

2015

57th Henry J. Miller Distinguished Lecture: Keynote Address

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Recommended Citation

Barnes, Robert; Lithwick, Dahlia; Liptak, Adam; Segall, Eric J.; and Donohue, Luke (2015) "57th Henry J. Miller Distinguished Lecture: Keynote Address," *Georgia State University Law Review*: Vol. 32: Iss. 4, Article 4.
Available at: <http://readingroom.law.gsu.edu/gsulr/vol32/iss4/4>

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**2016 GEORGIA STATE UNIVERSITY LAW
REVIEW SYMPOSIUM & MILLER LECTURE
PANEL: SUPREME COURT TRANSPARENCY IN
THE AGE OF SOCIAL MEDIA**

**Robert Barnes (RB), Dahlia Lithwick (DL), Adam
Liptak (AL), Professor Eric Segall (ES), and Luke
Donohue (LD)***

ES: Those who know me know I am not easily intimidated. I am intimidated. I admit it. Welcome. What a fantastic turnout. I have to do a couple of thank yous really quickly and then we will bring our esteemed guests up to the stage. Luke Donohue and Christine Lee are the student symposium editors who have worked unbelievably hard to make this whole day-and-a-half go forward and they deserve a huge round of applause. And this room as you see it right now is the product, really, of one person's work, one person's vision, who makes this lecture series, every year, as amazing as it could possibly be and I am going to make her raise her hand. Vickie Dye, in the back, please give Vickie a huge hand. So, very shortly, as soon as I am done, this cart is going to move away and Luke Donohue will be with me and we have the privilege of interviewing our three Miller lecturers this year. If I were to do any kind of reasonable biography of these three people, then we would be here until one o'clock listening to me do their biographies. So, I am not going to do that. Their full bios are in your program. All I am going to say about them is Adam Liptak is the Supreme Court reporter for the *New York Times*; Robert Barnes is the Supreme Court Reporter for the *Washington Post*; Dahlia Lithwick is the Supreme Court reporter for

* This transcript is a reproduction of the Keynote Presentation and 57th Henry J. Miller Lecture Series at the 2016 Georgia State University Law Review Symposium on February 11, 2016. The panel features Robert Barnes of the *Washington Post*, Adam Liptak of the *New York Times*, and Dahlia Lithwick of *Slate.com* and *Newsweek*. The panel is moderated by Eric Segall, Kathy and Lawrence Ashe Professor of Law at Georgia State University College of Law, and Luke Donohue, 2015–2016 Georgia State University Law Review symposium editor.

Slate. If at any moment in your life you ever want to know what is happening at the Supreme Court of the United States, these are the three people, if you go to them, you will know all that you need to know. Let us please welcome them to the stage.

So how this is going to work is we are going to have a conversation. And we melded these two events, the Law Review Symposium and this Miller Lecture series, which requires us to have this conversation in front of 535 people who are eating. We are going to do the best that we can to make do with that. I am going to ask the first question. Luke is going to follow up. And then we are going to go where the conversation takes us. And there will be time at the end for questions, both from the symposium participants, who are seated up front, and for anybody else in the audience. There are microphones somewhere on the side. And do not be shy, it is only 530 people. So please feel free to participate.

So my first question is a total softball but we are going to start here. There have to be unique issues for reporters covering the Supreme Court of the United States as compared to the President, the Senate, governors. And, that is question one, and then 1(a) is something I am very curious about. How often have you been able to sit down with a Supreme Court Justice, or in a room with a Supreme Court Justice, and ask them real questions, and have the possibility of semi-real answers?

Bob?

RB: About the challenges of covering the Supreme Court, they are not people who talk all the time. They do not always give interviews. You cannot go back and ask them what they meant by an opinion. You got the opinion. You do with it the most you can. And, so, in that way it is a very different kind of reporting than any other reporting, certainly than I have ever done, and I think anyone would do. It is a lot of reading. It is a lot of preparation. It is often, sometimes, a lot like being back in school as you try to learn the issues that are coming before the Court. As far as sitting down with Justices, people always say “I bet you get a lot of your information

from law clerks.” That is absolutely wrong. It is much easier to talk to a Justice than it is to a law clerk because they are scared to death of talking to the press. And the best time to get an interview with a Justice, and to sit down in a room with a Justice, is when he or she has just written a book. And it is pretty easy then. The rest of the time not so much.

DL: Well first of all I want to say thank you and I really want to thank the organizers. This has been an extraordinary experience in just being directed from one place to the next seamlessly. I want you to come home with me and just sherpa me through the rest of my life. I think I would echo everything Bob says. This is a weird beat because almost everything we cover is on paper. This is not a beat where you get scoops. This is not a beat where you are well served by rooting through dumpsters behind the building because there is nothing there. Trust me. And, so, it is a beat where you just do a lot of reading. You read, and you read, and you read, and then you read more. And then there are these two events that you cover. One is oral arguments, which may or may not matter. And one is the hand down of decisions, which may or may not matter. And those are the two things that we publicly cover. I think it is a very strange enterprise, and an enterprise that increasingly can be covered from across the country by following SCOTUSblog. And I think one of the things that, and we will probably talk about it a little bit this afternoon, but one of the things that is really paradoxical about this beat is that it has changed so tremendously in ten or fifteen years with the advent of new media, with the advent of the need for speed. And that the Court has changed in very infinitesimal ways the way we could do that better. And so I think the gulf between how the rest of the media has kept up with the world and how we have tried to keep up with the Court that does not really modify its procedures to help us do our jobs more quickly is one of the interesting paradoxes that we are still covering the Court like its 1986.

AL: What we do is barely journalism. I work in the Washington Bureau of the *New York Times* surrounded by political reporters and national security reporters and they are trying to find out secret stuff. I am trying to make sense of public stuff. And the challenge in the job is that it is long and technical and it is not a very hard working Court but when it does stuff it does it all at once. So there are days of the week when the Court will agree to hear cases and hear a couple of arguments and issue some decisions. And compressed into that one day of the week you have to make a choice about whether you are going to write three or four or five stories. Or at the end of June, they will hear the arguments in the big cases all through the year, but for some reason they think it is a great idea to wait until the end of June to drop them, sometimes several in a day. So those challenges are enormous and then you have now, in the internet world, something I never thought. When I started the job I said “One thing I can tell you for sure: I am not going to write an opinion about an opinion until I have read it.” Well, those days are gone. You have an opinion the size of *Citizens United*: 60,000 words long. That is the length of the *Great Gatsby*. The internet demands from editors and readers and such that they want the bottom line immediately, and that is a good opportunity several times a year to permanently damage your reputation.

LD: Adam, you kind of touched on this but one of the themes of today is that we are in a new age of social media, so my question would be: How is the kind of prevalence of social media changed the way that you have to report on the Supreme Court? And as a follow up, is that easier or is that harder?

AL: I do not think so. Social media is basically valuable, I do not think it plays a huge role in Supreme Court coverage. I do use Twitter to follow developments in the law around the country and I think it is quite useful. If you have a properly set up Twitter feed you do not really need to look at the wires. You do not need to look at the AP anymore, because every development, large or small, is going to

show up in the feed. So, as a news gathering tool it is fairly good. I like to sometimes, in a lighter tone, sometimes just to get news development out fast, also go to Twitter. But I do not think that social media as such has really influenced the basic coverage of the Court. It is really the demands of the internet and our own website that has this gravitational pull on the way we cover the Court.

DL: I might disagree a little bit just because I think it has compressed the news cycle in a way that makes it almost impossible to read the entire opinion, think of what you want to say, and write a piece because in those two days the world has moved on. And I think we were just talking about how it was not so very long ago when a decision came down and you did not have to file until that night. So not only could you read the opinion, you could also eat dinner. And those days are really behind us. I am finding more and more that saying to your editor twenty-four hours after a decision has come down “Hey, I really actually sat down and read *King* and I have some thoughts,” and they are onto the next thing. And so I think it gets digested and thought through in social media in a way that it seems as though “well we have played this out” and then I think it does become a little tricky to make the case that two days is in fact not too long to still be relevant and interesting. And I do have that sense of the walls closing in in terms of time.

RB: I think as a practical matter too, social media is the way that our work gets read and distributed. I mean, people, our studies have shown more and more, do not come to the *WashingtonPost.com* website to see what is there, they go to read stories because they have been referred there on Twitter or on Facebook or by someone’s email or someone’s list. And so the way people get to us is really different than the way it used to be even online. And so it makes a difference that way. I think it also creates a conversation in a way that we did not have before. It used to be there would be a letter to the editors saying they did not like what you had done, or praising you sometimes, and now it is immediate. You hear from people right

away. Sometimes they bring up very good things to think about and sometimes they are just nasty but it is still a real difference in that conversation that goes on.

ES: So I want to ask a general question that we all I think want to know the answer to, about cameras. But I want to put it in context, and I want to direct this to Dahlia first and then Adam and Bob can chime in. Something happened last year which I am guessing 80% of this room does not even know happened, that you (DL) reported on, that I think is very significant. The same sex marriage decision was decided on a Friday, I believe, and that Monday they had two other cases, important cases. During the decision announcements of that Monday Justice Scalia, I think these are your words, “acted unusually” in going back to and commenting on the same sex marriage decision from the week before and being very snarky to Justice Breyer among others. I am guessing most of you (the audience) do not know this, although you (DL) did a great column on it. Were that on national television, everybody, I think, in this room would know that happened because it would have been reported on, probably on the national news. So my questions is, one, are you for or against cameras, but two, don’t you have a little bit of a conflict of interest here because we now depend on you, and you are great at it, to describe to us what happened. But it is your filter.

DL: So many thoughts. The moment where the *Glossip* case comes down and part of what my complete emotional breakdown is rooted in is the problem that it makes no sense anymore to be in the chamber for hand down decisions because you are trapped in there. You cannot be in the chamber and file in five minutes. And so we all have to make very tough decisions: are we going to go in there and listen to them read their decisions and read their dissents, and, if so, by the time we come out forty-seven minutes later, we are at Super Bowl week. And there is nothing else to say about this case and so, fewer and fewer reporters actually go on decision days which is its own just insanity because that is either an important public

announcement of something happening or the decision is the important public decision and what happens in the chamber is not real. And because I live on the seam of that right now I do not quite know the answer, whether it matters what happens on the bench. To me it matters because it is tremendous theater. But that *Glossip* decision was a funny decision because it was a very strange hand down day. And the hand downs generally are strange because the syllabus does not correspond to the opinions and the judge who reads is not necessarily speaking on behalf of the opinion and there is all sorts of anxiety. And so you have this quasi-public piece of theater going on and your question is I think the right question. This is a public institution, it is a public day. Should there be cameras? Of course! I think that if you had cameras in there, there would be no decision days, precisely because this is when you see the majority of the eye rolling and the weirdness from the Justices. I mean really, the weirdness is on hyperdrive on those days because the Justices are [grips the chair arm rests forcefully]. You know, clutching their chairs, rocking back and forth and acting like petulant children. That is not the way they want to be perceived. And so I think that what has happened, and then I will answer the cameras question, but I think what has happened on those decision days is so fascinating as a reflection of: is this real or is this not real, is this the court or is this not the court. We talked about it a little bit this morning, and I think it is a fascinating existential question. So my short answer, having given you the long, “welcome to my breakdown” answer, is that I think that of course there should be cameras in the court and that is easy for me. I think that it is ironic that the court that does not want to be represented on film trusts reporters who are going to filter and editorialize, and then gets mad that we do it incorrectly. But I do think that decision days are in fact the manifestation of why there will never be cameras in the court because I think that if you want to see your Justices behaving badly that is the day to see it.

ES: Never is a strong statement.

AL: Your (ES) question is excellent, but not mostly about cameras on hand down days. On hand down days, just in the past year or so, Bob and I have joined the rest of the press corps in not going upstairs anymore where you are incommunicado and going downstairs instead, and instead of having the author of the decision brief you on what the author of the decision, in conversational terms, thinks are the highpoints of the decision. So, after twenty minutes of that, you have this sort of personalized briefing. You go downstairs. You are in very good shape to write. Instead you are doing this thing you remember from *Bush v. Gore* night where you are flipping through the decision and you just want to make sure you have the bottom line right because you cannot afford that twenty or thirty minutes to be incommunicado upstairs. So that is the self-interested part of it. I agree with Dahlia. There is no principled reason not to have cameras in the courtroom. It is, Eric, you are right, an argument against interest. I am probably a little better off that people have to rely on our reporting rather than cameras. I do think that it is a wholly academic discussion. It is not going to change. And nor do I think it would be a particularly big deal. Most of what the court does is very technical and unless you have prepared and unless you have read the briefs you will have no idea what is going on. The occasional bits of theater, as Dahlia says, are on the hand down days. The Justices seem to think it is important. They will talk publicly about how much thought they put into whether they are going to dissent from the bench because they think that sends a powerful signal, so they do think they are doing something. They do think, I mean presumably the oral dissent wants to be reported and they are not only talking to the tourists. They are talking to the Nation in a sense, but I guess they think it is important to talk to the Nation in a mediated fashion.

RB: I am with both of them and I think that the Court's arguments against cameras are fairly easily shot down by you (ES) and others who have made it that way. I also do not think it is going to change. I think that there are a number of reasons for that, but I think one is that this is something that I think that they would want to do

unanimously. I do not think this, allowing cameras in, is not something they want to take a five to four vote on and do. They fight with each other enough over the substance of their work. I think that they do not want to force anyone into it that does not want to be there. And so, I will be surprised when, if it ever happens.

LD: So this may be a non-issue but it seems like this current presidential election the Supreme Court is coming up more and more often between the fact that some Justices may retire and even Hillary [Clinton] mentioning that she might put [President] Obama on the Court. Is it any different the way that you do your job during an election year? Do you think there is more scrutiny? Or do you think that really anything changes at all?

AL: It is different in that people do not really pay attention to us. All they care about is the campaign.

RB: They will, they will! I think it is a little different. Every year, every four years, there is a spate of stories about how the Court is really important in the presidential election and then it turns out not to be that high on voters' agenda. I think that is going to be slightly different; I think that the Court has made so many important decisions about American life in the last few years that there is a heightened awareness. I do think that there is a general knowledge out there that this is a very closely divided court that the next president could have quite a say over. And they have an agenda this term with abortion, affirmative action, immigration, I am sure I am forgetting others, that plays perfectly into the political debate that is going on right now and these decisions will come down this summer I think with the country really tuned in to what the court says. I think it is going to make some difference, I still do not think it is the reason that people choose who to vote for president.

AL: The thought experiment might be if the first Affordable Care Act case in 2012 had come down the other way and had the five

Republican appointees strike down a Democratic President's signature legislative achievement in the middle of a presidential campaign, then the court really would have been front and center. And that may even explain some of the voting in the case.

DL: I do think, and I would be curious what my colleagues think about this, but I am finding the other sort of paradox of this job is it is *very* personality driven in a way it did not used to be. And so you sort of know if I write a piece about Sonia Sotomayor said this, it is just going have a *ton* more interest in traffic than the thousandth piece saying, "Wow, we have four Justices that are going to be 80 or more." There is a way in which the hinge for virtually everything that people are interested in, you know, "Notorious RBG,"—bajillion hits, does not matter, you could have her shopping list and it would get a bajillion hits; Justice Scalia said, "What?"—a bajillion hits. And so I think that there is just this interesting way in which more and more and more, the sort of profile, of a sort of fawning profile, a critical fawning profile, those things drive passions in a way that even cases do not.

AL: Dahlia, I think that may always have been so, but we did not have the data. Now that we know what gets the clicks, we are the victims of big data, where as before, we kind of suspected that the profile piece got a lot of readers, but we did not know it. So we exercise what used to be called, "news judgment." And now I have access in real time to how many people are looking at my stories, and it is a pernicious thing, I should not be allowed to look.

RB: And yet, for all of that, and the interests, what was the last poll? Fourteen percent of people can tell you who the Chief Justice is? So, we have not gone that deeply into the public psyche and knowledge.

ES: I only have one comment. Prior the 1992 presidential election, Justice Thurgood Marshall was very ill and resigned from

the Court. Rumor has it part of his thinking was that the first George Bush was going to win anyway, so it would not matter. He was obviously wrong, but that miscalculation resulted in Justice Clarence Thomas being appointed to the Court, whereas if he had waited about ten more months, Bill Clinton would have had that pick. Without Justice Clarence Thomas, going back in time, there is probably no *Heller*, the gun case, there is probably no *Citizens United*, and there is probably no *Bush v. Gore*. So, who knows what happens, so my suggestion there is if the balance of the Court is at stake, this is really important to the American people, whether they think so or not, I think.

I started off with a softball question, so now I am going to ask a very sensitive question. David Garrow, who is a nationally known reporter, wrote an article in the *LA Times*¹ recently where he suggested, forgive me for this, that two members of the Court, Scalia and Ginsburg, maybe are reaching the end of their productivity in terms of their energy levels and skill—this is David Garrow talking—and, David has long chronicled a number of situations where Justices were too sick to do their jobs. We all agree Justice Douglas after his stroke really could not do his job correctly, and David has long questioned life tenure. And although life tenure is not directly related to transparency, it is certainly related in a lot of significant ways. So, my question, which you can duck if you want, is: are you in favor of life tenure, or should we think about doing something that every other judge in the democratic world has, which is, other than our lower federal court judges, which is either fixed terms, or retirement ages? And it would take a Constitutional amendment to do that.

AL: So again, academic question only, is not going to happen. Eric is right, everyone else, the major Constitutional courts around the world, have long tenure, but fixed tenure. And that is, if we were

1. David J. Garrow, *Four Supreme Court Justices are Older than 75. Is that a Problem?*, WASH. POST (Feb. 2, 2016, 5:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-0202-garrow-aging-judiciary-20160202-story.html>.

starting over, that is probably the way to do it. The Framers probably did not anticipate that people would live to be as old as Justice John Paul Stevens. The age of appointment through history has been remarkably constant. You get on the court in your early fifties. But when you got a guy on the court in your early fifties in 1800, you were not going to be around all that much longer. And now people really stick around. To the Garrow point, I do not see diminished mental capacity. I think that they are old but sharp. Occasionally, you might see some evidence of diminished work ethic. But I do not think diminished smarts.

RB: I would have to agree with that. Justice Ginsburg is the oldest [Justice], I think she will turn eighty-three this spring. And while she always looks frail and old, she is the Justice I think that you would, most of us would agree, is the most prepared for oral argument. She knows the record better than anyone. If a lawyer tries to get away with something, she will quickly whistle them back into line about how that is not what happened in the court below. And so I am like Adam, I do not see it. When you go up there and look at them, yeah it looks like a bunch of old people, but I do not see where there is any kind of loss.

AL: And you have to bear in mind that the average Supreme Court Justice is still younger than the average Rolling Stone.

DL: I would also have to say, not only do I see no evidence of decline, to the extent that there is evidence of decline it is that Ruth Bader Ginsburg falls asleep at the State of the Union. I fall asleep at the State of the Union. I just do not think that is evidence of doddering old age. And I would really associate myself with the remarks of both my colleagues. I think if you sit in there and you watch them, I see no evidence that the younger Justices are working at higher voltage than the older Justices. I think that having seen Justice John Paul Stevens, he could have plausibly stayed, and that he benched himself out of an anxiety that comes from some of what you

are talking about, which is sometimes misplaced. I just feel that, in addition to the large Constitutional questions, I sometimes think these conversations sort of manifest this subtle ageism that is uniquely American, that says, “you can’t get work when you’re Susan Sarandon because we only want Jennifer Lawrence.” I just think that in most cultures throughout most of history we had tremendous respect and reverence for people in their eighty’s because they are really smart. And so I balk a little bit at the idea that they have an expiration date because of some magical number.

ES: I just want to say in David Garrow’s defense, and my own defense, our arguments are not based on any notion that an eighty-five year old cannot do as good of a job as a sixty-five year old. David’s arguments, and he wrote he wrote a seminal article on this, a chapter in my book, is that no one should have a lot of governmental power for life. It is just not something we should do. And if you have a lot of governmental power for life, no matter how great you are, you will at some point in time, begin to think that law is what you think it is in ways that is different if you do not have power for life. It is not an age thing. I think Justice Stevens was totally sharp when he retired.

LD: Is there a subject matter, environmental law, criminal law, employment law, that you really enjoy writing, like when a case is about to come out you are very excited to write about? And on the other side of that coin, is there one that you are just not excited to see come across?

RB: Well nothing strikes fear in a Supreme Court reporter’s heart like a patent case.

DL: Maybe, ERISA.

RB: [In agreement] Maybe, ERISA.

AL: Those are the cases where you try to figure out if you can justify not writing about them at all.

RB: It is like “Is there a reporter on this staff who really knows this issue better than I do? And wouldn’t that be more fair to readers?”

ES: We talked in the morning about the fact that we do not know which Justices voted to hear which cases for the all-important writ of certiorari. We also talked about the fact, that to the best of our knowledge, there is no official record kept anywhere of how the Justices vote over time on the all-important decision whether to hear a case. 8,000 appeals a year, give or take, they take 75. It is an incredibly important decision. I am on record, forcefully, saying we should know who voted, not why, but who voted. And I am just curious what you all think.

RB: I do not think it is as important as you do. Because I think that there are probably a lot of reasons that a Justice does not take a case: that there is something wrong with this particular framing of the issue, maybe an important issue but this is not the right way to do it. But I know that Justice Sotomayor has said that Justice Scalia gave her advice when she got on, “don’t worry about passing on a case because there is going to be another one just like it next year or the year after that.” And so I think if there is not an explanation of why they did not take a case, then I do not know exactly what you would get from knowing what the cert vote was. But do not take away my first amendment card because I said that. I just think there would have to be a lot of things that would go into to make it sort of valuable information.

DL: I think I agree with Bob, I think it is important and many, many, many, times going to be misleading. And I guess we just want to reflect, and it occurred to me this morning, and I know we will talk about more of this this afternoon, but, this really does pit the

imperatives of history against the imperatives of the institutional functions. And those are the questions, I mean, that was sort of the upshot of the conversation about recusal. And on the one hand, there is no question that history demands the moment you (ES) described: I need to be able to show my children Justice Anthony Kennedy reading *Obergefell*. I need that. Which is why we do the podcast and try to at least put the audio in the ears of people reading opinions, because I think history demands that. But I think that in some of these cases it is just, there is a less plausible argument that history demands cert votes. And if it does, maybe in June as you suggested, but I think that in a lot of these cases the damage to processes would really be consequential enough that you have to modulate the imperatives of history against the imperatives of the Court doing with the cert votes all the things they need to do.

AL: They are not going to do it voluntarily. I do not know if Congress could force them to do it. If Congress did force them to do it, I think they would find a way around it. They would just confer ahead of time and see if there were four votes or not, and it would all be nine or zero.

ES: Mark Tushnet of Harvard Law School made exactly that statement in a big conference we had this summer, saying they would find a way around it, they would not do it, they would not publicize it.² Which, I just, I think does reflect something. Scalia's advice to Sotomayor: "don't worry there's another case next year." I cannot let that pass. I mean, tell that to the litigant who is either in prison or losing liberty or property, or is otherwise affected.

AL: Well, on that theory they should take every error correction case, so that proves too much.

2. Eric Segall, *Supreme Court Transparency (or Lack Thereof)*, DORF ON LAW (Aug. 3, 2015, 12:00 PM), <http://www.dorfonlaw.org/2015/08/supreme-court-transparency-or-lack.html>.

QUESTION & ANSWER SESSION

Audience: Good Afternoon, and thank you for being here . . . I enjoy these programs every year. I was curious about your assessment as to the stay that was issued in the Clean Air Act situation in the last few days.³ As I understand it, it is fairly unique. And the lines drawn by the court, maybe not atypical, but I want to get your assessment as to the dynamics and where you think that is going.

AL: It was a surprise. Most of what you will hear from us is how does it affect us? And it was a surprise that the Court thought it had to act so quickly as to issue this stay at 6:30 at night on a Tuesday when the first obligations under the regulations kick in in [the year] 2022. They could have waited for a more humane hour. It is one of those cases where, it is a shadow-docket type of case, where you really would like a little bit of explanation beyond the fact that it was a 5-4 vote with the five Republican appointees blocking a major initiative of a Democratic president, and the four Democratic appointees going the other way. If the court wants to be perceived as apolitical, this was not a good way to do it.

RB: And the tough one on that too was there was really no explanation from either side. No reason about why this needed to be done now. And from the dissenters, no explanation of why it was a bad idea. And so, we talked earlier today at the symposium about whether the Justices are giving us enough reasons for the actions they take. And would it serve them better sometimes to try to provide explanations rather than to open it up to the floor for speculation about why they would have done what they did.

3. Adam Liptak & Coral Davenport, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions*, N.Y. TIMES (Feb. 9, 2016), http://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html?_r=0.

AL: And to the questioner's point about it being fairly unique, it apparently is authentically unique. It is that rare thing that you can call unprecedented of a stay being issued of a regulation that has never been tested in any court.

ES: To Adam's point about five republicans and four democrats, that same week, Chief Justice Roberts went to New England School of Law and complained that the American people think the Supreme Court is too political. So I thought the irony of that was interesting.⁴

Audience: Thank you for being here and for letting us know what is *really* going on. I would like to know if they ever talk back to you? That is to say: They speak. You speak. Do they ever rebut? Or do any of them ever rebut? Either privately or correspondence or, certainly not publically, or we would know about it.

AL: Without disclosing any confidences, such a thing might not be unheard of.

DL: They are doing that right now. [Referring to audible microphone feedback]. That is on the orders of the Chief Justice. You hear about it—you either hear directly or they say something or somebody, somewhere says something.

AL: It is more criticism than praising.

DL: There is not a ton of praise. But word gets back in some fashion or other.

RB: Although I will tell you that once, in meeting a Justice privately, I said if I ever got something wrong in a story, or, just really misinterpreted something and even if—I will say he or she—

4. For Chief Justice Roberts's remarks at the New England School of Law, see *Inside the Supreme Court*, C-SPAN (Feb. 13, 2016), <http://www.c-span.org/video/?404131-1/discussion-chief-justice-john-roberts>.

did not want a correction I would like to get that information, and he or she said, “Well, that would be nice, but I’m probably not going to read anything you write.”

DL: I do think it is interesting that when the Justices are asked: “in the 70s, none of you went on television, and now, you are all on television all the time—you are on sesame street. Why are you *so* public?” And Justice Scalia has this answer, which is, “everybody else is in this conversation except me. So now I want to be in the conversation.” And he describes it as once it became a public free-for-all where everybody is talking about the Justices in deeply personal terms, that it is kind of a sin on their part not to represent themselves. And so I think we sometimes forget that there was a long period of history where you could not turn on Charlie Rose or Sesame Street or CNN and find a justice all the time. And it does have a lot to do with the fact that they are all [selling] books. But I think in a deep way it has to do with the feeling that there is a very, very vociferous conversation about the Court and the Justices personally and that they want to be in it. They would rather be in it than not.

AL: There is a transparency problem here, too. The Justices, unlike the President, do not disclose their travel schedules. They like to go to friendly groups and not have any press there. And that would seem to me a rudimentary thing for a high level public official to at least make their public appearance schedule public. And yet none of them do.

ES: And I feel compelled to point out that Justice Scalia never lets himself be videotaped as a condition of his—most of his—public appearances. And he came to Georgia two years ago pursuant to a really great conference run by the ABA here, said some remarkable things—Adam was here for that—and none of that was videotaped because he would not allow it. And had there been videotape I think there would have been a much bigger national story about that.

RB: It is a very strange. It is a very strange thing too, because, even among the Justices, they have this sort of varying set of rules that are very hard to figure out and follow. Sometimes a speech at a law school is webcast and there is no problem. Sometimes it is closed to any sort of coverage at all. Sometimes you can go in and listen but you cannot broadcast anything out of what was said. Frankly, I do not understand the system because it is never the same.

DL: One more strange valence around this that is problematic for a reporter is that [Justices] go off to some law school, and they say some odd thing and it is reported by some stringer who does not know that in fact, well, this has been written in his opinions before, as though this is the first time Justice Scalia ever said this. No, he says it a lot. And then that becomes the story. And so I just think it is an odd parallel to the complaints about the Supreme Court reporters who cover the Court and perpetually get it wrong in the view of the Justices. A good way to not have one little bit of something you said at Notre Dame taken out of context and blasted out on all the wires is to have video of the speech, and then we can see. This is another layer of this notion that [the Justices] are protecting [themselves] by not releasing the speech and not letting anybody come means that the person who reported that speech was in Mrs. Baker's twelfth grade journalism class. That is who reported that speech. And that is not good for the Court.

Audience: Thank you for sharing your insight with us . . . and I was wondering, and we have touched on it, that the next president could potentially appoint four Supreme Court Justices. And in light of our conversation today about transparency, and all these questions that we have, are you all excited about four confirmation hearings?

What do you all plan to do because I think the American people and the front runners right now can be called extreme by some, and they could be pretty contentious and there could be a lot of educating to do to the American public about the confirmation hearings. So I

would just be interested to hear your thoughts on four upcoming confirmation hearings.

RB: I have been involved in covering two. These guys have done more, I think. And I think that the real work for reporters comes before the confirmation hearing, which is to try to write as well as you can who these people are, what their background is, what you can tell about their philosophy. But I think once you get to the confirmation, you do not learn a whole lot more, because, as you know, it is mostly speeches by Senators on both sides, not particularly interested in the answers. That is where the press's real role is in this program is to try to find out who these people are right away. I think the other thing that is hard for us—for anybody—to know right now is the next president certainly will have a chance to make a big impact, but it really depends also on what kind of Senate he or she is facing. And that will really determine what kind of nominees you are going to get and how far those nominees would move the Court.

DL: My favorite confirmation hearing story is during Justice Alito's hearings my Dad sent me an email saying, "Please close your computer, the whole world is watching you play solitaire on C-SPAN." So, that is how riveting those are. I think this goes to Eric's foundational point here, to me the most interesting thing, having covered four now, about the process of journalism and where it intersects with the confirmation process is that they put their one Supreme Court reporter on the story and then they put their nineteen Hill reporters on the story. This is not a Justice story. This is not a law story. And you will maybe get pinged by your editor if someone accidentally talks about the commerce clause. Then they might want you, but for the most part, this is processed by our editors as a political story, as a Hill story. Bob is right. We spend an enormous time reading their law review articles and trying to ferret out their positions on things, but by the time the big show starts, it is not a Court story.

AL: Agreed.

ES: I have a real quick comment; if Justice Ginsberg and Justice Scalia, who are the two most senior Justices, serve as long as Justice Stevens and nobody else resigns, the next two-term president will have no appointments. So it is in no way a *fait accompli* that this next president is going to have a couple appointments.

Audience: Mike Gerhardt from the University of North Carolina Chapel Hill. I just want to follow up, maybe ask Eric's question a little differently and get your reactions. So it seems to me a lot of the concern about trying to sort of make the Court more transparent is a concern about trying to make it either more accountable, or to make it to some extent more constrained in certain respects. And so, I'm wondering to what extent you find, or what you think actually constrains the Justices. Do you think it is the law in the particular cases? Do you think it is the public perception of what they do that might constrain them sometimes? What are the factors you perceive are constraining the Justices?

ES: That is a big question.

DL: Adam?

AL: Institutionally, the Court cares about its reputation, prestige, authority. They are a little bit surprised that people follow what they have to say because there is no particular reason we all do. They talk with awe about how there were no riots after *Bush v. Gore*. So, institutionally they care about people continuing, as is not the case in much of the developed world, really making the Supreme Court the leading, tiebreaking, end-of-discussion institution. Individually, they don't like to be accused of internal inconsistency. They like for their jurisprudence to have integrity and many of them care about elite opinion from law schools and journalists. They do not like to be

criticized on substantive grounds. I think more and more, as with the rest of the country, they care about elite opinion in their political camp. But I do think they are constrained by some of those factors.

DL: I think maybe they are constrained by the appearance of being political, and all that that manifests, which is why you get the Chief Justice [asking] why is everybody talking about the Court?⁵ Because they really think, and this is Justice Breyer's, "we all agree we are not J.V. politicians." I think that anxiety is a very deep one and it is paradoxical for all the reasons Eric lays out. But I think that anxiety about "looking political" is a constraint.

AL: So any time you have a Supreme Court Justice make a public appearance, they say "Why don't they write about our unanimous decisions," hey are unanimous a lot, 40-50% of the time, they are unanimous in trivial, statutory cases.⁶ "Why do they only write about the 5-4 decisions on the front page of the *New York Times* at the end of the year?" Maybe because those are the most important ones, and maybe because it is most of the time the same five and the same four?

ES: Michael, I would not be me if I did not say that the only real limit on the Supreme Court is what they think they can get away with.

Audience: Anne Emanuel, retired from this law faculty. This is the least controversial and easiest question you will get for a long time. But over the decades ago, clerkships, judicial clerkships, were almost uniformly one or two years. But over the decades, semi-permanent and even permanent clerkships have become very, very common in both the state courts and the lower federal courts. I, for

5. *See id.*

6. Hon. Eric Posner, *Why does the Supreme Court Usually Decide Cases Either 9-0 or 5-4?*, SLATE.COM: SUPREME COURT BREAKFAST TABLE (July 1, 2014, 11:07 AM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2014/scotus_roundup/supreme_court_2014_why_are_most_cases_either_9_0_or_5_4.html.

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one, never hear about that on the U.S. Supreme Court, and I wonder what the practice is there.

RB: It is one year. One year and then a \$300,000 signing bonus at the law firm that they have decided to go to.

Audience: [Eugene Volokh of UCLA School of Law]. It happened, I believe, back in the 1950s, I believe Eugene Gressman of Stern and Gressman of the Supreme Court Practice book, I think he was a clerk for five years, and I want to say it was Justice [Murphy]. So it has happened on occasion.

RB: Sometimes when there is a transition on the court, a clerk will stay more than one year, right?

Audience: [Eugene Volokh] Or will go to a new Justice.

RB: Yeah.

Audience: [Eugene Volokh] But, almost never. But that is the one little factoid.

ES: I think we have time for maybe one more question, and we will give it to Dean Kaminshine.

Audience: I wanted to return to the issue of cameras in the courtroom for a second, and wondered whether times have changed in terms of the boundaries, or lesser boundaries, between broadcast media, journalism media, and Comedy Central media, and the ease with which Instagram and Marco Rubio can make four mistakes over three hours and it shows up the next day as four mistakes over ten seconds. I am wondering if those kind of things make the argument harder for the Court. If the Court might have been more willing, hypothetically, fifteen or twenty years ago, to embrace the arguments that are being advanced here, but that the boundary between the

journalism you do and the ridicule-focused journalism that others do, what passes for journalism might get in the way of your argument.

AL: I think that is a very good description of how they really feel. It is wholly on principle that they like to think, “Well if we could only have ourselves presented on C-Span that would be one thing. But if someone were to take it and put it on Comedy Central, that would be another thing.” I do think they think that, and I do think they are right to be scared of it because some of them, Justice Scalia, say provocative things, and some of them, Justice Breyer, say goofy things. It is true that you would get some mockery and some diminishment of the Court’s reputation. That is true, but it is not a good reason. Citizens in a democracy ought to be able to see their government at work in a public setting as this is. We will hear Nancy’s [Marder] counterargument, but there is no counterargument.

RB: Well, the other thing is late night shows already do it, they just have dogs playing the roles of the Justices. So, I certainly agree that they enjoy their anonymity, which would be lost if they were on TV all the time on the news; none of which I am saying are good ideas, good reasons for doing that, but I think that is the way I think the court thinks of it.

AL: And we have now more than once had cameras in the court room where people smuggled in little pen cameras and have protests and that has set back the cause of cameras. If it is possible to set back the cause of cameras further, that has set back the cause of cameras further, because if the Justices who hate these protests, were to think that cameras make them more likely because more exposure, that is yet another reason that they are not going to want cameras.

DL: First of all, I would like to stake out the position that mockery-based journalism can happen in print as well. And I also think that it is such a perplexing argument to say Marco Rubio can be lampooned by John Stewart but not me. I understand the gravitas

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argument, but there is a better argument, which is just do not do dopey things in front of the camera, and it seems to me that the problem is the notion that we could not stop ourselves from being mocked. You could. You could be normal people, doing a job, normally. And so I am always baffled by the snippets notion because you have perfect control over snippetry, which is just do not say dumb things. I am just always baffled by the notion that the Justices themselves have no agency here. They do have agency. They could conduct themselves decorously and not call each other Hallmark cards, and so it just seems to me that this is an argument that suggests that there's this "gotcha" quality that is going to get them no matter what they do or say. I think if you feed the John Stewart machine, you will certainly get John Stewarted, but you have the option to just be normal.

ES: Okay, we are going to call it at that. Let us give them a round of applause.

