch, eds., *Tabloid Tales: Global Debates over Media Standards, Critical Media Studies: Institutions, Politics and Culture* (New York: Rowman and Littlefield, 2000). 18.

type of media cannot fulfill the needs of a democratic public sphere, which requires a focus on political structure and processes.<sup>463</sup>

Dan Schiller argues that sensationalism isn't necessarily always something that is imposed on people, but rather, it sometimes responds to a mood or need. He writes that the crime news trumpeted by the penny press of the 1830s helped define the moral boundaries of communities. Lurid murder stories were about more than the guilt of one person, but rather, made a statement about the "wicked morals of society." The penny papers positioned themselves as the defenders of the community, punishing wrongdoers through public shaming and providing moral lessons to all. However, their self-appointment as the voice of the people masked the commercial basis for their performance of this role.<sup>464</sup>

The charge of sensationalism often impugns the assumed consumers of certain material as much as it impugns the material itself. Sensationalistic coverage, and the working class or uneducated people thought to consume it, are associated with irrationality, disorder and self-indulgence, and contrasted with serious or elite media and its consumers, who are associated with self-denial, rationality and order.

Sensationalism's defenders sometimes accuse its critics of trying to universalize their own elite tastes. Defenders point out that tabloids can be subversive texts. Their focus

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<sup>463</sup> The distinction between sensational and serious coverage is also represented by Michael Schudson's distinction between "story journalism" and "information journalism" and by the tension between the "expressive" and "referential" functions of modern media perceived by early scholars of communication Charles Horton Cooley, John Dewey and Robert Park. D. J. Czitrom, *Media and the American Mind: From Morse to McLuhan* (University of North Carolina Press, 1983). Schudson, *Discovering the News*. See also H. Dicken-Garcia, *Journalistic Standards in Nineteenth-Century America* (Madison, WI: University of Wisconsin Press, 1989). H. J. Gans, *Popular Culture and High Culture: An Analysis and Evaluation of Taste* (New York: Basic Books, 1999).

<sup>464</sup> Schiller, *Objectivity and the News*. 47-45.

on topics considered private in fact broadens the conception of public life and democratizes the public sphere. Colin Sparks and John Tulloch write that because citizens have few direct, concrete opportunities to use political news, stories about crime and sex can in fact have more “perceived existential utility.” However, they point out that, despite the strength of many of these defenses sensational journalism facilitates private enjoyment over democratic participation.<sup>465</sup> I don’t believe this criticism can be written off as class bias.

The concern about sensationalism is a concern about what goes on outside the courtroom. It could influence potential jurors, but more often this concern refers to how the television audience will understand a trial and view the judiciary. Sensational coverage is seen as potentially eroding the court’s dignity.

There are some reasons to associate images with sensationalism. Images inevitably capture physical appearance, taking attention away from the realm of pure ideas. Celebrity magazines today are centered on photographs. However, images are not inevitably sensational, and print *can* be sensational. The penny press had no photographs, and today, there is plenty of sensational print coverage of trials in tabloid newspapers and celebrity magazines. It appears that characteristics have been attributed to a communication mode (visual communication) and a technology (the camera) when they often stem from commercial media’s imperative to attract audiences and the journalistic practices that have grown up around this imperative.

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<sup>465</sup> Sparks and Tulloch, eds., *Tabloid Tales: Global Debates over Media Standards*. 18-28.

### Television's structural properties

The association between cameras and sensationalism today is connected to the fact that newspapers and television also have different histories. Newspapers originated as sources of information, commercial listings of what ships were coming in and what goods they would carry. Their early incarnations also included commentary about public affairs. Television began as an entertainment medium. News programs gradually emerged, but for decades they remained a small part of television's overall offerings. Only since the 1980s have dedicated public affairs channels populated television, and even they are produced with an entertainment flavor. The existence of C-SPAN does not change the rest of the television landscape.

Dan Hallin writes,

Network television journalists largely accepted the "professional" standards of news reporting that evolved in the print media. Yet television news is also entertainment, carried on in an intensely competitive commercial environment... The combination of entertainment and journalism is not something television invented. It goes all the way back to the first commercial mass media, the penny papers of the 1830s. But television is its premier practitioner today.<sup>466</sup>

Hallin was writing in 1985, but today's media landscape is even more commercial and competitive, and increasingly mixes entertainment with public affairs.<sup>467</sup> He goes on to explain some of the reasons for television's commercialism and its entertainment focus:

That television shows this duality [entertainment and political affairs journalism] most sharply has to do with the structure of the television

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<sup>466</sup> D. Hallin, "'We Keep America on Top of the World'," in *Watching Television*, ed. Todd Gitlin (New York: Pantheon Books, 1986).

<sup>467</sup> D. Hallin, "Commercialism and Professionalism in the American News Media," in *Mass Media and Society*, ed. J. Curran and M. Gurevitch (New York: Oxford University Press, 2000).

industry. In the newspaper business, the tension between entertainment and journalism was sharpest in the days depicted in *Citizen Kane* and *The Front Page*, when urban newspapers competed head-to-head for readership. Today, most papers have monopolies, or nearly so, in their primary markets ... But in the television business, the three networks compete head-to-head for the same national market, and in each major urban area at least three television stations fight for the advertising dollars. Television's consumers, moreover, are more volatile. They are like the newspaper reader of years ago, who bought the paper on the newsstand rather than by subscription, and might buy one paper today and another tomorrow depending on the headlines. The audience for an evening news show can fluctuate considerably from day to day ... The result has been a significant convergence of news toward the conventions of television entertainment, with news broadcasts becoming faster-paced... more visual, and with greater emphasis on the kinds of stories ... the audience is assumed to enjoy watching.<sup>468</sup>

The commercialization of the airwaves has been intensified by deregulation and entertainment-oriented companies' acquisition of news networks. As news becomes a more competitive, commercial product, and ratings become increasingly important, entertainment value is further prioritized. Public affairs programming borrows from entertainment formats and follows entertainment celebrities.<sup>469</sup>

Many find the intersection of courts and television's commercial, entertainment tone disturbing. In the 1961 ABA hearings on cameras in the courtroom participants testified that they hoped never to see a broadcast trial interspersed with toothpaste or dog food commercials and that trials are not entertainment. This antipathy is linked to the tension between the public interest focus associated with professionalism and commercialism's motivations of private gain. Furthermore, the personalization often associated with entertainment and with television is often

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<sup>468</sup> Hallin, "'We Keep America on Top of the World'."

<sup>469</sup> D. Thussu, *News as Entertainment: The Rise of Global Infotainment* (London: Sage, 2008). 2-8.

unsuitable for judges' need to remain and appear impartial and independent. While politicians have increasingly appeared in entertainment contexts during the past two decades, judges fill a different role in politics and culture, and have mostly eschewed the spotlight. Recently, this may be changing and I'll discuss this in Chapter Five.

Thus, while the visual mode does have some communicative properties, sensationalism and infotainment are not caused by images per se. Television's entertainment focus flows from the commercial, competitive structure of media industries and the newsgathering and production practices that succeed under that structure.

#### Cameras turn trials into media spectacles

Connected to the charge that cameras create sensationalistic coverage is the charge that cameras turn trials into media spectacles, with media crews camped inside and outside the courthouse, reporting every detail, including those excluded from the trial. Because cameras are allowed in many state courts, these courts present opportunities to assess cameras' impact. Many state trials with cameras are unremarkable, but a few of them have become tabloid media spectacles.<sup>470</sup> Critics often claim that this happens because of the cameras and point to OJ Simpson's murder trial as the example. Testifying before Congress in 2001, Judge Edward R. Becker, said, "Since the infancy of motion pictures, cameras have had the potential to create spectacle around court proceedings. Obvious examples include the media

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<sup>470</sup> For a discussion of research on cameras in state trials, see Barber, *News Cameras in the Courtroom: A Free Press - Fair Trial Debate*.

frenzies that surrounded the 1935 Lindbergh baby kidnapping trial, the murder trial in 1954 murder trial of Dr. Sam Sheppard, and the more recent Menendez brothers and the O.J. Simpson trials.”<sup>471</sup> These notorious trials are deemed to have been inappropriately media-saturated and improperly conducted, sometimes leading to miscarriages of justice. Critics of the verdicts often blame the media attention.<sup>472</sup> There is sometimes truth to this blame, but as in other situations, cameras are blamed more than other media when it’s not clear that they’re guiltier.

There have been “trials of the century” since the 19<sup>th</sup> century. Trials present good staging grounds for human drama. Two clearly identifiable sides are pitted against each other; one wins and the other loses. The subject sometimes involves violent crime, sex, money, or corruption, and often elicits emotional testimony or information about intimate details of peoples’ lives. When celebrities and politicians are involved, this is an opportunity to see them taken down a notch. In a trial, there is a sense in which the powerful are treated just like everyone else (though with better-paid lawyers). However, despite the long history of media sensation trials, the characteristics criticized in the O.J. trial are often blamed on television cameras.

Trials become media sensations for several possible reasons. They may involve celebrities, whose lives are already followed by tabloids. This happened in recent years in trials involving model and television star Anna Nicole Smith, pop singer Michael Jackson, and music producer Phil Spector. Trials can also become media sensations because the charges are especially shocking or brutal. Within this category

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<sup>471</sup> *Allowing Cameras and Electronic Media in the Courtroom.*

<sup>472</sup> This happened with Hauptmann’s guilty verdict and O.J. Simpson’s not guilty verdict.



there is particular attention paid to crimes that involve ripping apart a family unit, as in the trial of the Menendez Brothers, who were charged with murdering their parents. Another subset of this type of spectacle trial is the kidnapping and abuse of young children. A third type of media sensation trial involves political or economic issues relevant to the public, such as government or corporate corruption. Recent examples include the trials of Vice Presidential aide Scooter Libby, Representative Duke Cunningham, and financier Bernard Madoff. Most of these are federal trials and thus don't allow cameras. Ironically, though, these trials present instances in which the traditional arguments for government transparency are particularly strong, because they're clearly relevant to the public interest and the trial may provide information relevant to future government policy.

Cameras are often blamed when state trials become notorious, media-saturated, tabloid spectacles, but newspapers have always performed this work as well. Furthermore, it's often the pre-trial coverage and the media outside the courtroom, not the media inside the trial, that bring notoriety. Many view the OJ Simpson trial for the murder of his wife as representative of the dangers of media attention, particularly cameras. Many disagree with the not guilty verdict and believe the presence of cameras in the courtroom helped bring it about. A common version of the argument holds that cameras provided defense attorney Johnnie Cochran's strategy of "playing the race card" with a stronger impact and that this pressured the jury to acquit Simpson. The claim is that the cameras enabled the issue of race to enter the trial inappropriately and this affected the result.

It's difficult to prove or disprove the claim that cameras turn trials into media sensations. These trials are hard to generalize from because they are unusual. Their notoriety and tabloidization are connected to the involvement of celebrities or the nature of the charges. Judges' lack of control over the courtroom may be another factor.

Individual notorious trials are often offered as proof of a particular theory about cameras, but the difficulty of agreeing on what they prove echoes the difficulty of proving media effects in general. During its mid-20<sup>th</sup> century heyday and continuing up to the present, the administrative or behavioral school of communication research pioneered by Paul Lazarsfeld has framed mass media effects as a scientific field, tallying measurable empirical results to produce hard information that is useful to policymakers and media industries. This approach fails to address the social and cultural context in which mass media messages are received, and misses a lot by limiting its scope to "effects" that are observable, measurable and quantifiable. Daniel Czitrom critiques this approach, writing, "communication, even with the technological sophistication of modern media, remains a human activity – sensuous, infinitely varied, often ambiguous, stubbornly resistant to the kinds of laws found in the physical sciences." Attempts to use these findings in debates about public policy underscore the difficulty of this enterprise. Hearings about the effects of violence or advertising on children inevitably produce two sets of experts making opposite claims.<sup>473</sup>

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<sup>473</sup> Czitrom, *Media and the American Mind: From Morse to McLuhan*. 145-146.

### Images are misleading

Many claim that cameras will create misleading coverage. This claim can mean different things –that images are inherently misleading, that they’re used in misleading ways, or, with regard to television, that even innocent editing necessitated by time constraints changes the meaning of events. Editing sometimes presents a tension between comprehension and completeness.<sup>474</sup> Some editing aims to help people understand a trial better, but this inevitably shapes the meaning conveyed. Some worry, too, that television editing or selection of cases will focus on hot button issues, ignoring the more mundane trials and oral arguments, and that this will create the impression that courts are more politically focused institutions than they really are.

Today, many people note that television often disseminates misleading information, but in 1937 the ABA’s original Canon 35 made the same charge about still images. There is something about images that is seen as more dangerously misleading. Print can also mislead, through choice of words, selection and emphasis, and editing, but misleading via images raises more concern. This concern comes across in the debate about cameras in the Supreme Court, when people say cameras would be acceptable as long as the coverage is “gavel to gavel.” Justice Scalia has said

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<sup>474</sup> *New Yorker* writer Malcolm Gladwell pushed this tension to its extreme, arguing that Enron executives convicted for misleading employees and investors about how well the company was doing had done nothing technically wrong. They had released all the information about their business dealings. The problem was that this information was too complex for most people to understand. Gladwell uses this story to critique the disclosure model of corporate governance. M. Gladwell, "Open Secrets: Enron, Intelligence, and the Perils of Too Much Information," *The New Yorker*, January 8 2007. *New York Times* writer Joe Nocera disputed Gladwell’s argument, writing “The point is not the sheer volume of disclosure; it’s whether disclosure illuminates or obfuscates. Enron usually did the latter.” J. Nocera, "Tipping over a Defense of Enron," *New York Times*, January 6 2007.

that cameras are inappropriate because sound bites misinform.<sup>475</sup> Judges interviewed for the pilot project in the federal courts also expressed the worry that cameras would misinform people.<sup>476</sup> In her confirmation hearing, Justice Ruth Bader Ginsberg was asked whether she thought cameras should be allowed into the Supreme Court and she replied that it might be appropriate, “as long as the editing could be controlled.”<sup>477</sup> It’s undoubtedly true that television networks would truncate oral argument and this would change the meaning of the parts shown and could mislead viewers. However, it’s difficult to imagine Ginsberg’s statement – a government official saying they would allow media coverage if they could control the editing – being made publicly about print media.

The fear of misleading is ironic because photography is often understood to be an unmediated copy of reality, a view that Lisa Cartwright and Marita Sturken call the “myth of photographic truth.”<sup>478</sup> The association with truth comes in part from the fact that photographs are created with mechanical devices and the human agency involved is harder to grasp. Trust in the veracity of images is declining with the advent of digital photography, which is easier to doctor.<sup>479</sup> However, Cartwright and Sturken write, “it’s a paradox of photography that although we know that images can be ambiguous and are easily manipulated and altered ... much of the power of photography still lies in the shared belief that photographs are objective or truthful

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<sup>475</sup> Tong, "Televising Supreme Court and Other Federal Court Proceedings: Legislation and Issues."

<sup>476</sup> Johnson and Kraftka, "Electronic Media Coverage of Federal Criminal Proceedings."

<sup>477</sup> Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Ruth Bader Ginsburg to Be Chief Justice of the United States*, 1993.

<sup>478</sup> Sturken and Cartwright, *Practices of Looking: An Introduction to Visual Culture*. 17.

<sup>479</sup> W. Mitchell, "Intention and Artifice," in *The Reconfigured Eye: Visual Truth in the Post-Photographic Era* (Cambridge, MA: MIT Press, 1994).

records of events.”<sup>480</sup> There is also a way in which photographs bear a physical imprint of that which they represent. Susan Sontag writes that photographs, like a death mask, bear a trace of the real.<sup>481</sup>

Cameras’ purported power to portray reality accurately is also what makes them feared. Perhaps because images give the impression that one is seeing reality unmediated, viewers don’t have their guards up; they don’t have the same level of skepticism as readers of text. This means images are experienced in a more visceral way than text.<sup>482</sup> We’re less aware of the process of reading them than we are of the process of reading text.<sup>483</sup>

Images are not interpreted in a vacuum. They are linked to cultural narratives that give them meaning and can be positioned in particular ways. For example the Rodney King video was given particular meanings for the jurors in the police officers’ trial. When the video surfaced there was a sort of exhilaration about the fact that there

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<sup>480</sup> Sturken and Cartwright, *Practices of Looking: An Introduction to Visual Culture*. 17.

<sup>481</sup> R. Barthes, *Camera Lucida: Reflections on Photography* (New York: Farrar, Straus and Giroux, 1981), S. Sontag, *On Photography* (New York: Farrar, Straus and Giroux, 1977).

<sup>482</sup> Michael Cole and Helene Keyssar point out that the concept of literacy is applied to print and film in different ways. One can be illiterate or literate in terms of print, but we don’t talk about anyone being illiterate in terms of film. With print, literacy means you know how to *do* something. With film, literacy means, in a sense, that you know how to *appreciate* something. Cole and Keyssar argue that we interact with film on two levels. On the one hand is a set of codes found throughout a film that some know how to “read.” On the other hand is “our everyday scheme for events in the world,” a level on which we experience a film the way we experience things in the world. If a film is structured with a straightforward narrative, anyone can take meaning from it. If a film is less narratively coherent, only a viewer who knows certain film codes can take meaning from it. In straightforward film narratives, there is a sense of immediacy that pulls us in. (M. Cole and H. Keyssar, “The Concept of Literacy in Print and Film,” in *Literacy, Language and Learning: The Nature and Consequences of Reading and Writing*, ed. D.R. Olson, N. Torrance, and A. Hildyard (Cambridge, UK: Cambridge University Press, 1985).)

<sup>483</sup> Valerie Hartouni writes that although we think of seeing as a “physiological event, an automatic, spontaneous, or mechanical process,” it is “rather an act of immense construction,” a “set of learned practices and processes.” V. Hartouni, *Cultural Conceptions: On Reproductive Technologies and the Remaking of Life* (Minneapolis: University of Minneapolis Press, 1997). 12-13.

was “objective proof” this time of police brutality. Most people who saw the video on television were outraged. But in the trial the video was broken into separate frames and in each one the defense lawyers described the officers as using necessary, approved procedures and Rodney King as in control. King was described as bear-like and his body was described as a gun (with a “cocked leg,” etc), resonating with cultural myths of the black male body as dangerous.<sup>484</sup>

Photographic images are never unmediated information. There will always be decisions about framing, angle, and editing, and the explanation and commentary that bracket images, along with the viewing practices and mental frameworks people bring to the task, give them meaning. However, because they give this impression, our reaction to them is less guarded. So, because of images’ air of authenticity, veracity and immediacy, and their potential ambiguity, manipulation with images causes more concern than with text. However, this manipulation isn’t unique to images; it happens with text also.

The worry that images make people feel like they’re directly experiencing an event has also led to the concern that people watching a trial on television will think they have seen the same things as the jury and will expect the jury’s determination of guilt or innocence to match theirs. Television viewers can imaginatively place themselves into the position of the jury because jurors are ordinary people with no

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<sup>484</sup> See K. Crenshaw and G. Peller, “Reel Time/Real Justice,” in *Reading Rodney King - Reading Urban Uprising*, ed. R. Gooding-Williams (New York: Routledge, 1993). See also A. Goodwin, “Truth, Justice and Videotape,” in *Inside the L.A. Riots: What Really Happened -- and Why It Will Happen Again*, ed. D. Hazen (Institute for Alternative Journalism, 1992).

special knowledge or experience.<sup>485</sup> Judge Nancy Gertner, testifying before Congress in 2001, said she worries that people watching trials on television will form strong opinions about what the verdict should be and will become cynical about the legal system if the jury's verdict is different from their own. Of course, television viewers don't experience what the jury experiences; they see both more and less. Judge Gertner explained, "You watch the proceeding on television, you take a bathroom break, you answer the phone, you make popcorn, you miss critical testimony."<sup>486</sup> At the same time, jurors' views of proceedings are limited by evidence rules, criminal procedure and instructions not to watch, read or listen to media.

### Images and irrationality

Manipulation via images causes more concern in part because images are associated with irrationality. Reading and writing are associated with rationality because they're understood to be one step removed from an event; a process involving thinking occurs between a reader and an event and between a writer and an event.<sup>487</sup>

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<sup>485</sup> The framework of a jury may resonate with viewers accustomed to contemporary television formats such as *American Idol* that allow viewers to concretely affect outcomes. For analyses of television formats that let the audience "vote" see S. Holmes, "'But This Time You Choose!'" *International Journal of Cultural Studies* 7, no. 2 (2004); S. Murray and S. Ouellette, eds. *Reality TV: Remaking Television Culture* (New York: New York University Press, 2004); S. Ouellette and J. Hay, *Better Living through Reality TV: Television and Post-Welfare Citizenship* (Malden, MA: Blackwell, 2008); F. Rocha, "'the Decision Is Yours!': TV Globo's Search for a Brazilian God," *Journal of Latin American Cultural Studies* 4, no. 1 (1995).

<sup>486</sup> *Allowing Cameras and Electronic Media in the Courtroom*.

<sup>487</sup> Cultural psychologists Michael Cole and Sylvia Scribner showed that the link between literacy and rationality depends on the social practices that embed literacy. They found that literacy promotes rationality in the context of schooling, but when removed from that context the two are not linked. Cole and Keyssar, "The Concept of Literacy in Print and Film"; Mitchell, "Intention and Artifice"; *Mutual Film Corporation v. Industrial Commission of Ohio*, 456 U.S. (1915); S. Scribner and M. Cole, "Literacy without Schooling: Testing for Intellectual Effects," *Harvard Educational Review* 48, no. 4 (1978), D. Thomson, "Split Decision," *New York Times*, October 7 2004. See also E. A. Havelock,

Though we do “read” or decode images, this process isn’t as apparent to us as is reading text – it’s more immediate and naturalized.<sup>488</sup> This creates problems for images’ role in democratic discourse, because liberal democratic notions of public debate call for rational thinking. The imagined viewer of images – irrational, emotional, immersed rather than reflective – is the opposite of the rational citizen imagined by liberal democratic arguments for government transparency.<sup>489</sup>

The Supreme Court articulated a similar distinction between images and text in *Mutual Film Corp. v. Industrial Commission of Ohio*, a 1915 case upholding film censorship. The Court argued that moving images should not be included under the protection of freedom of the press, explaining, “They are mere representations of events, of ideas and sentiments published and known, vivid, useful and entertaining no doubt, but, as we have said, capable of evil, having power for it, the greater because of their attractiveness and manner of exhibition.” Although the case itself was overturned in the 1950s, that part of the rationale animates contemporary folk theories about images.<sup>490</sup>

### Arguments in favor of cameras in the courtroom

Many journalists, lawyers and politicians extol the benefits of cameras in the courtroom, claiming that visual media can be valuable for democracy. Although they

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"The Coming of Literate Communication to Western Culture," *Journal of Communication* Winter (1980).

<sup>488</sup> Hartouni, *Cultural Conceptions: On Reproductive Technologies and the Remaking of Life*. 12-13.

<sup>489</sup> One can also legitimately ask whether communication not animated solely by rational thought might be valuable in democratic discourse. The majority in *Cohen v. CA*, understood emotion (represented by the phrase “fuck the draft”) to have value in democratic discourse.

<sup>490</sup> *Mutual Film Corporation v. Industrial Commission of Ohio*, 456 U.S. (1915).



express the opposite points of view, there are similarities between the arguments for and against cameras in the courtroom. Both make some sweeping statements about the power of the visual. Both sides point to well-known individual anecdotes as supporting evidence for their arguments. There are examples on both sides, but the effects each side highlights in their examples could have been caused by factors other than cameras. This argument underscores the difficulty of drawing definitive predictive conclusions about the effects of modern media.

#### Cameras will create better public understanding of the judiciary

Camera advocates say television will help people to better understand the judicial system. Some argue that the proliferation of crime-related television fiction has created misperceptions and that televising real trials will correct them.<sup>491</sup> The National Association of Criminal Defense Lawyers (NACDL), although taking the position that cameras should be kept out of courts unless both parties agree to allow them, makes the point that more exposure to real trials will help citizens learn about concepts such as the presumption of innocence and other aspects of defendants' rights, and this will make them better jurors.<sup>492</sup> Judge Nancy Gertner, testifying before Congress in favor of cameras in the courtroom in 2000, said, "It was extraordinary to me as both a litigator and a judge to listen to some of the comments during the O.J.

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<sup>491</sup> The "CSI effect" is a phenomenon thought to make jurors expect sophisticated proof such as fingerprints and analysis of clothing fibers. These types of evidence are television-friendly, but they are more rare in real life. S. Cole and R. Dioso-Villa, "CSI and Its Effects: Media, Juries and the Burden of Proof," *New England Law Review* 41, no. 3 (2007).

<sup>492</sup> B. E. Bergman, "Written Statement of Barbara E. Bergman on Behalf of the National Association of Criminal Defense Lawyers, before the Senate Committee on the Judiciary Re: Cameras in the Courtroom" (2005).

Simpson proceedings. There were people talking about how they believed O.J. Simpson was probably guilty, but not beyond a reasonable doubt. It was a level of sophistication about that concept that I frankly had not heard in the voir dire that I regularly conduct of jurors.”<sup>493</sup> Some, making a classic argument for government transparency, say that if citizens learn more about the justice system, they will be more likely to understand why certain policies are misguided and will demand changes.

In these arguments, the fact that television makes information easy to consume and understand is seen as a benefit because it facilitates government transparency and democratic communication. These arguments hold that images can be associated with rational thought, and that television can create accurate, or at least good faith portrayals. They assume that images and television have a special power; they just see its impact as helpful rather than harmful.

Journalists’ organizations have often claimed that allowing cameras into courtrooms will create more accurate or more meaningful information, because viewing a televised trial is much like actually being there. In a letter to Chief Justice Rehnquist asking for permission to film oral argument in *Bush v. Gore*, The Radio-Television News Directors Association (RTNDA) argued that allowing cameras would provide the country with “unlimited seating” at the event.<sup>494</sup> RTNDA has also argued in amici briefs and letters that permitting cameras into the courtroom will allow people to see trials for themselves and thereby avoid having to rely on “media spinners.” The implication is again that cameras provide a less mediated experience than print.

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<sup>493</sup> *Allowing Cameras and Electronic Media in the Courtroom.*

<sup>494</sup> RTNDA news release, November 27, 2000, “RTNDA Asks U.S. Supreme Court to Allow Radio and Television Coverage of Election Debate.”

RTNDA's contention conflicts with the claim that images are uniquely manipulative. However these two views are linked; both understand images as having strong power because of their immersive qualities.

Senator Arlen Specter argues that cameras would help people understand the Supreme Court's decisions. He argues that in the past several years many recent decisions – not coincidentally, decisions he disagrees with or that strike down legislation he has authored -- have been completely incomprehensible, and that televising oral arguments might help Americans understand these decisions. This notion implies that oral argument holds the key to understanding the Court's decisions, and that reading opinions is not enough. This frames oral argument as a back stage that needs to be made more accessible because the important decision-making takes place there. Many contest this understanding, pointing out that oral argument is only a tiny percentage of the justices' decision-making process and that most of their decision-making takes place during conference and when they are reading the briefs, talking to law clerks, conducting legal research and reading each other's drafts. Oral argument often makes little difference in how the justices vote.<sup>495</sup>

From this perspective, the important part of the Supreme Court's back stage is the Justices' chambers and conference. The written opinions, polished results prepared especially for public consumption, are the front stage. Oral argument sits between

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<sup>495</sup> M. S. Ball, "The Play's the Thing: An Unscientific Reflection on Courts under the Rubric of Theater," *Stanford Law Review* 28 (1975); S. Mosk, "In Defense of Oral Argument," *Journal of Appellate Practice and Process* 1 (1999). Edward Lazarus, a former Supreme Court clerk, argues that the Justices often go into oral argument virtually certain of how they'll vote. E. Lazarus, *Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court* (New York: Penguin Books, 1998).

front stage and back stage. It's not closed or secret, but it's not visible to most people and is not visible on television. This makes oral argument in appellate courts different from jury trials in lower courts, because in appellate court so much information that goes into a decision is gathered and discussed outside that event. In a jury trial, attorneys' arguments and witnesses' testimony are provided only in court, so there is an element of liveness that is important. Justice Scalia captured this element of liveness when, in an opinion in a case about the right to confront the witnesses against you, he referred to the "crucible of confrontation."<sup>496</sup> Oral arguments in appellate courts can function as performances because the real work can get done elsewhere. However, Supreme Court oral argument is not televised, and thus can't be seen by most of the public, giving less reason for performance. It's not pure back stage or pure front stage.

#### Cameras will raise public esteem for courts

Proponents also laud cameras for their potential to raise esteem for courts and give them increased legitimacy. This argument holds that if people understand the complexities of courts' work, they'll respect them more. RTNDA argues that cameras will raise esteem for courts by helping the public accept verdicts that would otherwise have been very unpopular. They usually bring up the Amadou Diallo case in support of this. Diallo was a Guinean immigrant who was shot by New York City police officers when he was standing, unarmed, in front of his Bronx apartment. The police

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<sup>496</sup> *Crawford v. Washington*, 541 U.S. 36 (2004).

officers thought he had a gun and shot him 41 times. This occurred amidst other incidents involving police misbehavior and racial profiling in New York City. Although the police were acquitted, no protests occurred. RTNDA argues that there would have been massive protests or riots when the policemen were acquitted if the trial had not been televised. People were able to watch the whole process and learned how hard it was to prove the policemen guilty beyond a reasonable doubt. Like the OJ example, this example is intended to prove the rule, but in fact, there were multiple factors at work, and it's not clear what television contributed.

This claim that cameras will help people accept verdicts assumes that cameras can provide the most valuable, complete information. This is essentially the opposite of the assumption that television images will be misleading. However, the two views are similar in that they both attribute a special power to images.

#### Suspicion of new communication technologies

Both the pessimistic and optimistic predictions about what cameras in the courtroom will do are connected to a tradition that either vilifies or glorifies new communication technologies. Communication technologies have often inspired both utopian and dystopian fantasies about what they will mean for American life.

When the telegraph emerged in the 1840s, many imagined that this technology's promise of closing time and space would foster moral elevation and facilitate national harmony and world peace. However, some were fearful that unseen threats to the public lurked within this technology, possibly linked to electricity, the

mysterious, intangible force that powered it. The telegraph began to influence newsgathering, and some 19<sup>th</sup> century press criticism strikingly resembles today's media criticism. The London *Spectator* opined on the telegraph's impact in 1889: "The constant diffusion of statements in snippets, the constant excitements of feelings unjustified by fact, the constant formation of hasty and erroneous opinions, must in the end ... deteriorate the intellect of all to whom the telegraph appeals."<sup>497</sup>

The emergence of motion pictures as urban amusements in the 1890s inspired less praise than the telegraph had, partly because their primary consumers for the first two decades were urban immigrant factory-workers. This group was already viewed as morally precarious by reformers who wished urban amusements were more edifying and wholesome and by cultural traditionalists who believed that "culture" was the province of the elite and that this popular form would debase it. Critics worried that the darkness of movie theaters would cause eyestrain, destroy regular social interactions, and encourage inappropriate sexual behavior. However, some saw possibilities for moral instruction and Americanization through motion pictures.<sup>498</sup>

Simultaneous hope and fear have accompanied the development of other communication technologies, from radio to the internet. This dynamic illuminates the complicated and ambiguous promise of human communication itself. The arguments for and against cameras in the courtroom don't stem entirely from the predictable strains of hope and fear attached to communication technologies. However, there is a thread of this tradition running through the cameras in the courtroom debate. Cameras,

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<sup>497</sup> Czitrom, *Media and the American Mind: From Morse to McLuhan*. 4-19.

<sup>498</sup> *Ibid.* 47.

by producing the impression of unmediated representation, create the promise of closing distance between people and events, but this promise, and the practices with which it is associated, arouse suspicions. The unique role of the judiciary in the United States' constitutional system accentuates these suspicions because for the judiciary, the influence of public opinion and the closing of distance can be problems.

### Conclusion

There are good reasons to be wary of cameras in the courtroom, but these reasons are not as overpowering as sometimes assumed. In this chapter I have explained how some of the arguments underlying the ban are based on unsupported assumptions and folk theories about media effects. Cameras are viewed as a problem in trials both because of the unique needs of the judiciary – the requirements for a fair trial and the need to maintain judicial legitimacy– and because of the assumptions made about cameras.

Many arguments against cameras in the courtroom have some validity because photographs have some distinctive qualities. For viewers, they create the impression of unmediated communication, and for subjects, they create the cognizance of a mass audience for one's physical likeness. However, images don't always do the things they're accused of doing – such as misleading and sensationalizing -- and other types of media sometimes do. It's often not a technology or communicative mode that causes problems, but the practices that embed them. The competitive commercial media structure encourages aggressive, sensational or entertainment-oriented

newsgathering and production practices. These practices are often associated with images, but are not unique or inevitable to them.

In the cameras in the courtroom debate, images are often treated as symbolic of a broader set of cultural, economic or political forces that have created the modern instantiation of transparency. Concerns about images in this debate are connected to questions about whether government transparency is possible and about whether ordinary people can understand the complexities of modern governance. These concerns are especially pronounced when the information pertains to the judiciary, which needs a certain level of insulation from the public, both in its work and in its appearance. Fair trials and the judiciary's constitutional role depend on this.



**CHAPTER FIVE: THE PERSONALIZATION OF THE JUDICIARY:  
SUPREME COURT JUSTICES' PUBLIC IMAGES**

The information we receive about government is often shaped by modern transparency practices, among which is personalization. In my scheme, the personalization of government transparency means two things: first, a focus on individual office-holders rather than political parties or institutions, and second, an understanding that these office holders' private lives are relevant to their public duties. Personalization does not fit well with the judiciary, and judges have generally resisted it. Judges are supposed to represent the Constitution rather than particular constituencies, and their legitimacy is rooted in their dispassionate method of reasoning. Thus, they're expected to downplay their human selves, particularities and situatedness. However, the last few decades have brought modest yet mounting evidence of the personalization of the judiciary; judges increasingly present themselves and are presented by others as individuals with personal and political views. Many avoid this practice, but it is gradually becoming more common. In this chapter, I argue that several developments of the past few decades can be viewed as linked to each other by the part that they play in advancing the personalization of the judiciary. In this chapter I address this dynamic in relation to the Supreme Court Justices.

The personalization of the judiciary has been encouraged by at least three forces. First, Supreme Court decisions about controversial topics and the polarizing discussions about these decisions, filtered through the modern transparency apparatus, have sharpened and made more apparent the tension between the federal judiciary's constitutional role and the principle of majoritarianism. This is also the tension between law, or power subordinated to rules, and politics, or power that is not similarly constrained. Second, the trends that characterize communication about other areas of government, including cynicism, anti-elitism, commercial competition, infotainment and orientation towards the public, have begun to influence communication about the judiciary, just later and more tentatively. Third, Supreme Court Justices have been venturing into cultural arenas they previously avoided, in some cases in an attempt to defend themselves and the rest of the judiciary from attacks by elected officials and the public. This strategy is ironic, because it attempts to combat a problem related to personalization with more personalization.

In Part I, I discuss personalization and the reasons the judiciary has traditionally resisted it. In Part II, I discuss three developments I see as constituting the personalization of the judiciary: the justices' more frequent and vigorous engagement with the general public, a growing tendency to discuss judges as individuals and even as personalities, and the explosion of dissents and concurrences in the Court's opinions. In Part III, I discuss how these changes have been enabled and encouraged and what they mean.

Ultimately I think that these changes should be welcomed or at least tolerated, but nuance is needed to preserve an understanding of the judiciary that includes both its apolitical and political elements. However, my main purpose is not to condemn or praise the personalization of the judiciary, but rather to identify its contemporary manifestations and to explain the stakes involved. This development is interwoven with many of the broad cultural and political changes that I've discussed in previous chapters, and thus, it's not possible to stop it by prohibiting specific practices any more than it is possible to depoliticize Supreme Court confirmations by banning television cameras.

### **Part I: Personalization and judicial resistance**

The democratic ethos that has accompanied democratic structural changes in the United States has embedded the idea that communication and information always strengthen democracy, and that politicians should connect with the public on a personal level. Elected officials' efforts to win public approval involve a constant stream of communication, and this often includes trumpeting aspects of their personalities and private lives. As party loyalty has declined and New Deal-era class-based ideological alliances have fractured, personal qualities like trustworthiness have been deemed more salient. Personal appeals aren't just for campaigns; politicians try to connect with voters to boost their popularity while they're in office in order to win the public support that is now essential to pushing their policy agendas. High approval ratings work as political capital. The democratic cultural ethos favors politicians who

demonstrate that they are ordinary people, not “elites.” The commercially rooted journalistic practices that favor “digging for dirt,” the emphasis on trustworthiness, and the possibility of cowing opponents through scandal ensure that aspects of politician’s personal lives that they don’t want exposed will also be publicized.

Personalization pushed to an extreme can turn into celebritization. Many have noted that politicians’ public images have been converging with the conventions of entertainment celebrity.<sup>499</sup> An old but still useful definition of celebrity holds that it is the quality of being known for being well known.<sup>500</sup> Today, the industrial, social and aesthetic elements of celebrity have infused not just the world of entertainment, but also the worlds of politics, sports, art, architecture, academia and cooking, to name a few. Celebrities’ fame and familiarity come to eclipse their actual accomplishments in the public eye, so that their entire lives become performances. Josh Gamson writes that since the 16<sup>th</sup> century, fame has entailed a “well developed notion of individuality.”<sup>501</sup> Celebrities are differentiated by their personalities and thus must constantly perform their personalities in order to remain distinctive.<sup>502</sup> Today, the information we learn about celebrities often concerns their personal relationships, child rearing, pets, clothes and vacations.

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<sup>499</sup> D.J. Boorstin, *The Image: A Guide to Pseudo-Events in America* (New York: Athenium, 1987); J. Gamson, *Claims to Fame: Celebrity in Contemporary America* (Berkeley: University of California, 1994); M. Orth, *The Importance of Being Famous: Behind the Scenes of the Celebrity-Industrial Complex* (New York: Henry Holt and Company, 2004); R. Schickel, *Intimate Strangers: The Culture of Celebrity* (Garden City, New York: Doubleday & Company, Inc., 1985).

<sup>500</sup> Boorstin, *The Image: A Guide to Pseudo-Events in America*. 57.

<sup>501</sup> Gamson, *Claims to Fame: Celebrity in Contemporary America*. 18.

<sup>502</sup> Boorstin, *The Image: A Guide to Pseudo-Events in America*. 65.

The creation and maintenance of celebrity requires visibility and packaging, and this necessitates a stable of professionals, including handlers, press agents, and stylists. The celebrity industry also encompasses the media outlets for which celebrity news has been a boon in an age of cutthroat competition. In the 1970s, more and more magazines and newspapers found they could achieve high sales by focusing on “people” and “personality,” and there is always more television airtime to fill.<sup>503</sup>

The celebrity industry took off in the early 20<sup>th</sup> century, when Hollywood studios carefully managed their stars’ public images. In the beginning, the desired image was glamour, but Gamson shows that in the 1930s stars began to present themselves as “more and more mortal,” photographed in their homes or playing with their children, conveying that their values and activities were the same as those of “ordinary people.” This created a greater sense of intimacy with fans. Gamson argues that this shift happened because the film studios’ publicity management and “celebrity machine” had become frequent topics of public discussion, and this evoked questions about whether celebrities were authentic and deserved their fame or whether they were purely manufactured. Stars and their agents counteracted this skepticism by inviting the public to see who they “really were” beneath the publicity, as if to say, because there is so much image management, it’s important that you get a glimpse of the real person beneath it.<sup>504</sup> This dynamic has continued up to the present.<sup>505</sup>

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<sup>503</sup> Gamson, *Claims to Fame: Celebrity in Contemporary America*. 43.

<sup>504</sup> Ibid. 29-36.

<sup>505</sup> Ibid. 54. Today, acknowledgement of image-management, and even self mockery related to it, is part of most celebrities’ public performances. This is part of showing audiences that they’re down to earth “when you get to know them.”

Politics has acquired many of the trappings of celebrity, including the teams of image management professionals, personal revelations and attempts to project ordinariness. Many associate the celebritization of politics with the entry of entertainment stars into the political arena. However, the other part of it is that the production process around politics has come to resemble the entertainment production process. Politicians seek visibility, their personalities and relationships are discussed and scrutinized, and they cultivate the impression of intimacy, frankness and spontaneity. The focus on individuality and personal life make celebritization similar to personalization, but celebritization entails additional dynamics. Celebrity means that fame and familiarity, particularly when attached to personality, eclipse accomplishments, and that visibility is sought as an end in itself. Not all personalization is celebritization.<sup>506</sup>

There is a certain aspect of democratic representation that seems to fit organically with personalization, or at least makes the personalization dynamic understandable. Representatives are structurally linked to the public. While conceptions of proper representation vary,<sup>507</sup> representatives always have to take some type of heed of their constituents' needs because they'll be held accountable in elections. However, this doesn't have to entail personalization. The push for self-

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<sup>506</sup> Ibid. 187-196. John Gamson does not focus on political celebrity, but in a short section he points to a problem – beyond the typical criticisms of triviality and shallowness – with celebrity politics in a democracy. In his study of contemporary celebrity, Gamson found that fans often recognize the artifice of celebrity but make a game of figuring out what is fake and what is real, or cultivate a postmodern knowing cynicism about it. The “true believers” who thought celebrities were genuinely talented and personally authentic were rare. Gamson points that that this is an insidious dynamic for democratic politics, as participation entails a level of recognition that it's not all a game and that there is something real going on – concrete policies, for example – in addition to the artifice.

<sup>507</sup> On representation see H. F. Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1967).

exposure and ordinary person credentials can lead politicians to elaborately package themselves, clouding public understanding of their goals and decisions. The urge to degrade elites, to bring them down to our level, can leave officials with no moral authority to do what we want them to do politically. It also ill-prepares people for moments when public policy matters are too complex for common understanding.

While the anti-elitist ethos and personalization of politics pose some problems for the elected branches, these trends fit somewhat comfortably with institutions structurally linked to public wishes. The same is not true for the federal judiciary; outside of the appointment process the federal judicial role is designed to resist public influence. Personalization aggravates the tension in the judiciary between the intended universality of the law and the particular individuals who make and interpret it. Judicial decisions are ideally supposed to come from an interpretation of law constrained by rules, not who judges are as individuals. Thus, judges in some ways have to strive to be non-persons. The tension arises because judges, of course, *are* people, but their role means doing what they cannot to let this entirely dictate their decisions.

Judges' avoidance of personalization is related to the way they maintain legitimacy. While elected officials seek legitimacy through public approval – often by appearing accessible and “ordinary” – judges traditionally maintain legitimacy through distance rather than familiarity. This distance mutes their particularities and personhood and thus enables them to represent impersonal authority. This distance

also means that the only way they can be evaluated is by the strength and internal consistency of their reasoning, and this is the backbone of judicial legitimacy.

Judges traditionally maintain this distance by limiting their communication with the public. Their main points of contact are their published opinions.<sup>508</sup> The public doesn't learn about the work the justices do to reach their decisions, the kind of information expected from the legislative and executive branches. Justices' law clerks are admonished to maintain strict secrecy about what they see and hear during their year on the Court. Until recently, clerks generally followed these rules. The justices' conference, in which they discuss their positions on cases, is closed to everyone. The only records of these meetings and of the back-and-forth of opinion drafting that follows them can be found in clerks' recollections and in the justices' personal papers, whose level of detail and accessibility to the public vary widely.

It's often said that the secrecy of the justices' deliberations is necessary for the same reason executive branch officials need secrecy: it allows for candid deliberations. If participants feared their words would be published, the argument goes, they would lose the benefits of free discussion. Some counter that the implied parallel between the executive and judicial branches makes no sense, because judicial decisions, unlike business, political and military decisions, should be based on reasons "that can be stated publicly without embarrassment."<sup>509</sup> This reasoning is the cornerstone of judicial legitimacy. However, the secrecy doesn't just hide the reasons themselves. It also hides the decision-making process, which can involve refining

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<sup>508</sup> They have communicated more with the professional legal community, publishing law review articles and books about legal topics, and speaking at bar association functions.

<sup>509</sup> R.A. Posner, "The Courthouse Mice," *The New Republic*, June 12, 2006.



ideas and changing one's mind. This may be less likely in the spotlight. It's also the most humanizing aspect.<sup>510</sup>

In limiting their communication with the public to their published opinions, the justices ask the public to look only at their logic, without any of the messiness, irrationality and cajoling of the process.<sup>511</sup> The goal is for their publicly stated rationales to be the only ones attributed to them.<sup>512</sup> It is of course the messiness and irrationality of decision-making, and the gap between publicly stated reasons and real motivations, that transparency measures in the other branches aim to reveal. This brings the public face to face with officials' personal and political preferences and subjects the process to public pressure, and these effects are what the Supreme Court seeks to avoid.

Judges' avoidance of modern transparency practices helps them avoid personalization. However, judicial transparency and the personalization of the judiciary are becoming more acceptable and less rare. In the last few decades, and particularly in the last few years, judges have become more visible and identifiable as individuals. They present themselves, and are presented by others, as real people. In the next section I'll describe some of the components of this change.

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<sup>510</sup> T.C. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk* (Palo Alto, CA: Stanford University Press, 2006); Posner, "The Courthouse Mice"; A. Ward and D.L. Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court* (New York: New York University Press, 2006). R.A. Posner, *The Federal Courts: Crisis and Reform* (Cambridge, MA: Harvard University Press, 1985). E. Lazarus, "The Supreme Court's Excessive Secrecy: Why It Isn't Merited," *FindLaw*, September 30 2004.

<sup>511</sup> T. Mauro, "The Supreme Court and the Cult of Secrecy," in *A Year in the Life of the Supreme Court*, ed. R. Smolla (Raleigh, NC: Duke University Press, 1995).

<sup>512</sup> A. Dershowitz and R.A. Posner, "Dialogues: The Supreme Court and the 2000 Election," *Slate*, July 10 2001. In this exchange, Professor Alan Dershowitz argues that judges should be candid about the reasons for their decisions, and Judge Richard Posner argues that it is acceptable and unavoidable for judges to have unstated extralegal reasons for their opinions as long as legitimate legal reasons do exist.

## **Part II: Components of the personalization of the judiciary**

During the late twentieth century and especially during the last ten years, the Supreme Court Justices' standards of revelation have been changing. Even without television cameras in oral arguments, the justices have been more visible to the public, and this visibility has involved personalization. The changes include both the way the Supreme Court Justices present themselves and the way others discuss them. Treating the justices as individuals can sometimes contribute to highlighting their political beliefs and accentuating the links between these beliefs and the law.

These changes have coincided with the other changes discussed earlier – growing expectations of personal revelations in public life, close scrutiny of officials' behavior, the Supreme Court's centrality in contemporary debates about polarizing subjects and the inseparability of government transparency from commercial infotainment, personalization, performance and public appeals. We could say that the same changes taking place in the rest of the political culture and institutions have been taking place in the judiciary, just more slowly and tentatively. However, these changes are a bigger step for the judiciary than for the other branches.

### Justices' communication with the public

In the last ten years, the Supreme Court Justices have begun to communicate more with the public outside of their opinions, and this often appears to be an attempt to defend themselves. This is striking because the justices have usually avoided

explaining themselves outside of their opinions, which purport to provide the reasons for decisions. The act of defending oneself to the public implies that one needs public approval. While it's important, for the Court's legitimacy, that the public respect its decisions, judges move into new territory when they go further than their decisions to explain themselves: they come closer to seeking public approval. Of course, federal judges can make whatever decisions they see fit; they're difficult to remove from office. But the contemporary democratic ethos and the intense public spotlight focused on the Court have elevated the need for legitimation and are leading the Court towards a concern with public approval.

In engaging with the public and making themselves more visible and accessible, the justices are seeking legitimation in a new way. The traditional need for distance and impartiality is still there, but an additional avenue has been opened up. This new avenue of legitimation is more consonant with today's democratic ethos, in which aloofness and elitism engender mistrust. However, while the democratic ethos and legitimation through public approval were absorbed fairly smoothly into the legislative and executive branches, the federal judiciary has often resisted them. Seeking visibility and engagement with the public accentuates personalization and links the justices with entertainment forums that they previously avoided. This is the way to communicate with the public today.

In the past few decades and particularly in the last five years, the Supreme Court Justices have given speeches whose intended audiences seem to be the broad public rather than just the legal community. Furthermore, many of the justices' recent

speeches appear to be responses to strong criticisms of the judiciary and threats to judicial independence. During the first few years of this century, Supreme Court decisions involving gay rights, the death penalty, eminent domain and the separation of church and state have solidified some conservatives' view that the judiciary is their enemy.<sup>513</sup> This built on the distrust and bitterness already churned in the second half of the 20<sup>th</sup> century by the Court's rulings touching on criminal procedure, race, abortion, speech and school prayer. These controversies brought the judicial role to the fore of public debate, raising the stakes associated with the tension between constitutional adjudication and majoritarianism and between state and federal power, and inspiring questions about the Court's legitimacy. At the turn of the 21<sup>st</sup> century, criticism of the justices from both the public and the Congress grew increasingly sharp, and sometimes it was the justices' distance from the public – their “elitism” -- that was attacked.<sup>514</sup>

Through the 1990s and early 2000s, conservative talk radio hosts depicted judges as godless elitists intent on destroying American values. Congress sought to curtail courts' power with court-stripping measures and tightening of sentencing guidelines. In 2003, Congress passed a measure mandating that when a Judge reduces a sentence, that Judge's name be reported to Congress.<sup>515</sup> Republican Senators, who were then in the majority, focused on the concept of “judicial tyranny” in part to

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<sup>513</sup> *Kelo v. City of New London*, 454 United States 469 (2005); *Lawrence v. Texas*, 539 United States 558 (2003); *McCreary County v. ACLU of Kentucky*, 545 United States 844 (2005); *Roper v. Simmons*, 543 United States 551 (2005).

<sup>514</sup> J. D. Hunter, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991).

<sup>515</sup> *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003*, 108-21, 108th Congress.; J. Rosen, "It's the Law, Not the Judge," *Washington Post*, March 27 2005.

strengthen their argument for eliminating the filibuster as a minority tool for stopping judicial confirmations.

The wave of criticism of the judiciary reached a crescendo in the spring of 2005. Several recent decisions had been unpopular with conservative groups. Conservatives were also furious that several judges refused to intervene in the March 2005 case of Terry Schiavo, a woman in a “persistent vegetative state,” whose husband and parents disagreed over whether her life-sustaining feeding tube should be removed. In some ways, this case was a triumph for the rule of law, because the judges who handled the case, although they received threats of impeachment and death, rejected the legislation Congress had crafted to ensure a particular result in this case. However, this episode also illustrated contempt for judicial independence.

The Schiavo episode was just one of many such illustrations in the spring of 2005. In April 2005, a group called the Judeo-Christian Council for Constitutional Restoration hosted a conference entitled “The Judicial War on Faith.”<sup>516</sup> *Men In Black: How the Supreme Court is Destroying America*, became a *New York Times* bestseller. The author recommends impeachment, court stripping and term limits.<sup>517</sup> After a judge was murdered in Atlanta and a judge’s family was murdered in Chicago, both by disgruntled defendants, Senator John Cornyn made a speech on the Senate floor in which he seemed to blame the wave of violence on judges’ “political decisions.” He said, “It builds up and builds up and builds up to the point where some

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<sup>516</sup> <http://www.StopAcivistJudges.org>

<sup>517</sup> M. Levin, *Men in Black: How the Supreme Court Is Destroying America* (Regnery Publishing, Inc., 2005). D. Lithwick, "The Limbaugh Code," *Slate*, April 1, 2005.

people engage in violence.”<sup>518</sup> Shortly afterwards, Congressman Tom DeLay stated in a speech “Judges need to be intimidated.” A group called “J.A.I.L 4 Judges” succeeded in placing on a South Dakota ballot a measure designed to limit judicial independence. The measure did not pass, but if it had, it would have eliminated judicial immunity (which protects judges from personal liability for their decisions), and created a special Grand Jury to indict judges for a variety of offenses. J.A.I.L. 4 Judges also pickets judges’ homes and files Freedom of Information requests for information about judges’ personal lives and property.<sup>519</sup>

These attacks seemed to move from the common conservative criticism of “liberal activist judges” to criticism of the entire judiciary. Behind this type of criticism is the idea that even conservative judges will be seduced by liberal ideas once on the court, and so the only way to repair the situation is to eliminate judicial independence.

These criticisms of the judiciary were not unprecedented. Congress, the President and the public attacked the Supreme Court in the 1930s for striking down New Deal legislation, and President Roosevelt sought to bend the Court to his agenda with his court-packing plan.<sup>520</sup> The Warren Court’s desegregation and criminal procedure cases in the 1950s and 1960s inspired “Impeach Earl Warren” signs and Justice Hugo Black wore a bulletproof chest protector when he visited his home state

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<sup>518</sup> J. Files, “Year after Shootings, Calls to Increase Judges’ Security,” *New York Times*, March 19 2006; A. Liptak, “Public Comments by Justices Veer toward the Political,” *New York Times*, March 19 2006.

<sup>519</sup> B. Brandenburg, “Rushmore to Judgement,” *Slate*, March 14 2006. <http://www.jail4judges.org>. The Justice at Stake Campaign sought to defend judicial independence. <http://www.justiceatstake.org>

<sup>520</sup> B. Cushman, *Rethinking the New Deal Court: The Structure of a Constitutional Revolution* (Oxford: Oxford University Press, 1998). G. E. White, *The American Judicial Tradition: Profiles of Leading American Judges* (Oxford: Oxford University Press, 1998).179-201.

of Alabama.<sup>521</sup> What is new in the 21<sup>st</sup> century is that the justices responded by reaching out to the public.

Several of the justices gave speeches during 2005 and 2006 addressing the public criticism. Sandra Day O'Connor was particularly active, defending judicial independence and castigating the critics on numerous occasions in what some referred to as her "stump speech." She began her efforts before she retired from the Court in the summer of 2005 and continued them afterwards. Although Justice O'Connor's retirement has given her more latitude to become a public personality, this is still a new posture for a retired justice. Many of the active justices have joined her in these efforts. O'Connor warned an audience at Georgetown University that thwarting judicial independence had helped dictatorship flourish in developing and Communist countries. She also entreated fellow judges to "make a friend out of members of Congress... Try to help them understand the needs of judges. It's much harder to turn a cold shoulder on someone you know."<sup>522</sup> In several speeches, sometimes accompanied by other justices, she argued that people using the phrase "activist judges" don't understand the role of courts. Justice Ginsberg gave a March 2006 speech in South Africa criticizing threats to judicial independence.<sup>523</sup> Anthony

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<sup>521</sup> R. Citron, "Strife-Cycles," *Slate*, April 15, 2005. R.K. Newman, *Hugo Black: A Biography* (New York: Fordham University Press, 1997).

<sup>522</sup> Liptak, "Public Comments by Justices Veer toward the Political"; J. Shafer, "O'Connor Forecasts Dictatorship," *Slate*, March 13 2006. N. Totenberg, "O'Connor Decries Republican Attacks on Courts," (2006).

<sup>523</sup> R.B. Ginsburg, "'A Decent Respect to the Opinions of [Human]Kind': The Value of a Comparative Perspective in Constitutional Adjudication" (Constitutional Court of South Africa 2006).

Kennedy gave a speech criticizing editorialists who don't read judicial opinions before reporting on them, apparently referring to the *Wall Street Journal*.<sup>524</sup>

The justices' early 21<sup>st</sup> century speeches were novel because they addressed the broad public and also because they were pointed about matters related to contemporary political discourse. They responded fairly directly to critics in Congress and in the public, and refuted their arguments. Justice Ginsburg told an audience that both she and Justice O'Connor had received death threats because they had cited foreign courts' decisions. She then explained that judges use a diverse array of sources in making decisions, and that foreign law could be valuable even though it was not binding precedent. She also mentioned a failed bill in Congress that, if successful, would have prohibited citing foreign law, and said she found it "disquieting" that its proponents had "attracted sizable support," and that she was concerned that "they fuel the irrational fringe."<sup>525</sup> Supreme Court Justices have made politically tinged speeches before; Clarence Thomas went on what has been called a post confirmation "thank you tour," speaking to very conservative law, policy and watchdog groups, and has continued this practice, as have other justices.<sup>526</sup> The wave of speeches of the past several years, however, moves towards addressing a more popular audience and joining the popular discourse.

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<sup>524</sup> Liptak, "Public Comments by Justices Veer toward the Political"; D. Lithwick, "Courting Attention," *Washington Post*, April 9 2006. "Swing Justice: Anthony Kennedy Attacks the Media and Wonders If Liberals Hate Him," *Wall Street Journal*, April 6 2006.

<sup>525</sup> Liptak, "Public Comments by Justices Veer toward the Political"; Ginsburg, "'A Decent Respect to the Opinions of [Human]Kind': The Value of a Comparative Perspective in Constitutional Adjudication".

<sup>526</sup> K. Merida and M.A. Fletcher, *Supreme Discomfort: The Divided Soul of Clarence Thomas* (New York: Doubleday, 2007). 227-231.



In 2009, Justice O'Connor launched a web site called "Our Courts," which explains the role of courts in the American Constitution.<sup>527</sup> She promoted the site on television shows such as the *Daily Show* and *Good Morning America*, explaining that she created it because she was appalled to learn how little Americans know about courts and the constitutional system of government. On the *Daily Show*, she said, "We heard a lot from congress and the public about activist judges, secular, godless humanists telling us what to do. I didn't see it that way and I thought perhaps a lot of Americans had stopped understanding about the three branches of government and actually, the Annenberg Foundation took some polls, and only a third can name the three branches."<sup>528</sup>

Justice O'Connor has been at this for several years. Her book *The Majesty of the Law*, published in 2003, is written in language clearly aimed at a lay audience, and often reads like a defense of the Court. Justice O'Connor defends the composition of the Court's docket, the production of fragmented opinions and the practice of citing international law. On several occasions she mentions that judges and justices sometimes feel "underappreciated."<sup>529</sup>

These examples don't qualify as a publicity onslaught by today's standards. They're very modest compared to the efforts of the other branches and interest groups. However, they constitute a significant step for the judiciary. Dahlia Lithwick argues that the justices want to "join the national conversation," but the typical channels used

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<sup>527</sup> <http://www.ourcourts.org>

<sup>528</sup> *The Daily Show*, March 3, 2009.

<sup>529</sup> S. D. O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*, ed. Craig Joyce (New York: Random House, 2003).

to do so -- blogs, editorials, regular television appearances – aren't viewed as appropriate for them, so they use the less direct channel of speeches "with an assist from the media."<sup>530</sup> In other words, justices make speeches to small audiences with the knowledge that journalists will report on what they said. This strategy allows them to engage with the public while keeping their distance at the same time.<sup>531</sup>

The lack of established press routines for how to report these judicial speeches indicates their novelty. After one O'Connor speech, several liberal bloggers, happy to see that a justice was rebuking Republican officials, complained that the press was not giving the speech enough coverage. Journalist Jack Shafer responded to this criticism with the argument that the undercoverage was not a cover-up of O'Connor's criticisms, but rather, demonstrated that journalists are simply not accustomed to covering a former justice. No one was sure whether her remarks were important news. Shafer wrote that O'Connor was "feeling her way" towards a space where she could speak her mind without being too political, a new space for her.<sup>532</sup>

The justices have also begun to give more media interviews. This happened in the past but it was rare. Mike Wallace interviewed Justice William O. Douglas about his views on freedom of expression in 1958. Nina Totenberg interviewed William

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<sup>530</sup> Lithwick, "Courting Attention."

<sup>531</sup> In April 2004, Antonin Scalia caused a stir when he had a Federal Marshall demand that a reporter erase a digital recording she had made of a speech he gave because he does not allow recording. The Department of Justice later conceded that the Marshall had violated federal law by doing this. Justice Scalia usually bars television cameras from his public appearances but his policy on digital audio recorders has fluctuated. He is happy for journalists to attend his speeches and report on them. This suggests that Justice Scalia wants to engage with the public, but in a less direct manner that comports with the traditional expectations of a Supreme Court Justice. The categories parallel the Supreme Court's stances in the cameras-in-the-courtroom debate: text is allowed, video is forbidden, and audio is placed somewhat inconclusively in between them. D. G. Savage, "Scalia's Tape Tactics at Issue," *Los Angeles Times*, April 9 2004.

<sup>532</sup> Shafer, "O'Connor Forecasts Dictatorship."

Brennan in 1987, a few years before he retired, about a range of subjects. In introducing the interview with Brennan, NPR's announcer began, "It's rare for a Supreme Court Justice to answer questions about his work, but in an unusual series of interviews with NPR's Legal Affairs Correspondent Nina Totenberg, Brennan discussed his legal philosophy, and his life on and off the bench." Brennan discussed his relationships with other justices, his daily regimen, and the suddenness of his second marriage, upon the death of his first wife, to his longtime secretary. He also talked about why he continued to dissent in cases involving the death penalty, why he had changed his mind about the constitutionally permissible limits on obscenity, and how he reconciled his religious views with his judicial opinions. He defended the language of *Cooper v. Aaron*, a desegregation case in which Brennan's majority opinion stated that the Supreme Court's decisions were the supreme law of the land and states had to obey them.<sup>533</sup>

Recently, these interviews have become more common and many humanize the justices. The justices sometimes appear to be trying to show that they are ordinary human beings rather than "elites." In October 2006, Justice Ginsberg invited Mike Wallace into her chambers for an interview. She explained the process of selecting applications for review and reading the briefs to prepare for oral argument. She talked about collegiality on the Court and her friendship with Antonin Scalia, and said she was troubled by the fact that the public doesn't always understand the Court, pointing

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<sup>533</sup> N. Totenberg, "Interview with William J. Brennan" (1987).

out that, contrary to what some think, “none of us can project our will.”<sup>534</sup> In 2008, Justice Scalia sat for interviews with C-SPAN, NPR’s *All Things Considered*, PBS’s *Charlie Rose*, and CBS’s *Sixty Minutes*. These were scheduled in conjunction with the release of his new book, *Making Your Case: The Art of Persuading Judges*, but they touched on Justice Scalia’s personal life and his views on legal issues. In the *Sixty Minutes* interview, Scalia and journalist Leslie Stahl strolled through his childhood neighborhood in Brooklyn, visited his elementary school and talked about what it was like to be an only child. They also discussed his views on *Bush v. Gore*, abortion and torture.<sup>535</sup> Justice Scalia has taped other interviews with outlets ranging from the *Today Show* to the *National Review*. All of the Supreme Court Justices of the last ten years, except for the notoriously press averse Justice David Souter, have given occasional press interviews during the past few years.

Chief Justice John Roberts in particular seems to be comfortable in the public eye and adept at public relations. In November 2006, he appeared on an episode of *Nightline* taped at the University of Miami. After posing for pictures with the women’s basketball team, Roberts sat for an interview with legal affairs reporter Jan Crawford Greenburg. He talked about the justices’ collegiality, his children, the job of assigning opinions, and his support for “judicial minimalism” and “restraint.”<sup>536</sup> Dahlia Lithwick writes that unlike Justice Scalia, whose “contempt for the media crashes up against his desire for a voice in the broader national conversation about law,” Justice Roberts has recognized that the media can be helpful in disseminating

<sup>534</sup> S. Conroy, "Madame Justice," *cbsnews.com*, (2006).

<sup>535</sup> Interview with Lesley Stahl. "Justice Scalia On The Record." *60 Minutes*. April 27, 2008.

<sup>536</sup> J.C. Greenburg, "Roberts Says High Court Not About 'Political Preferences'" (ABC News, 2006).

ideas about judging.<sup>537</sup> Justice Roberts' approach is similar to the other branches' approaches: officials provide information to the public, but in doing so, they are transmitting the messages they want the public to hear rather than providing a clear window onto their work. Some have pointed out that, although Roberts has tirelessly disseminated the message of judicial minimalism and restraint, in practice, he often appears to be more devoted to pursuing a conservative understanding of law.<sup>538</sup> What is important for this discussion is that he is publicly campaigning for his view.

Justices' recent autobiographies continue the trend of engaging with the public. Some justices have written memoirs in the past, but they weren't the intimate, emotionally revealing documents that memoirs have become today, and they rarely discussed the Court's work.<sup>539</sup> William O. Douglas broke these barriers. He published a memoir in two installments, *Go East, Young Man: The Early Years* and *The Court Years: 1937-1975*, that provided a window into his emotional life and volunteered unvarnished accounts of his experiences on the court.<sup>540</sup> This was fitting for Douglas, the first Supreme Court justice with a notorious personal life. He cultivated his image as an individualist, leading one commentator to label him "the anti-judge."<sup>541</sup> Douglas

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<sup>537</sup> ABC News: Nightline Interview with Chief Justice John Roberts, November 13, 2006; D. Lithwick, "The High Court Goes Courting," *Slate*, November 14, 2006.

<sup>538</sup> J. Toobin, "No More Mr. Nice Guy: The Stealth Activism of John Roberts," *The New Yorker*, May 25 2009.

<sup>539</sup> Jeffrey Rosen writes that earlier justices published short fragments of memoirs, but they were not particularly personal or revealing. Chief Justice John Marshall wrote an "autobiographical sketch," some 19<sup>th</sup> century justices wrote "autobiographical fragments," and Justice Hughes wrote "autobiographical notes." Earl Warren wrote a memoir that did discuss the Court's work, but it was restrained. These memoirs didn't show who the justices were as people. J. Rosen, "Judicial Exposure," *New York Times*, January 29 2006.

<sup>540</sup> W. O. Douglas, *Go East, Young Man: The Early Years* (New York: Random House, 1974); W. O. Douglas, *The Court Years: 1939-1975* (New York: Random House, 1980).

<sup>541</sup> White, *The American Judicial Tradition: Profiles of Leading American Judges*. 369-419.

was married four times, twice to women more than forty years his junior, prompting Congressional resolutions calling for investigations into his character. He also spearheaded projects that placed him in the public eye and took him outside of the legal realm, such as leading a hike to protest a new highway's encroachment into a wilderness area and traveling to the Soviet Union in 1955 to take pictures and write an account for *Look* magazine.<sup>542</sup> In a way, Douglas was a celebrity justice. However, he was known as much for his unapologetically liberal decisions on the court as for his personal life.

Douglas' tendency to trumpet his personality and politics was reflected in his work on the Court. He insisted on making his views known in each case, refusing to seek consensus by softening his stances. Some of his colleagues reported that he often seemed to try to make it impossible for anyone to agree with him. Douglas was thoroughly a legal realist, often barely attempting to hide the ideological dimensions of his opinions. For Douglas, the constraints on judges were not institutional or doctrinal, but rather came from within the judge, from personal integrity and philosophical outlook.<sup>543</sup>

Few justices have followed Douglas' lead in writing a modern memoir. Chief Justice Rehnquist, aligning himself with the older tradition, said he would not write a

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<sup>542</sup> B. A. Murphy, *Wild Bill: The Legend and Life of William O. Douglas* (New York: Random House, 2003). 362-377; "September Song," *Time* July 29 1966. M. Urofsky, "Conflict among the Brethren: Felix Frankfurter, William O. Douglas, and the Clash of Personalities and Philosophies on the United States Supreme Court," *Duke Law Journal* 71 (1988). White, *The American Judicial Tradition: Profiles of Leading American Judges*. 369-419.

<sup>543</sup> White, *The American Judicial Tradition: Profiles of Leading American Judges*. 386-414.

memoir because Judges should not reveal their personalities in public.<sup>544</sup> Justices O'Connor and Thomas both published memoirs in the past few years. O'Connor's, *Lazy B*, written with her brother H. Alan Day, focuses on her childhood and is made up largely of folksy anecdotes that don't reveal much about her personality. She also wrote a children's book about her childhood horse, Chico.<sup>545</sup> Thomas' memoir, *My Grandfather's Son*, covers his entire life, including his childhood, college years, early career and contentious confirmation, and provides an intimate portrait of his inner world.<sup>546</sup> He promoted this book on *Sixty Minutes*, the *Today Show* and the *Rush Limbaugh Show*.

Jeffrey Rosen argues that there are significant similarities between Thomas and Douglas's memoirs. Both share the authors' private thoughts and emotions. Both are written in a tell-all, gossipy style and seem to delight in settling old scores. Both seek to justify the authors to the public. However, Thomas went further. Douglas' memoir reveals his fears and neuroses, but focuses on his work on the Court. He barely mentions his marriages. Thomas's, memoir, however, is written in an "exhibitionistic spirit." He discusses his former drinking problem and the pain of his confirmation hearings, and reveals the anger and resentment that shape his personal perspective. In Rosen's words, Thomas was the first to write a "scandal memoir," and the first to write a best seller. Rosen argues that, in doing this, Thomas "harmed himself and the

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<sup>544</sup> J. Rosen, "Pinpointed," *The New Republic*, December 10 2007.

<sup>545</sup> S. D. O'Connor and A.H. Day, *Lazy B: Growing up on a Cattle Ranch in the American Southwest* (New York: Random House, 2002). S. D. O'Connor, *Chico* (New York: Dutton Juvenile, 2005).

<sup>546</sup> C. Thomas, *My Grandfather's Son: A Memoir* (New York: HarperCollins, 2007).

Court” by undermining “the public’s respect for judges as apolitical authorities.”<sup>547</sup>

Rosen doesn’t mention that Douglas’ memoir discusses his psychotherapy sessions, through which he developed the understanding that his constant headaches resulted from childhood phobias and guilt about having left his single mother in poverty-stricken Yakima, Washington when he moved to the east coast. However, Thomas’ memoir is more consistently laced with this type of personal revelation.

### Portrayals of Supreme Court Justices and their decision-making

In addition to the justices’ self-presentation, other peoples’ portrayals of them in journalism and popular culture contribute to their personalization. The skeptical journalistic culture that developed in the late 1960s and 1970s has produced accounts of the justices that seek to burst the bubble of silence and reverence surrounding them. However, until recently, this project of demystification has been viewed as less acceptable for the Supreme Court than for other institutions. Stories about politicians’ personal lives gained momentum in the 1970s, but were taboo for Supreme Court Justices at that point. In the last twenty years portrayals of justices’ personal lives have become more acceptable, but even today, Supreme Court reporting is usually less aggressive and less scandal-focused than other political reporting.

Journalists who cover the Supreme Court don’t have as much access to their subjects as journalists covering the other branches, because they usually only see oral argument and don’t learn about the decision-making process for each case. There is a

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<sup>547</sup> Rosen, "Judicial Exposure"; Rosen, "Pinpointed."



small press office at the Court and journalists have a designated seating area inside the courtroom, but apart from occasional lunches with the justices and even more occasional interviews, Supreme Court journalists don't get much more access to the justices than a diligent member of the public would get by attending oral argument every day. In interviews, the justices rarely talk about cases and never talk about cases for which the opinions have not yet been announced.

The Supreme Court journalists receive the Court's opinions at the moment they're delivered to the public. When the justices read their opinions from the bench, an audio stream is piped into the pressroom for journalists who need to file stories right away, and manila envelopes with the printed opinions are handed out to the journalists at exactly this minute. The opinions aren't handed out earlier because the Court doesn't announce beforehand which opinions will be handed down and this is kept secret. The justices also want to be able to make last minute changes to opinions.<sup>548</sup> While journalists covering Congress or the executive branch often receive information about ongoing negotiations, either from unauthorized leaks or deliberate trial balloons, this does not happen for Supreme Court journalists. Edward Lazarus writes that the press abets Supreme Court secrecy by refraining from doing investigative reporting, but Supreme Court journalists don't have much choice; there are few avenues of information.<sup>549</sup>

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<sup>548</sup> Visit to Supreme Court press office as guest of Supreme Court journalist Tony Mauro. April 25, 2007. The Supreme Court press office provides summaries of decisions for journalists to prevent misleading stories caused by misunderstandings. D. Paletz and R. Entman, *Media Power Politics* (New York: The Free Press, 1981). The verbal announcements of decisions are also summaries, as Tony Mauro told me, "the closest they get to spin."

<sup>549</sup> Lazarus, "The Supreme Court's Excessive Secrecy: Why It Isn't Merited."

In 1981, media scholars David Paletz and Robert Entman wrote that journalists cover the Supreme Court in a restrained and reverential fashion because they don't have legal training and are intimidated by the law.<sup>550</sup> This statement doesn't ring as true today because journalists with law degrees populate political magazines and television news, styling themselves as legal experts and seeking to demystify the Court's work. While legal journalists rarely have sources or special access, their training and confidence in legal matters help them provide analyses, such as pointing out justices' preferences for certain legal doctrines and making predictions about cases' outcomes. Stephen Hess found that news stories related to the judiciary have risen in number and importance since the 1970s.<sup>551</sup>

Other journalists have also begun to discuss the justices in a non-reverential, demystifying manner. *New York Times* columnist Maureen Dowd, in a piece about the Supreme Court decision that sealed George W. Bush's victory over Al Gore in the 2000 Presidential race, pretended to get inside the justices' heads. Chief Justice Rehnquist gripes that he wants to retire and can only do so under a Republican President, Justice Scalia reasons that with a Republican President he may end up as chief justice, and Justice Ginsburg tells Al Gore's lawyer that she loves him.<sup>552</sup> As the title of Dowd's column, "The Bloom is Off the Robe," suggests, the *Bush v. Gore* decision highlighted the fact that the justices are far from impartial, interest-less oracles of the law.

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<sup>550</sup> Paletz and Entman, *Media Power Politics*.

<sup>551</sup> S. Hess, "The Washington Reporters Redux, 1978-98," in *Media Power, Professionals and Policies*, ed. H. Tumber (New York: Routledge, 2000). 231.

<sup>552</sup> M. Dowd, "The Bloom Is Off the Robe," *New York Times*, December 13 2000.

The people with the most information about the Court's inner workings are the Supreme Court clerks. The number of clerks has risen during the past century, and today each justice hires four. Clerks' responsibilities have also expanded. Todd C. Peppers describes this expansion as an evolution from stenographers to legal assistants to law firm associates.<sup>553</sup> Clerks today write recommendations to grant or deny certiorari for applications the Court receives, do legal research, write briefing memos for oral argument, discuss cases with the justices and draft opinions.<sup>554</sup> Though clerks are not present during the justices' conference where they state their initial positions about cases, they often hear about Conference later from their bosses. They also read – and write large portions of – the opinion drafts circulated, and they're party to justices' attempts to woo each other to secure majorities.<sup>555</sup>

Clerks have always been expected to remain silent about the Court's work. However, this duty has been emphasized more explicitly as clerks have gained more access to information as a result of their expanding responsibilities and as journalists have become more aggressive. Concerns about leaks have existed for at least a century, but since the 1960s, clerks have more frequently leaked information about the relationships among the justices and their decision-making processes. Today, former clerks are sometimes willing to discuss what they saw and heard during their clerkship, but it's still almost unheard of for them to leak information while they're at

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<sup>553</sup> Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*.

<sup>554</sup> Justice Stevens' clerks read all cert petitions and write recommendations. All other clerks take part in the "cert pool" in which petitions are divided up among all the clerks, and the resulting memos are circulated among all justices.

<sup>555</sup> Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*; Ward and Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. Posner, *The Federal Courts: Crisis and Reform*. 102-110.

the Court. When clerks arrive at the Court, they hear about the “ninety-second rule,” which states that a clerk who talks to a journalist for longer than ninety seconds will be fired.<sup>556</sup>

Information from former clerks has enabled authors to write books detailing the Court’s interior culture and the behind-the-scenes negotiations that shape opinions. The changes in the reactions to these books in the last thirty years show that standards of revelation regarding Supreme Court Justices have evolved. Portraying the justices in a humanizing, personalizing light has become more acceptable.

The first Supreme Court exposé was *The Brethren*, written by journalists Bob Woodward and Scott Armstrong.<sup>557</sup> *The Brethren* describes the Court’s inner workings during the terms between 1969 and 1975. It depicts the justices as human beings, showing them scheming, cajoling and horse-trading for votes on opinions, and depicts Chief Justice Burger as pompous, duplicitous and unintelligent. Woodward and Armstrong got most of their information by interviewing over 170 clerks, who described what they had seen and heard while at the Court, including their own roles in shaping opinions. Several justices gave their clerks explicit permission to speak to Woodward, and Justices Potter Stewart, Harry Blackmun and Lewis Powell were all interviewed for the book.<sup>558</sup>

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<sup>556</sup> Ward and Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. 11.

<sup>557</sup> B. Woodward and S. Armstrong, *The Brethren: Inside the Supreme Court* (New York: Simon and Schuster, 1979).

<sup>558</sup> D. J. Garrow, "The Supreme Court and the Brethren," *Constitutional Commentary* 18 (2001); Ward and Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. 14. After Potter Stewart’s death, Bob Woodward revealed in an interview with *Playboy* that Stewart had been a source for the book. Researchers have learned from Blackmun’s and Powell’s papers at the

*The Brethren* created an uproar when it came out in 1979. Commentators from all points on the political spectrum disputed its accuracy and the authors' grasp of legal issues.<sup>559</sup> Some critics argued that the clerks Woodward and Armstrong had interviewed had been attempting to aggrandize their own importance and get revenge on old opponents, thus leading the authors astray. Conservatives deplored the book for excusing and even celebrating justices' liberal leanings while depicting conservative views as sinister. A lot of criticism focused on Woodward's signature style, which recounts events from the perspective of an omniscient narrator, leaving the reader little indication about where information comes from, and presents a deadpan recitation of facts, refusing to address their implications. Many argued that the book's gossipy style was inappropriate, that the clerks should never have spoken to a journalist, and that the Supreme Court's decision-making process should not be revealed in this way. These critics were objecting to the personalization of the justices -- the project of making them human and highlighting their political preferences, detracting from their mystery and from the Court's prestige.<sup>560</sup>

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Library of Congress that these two justices spoke to Woodward as well. Woodward and Armstrong stated in 1979 that five justices had spoken to them for the book, and Justice Powell's papers suggest that the remaining two justices who cooperated were Justices Rehnquist and White.

<sup>559</sup> Anthony Lewis re-interviewed many clerks Woodward and Armstrong had interviewed and, speaking on the record, these clerks strongly disputed a key assertion *The Brethren* makes that Justice Brennan had voted against his better judgment in a denial of certiorari in order to court Justice Blackmun for upcoming abortion and obscenity cases. This catch was significant because Woodward had intimated that these very clerks had been his sources for that story. A. Lewis, B. Woodward, and S. Armstrong, "The Evidence of 'the Brethren': An Exchange," *New York Review of Books*, June 12 1980.

<sup>560</sup> M. Meltsner, "The Brethren: A Symposium," *The Nation*, February 2 1980. A. Wohl, "Those Who Do Not Remember the Past ...," (JURIST: The Law Professors' Network: 1998). A. Lewis, "Supreme Court Confidential," *The New York Review of Books*, February 7 1980. E. Abrams, "Treason of the Clerks," *Policy Review* 12 (1980). G. Kannar, "Pillory of Justice," *Columbia Journalism Review* 18, no. 6 (1980). G. V. Higgins, "The Brethren's Clerks," *Harper's* 1980. Abrams, "Treason of the Clerks.", J. J. Kilpatrick, "Nothing of Honor," *National Review*, February 8 1980, Lewis, Woodward, and

One factor that made the book inherently personalizing was Woodward's tendency to focus on personalities and relationships, a practice embodied by his professed attitude that "the human story is the core." Joan Didion has argued that this tendency is also produced by his method, which allows self-interested leakers to drive his storylines. She writes, "That this crude personalization works to narrow the focus, to circumscribe the range of possible discussion or speculation, is, for the people who find it useful to talk to Mr. Woodward, its point."<sup>561</sup> George Kannar had a similar assessment. He wrote that in *The Brethren*, "public acts are almost exclusively the result of private wounds and aspirations. The result is not edification, but dramatization."<sup>562</sup> Although this quality characterizes many of Woodward's books, it's in reference to the Supreme Court that it created a whirlwind of criticism based on alleged inappropriateness in addition to shoddiness and lack of credibility. Though Woodward may be an extreme case, his demystifying, personalizing reporting style is emblematic of the changes in journalism after the 1970s, and in *The Brethren* these changes intersected with the Supreme Court, depicting the justices in a new way.

Praise for *The Brethren* when it came out was rare. Some conceded that the book caused a fury because it had brought to light the contrast between an idealized notion of judging and the personal and political context in which it inevitably takes

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Armstrong, "The Evidence of 'the Brethren': An Exchange." W. Berns, "The Clerks' Tale," *Commentary* 69, no. 3 (1980). S. M. Evans, "The Brethren: A Judicial Hatchet Job," *Human Events* 1980.

<sup>561</sup> J. Didion, "The Deferential Spirit," *New York Review of Books*, September 19 1996.

<sup>562</sup> Kannar, "Pillory of Justice."

place, a contrast that should not be surprising.<sup>563</sup> Michael Meltsner wrote in the *Nation* magazine,

The portrait is unflattering only to the extent that we need to maintain the pretense that constitutional adjudication consists of applying clear text and unambiguous precedent in a value-free universe ... A risk of the book is that it will nourish those who believe that it is only politics that decides cases, but the negotiating and strategizing that go into forging constitutional law should not be ignored just because some will make this error.<sup>564</sup>

Meltsner also notes that the authors reported only on cases that were closed in 1976, respecting the need for secrecy regarding deliberations still in progress.<sup>565</sup> Subsequent insiders' reports about the Court suggest that the revelations about the Court's internal deliberations haven't had the "chilling effect" many feared.<sup>566</sup>

The publication of *The Brethren* heightened the Court's emphasis on clerk discretion. This subject had been given increasing attention at the Court since Warren Burger became chief justice in 1969 and each justice instituted a policy for his own chambers, but in the 1980s these concerns were codified at a higher level. In 1981, both the Judicial Conference and the Federal Judicial Center issued codes of conduct for law clerks. The Supreme Court issued its own version in 1987, and this code was revised in 1989 to the form it holds today. The code states that "the relationship between justice and law clerk is essentially a confidential one," and that a clerk cannot reveal "any confidential information received in the course of the law clerk's

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<sup>563</sup> T. L. Shaffer, "Brothers in Law," *Review of Politics* 43, no. 1 (1981). Berns, "The Clerks' Tale."

<sup>564</sup> Meltsner, "The Brethren: A Symposium."

<sup>565</sup> *Ibid.*

<sup>566</sup> Posner, "The Courthouse Mice"; Wohl, "Those Who Do Not Remember the Past ... ."

duties.”<sup>567</sup> Judge Richard Posner has written, “I do not remember from my time as a clerk for Justice William Brennan anyone saying anything about confidentiality, though it was understood that one was not to gossip about the justices or discuss pending cases with outsiders. Now there is an elaborate code of conduct for clerks, enjoining them to utmost confidentiality, as if they were handling national defense secrets.”<sup>568</sup> Thus, the clerks’ expanded access to information, coupled with their willingness to leak, lead to the codification of the expectation of confidentiality.

The next book to make a similar splash was *Closed Chambers*, written by Edward Lazarus, one of Justice Harry Blackmun’s former clerks.<sup>569</sup> This book, published in 1998, focuses on the 1988-1989 term, when Lazarus was at the Court, but also provides a detailed insider’s account of many cases decided in the thirty years before that and the five years afterwards, focusing on cases about race, the death penalty and abortion. Lazarus used his own observations as a clerk for Justice Blackmun and also interviewed clerks from his year and former and subsequent clerks. Like *The Brethren*, *Closed Chambers* highlights the law’s inconsistency, the justices’ fallibility, and the subjective nature of judging. Lazarus also makes a historical argument that some have said idealizes the past too much.<sup>570</sup>

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<sup>567</sup> Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*. 204. The Code of Conduct for Law Clerks of the Supreme Court of the United States is itself kept somewhat confidential. Chief Justice Rehnquist would not give a copy to Todd C. Peppers for his scholarly book about Supreme Court clerks, but Peppers found a copy in the Thurgood Marshall papers at the Library of Congress.

<sup>568</sup> Posner, "The Courthouse Mice."

<sup>569</sup> E. Lazarus, *Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court* (New York: Penguin Books, 1998).

<sup>570</sup> D. Kairys, "Reason Worship," *JURIST*, May 1998.



Lazarus argues that the Court has grown increasingly polarized during the past several decades because of the political passions attached to constitutional law, the rancor of the appointment process, and many justices' refusal to listen to others' arguments or to make decisions for the good of the institution. He writes that the justices have become calcified in their decision-making, standing their ground rather than attempting to reach common ground. In other words, Lazarus asserts that the justices' decision-making process –on which the Court's legitimacy largely rests – has been corrupted, and looks a lot like voting. Lazarus implores the Court to become more deliberative and entreats the public to treat the Court less like a political institution.

*Closed Chambers* elicited as much shock and venom as *The Brethren*. Because Lazarus was an accomplished and erudite lawyer it was harder to dispute his understanding of the law, and many reviewers praised his elegant writing style and legal explanations. Some commentators disputed his accuracy and pointed out his liberal slant, a slant Lazarus readily admits in the book. Some pointed out that the non-political decision-making Lazarus imagines was practiced before the 1980s simply never existed.<sup>571</sup> Kathleen Sullivan complained that Lazarus psychologizes the moderation of Justices O'Connor, Souter and Kennedy rather than describing the intellectual sources of their disagreements with conservatives. Many critics were appalled that Lazarus, a former clerk, would break the ethical imperative of silence about his time on the Court and that other clerks would break it to talk to him. Ninth

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<sup>571</sup> Ibid. I agree with this criticism. It's inevitable that personal and political views will influence judging. However, it's possible that there is today a greater emphasis on individual fealty to one's opinions, whereas previously there was a stronger push for consensus. I discuss this later in this chapter.

Circuit Judge Alex Kozinski was so enraged that he said he would not let Lazarus, an attorney practicing in California, argue any cases before him.<sup>572</sup>

Since the publication of *Closed Chambers*, other books have sought to lift the veil of secrecy over the Court, and they have met with diminishing shock and outrage. Jeffrey Toobin's *The Nine*, published in 2007, describes the doctrinal changes and personal relationships on the Rehnquist Court and offers insiders' nuggets, such as the fact that Justice Souter was so upset by what he considered to be his conservative colleagues' crassly partisan behavior in *Bush v. Gore* that he seriously considered resigning. Like Woodward, Armstrong and Lazarus, Toobin researched his book by talking to clerks and justices and looking at documents. The book was billed as a successor to *The Brethren* and *Closed Chambers*, carrying a blurb from Woodward on the inside of the front cover, but did not elicit the same reaction.<sup>573</sup>

The typical charges of partisanship and inaccuracy were leveled, and some commentators criticized Toobin's analysis of legal issues, but no one claimed the book was inappropriate or distasteful. In fact, one frequent complaint was that the book revealed nothing new. David Margolick, writing in the *New York Times*, criticized Toobin for not speaking to enough former clerks, an illustration of the change in attitudes since 1980, when Woodward and Armstrong were excoriated for speaking to clerks at all. Garret Epps, writing in *Salon*, compared *The Nine* unfavorably to Jan Crawford Greenburg's recently released book *Supreme Conflict* in part because

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<sup>572</sup> D. J. Garrow, "Dissenting Opinion: A Witness from inside the Supreme Court Is Not Impressed," *New York Times*, April 19 1998; A. Kozinski, "Conduct Unbecoming," *Yale Law Journal* 108 (1999); R. K. Painter, "Matters of Ethics: Open Chambers?," *Michigan Law Review* 97 (1999). K. M. Sullivan, "Behind the Crimson Curtain," *New York Review of Books*, October 8 1998.

<sup>573</sup> J. Toobin, *The Nine: Inside the Secret World of the Supreme Court* (New York: Doubleday, 2007).

Greenburg got “deeper inside the court’s bubble.”<sup>574</sup> While individual anecdotes within the book may have been new to most ears, the insight that the justices are human beings and their mode of decision-making is not always rational was not surprising.

In the October 2004 issue of *Vanity Fair*, a long, detailed article by David Margolick, Evgenia Peretz and Michael Shnayerson described the internal dynamics of the justices’ decision-making in *Bush v. Gore*, in which the more liberal justices sided with Gore and the more conservative justices sided with Bush, handing him the Presidency. The story revealed that, while Gore’s lawyers had assumed that Justices Kennedy and O’Connor were “persuadable,” they had in fact decided beforehand to rule for Bush and were looking for any argument to support that result. Justice Kennedy is depicted as putting on a ridiculous performance of “agonizing” just to make himself look fair and moderate, spoon feeding the Bush lawyers the arguments most helpful to their cause during oral argument, and essentially tricking the dissenters into thinking he was open to their arguments (when he wasn’t) in order to get them to join parts of his. Justice Scalia is depicted as barely bothering to hide the bald partisanship of his standpoint, urging the Court to grant Bush’s stay of the Florida recount before even receiving the Gore team’s response (the Court did wait to hear the

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<sup>574</sup> D. Margolick, "Meet the Supremes," *New York Times Book Review*, September 23 2007. N. Totenberg, "'The Nine' Reveals Politics of High Court," *All Things Considered*, September 14 2007. A. Althouse, "Justice on the Couch," *The New York Sun*, September 24 2007. K. J. Hamilton, "U.S. Supreme Court: A History of Hows and Whys," *The Seattle Times*, September 28, 2007. G. Epps, "The Nine," *Salon*, September 13 2007. J.C. Greenburg, *Supreme Conflict: The Inside Story of the Struggle for Control of the United States Supreme Court* (New York Penguin Press, 2007). A. Lewis, "The Court: How 'So Few Have So Quickly Changed So Much'," *New York Review of Books*, December 20 2007. J. Adler, "Toobin on Chief Justice Roberts," *The Volokh Conspiracy*, June 3 2009.

Gore arguments). The only mention of race in the opinion drafts was a footnote in Justice Ginsberg's dissent mentioning the disproportionate number of blacks prevented from voting, but she removed it when Justice Scalia complained about the "Al Sharpton footnote."<sup>575</sup>

The *Vanity Fair* story was based on interviews with roughly one quarter of the 35 clerks from the 2000 term. After it came out, a group of prominent lawyers, government officials and former clerks released a statement criticizing these clerks for violating the clerks' Code of Conduct and their "duty of confidentiality."<sup>576</sup> The clerks who spoke to the journalists, anticipating this reaction, had defended themselves, and their explanation appeared in a footnote in the article: "We feel that something illegitimate was done with the Court's power, and such an extraordinary situation justifies breaking an obligation we'd otherwise honor... Our secrecy was helping to shield some of those actions." The journalists added, "If this account may at times be lopsided, partisan, speculative, and incomplete, it's by far the best and most informative we have."<sup>577</sup>

Even before the revelations of the behind-the-scenes decision-making details, *Bush v. Gore* had essentially made the case to the nation that political views influence judging. Five states' rights conservatives had voted to intervene in a state political process, and four moderate liberals who were often supportive of federal power had

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<sup>575</sup> D. Margolick, E. Peretz, and M. Shnayerson, "The Path to Florida," *Vanity Fair*, October 2004.

<sup>576</sup> D. J. Garrow, "Acolytes in Arms," *The Green Bag*, Summer 2006; D. Lane, "Bush v. Gore, Vanity Fair, and a Supreme Court Law Clerk's Duty of Confidentiality," *Georgetown Journal of Legal Ethics* (2005); Margolick, Peretz, and Shnayerson, "The Path to Florida"; T. Mauro, "High Court Clerks Bemoan 'Bush v. Gore' Revelations," *Law.com*, September 28 2004.

<sup>577</sup> Margolick, Peretz, and Shnayerson, "The Path to Florida."

voted to leave the state process alone, all nine aiding their candidates of choice. It appeared that the justices had simply voted for President. The additional revelations just underlined this perception and fleshed out how the doctrinal postures had been constructed around these positions. Defending the decision, Judge Richard A. Posner wrote, “Every advocate knows that in arguing a position one tries to make it connect with something in the judge’s life,” and explained that lawyers try to trigger judges’ “empathic reactions.” He continued, “the fact that extraneous factors may cause a judge to be more alert to a particular line of argument than he might otherwise be” and “that unconscious feelings influence judges” are “such pervasive features of the judicial process that to regard them as proof of corruption is to condemn the entire process.”<sup>578</sup>

The fact that the case prompted clerks to leak suggests a nexus between transparency and the apparent disappearance of the line between law and politics. In other words, in this case the justices exercised political power, or power unconstrained by legal rules, and the clerks responded by using the communicative norms of the political branches, which include the practice of leaking. Some accused the leakers of needlessly politicizing the Court’s public image, but the causality between leaking and politicizing ran the other way as well, perhaps more. Transparency became more important and more attainable *because* of the clerks’ perception that politics had entirely overwhelmed law. *Bush v. Gore* placed the Court directly into the arena of

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<sup>578</sup> Dershowitz and Posner, “Dialogues: The Supreme Court and the 2000 Election.”

politics, and thus the confidentiality standards associated with politics overcame the confidentiality standards expected by the Court.

It would be best if this case were a political high water mark for the Court and its image, rather than the norm. We need to be aware that the line between law and politics is permeable and that justices' backgrounds and preferences influence their thinking, but we also need to preserve the understanding that legal values of rule-bound decision-making play a role in Supreme Court decisions. Without this understanding, the Court can't fulfill its constitutional role because it will lose its legitimacy. Keeping this tension between different conceptions of judging alive is a delicate task for public discourse.

The portrayals I've discussed described the justices as human beings whose subjective preferences enter their judging, and these descriptions are increasingly commonplace and respectable. These portrayals have been enabled by clerks' willingness to reveal insider details, a willingness that parallels the growth of a culture of personal revelation and skepticism of authority since the 1970s. In the case of *Bush v. Gore*, the transparency ethos underlying the willingness to reveal was strengthened by the bluntness of political motives that shaped the decisions, the apparent lack of mitigation by rule-bound legal reasons, and the high political stakes attached to the outcome.<sup>579</sup>

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<sup>579</sup> Two recent scholarly books about Supreme Court clerks, *Sorcerers' Apprentices* and *Courtiers of the Marble Palace*, both written by political scientists, are based on research in justices' papers, surveys of past clerks, and interviews with past clerks. These books focus on the clerkship as an institution, and look at the evolution of specific policies such as the "cert pool." They describe individual justices only in the context of their relationships with their clerks and their clerk-related-policies, and they don't

As the Supreme Court Justices have been humanized both through their own engagement with the public and through others' accounts of their personal qualities and political views, they have become popular culture figures and are objects of fascination beyond their jurisprudence. It is in this way that they approach the status of celebrities. They aren't fully celebrities, though. While they have been engaging more with the public, their visibility is limited. However, they are fascinating in part because they are traditionally so hidden and removed from the public. Even small revelations about the justices – for example, that Ruth Bader Ginsburg says she is a terrible cook<sup>580</sup> – are more enticing than they would be about a Senator. The justices are discussed in late night comedy routines and on talk shows. They occasionally appear on the covers of magazines read by the general public.<sup>581</sup>

Legal blogs are mushrooming on the internet, some serious and some irreverent.<sup>582</sup> One subgenre explicitly frames the Supreme Court Justices as celebrities, breathlessly reporting on “sightings” of the justices outside of the Court. *Above the Law* calls itself a “legal tabloid”<sup>583</sup> and *Underneath Their Robes* announces that it

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focus on personality, legal doctrine, or actions in specific cases. Because of this focus, and the scholarly nature of these books' tone and audience, the participating clerks haven't been criticized for breaches of confidentiality. This shows it's not speaking about one's clerkship that is incendiary, but rather, it's the type of information revealed and the context in which it's published. Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*; Ward and Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*.

<sup>580</sup> R.B. Ginsburg, "Lighter Side of Life at the United States Supreme Court," (New England Law - Boston: 2009).

<sup>581</sup> J. Rosen, "The Unlikely Liberal," *The New York Times Magazine*, September 23 2007; D. Von Drehle, "Does the Supreme Court Still Matter?," *Time*, October 22 2007.

<sup>582</sup> J.D. Glater, "Opening Arguments, Endlessly," *New York Times*, October 7 2005.

<sup>583</sup> <http://www.abovethelaw.com>

offers “news, gossip, and colorful commentary about the federal judiciary.”<sup>584</sup>

Underneath Their Robes’ mission statement explains,

"Underneath Their Robes" ("UTR") is a combination of *People, US Weekly, Page Six, The National Enquirer, and Tigerbeat*, focused not on vacuous movie stars or fatuous teen idols, but on the federal judiciary. The mission of UTR is to get "underneath the robes" of our federal judges, to find out what they are really like -- not as impersonal guardians of the Constitution, or as disembodied legal minds analyzing complex legal disputes, but as human beings ... In light of federal judges' high station and great influence, as well as the insights of legal realism concerning the important role that a judge's personality and private life can play in judicial decision-making, such keen interest in federal judges as people is understandable and justified.

To this end, *Underneath Their Robes*, with the help of lawyers and clerks who write in, reports on federal Judges’ cars, residences, cuisine choices, physiques and other personal information. This blog was extremely popular and Federal Appeals Court Judges Alex Kozinski and Richard Posner were known to have written in. *UTR* was temporarily shut down after Jeffrey Toobin revealed in the *New Yorker* that the blogger – “Article III Groupie” -- was David Lat, an Assistant United States Attorney in Newark, New Jersey, but it’s now back up with a new blogger.<sup>585</sup> This blog is read mostly by lawyers, and it’s doubtful that the general public would find it as enticing.

Some judges now maintain their own blogs. The best-known judge blogger is Richard Posner, who sits on the United States Court of Appeals for the Seventh Circuit and teaches at the University of Chicago Law School. On the blog, which shares with Economics Professor Gary Becker, Posner writes about his thoughts on

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<sup>584</sup> <http://underneaththeirrobes.blogs.com>

<sup>585</sup> J. Toobin, "Scotus Watch," *The New Yorker*, November 21 2005. "Blawg Review Awards 2005," (2005).



political and economic issues. For example, the postings for June 7, 2009 include thoughts about the Obama Administration's health care policies, the role of Asia in the international economic system, the idea of an "obesity tax" on products like soda, and the vitality of the conservative movement.<sup>586</sup> Asked in an email how his judicial obligations affect what he can discuss on his blog, Judge Posner replied, "The ethical rules governing federal judges forbid public comment (that would include in a blog) by a judge on a pending or impending lawsuit, and I try to observe that rule. There is no rule about comments on pending legislation, though I would not comment on an interpretive issue that might be presented by such legislation--that is, the kind of issue that a judge might be called upon to rule on."<sup>587</sup> This suggests that judges' engagement with the public and discussion of political issues is appropriate as long as they don't touch on the precise questions likely to come before them on the bench. In this way, this is consistent with some of the Supreme Court Justices' current approach. The zone of information kept hidden seems to have shrunk from encompassing almost everything about a judge except their published opinions to encompassing just their views about future cases.

#### Personalization and legal results: The judge and the law

All of this communication by and about judges has emphasized the fact that judges are human beings with different points of view that influence their decisions. This insight is not new; it first gained prominence in the early 20<sup>th</sup> century with the

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<sup>586</sup> <http://www.becker-posner-blog.com/index.html>

<sup>587</sup> Email from Judge Posner

rise of legal realism, a school of thought that understands law to be based not on formal rules, but on judges' decisions, which should derive from the realities and needs of the social world. Today this view has been invited to the foreground of contemporary discourse by Judges' more prominent and personalized profiles in public life. While the view is not new, the cultural and political context for it is, and this context has encouraged justices to respond by engaging with the public.

Legal scholar Jeffrey Rosen writes that the personalization of the judiciary has made people associate legal results with particular judges rather than with the law. He argues that this diminishes courts' legitimacy because it squanders the "sense of impersonal respect on which their legitimacy depends." Rosen faults journalists who reference judges' political affiliations and judges who have recently written memoirs.<sup>588</sup> He argues that the situation has been made worse by the "legalization of politics," in which judges are asked to decide issues that politics could not or would not resolve, and by contentious judicial nominations and recent fights over the filibuster. These are believable culprits, but the situation must be placed in a more multifaceted context. A broad set of changes in American politics and culture have encouraged and enabled the personalization of politics in general, and the personalization of the judiciary has followed in part from this development.

The personalization of the judiciary is certainly linked to the tendency to view decisions as the products of judges rather than the law, and this stance is a problem in undiluted form. However, it shouldn't be condemned outright. Law simultaneously

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<sup>588</sup> Rosen, "It's the Law, Not the Judge"; Rosen, "Judicial Exposure."

reflects power relations and particular interests *and* needs to be internally consistent with its own logical standards in order to thus maintain its legitimacy. It thus has a dual nature, and I believe that its public image needs to reflect that duality. It's important for people to have faith in judges' intellectual integrity, but it's also important for people to understand that there are different approaches to adjudication and that judges' subjective viewpoints make a difference. Our contemporary political structure and culture make public support necessary to confirm judges, and the public can't participate intelligently in this enterprise without understanding the dual nature of judging. Different political views make different legal results more likely than others, though they don't make them inevitable. This is why there are fairly consistent voting blocs on the Supreme Court. However, if people are to respect judges' rulings they need to understand that they are reached through a different process than legislative or executive decisions, and must meet different standards. This duality is hard to maintain, especially when contemporary discourse about judges is polarized and hyperbolic, but it's important to work at maintaining it.

Rosen's prescription is also somewhat ironic. He argues that recent harsh criticisms of judges and the disrespectful atmosphere are partially caused by the personalization of the judiciary, which includes judges' self-presentation. Rosen counsels judges to *avoid* the spotlight in order to *retain* respect and legitimacy. The irony is that Judges are seeking the spotlight to retain respect and legitimacy. They're responding to attacks on judicial independence with publicity campaigns that have

tended to humanize them – endeavors that Rosen sees as partially responsible for the attacks in the first place.

In today's political and cultural atmosphere, engagement with the public is the way to secure legitimacy. This presents a conundrum for the judiciary. Public appeals fit comfortably with elected officials' roles, but they clash with judges' roles. Politicians today emphasize their credentials as "regular people," and this fits with the elected branches because they're structurally linked to popular wishes and their legitimacy is based on this link. Judges' legitimacy, however, requires that they convey impartiality and reasoning constrained by rules, and this aspiration is somewhat superhuman. Judges' selling themselves as "ordinary people" creates tension with their role. Yet, in today's political culture, engaging with the public and presenting oneself as a regular person – rather than maintaining an aloof distance – is the way to gain trust. Thus, while Rosen argues against personalization of the judiciary on the grounds that it causes politicization and attacks, some aspects of the personalization are linked to an attempt to counter these problems.<sup>589</sup>

Though I don't think it's possible or fruitful to find a single, concrete causal starting point, I believe these developments have been enabled by the changes in the practice of transparency in the broader political culture, including skepticism towards authority figures, focus on scandal, the personalization of politics, public expectations of information, and the need to gain public approval for official actions.

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<sup>589</sup> J. Rosen, *The Supreme Court: The Personalities and Rivalries That Defined America* (Times Books, 2007). A final irony is that Rosen's recent book, the *Supreme Court: The Personalities and Rivalries that Defined America*, focuses, as its title suggests, on personalities, character and temperament, and argues that these qualities are of utmost importance to the Court's decisions.

### Opinion writing practices

The personalization of the judiciary has also been furthered by changes in Supreme Court opinion-writing practices. There has been a shift away from the norm of a joint opinion of the Court joined by all or most justices to the norm of separate opinions written by several justices. If five justices agree on a judgment and a reason for it, the resulting holding is considered strong law and lower courts must follow it. If fewer than five justices agree on the judgment or the rationale, the result is a plurality opinion and has less authority. Concurrences provide separate reasons for reaching a decision and dissents provide contrary judgments altogether. Both concurrences and dissents have become more numerous through the Court's history. In 1894, the Supreme Court Justices issued 188 majority opinions, 18 dissents and no concurrences. In 1982, the Court issued 162 majority opinions, 140 dissents, and 70 concurrences.<sup>590</sup>

The practice of giving every justice his or her say in a separate opinion can be seen as related to transparency. This is personal transparency in that each justice gets to write what they really think rather than acquiescing to a common opinion that may conceal their individual views. It is process transparency in that the public gets a better window onto how a decision was reached than would be provided by a unanimous opinion achieved by covering up differences.

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<sup>590</sup> Posner, *The Federal Courts: Crisis and Reform*. 237.

These changes are related to changes in judicial administration, the court's role, the public's focus on the court, and the judicial shift towards engagement with the public. The Court's legitimacy is rooted in the public's understanding that its decisions are based on consistent principles and careful reasoning, and these analyses are laid out in the Court's published opinions. Thus, changes in opinion-writing practices suggest changes in the Court's understanding of how to maintain legitimacy.

The fragmentation of opinions has expanded the role of individual justices both in practice and in the public eye. It makes every individual opinion more important, because each justice can refuse to sign an opinion without certain changes and can alter a holding by writing a concurrence in a 4-4 decision.<sup>591</sup> This practice also makes each individual known for his or her individual views, furthering personalization.

#### Hiding disagreement: Seeking legitimacy through unanimity

In the British tradition of *seriatim* opinions, each justice states his own decision and the reasons for it. Chief Justice John Marshall, who served in this role from 1801 to 1835, put a stop to this and instituted the tradition of the opinion of the Court, in which the Court spoke with one voice. This meant individual justices had to temper their views to find common ground or set aside their views and sign onto opinions they did not agree with. It provided strong moral authority for the Court's rulings and clear guidance to lower courts and also protected individual justices from retribution for unpopular decisions. This tradition was part of Marshall's larger project

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<sup>591</sup> D. Lithwick, "A High Court of One: The Role of The "Swing Voter" In the 2002 Term," in *A Year at the Supreme Court*, ed. N. Devins and D. M. Douglas (Durham, NC: Duke University Press, 2004).

of bolstering the Court's public image and its power vis-à-vis the other two branches. Marshall established the Court's responsibility of judicial review and also curtailed the partisan activities in which several justices had been engaging before his tenure.<sup>592</sup>

Though Marshall did not always achieve complete unanimity, he sought it, and his record is very different from opinions today. During his first four years on the Court, he wrote every opinion not published *per curiam*, and only one concurrence and no dissents slipped through. As more and more Jeffersonian and Jacksonian appointees joined the Court, real differences of opinion emerged, but the justices still agreed much more frequently than the anti-Federalist Presidents wished. Herbert A. Johnson argues that the accusation sometimes made that Marshall "dominated" the other justices is not accurate, and that unanimity was achievable for several reasons. The justices had similar socioeconomic and professional backgrounds that made them all nationalistic and concerned about property rights. For most of Marshall's tenure, they lived together in a boarding house, which allowed group meals and lengthy conversations, creating strong relationships. Finally, the justices "became fellow combatants in defense of the Court."

The Marshall Court issued opinions asserting the supremacy of the Constitution over state and federal law and the Supreme Court's role as ultimate interpreter of that document, making judicial review an "external, continuously operating legal restraint on legislative and majority will." In response, Congress and

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<sup>592</sup> O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*. 70-72; H. A. Johnson, *The Chief Justiceship of John Marshall, 1801-1835* (Columbia, SC: University of South Carolina Press, 1997). 53-58, 100; White, *The American Judicial Tradition: Profiles of Leading American Judges*. 8-20.

the public pressured the Court, sometimes threatening impeachment, and this united the justices. The fact that the Court's frequent unanimity strengthened the Court's legitimacy and stature is underlined by the fact that Thomas Jefferson, who was extremely hostile to federal judicial power, tried to subvert the Court's apparent unanimity by lobbying the Republican-appointed justices to "revert to the older practice of delivering opinions *seriatim*." After Marshall's tenure, more concurrences and dissents began to appear, but opinions were not as fragmented as they are today.<sup>593</sup>

Chief Justice Taft, whose tenure lasted from 1921 to 1930, also prized unanimity above individual expression and tried to reinstitute this norm. Like Marshall, he instituted a series of changes that transformed the federal judiciary's role; he secured more judgeships from Congress, created the predecessor of the Judicial Conference, and lobbied Congress to pass the *Judiciary Act of 1925*, which changed the rules for review of applications to give the Court more control over its docket.<sup>594</sup> He also secured the funds to build the building that is the Supreme Court's current home and said the building should "embody the dignity of the Court." Taft saw these changes and the goal of unanimity as part of the project of strengthening the court's legitimacy and making the law more uniform and efficient. He believed unanimity gave the Court's judgments weight and clarity, explaining that it was "better to have the law certain than settled either way."<sup>595</sup>

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<sup>593</sup> O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*. 70-72; Johnson, *The Chief Justiceship of John Marshall, 1801-1835*. 31-52, 60, 68-74, 80, 96-99; White, *The American Judicial Tradition: Profiles of Leading American Judges*. 22-33.

<sup>594</sup> *Judiciary Act of 1925*.

<sup>595</sup> O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*. 116; White, *The American Judicial Tradition: Profiles of Leading American Judges*. 179-181, 203; R. Post, "The



During Taft's tenure, 84% of opinions were unanimous. He achieved this unanimity through careful exercise of the assignment power, debate during the writing process, refinement of opinions to satisfy as many justices as possible, and the justices' willingness to sign opinions they disagreed with. Taft was frustrated by Justices Holmes, Brandeis and Stone for their propensity to dissent. He originally tried to keep Brandeis off the Court because he appeared to be a probable dissenter, and later tried to prevent Brandeis from dissenting when possible. In one 1923 case for which Justice McReynolds had written a majority opinion inspiring a dissent from Brandeis, Taft secured reargument and wrote the opinion himself in order to satisfy Brandeis and achieve unanimity. Even Justice Holmes, whose dissents in freedom of expression cases are iconic, stifled his own views and joined the majority when he thought he had been dissenting too much in recent cases.<sup>596</sup>

Taft's attitude suggests a view that the Court's institutional dignity and legitimacy were better bolstered by a united front, even one that left thoughts unstated, than by candor from each individual justice. Taft said, "Most dissents are a form of egotism. They don't do any good and they only weaken the Court's prestige."<sup>597</sup> This thinking mirrored the ABA's Code of Judicial Ethics in place at that time. Canon 19 stated,

It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusion

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Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court," *Minnesota Law Review* 85 (2001).

<sup>596</sup> O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*. 116; White, *The American Judicial Tradition: Profiles of Leading American Judges*. 180; Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court."

<sup>597</sup> O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*. 113-117.

and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principle, dissenting opinions should be discouraged in courts of last resort.<sup>598</sup>

This suggests that transparency regarding each justice's position was not highly valued. The reputation of the institution was more important than the reputations of the individuals or their candor. This Canon was dropped during 1972 revisions of the Code because the ABA "deemed it unhelpful to make dissenting an ethical issue."<sup>599</sup>

Despite Taft's motivations, his accomplishments were a mixed blessing for the Court. G. Edward White writes that Taft's strengths were also his weaknesses. Though he sought to achieve unanimity when possible to bolster the Court's legitimacy, this ended up producing an image of the Court as a "monolith of reaction," clinging to 19<sup>th</sup> century beliefs about the importance of property rights and the free market when the rest of the nation was increasingly hostile to this outlook and favored legislative and executive experimentation and intervention in the economy. The dissents that were published seemed to align themselves with this public. In this environment the Court's frequent unanimity did not serve the legitimating purpose for which Taft intended it.<sup>600</sup>

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<sup>598</sup> Ibid. 117. Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court."

<sup>599</sup> G. Lebovits, "Technique: A Legal Method to the Madness," *New York State Bar Association Journal* 75, no. 5 (2003).

<sup>600</sup> White, *The American Judicial Tradition: Profiles of Leading American Judges*. 189-198.

Making rifts public: The ministry of justice and the indeterminacy of law

After Taft's tenure, justices began to write more separate opinions. His successor, Chief Justice Hughes, tried to forge unanimity, but the rifts on the Court over the New Deal were too deep.<sup>601</sup> Some attribute the breakdown in unanimity to the fact that during the 1930s, there were more and more cases of "broad national significance," and decisions were weightier. It came to be seen as a "moral imperative" to make objections public.<sup>602</sup> While public and Congressional rage at the Marshall Court's decisions helped cement the justices' unanimity, in the 1930s this drove justices to speak out individually.

Robert Post argues that the uptick in concurrences and dissents in the 1930s also stemmed from an administrative change Taft had engineered. The *Judiciary Act of 1925* shrunk the Court's mandatory jurisdiction and made their review of most cases discretionary. The Court could now choose the cases it wanted to hear and used the opinions in these cases to lay down principles and rules to be used by other courts and in other cases. For the cases the Court chose not to hear, the decision of the last court to have heard them would be final. This redefined the Court's role as a body that supervised the federal system and guided the development of law, rather than one primarily tasked with resolving disputes between individual litigants. As Post puts it, the Court's role changed from that of a "court of last resort" to that of a "ministry of justice." One consequence of this was that the Court's audience came to be understood as the public at large rather than the parties in the disputes. This had always been the

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<sup>601</sup> Ibid. 213-214.

<sup>602</sup> Lithwick, "A High Court of One: The Role of The "Swing Voter" In the 2002 Term."

case to some extent, but the Court's new control over its docket highlighted this.

According to Post, the Taft Court's short, rapidly written, largely unanimous opinions worked for a "court of last resort." The "ministry of justice" model brought a smaller number of cases with higher stakes attached to them, and these elicited longer opinions that took longer to write and inspired more dissents and concurrences.<sup>603</sup>

Thus, the higher stakes and more public orientation of the decision-making prompted more transparency.

The Great Depression and the New Deal policies forged to address it fit comfortably with the understanding that law is indeterminate, that judges make, rather than discover, law, and that this process is inevitably shaped by ideology. It was clear that the justices had different ideologies, and this made apparent unanimity in opinions less meaningful. Post argues that evolving dissent practices express evolving conceptions of the line between law and politics.<sup>604</sup> When more people viewed law as made up of timeless, unchanging principles, there was less reason to dissent, but when law came to be seen as more flexible, dissents served more of a purpose.

During the 1940s, cases involving individual rights increasingly split the Stone and Vinson courts into two contentious camps represented by Justice Felix Frankfurter's advocacy of judicial restraint and Justices William O. Douglas' and Hugo Black's individual rights absolutism. This rift pitted two types of liberalism against each other: Frankfurter's "process liberalism" emphasized neutrality in judging and the need to seek reforms through the elected branches. Ideological judging was to

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<sup>603</sup> Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court."

<sup>604</sup> Ibid.

be curtailed through institutional and doctrinal limitations. Douglas' "substantive liberalism" stressed the importance of achieving a just outcome in each case and approved of seeking social and political reforms through courts. In the October 1943 term, for the first time in its history, a majority of the decisions the Court announced – fifty eight percent – were divided. The *New York Herald Tribune* responded with an editorial reminding the Court of its duty "to provide coherent doctrine."<sup>605</sup>

#### Occasional unanimity for clear guidance and more authority

The trend towards divided opinions continued through the Warren and Burger Courts. In 1972, when the Court issued a moratorium on capital punishment, each justice wrote a separate opinion for the first time in history. However, even after concurrences and dissents became common, the justices occasionally managed to draft a unanimous majority opinion in the face of disagreement in order to provide clear guidance and moral weight. The Court achieved a unanimous opinion in *Brown v. Board of Education*, the landmark desegregation case, withholding any glimmer of hope for segregationists and underlining the message that this decision was clearly mandated by the Constitution.<sup>606</sup>

A series of cases brought before *Brown*, between 1938 and 1953, had challenged segregated schools and in each, the Court had ruled that facilities for black

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<sup>605</sup> Urofsky, "Conflict among the Brethren: Felix Frankfurter, William O. Douglas, and the Clash of Personalities and Philosophies on the United States Supreme Court"; M. R. Belknap, *The Supreme Court under Earl Warren, 1953-1969*, ed. H. A. Johnson (Columbia, SC: University of South Carolina Press, 2005). 13-17; White, *The American Judicial Tradition: Profiles of Leading American Judges*. 220-230.

<sup>606</sup> Belknap, *The Supreme Court under Earl Warren, 1953-1969*. 24-32; White, *The American Judicial Tradition: Profiles of Leading American Judges*. 338-340.

students had to be built or improved to provide equal educational experiences to blacks and whites.<sup>607</sup> The justices weren't yet ready to rule that segregation inherently violated the 14<sup>th</sup> Amendment. Though a majority of the justices were leaning in that direction, Kentuckian Justice Stanley Reed supported the doctrine of "separate but equal," and Justices Vinson, Frankfurter and Jackson had doubts about the practical benefits and doctrinal propriety of a decision outlawing segregation.<sup>608</sup>

When Chief Justice Vinson stepped down in 1953, President Eisenhower appointed California Governor Earl Warren to replace him, and using skills learned in politics, Warren helped unite the Court around the judgment that segregation was unconstitutional. In the conference discussion on *Brown*, Warren kept the tone informal, setting aside the tradition in which each justice states how he intends to vote. Warren thought that issuing definitive statements would make it difficult for anyone to change their mind later. Realizing the remedy was the thorniest issue, Warren divided the case into two halves, *Brown I* addressing the constitutionality of segregation and *Brown II* laying out the parameters for progress on remedies, and asked that *Brown II* be reargued the next term. Then, with only *Brown I* at issue for the moment, he persuaded Justice Reed to join the majority and "do what is best for the country." After writing the opinion himself, Warren personally visited Justice Jackson, who was in the hospital recovering from a heart attack, and secured his agreement to sign onto

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<sup>607</sup> *McLaurin v. Oklahoma State Regents*, 339 U.S. 637 (1950); *Missouri Ex Rel. Gaines v. Canada*, 305 U.S. 337 (1938); *Sweatt v. Painter*, 339 U.S. 629 (1950).

<sup>608</sup> Belknap, *The Supreme Court under Earl Warren, 1953-1969*. 24-32; White, *The American Judicial Tradition: Profiles of Leading American Judges*. 338-340.

the opinion of the court and drop the concurrence he had been working on.<sup>609</sup> The opinion was unanimous, conveying to the country that the Court's stance was firm and its authority clear.<sup>610</sup>

This achievement was underlined a few years later in *Cooper v. Aaron*, in which the Court unanimously reiterated state officials' obligation to obey *Brown*, chastising Arkansas officials who were dragging their feet in implementing it. This opinion included a statement that "the three justices appointed since *Brown I* agreed completely with the 1954 decision and that the Court 'unanimously reaffirmed' it."<sup>611</sup> The Warren Court did not seek or achieve unanimity as often as the Marshall and Taft Courts had, continuing to divide between process and substantive liberalism, but the unanimity in these crucial cases gave the Court strength through a united voice.<sup>612</sup>

The Burger Court issued a unanimous opinion in *United States v. Nixon*, which mandated that President Nixon turn over incriminating tapes. However, this practice has become rare. The Court today decides some cases unanimously, but these are cases in which the issues are not important to public discourse and in which the justices actually agree. The practice of putting aside disagreements to provide strong guidance to the country in a controversial case does not appear to exist today.

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<sup>609</sup> Belknap, *The Supreme Court under Earl Warren, 1953-1969*. 29-48. *Brown II* was also unanimous, which was possible largely because the opinion was fairly short and not terribly specific, allowing all justices to agree to it but not providing clear benchmarks to lower courts. *Brown v. Board of Education of Topeka*, 349 U.S. 294 (1955); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>610</sup> Belknap, *The Supreme Court under Earl Warren, 1953-1969*. 24-32; White, *The American Judicial Tradition: Profiles of Leading American Judges*. 338-340.

<sup>611</sup> Belknap, *The Supreme Court under Earl Warren, 1953-1969*. 47-48; *Cooper v. Aaron*, 358 U.S. 1 (1958).

<sup>612</sup> White, *The American Judicial Tradition: Profiles of Leading American Judges*. 321. White calls this divide the divide between the "humanitarian and professionalist impulses of modern liberalism."

Today, we often understand the Court's legitimacy to be bolstered by the fact that each justice sticks to his or her principles and speaks his or her mind. Supreme Court rulings are often made up of splintered and overlapping opinions written by different justices who join part but not all of each other's opinions. Lower courts and attorneys are left to piece together holdings from separate pieces of opinions. This development is partly related to transparency, because it entails showing the public the disagreements within the Court, disagreements that are hidden when justices subvert their own views and sign opinions they disagree with. It contributes to the personalization of the judiciary by making clear each justice's individual opinion, allowing him or her to speak as individuals rather than as an institution.

In *The Majesty of the Law*, Justice O'Connor defends the current Court's practice of publishing fragmented opinions. She writes that although the justices with whom she served "greatly prefer" unanimity, this does not "overwhelm other goals." These other goals are presumably those of being forthright and clear – transparent -- about one's individual thinking, even if it doesn't make a difference to the outcome of a case. The differences between the Taft Court and the present Court, O'Connor writes, "probably reflect the lengths to which we are willing to go to achieve unanimity." O'Connor writes that, ironically, the institutional legitimacy that Marshall and Taft helped build through their focus on unanimous opinions has provided the current justices the space to express themselves individually.<sup>613</sup> One thing Chief Justice Taft may have missed, she writes, is that "at times the existence of dissent can

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<sup>613</sup> O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice*. 120.



bolster, rather than undermine, the Court's legitimacy" by highlighting each justice's independence and integrity.<sup>614</sup> This suggests that the current practice of publishing many separate opinions is partly linked to the justices' attentiveness to developing their own individual jurisprudential stances and standing up for their principles publicly.

Unanimous decisions about contentious issues require that the justices be willing to find common ground and to change their minds based on each other's arguments. Edward Lazarus writes in *Closed Chambers* that polarization among the justices has made this almost impossible. The justices are too committed to their principles to deliberate, and conference consists simply of voting. Some have argued that Lazarus' view is naive, constructed around a false fantasy of past justices' deliberations.<sup>615</sup> The Court has been polarized at various times in the past, but today that polarization is made public through frequent separate opinions. Signing opinions one disagrees with may seem more consequential because the Court is seen as speaking to the whole nation and the public and news media closely monitor and care passionately about its decisions.

#### Supreme Court clerks and separate opinions

Another factor contributing to the growth in separate opinions is the justices' expanding stables of law clerks that write them. The justices got legal secretaries in the late nineteenth century and by the 1930s these assistants had become law clerks

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<sup>614</sup> Ibid. 121.

<sup>615</sup> Kairys, "Reason Worship."

who had law degrees and did legal research. In the 1940s, some justices occasionally had their clerks draft opinions, and this became increasingly common during the following decades. In 1972, the Court instituted a “cert pool” which allowed clerks for participating justices to divide the job of reviewing litigants’ applications and writing memos recommending granting or denying certiorari. The cert pool freed a large portion of the clerks’ time for new tasks, and, combined with the growth of the allotment of clerks per justice from two to three in 1970 and three to four in 1974, this meant more writing could be produced by each justice’s chambers. Artemus Ward and David L. Weiden write, “After the cert pool was created and expanded, the number of separate concurring and dissenting opinions issued by the justices exploded.” Today, each justice has four clerks, all of whom have already clerked for another Court and may have even more professional experience.<sup>616</sup> With the exception of Justice Stevens’ chambers and sometimes Justice Scalia’s, clerks write the first drafts of opinions and the justices act as editors.<sup>617</sup>

In addition to making the proliferation of concurrences and dissents feasible, clerks may also make separate opinions more likely by sharpening the polarization of the Court. Lazarus writes that clerks often arrive at the Court with strong partisan

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<sup>616</sup> Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*; Posner, "The Courthouse Mice"; Ward and Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*. 46, 206-228; Garrow, "Acolytes in Arms."

<sup>617</sup> Both Richard Posner and Edward Lazarus criticize the delegation of opinion writing to clerks. Posner writes that “ghostwritten opinions” are longer, more polished and more scholarly but not better. Rather, they’re colorless, timid and euphemistic. Clerks are bright but inexperienced, and editing cannot make an opinion a justice’s own. Lazarus argues that, by giving the initial drafting to clerks, the justices forego the opportunity to engage in the self-criticism and refinement of argument that happens in the writing process. Their opinions become petrified in the form they took right after conference. Lazarus, *Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court*; Posner, "The Courthouse Mice"; Posner, *The Federal Courts: Crisis and Reform*. 107-110.

attachments and scheme to get their justices to commit to their interpretations of the law.<sup>618</sup> Weiden and Ward write that clerks' partisan loyalties have grown stronger, and Todd C. Peppers, another political scientist, writes that "the ideological distance between clerks and their justices has diminished." While clerks used to arrive at the Court right after law school, they're now required to have a year of appellate clerkship experience, and this experience gives them a form of ideological socialization. Many Supreme Court Justices take a majority of their clerks from "feeder judges" on the circuit courts with whom they have good relationships, and almost every primary feeder judge is either very liberal or very conservative. There are many moderate circuit judges, but none are Supreme Court feeder judges.<sup>619</sup> One study showed that between 1975 and 1998, the ideological match between the circuit court judge and Supreme Court justice for whom each clerk worked grew tighter.<sup>620</sup> Thus, clerks contribute to the proliferation of separate opinions not just by providing the labor power to produce them but also by imbuing opinions with their ideological commitments and perhaps rigidity, thereby making it harder to find or hold common ground during the opinion drafting process.

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<sup>618</sup> Lazarus, *Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court*.

<sup>619</sup> Garrow, "Acolytes in Arms"; Peppers, *Courtiers of the Marble Palace: The Rise and Influence of the Supreme Court Law Clerk*; Ward and Weiden, *Sorcerers' Apprentices: 100 Years of Law Clerks at the United States Supreme Court*.

<sup>620</sup> C. Ditslear and L. Baum, "Selection of Law Clerks and Polarization of U.S. Supreme Court," *Journal of Politics* 63 (2001); Garrow, "Acolytes in Arms." 418.

### Assessing the proliferation of separate opinions

The tradition of a joint opinion produces a certain kind of secrecy: it hides differences of opinion. The Marshall and Taft Courts had disagreements; they just weren't aired in the opinions. Although often more secretive, unanimity allows the Court to speak as an institution rather than a collection of individuals, giving decisions clarity and weight. Richard Posner argues that signed opinions are damaging because they encourage an "individualistic" judicial perspective, when what is needed is an "institutional judicial perspective." According to Posner, signed opinions and the proliferation of concurrences and dissents produce a focus on individual justices' reputations and encourage long, self-indulgent opinions that show little concern for the needs of appellate judges' busy audience of lower court judges and attorneys. From an individualistic standpoint, a justice should strive to communicate to the world where he or she stands, but from an institutional perspective, a justice should avoid publishing a dissent or concurrence if it doesn't make a difference to the holding and if the issue is unlikely to be reopened soon.<sup>621</sup>

Separate opinions also have benefits. Dissents and concurrences in cases such as *Whitney v. California* and *Lochner v. United States* have helped guide later changes in the law.<sup>622</sup> Justice William J. Brennan in his later years on the Court dissented in every death penalty case, even though he had no chance of ever prevailing, and defended this practice against critics. He argued that dissents keep the majority accountable for the consequences of its decision, emphasize limits on the majority

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<sup>621</sup> Posner, *The Federal Courts: Crisis and Reform*.

<sup>622</sup> *Whitney v. California*, 274 U.S. 357 (1927). *Lochner v. United States*, 198 U.S. 45 (1905).

decision, and suggest legal theories that state courts might use to interpret their own constitutions. Dissents also show that the Court took the arguments of both sides seriously. Additionally, Brennan maintained that repeated dissents that provide no new information and have no practical effect – such as his dissents in death penalty cases – constitute “a statement by the judge as an individual: ‘Here I draw the line.’”<sup>623</sup>

What makes this debate important to the discussion of the personalization of the judiciary is that it’s in part a discussion about whether judges should emphasize their individuality, a question whose answer has traditionally been no. Justice Brennan links his argument for judicial individuality and transparency to a more flexible and adaptable conception of law, paralleling Robert Post’s argument that the rise in separate opinions in the 1930s was linked to legal realism. Additionally, in criticizing dissents, Posner describes the justices’ audience as made up of lower court judges and attorneys who will be professionally affected by the opinion, while Brennan, in defending dissents, describes the justices’ audience as the entire society, and an opinion as part of a larger conversation. This, too, parallels Robert Post’s argument that separate opinions are linked to the conception of the Court as a “ministry of justice,” as speaking to the entire society rather than just the litigants. These are changes in “how the Court perceives and engages in its mission.”<sup>624</sup>

Thus, the proliferation of separate opinions, which started in the 1930s and has increased in recent decades, and the aspect of personalization that has accompanied it, have been encouraged by multiple factors at once. The increase in the number,

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<sup>623</sup> W. J. Brennan, "In Defense of Dissents," *Hastings Law Journal* 37 (1986).

<sup>624</sup> Post, "The Supreme Court Opinion as Institutional Practice: Dissent, Legal Scholarship, and Decisionmaking in the Taft Court."

experience and polarization of the clerks played a role but was not sufficient. The clerks had more time and training to write opinions, but we have to ask why their bosses used this labor power to produce separate opinions rather than for something else. The clerks also come to the justices from ideologically well-defined feeder judges and this may make it harder to find common ground in opinions, but we need to ask why the justices have lately chosen to select their clerks in this way.

It seems to me that a combination of other factors having more to do with the Court's role in society combined to encourage the production of individual opinions. First, since the 1930s the Court has more frequently found itself at the center of societal battles over controversial topics. The Supreme Court is scrutinized and sometimes excoriated by many people and groups. The understanding that law is indeterminate and depends on judicial decisions has sharpened these conflicts. Second, since the 1930s the Court has controlled its docket and has used the cases it hears to guide entire areas of federal law rather than just resolving individual disputes. This shifts the Court's audience from individual litigants to the entire nation, and raises the stakes of each decision. Third, since the 1960s, Supreme Court decisions have touched on topics that have personal dimensions, such as schooling and sex, and thus sometimes evoke emotional responses from the public.

It seems likely that these three factors related to the Court's role in society have combined to make it personally, intellectually and professionally more difficult for the justices to sign decisions they disagree with. It also seems likely that, because Presidents since the 1970s have applied more time and resources to ideologically

screening judicial candidates, the justices simply disagree more often because their ideologies are further apart. Finally, on top of all these other reasons, I don't think it can be a complete coincidence that the justices' increasing self-presentation as individuals has happened simultaneously with the personalization of politics in general. Through the 20<sup>th</sup> century, politicians in all branches of government have increasingly been known as individuals rather than as representatives of parties or institutions, a shift attributable to changes in political structure and culture and the news media. It is likely that this reinforced the parallel changes in the Supreme Court Justices' public personas.

#### Familiarity with individual justices

The increase in separate opinions accentuates the personalization of the judiciary. This practice, in combination with the polarizing and personal subject matter of some contemporary cases, has encouraged the public to associate individual cases with individual justices. Edward Lazarus points out that Justice Harry Blackmun will forever be associated with *Roe v. Wade* in a way that is not the case for many other decisions. He argues that few non-lawyers know who decided other famous cases but many know Harry Blackmun wrote the opinion in *Roe*. As a result, Blackmun was the target of protests and personal threats as well as praise and thanks. He received hundreds of thousands of letters about *Roe* and read every one. Lazarus surmises that, when they voted to uphold the central premise of *Roe* in *Planned Parenthood v. Casey*, Justices O'Connor, Souter and Kennedy wrote a joint opinion because they

each feared taking individual responsibility for the decision and receiving the threats Blackmun had received. Lazarus writes that Justice Scalia attempted to convince Kennedy to vote to overturn *Roe* by pointing out that he would become a target just as Blackmun had become, and that it's thought that Blackmun attempted to stiffen Kennedy's spine by showing him letters he had received from Catholics praising *Roe*.<sup>625</sup> This suggests that this aspect of the personalization of the judiciary – the association between individual justices and decisions – can cause justices to feel the weight of public opinion in ways that pose problems for the judicial role.

Another shift that both adds to and responds to the individuation of the justices' public images is the Supreme Court's recent decision to begin identifying which justice said what in the transcripts of oral argument. Transcripts are available on the Court's website, in its library, and from its reporting service, Alderson Reporting Service. Until recently they did not indicate who was speaking; instead of the justice's name, the transcript read, "Question." Since September 2004, each transcript has listed the name of the justice speaking. The Court's press release explained the change this way: "The change in practice is being made in the interest of the accuracy and completeness of the transcripts for reporting, research and archival purposes."<sup>626</sup> These reasons aren't striking; what is notable is the fact that this particular type of documentation – which justice said what – didn't previously seem important but now

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<sup>625</sup> Lazarus, *Closed Chambers: The Rise, Fall and Future of the Modern Supreme Court. Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

<sup>626</sup> K. L. Arberg, "Oral Argument Transcripts," (Supreme Court of the United States- press release, 2004).



does. This provides the public with a channel through which to learn about the justice's individual views and disagreements.

### Continuing resistance to personalization of the judiciary

In this chapter, I've discussed how the Supreme Court Justices' images have been personalized during the past several decades through their own communication with the public, their opinion-writing practices, and descriptions of justices in news media, books and popular culture. However, the transparency and personalization of the judiciary are not as far-reaching or as accepted in politics generally. The secrecy of the Court's internal operations is one area of resistance. The Court considers everything except its published opinions, and to some extent oral argument, to be back stage. While justices give interviews, these are still rare compared to other officials, and they usually stick to general statements about the Constitution, the process of judging, and collegiality on the Court. The justices usually refuse to talk about their decision-making on individual cases. Although clerks today are sometimes willing to leak information about the Court's decision-making several years after they leave the Court, this doesn't happen while the clerks are at the Court. Even Bob Woodward observed the admonition not to publish anything about ongoing cases.

Attitudes towards judicial papers also suggest continuing reticence towards revelation, personalization, and modern transparency practices in general. Although many justices house their papers with the Library of Congress, they attach rules

mandating waiting periods or restricting who may see them.<sup>627</sup> Most justices' papers are closed, by the deed of gift, for between five and fifteen years after their deaths or until all justices who participated in the cases have died. Some justices also stipulate that their literary executors must clear any use of their papers.<sup>628</sup> When Thurgood Marshall's papers were opened to the public right after his death and the *Washington Post* printed excerpts of them, Rehnquist wrote an angry letter to the Library of Congress stating that many justices would not house their papers there. However, since then, Justices White and O'Connor have given their papers to the Library of Congress.<sup>629</sup>

The flap over Marshall's papers may not have occurred if they had been used by academics writing books rather than journalists writing for the *Washington Post*. This situation partly parallels the scuffle over Professor Peter Irons' use of the tapes of oral argument to make a compendium intended for the general public. One of Irons' transgressions was to contravene the stipulation that those tapes be used for "serious scholarly and legal research."<sup>630</sup> This suggests that sometimes the Court puts up barriers to information not because the information shouldn't get out but because there is a worry about how the information will be framed. Thus, the justices are

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<sup>627</sup> The Library of Congress Manuscript Division's web site states: "Among the chief justices, the division holds the papers of Oliver Ellsworth, John Marshall, Roger B. Taney, Salmon P. Chase, Morrison R. Waite, Melville Weston Fuller, William Howard Taft, Charles Evans Hughes, Harlan Fiske Stone, and Earl Warren. The papers of associate justices are also well represented here. For the Warren Court (1953-69) alone, the division holds the papers of Hugo L. Black, William O. Douglas, Felix Frankfurter, Harold H. Burton, Robert H. Jackson, William J. Brennan, Jr., Byron R. White, Thurgood Marshall, and Arthur J. Goldberg." <http://www.loc.gov/tr/mss/guide/federal.html>

<sup>628</sup> Email from Daun von Ee, Historical Specialist in the Library of Congress' Manuscript Division, June 15, 2009.

<sup>629</sup> Mauro, "The Supreme Court and the Cult of Secrecy."

<sup>630</sup> Ibid.

increasingly humanized but it's a more controlled, careful humanization than occurs for the other branches.

With all this context, we can ask whether the Supreme Court Justices are celebrities. They certainly have some celebrity features, particularly those features celebritization shares with personalization. They are increasingly distinguishable as individuals and there is public interest in their personal lives. However, I view personalization as more subtle than celebritization. More than individuation and personal revelations are necessary for celebritization; it entails also that a person's notoriety eclipse their accomplishments and that they are so visible that they become very familiar to the public, creating the illusion of intimacy. I don't believe these changes have yet fully colored the Supreme Court justices, and they aren't the norm at the Court. The personas of Justices Douglas, Thomas and O'Connor all show signs of this trend, but I don't believe it has fully arrived. For the most part, the justices are famous for their role as justices and they have curtailed their visibility much more than most other public figures do. The key to this difference may lie in the fact that celebrity figures, whether in entertainment, politics or other realms, need the public's support, either commercially or electorally. The justices have some distance and independence from the public built into their roles. This insulation from the public may be changing, but it's changing slowly and only along certain fronts.

### **Part III: Personalization and judicial legitimacy**

In this chapter, I've laid out several developments that contribute to the personalization of the judiciary, a phenomenon I view a part of a larger set of modern transparency practices. The different developments I've discussed are rooted in different kinds of changes, some of which overlap and some of which don't. However, I believe the different components of the personalization of the judiciary reinforce each other. These changes are loosely related to the contemporary focus on government transparency, the ways in which transparency has been practiced in the past fifty years, and the increasing need for officials to engage with the public. These developments encourage personalization, and this causes more tensions in the judiciary than it does elsewhere, because judges have traditionally eschewed personalization due to their constitutional role.

The environment in which the Court exists is different now from fifty years ago. The differences among the justices have become part of the public information landscape. The subjects the Court addresses are often at the center of political discourse. Furthermore, public appeals and public opinion have become more important to official actions. Rather than working behind the scenes, elected officials conduct almost constant campaigns, appearing on television, making speeches, and writing editorials to maintain popularity for themselves and their policies throughout their terms.<sup>631</sup> Sharing personal stories and cultivating an image of ordinariness are viewed as helpful to legitimation. Judges are not elected officials but they do exist in

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<sup>631</sup> S. Blumenthal, *The Permanent Campaign* (New York: Simon and Schuster, 1982); N. Ornstein and T. E. Mann, eds., *The Permanent Campaign and Its Future* (Washington, D.C.: The American Enterprise Institute and the Brookings Institution, 2000).

this political and cultural environment, and their self-presentation shows signs of following these trends. The justices must exist in this environment in which achieving legitimacy and respect often entails public appeals, and in defending themselves against attacks, they've furthered their own personalization. These changes are a bigger and more profound change for the judiciary than for elected officials because judges aren't directly accountable to the public.

The federal judiciary has not had this tie to the public before.<sup>632</sup> This new type of public communication constitutes a new method of legitimation for the federal judiciary. Traditionally judicial legitimacy is based on judges' mode of decision-making and their neutral stance. This is still partially the case, but there is now another plane of judicial legitimation, and this one parallels the other branches. Federal judges are now more accepting of personalization and public appeals, and more accepting of modern media.

This shift resonates with the argument that the Court's decision to give its constitutional blessing to cameras in the courtrooms in *Chandler* in 1981, when they had withheld this blessing in *Estes* in 1965, was based not on different facts or law, but rather on a revision of the justices' understanding of what the news media, particularly television, could do for judicial legitimacy and trial fairness.<sup>633</sup> According to this argument, in 1965 the majority viewed television as dangerous, but by 1981 the justices viewed it as potentially helpful. Of course, the Court's composition had changed during the intervening years as well, moving slightly to the right with

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<sup>632</sup> The same cannot be said for state judges, many of whom are elected.

<sup>633</sup> C. R. Nesson and A. D. Koblenz, "The Image of Justice: *Chandler v. Florida*," *Harvard Civil Rights - Civil Liberties Law Review* 16 (1981).

Nixon's appointees, but the issue of cameras in the courtroom does not line up with ideological or partisan sides. It seems more likely that the general cultural understanding of how public officials should interact with media had changed. The media was often cynical and commercially focused, but at the same time, officials were able to use the media to win over the public.

Federal judges' ability to make decisions does not depend on public approval because they're not elected. However, in some ways they do need public approval: as Alexander Hamilton wrote, they have neither the purse nor the sword. They need the other branches to implement their decisions, and to provide them with clerks, offices, salaries and security. Furthermore, although public criticism can't remove justices from office, it can tarnish their reputations. We could say, that, in response to these challenges, Supreme Court Justices have been "going public."<sup>634</sup> They press their concerns in speeches intended for the public. They strive to build acceptance of certain modes of constitutional interpretation. They also appear to go public to make points about policy and legislation that affects them. Chief Justice Rehnquist used his yearly address to criticize mandatory sentencing laws, and Justice Roberts has used his to advocate for higher judicial salaries. Justices appear before Congress and press their case for more security and resources.<sup>635</sup>

This new plane of legitimation puts the judiciary in a bind. It highlights the fact that the justices are individuals with political and personal views and experiences,

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<sup>634</sup> S. Kernell, *Going Public: New Strategies of Presidential Leadership* (Washington, D.C.: Congressional Quarterly, 1997).

<sup>635</sup> "Supreme Court Justices Going Public," Lori Johnson, presented at *Western Political Science Association* meeting in March 2005, in Albuquerque, NM.

and thus diminishes the veneer of impersonal authority. However, that veneer isn't supportable and would be tarnished regardless. Judges have different approaches to the law, and their ideologies and backgrounds do affect these approaches.

Additionally, judges do need to maintain their legitimacy. In today's political culture, engagement with the public is the way to do this. Any engagement with the public will be filtered through modern transparency practices and will involve an element of personalization.

While some argue that judges should avoid the spotlight altogether this isn't possible today and probably isn't desirable. However, it's important that judges engage with the public in a different way than the elected branches do. They need to maintain public respect for their constitutional role and mode of decision-making and to argue for a vision of law's duality: adjudication is shaped by context and by the particular individuals entrusted with it *and* it is structured by internal standards and principles that can temper ideological preferences. The public shouldn't be told that judges are robots who make decisions based strictly on legal texts and abstract principles and shouldn't be told these texts and principles are entirely self-defining. This isn't the case, and it's a difficult fiction to maintain. However, neither is it correct or useful to create the appearance that judges are purely politicians who are essentially voting every time they make a decision. They work within other bounds and with other concerns, and the public needs to understand these as well. Though paradoxical because of the personalization involved, it's possible that judges are the best people to make this case.

## **CONCLUSION**

This study sheds light on transparency, the federal judiciary, and both of their relationships with American democracy. Citizens' ability to know and understand what their government is doing has increased as the government has become more democratic. Today we often assume that more information is always good for democracy. However, as the expectations and practices serving this ideal have developed, transparency has also changed in shape and meaning, and the contemporary instantiation of transparency has led to some unintended results.

The drive for transparency and the accompanying ethos that emphasizes the need for public approval of government actions has created several corresponding dynamics. It can be difficult for officials to make complex decisions requiring expert knowledge that citizens don't possess, and this may prevent them from doing what is in the best interests of their constituents. Additionally, because officials are constantly in the act of selling themselves to the public, the information they provide about their views and goals is increasingly scripted. Thus, often citizens aren't so much monitoring government as they are receiving targeted messages from government. This changes the location of the line between the front stage and back stage of government processes. Officials perform transparency, and the actual decision-making retreats further back. When an issue is complex or esoteric, the translation necessary to explain it to the public can open citizens up to further layers of mediation and perhaps manipulation.



The means by which information is disseminated have also led transparency away from the model imagined by democratic theory. In a populous, geographically dispersed country, transparency is enacted through the mass media and is often inseparable from it. In the United States, particularly in the last three decades, these media have become increasingly commercialized and competitive, and they shape information to benefit their bottom line. Information is often delivered in an entertainment idiom that favors scandal and conflict and sometimes trivializes substantive matters. Personality-based stories keep audiences engaged, and this magnifies the personalization already set in motion by the use of advertising and public relation techniques in politics and the decline in the power of political parties.

Modern transparency practices are not necessarily always bad, but they do conflict with the vision of transparency imagined by many advocates. This conflict is the same one that Walter Lippmann described in *Public Opinion*, in which he argued that that the kind of democratic communication many described was not possible because of the nature of the media, the government and human perception itself. Lurking in the background of many related concerns about transparency's limitations is the concept of rationality. Democratic theory imagines citizens who are rational and informed, but modern transparency practices often seem to address a hypothetical citizen who is irrational and confused.

However, many criticisms of modern transparency practices are misguided. Some arguments rely on myths about particular media or technologies and ignore the specific practices that embed them and the broader forces of which they are just one

part. Debates about transparency are often debates about how to assess communication media and what they mean for the possibility and value of democratic communication. Television and images are in some ways treated as symbolic of modern transparency practices and of democratic communication in general. However, television and photography don't always cause the problems they're blamed for, and they don't do so alone. Assuming that they do can blind us to the broader sources of problems.

Modern transparency practices can be especially problematic for the federal judiciary because of judges' constitutional role and mode of decision-making and the particular requirements of fair trials. The judiciary is tasked with upholding the constitutional principles in the United States' constitutional design, and this sometimes means restraining majorities in the service of individual rights and limits on government power. However, transparency, particularly its modern practice, enhances the majoritarian focus. Judges have traditionally maintained legitimacy through distance, but modern transparency practices bridge that distance.

It's clear that the federal judiciary is different from the other branches – judges make decisions based on different standards, and have a different role. What this study has tried to show is how the judiciary is different from the other branches in terms of *communication*. Many see communication as central to democracy, but it has an uneasy relationship with the judiciary because it can be a tool of majoritarianism. While all branches' communication with the public has been changed by the growing popularity of the ideal of transparency and the practices and policies that have shaped

it, the change in the judiciary is of a different order because judges don't have a structural tie to the public once on the bench.

The federal judiciary does need to maintain legitimacy in the public's eyes in order to fill their constitutional role. Today's democratic ethos makes this role especially jarring to some and makes it even more imperative that the judiciary maintains legitimacy. The power to deprive a person of life or liberty and to say what the law is must be justified and legitimated. The democratic ethos puts the judiciary in a bind, because judges traditionally maintain legitimacy through their decision-making logic and impartial stance, and this can lead them to make decisions that majorities don't like.

Transparency is neither always good nor always bad for democracy or for the judiciary. It has not been my objective in this study to produce a normative statement about transparency policies for the areas I've discussed, but I can offer some thoughts here. On a very general level, it's important to recognize that transparency is inseparable from the mass media, and their increasingly competitive commercial structure influences what transparency means and how it works. The decline of journalistic professionalism that has accompanied the growing emphasis on the bottom line has enabled some of the excesses of modern transparency practices. Regulating media consolidation in the interest of preserving a public interest commitment and some measure of public affairs coverage should be considered a component of government transparency.

However, we should remember that tabloid-style media have existed since the 1830s, and their longevity suggests that they fill real human needs, such as the desire to hear interesting stories about people and about breaking societal taboos. Not all information must serve rational, public sphere debate. I don't believe tabloid formats are dangerous per se; I believe they're dangerous when they start to crowd out other formats, particularly discussions of public affairs with a public interest orientation.

On the level of transparency's relationship with the judiciary, the balance between majoritarianism and constitutionalism should be a guiding force in making decisions about what to allow. Transparency is more appropriate when majoritarianism is the governing principle in a situation. It's more important to be cautious about transparency when constitutionalism is the guiding principle. I am thus more sympathetic to modern transparency practices in confirmations than in trials, because confirmations present an appropriate place for a democratic check on the judiciary, while trials do not. My policy preference for confirmations is in many ways an argument for the status quo. Given the political and cultural environment that we have and that can't be easily changed, I would keep the process the way it is, despite its performative nature and the distortions it often produces. The performances serve a democratic purpose that is appropriate in these events. In trials and hearings, the situation is different. This is where judges' constitutional duty is most important and where they therefore must be most insulated from public opinion. This means curtailing transparency in trials is more understandable.

I also think it's important to consider the audience for whom each type of information is most relevant. This suggests the need for a distinction between trial and appellate courts. Trial courts' actions are most relevant to individual defendants and litigants, who are often in danger of losing their liberty or even their lives. Although public benefits accrue from keeping these trials open, the potential dangers to litigants are such that federal trial courts, particularly criminal courts, should remain off limits to cameras. The work of appellate courts, on the other hand, is relevant not just to litigants, but also to the broader society. Appellate judges' statements and actions concern the law itself and the societal values the law codifies. Furthermore, appellate courts don't have witnesses or jurors, whose reactions to cameras cause the most worry and are unpredictable. Thus, I would advocate allowing cameras in federal appeals courts, including the Supreme Court, but not in trial courts unless both parties in a particular trial agree to it. Some consider this position restrictive, but it's more permissive than the current policy.

Of course, fair trials are not the only consideration in the debate about cameras in the courtroom. People also worry about public perceptions of trials and of the judiciary. It is not clear to me that cameras would, on balance, threaten the legitimacy of appellate judges or courts. I believe the results would be mixed. Many misunderstandings currently shape public discourse about courts and more information could help. Because appellate courts' work is more clearly relevant to the public, I am comfortable with the idea of televising them, particularly if guidelines such as those from the federal pilot program are used.

The personalization of the judiciary is obviously less amenable to concrete policies. This trend is intertwined with changes in American politics and culture and in the Court's role. Today's democratic ethos and the Court's important role in American life make the justices' engagement with the public understandable. I believe it's appropriate that the public see and think about who the justices are as individuals. However, it's important to keep alive the understanding that even though they're individuals and their personhood affects their work, this work is also structured by legal rules and procedures and is thus different from legislative and executive work. This combination of politics and principles leads different justices to different conclusions, and the law is shaped by these conclusions rather than set in stone. However, the institutional and doctrinal constraints justices work with are different from the parameters politicians work with. Judging is political but it's not purely politics.

Thus, there is a tension between transparency and the judiciary, and this tension has grown more pronounced as American politics have become more democratically focused and as modern transparency practices have taken shape. This suggests a conflict between two important sets of principles in American government – the rule of law on the one hand and transparency, public opinion and the public sphere on the other. The roots of this conflict are deeper and broader than any one medium or technology: they're productive tensions within constitutional democracy itself.

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