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Institutionalizing Press Relations at the Supreme Court: The Origins of the Public Information Office

Jonathan Peters*

ABSTRACT

At the U.S. Supreme Court, the press is the primary link between the justices and the public, and the Public Information Office (“PIO”) is the primary link between the justices and the press. This Article explores the story of the PIO’s origins, providing the most complete account to date of its early history. That story is anchored by the major events of several eras – from the Great Depression policymaking of the 1930s to the social and political upheaval of the 1970s. It is also defined by the three men who built and shaped the office in the course of forty years.

I. INTRODUCTION

Anna Nicole Smith drew a big crowd in 2006 when she arrived at the U.S. Supreme Court. The former Playboy model and reality-TV star was there to watch the oral argument in her own case, an effort to claim part of her late husband’s estate.¹ Photographers swarmed her, one bystander shouted that she was a “goddess,” and the public line to attend the argument wrapped around the Court’s plaza.² As the writer and scholar Jonathan Turley noted, Smith’s appearance generated more attention and news “cover-

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1. Joan Biskupic, *Supreme Court Hears Anna Nicole Smith’s Case*, USA TODAY (Feb. 28, 2006, 10:44 PM), http://www.usatoday.com/news/washington/2006-02-28-anna-nicole_x.htm.

2. See Patty Reinert, *Anna Nicole Smith Draws a Crowd*, HOUS. CHRON. (Feb. 28, 2006), <http://www.chron.com/disp/story.mpl/metropolitan/3690584.html>.

age than it would if Chief Justice John Marshall returned from the dead for the argument.”³

Once in the courtroom, however, where cameras are not allowed, Smith quickly blended in, “just one more face, barely perceptible amid about 300 visitors.”⁴ Indeed, it appeared that few in the “gallery even knew she was there, sitting halfway back in the public section, quietly wiping away tears” as Justice Stephen Breyer talked about Smith’s late husband, the billionaire oilman who married Smith when she was twenty-six and he was eighty-nine.⁵ At the end of the argument, Smith slipped out the Court’s side door, then negotiated through a throng of photographers.⁶ She made no statements and signed no autographs.⁷ She just smiled a few times before sliding into a dark sport-utility vehicle parked on the street.⁸

Slate writer Dahlia Lithwick wrote at the time: “I would love to tell you that [Smith] did something, anything, to distinguish herself from the thousands of appellants who have brought their cases into these marble walls. But the court has worked its magical spell of blandness, . . . and she is just another litigant with a probate dispute today.”⁹ And yet she did distinguish herself if only because her presence created a media frenzy. News outlets from around the country staked out the Court to get photos of her arriving and leaving.¹⁰ Others requested extra seats in the courtroom, and still others, many covering the place for the first time, asked Court officials for help and guidance.¹¹ They did not know where to begin.

At the center of the media frenzy was the Public Information Office (“PIO”), the institutional liaison between the Court and the public and news media. Its staff credentialed reporters to attend the argument, fielded requests from broadcasters to shoot video around the plaza, and answered questions about the Court’s traditions and procedures.¹² However, the staff did not hold

3. Jonathan Turley, *Lap Dances, Wills and – You*, USA TODAY (Feb. 27, 2006, 8:10 PM), http://www.usatoday.com/news/opinion/editorials/2006-02-27-anna-nicole-edit_x.htm.

4. Biskupic, *supra* note 1.

5. Reinert, *supra* note 2.

6. *Id.*

7. *Id.*

8. Biskupic, *supra* note 1; Peter Lattman, *Update: Anna Nicole and the Supremes*, WALL ST. J. (Feb. 28, 2006, 1:01 PM), <http://blogs.wsj.com/law/2006/02/28/anna-nicole-and-the-supremes-update/>.

9. Dahlia Lithwick, *Rack and Ruin: The Supreme Court Considers Anna Nicole’s Surprisingly Real Claims*, SLATE (Feb. 28, 2006, 6:16 PM), <http://www.slate.com/id/2137106/>.

10. Interview with Kathleen Arberg, Public Information Officer, U.S. Supreme Court, in Wash. D.C. (May 17, 2011).

11. *Id.*

12. *Id.*

a press conference about the case, did not distribute news releases, and did not offer any analysis or interpretation of the briefs or oral argument.¹³

The day after Smith's oral argument, the PIO intern, a college student, asked one of his coworkers about the origins of the office.¹⁴ He wanted to know where it came from and how it operated in the early days. The coworker did not have concrete answers. Nor did others in the office. The general consensus was that in the 1930s an Associated Press reporter misinterpreted the reasoning of the *Gold Clause Cases* and issued a bulletin misstating the Court's decision, an error that facilitated the hiring of a press liaison and the creation of the Public Information Office.

In reality, the story of the PIO's origins is more complicated, and this Article is the first to explore that story in depth, providing the most complete account to date of the PIO's early history. It is worthy of exploration because the interaction among elites, institutions, and the public is of primary importance in a democratic society.¹⁵ At the Supreme Court, specifically, the press is the primary link between the justices and the public, and the PIO is the primary link between the justices and the press. To explore the PIO's early history, then, is to explore how the Court has attempted to influence the flow of information between elites and the public.

Studies of the Supreme Court and press activities, which have focused mostly on news coverage of the Court, have crossed methodological lines, including historical methods and interviews,¹⁶ case studies,¹⁷ observation,¹⁸ quantitative methods,¹⁹ and content analysis.²⁰ This Article uses historical methods and interviews. First, it relies on primary sources: correspondence of the justices, memoranda among the justices and other Court officers, internal Court newsletters and bulletins, Court press releases and media advisories, and speeches. These were available through reporters who cover the

13. *Id.*

14. The PIO intern referred to is the author, Jonathan Peters.

15. ELIOT E. SLOTNICK & JENNIFER SEGAL, *TELEVISION NEWS AND THE SUPREME COURT: ALL THE NEWS THAT'S FIT TO AIR?* 1 (1998).

16. *See, e.g.*, RICHARD DAVIS, *JUSTICES AND JOURNALISTS: THE U.S. SUPREME COURT AND THE MEDIA AGE* (2011); RICHARD DAVIS, *DECISIONS AND IMAGES: THE SUPREME COURT AND THE PRESS* (1993) [hereinafter *DECISIONS AND IMAGES*].

17. *See, e.g.*, DAVID GREY, *THE SUPREME COURT AND THE NEWS MEDIA* (1968); Richard Davis, *Lifting the Shroud: News Media Portrayal of the U.S. Supreme Court*, 9 *COMM. & L.* 43 (1987).

18. *See, e.g.*, Grey, *supra* note 17.

19. *See, e.g.*, LARRY BERKSON, *THE SUPREME COURT AND ITS PUBLICS: THE COMMUNICATION OF POLICY DECISIONS* (1978); JOHN GATES, *THE SUPREME COURT AND PARTISAN REALIGNMENT: A MACRO- AND MICROLEVEL PERSPECTIVE* (1992); THOMAS MARSHALL, *PUBLIC OPINION AND THE SUPREME COURT* (1989); DAVID ROHDE & HAROLD SPAETH, *SUPREME COURT DECISION MAKING* (1976).

20. *See, e.g.*, David Ericson, *Newspaper Coverage of the Supreme Court*, 54 *JOURNALISM QUARTERLY* 605 (1977); Ethan Katsh, *The Supreme Court Beat: How Television Covers the U.S. Supreme Court*, 67 *JUDICATURE* 6 (1983); Michael Solimine, *Newsmagazine Coverage of the Supreme Court*, 57 *JOURNALISM Q.* 661 (1980).

Court and through (1) the Thurgood Marshall papers, housed at the Library of Congress, and (2) the Lewis F. Powell papers, housed at Washington and Lee University. Second, this Article relies on secondary sources: books, articles, treatises, monographs, and videos commenting on the Court's relationship with the press. Third, it relies on interviews with six current or former members of the Supreme Court press corps and three current or former Court staffers. The average interview lasted ninety minutes, and all but one were conducted in person.

II. THE EARLY DAYS

In the 1930s, the Supreme Court found itself in the middle of Great Depression policymaking. President Franklin D. Roosevelt was lobbying Congress to pass a series of bills, collectively called the New Deal, to improve economic conditions across the country.²¹ The bills focused on what historians today call the Three R's: *relief* for the unemployed; *recovery* of the economy; and *reform* of the financial system.²² Although many of the bills passed, with Roosevelt signing them into law, the Supreme Court found several of them unconstitutional.

Consider the Agricultural Adjustment Act of 1933.²³ Supported by Roosevelt, who believed prosperous farms would lead to a prosperous America, the Act created the Agricultural Adjustment Administration ("AAA").²⁴ Its purpose was to raise the price of commodities through subsidies and scarcity.²⁵ However, the AAA met an early demise when the Supreme Court ruled in 1936 that the Agricultural Adjustment Act was unconstitutional.²⁶ Justice Owen J. Roberts, writing for the majority, said a "statutory plan to regulate and control agricultural production [is] a matter beyond the powers delegated to the federal government."²⁷ Just one year earlier, the Court had struck down Title I of the National Industrial Recovery Act, which created the National Recovery Administration, responsible in general for stabilizing wages and prices.²⁸

Frustrated and determined to get around the Supreme Court, Roosevelt used the Senate Majority Leader to propose and push for the Judicial Proce-

21. JONATHAN ALTER, *THE DEFINING MOMENT: FDR'S HUNDRED DAYS AND THE TRIUMPH OF HOPE* 163 (2006).

22. Rita G. Koman, *Relief, Recovery, Reform: The New Deal Congressional Reaction to the Great Depression*, OAH MAG. OF HIST., Summer 1998, at 39.

23. Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31.

24. *Agricultural Adjustment Administration (AAA)*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/9551/Agricultural-Adjustment-Administration-AAA> (last visited Nov. 20, 2014).

25. *Id.*

26. *United States v. Butler*, 297 U.S. 1 (1936).

27. *Id.* at 68.

28. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

dures Reform Bill of 1937, often called the court-packing plan.²⁹ Among other things, it would have granted the president the authority to appoint up to six additional justices to the Court, one new member for every sitting justice older than 70.5 years.³⁰ Roosevelt thought that by expanding the size of the Court he could create a pro-New Deal majority.³¹ Although the plan failed, the Court's independence and image had been threatened, compelling the justices to fight back publicly.³² Chief Justice Charles Evans Hughes, for example, wrote a letter to the Senate Judiciary Committee that challenged the president's rationale for the court-packing plan.³³ Newspapers republished the letter.³⁴

Amid that political drama,³⁵ the Supreme Court quietly appointed a member of the clerk's staff to "handle queries from hundreds of news writers seeking information on court moves that have captured public attention, especially since the New Deal controversies began pouring into the tribunal."³⁶ The idea came from a committee of reporters that pitched the idea to Hughes, and the job ultimately fell to Ned Potter, who had worked in the clerk's office for eight years recording the Court's formal minutes.³⁷ Potter had no experience in journalism or public relations, and that may have been the point.³⁸ Court officials emphasized at the time that Potter was not a "press agent" or "public relations counselor."³⁹ He would issue no "handouts" or "press releases."⁴⁰ He would not comment on the Court's opinions and orders, nor

29. See MICHAEL E. PARRISH, *THE HUGHES COURT: JUSTICES, RULINGS, AND LEGACY* 24 (2002).

30. *FDR's Losing Battle to Pack the Supreme Court*, N. COUNTRY PUB. RADIO (April 13, 2010), <http://www.northcountrypublicradio.org/news/npr/125789097/fdr-s-losing-battle-to-pack-the-supreme-court>.

31. *Id.*

32. DECISIONS AND IMAGES, *supra* note 16, at 32.

33. Richard D. Friedman, *Chief Justice Hughes' Letter on Court-Packing*, J. SUP. CT. HIST., no. 1, at 79-83 (1997).

34. *Id.* at 83.

35. In 1935, an Associated Press reporter misinterpreted the majority opinion in the *Gold Clause* cases and sent out a bulletin misstating the Court's decision. See Everette E. Dennis, *Another Look at Press Coverage of the Supreme Court*, 20 VILL. L. REV. 765, 770 (1975). That error led to a policy change at the Court that allowed reporters to get opinion proofs as soon as the opinions were announced in the courtroom. *Id.* It is also possible that for Court officials the error illustrated the need for a press liaison. *Id.*

36. Associated Press, *Supreme Court Gets a 'Press Contact Man'; Appointment Was Requested by Newspapers*, N.Y. TIMES, Jan. 1, 1936, at 2.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

would he explain them.⁴¹ Rather, Potter would maintain a complete set of briefs, opinions, and other records for the convenience of the press, he would credential reporters for seating in the courtroom, and he would supervise the press room.⁴²

Although this marked a significant step for the Court, appointing “an official for the mutual benefit of the press and the [C]ourt officers,” it did not merit an official announcement.⁴³ No press release, no media advisory, no memo. Nothing. In fact, “[t]he appointment became known when Mr. Potter moved his desk and files into the larger of the two rooms assigned to the press in the basement of the [new] . . . building.”⁴⁴ Those rooms, the Court’s first attempt to institutionalize its relationship with the press, were “remarkably good” for a place “long distinguished [by] its detached attitude.”⁴⁵ The press rooms even included pneumatic tubes that linked them with the courtroom, enabling the reporters upstairs to “send copy swiftly down to telegraph and telephone instruments below.”⁴⁶ Still, compared with other institutions, the Court was slow to provide physical space to the press and to appoint a press liaison.⁴⁷ When the Court moved into its current building and opened the press room, Congress and the White House years before had allocated space for the press.⁴⁸ Likewise, when the Court appointed Potter to be the press liaison, Congress and the White House years before had hired their own press officers.⁴⁹

For the first few years, Potter basically shuffled paper and made sure the reporters had what they needed to do their jobs.⁵⁰ But by the late 1930s, early 1940s, Potter and the Court began to accommodate the press “in ways both large and small.”⁵¹ One example involved the selection of cases for oral argument.⁵² Since the Judiciary Act of 1925, the Court’s jurisdiction had been primarily discretionary, which meant the justices could choose what cases they heard.⁵³ Before the justices met to discuss the petitions, in a meeting called the conference, the chief justice prepared a list of cases that in his view should be considered. Historically, the Court did not distribute that list to

41. Lewis Wood, *Press Needs Met by Supreme Court: New Contact Officer To Make Work Easier for Reporters Assigned to Cover Cases*, N.Y. TIMES, Jan. 5, 1936, at E7.

42. Associated Press, *supra* note 36.

43. Wood, *supra* note 41.

44. Associated Press, *supra* note 36.

45. Wood, *supra* note 41.

46. *Id.*

47. DECISIONS AND IMAGES, *supra* note 16, at 35.

48. *Id.*

49. *Id.* at 36.

50. *Id.*

51. *Id.*

52. *Id.* at 49.

53. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 850 (1989).

reporters, but sometime during Potter's tenure the Court began to do so.⁵⁴ The distribution of the list enabled the reporters to preview cases and even to write about ones that did *not* get a hearing.⁵⁵

In 1947, Banning Whittington, who covered the Court for United Press from 1941-1945, replaced Potter.⁵⁶ He carried on the largely clerical and administrative tasks of maintaining briefs and opinions for the press, credentialing reporters, and supervising the physical space.⁵⁷ But he also took on the role, in his twenty-six-year tenure, of press counselor to the justices and advocate for the press corps.⁵⁸ First, to keep the justices informed of news coverage of the Court, Whittington sent memos to chambers that included newspaper and magazine clippings.⁵⁹ He also maintained a list of reporters covering the institution and notified the justices when someone joined the beat.⁶⁰ Second, Whittington produced an in-house newsletter, the *Docket Sheet*, which was distributed to all Court employees, including the justices.⁶¹ It featured all manner of personnel news and shoptalk, such as birth and death announcements and retirement stories.⁶² Third, in 1967, after Chief Justice Earl Warren gave a speech about crime control, Whittington conferred with Warren about the lack of news coverage of the speech, discussing with Warren the reasons the speech failed to generate much news.⁶³ Whittington did the same for other justices, too, conferring with them about the news coverage of their extrajudicial activities.⁶⁴

Meanwhile, as an advocate for the press corps, Whittington recommended changes to Court practices to accommodate press needs.⁶⁵ One such practice was the release of opinions at the end of the term.⁶⁶ Historically, the

54. DECISIONS AND IMAGES, *supra* note 16, at 36.

55. *Id.* at 49.

56. *Id.* at 38.

57. *Id.* at 56.

58. *Id.*

59. *Id.*

60. *Id.*

61. See Arthur John Keeffe, *Practicing Lawyers' Guide to the Current Law Magazines*, 52 A. B. A. J. 1168, 1168 (1966).

62. DECISIONS AND IMAGES, *supra* note 16, at 50.

63. DECISIONS AND IMAGES, *supra* note 16, at 57.

64. *Id.*

65. *Id.* This is not to say Whittington always supported the press or always supported practices designed to improve news coverage of the Court. For example, at one time law professors were available in the press room to answer questions and to help reporters understand the legal issues raised by opinions. Lionel S. Sobel, *News Coverage of the Supreme Court*, 56 A.B.A.J. 547, 550 (1970). They were there, in the fall of 1964, because of an Association of American Law Schools project. *Id.* It was abandoned, however, just one year later. *Id.* Reporters often were too rushed to consult the on-duty professor, and many people at the Court, including Warren and Whittington, did not like the project. *Id.* Of course, whether that program actually helped the press is a separate question.

66. DECISIONS AND IMAGES, *supra* note 16, at 36.

Court released opinions only on Mondays, and the controversial ones tended to stack up as the term progressed.⁶⁷ As a result, the justices often released a dozen opinions, totaling hundreds and hundreds of pages, on a single day in June.⁶⁸ That frustrated reporters, who found it difficult to wade through the opinions and to report on them accurately, all with a deadline looming. In 1965, after a lobbying campaign by reporters and others, including Whittington, the Court changed its practice of releasing opinions only on Mondays.⁶⁹

One year later, the Court reversed its practice of not announcing *which* decision days would see opinions.⁷⁰ Just because it was a decision day did not mean a decision would be released that day.⁷¹ This made it difficult for reporters to plan ahead to be at the Court, so they complained to Chief Justice Warren, who authorized Whittington to “notify reporters in advance of days when decisions would be announced.”⁷² Then, in 1969, amid an effort to deny reporters access to the conference list, Whittington supported the press corps.⁷³ He wrote to Warren that “it would be a very big handicap for all of them to work without [the list].”⁷⁴ Whittington and the reporters prevailed.⁷⁵

Around the same time, Whittington was lobbying Warren to release headnotes (*i.e.*, summaries of the ruling and reasoning) with the body of every opinion.⁷⁶ Some justices already were doing so, but most were not.⁷⁷ Clerks simply prepared the headnotes when the opinions were on their way to the *United States Reports*, well after they had been released.⁷⁸ That changed when NBC News reporter Carl Stern raised the issue with Chief Justice Warren Burger, in the late 1960s, early 1970s:

I told Burger the sad story of how I reported a case wrong on a day when the justices dumped a dozen opinions on us . . . I told him it would be wonderful if the Court would release headnotes at the same time they released opinions. Then I wouldn't face some kind of trauma every time the Court released multiple opinions. Burger agreed . . . and instructed the Reporter of Decisions to do it.⁷⁹

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 37.

71. *Id.*

72. *Id.*

73. *Id.* at 60.

74. *Id.*

75. *Id.*

76. *Id.* at 38.

77. *Id.*

78. *Id.*

79. Interview with Carl Stern, Former Reporter, NBC News, in Wash. D.C. (May 15, 2011).

Whittington also worked with Burger to enlarge the press section of the courtroom. For many years, the reporters sat at tables directly in front of the justices, but that arrangement accommodated only half a dozen reporters.⁸⁰ Moving the press section to the left side of the room quadrupled that number and allowed the Court to seat reporters in an overflow area behind the section.⁸¹ This was a needed change because the number of legal reporters was on the rise.⁸² Not everyone, however, liked the move. “One of the effects . . . was that reporters could no longer eavesdrop on the justice’s [sic] whispers to each other while sitting on the bench. Some . . . complained that due to the poor acoustics . . . they could not even hear the justices or counsel from the new press section.”⁸³

Finally, in the most noted story involving Whittington, he was neither a press counselor to the justices nor an advocate for the press corps. Instead, he was a minor player in a major event: the release of *Brown v. Board of Education*.⁸⁴ Reporters first heard that May 17, 1954, would be a “quiet day.”⁸⁵ They were working in the press room as the justices conducted business upstairs, releasing opinions on monopolistic practices in milk sales, on collecting indemnity from negligent employees, and on the rights of union workers to picket retail stores.⁸⁶ It looked like a quiet day, indeed.

But before the Court adjourned, clerk Harold Willey dispatched a pneumatic message to Whittington, who slipped on his coat in the press room and announced to the reporters, “Reading of the segregation decisions is about to begin in the courtroom. You will get the opinions up there.”⁸⁷ At first he moved so nonchalantly that Louis Lautier, of the Negro Newspaper Publishers Association, later said, “I thought [Whittington] was going to say he was going to lunch.”⁸⁸ He picked up speed, though, once he got in the hallway.⁸⁹ The courtroom was “one floor up, reached [only] by a long flight of marble steps.”⁹⁰ Whittington ran with the reporters down the hall, up the steps and around the corner, and they arrived just in time to hear Warren begin reading.⁹¹

80. DECISIONS AND IMAGES, *supra* note 16, at 37.

81. *Id.*

82. *Id.*

83. *Id.*

84. 347 U.S. 483 (1954).

85. RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF *BROWN V. BOARD OF EDUCATION* AND BLACK AMERICA’S STRUGGLE FOR EQUALITY 701-02 (1977).

86. *Id.* at 702.

87. *Id.*; Luther A. Huston, *High Court Bans School Segregation; 9-to-0 Decision Grants Time to Comply*, N.Y. TIMES, May 18, 1954, available at <http://www.nytimes.com/learning/general/onthisday/big/0517.html#article>.

88. Lerone Bennett, Jr., *The Day Race Relations Changed Forever*, EBONY, May 1985, at 108, 112.

89. *Id.*

90. Huston, *supra* note 87.

91. *Id.*

“I have for announcement,” Chief Justice Warren said, “the judgment and opinion of the Court in No. 1 – *Oliver Brown et al. v. Board of Education of Topeka*.”⁹² It was 12:52 p.m.⁹³ Downstairs, the *Associated Press* “carried the first word to the country: ‘Chief Justice Warren today began reading the Supreme Court’s decision in the public school segregation cases. The court’s ruling could not be determined immediately.’ The bells went off in every news room in America. The nation was listening.”⁹⁴ Shortly after Warren announced in full the Court’s ruling and summarized the reasoning, Whittington gathered and distributed copies of the opinion to reporters, before returning to his office and essentially getting out of the reporters’ ways.⁹⁵ Consistent with Potter’s job description, Whittington did not interpret or otherwise comment on the opinion.⁹⁶

III. THE MODERN ERA

By the early 1970s, America was at war abroad and with itself. Fighting raged in Vietnam,⁹⁷ the Pentagon Papers ignited a debate about the balance between national security and free speech,⁹⁸ reporters Bob Woodward and Carl Bernstein began unraveling the lies of President Richard Nixon,⁹⁹ and abortion restrictions divided the country, carving out new socio-religious fault lines.¹⁰⁰ These and many other issues reached the Supreme Court, where Warren Burger had been chief justice since 1969.¹⁰¹ An energetic and physically imposing man, he presided over a Court that was, in its own way, as activist as Earl Warren’s, “creating new constitutional doctrine in areas like the right to privacy, due process and sexual equality.”¹⁰²

Chief Justice Burger did all he could to preserve the secrecy of the Court’s internal operations, and quite frequently he was hostile to the press. Asked by a lawyer at a symposium what he thought of the reporters covering the Court, Burger replied, as he often did: “I admire those who do a good job,

92. KLUGER, *supra* note 85, at 702.

93. *Id.*

94. *Id.*

95. E-mail from Anthony Lewis, former columnist, N.Y. Times, to author (May 15, 2011) (on file with author).

96. *Id.*

97. See, e.g., *Vietnam War*, ENCYCLOPEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/628478/Vietnam-War> (last visited Nov. 20, 2014).

98. See, e.g., *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971).

99. See generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT’S MEN* (2d ed. 1994).

100. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973).

101. Linda Greenhouse, *Warren E. Burger Is Dead at 87; Was Chief Justice for 17 Years*, N.Y. TIMES (June 26, 1995), <http://www.nytimes.com/1995/06/26/obituaries/warren-e-burger-is-dead-at-87-was-chief-justice-for-17-years.html?src=pm&pagewanted=1>.

102. *Id.*

and I have sympathy for the rest, who are in the majority.”¹⁰³ In 1970, a Washington publisher chided Burger for requiring permission before his “State of the Judiciary” speech could be printed.¹⁰⁴ And Burger reserved special scorn for TV, which he regarded as intrusive.¹⁰⁵ He said in 1979 that his constitutional right to privacy allowed him to ban broadcast equipment from his public appearances,¹⁰⁶ and one time he pushed away a TV cameraman trying to follow him into an elevator.¹⁰⁷

Perhaps ironically, Burger was a former newspaper freelancer and wrote several of the Court’s most important opinions interpreting the First Amendment and its free-expression guarantees.¹⁰⁸ He also held regular meetings with the press, called “wages-and-hours sessions,” where Burger talked with reporters in the permanent press corps about working conditions and press policies at the Court.¹⁰⁹ Those sessions were informal and generally off-the-record.¹¹⁰ At one of them, when the Court was renovating a number of rooms, a reporter asked the chief, “Would you like for us to pay rent?” Burger paused before responding, “No, because renters have rights.”¹¹¹ Joking or not, Lyle Denniston, who has covered the Court for more than sixty years, said, “I think that was reflective of his basic attitude.”¹¹²

In any case, Burger’s “imprint was distinct in the area to which he gave his most sustained attention, judicial administration.”¹¹³ He created a number of offices and institutions whose common purpose was to “improve the education and training of participants in nearly all phases of the judicial process,” because he believed “judges could be helped to be more efficient if professional management techniques were imported to the courts.”¹¹⁴ At the Supreme Court, one of the areas that got Burger’s attention was press and public affairs. Whittington retired in 1973, and rather than simply appoint someone to replace him, Burger created a whole new office: the Public Information Office (“PIO”), led by a Public Information Officer.¹¹⁵

103. *Id.*

104. Fred P. Graham, *Burger Is Chided on Order to Press; Editor Criticizes Restriction on Reprinting Speech*, N.Y. TIMES, Sept. 2, 1970, at 13.

105. Greenhouse, *supra* note 101.

106. CONGRESSIONAL QUARTERLY’S GUIDE TO THE U.S. SUPREME COURT 722 (Elder Witt, ed., 1979).

107. Greenhouse, *supra* note 101.

108. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980); *Neb. Press Ass’n v. Stuart*, 427 U.S. 539 (1976); *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241 (1974).

109. Interview with Lyle Denniston, Reporter, SCOTUSblog, in Wash. D.C. (May 17, 2011).

110. *Id.*

111. *Id.*

112. *Id.*

113. Greenhouse, *supra* note 101.

114. *Id.*

115. BARRETT MCGURN, *AMERICA’S COURT*, at ix-x (1997).

For the new position, Burger wanted a reporter who understood the news world – and not one trained in the law.¹¹⁶ A lawyer might be tempted to comment on Court opinions, and those comments might be taken as controlling law. Additionally, Burger wanted someone who had worked at least five years as a government spokesperson, “someone who understood what State Department Spokesman Bob McCloskey once said: ‘Reporters and spokesmen have the same task, to explain what the government is trying to do. The spokesman has an additional job, to help the government succeed.’”¹¹⁷

Barrett McGurn got that job, beating out 140 other applicants to become the Court’s first Public Information Officer.¹¹⁸ He had three decades of journalism experience – as an Army reporter for *Yank* magazine and as former chief of the Rome and Paris bureaus for the *New York Herald Tribune*.¹¹⁹ After leaving journalism, McGurn was press attaché at the U.S. Embassy in Rome, from 1966 to 1968; embassy counselor for press affairs in Saigon, from 1968 to 1969; and deputy spokesman for the Department of State, from 1969 to 1972.¹²⁰ And right before he joined the Court’s staff, for a short time in 1972, he wrote commentaries for the world file of the U.S. Information Agency.¹²¹

McGurn, a “formal man with an impish smile and eyebrows that had a life of their own,” conceived of the PIO, the physical space unchanged from the Whittington era, as a place where reporters could get documentary materials and courtroom seating but not much else.¹²² A former assistant to McGurn, who no longer works at the Court, described McGurn as “stoic” and “reserved” and “taciturn,” adding that he was a “loyalist to Chief Justice Burger” who “thought his was a position of preserving decorum for the Court and protecting it.”¹²³ McGurn himself once said that “the job of a reporter covering the Supreme Court is a challenging and difficult one, calling upon the full range of each reporter’s talent and industry. I think that the regulars who cover the Court understand that certain aids and some bits of information cannot be provided, given the Court’s special needs of its own.”¹²⁴ McGurn

116. *Id.* at x.

117. *Id.*

118. *Id.*

119. Timothy R. Smith, *Obituaries: Barrett McGurn; Edward L. Nelson Jr., Press Secretary*, WASH. POST (July 8, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/07/AR2010070705112.html>.

120. *See* MCGURN, *supra* note 115, at 195.

121. *See* Smith, *supra* note 119; *see also* Arthur John Keeffe, *Current Legal Literature*, 60 A. B. A. J. 1582, 1583 (1974).

122. Tony Mauro, *Barrett McGurn, Onetime Supreme Court Spokesman, Dead at 95*, LEGAL TIMES (July 08, 2010), <http://legaltimes.typepad.com/blt/2010/07/barrett-mcgurn-onetime-supreme-court-spokesman-dead-at-95.html>.

123. This information was gleaned from an interview conducted on May 20, 2011 with a source that wished to remain anonymous.

124. Barrett McGurn, Address at National Judicial College (Aug. 3, 1982).

likely overestimated the understanding of the regulars – or perhaps underestimated their disdain for him.

“He was useless and contemptuous of the press corps,” said Stephen Wermiel, who covered the Court for the *Wall Street Journal*.¹²⁵ “He thought the beat was all about handing out the opinions and providing the orders list.”¹²⁶ Others in the press corps felt the same way. Denniston said, “You’d have to break Barrett’s arm to get him to do anything, because he didn’t care about the press.”¹²⁷ Tony Mauro, of the *National Law Journal*, said, “His office wasn’t helpful at all. . . . He was really tough to work with.”¹²⁸ And Dick Carrelli, formerly of the Associated Press, described McGurn as “the palace guard.”¹²⁹

Often, it seemed McGurn was there to preserve secrecy and to insulate the justices, rather than help the press.¹³⁰ First, when a reporter would request an interview with a justice, McGurn often did not send the request to the justice.¹³¹ Other times, when he *would* send the request, he would attach a memo to it that presumed the justice would not do the interview.¹³² Many of the memos reviewed for this article included the question, “Shall I tell the reporter you decline?” McGurn might have adopted that approach because of the individual press practices of the justices (some generally did not do interviews), but in any case the presumption made it easy for the justices to decline. Wermiel summed up the problem this way: “His memos were designed to fend off reporters, in this sense: ‘I have some obligation to tell you that a reporter has asked a question, but that’s all you need to know; you don’t need to worry about it.’”¹³³

Second, when a reporter asked McGurn for information related to the Court, he rarely provided the information despite his “PIO theory” that “there was no such thing as an indiscreet question, only indiscreet answers.”¹³⁴ The columnist Jack Anderson wrote in 1978 that “McGurn is a faithful reflection

125. Interview with Stephen Wermiel, Professor, Am. Univ. Coll. of Law, in Wash. D.C. (May 16, 2011).

126. *Id.*

127. Interview with Lyle Denniston, *supra* note 109.

128. Interview with Tony Mauro, Supreme Court Correspondent, Nat’l Law Journal, in Wash. D.C. (May 13, 2011).

129. Interview with Richard Carelli, Former Reporter, Associated Press, in Wash. D.C. (May 16, 2011).

130. Interview with Stephen Wermiel, *supra* note 125; Keeffe, *supra* note 121. One exception was the Court’s in-house newsletter. Keeffe, *supra* note 121. Late in his tenure, Whittington discontinued the *Docket Sheet*, and early in his tenure, McGurn revived it, much improved and filled with lively articles, some of which made it into the popular press. *Id.* It was published subject to prior review by the justices. *Id.*

131. Interview with Stephen Wermiel, *supra* note 125.

132. *Id.*

133. *Id.*

134. MCGURN, *supra* note 115, at 41.

of his master's view that the press should be given only what Burger wants them to have, not what they ask for."¹³⁵ He went on to explain the way McGurn deflected questions he did not want to answer:

[It] is a form of Nixonian stonewall: instead of refusing comment, he answers a different question, as if he hadn't understood the real one. One reporter, thinking McGurn might not have heard him correctly, kept repeating his question. The press officer, like the telephone-answering tape recording, just kept repeating his irrelevant, unresponsive reply. As another victim of McGurn's non sequiturs put it: "Your first impression is that they're putting you on. Your second impression is that they're insulting your intelligence."¹³⁶

Linda Greenhouse, who covered the Court for thirty years for the *New York Times*, said McGurn sometimes did more than deflect – he plainly refused to answer questions, and for no apparent reason.¹³⁷ In the late 1970s, early 1980s, she was standing in the PIO's outer office when the phone rang.¹³⁸ On the other end was a person asking about the status of a case.¹³⁹ McGurn said that was a question for the clerk's office, so the caller asked for the phone number, only to be told it was a non-public number.¹⁴⁰ "Well, it was no such thing; it was a public number," Greenhouse said. "You could look in the D.C. phonebook, and there it was. McGurn just had the hard-wired instinct not to tell anybody anything."¹⁴¹

When he *did* answer a question, McGurn's information was not always reliable.¹⁴² For example, he regularly downplayed the seriousness of injuries and illnesses that befell the justices, exaggerating the bright side. Denniston said in 1978, "I can't remember a single illness in the last three years where at least one fact was not given in a faulty manner."¹⁴³ Of course, it was not uncommon for the justices to keep the PIO and others in the dark about their injuries and illnesses, but that would better explain an absence of information from the PIO, rather than bad information.¹⁴⁴

In general, too, reporters felt they had to be circumspect around McGurn because he was to Burger what wiretaps were to Nixon. For many years, the press corps suspected that McGurn was spying on them – eavesdropping on

135. Jack Anderson, *Nation's Press Knows Well Burger Is On Their Case*, GALVESTON DAILY NEWS, Oct. 19, 1978.

136. *Id.*

137. Interview with Linda Greenhouse, Journalist, N.Y. Times, in Wash. D.C. (May 14, 2011).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. Anderson, *supra* note 135.

143. *Id.*

144. Interview with Linda Greenhouse, *supra* note 137.

their conversations and relaying what he heard to the chief justice.¹⁴⁵ The suspicion was so strong that reporters warned newcomers to the beat that whatever they said in McGurn's presence could be passed on. "You really had to be careful," Carrelli said. "You could never rely on [McGurn] to keep comments that you made, in jest or in passing, to himself. That strained our relationship with him."¹⁴⁶ In fact, the papers of Justice Thurgood Marshall, released in 1993, do include memos from McGurn to Burger reporting on conversations McGurn overheard among reporters in the press room.

McGurn worked hard to monitor the press corps and keep the Court's secrets, and at the same time he maintained that the Court was not secretive at all. Rather, he said it operated in a "goldfish bowl."¹⁴⁷ That was the case, McGurn said, because the briefs were publicly available, the oral arguments were conducted in public, and the justices set out their rulings and reasoning in opinions, also publicly available.¹⁴⁸ Whether that makes the Court an open place is up for debate, but for a while, when reporters retired or otherwise left the Court beat, they received goldfish bowls as gifts from their colleagues in the press corps.¹⁴⁹ And despite McGurn's best efforts, secrets spilled out of the Court on his watch.

In 1978, it became clear that reporters Bob Woodward and Scott Armstrong were working on an investigative project about the Court, beginning what McGurn later called "history's most massive penetration of Supreme Court privacy."¹⁵⁰ That project turned out to be *The Brethren*, published in 1979, a sprawling behind-the-scenes account of life at the Court.¹⁵¹ Woodward and Armstrong enjoyed unparalleled access, according to the book's introduction:

Most of the information in this book is based on interviews with more than two hundred people, including several Justices, more than 170 former law clerks, and several dozen former employees of the Court. Chief Justice Warren E. Burger declined to assist us in any way We obtained internal memoranda between Justices, letters, notes taken at conference, case assignment sheets, diaries, unpublished drafts of opinions and, in several instances, drafts that were never circulated even to the other Justices. By the time we had concluded our research, we had filled eight file drawers with thousands of pages of documents

145. Interview with Richard Carelli, *supra* note 129.

146. *Id.*

147. Barrett McGurn, *Public Information at the United States Supreme Court*, 69 A.B.A.J. 40, 40 (1983).

148. *See id.* at 40-42.

149. Interview with Richard Carelli, *supra* note 129.

150. MCGURN, *supra* note 115, at 19.

151. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHERN: INSIDE THE SUPREME COURT* (Simon & Schuster 1979).

from the chambers of eleven of the twelve Justices who served during the period 1969 to 1976.¹⁵²

McGurn chalked up the security and secrecy breach to two things. One, originally Woodward told McGurn and others that the book would focus on decision-making in Washington, with the Court as a minor player. “The talk of government rather than specific Supreme Court decision making, plus assurances that no one would be asked to betray confidences,” McGurn said, “gave the [reporting] team an entrée to many former law clerks.”¹⁵³ McGurn even sent a memo to chambers July 12, 1977, stating that Woodward told McGurn the book would not involve “investigative reporting”¹⁵⁴ and a second memo to chambers July 14, 1977, stating that the “White House will be the main focus” of the book.¹⁵⁵ Two, McGurn believed that Woodward’s celebrity helped his project. “Many of the scores of persons approached by Woodward could not resist seeing him,” McGurn said.¹⁵⁶ “Thanks to his presidential exposé, he was himself a personality portrayed glamorously in the movies by the ruggedly handsome Robert Redford.”¹⁵⁷

In any case, *The Brethren* soon sold more than 600,000 copies, earning a spot on the *New York Times* bestseller list. Hundreds of newspapers ran excerpts, and the press deluged McGurn for comment, all to no avail.¹⁵⁸ He had kept the justices aware of the news coverage, but the justices kept their silence. If nothing else, for McGurn, the book proved that “with sufficient resources, energy, nerve and guile, the Supreme Court’s security could be breached.”¹⁵⁹ But it would not be breached, at least, through the PIO. A former assistant to McGurn, who no longer works at the Court, said Woodward visited the PIO a few times, but “otherwise he didn’t come around much, probably because he assumed or realized he wouldn’t get any useful information there.”¹⁶⁰

To be sure, that was not the first breach, nor would it be the last. News leaks in most areas of government are regarded as regrettable but inescapable. They are a part of doing business in Washington. But at the Court they are regarded as violations of a sacred trust, based partly on the fear that an unscrupulous investor could profit at the expense of the innocent if he had advance knowledge of case outcomes.¹⁶¹ News organizations do not often vio-

152. *Id.* at 3-4.

153. MCGURN, *supra* note 115, at 20.

154. Memorandum from Barrett McGurn to Justice Blackmun (July 14, 1977) (on file with the Library of Congress).

155. Memorandum from Barrett McGurn to Justice Blackmun (July 12, 1977) (on file with the Library of Congress).

156. MCGURN, *supra* note 115, at 21.

157. *Id.*

158. *Id.* at 22.

159. *Id.* at 23.

160. *See supra* note 123.

161. *See* MCGURN, *supra* note 115, at 23.

late that trust, so to speak, but it *has* happened – and it happened when McGurn was public information officer.¹⁶² In 1973, *Time* magazine predicted the gist of *Roe v. Wade*, and NPR in 1977 reported that the justices had voted 5-3 against reviewing the convictions of three defendants in the Watergate cover-up case (such votes were supposed to be secret).¹⁶³

In another incident, Elizabeth Olson, the Supreme Court reporter for United Press International (“UPI”), obtained in June 1981 a document appearing to indicate in advance the outcome of a case.¹⁶⁴ Olson wrote a story about the document, but UPI’s Washington Bureau Chief spiked the story because he said he “had no way of confirming it was an accurate document,” characterizing it as “an eight-page document, unsigned and undated . . . what appeared to be a dissent to a majority ruling.”¹⁶⁵ He added that the document came into Olson’s possession “accidentally” and that it “was attached mistakenly to some other material which the Court had distributed to reporters.”¹⁶⁶ McGurn, in a June 17 memo to Burger, said, “Just what the ‘8-page document’ may be I do not fathom.”¹⁶⁷ Lyle Denniston, then of the *Washington Star*, reported at the time that McGurn had telephoned UPI President Roderick W. Beaton, raising the issue of whether UPI had spiked the story because of pressure from the Court.¹⁶⁸ It was confirmed that McGurn did make the call, but Beaton was out of the office and never talked with McGurn.¹⁶⁹ UPI’s Washington Bureau Chief said he returned the call only after deciding to spike Olson’s story.¹⁷⁰

Finally, ABC correspondent Tim O’Brien engineered three leaks in the late 1970s. He reported in advance (generally correctly) the votes or delays or outcomes of cases involving media law, prisoner rights, and affirmative action.¹⁷¹ McGurn said later that “[j]ustices and reporters alike were astonished. How was Tim doing it? What should be done?”¹⁷² For its part, the press corps was divided. Some said O’Brien was simply doing as reporters do, while others said he was acting irresponsibly. Morton Mintz, of the *Washington Post*, told McGurn at the time, “Protect your secrets. We have all we can do to study five thousand cases a year and to report on two hundred decisions. If the leaks keep up, we will have to try to match them. Our

162. *Id.* at 806.

163. *Id.* at 768.

164. *UPI Decides Against Scooping Supreme Court*, EDITOR & PUBLISHER (Duncan McIntosh Co. Inc., Irvine, Cal.), June 13, 1981, at 14.

165. *Id.*

166. *Id.*

167. Memorandum from Barrett McGurn to Chief Justice Warren E. Burger (June 17, 1981) (on file with the Library of Congress).

168. *UPI Decides Against Scooping Supreme Court*, *supra* note 164.

169. *Id.*

170. *Id.*

171. MCGURN, *supra* note 115, at 27.

172. *Id.*

job is already all but impossible and will be twice as difficult.”¹⁷³ The justices were more upset, and Burger estimated that O’Brien’s enterprises cost him “not less than twenty hours on [his] personal schedule.”¹⁷⁴ Eventually, after Burger reassigned a Government Printing Office linotyper, who worked in the Court’s printing unit, the leaks stopped.¹⁷⁵ Burger had suspected the linotyper was tipping off O’Brien.¹⁷⁶

One of O’Brien’s leaks involved *Regents of the University of California v. Bakke*, a 1978 case that took on a life of its own in the press corps and in the PIO.¹⁷⁷ The legal question was: Did the University of California violate the Equal Protection Clause, and the Civil Rights Act of 1964, by using an affirmative action policy that resulted in the repeated rejection of a white man’s application to attend medical school?¹⁷⁸ In other words, *Bakke* was a big case, one that promised to make big headlines and that illustrated to some degree the disconnect among the Court, the PIO, and the press.

Because the Court refused to announce when a particular opinion would come down, the press had to stake out the Court day after day, just waiting for *Bakke*.¹⁷⁹ For weeks news outlets sent multiple reporters to the Court, for weeks NBC and ABC had full camera crews outside, and for weeks editors were on standby.¹⁸⁰ Those days McGurn began at 9 a.m. to field phone calls about *Bakke*, from people asking if the case had come down.¹⁸¹ He simply told each caller to wait until 10:30 a.m., when the Court customarily released opinions.¹⁸² It appears McGurn did not make the justices aware of the expense for the press of each day sending multiple reporters, maintaining full camera crews, and so forth.¹⁸³ “He probably didn’t view that as his job,” said Carl Stern, formerly of NBC News.¹⁸⁴ “Or he figured it wouldn’t have done much good.”¹⁸⁵ For his part, McGurn simply dismissed the hype, saying that every term “there’s a big case, the death penalty cases, the tapes of President Nixon. But we all have to wait.”¹⁸⁶

173. *Id.* at 28.

174. *Id.*

175. CONGRESSIONAL QUARTERLY’S GUIDE TO THE U.S. SUPREME COURT, *supra* note 106, at 724; MCGURN, *supra* note 115, at 28-29.

176. CONGRESSIONAL QUARTERLY’S GUIDE TO THE U.S. SUPREME COURT, *supra* note 106, at 724; MCGURN, *supra* note 115, at 28-29.

177. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

178. *Id.* at 269-70.

179. Jacqueline Trescott, *Waiting for Bakke*, WASH. POST, June 23, 1978.

180. *Id.*

181. *Id.*

182. *Id.*

183. Interview with Carl Stern, *supra* note 79.

184. *Id.*

185. *Id.*

186. Trescott, *supra* note 179.

At the time, the only other case in recent memory that produced as much anticipation was the Nixon tapes case, *United States v. Nixon*,¹⁸⁷ a relative bright spot in McGurn's tenure.¹⁸⁸ The president's fate hanging in the balance, seemingly every reporter in D.C. wanted a seat at the oral argument. William H. Rehnquist, the newest member of the Court and a former assistant attorney general in the Nixon administration, recused himself and took no part in the case.¹⁸⁹ As a result, the job fell to him to decide who got into the oral argument – politicians, reporters, and citizens alike.¹⁹⁰ Rehnquist, in turn, delegated to the PIO the job of deciding which reporters got in, saying he would take care of the others.¹⁹¹ McGurn initially suggested that all 300-some seats should go to the press, on the theory that each reporter served a broad audience.¹⁹² Rehnquist disagreed and gave McGurn more seats than usual, ninety-two in total, but not enough to meet demand.¹⁹³

McGurn decided that only one seat would go to each news outlet, a rule that did not last long.¹⁹⁴ The two American news wires needed two reporters each in the room, one for overall coverage and the other for progress reports as the argument unfolded.¹⁹⁵ Thus, the wires got two seats each.¹⁹⁶ McGurn then moved through a minefield of other issues, addressing each on the fly: Who would get front-row seats? What is the importance of a news magazine compared with a newspaper compared with a TV network? What about foreign correspondents who cover the U.S.? Reporters from England, France, Germany, Italy, and Japan wanted seats.¹⁹⁷ Finally, playing the role of advocate for the press corps, McGurn arranged for the price of oral-argument transcripts to be reduced and for them to be expedited so they would be ready thirty minutes after the argument.¹⁹⁸

187. 418 U.S. 683 (1974).

188. One other bright spot was the press conference McGurn arranged for Justice William O. Douglas, in 1973, to mark his longevity on the Court. A successful event, it drew extensive TV coverage because justices never called press conferences. Two years later, Douglas was back in front of the cameras, with McGurn's blessing, but it did not go so well. Douglas had suffered a stroke and was struggling to stay on the Court. From his and McGurn's point of view, the justice needed to reassure the country of his competence. One TV interview could do that. But it turned out to be a disaster, as Douglas peered at his questioners and labored to form words.

189. THE SUPREME COURT IN CONFERENCE (1940-1985): THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 186 n.38 (Del Dickson ed., Oxford University Press, 2001).

190. *Id.*

191. MCGURN, *supra* note 115, at 9.

192. *Id.*

193. *Id.* at 10.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* at 10-11.

198. *Id.* at 11.

All in all, McGurn was as inclusive as possible and received only a few complaints out of the hundreds of requests he handled.¹⁹⁹ Notably, one of the complaints came from a gossip columnist whose paper had a seat in the courtroom.²⁰⁰ It was filled, however, by his paper's legal correspondent.²⁰¹ McGurn understood that the columnist, to get color for his copy, needed to be in the courtroom. So he bent his one-seat-per-outlet rule, admitting the columnist to the argument.²⁰² The next day, the columnist reported that in assigning seats McGurn played favorites with those he knew.²⁰³

IV. CONCLUSION

The story of the PIO's origins is anchored by the major events of several eras – from the Great Depression policymaking of the 1930s to the social and political upheaval of the 1970s. It is also defined by the three men who built and shaped the office in the course of forty years. First, Ned Potter was a glorified clerk. He maintained briefs and opinions for the press, credentialed reporters, and supervised the press room. Court officials emphasized that he was not a “press agent” or “public relations counselor.”²⁰⁴ Second, Banning Whittington carried on those clerical tasks but also adopted the roles of press counselor to the justices and advocate for the press corps. He sent memos to chambers with newspaper clippings, produced an in-house newsletter, and proposed changes to Court practices to accommodate the press.²⁰⁵ Third, Barrett McGurn was the first to hold the title Public Information Officer, in charge of an office larger in physical size and resources than Potter's and Whittington's. He was a clerk, counselor and advocate, like Whittington, but often it seemed McGurn was there to preserve secrecy and insulate the justices, rather than help the press. Together, these men – and the events that encouraged the Court to institutionalize its relationship with the press – show that the story of the PIO's origins is the story of connecting justices and journalists, in service of influencing the flow of information related to the Court.

This is a significant observation and phenomenon because in democratic political systems the interaction among elites, institutions, and the public is of primary importance.²⁰⁶ Moreover, the flow of information between elites and the public is critical to an institution's functioning and perceived legitimacy.²⁰⁷ In an ideal democratic society, citizenship requires people to be aware of the activities of government, because a base level of awareness permits

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

203. *Id.*

204. Associated Press, *supra* note 36.

205. Keefe, *supra* note 61.

206. SLOTNICK & SEGAL, *supra* note 15.

207. *Id.*

them to protect their interests by holding elites and institutions accountable.²⁰⁸ At the Supreme Court, again, the press is the primary link between the justices and the public, and the PIO is the primary link between the justices and the press.²⁰⁹ Although much research has focused on news coverage of the president and Congress, far less has focused on news coverage of the judiciary, and even less has focused on the PIO and press relations at the Supreme Court.²¹⁰ This Article provides the most complete account to date of the PIO's origins. However, it is not offered as comprehensive, and it represents a debt owed to the scholars, such as Richard Davis at Brigham Young University, who have devoted their talents to studying news coverage of the Supreme Court and the justices' efforts to manage the institution's image.

This area is ripe for more research.

208. *Id.*

209. *Id.* at 2.

210. *Id.*