CAMERAS IN THE UNITED STATES SUPREME COURT:

JUDICIAL TRANSPARENCY & THE OBLIGATION THEREOF

An Undergraduate Research Scholars Thesis

by

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ABSTRACT

Cameras in the United States Supreme Court:
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Literature Review

The sources utilized in this thesis each serve a particular function in relation to the theoretical framework. They are organized by the extent to which they contribute to the three dominant disciplinary approaches found throughout the work. The established literature referenced in the first section contributes to the historical summary of the Supreme Court's forward progression toward the public disclosure of its work. Many sources used therein are primary, as they are meant to portray contemporary accounts of the Court's steps as they occur in time.

The sources used in the second section help to develop transparency as a demanded intangibility—a commodity of sorts. Hopefully, understanding transparency as a resource for the public will allow for the reader of this thesis to make sense of the concept's variable application in all parts of the federal government.

In the third section, the sources used are distinct in that they are meant to help conceptualize the potential consequences of implementing cameras in the Supreme Court. Identifying the

public's stance on issues related to the Supreme Court itself is necessary to any speculation regarding the consequences. This is because they affect the public both directly and indirectly. In this final section, much of the literature also includes pre-fabricated ideas about what could potentially happen if the institution were to tolerate televised coverage of proceedings. In my own assessment, I am skeptical of the reasoning in positions for both the affirmative and the negative, but I ultimately side with those—and with others in part—whom I feel better represent my ideas regarding the Court's future. This summary view is expressed in the second subsection of Chapter III and elaborated in the conclusion of this thesis.

Thesis Statement

In our democracy (a constitutional republic) the value of transparency cannot be overstated, as it provides a monitorial means through which the electorate can ensure their interests are maintained by those who make decisions on their behalf. Nonetheless, whether the obligation of transparency should be taken to apply throughout the government co-equally—and specifically, in the nation's highest court—has become subject to disagreement. Though the benefits of increasing transparency in the U.S. Supreme Court are indeed significant, doing so by permitting video cameras for court proceedings in an era of considerable ideological polarization may also yield unwanted consequences that should discourage efforts toward any implementation policy at this point in time.

Theoretical Framework

To properly assess and respond to the debate regarding cameras in the Court, this work begins with a historical discussion, covering a near-comprehensive timeline of the institution's progression in public disclosure. The purpose of this is to demonstrate the extent to which the Court has already become the most transparent branch of the federal government. This thesis then

proceeds to evaluate the potential outcomes of camera implementation while making sense of the societal context in which the debate persists. The idea of government transparency is a theme discussed throughout the work, as it is the fundamental demand that underlies the relevant debate.

Project Description

This thesis endeavors to address the debate regarding whether video cameras ought to be allowed in the United States Supreme Court. Prior to joining the relevant discussion, I provide a comprehensive history of the Court's steps toward increased transparency, beginning with the institution's inception. This section highlights the evolving role of transparency in the context of institutional independence—a context that persists emphatically today. The following section describes the role and degree of transparency in the elected branches of the federal government. It contrasts the obligation of disclosure in these branches with that of the Judiciary and also seeks to identify the propriety of selective disclosure in each of the three.

Then, this thesis focuses on the prospect of video camera implementation. I have chosen to dissect the positive and negative consequences that might occur should the Court lift the current device ban. In the final section, I compare the consequences, then proceed to argue that the probable negatives cause concerns that should outweigh the potential benefits. I believe that camera implementation can happen without compromising the Supreme Court's ability to function properly, but only if society changes. In this section, I discuss the societal polarization that makes a policy allowing cameras so dangerous, and I detail the developments that must take place if the Court is to progress safely.

ACKNOWLEDGEMENTS

This work is dedicated to my family. Thank you for always supporting my spontaneous decisions to embark on journeys that promise no return with sanity. I also want to thank my advisors, Dr. Radzik and Prof. Penrose. Your willingness to help me pursue my interests is not only kind, it is valued; I am becoming a more attentive and careful writer with each piece of advice I receive from both of you. Last, the dedication of this thesis is shared with Katherine, my partner in crime. Thank you for everything you do, especially for allowing me to finish my thoughts when they become too difficult to listen to—as they often do so quickly.

INTRODUCTION

Current practice in the U.S. Supreme Court maintains a tradition of prohibiting video cameras inside the courtroom during both argument and non-argument sessions. However, an act of the Legislature may effectively subject this policy to change, as it is not within the Court's exclusive authority to decide. Should statutory means provide for the implementation of video recording during proceedings, the institution must surely comply. Of course, the Supreme Court may exercise review of a statute such as this in the event an objecting party—on grounds of provable injury—petitions the high court under its appellate jurisdiction. What then must the Court consider? The principal motive underlying the relevant debate is an increase in institutional transparency, which is part of the more encompassing discourse over transparency in the federal government as a whole.

Justice Brandeis believed that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman."[1] He, like many others in our country's history, believed that a democracy ought to entail a readily-informed public, equipped with the information and materials it needs in order to participate in government. In the elected branches, the relationship shared by the people and those whom they choose to make decisions on their behalf is relatively intimate. This connection should yield a somewhat higher obligation of governmental transparency in order to encourage an active relationship—something which is probably in the greater interest of the populace.

[1] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (Thoemmes Press 2003) (1914).

However, the sovereignty of the people is nevertheless limited, especially, some might add, in the federal judiciary. Their influence as to who assumes a seat on the bench is operative only at the ballot box. The people elect an executive as well as individuals by whom they are represented in the Senate; the former nominates judges to occupy the courts, and the latter provides its constitutionally-prescribed "Advice and Consent" thereafter.[2] Therefore, the extent to which Americans may "assess progress" and "assign blame" is evident solely (though indirectly) in their civic role as the electorate.[3] Governmental transparency, as it is so understood, thus does not apply to the Judiciary as it does to its institutional checks and balances, since the nature of the relationship shared between the Judiciary and the people is comparatively disconnected. Nonetheless, the proverbial closed-doors policy is still subject to popular censure. Proponents of general transparency believe a reversal in the Court's stance is necessary, but lawmakers are evidently careful in their approach to satisfying such demands. This sense of caution is demonstrated in proposed legislative efforts that purport to show deference to the institution's case-by-case discretion.[4]

If even those with the authority to implement video cameras exhibit hesitance, do their partial concessions warrant further attention? Should we look to societal preparedness or a lack thereof? If so, is it incumbent upon the government to acknowledge this social state before

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[2] U.S. Const. art. II, § 2, cl. 2.

[3] Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 917 (2006) ("[P]opular accountability need[s] a system for disclosing information about government.").

[4] Cameras in the Courtroom Act, H.R. 464, 115th Cong. § 678 (2017) ("The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of one or more of the parties before the Court.").

changing the Court's policy? This thesis argues that allowing video cameras inside the courtroom is not a proper remedy to the demand for increased transparency—at least not at this time.

I am of the mind that cameras might actually have a place in the Court's future. In fact, the potential benefits are so valuable that I believe we should by no means abandon the relevant debate. However, the negative concerns are possibly so profound that their long-term implications may be detrimental to the institution's ability to operate impartially and with its intended independence. So, I believe that, since these negatives relate to possible political encroachment, if the Court were to pursue cameras, it should wait until society has reached a point where the degree of its political polarization is not as high as it currently is.

CHAPTER I

THE PROGRESSIVE HISTORY OF JUDICIAL TRANSPARENCY

Judicial Accessibility, 1789 to 1953

Advocacy for increased disclosure in the Supreme Court is not a new phenomenon in the United States, and arguments for transparency easily predate the advent of camera technology. Some proponents of such changes have cited various concerns in hopes of making available as much information and material as possible, while others even claim that policies to the contrary merit labels such as "secretive" and "opaque."[5] Fortunately for them, the institution has continually built upon successive efforts toward increased disclosure either directly or in the pursuit of unrelated objectives that have nonetheless produced the same result. The Court's evolution through history, however, has been neither a recent nor rapid development, and it has progressed with due care since its foundation.

Throughout the Supreme Court's progression toward increased transparency, the institution has stayed mindful of its intended independence. We should remember that the Court has also maintained awareness of its developing responsibility to review cases impartially—a task made possible by its political insulation. So, in observing the historical implementation of new media for transparency, we can say such steps are progressive, but we should remove ourselves from the common understanding of progressivism in government. Instead, Alexander Bickel's exploration of the ideological spectrum among judges provides a more appropriate view of what it means to act progressively within an old and naturally conservative framework. He suggests that

[5] Eric J. Segall, *Invisible Justices: How Our Highest Court Hides from the American People*, 32 GA ST. U. L. REV. 787, 847 (2016).

a framework like this is "inhospitable to social … experimentation" and, by inference, that "progressiv[ism], having regard to the unrest of the people," might otherwise seek its accommodation.[6]

The Court's history of information disclosure begins with the release of opinions, which began in 1791.[7] Opinions represent the ultimate product of the institution's work, which makes sense because the foremost responsibility of the judiciary is to render judgments concerning individual cases. Today, their dissemination is facilitated by the Reporter of Decisions, whose salaried office was created statutorily in 1817, providing that the said Reporter "shall print and publish, or cause to be printed and published, the decisions of [the Supreme Court]."[8] The law establishes that the Reporter is to be appointed by the Court and lists the duties relevant to the position.[9] However, the tenures of the first two reporters actually predate the law. When the justices first met for the first two terms in New York City, they appointed a Crier on February 2, 1790, and a Clerk on the following day; they did not name a reporter.[10] But, there was no practical

[6] Alexander M. Bickel, *Adjectival Simplicities and the Neo-Realists, Nihilists, et al.*, *in* THE LEAST DANGEROUS BRANCH THE SUPREME COURT AT THE BAR OF POLITICS 78 (1986). I reference Bickel's discussion because its view of progressivism versus conservatism can be used to accurately describe the implementation of any new transparency policy in the Supreme Court, without playing on the ordinary understanding of progressivism today. The decision to release, say, oral argument transcripts—something that only began in the mid-twentieth century—would be considered a progressive action here because the release demonstrates social experimentation insofar as it caters to public demands for further disclosure of the inner workings of the institution. It is a response to the "unrest of the people." The same principle applies to all other steps toward transparency.

[7] Prior to this, maintaining any trace of judicial records was not mandated by law.

[8] An Act to Provide for Reports of the Decisions of the Supreme Court, ch. 63, 3 Stat. 376, (1817).

[9] The act requires that opinions be printed and published within six months of their having been made, and the Reporter is to also deliver eighty copies to the Secretary of State. These copies are to then be distributed to the President of the United States, the justices of the Supreme Court, the judges of the U.S. District Courts, and to various other officers of the federal government. Copies of opinions are also required by this law to be delivered to the Library of Congress for, assumedly, archival purposes.

[10] 1 Engrossed Minutes, Records of the Supreme Court of the United States, Record Group 267, National Archives, Washington, D.C.

need for one, seeing as its docket was empty for the first three terms. It was not until the Court prepared to issue its first opinion, in *West v. Barnes* (1791), that it finally required the services of a new officer.[11]

So, in 1790, the Court named Alexander J. Dallas of Pennsylvania to assume virtually the same responsibilities vested to the Reporter in the session law of 1817. Dallas was born in Jamaica and educated in England before he settled in the U.S. in the early 1780s to practice law as a member of the Philadelphia bar.[12] His original publication of "at least eleven accounts of cases decided in the Pennsylvania and Delaware courts" from 1788 to 1790 was well enough received for him to undertake a compilation of Pennsylvania court decisions in book form.[13] Volume 1 of Dallas' *Reports* constitutes the first volume of the *United States Reports*, a collection which features his contributions up until the end of his service with the Supreme Court in 1800. Dallas would go on to lead a life of both private practice and public service, "culminating in his appointment as [James] Madison's Secretary of the Treasury in 1814."[14]

However, the accuracy of Dallas' reporting is questionable. His work is indisputably the first comprehensive collection of American law reports of any kind—a respectable feat in and of itself.[15] Yet, as Craig Joyce states, Dallas' early reports are merely "accounts of Pennsylvania

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[11] West v. Barnes, 2 U.S. (2 Dall.) 401 (1791) (unanimously deciding that, "writs of error to remove causes to [the] court from inferior courts, can regularly issue only from the clerk's office of [the] court."). The only other activity by the Court in that term (August, 1791) was to rule on a procedural motion in the first case ever placed on the Supreme Court's docket, *Vanstophorst v. Maryland*, 2 U.S. (2 Dall.) 401 (1791).

[12] R. WALTERS, JR., ALEXANDER JAMES DALLAS: LAWYER – POLITICIAN – FINANCIER 1759-1817, at 7, 8-9 (1943)

[13] Craig Joyce, *The Rise of the Supreme Court Reporter: An Institutional Perspective on Marshall Court Ascendancy*, 83 MICH. L. REV. 1295-1296, 1298 (1985). Volume 2 of Dallas' *Reports* is where opinions of the U.S. Supreme Court first appear.

[14] *Id*. at 1295.

[15] *Id*. at 1296; *see also* JULIUS GOEBEL, JR., ANTECEDENTS AND BEGINNINGS TO 1801, at 799 (1 Devise History, 1971). "[S]omewhat less than half of the dispositions made by the Supreme Court in the

decisions … based on notes preserved by judges and lawyers."[16] The fact that these initial reports are not written opinions, as we might otherwise assume, is somewhat concerning because we rely on judges alone to produce binding material. At the same time, however, there did not exist a pressing need for a collection of wholly accurate colonial case law, at least for referencing purposes. Prior to the Revolution, law practice in the colonies utilized English common law as precedent, but following independence, only common law decisions handed down before the Declaration (1776) were considered persuasive in American courts.[17] In the decade following that year, however, no new American precedent—which was suddenly necessary—was created, and American courts "remained almost entirely dependent on English legal literature."[18] Needless to say, the circumstances of the forced transitions brought by the Revolution made the jobs of those like Alexander Dallas tedious and confusing. Furthermore, there was no statutory requirement that opinions be reduced to writing in the Pennsylvania courts, and it was not until 1806, when Dallas had just finished his *Reports*, that such a law would place this burden on judges.[19] So, interestingly, Dallas' work is not a complete body of primary case law. Moreover, with specific regard to the United States Supreme Court, Dallas still did not receive the help that he might otherwise have benefitted from since the justices were also not legally obligated to write down their opinions.[20]

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first decade of its existence are reported," but when the reporting scope is narrowed to cases decided on the merits or on jurisdictional grounds, this statistic "probably exceeds 70 percent." Thus, Dallas' *Reports* is not *fully* comprehensive.

[16] *Id*. The specific compilation Joyce refers to is Dallas' 1790 publication, *Reports of Cases Ruled and Adjudged in the Courts of Pennsylvania Before and Since the Revolution*. The volume contains law reports dating as far back in time as 1754.

[17] Briceland, *Ephraim Kirby: Pioneer of American Law Reporting, 1789*, 16 AM. J. LEGAL HIST. 302 (1972).

[18] Joyce, *supra* note 13, at 1297.

[19] Act of Feb. 24, 1806, § 25, Pa. Laws 345.

[20] Not until 1834 did the Supreme Court issue an order requiring that its justices file all subsequent opinions in writing, Order of Mar. 14, 1834, 33 U.S. (8 Pet.) vii (1834). Prior to this order, many opinions were delivered orally.

What casts even more doubt on the accuracy of Dallas' reporting are questions relating to the substance of his publications. True, the virtual absence of written opinions in the first ten years of the Court's existence made compiling decisions rather demanding. But, to provide an example, rather than simply re-transcribing his sources,[21] Dallas appears to have sometimes enhanced them; this became clear when an original source that he had purported to copy in one of the arguments of a 1796 case resurfaced and featured blatantly different content.[22] His patchwork law reports should not be characterized as misinformation, but they certainly do not deserve to be called totally authentic.

Now, despite the imperfections of the Court's earliest opinions—which largely existed as a result of the problems in reporting—their publication in volumes is the first real act of transparency committed by the Judiciary. Though the primary purpose of publishing opinions was to catalogue precedent and establish a system of legal reference, the information itself was nonetheless available to the public for whatever uses they intended. However, as the young Supreme Court began to incur a larger docket, the need for uniform correctness arose.

The Court's new mission to establish a more accurate record of their opinions was simultaneously its second movement in the direction of increased judicial transparency. Providing a truer representation of the Court's work was—and still is—important, as it offered the public the proper tools with which to informedly participate in the government.[23] But, whether Americans were aware, the material they had been receiving was not entirely the handiwork of Supreme Court justices. Fortunately, the institution's issue with their problematic Reporter seemed as though it

[21] 3 U.S. (3 Dall.) at 207 (crediting the content of his report to his having been provided notes by W. Tilghman, counsel in *Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796)).

[22] Joyce, *supra* note 13, at 1305. Dallas had apparently omitted whole paragraphs and occasionally shifted emphasis on what he had retained.

[23] Samaha, *supra* note 3.

would fix itself when Alexander Dallas abandoned his commitment to compiling the Court's opinions in 1800. In fact, by the time the federal government had finally transitioned to Washington City, he had apparently developed a distaste for his long-time responsibility. In a letter to a friend, he expressed his frustration:

> I have found such miserable encouragement for my Reports, that I have determined to call them all in, and devote them to the rats in the State-House…. [L]et me beg of you to *direct* a *servant* to *nail* up, and forward, those that remain in your care. The manuscript of 4t. Volume is compleat [sic] – it brings the *decisions* of the Supreme Court of the US. down to the last Term; but I will commit it to the *flames* instead of the *press*.[24]

The decisions referenced, from the August 1800 Term, now comprise a portion of volume 4 of Dallas' *Reports*.[25] With this final contribution, the Court's original Reporter created the position's first vacancy, albeit informally.[26]

William Cranch began reporting for the Court following his predecessor's leave. But how he managed to inherit the burden is not as well understood as his ascendancy to local prestige. Shortly after Cranch's arrival to the capital city in 1800, his uncle, John Adams, appointed him Commissioner of Public Buildings in the Federal City, then, in supplement to the Act of Feb. 27, 1801, an assistant judge on the new District of Columbia Circuit Court.[27] Thereafter, the well-connected jurist resumed Dallas' work, and, despite his having multiple responsibilities, he seemed to take the job seriously. Writing in the preface to his first volume, he noted that, "uncertainty of the law, which is … the subject of complaint in this country, may be attributed to the want of American reports" and that, "[u]niformity … can not be expected … unless the decisions of the

[24] Alexander J. Dallas to Jonathan Dayton (Oct. 18, 1802), George M. Dallas Papers, Historical Society of Pennsylvania, Philadelphia.

[25] Joyce, *supra* note 13, at 1306.

[26] At this point the Court is still without an official Reporter position. *See* note 22.

[27] Joyce, *supra* note 13, at 1307; *see also* Act of Feb. 27, 1801 (ch. 15, 2 Stat. 103) (creating the United States Circuit Court for the District of Columbia).

various courts are made known to each other." He adds that for uniformity to persist in a national judiciary, "report[ing] the cases decided by the Supreme Court … can not need an apology."[28] Cranch appeared to believe this undertaking required greater attention to detail as well as extra materials that his predecessor never provided. However, his efforts to improve upon the quality of the previous record, successful as they were, created a new problem.[29] His sure "prolixity," often containing what may as well be supplemental scholarship, was too expensive for reasonable public access.[30] Thus, the Court now faced another transparency conflict.

Whether the dissemination of opinions was on a wide enough scale to reach a sizeable readership determines the actual value of opinion publication as a medium of transparency. If purchasing (or otherwise borrowing) contemporary case law were feasible for only a fraction of the population, how can the volumes' mere availability in the market have qualified as transparency? Access was curtailed, in a way that favored the few. Interestingly, the Legislature sought to remedy the cost barrier by passing the Act of February 22, 1827, which prohibited

[28] 5 U.S. (1 Cranch) iii-v (1804).

[29] Joyce, *supra* note 13, at 1308. As Joyce found, Cranch provided accurate summaries of the arguments of counsel, but, to provide an example of the Reporter's superfluous additions, Joyce also noted that he included original "useful additional matter" in the first and fourth volumes of his *Reports*, which contributed to higher production costs.

[30] William Pinkney to Henry Wheaton (Sept. 3, 1818), Wheaton Papers, The Pierpont Morgan Library, New York City. Pinkney also described Cranch's Reports as "unprofitable" and "expensive." To illustrate the financial roadblock, consider that the price of a set of Cranch's volumes drew close to fifty dollars. Joyce, *supra* note 13, at 1309. Moreover, Smith Thompson's purchase of vols. VII, VIII, and IX of Cranch's *Reports* cost him $16.00 in 1818. W. Gould to Smith Thompson (Feb. 3, 1818), Gilbert Livingston Papers, New York Public Library, New York City. Taking into account inflation from 1818 to 2019, and considering the page lengths of vols. VII, VIII, and IX (656, 495, and 520, respectively) and of the three most recent volumes of *United States Reports* (vols. 567, 568, and 569) (1,313, 1,414, and 1,182, respectively), the approximate average cost per page of the Cranch volumes—at least for Thompson—would have been $0.19 in 2019, whereas the approximate cost per page for the recent triplet (sold by the U.S. Government Publishing Office at, usually, $82.00) would have been $0.06 in 2019. *See generally* table in App. A.

volume price points in excess of five dollars per copy.[31] However, the Court's own approach to this issue of limited dissemination would mark its next major step forward, but, arguably, the development unfolded slowly in the wake of foundational American copyright precedent.

Henry Wheaton, the Court's third Reporter (and its first official one), compiled decisions from 1816 to 1827 and enjoyed the limited monopoly granted thereto by copyright. In pursuit of literary protection, Wheaton purportedly acquired a copyright for his first volume under the common law in Pennsylvania. Then in 1827, Richard Peters, Jr., his immediate successor, published and sold a comprehensive abridgment of the Court's decisions to date.[32] Wheaton, who previously reaped the spoils of uncontested rights, sued Peters, asserting infringement. He argued that Peters' work contained, "without any material abbreviation or alteration, all the reports of cases in the said first volume" and requested an injunction be placed on further sales.[33] In the trial court, Peters denied that he had infringed upon any protected material. Furthermore, he rejected the validity of Wheaton's copyright on the basis of an alleged failure to satisfy the federal statutory requirements for procuring a copyright. The trial court ruled in favor of Peters and Wheaton appealed to the Supreme Court—his former employer.

Writing for the majority, Justice McLean affirmed the lower court ruling. He noted that nowhere in the common law, insofar as its English form had been introduced to the state of Pennsylvania, could a guarantee of perpetual property in the copyright of one's work be found. The Court thus rejected Wheaton's claim that "no presumption could be drawn against the

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[31] Act of Feb. 22, 1827, ch. 18, §§ 1-3, 4 Stat. 205.

[32] RICHARD PETERS ET AL., CONDENSED REPORTS OF CASES IN THE SUPREME COURT OF THE UNITED STATES: CONTAINING THE WHOLE SERIES OF THE DECISIONS OF THE COURT FROM ITS ORGANIZATION TO THE COMMENCEMENT OF THE PETER'S REPORTS AT JANUARY TERM 1827: WITH COPIOUS NOTES OF PARALLEL CASES IN THE SUPREME AND CIRCUIT COURTS OF THE UNITED STATES (1830).

[33] *Wheaton v. Peters*, 33 U.S. 595 (1834).

existence of the common law as to copyrights … from the fact of its never having been asserted until the commencement of [the] suit."[34] As for whether the issue had been addressed at the time of the state's initial settlement, "it was [already] decided by the highest judicial court in England that the right of authors could not be asserted at common law, but under … statute."[35] Likewise, if even the whole of English common law had been adopted by Pennsylvania courts, Wheaton's argument would have stood baseless. Justice McLean also rejected the complainant's belief that the term "secure," as it is used in the Constitution and in the acts of Congress, should be taken to "indicate[] an intention not to originate a right, but to protect one already in existence" (i.e., the first volume's registration).[36] He explained that Congress, through its passing of the act of 1790—the Legislature's solidification of its Sec. 8 powers—meant to originate a copyright, "instead of sanctioning an existing [one]."[37]

The Court next addressed whether Wheaton had satisfied the applicable statutory requirements for procuring a valid copyright. The procedure imposed the following steps:

> First, the title of the book is to be deposited with the clerk, and the record he makes must be inserted in the first or second page; then the public notice in the newspapers is to be given, and within six months after the publication of the book a copy must be deposited in the Department of State.[38]

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[34] *Id*. at 659.

[35] An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, during the Times therein mentioned, 9 Anne c. 19 (1710). This statute ("the Statute of Anne") is commonly recognized as the English-speaking world's first copyright law.

[36] U.S. Const. art. I, § 8, cl. 8 (delegating Congress' authority to "promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"); *see also* Act of May 31, 1790, ch. 5, 1 Stat. (granting the "sole right and liberty of printing" to an author).

[37] *Supra* note 33, at 661.

[38] *Id*. at 664.

Wheaton argued that his alleged compliance with the first two requirements perfected his title. The Court disagreed and, in a manner of deference to the Legislature, caused for the necessity that all four parts of the statute be satisfied.

Last, and most importantly for the sake of our transparency inquiry, the majority noted that the Court is "unanimously of [the] opinion that no reporter has or can have any copyright in the written opinions delivered by [it], and that the judges … cannot confer on any reporter any such right."[39] Justification behind this is absent from the opinion, but the implications of the holding are clear. Prior to the decision, any Reporter could have secured a right to control the publication and dissemination of opinions, thus wielding the ability to restrict public access as a private entity. Without *Wheaton*, this would also apply to private entities with similar rights to items like statutes, official speeches, and other information from the public domain.

The outcome of the case favored one of two competing interests. On the one hand, authors sought the right to profit from their labor, "both for the encouragement of their own work and for the advancement of a national literature."[40] On the other hand, a heavily pro-author perspective preferred the creation of monopolies, thereby defeating the public's legitimate interest in affordable access to public materials.[41] *Wheaton* prevented the latter. The holding defined the fundamental limits of copyright on the premise that to confer upon an author such a right is to grant said author a limited monopoly but primarily for the public's benefit. The resulting blow against opportunities to profit from what should rightfully remain within the common citizen's financial reach represented the Court's longest stride toward transparency yet. No longer could

[39] *Id*. at 668.
[40] Joyce, *supra* note 13, at 1372.
[41] *Id*.

private individuals with "real business acumen," like Richard Peters, Jr., tap into unregulated markets and capitalize on business interests that place mass information in the periphery.[42]

The increased availability of opinions that resulted from the *Wheaton* holding continued to expand in later cases. In *Banks v. Manchester*, the Court extended the principle of open access to state court opinions, acknowledging the public's "right of access" to them.[43] The Court also held that parts of state reports could not receive copyright protection for lack of an author but that whole volumes should not be precluded from the same protection because "other portions of … [them] *may* satisfy the requirement of authorship."[44] In the same year, the Court narrowed *Wheaton* by holding in *Callaghan v. Myers* that original additives to opinions and statutes may be copyrighted.[45] This indirectly incentivized the publication of explanatory material that made sense of otherwise complex content. Then, a century later, the Court held in *Feist Publications, Inc. v. Rural Telephone Service Co.* that a compilation of facts—which, individually, belong to the public domain—may qualify for protection.[46] If the compilation exhibits some degree of originality in the arrangement of facts, it may enjoy legal treatment as a work of authorship. All of these subsequent developments have helped in answering the aged question, "Who owns the law?"[47] But though the simple, theoretical answer is that it belongs to the people, the issue of ownership is clearly more complicated.

Disseminating a reliable judicial record proved difficult for the young Supreme Court, but the institution evidently succeeded, taking its largest steps in the former half of the eighteenth

[42] *Id*. at 1389.
[43] Banks v. Manchester, 128 U.S. 244 (1888).
[44] *Id*. at 253.
[45] Callaghan v. Myers, 128 U.S. 617 (1888).
[46] Feist Publications, Inc. v. Rural Telephone Service Co., 499 U.S. 340 (1991).
[47] Beth Ford, *Open Wide the Gates of Legal Access*, 93 OREGON LAW REVIEW 541 (2014).

century. However, the later advent of instantaneous communication technology presented the Court with new challenges. Achieving increased transparency now required that it expand the convenience of the recently improved access. To do so meant that news of opinions would have to come with greater speed. Certainly, Washington news outlets utilized electronic innovation to communicate what would otherwise travel on paper, but as for the Court's own attempt to spread information with such speed, the only time it did so contemporarily was during a demonstration of Morse's telegraph in 1844.[48] After this point, the Court would experience an extensive gap until it saw its next few major steps toward increased transparency. These steps would not occur until President Eisenhower's appointment of Earl Warren to serve as the nation's fourteenth Chief Justice.

The Warren Court

Not too long after Chief Justice Warren assumed office, the Court elected to begin recording oral argumentation audio in 1955.[49] This unprecedented act of transparency was not as open as one might believe, however. Initially, only handpicked cases were to be recorded, "underscoring [the Court's] reticence and [having] the unfortunate effect of reemphasizing that all of the rest of the cases were off limits."[50] Further, use of the audio was at first limited to justices and their clerks, "with some access granted to researchers."[51] From 1955 to the end of the century, the justices sporadically displayed their reluctance to disseminate the recordings. In 1971, for

[48] Susan Freiwald & Stephen W. Smith, *The Carpenter Chronicle: A Near-Perfect Surveillance*, 132 HARV. L. REV. 205 (2018). "On May 24, 1844, a crowd gathered inside the United States Supreme Court chambers in the basement of the Capitol, eagerly awaiting a demonstration of an amazing new communication technology. They watched as inventor Samuel F.B. Morse successfully sent the first long-distance telegraph message—'What hath God wrought?'—to a railroad station near Baltimore."

[49] The Warren Court began in 1953 and lasted until 1969, when the Chief Justice announced his retirement.

[50] RonNell A. Jones, *U.S. Supreme Court Justices and Press Access*, BRIGHAM YOUNG UNIVERSITY LAW REVIEW 1791, 1798 (2012).

[51] *Recordings of the Court,* OYEZ.ORG, http://oyez.org/about (last visited Apr 3, 2019).

example, when CBS broadcasted part of the oral arguments in the Pentagon Papers case, the Court stopped sending audio tapes to the National Archives for fifteen years.[52] When they resumed the release of tapes in 1986, they required users to obtain Court permission, which would have been granted only for educational and non-commercial purposes.[53] Interestingly, the Court waited until the early 1990s to grant the public full access to the materials.[54] By this time, many of the institution's most notable—and controversial—landmark cases had long been argued and decided. The Court would address this early policy of delayed release later on.

The Warren Court's other contribution to transparency came near the end of its sixteen-year duration, when it began archiving and releasing all oral argument transcripts at the beginning of the 1968 Term.[55] Before this, transcripts were hit or miss, so to speak. Also, the fact that the release of transcripts began over a decade after the recording of argument audio has ignited some interest. This is probably because it might make more sense to first release the transcripts, if one is to think about the chronology of technological innovation and the pattern of institutional adoption of such innovation—generally in accordance with that chronology. And on a more practical level, not to mention, ease of legal citation could have improved earlier if transcription came first. Regardless of the interpretation, the availability of audio recordings and transcripts, though for a while unsteady and inconsistent, at last introduced the Court to the technological age. Though in delayed fashion—as per usual—the Court solidified the basis for its later movement toward increased public access, thanks to Warren Era initiatives and their modernizing effect.

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[52] Roy M. Mersky & Kumar Percy, *The Supreme Court Enters the Internet Age,* 63 TEX. B.J. 569, 569 (2000), *available at* http://www.llrx.com/features/supremect.htm.

[53] *Id*.

[54] Jones*, supra* note 50.

[55] Transcripts and Recordings of Oral Arguments, HOME - SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/oral_arguments/availabilityoforalargumenttranscripts.aspx (last visited Apr 4, 2019).

Current Policy

Now, the Court posts argument transcripts on its website on the same day the arguments take place.[56] Only a decade prior to the creation of the website in 2000, "it had made decisions available electronically to [only] news and legal information organizations."[57] As for audio, the justices first agreed to release the tapes to the media for specific high-profile cases on the day of arguments. In response to C-SPAN's requests, the Court allowed the same-day release of the audio for *Bush v. Palm Beach County Canvassing Board* and *Bush v. Gore*, only after denying various other networks' requests for permission to televise the proceedings live.[58] The Court has ultimately adopted a policy of releasing audio recordings at the end of the week.[59]

This is essentially where the Court currently stands with respect to its level of openness with the public. Since the initial release of opinions in 1791, the institution has taken multiple steps toward transparency, while sometimes regressing, as evidenced by its early struggles with accuracy and its recent unpredictability with the release of audio and transcript materials. Nevertheless, the remarkable progress the Court has made since its foundation proves how open it truly is. Considering that, as stated before, the near totality of the Court's work is case-related, the fact that its progression over time has led to easier and more widespread access to materials and

[56] The 2000 creation of the Court's website "enabled readers to access the Court's docket and opinions quickly for the first time." Tony Mauro, *Let the Cameras Roll: Cameras in the Court and the Myth of Supreme Court Exceptionalism*, 1 REYNOLDS COURTS & MEDIA LAW JOURNAL 259–276, 266 (2011).

[57] *Id*.

[58] Bush v. Palm Beach County Canvassing Board, 531 U.S. 70 (2000); Bush v. Gore, 531 U.S. 98 (2000) (effectively confirming the outcome of the 2000 presidential election, in which George W. Bush won after controversy surrounding the inaccurate counting of "chads" in Florida).

[59] Tony Mauro, *Supreme Court Will Release Argument Audio on Delayed Basis,* BLOG LEGAL TIMES (Sept. 28, 2010, 2:30 PM), http://legaltimes.typepad.com/blt/2010/09/supreme-court-will-release-argument-audio-on-delayed- basis.html (last visited Apr 4, 2019) (explaining the new policy as "a move that virtually ensures the justices' voices won't turn up in news reports except in Sunday talk shows or later when the decision is released") (original note borrowed from Jones; *see* Jones *supra* note 50, at 1798).

information related directly to its work suggests that the Supreme Court is a highly transparent institution and, as the next section of this thesis will demonstrate, perhaps the most transparent body within the government. Whether the individual milestones were achieved in response to demands for transparency, the Court has nonetheless opened its doors, for want of a better phrase.

CHAPTER II

THE OBLIGATION OF JUDICIAL TRANSPARENCY

Government Transparency in General

James Madison wrote that, "popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or to a Tragedy."[60] He believed that a lack of knowledge about internal government action could possibly deny the public a means of preventing an unfavorable quality of life. In our present democracy—largely of Madison's design—citizens are meant to "appreciably influence the direction of government, and … have an opportunity to assess progress and assign blame."[61] Thus, the government bears an obligation to make available certain materials and information to encourage informed participation in a system over which the people are sovereign. The legitimate interests of private individuals motivate the demand for an expansion of transparency as further disclosure is a "necessary precondition" to accountability.[62] Essentially, transparency is a way to ensure that "persons with public responsibilities [are] answerable to 'the people' for the performance of their duties."[63]

Generally, expanding of transparency is a good thing. With more access to information, the populace can become better-equipped to identify potential points of concern, deter corruption, and incentivize the continuance of decent policies with the promise of political support. On the

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[60] Letter from James Madison to W. T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103, 103 (Gaillard Hunt ed., 1910).

[61] Samaha, *supra* note 3.

[62] Shkabatur, Jennifer (2012) "Transparency With(out) Accountability: Open Government in the United States," *Yale Law & Policy Review*: Vol. 31: Iss. 1, Article 4.

[63] Michael W. Dowdle, *Public accountability: Conceptual, historical and epistemic mappings*, REGULATORY THEORY 197–215 (2017).

contrary, opacity may deprive the people of such privileges. So, to avoid Madison's *tragedy*, all branches of the government should fulfill the obligation of transparency. But how and to what extent they do ought to vary depending on the nature of their relationships with the public.

The Elected Branches

In the elected (political) branches, where it is incumbent upon officials to act on behalf of their constituents, the obligation of transparency is inherently immediate. This sense of immediacy derives from the idea that voters hold those whom they elect accountable for their decisions. Public accountability, Shkabatur notes, consists of two components: "the explanation and justification of … activities to the public; and an accompanying mechanism for public sanctions."[64] The former entails an explanatory standard; the latter may, though not necessarily, require a punitive element (e.g., impeachment/expulsion, removal from special committees, loss of voter trust, or failure to win re-election).[65] These components comprise a system—a surveillance apparatus of sorts—aimed at rewarding abstinence from selfishness and are, in effect, the people's check against vicious inclinations.

Public accountability is primarily satisfied with transparency. "[T]he free flow of information to interested members of the public is a prerequisite to their participation in the deliberative process and to their ability to hold elected officials accountable."[66] For the Legislature, popular deliberation provokes a regional—and sometimes national—discourse that, in practice, reflects the direction of voter support in midterm elections. Since legislators usually seek to maintain their incumbency—a goal that is becoming increasingly commonplace—their

[64] Shkabatur, *supra* note 62, at 82.

[65] Members of either the House of Representatives or the Senate may face removal upon the "[c]oncurrence of two thirds" of the house to which a given member belongs, U.S. Const. art. I, § 5, cl. 2. The removal process for an acting president (impeachment) is outlined in art. II, § 4.

[66] Steven Aftergood, *Reducing Government Secrecy: Finding What Works*, 27 YALE L. & POL'Y REV. 399 (2009).

responsiveness to constituents must be attentive and satisfactory in order to achieve a discourse that signifies favorability.[67] Ideally, this relationship is intimate when compared to the more generalized (and often divided) one shared between eligible voters and the president. For the Executive Branch, popular deliberation provokes a *national* discourse that reflects the direction of voter support in *presidential* elections and also the state of party cohesiveness. It goes without saying that the people's relationship with Congress is more direct, whereas it is less so the case with the president. Likewise, the immediacy of transparency as an official obligation would seem greater where the relationship is more direct.

But should the executive's relative disconnect with the people translate to a lower standard of openness? Certainly not. The standard can be, and arguably is, much higher. For example, the consequences of an uninformed population in a national election could be undesirable for all of America. To elect a candidate who is unfit for the position would be to potentially endanger the country's national security, seeing as the president is chief diplomat and supreme military commander.[68] Moreover, the frequency with which the media discusses the president suggests a significant popular interest in the officeholder's actions. According to one content analysis, network television covers the presidency "twice as much as Congress and nearly five times as much as the U.S. Supreme Court."[69] Another analysis looked at the nature of recent coverage on

[67] Historically, seeking re-election has become increasingly popular among members of Congress. Recently, however, the Republican party saw more members of the House declare no intention to run for re-election in the 2018 midterms. The Democrats also saw more members of the same chamber declare no such intention, but, from 2012 to 2016, the general trend for both the House and the Senate (for both parties) included fewer not seeking re-election in the midterms. The 2018 outlier in the data set can be explained by a number of factors like distaste for the somewhat divisive issues at the center of national debate or increasing ideological polarity at the party level. Still, the normal trend is in favor of re-election aims. *See generally* table in App. B.

[68] The President of the United States also serves as chief of state, chief executive, chief administrator, chief legislator, party chief, and chief citizen.

[69] Matthew Eshbaugh-Soha & Jeffrey S. Peake, BREAKING THROUGH THE NOISE: PRESIDENTIAL LEADERSHIP, PUBLIC OPINION, AND THE NEWS MEDIA (2011).

the Trump Administration in comparison to past administrations, finding that 69% of coverage on the current administration framed segments around leadership and character, while the other 31% focused on ideology and agenda. Average coverage throughout the Obama Administration framed related stories evenly (50% on leadership and character; 50% on ideology and agenda), and coverage during the Bush and Clinton administrations tended to focus more on ideology and agenda.[70] Such reports suggest an increasingly personal interest in the president, whether for critical or supportive reasons. Either way, not only does the public possess a reasonable right to demand a transparent executive, it expresses its interest in one.

Last, there is the question of what freedom the political branches ought to enjoy in their day-to-day operation. That inquiry seeks to identify circumstances under which confidentiality is either necessary or appropriate, and the Freedom of Information Act ("FOIA") has effectively drawn a line to differentiate information that the public may request access to from that which is exempt.[71] Though the FOIA has disappointed many since its enactment in 1966, largely due to its having placed the burden on requestors, and for lack of affirmative disclosure duties, many of its codified exemptions are still sensible. For example, the FOIA does not apply to matters "established by an Executive order to be kept secret in the interest of national defense or foreign policy."[72] Also, it is extensively vigilant to preserve fair law enforcement proceedings.[73] Its other

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[70] Amy Mitchell et al., COMPARING NEWS COVERAGE OF TRUMP'S FIRST 100 DAYS TO COVERAGE OF PAST ADMINISTRATIONS PEW RESEARCH CENTER'S JOURNALISM PROJECT (2017), https://www.journalism.org/2017/10/02/a-comparison-to-early-coverage-of-past-administrations/ (last visited Mar 6, 2019).

[71] Passed to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed," the FOIA has supported the principle that, "all governmental records shall be made available upon public request, unless specifically exempted." *See NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978); *see also* 5 U.S.C. § 522(a)-(b).

[72] 5 U.S.C. § 522(b)(1)(A).

[73] The FOIA exempts "records … compiled for law enforcement purposes, but only to the extent that the production … could reasonably be expected to interfere with enforcement proceedings, … deprive a person of a right to a fair trial or an impartial adjudication, … constitute an unwarranted invasion of

exemptions include materials related to things like geological information about wells, personal privacy, and litigation privileges—all of which are tied either directly or indirectly to the work or delegation of the government. Needless to say, there are certain things recognized by law that the political branches must withhold in order to function in accordance with the people's greater interests.[74]

Transparency in the Supreme Court

In the Judiciary, the nature of necessary freedom applies almost entirely to case-related matters. Aside from other sensitivities, like insider trading concerns, the focus of independence in the federal government's only unelected (apolitical) branch—more specifically, the Supreme Court—relates to the extent that its political insulation (or, sometimes, lack thereof) allows it to adjudicate matters without regard to persons.[75] Yet, despite the omnipresent possibility of political

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personal privacy, … disclose the identity of a confidential source, … disclose techniques and procedures for law enforcement investigations or prosecutions, or … disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or … endanger the life or physical safety of any individual." 5 U.S.C. § 522(b)(7)(A)-(F).

[74] I have associated the FOIA mainly with the elected (political) branches, since the majority of the act's provisions apply solely to them. The act does, however, speak to judicial matters, requiring the release of "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases." 5 U.S.C. § 522(a)(2)(A).

[75] The supposed concerns of insider trading trace back to 1919, when one "egregious law clerk 'leak' … led to a criminal indictment. This incident, widely reported in the press at the time, occurred in 1919. One Ashton F. Embry was in his ninth year of service to Justice McKenna. It was discovered that he leaked information to three outsiders about an opinion of the Court that was not ready for public release. That opinion was *United States v. Southern Pacific Co.*, 251 U.S. (1919). With this information in hand, Embry and the three outsiders engaged in stock speculations on the New York Stock Exchange and other exchanges. They garnered … profits of $1,412.50. When Chief Justice White heard of the incident, the matter was turned over to the Department of Justice. On December 16, 1919, the facts concerning the incident were released to the press, which headlined the story as a 'Supreme Court leak.' On that same day Embry resigned his law clerkship, giving as the reason his growing outside baker business. Justice McKenna accepted the resignation 'with regrets for the necessity.' Embry was later indicted, along with the other three, for 'conspiracy to defraud the Government of its right of secrecy concerning the opinions.' They unsuccessfully challenged the validity of the indictment, culminated by the Supreme Court's denial of certiorari. Embry v. United States, 257 U.S. 655 (1921). The case never came to trial; a *nolle prosequi* was eventually entered, apparently because the Department of Justice did not believe it could win at trial since its only witnesses were government investigators." STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE (8th ed. 2002).

encroachment upon the Court, as well as the high degree of sensitivity associated with pending cases, the Supreme Court does in fact bear an obligation to be transparent with the public. Though the relationship between the Court and the people is nothing at all like that in the elected branches, there are still a number of reasons to emphasize openness within the institution.

Adam Samaha notes six ways in which information regarding the courts and their work can be valued, and these foci seem to accommodate the Supreme Court, notwithstanding its special differences from other judicial institutions. First, information is valued for monitoring purposes, since transparency demands commonly contend that, "bad conduct is more likely to take place when the relevant actors are able to shield themselves from others." Thus, "[i]nformation access might facilitate monitoring … and deter misconduct or otherwise result in desired behavioral change." Second, access to information allows for reform. On this point, Samaha notes that, "[e]xposing information about judicial operations is the groundwork for intelligent judgment about the proper design of the court system." Third, increased access to information helps potential litigants plan for future appearances before the Court. Fourth, information may benefit the public for settlement or legitimacy reasons since "[t]he concept of legitimacy includes moral judgments about when the influence of law is justified…." Fifth, information provides academic knowledge to all those who receive it—professional scholars, lawyers, students, and others. Samaha's sixth point (popular entertainment), however, does not apply to the Court, seeing as there has never been an opportunity for consumption with respect to its proceedings.[76]

A general familiarity with the concept of judicial independence helps to make sense of the Court's distinctive obligation of transparency. *Federalist No. 78*—known for its defense of the

[76] Adam M. Samaha, *Judicial Transparency in an Age of Prediction*, 53 VILLANOVA LAW REVIEW 844–846 (2008) (noting, among other things, that the value of entertainment "comes from viewing human drama instead of gathering knowledge about institutional function" and that it has applied in cases like *Court TV*).

concept—provides an appropriate introduction to the context through which we should observe this. In the essay, Alexander Hamilton describes judicial independence to be "peculiarly essential in a limited Constitution." The "benefits of the … moderation of the judiciary" should involve instances where it might "[displease] those whose sinister expectations … may have [been] disappointed" and where it must have "commanded the esteem and applause of all the virtuous and disinterested," demonstrating the value of isolation in producing objectivity.[77] Hamilton also alludes to the value of institutional independence in *Federalist No. 76*, in which he discusses the president's nomination powers. He advises that the executive have "[fewer] personal attachments to gratify" in the selection of judicial nominees. The selection should also be restrained by "a more exact regard to reputation" and an obligation to "prefer with impartiality the persons who may have the fairest pretensions to [the requisite qualities]" of the position to be filled.[78]

Setting the proper context also benefits from understanding the Court's exclusive power of judicial review. Hamilton comments on this idea as well. In his career as an attorney, he breaks ground on the concept of judicial review, arguing for the defense in *Rutgers v. Waddington* (1784).[79] His position serves as a precursor to the same idea he advocates later on in the *Federalist*, where he writes that, "[t]he interpretation of the laws is the proper and peculiar province of the

[77] THE FEDERALIST NO. 78 (Alexander Hamilton).

[78] THE FEDERALIST NO. 76 (Alexander Hamilton).

[79] Peter Charles Hoffer, *Rutgers v. Waddington: Alexander Hamilton, the End of the War for Independence, and the Origins of Judicial Review*, *in* Rutgers v. Waddington: Alexander Hamilton, the End of the War for Independence, and the Origins of Judicial Review xi (2016). "The argument that property rights derived from the state (the plaintiff's case in *Rutgers*), countered by the argument that property rights derived from the nation and its treaty obligations (the defendant's response), might … be viewed as a microcosm of the larger dispute between the antifederalists and the federalists in 1787. At the same time, even the most consistent and persistent advocates of this view—men like Alexander Hamilton—did not see their efforts to create a stronger national government and a more business-friendly economy as a counterrevolution."

courts." He adds that a constitution "belongs to [judges] to ascertain its meaning."[80] Then, in solidifying this view, Chief Justice John Marshall writes in 1803 that, "[i]t is emphatically the province and duty of the Judicial Department to say what the law is."[81] But the fact that this exclusive authority was not established until *Marbury* is interesting. Hamilton would likely have believed that virtual political insulation is optimal for judicial review since the various privileges and immunities afforded to judges free them "from the need to behave in politically advantageous ways."[82] In other words, serving a life term (during *good behavior*) precludes the necessity to please for political reasons and erases—or at least it should—the fear of retribution as a result of rendering unpopular decisions. So, why were judicial review and independence not established simultaneously? The answer is unclear, but we do know a few things: (1) that the Constitution is somewhat vague in its definition of judicial powers and (2) that its substance represents a compromise between advocates of strong and weak central government.

Article I of the Constitution of 1787 creates the United States Congress, "which shall consist of a Senate and House of Representatives."[83] Section 2 details the manner in which officials are elected, the length of the terms for which said officials may serve, the minimum frequency of assemblies, and other structural components of the Legislature. Article I also delegates specific powers to Congress—a detail-oriented effort at a job description, so to speak.[84] Among these

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[80] Hamilton, *supra* note 77.

[81] *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

[82] Vincent R. Johnson, *The Ethical Foundations of American Judicial Independence*, 29 FORDHAM URB. L.J. 1007, 1028 (2002) at 1008.

[83] U.S. Const. art. I, § 1.

[84] *E.g.*, U.S. Const. art. I, § 8, cl. 8 (providing—to demonstrate Article I's precision—the "Power To … promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"). The purpose of providing the *Patent and Copyright Clause* is to exemplify the lengths to which the Constitution details legislative powers, whereas it is does not go to such lengths in Article III.

include the right to impose and collect taxes and to coin a national currency. Article II defines the powers of the president, vesting thereto, among other things, the power to make treaties and to make official appointments. Article III, however, is concise. Section 1 establishes the Supreme Court and (expanding on Article I) gives Congress the authority to vest the remaining judicial power to "such inferior Courts as [it] may from time to time ordain and establish."[85] Section 2 describes the original and appellate jurisdictions of the Supreme Court and mandates that the "Trial of all Crimes, except in Cases of Impeachment, shall be by Jury … in the State where the said Crimes shall have been committed."[86] Finally, Section 3 addresses the prosecution of treason. Unlike the Constitution's treatment of the elected branches, its creation of the Judiciary is, effectively, no more than a mere creation. Nowhere in Article III can we find a contemplation of judicial review. Perhaps this is due in part to a lack of precedent. At the time, the British judiciary was comprised of three court systems: King's Bench, Common Pleas, and Chancery. Each adjudicated a particular subject matter: criminal law, private law, and matters of equity, respectively. Moreover, the Framers had no intention of reproducing the British style of government, so starting from a blank slate made the Convention's objective all the more difficult. Needless to say, the end result was vague, and it warranted further clarification.

We also know that the Constitution is a product of the compromise made between the Federalists and the Antifederalists, and this is especially true with respect to Article III. The former's arguments are expressed in the *Federalist Papers*, whereas their opponents' views constitute a collection of writings referred to as—conveniently—the *Antifederalist Papers*. Regarding the Judiciary, *Antifederalist No. 78-79* notes that, "[t]he supreme court under [the]

[85] U.S. Const. art. III, § 1.
[86] U.S. Const. art. III, § 2.

constitution would be exalted above all other power in the government, and subject to no control." Specifically, the essay points out that the Court's power would be "in many cases superior to that of the legislature."[87] But, two months prior to the essay's publication, Oliver Ellsworth (who would later become the third Chief Justice of the Supreme Court), before the Connecticut ratification convention, asserted that the Constitution defines the Judiciary as a check against the general legislature. This check, he argued, is justified by its delegation of review powers to national judges, "who to secure their impartiality are to be made independent," over matters in which the United States makes laws that may contradict the Constitution, or when states make laws that usurp the general government.[88] Ellsworth calls judicial review a necessary "coercion of law" that promotes national integrity. Still, the scope of judicial authority is unclear at this point, and it is effectively unaddressed in Article III. It is not until *Marbury* that the judicial powers are sufficiently defined.

Clearly, the Supreme Court wields a consequential authority to uphold or nullify another branch's actions. Thus, it should come as no surprise that many have subjected this exclusive power to controversy. Some claim that judicial review arms the Court as a *super legislator*, while others warn that abolishing it would gift the president a "virtual blank check" and force courts to sustain congressional violations of the separation of powers, justified "in the name of 'the people.'"[89] By its strongest proponents, the *Marbury* legacy is revered with hallowed status. Regardless of any opinion, judicial review is practically an integral component of the judicial process today, and its implications are profound. Therefore, as this thesis progresses, all further consideration of the Supreme Court should not abandon the import of its exclusive authority to

[87] THE ANTIFEDERALIST NO. 78-79 (Brutus).

[88] Oliver Ellsworth, CONNECTICUT CONVENTION (1788).

[89] Laurence H. Tribe, Jeremy Waldron & Mark Tushnet, *On Judicial Review: Laurence H. Tribe, Jeremy Waldron, and Mark Tushnet Debate*, DISSENT 81–86 (2005).

"say what the law is."[90] Further, we should view its unique independence relative to judicial review—specifically, how different degrees of independence encourage (or impede) unbiased review execution.

To demonstrate the dependency of impartial judicial review on independence, I will briefly experiment with the latter's polar extremes in the abstract. So, when the idea of maximum transparency is discussed, I endeavor to mean a Supreme Court that must respond to all demands for increased disclosure. With maximum transparency, the Court receives hardly any room to operate satisfactorily. Requiring it to disclose all materials or respond to all requests for information—much like how the FOIA works—would bring previously discussed concerns to the forefront (e.g., insider trading, breach of confidentiality). More importantly though, responding to such request makes the institution answerable to the people, essentially demonstrating the Court's interest in giving the people what they want, for lack of a better description. By the same token, minimum transparency entails complete institutional freedom from such compulsion. Not having to make available its materials and information, either in relation to pending cases or those recently decided, would probably provide for the most comfortable setting for judges to decide cases in isolation from the public. However, this would prompt outsiders to attach undesirable descriptors of secrecy to the institution.[91] And, let us not forget, judges were never granted complete immunity from removal. Vesting to the Supreme Court a right to total isolation would deprive Congress of the ability to monitor any *bad* behavior and act accordingly.[92]

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[90]Dowdle, *supra* note 63.

[91] Segall, *supra* note 5.

[92] *Supra* note 85. The Constitution states that, "The judges, both of the supreme and inferior courts, shall hold their offices during good behaviour.…" The term good behaviour is not specific, and the stipulation has become relevant just once since the Court's beginning, when Justice Samuel Chase (a George Washington appointee) was impeached in 1804 by the House of Representatives. He was acquitted in the Senate and continued to serve as Associate Justice.

Now, surely neither of these extremes represent the Roberts Court, nor any past court for that matter, but the point of thinking about them is to establish a spectrum on which to place the prospect of implementing cameras in Supreme Court proceedings. If the Court were to allow such devices in the courtroom, what changes in the judicial process might we suspect? Are these changes good, or are they bad? It ultimately comes to whether we value transparency more so than we do the assurance of optimal institutional function, and televising the Supreme Court in action would undeniably be a radical form of transparency. But doing so may yield positive outcomes. Likewise, there may also be a plethora of negatives to be weighed in consideration of TV coverage.

CHAPTER III

IMPLEMENTATION

This section will first cover two potential benefits, then two concerns, followed by a third, relatively insignificant issue. After each is elaborated, all will be considered together to formulate a suggestion regarding the direction of the debate about bringing cameras into the Supreme Court.

Foreseeable Consequences

If H.R. 464—or something similar to it—were to pass, the Supreme Court must "permit television coverage of all open sessions of the Court unless [it] decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of one or more of the parties before the Court."[93] Such an unprecedented change would be the most significant movement toward increased transparency in the Court's history, and it would also entail both beneficial and harmful implications. This last section seeks to explore some of these concerns and how they might contribute to arguments either for or against cameras in the Court. It must be established, however, that the following discussion is predominantly speculative. After all, no video camera has found its way into the nation's highest court while in session, so there is no past material from which to draw in the contemporary debate.[94] Moreover, the fact that some other—lower—courts allow cameras during their proceedings does not mean a

[93] *Supra* note 4.

[94] Technically, this statement is not entirely true, since members of the campaign finance reform group, 99Rise.org managed to smuggle a video recording device into the courtroom in 2014. The stunt was apparently meant to stage a protest in front of the sitting justices and to object to the 2010 holding in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (holding that corporate funding of independent political broadcasts in elections cannot be limited under the First Amendment to the Constitution). Bill Mears, SUPREME COURT SECRETLY RECORDED ON CAMERA - CNNPOLITICS CNN (2014), https://www.cnn.com/2014/02/27/politics/supreme-court-video/index.html (last visited Mar 22, 2019).

whole lot for our discussion. To be rather blunt, the Supreme Court is just too different and, dare I say, too special for the experiences of other venues to serve as comparable evidence.

Permitting video cameras in the Supreme Court—and thus, televised coverage of official proceedings—would provide the public with an extensive wealth of knowledge and means of education. In 1921, Charles Warren wrote that, "[t]he reaction of the people to judicially declared law has been an especially important factor in the development of the country; for while the Judges' decision makes the law, it is often the people's view of the decision which makes history."[95] But in a society where many believe the Supreme Court building houses a jury room and where high school students are taught only to memorize iceberg-tip legacies of no more than three Marshall Era decisions, "the true extent to which the American citizenry is uninformed seems quite alarming."[96] Many attribute misunderstandings to Hollywood portrayals of the legal profession, while the limited sense of import tagged to the Judiciary in schools cannot be so easily explained.[97]

Justice Harlan seemed to recognize a public benefit for modern education as a weapon against rampant ignorance, noting that, "television is capable of performing an educational function by acquainting the public with the judicial process in action."[98] Justice Frankfurter, who believed that, "public confidence in the judiciary hinges on the public's perception of it," even wished the news media would cover the Court as much as it did the World Series.[99] Whether the justices were truly thinking ahead of their time, their words encapsulate the idea that "reality … is

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[95] 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 3 (rev. ed. 1928).

[96] Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEXAS LAW REVIEW 1053–1098 (1993), at 1086.

[97] *Id*. at 1086, 1087.

[98] *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring).

[99] Ethan Katsh, *The Supreme Court Beat: How Television Covers the U.S. Supreme Court*, 67 JUDICATURE 7, 8 (1983); *see also* LIVA BAKER, FELIX FRANKFURTER 218 (1969).

more educational than interpretation"—something the public would otherwise be left to do from textual objects of the Court's work.[100] Justices Harlan and Frankfurter would have been more likely to acknowledge that allowing cameras "would not only educate the lay public about the law and the legal profession, but it also would provide a looking-glass through which the legal community could study and improve its skills in oral advocacy."[101]

Cameras would satisfy transparency demands. In 2006, the Congressional Research Service referenced a survey from that same year, which found that 70% of those polled believed televising the Supreme Court's oral arguments was a good idea. The report cited "increasing support for more transparency in government, the Court's recent issuance of controversial decisions, and the public's expectation that future Supreme Court cases were likely to involve constitutional issues of great public interest" as reasons for the high rate of support.[102] Another survey reported a 71% support rate in favor of cameras among poll respondents and cited similar motives underlying public sentiments on the issue.[103] More recently, C-SPAN commissioned PSB (a research-based consultant company) to conduct a survey on the topic, following the Kavanaugh confirmation hearings. The poll found that 64% of respondents supported cameras, but, interestingly, the same poll found that 91% of respondents believed Supreme Court decisions affected their everyday lives as citizens.[104] These reports, and others like them, are no anomaly,

[100] Matthew T. Crosson, *Cameras in Courts Do Not Adversely Affect Conduct of Court Proceedings,* N.Y. L.J., May 1, 1991, at 40.

[101] Piccus, *supra* note 96, at 1089.

[102] Lorraine H. Tong, *Televising Supreme Court and Other Federal Court Proceedings: Legislation and Issues* (Cong. Res. Serv. Nov. 8, 2006).

[103] Mario Trujillo, POLL: MOST WANT CAMERAS IN THE SUPREME COURT THE HILL (2014), https://thehill.com/blogs/blog-briefing-room/205454-poll-most-want-cameras-in-the-supreme-court (last visited Mar 28, 2019).

[104] C-K Editor, THE LATEST ON CAMERAS IN THE SUPREME COURT ISCOTUS NOW (2018), http://blogs.kentlaw.iit.edu/iscotus/latest-cameras-supreme-court/ (last visited Mar 28, 2019).

and understandably so, as the court of public opinion has tended toward the principle of open access in government.

Though there certainly are desirable consequences associated with cameras in the Court, there are a few that must be avoided. The most concerning of these is the potential incubation of political encroachment upon the institution. According to the PSB survey, 56% of respondents stated their belief that the Court is currently divided politically, which indicates that "[p]eople are … assuming [the justices are] partisan entities." "That," a PSB senior strategist notes, "has very serious implications."[105] Televising proceedings would provide the public a window view of the Court's operation, but it is probable that this view will at some point in translation be distorted (or spun). In terms of newsworthiness, "[w]e expect that if the Court decides a case in a 'liberal' or 'conservative' manner this may affect whether a decision attracts media attention."[106] The same goes for pending cases for which the outcome of the case may be reasonably predicted, per the public's understanding of who the "liberal" and "conservative" justices are in a given term. The key concern here is the public misconception of justices as politicians.

Justices Elena Kagan and Samuel Alito recently testified before the House Appropriations Committee's Financial Services and General Government Subcommittee and spoke to the idea of cameras in the Court when chairman Rep. Mike Quigley (D-Ill.) shifted the hearing's focus. He remarked that, "Most Americans have no idea how Supreme Court proceedings even work." Justice Kagan conceded that it would be "no small benefit if the American public were able to see [the proceedings]" but added that allowing cameras might cause justices to "filter" themselves "if they worried that playing devil's advocate during arguments might be interpreted in a video clip

[105] *Id*.

[106] Kaitlyn Sill, Emily Metzgar & Stella M. Rouse, *Media Coverage of the U.S. Supreme Court: How Do Journalists Assess the Importance of Court Decisions?* 30 POLITICAL COMMUNICATION 11–12 (2013).

as being biased." She concluded that if being able to watch the Court in action "came at the expense of the way the institution functioned, that would be a very bad bargain."[107]

Tony Mauro, who has made his position rather clear on the issue, claims that, "[w]hile cameras might, and probably do, distort the behavior of elected officials bent on pleasing their constituents, they should have little negative effect on contemplative, life-tenured judges who insist they are apolitical."[108] This is mostly true, especially considering that life tenure affords judges the divestment of any worry about displeasing a constituency. However, Mauro fails to address to issue of media spinning, which Justice Kagan essentially described in her testimony as predatory toward devil's advocacy. Mauro instead briefly covers the problems of excessive media sensationalism, recalling the "intrusive coverage" of the 1935 trial of Bruno Hauptmann for having kidnapped Charles Lindbergh's child.[109] The coverage prompted the American Bar Association's adoption of Canon 35, which suggested the banning of cameras and microphones from courtrooms for their ability to "degrade the court and create misconceptions with respect thereto."[110] Mauro should have considered the possible degradation of the Court and creation of misconceptions about it that oftentimes result from the skewed ways in which off-center media outlets portray the institution or its justices. This issue is arguably enhanced when the subject matter of news material involves hot-button legal subjects like free speech, abortion, LGBTQ rights, campaign finance restrictions, and others that commonly result in 5-4 or 6-3 splits.

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[107] Robert Barnes, SUPREME COURT JUSTICES TELL CONGRESS THEY ARE NOT CONSIDERING TELEVISING HEARINGS THE WASHINGTON POST (2019), https://www.washingtonpost.com/politics/courts_law/supreme-court-justices-tell-congress-they-are-not-considering-televising-hearings/2019/03/07/5fb28684-4116-11e9-9361-301ffb5bd5e6_story.html?utm_term=.96d008779a3a (last visited Mar 18, 2019); *see also* HOUSE APPROPRIATIONS COMMITTEE: Financial Services and General Government Subcommittee on the Federal Judiciary Budget, (2019).

[108] Mauro, *supra* note 56, at 270.

[109] *Id*. at 261, 262.

[110] 62 A.B.A. REP. 1134-35 (1937).

The second main concern with cameras in the Court is closely related to the first. It is reasonable to expect that, if increased media attention to the Court—by way of televised proceedings—may lead to further political encroachment, the ability of the institution to do its job impartially might be somewhat compromised. After all, damaged judicial independence is something the country probably cannot afford to incur, whether it knows this or not. Slight tendencies to cogitate one's "sinister expectations," as expressed through an evolving relationship between the Court and the political media, could spell for a defected vote or two in the next controversial civil rights case.[111] This concern, though seldom discussed in the relevant debate, still requires a further exploration, and the connection between political encroachment and the predation of fair, informed adjudication could be a research endeavor on its own.

A third concern about cameras is that the increase in access the public would receive would effectively introduce them to information known usually by lawyers—a supposed barrier to lay comprehension and actual popular education. As the late Justice Antonin Scalia explained in a 2012 interview with C-SPAN, if the public were to tune in to oral arguments on their televisions, they would witness the bench engaging with counsel on "dull" topics like "the internal revenue code, … ERISA, … patent law," and other things that "only a lawyer could understand and perhaps get interested in." As mentioned before, however, this third concern is relatively unimportant; the fact that the Court's work is not comprehensible to the lay observer does not—I believe—present any risk to the institution's capacity to function properly. But, going back to previously discussed concerns, Scalia mentioned that, "what most of the American people would see would be 30-

[111] *Supra* note 77.

second, 15-second takeouts from … arguments," taken out of context and wholly misrepresented.[112]

Taken into consideration, these consequences do not balance. In Chapter II I mentioned that the debate fundamentally asks whether we value transparency more so than we do the assurance of optimal institutional function. Addressing what could happen if cameras were permitted in the courtroom reveals the possibility that the Supreme Court's capacity to perform judicial review may be hindered. The lengths to which politics and the judicial process could come into contact merit hesitance when thinking about moving forward with such a radical new transparency policy. Nonetheless, the Court still bears an obligation to be open with the public about its work, albeit a relatively lesser one. The value of education for the public is immense, even if the substance of proceedings is "lawyerly." But whether the public will benefit from cameras depends on if it can overcome the greatest problem it faces: itself.

A Note on Temporal Propriety

Society is not ready for televised coverage of the Supreme Court. The most alarming concerns of what could unfold relate to misconceptions about the Court—that it is merely another political institution. Of course, I do not assume that because many have this impression, all of society must as well. However, as political polarization researcher, Thad Kousser notes, "We are [at this time] a nation divided along ideological and partisan lines … with 'liberal Republicans' and 'conservative Democrats' becoming endangered species." He adds that, "Policy is now contested mostly at the ends of the ideological spectrum."[113] Assuming Kousser's position is

[112] C-SPAN & Antonin Scalia, JUSTICE SCALIA ON CAMERAS IN THE SUPREME COURT C-SPAN (2012).

[113] Thad Kousser, Commentary: I'M A POLITICAL POLARIZATION RESEARCHER. HERE'S WHAT I KNOW IN 2018. TRIBUNE (2018), https://www.sandiegouniontribune.com/opinion/commentary/sd-utbg-tribalism-politics-democracy-20180316-story.html (last visited Apr 2, 2019).

reflective of the country at large—and, as a spectator, I believe it is—then the general public is in a potentially dangerous position with respect to the Judiciary. Given the media's role in reporting government activity in blatantly biased ways, one should not expect to watch clips of Court proceedings in the same contextual sequence across different news networks. Moreover, one cannot always anticipate even-handed reporting on such proceedings across networks like MSNBC and Fox News.

Disseminating misinformation about the Supreme Court's work to a vulnerable public may legitimize the idea of political judges if their work and words are spun to accommodate partisanship. In order for the people to demonstrate preparedness to accept the good that televised Court coverage has to offer, we must—aside from simply becoming less polarized—learn to appreciate the Judiciary in light of its independence and intention to administer equal justice under law. We must also understand its fundamental role in the separation of powers. If we do, we realize the necessity of impartial judges in a system of checks and balances. Finally, we must learn to tolerate political gridlock and not look to the courts to satisfy party preferences. If we can achieve this appreciative view, we can begin to discuss the implementation of video cameras at 1 First Street NE.

CONCLUSION

Indeed, the prospect of permitting cameras in the Supreme Court reveals a number of potential concerns. Yet, the value of their implementation would likely offer certain benefits that should merit our consideration. The foremost benefit would be an unprecedented stride in the direction of institutional transparency, but a look at history tells us, however, that the Court has already become arguably the most transparent body in United States government. From its beginning, the Court has both consciously and indirectly improved the quality of its record while making it more available to the public. If this is the case, would the adoption of a pro-camera policy even be necessary? After all, the principal motives underlying the movement still cite judicial transparency, which, as we know, is important for a number of reasons (including public accountability). What is certain is that the Court bears a unique obligation to be open with the public, but the degree of that openness is special to the extent that the relationship shared with the people is relatively disconnected, unlike in the political branches, where it is more intimate. Nonetheless, that relationship is extensive since the Court ensures the reasonable accessibility of its case-related information in a prompt and safe manner.

As asserted in the final chapter (pp. 41-42), the appropriateness of implementing cameras depends on society's willingness to appreciate the judicial process—specifically, the idea of judicial independence and its being a necessary precondition to the proper execution of judicial review. This societal evolution has yet to take place, given the previously cited concerns related to the country's current political polarization.

Further research on political polarization and public perception of Court-related news may advance this inquiry. The topic may also benefit from a more in-depth look at how the public views

the relationship between judicial independence and the obligation of transparency both across the government and within the Supreme Court.

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APPENDIX A

WILLIAM CRANCH'S PUBLICATION COSTS, CONSIDERING INFLATION

The table below compares the approximate cost per page of volumes VII, VIII, and IX of Cranch's *Reports* against that of the three most recent volumes of *United States Reports*. The calculated results are adjusted to accommodate inflation from 1818 to 2019, as provided by the Bureau of Labor Statistics consumer price index ("CPI"). Accordingly, prices in 2019 are 1,881.98% higher than average prices in 1818. This period averaged a 1.50% inflation rate.

	Term(s)	# of op'ns	Pg. Cnt.	Orig. cpu (USD)	2019 cpu (Δ USD)	Cost/pg. (Δ USD)	Cost/op'n (Δ USD)
Cranch Volumes[114]							
Vol. VII	Feb. 1812/'13	82	656	$5.33[115]	$105.71	$0.16	$1.29
Vol. VIII	Feb. 1814	44	495	$5.33	$105.71	$0.21	$2.40
Vol. IX	Feb. 1815	40	520	$5.33	$105.71	$0.20	$2.64
Avg. Cost/pg. (2019 USD)						**$0.19**	
GPO *United States Reports*							
Vol. 567	Oct. 2012	18	1,313	$82.00[116]	$82.00	$0.06	$4.56
Vol. 568	Oct. 2012	29	1,414	$82.00	$82.00	$0.06	$2.83
Vol. 569	Oct. 2011	30	1,182	$82.00	$82.00	$0.07	$2.73
Avg. Cost/pg. (2019 USD)						**$0.06**	

[114] The volumes refer to those purchased by Justice Smith Thompson. *See* note 44.

[115] This value, listed once for each of the Cranch volumes, is a one-third quotient of the $16.00 transaction in 1818. *Id*.

[116] U.S. Government Publishing Office, SUPREME COURT OF THE UNITED STATES (SCOTUS) U.S. GOVERNMENT BOOKSTORE, https://bookstore.gpo.gov/agency/supreme-court-united-states-scotus?field_format_value=Hardcover&sort_bef_combine=created%2BDESC&items_per_page=24 (last visited Mar 5, 2019).

Conclusion

The table above reports the average cost per page, adjusted to accommodate the change in purchasing power over time. Considering the price that Justice Smith Thompson paid for the three Cranch volumes ($16.00 in 1818—$317.12 today) and the average page count of those volumes, in comparison to the same averages associated with the three most recently published volumes of *U.S. Reports*, the average costs per page reflect a more expensive product in the earlier works.

APPENDIX B

OUTGOING MEMBERS OF CONGRESS, 2012-2018

The table below displays data from Ballotpedia and reflects only part of the original, which also considers members of Congress who left office before the midterms.[117] The purpose of this table is to demonstrate the recent historical trend of seeking re-election in Congress. As noted in the second section of this thesis, the data for 2018 constitute an outlier in the trend that may be explained by a few political phenomena.[118]

Year	Chamber	Democrats not seeking re-election	Republicans not seeking re-election	Total not seeking re-election
2018	Senate	0	3	3
	House	18	34	52
	Total	**18**	**37**	**55**
2016	Senate	3	2	5
	House	8	20	28
	Total	**11**	**22**	**33**
2014	Senate	5	2	7
	House	16	25	41
	Total	**21**	**27**	**48**
2012	Senate	6	3	10 (+1 ind.)
	House	23	20	43
	Total	**29**	**23**	**53**

[117] United States Senate elections, 2020, BALLOTPEDIA (2018), https://ballotpedia.org/United_States_Senate_elections,_2020 (last visited Apr 15, 2019).

[118] *Supra* note 67.