

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

COVERING THE APPELLATE COURTS

PREFACE: BRINGING LIGHT TO THE HALLS OF SHADOW

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Appellate judges operate in the shadows.

But they don't see it that way. "We are judged by what we write," says Supreme Court Justice Anthony Kennedy.¹

That is of course true, and every appellate court's proceedings and records are presumptively open to the public.²

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1. C-Span, *Cameras in the Courts*, <http://www.c-span.org/camerasinthecourt> (accessed Apr. 14, 2007; copy on file with Journal of Appellate Practice and Process) (quoting Anthony M. Kennedy, J., Sup. Ct. of the U.S., Testimony, H.R. Subcomm. on Fin. Servs. & Gen. Govt. of the Comm. on Appropriations, 110th Cong. (Mar. 8, 2007)).

2. See e.g. Richard J. Peltz, Joi L. Leonard & Amanda J. Andrews, *The Arkansas Proposal on Access to Court Records: Upgrading the Common Law with Electronic Freedom of Information Norms*, 59 Ark. L. Rev. 555, 559-611 (2006). It bears noting that the West Wing of the White House is certainly not so vulnerable to public scrutiny as are the courts, and the backrooms of legislative chambers are famously smoke filled. See e.g. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367 (2004) (holding that information about vice-president's meetings with oil-industry executives is not subject to public disclosure); 5 U.S.C. § 551(1)(A) (2007) (exempting Congress from reach of federal Freedom of Information Act) (available at <http://uscode.house.gov>); but see *Schwartz v. U.S. Dept. of Just.*, 435 F. Supp. 1203 (D.D.C. 1977) (refusing to dismiss legislator from access suit predicated on common law right of access to public records), *aff'd*, 595 F.2d 888 (D.C. Cir. 1979) (table). The original smoke-filled room was fabled to be part of a political

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Yet the parts of court activity that we see and hear seem only to whet our appetite for the rest of the process. What goes on during all that time when the judges are not in the courtroom?

What, for example, do the Justices of the Supreme Court do when they're behind the velvet-red drapes? One imagines the unfathomable machinations of the Wizard of Oz.³ In the present-day halls of One First Street in northeast Washington, one would be less surprised by a Horse of Many Colors than a unanimous decision.

Some of the known details of Supreme Court practice reliably kindle cocktail party prattle. We know the fabled Rule of Four for granting certiorari.⁴ We know of "the highest court in the land," the Court's officially undisclosed location for basketball play, where the Justices, rather than counselors, do the perspiring.⁵ And we know that the Scalias celebrate New Year's Eve at the Ginsburgs with caviar and wine,⁶ though we can only imagine the discourse on *stare decisis* and *auld lang syne*.

We know much less than we would like about how the Court gets from the spirited exchange of the public oral argument to the published opinion by "Justice Stevens, with whom Justice Souter joins, and with whom Justice Scalia joins

nominating process, though the term now has broader use. See Christopher Thale, *Smoke-Filled Room*, in *Ency. of Chi.*, <http://www.encyclopedia.chicagohistory.org/pages/3217.html> (noting that the term originated in an AP story about a late-night meeting at the Blackstone Hotel in which Warren G. Harding was advanced as the Republican party's nominee for president in 1920, and that it has come to mean "a place, behind the scenes, where cigar-smoking party bosses intrigue to choose candidates") (accessed Apr. 15, 2007; copy on file with Journal of Appellate Practice and Process). Of course, Congress is less smoke-filled today. See e.g. Lyndsey Layton, *A Smoking Tradition Snuffed Out by Pelosi*, Wash. Post A7 (Jan. 11, 2007); (indicating that smoking is now banned in the Speaker's Lobby but "still permitted in lawmakers' offices, in two designated smoking rooms in the House office buildings and in a small, concrete room in the Capitol's basement").

3. See *The Wizard of Oz* (MGM 1939) (motion picture). Really, see it.

4. See Joan Maisel Leiman, *The Rule of Four*, 57 Col. L. Rev. 975, 981-82 (1957) (noting that this traditional rule, although unwritten, likely dates back to the nineteenth century); see also Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, 16B *Fed. Prac. & Proc. Juris.* 2d § 4004.2 (West Pub. Co. 1996).

5. See Gina Holland, *For Lawyers, Highest Court in Land is "Basketball Heaven"; Upstairs from Justices, Players Sweat it Out in Hidden Gym—But Quietly*, Chi. Sun-Times 39 (Sept. 4, 2002). Actually, at least in 2002, only clerks, and none of the justices, played. *Id.*

6. Joan Biskupic, *Justices Strike a Balance: Pals Ginsburg, Scalia Ring in the New Year, then Duke it Out in Court*, USA Today 1D (Dec. 26, 2007).

except for Part III and footnote 17, dissenting in part.”⁷ Was it something Stevens said? This is the Great Unexplained, the Black Box of the Court. The facts and the arguments go in, and the decisions and the opinions come out. But what happens in between? Is real life on the Supreme Court as much fun as it was for Walter Matthau and Jill Clayburgh when they pretended to be Justices?⁸

Fortunately, we do not foray alone into this world of enigmatic process; we are guided by an elite corps of journalists, the appellate court reporters. Not the dusty kind on shelves, but the living, walking sort, who write, talk, and do stand-ups on the courthouse steps. They help us by researching, recording, and recalling, by informing, interpreting, and investigating, and by explaining, elucidating, and educating. They are the voices in our heads when we read our favorite newspapers and magazines, and the voices in our living rooms when we hear and watch the news. If you’re reading this law journal, you probably are a court-watcher, and you know who these reporters are. You probably have a favorite, maybe two.⁹ Maybe there is one you love to hate.

These reporters are closer to the action than we are. Like a member of the White House Press Corps who might occasionally glimpse the President in an informal aside, the appellate court reporter has a better chance than the general public of witnessing justice in a personal pose. Like any reporter who masters a niche beat, the appellate court reporter collects far more background than ever reaches readers. Some of this background enriches the reporting. Some of it is the fascinating minutiae of how the judiciary works (or doesn’t) that fails to make the cut because it’s not quite newsworthy. And some of it is just fascinating minutiae of interest only to the legal-eagle geek squad.¹⁰

7. *U.S. v. Booker*, 543 U.S. 220, 272 (2005).

8. See *First Monday in October* (Paramount Pictures 1981) (motion picture). Matthau and Clayburgh played Justices Dan Snow and Ruth Loomis. They were both nominated for Golden Globes.

9. Yes, I told my students that I would give an “A” to anyone who could arrange a date with my favorite. No, I was not serious. She happens to be happily married. Students, please stop e-mailing her.

10. E.g., you, because you read the footnotes in a law journal. I confess that when I was a legal intern in Washington many years ago, I was fascinated by reported sightings of

Who are these elite journalists? They have remarkable intellect and professional skills, yes, but they also have idiosyncrasies, and even, we hate to admit it, biases. Pulitzer-Prize winner Linda Greenhouse, who has set the standard for print reporting on the Supreme Court in her work for the storied New York Times, made news herself with a 2006 Harvard University speech in which she lamented Bush Administration policy on Guantánamo Bay and religious fundamentalists' "sustained assault on women's reproductive freedom."¹¹ On a lighter note, Nina Totenberg, whose voice intones legal authority for National Public Radio listeners, demonstrated on The Colbert Report how a reporter covering interminable Senate confirmation hearings stands and gyrates, as if powering a hula hoop, to restore sensation to the backside.¹² So as it turns out, appellate court reporters are people like you and me.

In August 2007, a panel of veteran Supreme Court reporters convened at the national convention of the Association for Education in Journalism and Mass Communication,¹³ where

Justice O'Connor at the Watergate Safeway, where I too shopped for groceries. I was tempted to stake the place out to learn her preference in breakfast cereal. So I understand where you're coming from.

11. *All Things Considered*, "Critics Question Reporter's Airing of Personal Views" (Natl. Pub. Radio Sept. 26, 2006) (radio broad.) (transcript and audio available at <http://www.npr.org/templates/story/story.php?storyId=6146693>) (accessed Apr. 16, 2008; copy of transcript on file with Journal of Appellate Practice and Process).

12. *Colbert Report*, "NPR's Legal Correspondent Helps Stephen with His Pledge Drive" (Comedy C. Jan. 19, 2006) (TV series) (video available at <http://www.comedycentral.com/colbertreport/videos.jhtml?videoId=49863>) (accessed Apr. 21, 2008; copy of initial screen on file with Journal of Appellate Practice and Process). In the interest of full disclosure, I must reveal that I once shared with Totenberg and her husband a plane ride on a private jet. No one gyrated, and they are lovely people.

13. I was there, so the following recollections derive from my notes.

Incidentally, Linda Greenhouse made some more unpleasant news at this program. When C-SPAN arrived to video-record the panel, Greenhouse, who had not been warned that television broadcast was a possibility, objected. The panel coordinators decided to bar the cameras. See e.g. John Eggerton, *Journalism Educators Bar C-SPAN*, *Broadcasting & Cable* (Aug. 10, 2007) (available at <http://www.broadcastingcable.com/article/CA6467927.html>) (quoting Greenhouse as saying that when she "accepted the invitation to speak to a roomful of journalists and professors, no one said anything about a nationally televised event," and that "[t]here is a difference between appearing before a room of 50 or so professors and speaking in front of national television") (accessed Apr. 21, 2008; copy on file with Journal of Appellate Practice and Process).

As cameras in the courts have long been an agenda item of media advocates, the irony of a famous court reporter's camera shyness, compounded by the complicity of journalism educators, was lost on few. AEJMC subsequently passed a resolution directing

moderator Amy Gajda¹⁴ asked the panelists to name their favorite Supreme Court cases. Washington Post reporter Charles Lane discussed *United States v. Cruikshank*,¹⁵ the Reconstruction-era decision in which the Court declined to construe the then-new Fourteenth Amendment to reach private acts, holding that the “power of the national government is limited to the enforcement of . . . [the] guaranty” against discrimination by the states themselves.¹⁶

Other panelists made more recent selections. Lyle Denniston, senior statesman of the panel, lately a resident genius on SCOTUSblog, and a Sun reporter when I was growing up in Baltimore, discussed *Bush v. Gore*.¹⁷ He argued that the case represented the triumph of law over politics and spared the nation a constitutional crisis. Noting the oral-argument skills of the lawyers in her pick; Jan Crawford Greenburg of ABC News cited the 2000 case in which the Supreme Court disallowed FDA regulation of cigarettes.¹⁸ Greenhouse referenced the 2003 decision on affirmative action in higher education, *Grutter v. Bollinger*.¹⁹ Tony Mauro—lately of Legal Times, American Lawyer Media, and law.com—and Pete Williams of NBC both reemphasized *Bush v. Gore*, and mentioned in addition the Guantánamo detainee cases²⁰ and *Elk Grove Unified School*

an apology to C-SPAN, pledging an open-coverage policy for the future, and indicating that all invited panelists will now be informed of that policy. AEJMC, 2007 Conv. Res. 3, *Resolution to Affirm Openness in AEJMC Convention Panels and Presentations* (Aug. 15, 2007) (available at http://www.aejmc.org/_events/convention/resolutions/07resolutions/resolution_3.pdf) (accessed Apr. 21, 2008; copy on file with Journal of Appellate Practice and Process).

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15. 92 U.S. 542 (1876). Chuck Lane, the editor who fired Stephen Glass from *The New Republic* in 1998, was played by Peter Sarsgaard in *Shattered Glass* (Lions Gate 2003) (motion picture). He noted to appreciative laughter at the AEJMC panel discussion that he did not cover *Cruikshank* personally, but he also indicated that the case would be included in his then-upcoming book. See Charles Lane, *The Day Freedom Died: The Colfax Massacre, the Supreme Court, and the Betrayal of Reconstruction* (Henry Holt & Co. 2008).

16. *Cruikshank*, 92 U.S. at 555.

17. 531 U.S. 98 (2000).

18. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Solicitor General Seth P. Waxman argued *Brown & Williamson* for the Government, and Washington, D.C., food and drug attorney Richard M. Cooper argued for the respondents.

19. 539 U.S. 306 (2003).

20. *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Rumsfeld v. Padilla*, 542 U.S. 426 (2004).

District v. Newdow.²¹ Mauro and Williams also talked about the challenges of reporting on cases involving life and death, Mauro speaking of a capital case²² and Williams of the “right to die” cases.²³

Dahlia Lithwick of Slate also discussed *Newdow*. She noted that court-watchers expected the oral argument to be an “unmitigated train wreck,” as Michael Newdow—a lawyer and atheist whose daughter was compelled to recite the pledge in school—argued the case himself, despite his emotional investment. Indeed, Lithwick pointed out, Newdow “broke every rule of how you talk to the Court”; he was “pushy,” “aggressive,” and “dramatic.” But, she concluded, “he rocked it.” Take-home lesson: As she put it, “we could learn a thing or two” from persons outside the usual judicial circles.

The AEJMC panelists’ testimonies recounted not just legal drama, but real memories of daily life and human foibles. Mauro told of accompanying Newdow to a store in Sacramento where the latter tried on hula skirts in anticipation of a party for his daughter. Lane recalled joggers who ran right past Justice Breyer but stopped to watch Pete Williams. Williams for his part remembered thinking that he was being booed by demonstrators awaiting the *Bush v. Gore* ruling when they were instead focused on a Gore attorney. And he admitted that the “high point of the [2006-07] term,” at least from his perspective, was that he “could not often enough on the air say ‘Bong Hits for Jesus.’”²⁴

All of these stories suggest that covering the appellate courts is an intense endeavor. Reporters on every beat walk a fine line between journalistic detachment and intimacy with their subjects, but these reporters are called on to walk that line with unparalleled sobriety. On the one hand, they must have an appreciation for the subtleties of legal tradition, the nuances of legal argument, and the inherent humanity, for better and for worse, of our justice system. On the other hand, they must possess the sharpest of journalistic skills if they are to translate

21. 542 U.S. 1 (2004). *Newdow* is the “under God” Pledge of Allegiance case that the Court kicked in 2004 for lack of standing.

22. *Penry v. Johnson*, 532 U.S. 782 (2001).

23. *Gonzales v. Ore.*, 546 U.S. 243 (2006); *Wash. v. Glucksberg*, 521 U.S. 702 (1997); see also *Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261 (1990).

24. See *Morse v. Frederick*, 551 U.S. ___, 127 S. Ct. 2618 (2007).

the peculiar archaisms of law into stories that convey to their audience the practical import of those rules and their results. The best of our court reporters are at once keen observers, logical thinkers, and master storytellers.

Though the writers in this special section acknowledge that appellate court reporting is not always regarded by newsroom editors as the art that it is or can be, it is nonetheless with this rarest of perspectives—the reporter as artist—that *The Journal* turns to the subject of covering the courts. The following pages offer essays from two of the nation's leading legal journalists, Lyle Denniston and Tony Mauro. As well, *The Journal* presents here two perspectives from the courthouse: one from the bench, that of Judge Diarmuid F. O'Scannlain of the Ninth Circuit, and one from public information officer Robert Craig Waters of the Florida Supreme Court. Judge O'Scannlain is well known to lawyers, law students, and *Journal* readers as no shrinking violet on the bench, having tackled his share of high-profile cases, including the 2006 jailing of video blogger Josh Wolf.²⁵ Craig Waters is a legend in his own time, having been the face of the Florida judiciary in the 2000 election debacle. But Waters was known among journalists before 2000, and is still hailed, for leading Florida courts to become perhaps the most publicly accessible judicial system in the world.

Denniston and Waters discuss the need for, and the advantages of, timely electronic access to the proceedings and rulings of state and federal appellate courts. Denniston lays out the practical constraints of competitive modern journalism, and Waters recounts how the Florida courts famously went online amid a global dispute over execution by electric chair. Mauro offers five points of guidance for courts that are intended to make living with the media watchdog a tolerable, and maybe even rewarding, exercise. And Judge O'Scannlain offers his observations on televised court proceedings, suggesting that feeding the media beast might be more in the public interest and less a detestable chore than some members of the appellate courts have long thought.

25. *In re Subpoena*, 201 Fed. Appx. 430 (9th Cir. 2006).

These four voices of experience bring light to the shadowy realm of the appellate judiciary. I encourage you to see what they have to say.

