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The Supreme Court's Limited Public Forum

Sonja R. West*

Abstract

When discussing the issue of transparency at the United States Supreme Court, most commentators focus on the line between public and private. Yet, transparency is not always such a black-or-white issue. There are, in fact, a surprising number of significant Court moments that occur neither wholly in public nor completely in private. Through policies that obstruct access by the general public and exploit real-world limitations on the press and practitioners, the justices have crafted a grey area in which they can be “public,” yet only to select audiences. The effect is that few outside the courtroom ever learn about these moments, even though they technically occurred in public. By operating in this semi-public sphere, the justices have robbed the public of important information about the workings of its Court. This essay adds to the ongoing discussion about transparency by exploring the Court’s “limited public forum” and the ways the justices have found to hide in plain sight.

On the last day of the 2014 term, the United States Supreme Court announced its decision in *Glossip v. Gross*,¹ a closely watched case about the constitutionality of lethal injections.² As is Court practice, the author of the majority opinion—in this case Justice Samuel Alito—read his bench statement, and Justices Sonia Sotomayor and Stephen Breyer followed by reading their respective dissents.

Things then took a curious turn. Justice Antonin Scalia, who had concurred with the majority, suddenly announced that he

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1. 135 S. Ct. 2726 (2015).

2. *See generally id.*

also wished to speak.³ He began by responding to some of Breyer's arguments about the death penalty but later made seemingly gratuitous references to the Court's same-sex marriage case from the week before.⁴

There are many bizarre things about this moment. It is exceedingly rare for concurrences to be read from the bench, and it was a break in Court protocol for Scalia, a justice in the majority, to follow the dissenters. The substance of Scalia's oral statement was also unusual, because it differed in noteworthy ways from his written concurrence and because he mixed in discussion of an unrelated case. Perhaps the strangest and most striking part, however, was that Scalia appeared to be speaking without notes, giving the impression that his statement was spontaneous and, perhaps, a surprise to everyone—including his fellow justices.⁵

Yet, despite this highly peculiar behavior by a Supreme Court justice, the episode went largely unreported. Most news outlets ignored it. A handful of reporters noted only that it was uncommon to have so many opinions read from the bench and especially odd for one to be a concurrence. Two reports mentioned Scalia's blurred discussions of lethal injection and same-sex marriage.⁶ And only one wrote that Scalia spoke out of turn (seemingly spontaneously) and strayed considerably from his written opinion.⁷

3. See Irin Carmon, *Scalia Protests Gay Marriage Ruling in Unrelated Case*, MSNBC (June 29, 2015, 12:10 PM), <http://www.msnbc.com/msnbc/scalia-protests-gay-marriage-ruling-again-unrelated-dissent> (last visited Jan. 4, 2017) (discussing Justice Scalia's unusual and unexpected comments) (on file with the Washington and Lee Law Review); Dahlia Lithwick, *Scalia Goes Off Script*, SLATE (June 29, 2015, 2:16 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/scalia_in_gossip_v_gross_supreme_court_decision_oklahoma_may_kill_using.html (last visited Jan. 4, 2017) (same) (on file with the Washington and Lee Law Review).

4. See Lithwick, *supra* note 3 (noting Scalia's remarks referencing *Obergefell v. Hodges*).

5. This also might explain why only his statement of all the justices who spoke was not distributed to the press.

6. Carmon, *supra* note 3; Lithwick, *supra* note 3.

7. See Carmon, *supra* note 3 ("Normal protocol at the Supreme Court is for the justice who is in the majority to summarize his or her opinion from the bench Although Scalia has dissented from the bench . . . the fact that he did so within a concurring opinion made the move all the more astonishing.").

What was the significance of Scalia's odd bench statement? Was it news? Was it law? Was it an official act of a powerful government actor? The answer seems to be all of the above and none of the above. How is this possible? It is possible because Scalia's statement occurred inside the Court's transparency zone of twilight. Events inside the zone of twilight are technically public—the press and some members of the public were present—but few outside the courtroom learn of them.

Over the years, the justices have developed a number of ways to be able to hide in plain sight. By embracing policies that obstruct access by the general public and exploit real-world limitations on the press and practitioners, the justices have carefully crafted a grey area in which they can be “public” in theory, yet available only to select audiences in practice.

Bench statements are a prime example of the justices' unique limited public forum and their fuzzy official-but-also-unofficial acts. Bench statements are, of course, unofficial in that they have no precedential value. They cannot be cited in another case or to another court with any force. The authoritative work of the Supreme Court lies, as we know, within the four corners of the text of its opinions.

There are nonetheless important implications in the actions and words of Supreme Court justices, particularly when they are spoken on the bench while court is in session. Professor Lani Guinier, for example, has argued that the justices' oral dissents can lead to action by non-judicial actors such as lawmakers and the public at large.⁸ Professors Christopher Schmidt and Carolyn Shapiro agree that bench statements can spark or augment important public dialogues.⁹

Sometimes it is not so much what the justices say but how they act in their limited public forum that raises a matter of public concern. When Justice John Paul Stevens spoke in a “halting fashion” during an oral dissent in 2010, it led to

8. See Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4, 49 (2008) (“[T]he dissenting opinion speaks to non-judicial actors, whether legislators, local thought leaders, or ordinary people, and encourages them to step in or step up to revisit the majority's conclusions.”).

9. See Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 WM. & MARY BILL RTS. J. 75, 128–29 (2010) (analyzing the “long and rich history of dramatic and emotional dissents from the bench”).

speculation of his retirement.¹⁰ And in some cases, justices have been observed making eye contact with lawyers and parties as they read their bench statements, either in perceived solidarity with¹¹ or opposition to¹² their causes. At other times it seems the justices' actions are directed at a colleague.¹³

Media coverage of these semi-public occurrences is uneven. Some incidents reach an outside audience,¹⁴ while others evaporate into thin air.¹⁵ It is unclear why members of the Supreme Court press corps often fail to report on such moments. Perhaps they fear losing future access to the justices. Maybe they feel that describing ambiguous moments crosses the line from objective reporter to biased commentator. Or, most likely, they simply have real-world limitations on how much coverage they can give to the Court.

10. See Adam Liptak, *After 34 years, a Plainspoken Justice Gets Louder*, N.Y. TIMES, Jan. 25, 2010, at A12 (“[Justice Stevens] has given signals that he intends to retire at the end of this term, and his dissent on Thursday was shot through with disappointment, frustration and uncharacteristic sarcasm.”).

11. See, e.g., Gunier, *supra* 8, at 10 n.21 (quoting Charles Ogletree as stating that, when Justice Breyer read his dissent in *Parents United*, Breyer “was looking right at us as he was reading his dissent” and that “[t]his was his coming out as a dissenter” (citing Telephone Interview with Charles Ogletree, Jesse Climenko Professor of Law, Harvard Law School (June 17, 2008))).

12. See Dahlia Lithwick, *As Kennedy Read his Opinion Friday Morning, Attendees Were Quiet, Anxious, Relieved*, SLATE (June 26, 2015, 1:15 PM), http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2015/scotus_roundup/supreme_court_2015_the_mood_as_anthony_kennedy_read_his_opinion.html (last visited Jan. 4, 2017) (describing Chief Justice Roberts as directing his dissent toward “the array of civil rights lawyers seated before him”) (on file with the Washington and Lee Law Review).

13. See Garrett Epps, *Justice Alito's Inexcusable Rudeness*, ATLANTIC (June 24, 2013), <http://www.theatlantic.com/national/archive/2013/06/justice-alitos-inexcusable-rudeness/277163/> (last visited Jan. 4, 2017) (noting Alito’s “mini-tantrum” while Justice Ginsburg read her dissent) (on file with the Washington and Lee Law Review). Epps noted that because Alito’s “display of rudeness” was silent, it “will not be recorded in transcript or audio; but it was clear to all with eyes, and brought gasps from more than one person in the audience.” *Id.*

14. See Schmidt and Shapiro, *supra* note 9, at 77–78 (describing Breyer’s dissent in the 2007 case of *Parents Involved in Community Schools v. Seattle School District No. 1* as “widely quoted” and “a key element of public discussions about the case”).

15. *Id.* at 79 (“Oral dissents thus become prominent parts of public discussion or debate only when the press or other extrajudicial actors find in the dissent a storyline that helps dramatize an otherwise attractive narrative.”).

The easiest way to pop the justices' semi-public bubble, of course, would be to allow video recording of court sessions. Video that was either live-streamed or quickly released would free the public from its reliance on third parties to get timely information. Yet the justices have continually ignored calls for video or even live-audio coverage of Court sessions including opinion announcements.¹⁶ They have maintained this hardline stance even though the primary arguments against cameras at oral arguments make little sense when applied to announcement days. For example, fears that justices and lawyers will grandstand or that the public will misunderstand the proceedings do not apply to the reading of short, prepared summaries.

Yet rather than allow additional access to opinion announcements, as logic would dictate, the Court has chosen to restrict it even more. Audio of the Court's oral arguments, for example, are released weekly on the Court's website,¹⁷ but audio of the bench statements are not made available until the beginning of the following term (often many months later) and even then only at the National Archives. Transcripts of oral arguments, likewise, are released daily on the Court's website, but there are no official transcripts of bench statements.¹⁸

The Court's restrictive policies on opinion announcements seem at times to be almost designed to stop the public from receiving timely and accurate information. They have led to absurdities like the infamous "running of the interns"¹⁹ and

16. See, e.g., Jonathan Sherman, *End The Supreme Court's Ban on Cameras*, N.Y. TIMES, at A27 (advocating for the Court to allow cameras during oral arguments and opinion announcements, but acknowledging that "[d]espite countless entreaties over the years from groups calling for 'sunshine' and 'transparency,' and giant changes in technology and communication, the [C]ourt has been unmoved").

17. See *Argument Audio*, SUP. CT. U.S., http://www.supremecourt.gov/oral_arguments/argument_audio.aspx (last visited Jan. 4, 2017) (providing downloadable recordings of oral arguments) (on file with the Washington and Lee Law Review).

18. See *Argument Transcripts*, SUP. CT. U.S., http://www.supremecourt.gov/oral_arguments/argument_transcript.aspx (last visited Jan. 4, 2017) (providing downloadable transcripts of oral arguments) (on file with the Washington and Lee Law Review).

19. See Erin Dooley, *Running of the Interns: This is What a Mad Dash Outside the Supreme Court Looks Like*, ABC NEWS (June 25, 2015, 3:00 PM), <http://abcnews.go.com/Politics/running-interns-mad-dash-supreme->

incorrect news reports regarding the decisions in major cases.²⁰ They also force reporters into the Cornelian dilemma of choosing between either being in the courtroom, where they can observe the justices firsthand but are cutoff from the outside world, or staying outside the courtroom, where they can read the opinions and communicate to the public but are unable to see the justices. The Court has even implemented a new policy that prevents organizations headed by licensed attorneys, like SCOTUSblog,²¹ the popular electronic platform used by millions to follow Court opinion announcements, from obtaining press credentials.²²

According to Supreme Court reporter Tony Mauro, the justices are “especially prickly” about access to opinion announcements because justices who join an opinion do not sign off on the bench summaries.²³ Thus they “don’t want the opinion announcements to be featured in the news media as an accurate

court/story?id=32024853 (last visited Jan. 4, 2017) (“Because cameras aren’t allowed inside the courtroom, interns, armed with hard copies of the opinion, must dash across the plaza and down the steps to deliver the decision to the network correspondents waiting to go live from the press pen – with hordes of reporters, photographers, and protesters looking on.”) (on file with the Washington and Lee Law Review).

20. See Tom Goldstein, *We’re Getting Wildly Differing Assessments* (July 7, 2012), <http://www.scotusblog.com/2012/07/were-getting-wildly-differing-assessments/> (last visited Jan. 4, 2017) (describing how both CNN and FoxNews incorrectly reported the decision in *National Federation of Businesses v. Sebuilus*).

21. Debra Cassens Weiss, *SCOTUSblog Can’t Get Supreme Court Press Credentials Under New Policy; What About Denniston?*, ABA J. (Feb. 10, 2015), http://www.abajournal.com/news/article/scotusblog_cant_get_supreme_court_press_credentials_under_new_policy_what_a/ (last visited Jan. 4, 2017) (on file with the Washington and Lee Law Review).

22. See Goldstein, *supra* note 20 (noting that the SCOTUSblog live blog received more than 5 million hits during the announcement of *National Federation of Businesses v. Sebuilus*); Corinne Grinapol, *Lyle Denniston Leaves SCOTUSblog* (Jun. 28, 2016), <http://www.adweek.com/fishbowldc/lyle-denniston-leaves-scotusblog/157117> (describing SCOTUSblog’s inability to secure press credentials) (last visited Jan. 4, 2017) (on file with the Washington and Lee Law Review); .

23. Tony Mauro, *Supreme Court Urged to Allow Broadcast of Historic Opinion Announcements*, LEGAL TIMES (June 24, 2015), <http://www.nationallawjournal.com/legaltimes/id=1202730341900/Supreme-Court-Urged-to-Allow-Broadcast-of-Historic-Opinion-Announcements#ixzz3ftbJtIXe> (last visited Jan. 4, 2017) (on file with the Washington and Lee Law Review).

representation of court decisions.”²⁴ Indeed, according to SCOTUSblog, it is the policy of the Court’s Public Information Office only to release copies of bench statements to members of the credentialed press with the curious warning that they may not reproduce it.²⁵

The justices, moreover, take all of these steps that shield opinion announcements from public scrutiny despite the fact that they clearly conflict with the public’s right to know. The reading of a bench statement involves a Supreme Court justice, adorned in his or her official Court regalia, ascending to the bench and being introduced by the Chief Justice as announcing the Court’s opinion in that case. This event occurs in open court and in front of members of the public and the press. It is a tradition that harkens back to the early practice of the Court issuing almost all of its opinions orally and individually.²⁶ Indeed, it is hard to imagine a more official government act.

Yet, all too often, what happens in the courtroom, stays in the courtroom. This creates one “reality” that exists inside and another that is released to the world. Schmidt and Shapiro noticed this insularity in their review of oral dissents. They found that when justices make bench statements, they seem to be speaking to “their colleagues, the law clerks, [and] the handful of knowledgeable Court watchers in the room” and are “largely motivated by emotional and interpersonal factors.”²⁷ In other words, the statements are for select insiders, not the public.

The justices’ sense of entitlement to the protection of their quasi-public bubble follows them off the bench as well. They

24. *Id.*

25. See Amy Howe, *A Reporter’s Guide to Covering the Same-sex Marriage Cases at the Supreme Court*, SCOTUSBLOG (Apr. 20, 2015, 4:29 PM), <http://www.scotusblog.com/2015/04/a-reporters-guide-to-covering-the-same-sex-marriage-cases-at-the-supreme-court/> (last visited Jan. 4, 2017) (noting that written copies of bench statements “are just for the use of the press and cannot be published”) (on file with the Washington and Lee Law Review).

26. See John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790–1945*, 77 WASH. U. L.Q. 137, 140 (1999) (“In the approximately sixty-three cases that Alexander Dallas reported for the years 1790–1800, the Court used a wide variety of opinion-delivery methods. The most popular was stating that the opinion was being issued “By the Court,” without any attribution to a particular Justice.”).

27. Schmidt & Shapiro, *supra* note 9, at 124–25.

frequently make closed-door appearances to exclusive, private groups.²⁸ They conceal their public appearance schedules and frequently ban cameras, recordings, or the press at their public speeches.²⁹

When it comes to the Supreme Court, transparency is not always a black-or-white question of public versus private. There instead exists a grey area in which the justices' actions are visible only to certain audiences. The Court has encouraged this semi-public sphere through policies that either cut off or delay more practical avenues of public access and that exploit the unique pressures on the press. Perhaps this is the justices' way of having the last word. Perhaps it creates plausible deniability when something goes awry. Whatever the reason, it leaves the public with a disturbingly incomplete and unofficial record of official government acts.

28. See, e.g., Curt Levey, *Ganging Up on Justices Thomas, Scalia, and Alito*, AM. SPECTATOR (June 21, 2011, 10:08 AM), <http://spectator.org/articles/37501/ganging-justices-thomas-scalia-and-alito> (last visited Jan. 4, 2017) (describing Justice Thomas, Scalia, and Alito's ties to the Federalist Society) (on file with the Washington and Lee Law Review).

29. See, e.g., Adam Liptak, *Scalia Apologizes for Seizure of Recordings*, N.Y. TIMES (Apr. 13, 2004), <http://www.nytimes.com/2004/04/13/us/scalia-apologizes-for-seizure-of-recordings.html> (last visited Jan. 4, 2017) (discussing Scalia's policies banning recordings of his public speeches for broadcast media) (on file with the Washington and Lee Law Review).