1998

**News Media Coverage of the United States Supreme Court**

Stephen Wermiel

Follow this and additional works at: https://digitalcommons.wcl.american.edu/facsch_lawrev

Part of the Communications Law Commons, Criminal Procedure Commons, Judges Commons, Law and Society Commons, and the Supreme Court of the United States Commons
NEWS MEDIA COVERAGE OF THE UNITED STATES SUPREME COURT

STEPHEN J. WERMIEL*

When the Conference of Supreme Courts of the Americas met in Washington, D.C., in October 1995, Justice Stephen G. Breyer of the United States Supreme Court outlined five main ingredients that preserve judicial independence in the United States.1 Each of the five elements could well be the focus of a separate conference. This essay will only elaborate on the fifth factor, which Justice Breyer described as "[a]ssuring the efficacy of judicial decisions."2

The "efficacy" of which Justice Breyer spoke depends in large measure on public respect for and compliance with the decisions of the courts. This essay will argue at a theoretical level that news media coverage of the United States Supreme Court, by creating an informed public that extends beyond the organized bar, is an essential element in the goal of guaranteeing respect for the United States Supreme Court and of fostering compliance with its decisions, which are the hallmarks of judicial independence.3 This may be an unintended consequence of news media coverage, since the role of reporters is to get their stories, not to promote judicial independence. Yet I hope to demonstrate that while the courts and the news media have different goals and objectives in their institutional relationship, in a democratic society it is generally in the na-

* Stephen J. Wermiel was the Wall Street Journal Supreme Court correspondent from 1979 to 1991. From 1992 to 1998 he was an associate professor of law at Georgia State University Law School in Atlanta, Georgia. For the '97-'98 academic year, he was a fellow at the Woodrow Wilson International Center for Scholars where he worked on the authorized biography of the late United States Supreme Court Justice William J. Brennan Jr. In the Fall 1998, he has been a visiting professor at Washington College of Law at American University.

1. The five factors are described in Stephen G. Breyer, Judicial Independence in the United States, 40 ST. LOUIS U. L.J. 989 (1996). The article describes the five factors as:
   First, the constitutional protections that judges in the United States have; second, the independent administration of the judiciary by the judiciary; third, judicial disciplinary authority over the misconduct of judges; fourth, the manner in which we address conflicts of interest; and finally, how we assure that the judge's decisions are effective.
   Id. at 989.
2. Id. at 994.
3. See infra notes 35-56 and accompanying text.
tional interest and in the judiciary’s interest to have responsible press coverage.

This essay will then examine at a practical level ways in which the United States Supreme Court should and does facilitate coverage by the news media. Exploration of these practical issues is not intended to find ways to enlist the news media in improving the image of the courts but rather to help ease the barriers to a responsible press from which both the judiciary and the press clearly benefit.

This discussion is limited to news media coverage at the level of the Supreme Court. While there is much interest in the broader area of relations between the news media and courts generally, the issues and concerns facing other courts differ in terms of public awareness, visibility, the types of legal proceedings and the available news media resources.

The value of the United States experience to other countries depends on many variables in judicial systems, and there is much for the United States to learn, as well, from the relationship between the news media and the Supreme Courts of other nations. This essay is intended to be part of just such an exchange of ideas.

I. THE SUPREME COURT’S INDEPENDENCE

Let me begin with a note about judicial independence. Residents of the United States have come to expect, indeed to rely, on the independence of the Supreme Court. It is the quality that, perhaps more than any other, assures the Court its credibility and public respect. This cherished independence is not merely the result of the guarantee of life tenure in Article III of the United States Constitution. It is the result of an enduring public perception that as a government institution, the Supreme Court works, that it reaches reasoned and thoughtful decisions in an adequately explained and appropriately detached manner.

A clear illustration of this judicial independence at work—the most recent of many examples—is the case of Clinton v. Jones, decided in May 1997. The Supreme Court, rejecting the position of President Bill Clinton, ruled unanimously that the United States Constitution does not grant the President of the United States complete immunity from civil lawsuits for damages arising from events that occurred before the President took office. Among the nine

4. See infra notes 57-75 and accompanying text.
6. Article III says that Judges of the federal system “shall hold their Offices during good Behaviour [sic].” U.S. CONST. art. III, § 1.
8. Id. at 1643.
Supreme Court Justices who ruled against the position of President Bill Clinton were Justices Breyer and Ruth Bader Ginsburg, both nominated to the Supreme Court by President Clinton. They were able to vote against the position of the President who appointed them without fear of reprisal or recrimination. Perhaps a more profound example is the case of United States v. Nixon
in which the Supreme Court, by an 8-0 vote, ordered the late President Richard Nixon to turn over to prosecutors secret tape recordings of conversations with his advisers and staff. The late Chief Justice Warren E. Burger and Justices Harry A. Blackmun and Lewis F. Powell, all appointed by President Nixon, voted to reject the President’s claim that the executive privilege of his office protected the tapes; indeed, Chief Justice Burger was the principal author of the decision.

These votes and countless other examples serve to reassure a democratic society that the Supreme Court, while never completely removed from the political process, is not directly influenced by political pressures like the other branches of government. But the purpose of this essay is not to extol the value of judicial independence, but to explicate the part that news media coverage of the Supreme Court plays in evaluating and, perhaps, expanding public awareness of judicial independence.

II. THE COURT’S OPERATIONS

To facilitate an understanding of how the news media covers the Supreme Court, a few basic facts are necessary about how the Supreme Court operates. This information is surely not new to most listeners or readers, but it may help to promote a common basis of understanding.

Each year, about 6,700 litigants who have lost in the courts below ask the Supreme Court to decide their cases. These litigants seek review of their decisions in the lower federal courts, or in the state courts involving matters of the United States Constitution or federal laws. The Court has almost total

---

9. Id. at 1639. Justice Ginsburg was appointed in 1993 and Justice Breyer was appointed in 1994.
10. Justice Breyer concurred in the Court’s judgment but did not join the majority opinion of Justice John Paul Stevens. Id. at 1652. Justice Breyer explained that he shared the Court’s conclusion that the Constitution did not require immunity for the President. Id.
12. Id. at 714.
13. Id. at 686. Chief Justice Burger was appointed in 1969, Justice Blackmun in 1970 and Justice Powell in 1972. William H. Rehnquist was also appointed an Associate Justice by President Nixon in 1972 but did not take part in the decision of United States v. Nixon.
14. See infra notes 35-56 and accompanying text.
discretion to choose which of these 6,700 cases it wants to decide.\textsuperscript{17} For the last few years the Court has selected about 80 to 90 cases a year.\textsuperscript{18} For all of the other cases, the last decision of the lower court stands.\textsuperscript{19}

There are no strict rules that the Supreme Court must follow in selecting the very few cases to decide out of the many petitions presented to it. Generally, however, the Justices decide cases that involve important legal issues that society needs to have settled. These often include legal issues that have arisen in more than one federal court of appeals and that have been decided in different, conflicting ways.\textsuperscript{20} The Court does not see its primary role as correcting injustices that may have occurred in other courts. The principal function for the Supreme Court is to resolve or clarify important legal doctrines for other courts to apply in future cases.\textsuperscript{21}

It is also important to remember that the Supreme Court operates in a common law system as an appellate court that does not determine the facts in the cases it decides.\textsuperscript{22} The Supreme Court does not hear witnesses or examine evidence. Its job is to decide whether the lower courts properly applied the law to the facts as determined in the lower courts.\textsuperscript{23}

The Supreme Court term begins each year on the first Monday in October.\textsuperscript{24} Between October and the end of April, the Justices convene in seven two-week sessions in which they hear the lawyers argue their cases in the courtroom for three days each week.\textsuperscript{25} Most cases are allocated one hour, with each side having thirty minutes to argue.\textsuperscript{26} Before the oral arguments the Justices read the written arguments, or briefs, submitted by the lawyers. The Justices frequently engage in very active questioning of the lawyers during the one-hour argument, trying to understand the full dimensions of the issues in the cases.\textsuperscript{27}

The Supreme Court reaches its decisions in secret meetings that are held during the two-week argument sessions.\textsuperscript{28} The decisions are announced exclu-

\begin{itemize}
  \item \textsuperscript{17} Id. at 163.
  \item \textsuperscript{18} \textit{Statistical Recap of Supreme Court’s Workload During Last Three Terms}, supra note 15, at 3136.
  \item \textsuperscript{19} \textit{See 5 AM. JUR. 2D Appellate Review} § 399 (1995) (stating that the denial of certiorari does not affect the lower court’s decision).
  \item \textsuperscript{20} \textsuperscript{20} \textsuperscript{STERN ET AL., supra note 16, at 168.}
  \item \textsuperscript{21} \textit{See generally LAWRENCE BAUM, THE SUPREME COURT 133 (6th ed. 1998).}
  \item \textsuperscript{22} Thomas G. Walker & Lee Epstein, \textit{The Supreme Court of the United States} 4 (1993).
  \item \textsuperscript{23} \textit{See generally BAUM, supra note 21, at 132.}
  \item \textsuperscript{24} \textsuperscript{STERN ET AL., supra note 16, at 3.}
  \item \textsuperscript{25} Id. at 5.
  \item \textsuperscript{26} Barrett McGurn, \textit{America’s Court, The Supreme Court and the People} 8 (1997).
  \item \textsuperscript{27} \textsuperscript{STERN ET AL., supra note 16, at 587.}
  \item \textsuperscript{28} Id. at 6. \textit{See also CONGRESSIONAL QUARTERLY, INC., THE SUPREME COURT AT WORK
sively in the form of written "opinions," which explain the reasoning of the Court.29 A decision may include an opinion for the Court, written by one of the Justices in the majority, and may also include one or more "concurring opinions" by Justices who agree with the decision but have a different view of the reasons for it, and "dissenting opinions" by Justices who disagree with the Court's result.30 The Court begins slowly issuing these written decisions in November and December, and then the pace picks up rapidly in May as the term nears an end usually by late June.31 These written opinions may be only a few pages or may be very lengthy, over 100 pages.32

The Court tries to announce all of its decisions from an October-to-June term during that same period and then takes a break from arguments and decisions for the months of July, August, and September.33 However, during these months, the Court continues to receive a steady flow of new cases and, except for the summer recess, continues to announce which cases it will decide.34

III. THE ROLE OF THE NEWS MEDIA

It is axiomatic in the United States that the Supreme Court has no direct power of enforcement for its rulings and depends upon the acceptance of its decisions by the people. The Supreme Court has observed:

As Americans of each succeeding generation are rightly told, the Court cannot buy support for its decisions by spending money and, except to a minor degree, it cannot independently coerce obedience to its decrees. The Court's power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.35

In explaining this concern two years ago, Justice Breyer said, "[a]n orderly society, in which people follow the rulings of courts as a matter of course, and in which resistance to a valid court order is considered unacceptable behavior which most people would not countenance, is the core assurance" required for effective judicial decision making.36

However, there is something of a paradox inherent in this goal. The difficult question is how to achieve and maintain respect for an institution, the Supreme Court, that speaks only in written opinions that are unlikely to be read

29. BAUM, supra note 21, at 132-133.
30. Id. at 138.
32. See generally Planned Parenthood v. Casey, 505 U.S. 833 (1992) as an example of an opinion over 100 pages.
33. STERN ET AL., supra note 16, at 3.
34. Id. at 5.
35. See Planned Parenthood, 505 U.S. at 865.
36. Breyer, supra note 1, at 996.
by more than a minuscule percentage of even well-educated citizens and that communicates in a terminology that most people would not be able to understand even if they had the chance to try. As United States Supreme Court Justice Ginsburg observed in a speech on the role of the news media in reporting on the Supreme Court, "even opinions that are clear and tight will have a limited audience: the legal profession and the press." There is no doubt that the credibility of the institution comes at least in part from the Supreme Court's independence, but fostering the public's understanding of that independence is not a regular part of the Court's daily routine.

One significant answer to this dilemma is that the public learns of the actions of the United States Supreme Court through the news media. Said Justice Ginsburg, "[m]ass media reporters are the people in fact responsible for translating what courts write into a form the public can digest." This transmission of information, on balance, helps to maintain the respect that the Supreme Court enjoys in the democratic system of governance. U.S. Court of Appeals Judge Gilbert S. Merritt, discussing not just the Supreme Court but the federal courts in general, made this point emphatically:

The judiciary, critical and uncooperative as we often are, recognizes that without the support of the media translating to the American public what the judiciary is all about, that we are not going to maintain for long a system of life tenure and no term limits. Additionally, we would not be able to maintain a system by which judges can be relatively free, compared to elected officials, of temporary public opinion.

Most judges do not lightly make the observation about the important role of the news media, as commentators have found much to debate and even to criticize about the focus and quality of news media reporting on the Supreme Court. Indeed, some judges acknowledge this important role for the news

---

37. Until recently it was difficult for non-lawyers even to obtain copies of decisions to read them directly. The advent of Supreme Court opinions on the Internet has certainly made the decisions physically more accessible to millions of people.


40. The Honorable Gilbert S. Merritt is a judge of the U.S. Court of Appeals for the Sixth Circuit and served as chief judge until January 1997.


42. For relatively recent discussions of the relationship between the news media and the Supreme Court, see generally RICHARD DAVIS, DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS (1994); Ginsburg, Communicating, supra note 38; Linda Greenhouse, Telling the Court's Story: Justice and Journalism at the Supreme Court, 105 Yale L.J. 1537 (1996); Merritt, supra note 41; McGurn, supra note 26; Ginsburg, Communicating, supra note 38 (1995); Jerome O'Callaghan and James O. Dukes, Media Coverage of the Supreme Court's Caseload, 69
media only in the most practical terms that sound almost like a *quid pro quo*. Suggesting that the relationship between the Supreme Court and the news media operates as more of a two-way street in which there is much to gain and lose on both sides, the late United States Supreme Court Justice William J. Brennan Jr. said:

The press needs the Court, if only for the simple reason that the Court is the ultimate guardian of the constitutional rights that support the press. And the Court has a concomitant need for the press, because through the press the Court receives the tacit and accumulated experience of the nation, and—because the judgments of the Court ought also to instruct and to inspire—the Court needs the medium of the press to fulfill this task.43

Despite criticisms and caveats, when it comes to the United States Supreme Court, news media reporting undoubtedly helps to create an informed public, an admittedly very small but vitally important constituency for obedience to even the most controversial and widely criticized rulings of the Court.44 This informed public may remain a minuscule segment of society, for many of the residents of the United States still know little about the Supreme Court.45 Yet this small constituency is surely made up of leaders and opinion-shapers who make respect for the Supreme Court respectable and who make the social costs of disregarding Supreme Court decisions too great.46

---


44. The Gallup Poll survey of public confidence in institutions in the United States shows a reasonably constant level of support for the Supreme Court. In 1996 those expressing a "great deal" or "quite a lot" of confidence, the two highest categories, totaled 45%. Leslie McAneny, *Public Confidence in Major Institutions Little Changed from 1995* (visited Sept. 11, 1998) <http://www.gallup.com/poll_archives/960606.htm>. Those with little or no confidence equaled only 16%. *Id.* Among other institutions, this places confidence in the Supreme Court behind the military (66%) and organized religion (57%), but ahead of the presidency (39%), banks (44%), the medical system (42%), television news (36%) and newspapers (32%). *Id*.

45. A survey by the Luntz Research Companies found that 59% of those questioned could name the Three Stooges, but only 17% could name three Justices and 55% could not name even one Justice. Richard Morin, *Unconventional Wisdom*, WASH. POST, Oct. 8, 1995, at C5.

46. In this essay, I use the term "respect" to explain the willingness of the people to abide by
In my view, even reporting that focuses too much on the personalities of the justices, or that too heavily emphasizes the view of the Court as a political institution, or that misinterprets the legal significance of the Court’s actions, or that pays too much attention to the results of cases and too little to the process and reasoning, adds to public understanding of and, ultimately, to public respect for the Supreme Court.\textsuperscript{47}

Let me clarify so as not to be misunderstood. It is not my purpose to argue that any news media reporting on the Supreme Court, even bad reporting, is better than no reporting at all.\textsuperscript{48} Rather, it is my view that there is a substantial amount of very good reporting about the Supreme Court. Moreover, even reporting which a reader may fault for its emphasis or perspective still more often than not cannot help but depict a reasonably accurate picture of a Supreme Court hard at work, engaged in the credible resolution of tough legal questions, grappling with some of the most difficult issues of the day, and turning out decisions in a timely fashion. This portrayal is not a bad balance for the Supreme Court and may be substantially better than the treatment of other government institutions by the news media.

Consider, for example, the criticisms by two political scientists who concluded several years ago that the news media’s selection of which cases to cover reflected a skewed view of the total caseload of Supreme Court decision.\textsuperscript{49} Writing in \textit{Journalism Quarterly}, Jerome O’Callaghan and James O. Dukes said the news media gave a disproportionate amount of attention to civil rights and First Amendment cases and not enough to economic and other issues.\textsuperscript{50} They concluded, “[t]he data make it clear that the media frequently neglect the Court’s contribution to the development of many diverse areas of American law . . . . In this light, one can only conclude that the public’s sup-

\textsuperscript{47} For a contrary view see the American Enterprise Institute Boyer Lecture, \textit{The Courts and the Press}, delivered by U.S. Supreme Court Justice Antonin Scalia on Dec. 6, 1989. Excerpts of a tape of the lecture are quoted in Slotnick, \textit{supra} note 42, at 130.

\textsuperscript{48} While I do not argue for this extreme point, Justice Scalia argued that the opposite extreme is true. He said, “I hope to have explained. . . . the wisdom of judge’s ancient belief that no news, by and large, is good news.” Quoted in Slotnick, \textit{supra} note 42, at 129.

\textsuperscript{49} O’Callaghan & Dukes, \textit{supra} note 42, at 202.

\textsuperscript{50} Id. at 195.
port of the Supreme Court . . . is based in large part on a misunderstanding of
the vital work done by the Justices.51 But this research seems to miss the im-
port of its own conclusion. It is readily apparent that the cases selected by the
news media for coverage generally involve the most volatile emotional and
controversial issues.52 If the small core of public support for the Supreme
Court is solid when focused on the volatile cases, that support would likely go
up, not down, if the Court’s less emotional cases received a greater share of
attention from the media. If the Court’s credibility can withstand news media
scrutiny of the most divisive cases, surely the Court’s reputation can stand up
to greater focus on lesser cases.

Several other disclaimers are necessary to place proper borders around the
point I seek to make. First, many judges and commentators are much less
willing to make the same claims for the benefits of news coverage when it
comes to courts below the level of the Supreme Court. Criticism of the news
media has been even greater and recognition of any salutary effect substan-
tially less when the discussion turns to coverage of lower state and federal
courts. Summing up the views of many of his judicial colleagues, Judge Mer-
ritt said:

Many judges do not particularly like the media. They are skeptical and cyni-
cal. The media tends to sensationalize and very much oversimplify the cases
that they have seen in the courts. The media [does not] deal well with the
complexity of the situations and with the problems of judicial process.53

The problems that Judge Merritt identifies are hardly peculiar to the
United States. At the 1995 Conference of the Supreme Courts of the Ameri-
cas, responding to observations by Justice Breyer, two Justices took a sharply
different view of the news media’s impact on judicial independence in their
countries. Josefina Calcano de Temeltas, First Vice-Chief Justice of the Su-
preme Court of Venezuela, said, “[t]he news media also exert considerable
pressure, to the extent that when a judge is preparing to issue a ruling, the
defendant has already been convicted by public opinion due to the pressure
of the news media (press, radio and television).”54 Another commentator raised
concerns about news media coverage prejudicing judges and compromising
their independence. “Extensive press and media campaign can have an effect
on judicial independence. A judge should do his utmost to not allow his mind
to be affected by what he has seen, heard or read outside the court,” said Ed-

51. Id. at 203.
52. Mcgurn, supra note 26, at 8-12.
53. Merritt, supra note 41, at 513. Some of this attitude may be attributed to the debate over
cameras in the courtrooms and their affect on criminal trials and juries, according to Judge Mer-
ritt.
ward Zacca, Chief Justice of the Supreme Court of Jamaica.\textsuperscript{55}

A second disclaimer is that I am not arguing that it is the job of the news media to promote public understanding of the Supreme Court or to protect and defend judicial independence. Virtually all news reporters would eschew any such role, except to the extent that there is a good news story involved. Enhancement of judicial independence in this country is simply a by-product of reporting about the Supreme Court as a credible institution.

Finally, I am not suggesting that the Supreme Court would cease to function without the news media to translate the Court’s decisions for readers, listeners and viewers. No doubt the Court would survive, carried along by public respect derived in part from the mystique that is a natural part of the Court’s secrecy and remoteness.

But what a healthy, even uplifting prospect it is to have the respect and credibility of a government institution generated from openness and increased public understanding instead of mystique. It is an awesome responsibility—for the news media and for the Court. As Linda Greenhouse, the longtime Supreme Court correspondent for the \textit{New York Times}, has observed, “it is sobering to acknowledge the extent to which the courts and the country depend on the press for the public understanding that is necessary for the health and, ultimately, the legitimacy of any institution in a democratic society.”\textsuperscript{56}

\section*{IV. FACILITATING THE NEWS MEDIA}

The discussion of news media coverage of the United States Supreme Court or of any other Supreme Court involves a mixture of factors. These include analysis of institutional pressures and motivations, as outlined above, and examination of very specific practical problems and pressures, as discussed below.\textsuperscript{57} The purpose of examining practical concerns is not because precisely the same problems exist in the other Supreme Courts of the Americas; surely the problems differ. But examination of the specific problems that arise in the United States helps to create a fuller picture of the dynamic between the Supreme Court and the news media. That dynamic, if fully explored, may in turn suggest lines of resolution for problems that are not limited to the Supreme Court of any one nation.

If there is good reason for the United States Supreme Court to encourage news media coverage, then it is logical to inquire what steps the Court may take to help facilitate reporting on decisions. In this section, I draw heavily on my own experiences as Supreme Court correspondent for the \textit{Wall Street Journal} from 1979 to 1991.

\begin{thebibliography}{99}
\bibitem{zacca}
\bibitem{greenhouse}
Greenhouse, \textit{supra} note 42, at 1538.
\bibitem{see}
See \textit{supra} notes 41-43 and accompanying text and \textit{infra} notes 72-75 and accompanying text.
\end{thebibliography}
During its nine-month session from October to June, the Supreme Court is covered by a regular, more-or-less full-time press corps of up to fifteen reporters. These reporters have cubicles in a ground-floor press room adjacent to the Court's Public Information Office. As many as two dozen other reporters may cover the Court regularly but are not there full-time. Several dozen additional reporters may cover the Court from time-to-time, most of them assigned to papers that do not really want a steady Supreme Court reporter but which occasionally want their own reporter's name and expertise on a story of important local interest.58

For the full-time reporters, the relationship with the Court has always been a strange mix of accommodation on the one hand and remoteness and aloofness on the other. The Court accommodates some basic needs of the news media, but is unwilling to consider other, even modest proposals or complaints. Indeed, because any formal discussions among the Justices and any official voting are conducted in closed session,59 even when the focus is about procedural reforms, at times the news media does not even know whether their requests have been considered by the Court.

The late Chief Justice Burger was willing to hold occasional meetings with some of the regular Supreme Court reporters, but the sessions were infrequent and did not often yield change.60 Still, the meetings did provide an opportunity for "regulars" to raise concerns with the Chief Justice about operating procedures at the Supreme Court that directly affect the news media. Chief Justice William H. Rehnquist has continued the practice with relatively little change.

There is little or no other formal contact between the Justices and the press corps. Some justices follow a practice of allowing newcomers to the Supreme Court beat to pay a courtesy call to introduce themselves. Some even allow an occasional return visit. There are episodic examples of individual Justices being sufficiently well-acquainted with particular reporters to have an occasional lunch or cup of coffee together. But the Justices rarely hold press conferences,61 and they never hold them to discuss their decisions.62

---

58. In her thoughtful discussion of these issues, New York Times correspondent Linda Greenhouse observed that "the commitment of the media to full-time coverage of the Court is shrinking..." Greenhouse, supra note 42, at 1541.

59. See infra note 66 and accompanying text.

60. Chief Justice Burger referred to these "off-the-record" sessions as "wages and hours" meetings, since figuratively they are about the working conditions for the press corps at the Supreme Court. Rarely do the sessions occur more often than once every two years. See generally, Nina Totenberg and Fred Barbash, Burger Loved the Law But Not the Hassle, WASH. POST, June 22, 1986, at C1.

61. In recent years, a few Justices have held press conferences upon their retirement from the Court. Also, in 1987, during celebration of the Bicentennial of the U. S. Constitution, a few Justices granted interviews. In 1986, upon reaching his 80th birthday and 30 years of service on
What are the ways in which the Supreme Court accommodates the press corps, and in what ways does the Court decline to make arrangements for the news media? Let me turn to those specifics.

The Court accommodates the news media by providing a press room with general work space for reporters and cubicles for the handful of regulars. In the rooms adjacent to and nearby the press room, the Court has also established an Office of Public Information with a small, very able professional staff to handle press inquiries as well as some public queries. Also located in the Public Information Office is a separate set of about one-third of the roughly 6,700 petitions upon which the Supreme Court acts each year and of the briefs filed in the ninety cases in which the Court hears arguments each term.

The Supreme Court also makes special provision for the news media by setting aside a section of seating in the courtroom for the use of reporters who cover the announcements of decisions and the oral arguments. When seats are in big demand for an important argument, the Public Information Office allocates the press seats. And although the Court does not allow television or radio broadcasts of its arguments, the Justices have allowed network artists to bring their big drawing pads into the courtroom so that they may sketch oral argument scenes or Justices announcing their decisions.

There are other accommodations, as well. The Public Information Office makes available to the news media the Court's "conference lists," the roster of petitions available for consideration by the Justices at their weekly closed-door conference where they vote on which cases to hear and which to deny review. The availability of this list does not tell the press which cases will be

the Supreme Court, Justice William J. Brennan Jr. did a round of television, radio and newspaper interviews.

62. Justice Ginsburg noted:

Legend has it that Justices, even Chief Justices, once took phone calls from some members of the press on decision days, to explain nuances of complex cases—not for quotation, of course, merely to clarify potential ambiguities. That kind of conversation, I can say with some confidence, is destined to remain legendary.

Ginsburg, Communicating, supra note 38, at 2122 (footnote omitted).

63. Toni House, the Public Information Officer since 1982, died suddenly in October 1998. A former newspaper reporter, she was well-regarded by the Supreme Court press corps.

64. The Public Information Office has copies of the paid petitions, but does not have a separate set of the "indigent" or in forma pauperis petitions in which the Court waived the filing fee for petitioners who could demonstrate that they could not afford to pay. In the last Court Term, October Term 1997 (October 1997 through June 1998), the Court acted on 2,142 paid petitions and 4,616 in forma pauperis petitions. To review the in forma pauperis petitions reporters must use the docket file room of the Supreme Court, but since so few pauper petitions are granted most reporters wait for the Public Information Office to get copies of the granted cases and rarely review indigent cases that are denied.

65. The Conference Lists are provided for news media convenience and are not made gener-
granted and which denied, but it does give the news media access to the same pool of cases which the Court is considering in a particular week. This enables the reporters to look through the list in advance and identify and prepare notes on cases that are of interest either because they expect the Court to grant review or because they have news value even if the Court denies review.

News reporting on this aspect of the Court's process is sometimes tricky and controversial. The Supreme Court operates on what is known as the "Rule of Four," meaning only four Justices need vote to grant review to a case even though a majority is five.66 When the Court denies review, it is long-accepted wisdom that the denial is not a decision on the merits and has no Supreme Court precedential value.67 As the Justices often remind us, a denial simply means there were not four Justices who, for whatever reason, wanted the Court to decide the particular case.68

This is a difficult concept for some reporters, especially those who do not regularly cover the Supreme Court. Thus, it is not uncommon to hear reports on radio and television or to read them in print that the Supreme Court affirmed a lower court's ruling or ruled against this group or that interest when the Court simply denied review to a petition. Justice Ginsburg has observed,"[s]till too often, in my view, the press overstates the significance of an order denying review. Headlines, particularly, may be as misleading as they are eye-catching."69

The Public Information Officer, who does not as a general rule explain the Court's actions or comment on the decisions, occasionally advises a reporter that a story may have overstated the significance of a denial of review. But this is one of the very few ways in which the Public Information Officer discusses the substance of the Court's work. For the most part, the office serves as an important conduit of information—handing out copies of decisions to the news media as they are announced in the courtroom, distributing the conference lists of cases to be considered by the Justices, maintaining the shelves of petitions and briefs, sometimes distributing copies of Justices' speeches, advising the press about the Court's schedule and announcing retirements when they occur.

There is no one at the Supreme Court who explains the decisions or comments on them. This is not a problem at all for the reporters who regularly cover the Court; typically they will have read some of the briefs and prepared

---

67. Id.
68. The classic formulation of this view belongs to Justice Felix Frankfurter. Id. at 917-919.
69. Ginsburg, Communicating, supra note 38, at 2123.
themselves to deal with the issues raised in a case. A number of the regulars also have law degrees, although most eschew the view that formal legal training is a prerequisite for the job. For the dozens of reporters who cover the Court much less frequently, there is less opportunity to prepare and often less familiarity with the case or with the law generally. These reporters sometimes turn to law professors or lawyers involved in the cases for explanation or comment, but the reporters' task of translating the legal terminology is a difficult one.

Indeed, even for the regular reporters, with or without legal training, the task of quickly digesting the opinions in time to meet daily news deadlines is formidable at best. About twenty-five years ago, the Court began preparing the syllabus for the decision in advance and releasing it with the opinion to provide a summary of the Court's actions. Individual Justices have also encouraged the development of a publication entitled Preview. Published by the American Bar Association Division for Public Education and other supporting groups, Preview contains discussions of the legal questions in pending cases written by law professors in terminology intended to simplify the issues. Preview is a very worthwhile effort, made available to reporters before the scheduled oral argument in a case. As a resource, it can provide valuable insight into the legal issues in a case and their potential significance, both for the law and for public policy. Justice Ginsburg says she even refers to Preview on occasion to help her decide how much time to set aside for review of the briefs in a case or whether to research a particular issue in a case.70

The absence of anyone to comment on or explain the Court's decisions is not a topic of major concern in the Supreme Court press corps, perhaps because it is such a well-settled practice. But there are small numbers of courts where information officers do try to explain the Court's actions or where a judge will occasionally conduct an off-the-record briefing to answer questions about a case. Public information officers at some courts are occasionally empowered to issue press releases announcing and, of necessity, summarizing decisions for the news media.71 The argument against having judges or court personnel explain decisions off the bench is an obvious one—the precedent is the decision, itself, and off-the-bench comments create the danger of lawyers citing the explanations which may differ somewhat from the decisions. Another obvious problem in an appellate court is that the judge who is speaking may not be accurately representing the views of the other judges who joined an opinion. The practice of speaking only through the published decisions is

70. Ginsburg, Communicating, supra note 38, at 2124.
71. The Georgia Supreme Court, for example, has a public information officer who issues press release summaries of the decisions. Some news organizations quote the summaries. The extent of this practice and other explanatory efforts in other courts would make a good subject for an empirical study.
well-settled in the Supreme Court, but the occasional problem of whether anyone officially connected to the Court should explain the Court's actions to reporters who need help, and if so, who that person should be, is likely to remain unsettled.

Behind the functions of the Public Information Office, there are numerous points of contention about the relationship between the Court and the news media.

A significant and recurring concern involves the Court's release of its decisions. Justices traditionally operate according to the view that if an opinion is ready to be announced, it should proceed as soon as possible. This makes good sense, and that is why the Court more than two decades ago abandoned its practice of announcing decisions only on Monday of the week they were ready for announcement. The problem remains, however, that in May and June, as the Justices prepare for their Summer recess, the Supreme Court typically releases about half of its decisions for the entire term, which runs from October to late June. There are still many days when numerous, voluminous, important decisions are released on the same day. As one account has recalled, on the last day of the October Term 1987 on June 29, 1988, the Justices "filled 446 pages" of the official Supreme Court reports of their opinions with nine decisions in a single day.\(^\text{72}\)

For years, the Supreme Court press corps has asked the Court to spread the decisions out in a more measured way in May and June so that the news media has more days on which to digest the opinions and more newspaper space or air time to devote to the reporting. The Court has been unwilling to further modify its practice, apparently failing to consider the possibility that it might be in the Court's interest, as well as in the news media's interest, to have more time and space available to reporting the decisions. The Court presumably would benefit from having the decisions explained in greater depth, with more time for the reporters to digest them. This would almost certainly improve the quality of the reporting to the public.

There are other differences of opinion between the Justices and the press corps, having less to do with the Court's decisions and more to do with the Justices themselves. The news media and the Justices have long been at odds about reporting on the health of the Justices. Journalists believe it is part of their job to hold the Justices accountable for their performance, and inability to be on the bench due to illness is a leading focus of this concern. The Justices are more concerned with protecting their privacy and, for the most part, resist any effort to systematically report their health, even when a problem is severe enough to necessitate hospitalization. The Public Information Office is caught in the middle, able to report only those medical concerns that are authorized by the individual Justices. On matters of this kind, the Justices operate as nine

\(^{72}\) Greenhouse, \textit{supra} note 42, at 1558.
separate, independent entities; there is no institutional policy that requires disclosure of medical problems. An unfortunate side effect is that some in the news media speculate regularly about health problems of the Justices and chase rumors of possible retirements. If these rumors were to be believed, just to pick one example, Justice Sandra Day O'Connor would have retired from the Supreme Court because of ill health nearly nine years ago. Instead, she is still an active member of the Court. One cannot help but wonder whether the loss of privacy that might result from a regular policy of confirming the hospitalization of Justices might be less intrusive than the public speculation and rumors about their health.

The pattern is similar with speeches by the Justices. The news media is not routinely informed when a Justice is giving a speech, unless that individual decides to release a text or notify the Public Information Office. Again, the Justices are not particularly looking for press coverage of their off-the-bench appearances and are far more comfortable speaking if there are no reporters or television cameras present. For some Justices, this is so because they want to be able to use the same speech more than once, for example with commencement addresses. For some it is because they wish to preserve their relative anonymity. For still others, they are able to speak more freely and candidly if they do not need to worry about dissemination of their remarks beyond a small audience. Again, no institutional policy exists and it is doubtful that any policy could operate effectively since the Justices govern themselves individually on these issues.

A final concern of more recent vintage is the timing of the announcement of which cases have been granted review by the Justices. Although this issue is unique to the practices of the United States Supreme Court, it is one of the latest additions to the fabric of the relationship that is the focus of this essay. For the last few decades, the Court has voted on which cases to hear at a closed-door Friday morning conference attended only by the Justices themselves. The results of that discussion were traditionally announced, along with the list of cases to which review was denied, on Monday mornings when the Court took the bench to hear oral arguments. In the last few years, this practice has changed. Throughout much of the fall the Justices have begun to announce the list of granted cases on Friday afternoon when their conference ends and to save the list of denied cases for Monday morning. This change in practice started because the Court was not filling up its argument calendar. In the days when the Justices were hearing 150 cases in a Term, the petitions were granted far enough in advance to allow the parties to meet the ninety day briefing schedule spelled out in the Supreme Court's Rules. This procedure also allowed the Clerk of the Court sufficient time to distribute the briefs for perusal by the Justices and their law clerks before the case was argued.

As the number of argued cases dwindled to 100 and then fell below that in recent years, however, the Justices found that cases granted review during
some fall and winter months would not be fully briefed in time to fill holes in the argument calendar in the period from January through April. Making the announcement that a case was granted on Friday afternoon instead of Monday morning during some fall months advanced the briefing schedule by three days. This seemingly brief acceleration may make the difference between a case being ready for argument when the Court's calendar has an opening and the calendar slot going unfilled. This early announcement also gives the illusion of allowing the lawyers to get a quicker start on meeting the briefing schedule; they may begin drafting their briefs during the weekend, instead of waiting until Monday afternoon.

When the Court's argument calendar is complete, usually by the end of January, the announcement of granted cases reverts back to Monday mornings. Cases granted after January generally will not be heard until the following Term, so there is plenty of time to complete the ninety day briefing schedule before an argument is scheduled.

This change in practice was done, no doubt, as a practical accommodation to the Court's needs and based on the assumption that there was no downside to the change. Yet, this seemingly harmless change has created a number of issues for the news media and for coverage of the Court. It has given the Supreme Court press corps less time to prepare their notes and background on the cases that are granted review and less time to write their news stories on those cases. A number of full-time Supreme Court correspondents traditionally used Thursday and Friday as preparation days to sift through and read petitions scheduled for consideration by the Court that week. The preparation days have now been cut in half for the journalists, and the lost day cannot be replaced since other Court activities occupy the reporters on the other weekdays. It is hard to imagine that anyone would argue that giving the press corps less preparation and writing time would be an improvement.

There may be another unintended consequence of this last change in procedure. With reporters writing their stories about granted cases on Friday for publication on Saturday, it is much more difficult to persuade newspaper editors and television news directors on Monday to devote space to stories about denied cases. Generally, the real legal story is in the granted cases, and the denied petitions offer only news of more general interest. When reporters could begin their stories with the important news that certain cases were granted and would be decided by the Supreme Court, editors were also willing to indulge a few denied cases to round out the stories. It is much more difficult to justify a story that is filled only with denied cases, since those cases have no legal value as far as the Supreme Court is concerned.73

73. This observation is based solely on my own anecdotal perception. It would be a worthwhile subject for empirical study to determine the extent to which a cause-and-effect relationship does exist between the change in the Court's practice and what appears to be a decline in the re-
Given the criticism of some misleading reporting about denied cases, perhaps less emphasis on rejected cases in news stories is an improvement rather than a problem. There may be another aspect of this development worth noting, although any conclusion along these lines is probably premature. The handful of regular reporters who devote their attention full-time to the Supreme Court have traditionally read more petitions than just about anyone else in the legal community except the Justices and their law clerks. In the unending national dialogue about the proper role of the Supreme Court in a democratic society and more specifically about how many and what kinds of cases the Supreme Court should be deciding, the Supreme Court "regulars" in the press corps could contribute to the debate because they have a somewhat unique perspective on the legal landscape of cases and issues coming to the Court. As reporting about denied petitions diminishes in both volume and importance, the incentives to the reporters to keep up with the petitions filed in the Supreme Court and the willingness of their editors to give them the time to read those appeals will decline. The ability of those reporters to contribute their knowledge of the Supreme Court's docket to the ongoing debate will also decline.

Some reporters who regularly cover the Court suggest that the Justices might reconsider the change taking into account the negative consequences that were almost certainly not previously weighed. An alternative might be to change the Supreme Court Rules to reduce the briefing schedule from ninety days to eighty-seven days when the Court deems it necessary to expedite a case to fill the calendar. The announcement of the Court's action could remain on Monday mornings, the lawyers could have a weekend off, and the briefing schedule could still be satisfied.

V. CONCLUSION

The relationship between the United States Supreme Court and the journalists who cover the Court is an unusual one in our society. Because of the differences among the Supreme Courts of the Americas in jurisdiction, procedure, volume and nature of cases, civil law tradition versus common law development and many other factors, it is difficult to suggest that the news media-Supreme Court relationship in the United States should serve as a model for the process in other nations. Despite these differences, it is essential that Supreme Courts everywhere continue to come to grips with the means of communicating their vital work to the citizenry, for without that effort the critical

74. See supra notes 67-69 and accompanying text.

A wellspring of public credibility and the independence that rests on it cannot long exist.