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TECHNOLOGICAL TRANSPARENCY: APPELLATE COURT AND MEDIA RELATIONS AFTER *BUSH V. GORE**

Robert Craig Waters**

I. INTRODUCTION: THE BIG CASE

The start of the broadcast was only minutes away, and for the next hour it would become the most watched television news event since the bizarre night of Florida's botched presidential election a month earlier. An entire world was scrutinizing little Tallahassee, Florida's capital city. The tension was palpable. I arrived early December 7, 2000, anxious to make sure that the Florida Supreme Court's all-important satellite uplink was working properly. This was the vital connection that would enable a world-wide audience to see and hear an hour-long oral argument broadcast from a courtroom that one commentator called "an elegant television studio."¹ At the time, such a description easily could have been derisive, and even today it would at least spark healthy debate among appellate court officials nationwide. There are a number who still believe courts and cameras should seldom mix. Not in Florida.

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1. Jeffrey Toobin, *Too Close to Call* 132 (Random House 2001).

In fact, the concept of an elegant television studio probably could have been applied to no other appellate court in 2000—an ironic coincidence in light of the historic events then unfolding in the Sunshine State. And it was my responsibility to make sure that the broadcasts did not fail at such a crucial time, since no other television cameras would be permitted in the building that day. Instead, the cameras permanently built into the courtroom architecture were the sole source of oral-argument video. They also were unique in a sense little recognized in 2000: These cameras were completely controlled by the Court's own Office of Public Information and, in just minutes, would feed live video to all of the world's major news networks. This in itself was an historic event, but one greatly overshadowed by the larger issue—the Presidency.

The top of the hour was quickly approaching—10:00 a.m., when arguments would begin. After assuring myself that a good test pattern was now flowing around the globe from our satellite transponder, I helped escort the twenty-eight credentialed reporters to their reserved seats in the courtroom. This was part of my duty as the public information officer for the Court—its spokesman and communications director. Going down my checklist, I went back to my computer to make sure the Court's Website—our on-line repository of all filings, orders, and decisions in the election cases—was working properly and could be quickly updated if the Justices issued any rulings that day. Satisfied that it was so, I went on to make sure that the three still photographers chosen pursuant to court order were in place in the areas assigned them as the courtroom “pool.”² Later I joined the Clerk of Court in briefing the attorneys and parties about how post-argument press interviews would be held outside the building shortly after 11:00 a.m.

This last item would be among the day's hardest assignments, and it mattered more than most people thought.

2. “Pooling” arrangements are very common in high-profile cases in jurisdictions that permit cameras into the courts. It is a method of limiting the number of photographers in the court while also meeting greater than usual demand for still photographs. At the Florida Supreme Court, pool photographers are required to share photographs they take with any other news organization that wants them. Our custom is that one of the pool photographers is chosen by the Associated Press, the wire service that reaches the broadest possible audience. The other two are elected by all photographers taking part in the pool after their names are submitted for final approval by the Office of Public Information.

Jettisoning the key political and legal players from the courtroom and into an uncontrolled mob could be interpreted as a lack of control, reflecting on the Court itself. Any kind of physical handoff at the front doors had proven difficult since Election Day, whether it was attorneys walking out into the crowd or my own task of announcing decisions from the front steps. We on the Court staff only controlled what happened inside. But when our doors swung out, they opened to nothing resembling the neighborly southern city of some 150,000 residents where I had worked since graduating from law school in 1986.

The scene in the public areas outside the building was near chaos, so much so that the Supreme Court Marshal had locked down the entire building weeks earlier. Huge crowds of reporters, demonstrators, and sightseers roamed from the stanchions on the courthouse steps across Duval Street and up the hill toward Florida's twenty-two story Capitol. If a riot had broken out, law enforcement never would have been able to contain it. Incidents of near violence already had occurred, the most notorious over a coveted parking spot for a satellite truck immediately across the street from the Florida Supreme Court building at the Capitol's curb.³ When the truck that first claimed the space had gone to refuel, its crew left a single reporter to stand in that spot to "save" it. Another satellite truck driver quickly saw the space and began inching toward the reporter, demanding that she move. When she did not, he used his massive truck to knock her to the asphalt—and was promptly arrested by law enforcement officers guarding the Supreme Court building. They had witnessed the entire episode.

For police, crowd control was complicated by the fact that the City of Tallahassee continued to leave two lanes of automobile traffic open on Duval Street between the Court and the Capitol. Elaborate landscaping on the series of terraces ascending up the hill from the street to the Capitol was

3. By some estimates, there were about eighty-five satellite trucks in Tallahassee during the election disputes. Due to their large size, they were parked all around the Capitol Complex, which includes the Supreme Court building. The true extent of their presence only became clear when a photographer took a high aerial photograph looking down on the complex, revealing satellite trucks wrapped like a band around the large cluster of government buildings.

completely hidden—some of it trampled—beneath a new tent city erected hastily by media that had descended on Tallahassee in the days after the election. This was choice real estate at the time: Television demanded a camera angle that showed the Florida Supreme Court building in the background, its Jeffersonian dome rising above satellite-truck dishes, and waving protest signs on the street below. These tents became the portable studios from which broadcasters fed news to a national and international audience.

I knew that the press interviews outside the building would invite disruption. As the days passed after the election, the crowds only grew larger and more boisterous. Reporters vied for the best positions to question attorneys representing the Republican and Democratic parties and their candidates. Security dictated that this could not be done in the more controlled environment inside our building, nor could it be done inside any other nearby building. Space was too limited for the hundreds of reporters on scene, and it was virtually impossible to separate actual journalists from mere spectators. Worse still, our Press Room could handle no more than a dozen reporters, even if all of them stood in a scrum.

So, all announcements to and interviews with reporters had to be done outdoors on the courthouse steps. This proved to be great drama for television, because it brought to mind the centuries-old practice of court staff making official public statements and conducting business from their front steps. But in late 2000, it had become a matter of sheer necessity. There had been no time to plan for alternate, and more secure, venues. The election dispute had been a complete surprise. And today we tend to forget: There still were ten months remaining before the terrorist attacks of September 11, 2001, would change everything—including court security in high-profile cases.⁴

So, the great contrast of the day was the difference between inside and outside. On instructions from Chief Justice Charles T. Wells, strict order would be enforced in the courtroom as the attorneys and the Justices delved through arguments and rebuttals, questions and answers about Vice President Gore's request to recount disputed votes. The few dozen people who

4. This was a concern that the Florida Supreme Court would be forced to re-address in 2004 when it looked like the state's electors again might decide the Presidency.

stepped in line early enough to obtain unreserved courtroom seating would be respectfully quiet. Everything that could be kept inside would be kept inside, where tight control was still possible. The doors would only open to some 150 people who would watch the proceedings and then would be promptly escorted back outside. The doors would close and lock behind them. No matter what raged outside, the interior of the Court building was unusually silent as judicial staff labored with their memoranda and their recommendations.

Even the distribution of court filings, orders, and opinions had largely moved outside the doors and into the virtual realm, distributed from the Court's existing website. One veteran Florida reporter, Pulitzer Prize-winner Lucy Morgan, called our decision to post every filing "inspired."⁵ I already had created a special Presidential Election Cases website on Friday, November 11, 2000, long before the first filings arrived. So, from the very start no one needed to come inside the building to obtain paper copies of documents that were public record—and therefore had to be produced on demand—under Florida's broad Sunshine Laws. Had we not used electronic distribution, our staff and our photocopying machinery soon would have been overwhelmed—a point made vivid when our only high-speed copying machine failed early in the controversy.

At first this looked like an easy solution, because the Court had pioneered using the Web as a court communications tool starting in 1994. Our staff thus had more Internet experience than most other courts, and our equipment could handle about three and a half million hits per day, which was considered at the time to be an extravagant number for a court. On Election Day, the Court's website only received about two thousand hits. This number almost certainly was suppressed by the obvious distractions of November 7, but a few thousand hits a day was the norm.

Less than two weeks later, demand rocketed far past capacity, into the tens of millions. Our website began to falter, and our Information Systems department was forced to find a better solution. It did so by purchasing additional Internet

5. Julian M. Pleasants, *Hanging Chads: The Inside Story of the 2000 Presidential Recount in Florida* 103 (Palgrave Macmillan 2004) (reporting interview with Lucy Morgan).

capacity from a company in the relatively new industry of “content delivery networks,” which can reroute Web traffic automatically from a beleaguered site to other backup servers around the nation and the globe. In essence, these networks create a large number of duplicate websites in diverse locations and reroute users to those that they can reach most quickly. This had the added benefit of moving Web traffic away from the main Tallahassee Internet hub, which itself was becoming snarled, much as cell-phone service in town became less reliable during the controversy.

With this expanded capacity, the Court’s website became an unprecedented phenomenon in its own right. For starters, attorneys and parties in the appeals quickly learned they could obtain new filings from the site before they were served with official copies a day or more later, giving everyone more time to prepare. And by the time arguments began on December 7, 2000, this system was delivering electronic copies to anyone on earth with Web access. Ordinary people no longer had to rely entirely on the news media, but could access the full record themselves and make their own conclusions. A considerable number e-mailed or wrote letters to the Court saying how much they appreciated not being confined to the “media filter” in reaching their own opinions about the meaning of these historic events.

Reporters also found that the website changed many of their assumptions about working on the ground in Tallahassee. Web distribution of all documents not only made geographic proximity to the Court irrelevant; it unexpectedly converted working at the scene into a liability. After our photocopier meltdown, far fewer reporters even bothered to stop by the front steps of the Florida Supreme Court to pick up paper copies. Their editors in New York, London, Moscow, or Tokyo typically obtained Web copies and broadcast the news before reporters standing in line in Tallahassee could even get the paper in hand.

High technology thus had become an information bridge from inside the Florida Supreme Court, past its locked doors, somersaulting over the daunting crowds outside, linking directly to the public and the press. Nothing like this had ever happened in a judicial proceeding of such importance to world history.

Most crucial of all was the use of television to broadcast Florida Supreme Court oral arguments live in their entirety. Clearly unaware of the long history of cameras in Florida's courts, some media outlets lavished praise on the Court as though the practice were a novel invention. Thus, the Philadelphia Inquirer already had characterized televised arguments in the presidential cases as "a model of civility, decorum and reasonableness." The Boston Globe had noted that the questions posed by the Florida Justices "were a refreshing contrast to the propaganda barrages of both campaigns."⁶ Echoing this view, one commentator had called the international broadcasts "unprecedented" and added:

Rather than hear the usual day-after-day political spinning from both camps, the public would see extended colloquies between judges and lawyers, in a surrounding where respectful and temperate arguments replaced the more familiar cacophony of overheated accusations.⁷

Another noted that "it was impossible not to be impressed by [the] dialogue in the court."⁸

None of the media noted how this became possible: By December 2000, the Court had owned its own cameras for three years and operated them through a recurring contract with the Communications Center of Florida State University (FSU), another state entity. Few even realized that these broadcasts were managed by the Office of Public Information and financed through its budget at a total annual cost of \$149,000.00 in 2000.⁹ Thus, no other broadcast cameras entered the courtroom during any arguments in the presidential election cases, contrary to the assumptions made by a number of journalists and the public. Inside the courtroom, many people did not even see the four robotically operated cameras. Each was only a few inches in

6. Howard Gillman, *The Votes That Counted* 63 (U. Chi. Press 2001) (quoting Editorial, *Rational Justices*, Bos. Globe—online edition A14 (Nov. 21, 2000), & Editorial, *Justices Behave Better Than Candidates' Camps*, Phila. Inquirer—online edition (Nov. 21, 2000)).

7. *Id.* at 59.

8. David A. Kaplan, *The Accidental President* 140 (William Morrow 2001).

9. By early 2008, the annual cost had dropped to \$135,000.00 for approximately 150 hours of live air time, not counting rebroadcasts. This number includes all oral arguments and all ceremonial events in the courtroom, including investitures, the inauguration of new Chief Justices, and the twice-yearly swearing-in of new attorneys.

height, two recessed into the wall behind and above the bench, and two placed atop half-pillars near the rear of the courtroom. They looked no different from standard closed-circuit security cameras.

So, when the clock showed 10:00 a.m. on December 7, 2000, the test pattern flowing up to the satellite and on to the world dissolved. It was replaced by the live scene of the Marshal intoning the traditional oyez. Chief Justice Charles T. Wells then called the only case of the day, styled *Albert Gore, Jr. v. Katherine Harris*.¹⁰

With that, millions of viewers sat down to watch what would become only the second appellate oral argument in history to be broadcast live from start to finish on all the world's major networks. The first had occurred only days earlier, on November 20, 2000, in the same courtroom in a separate appeal also arising from the 2000 presidential election dispute. To this day, there have been no other appellate arguments in history broadcast live, gavel-to-gavel, on a global basis. It was one of the many unique aspects of Florida Supreme Court operations that were only brought to widespread knowledge by what one commentator described as the "ridiculously implausible"¹¹ events of Election Day 2000.

It is nearly impossible to imagine a court news story bigger than this, nor one in which broad worldwide transparency was achieved by court officials rigorously managing and sincerely cooperating with the media.

II. CAMERAS IN THE COURTROOM

What was happening in the Florida Supreme Court that day was especially remarkable in light of the preceding sixty-

10. This case eventually generated several opinions. See e.g. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000), *rev'd sub nom Bush v. Gore*, 531 U.S. 98 (2000) (holding, on December 7, 2000, that the trial court had erred in refusing to examine ballots that registered as non-votes during the machine count, and in refusing to include votes previously identified during manual recounts); *Gore v. Harris*, 773 So. 2d 524 (Fla. 2000) (holding, on December 20, 2000, that awarding the relief sought by Gore and Lieberman was impossible because there was insufficient time in which to develop manual recount standards that were adequate to avoid an equal protection violation).

11. Gillman, *supra* n. 6, at 1.

five-year history of cameras in the courts. What Florida's highest court had done for years prior to the disputed election was to develop a method of managed cooperation with the press that stood in stark contrast to earlier skepticism of court and media relations. It did so through an understanding that communications technology was changing so rapidly over time that assumptions made more than six decades ago were no longer valid. The Florida Supreme Court's single greatest leap—one that led directly to the transparent way it handled the 2000 election cases—was to grasp what few had noticed as the 1990s progressed: Communications technology was becoming so inexpensive that courts could own and operate it themselves if the staff involved were properly trained and managed.

To understand how Florida reached this point requires a review of why cameras fell into disfavor some sixty-five years earlier and how they finally found their way back into at least some of the nation's courtrooms.

The problem began in 1935 when a New Jersey appeals court reviewed a key issue of concern in Bruno Hauptmann's conviction for the murder of aviator Charles Lindbergh's baby. The court described what it apparently viewed as the correct relationship between courts and the press when it found no error in the much-criticized actions of the media at trial. "If the result of an important murder trial is to be nullified by newspaper stories and radio broadcasts, few convictions would stand," the court found,¹² notably failing to mention the egregious details. But this permissive approach to media coverage was in keeping with earlier high-profile cases, such as Tennessee's infamous 1925 Scopes Monkey Trial.¹³

That view soon would change. By 1937, the American Bar Association recoiled in disgust from the *Hauptmann* news coverage, proposing a new canon of ethics barring photographic and radio media from America's courtrooms. The federal courts and most state courts soon adopted the new canon and, with a few exceptions, the concept of the ban became judicial scripture for decades to come. In lockstep, appellate courts wholeheartedly embraced the concept despite possessing greater

12. *N.J. v. Hauptmann*, 180 A. 809, 828 (N.J. Err. & App. 1935).

13. *See Scopes v. State*, 289 S.W. 363 (Tenn. 1926).

means of controlling media than did trial courts and lacking any worries about prejudicing juries. In 1952, no serious opposition arose when the infant medium of television was added to the courtroom ban. Thus began the decades of mutual suspicion that has haunted court and media relations into the twenty-first century.

There certainly was reason for concern following the Hauptmann trial. About 700 writers and about 130 still and newsreel camera operators were on hand at the New Jersey courthouse, and some clearly violated the rules laid down by the judge. The most serious was that a pool newsreel camera continued to film during actual court proceedings, even though the judge—apparently not realizing what was happening in his own courtroom—already had prohibited this practice. When the truth came out, the trial court withdrew its permission for the use of any cameras. Even then, at least one journalist, using a concealed camera, took a surreptitious photograph of Hauptman as the verdict was pronounced. What mattered most, however, was the public perception of how the trial was handled, and it was uniformly bad.¹⁴

But consider how this sorry state of affairs occurred. It was not merely that the technology of the day was primitive, expensive, and cumbersome. More to the point, the judge had lost control of what was happening in the courtroom, specifically what the media were doing. Perhaps no thought was even given to the possibility that management methods could be developed that balanced the right of a free press contained in the First Amendment with the right to a fair trial guaranteed by the Sixth Amendment. To be fair, a judge—whether at trial or on appeal—cannot reasonably be expected to divide time between sitting in judgment and managing the media. Nor can journalists be expected to police themselves while they are competing for news. There might have been a middle ground even in the 1930s, but it was not found.

Instead, the reaction to the *Hauptmann* case was swift and sweeping. New Jersey's entire concept of court and media relations was condemned by the ABA's euphemistically named

14. Richard B. Kielbowicz, *The Story behind the Adoption of the Ban on Courtroom Cameras*, 63 *Judicature* 14, 14 (June-July 1979) (noting that the photographers stationed outside the trial "caused the commotion that led to a total ban on courtroom photography").

Special Committee on Cooperation Between Press, Radio, and Bar. Rather than cooperation, it proposed an outright ban of electronic media from America's courtrooms. Its proposal was contained in what then was called Canon 35 of the code of judicial ethics.¹⁵ This marked the first time that the American bench and bar had comprehensively reconsidered earlier assumptions about public trials in light of communications technology that had emerged in the late nineteenth and early twentieth centuries. Most significantly, the concept of making court proceedings transparent to the public using emerging technology was discarded as unworkable. A fair trial now meant strict limits on media access; a public trial meant that journalists must use the same technology that existed when the Bill of Rights was adopted in 1791.

The era of the courtroom technology ban had begun.

III. NEW TECHNOLOGY, NEW TRANSPARENCY

The legacy of the Lindbergh murder trial remains to this day in many jurisdictions and in appeals courts that keep electronic media under tight restraint.¹⁶ Indeed, that legacy was not seriously questioned until the Supreme Court in 1965 stopped just short of supplying a constitutional basis for Canon 35.¹⁷ The plurality opinion in *Estes v. Texas*, read in light of the concurring opinions, did in fact find a violation of the right to a fair trial caused by unrestrained and excessive media access. Yet it premised that holding on a violation caused in part by an obvious lack of controls placed on the media, much as had occurred in the Hauptmann trial. Television crews reportedly had put a dozen cameras in the courtroom with cabling spread across the floor, and with microphones near the jury box.¹⁸ The *Estes* Court also found fault in the clumsy intrusiveness of

15. See *In re Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764, 770 (Fla. 1979) (summarizing history of Canon 35).

16. See e.g. Robert L. Brown, *Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts*, 9 J. App. Prac. & Process 1, 14 n. 72 (2007) (noting that although Justice Brown himself "champion[s] the webcasting of oral arguments before the Arkansas Supreme Court, the matter is only in the early discussion stage at [his] court").

17. *Estes v. Tex.*, 381 U.S. 532, 535 (1965).

18. *Id.* at 536.

media technology in that day, especially television.¹⁹ It further noted that future advances in the technology could result in a different outcome if they eliminated the “present hazards to a fair trial.”²⁰ Nevertheless, *Estes* prompted Texas to adopt the ban, leaving Colorado as the lone state allowing a limited form of camera coverage.²¹

After *Estes* failed to anchor Canon 35 in the Sixth Amendment, judicial officers struggled with an increasingly obvious criticism: Courts in that time and in all the years before simply had no idea of how to cooperate with media to reduce the sorts of problems that kept arising, and the ban did nothing to correct this situation.²² Apart from an occasional judge or clerk talking off the record, there was no one to help reporters understand what was happening, so the result was predictable. A vicious cycle was in play: Courts largely refused to talk to reporters and tried to limit newsgathering, increasing the likelihood that news reports would contain errors, which prompted courts to distrust the media all the more. Reporters perceived this as open hostility and reacted accordingly. There was no one to break the cycle. In fact, the very idea of courts having skilled communications directors—now usually called court “public information officers” (PIOs)—had not yet been conceived. As a rule, any “official” media relations were handled by the clerks’ offices on a minimalist basis.

As the relationship between courts and media evolved in the last decades of the twentieth century, many courts began to see that the premise underlying the post-*Hauptmann* ban was not sound. Courts were at fault, too, and perhaps more so than the media. After all, judges have absolute control over their own proceedings. In the 1970s, it became clearer that courts could accommodate the increasingly less obtrusive broadcast technology available to deliver information from the courtroom

19. *Id.* at 544, 548 (noting that “[t]elevision in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice,” and pointing out that “the circumstances and extraneous influences intruding upon the solemn decorum of court procedure in the televised trial are far more serious than in cases involving only newspaper coverage”).

20. *Id.* at 540.

21. *Post-Newsweek*, 370 So. 2d at 787.

22. Most reporters then—like most reporters today—typically had little if any training in the law. That is a reality courts can never change.

to the public, even if someone else owned that technology. And as new management techniques were developed in business colleges, people began to see that it might be possible to adapt them to the task of media management—and do so in a way that actually reconciled the competing interests. These new management concepts likewise implied the need for courts to have PIOs to oversee ongoing media relations.

Simultaneously, the advent of new media like the rise of the Web in the 1990s caused the price of communications technology to plummet as the ease of public access to information mushroomed. This led inexorably to a startling idea: In the twenty-first century, it would be possible for the judiciary to own and control the technology that delivers information from the courtroom to the public. With that, the core reason for the post-*Hauptmann* media ban vanished, most especially at the appellate level. Courts now could ban privately owned technology and replace it with their own. Control and transparency no longer were mutually exclusive. Judges now had the means to make their proceedings widely available to the public while also controlling the technology that made this possible. Appeals courts in particular could provide as much access as they wanted.

And this evolution of events ultimately led to the Florida Supreme Court's move toward the technological transparency that would later be on full display in *Bush v. Gore*, twenty-five years after the Court began its first official experiment to explore the emerging possibilities.

IV. THE FLORIDA EXPERIMENT

A. Historical Background

In May 1975, the Florida Supreme Court began issuing a series of unusually prescient orders and opinions that questioned the old Canon 35 by calling for an experimental program allowing broadcast and photographic media into state courts. The idea immediately galled a large majority of Florida trial

judges, who let their displeasure be known.²³ Proceeding cautiously, the Florida Supreme Court at first ordered that the experiment be conducted only in the trial circuit that encompassed Florida's capital city. It also required the parties' consent.

None would give it.

Undaunted, the Florida Supreme Court in 1976 ordered an expansion of the territory in which the experiment would be conducted. Once again, the consent of all parties could not be obtained in a single case. Many in the legal community urged the Court to recognize the experiment as a failure and drop it.

The Court refused.

Instead, the Florida Supreme Court doggedly pressed on, and pressed hard. In April 1977, it ordered that the experiment be expanded to all the courts of Florida, trial and appellate, and further added that consent of the parties or judge was no longer needed. Instead, the Court issued a detailed list of standards that the media had to observe and the presiding judges had to enforce.²⁴ The most noted trial televised during this period was the 1977 criminal case against Ronny Zamora. His attorney contended that he had killed an elderly neighbor only because of mental illness induced by watching too much violence on television—the so-called “TV intoxication” defense.²⁵ With this broadcast, Florida moved into the vanguard of states trying to find a way to put cameras in its courts without jeopardizing the rights of anyone involved.²⁶

At the conclusion of the experiment, the conference representing Florida's primary group of trial judges—the state circuit judges—conducted a survey of its members, and later, the Office of the State Courts Administrator²⁷ surveyed all non-

23. The Florida Supreme Court later said that “the overwhelming majority of trial judges . . . [were] generally unsympathetic to the experiment.” *Post-Newsweek*, 370 So. 2d at 767.

24. *Id.* at 783-85 (reprinting as an appendix to the opinion the required standards).

25. Marjorie Cohn & David Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* 22 (Rowman & Littlefield 2002).

26. For a 1979 survey of state approaches to cameras in the courtroom, see David Graves, *Cameras in the Courts: The Situation Today*, 63 *Judicature* 24 (June-July 1979), and for a more recent survey, see Brown, *supra* n. 16.

27. The OSCA assists the Chief Justice in administering Florida's statewide unified courts system.

judicial participants including jurors, witnesses, attorneys, and court personnel. The results belied longstanding assumptions about the impact of media activities in courts. Foremost, attorneys and court personnel reported that the presence of cameras only slightly encouraged lawyers to “grandstand.” While jurors and witnesses reported a slight increase in nervousness due to the cameras, they also reported feeling slightly more responsible in fulfilling their roles. Most of those responding reported that they felt cameras had no effect or only a slight effect on the dignity of the proceedings.²⁸

In fact the only surveyed group in which a significant minority opposed the experiment was judges. Yet, of the Florida judges who actually had cameras in their courtrooms during the experiment, about ninety percent reported that “jurors, witnesses, and lawyers were not affected in the performance of their sworn duty in the courtroom.”²⁹ In particular, all of the participants in Ronny Zamora’s trial, from the judge to the jurors and the defense attorney, reported that televising the proceedings had few negative impacts and a great many positive ones.³⁰ Finally, the Florida Supreme Court gave its assessment of the impact of the cameras in its own courtroom during the experiment: “[W]e found absolutely no adverse effect upon the participants’ performance or the decorum of the proceedings,”³¹ it concluded.

Based on these reports, the Florida Supreme Court ended the experiment by making it a permanent feature of state procedural law, through a far-reaching change to its version of Canon 35.³² It created what arguably was, and what arguably remains, the nation’s broadest rule allowing cameras into courtrooms. Under the Florida Supreme Court’s rule and later case law interpreting it, a presumption was created that cameras would be permitted provided they followed the minimum standards, as later amended. No permission of the parties, the

28. *Post-Newsweek*, 370 So. 2d at 768-69.

29. *Id.* at 776.

30. Cohn & Dow, *supra* n. 25, at 23-24.

31. *Post-Newsweek*, 370 So. 2d at 769.

32. By this time, Florida’s equivalent canon was number 3A(7). This canon was later transferred from the Florida Code of Judicial Conduct to the Florida Rules of Judicial Administration, in which it is currently numbered as Rule 2.450.

judge, or anyone else was required. Cameras would be automatically barred exclusively in certain well defined categories of cases, such as juvenile proceedings. They could be excluded or restricted in others only upon an adequate showing of harm by the party moving for relief, after providing the media's lawyers an opportunity to be heard. Even the filming of jurors was not usually restricted.

All of this was upheld by the United States Supreme Court in *Chandler v. Florida*,³³ which found that the mere presence of communications technology—without more—did not violate due process. Though *Chandler* chiefly was concerned with balancing the rights to a free press and a fair trial, it also implied another conclusion: Banning cameras in appellate arguments posed no risk of a due process violation, because there was no jury and no trial to taint.

As the years passed after 1979, any support for closing Florida state courts to cameras evaporated. The issue rarely comes up today. Floridians often speak of a culture of openness that pervades official actions of state government, a concept reaffirmed when voters enshrined it in the state Constitution in 1992.³⁴ In fact, the openness of the state's courts has become so engrained in Florida law and tradition that its citizens take it for granted as much as people from other states or nations misunderstand it. Reporters who came from around the world after Florida's 2000 presidential election often were astonished to find that every court proceeding and quasi-judicial hearing in the numerous cases was open to cameras. And they were amazed to find that the Florida Supreme Court's policy toward the media was not one of just openness, it was one of active outreach to the press.

To explain how this policy came into being requires a jump forward from the 1979 camera rule's adoption to the 1990s when the Florida Supreme Court began preparations for another unprecedented event—the state's first inauguration of a new Chief Justice to which the public and the press were invited. This unusual degree of openness presaged much that would

33. 449 U.S. 560, 583 (1981).

34. Fla. Const. art. I, § 24.

follow, most especially how the appeals in *Bush v. Gore* would be handled.

B. Chief Justice Kogan's Access Initiative

Florida's high court operates under an unwritten assumption that its new Chief Justice will be elected from its members every two years based on seniority: The most senior Justice who has not yet held the office normally becomes the next Chief Justice. However, the exact order of succession is not assured until the next election actually takes place, usually about two or three months before the new Chief Justice takes office. This inherent uncertainty in the succession was completely eliminated for a time by a series of unusual events that began in 1993. That was when President Bill Clinton nominated Florida's first female Chief Justice, Rosemary Barkett, to the United States Court of Appeals for the Eleventh Circuit. After her confirmation and departure from the Court in late April 1994, roughly two months remained in her term as Chief Justice.

In an unusual move, the Florida Supreme Court decided to divide these two months between the next two most senior members, Justice Stephen H. Grimes and Justice Gerald Kogan. This extended each of their terms from the usual twenty-four months to twenty-five, but it also marked an extraordinarily early confirmation that Kogan in fact would become Chief Justice more than two years later on June 1, 1996. There was significance to this fact. The custom of choosing Chief Justices based on seniority had been broken several times, most recently in the 1970s. It was not resumed again until 1984, less than a decade earlier. Kogan would never face the uncertainty his predecessors did, giving him a full two years to plan.

These events might have become little more than Florida Supreme Court trivia except for the fact that the tenure of these three Chief Justices encompassed the defining years of Florida's pioneering, comprehensive foray into high-technology communications and outreach to the media.

It had begun even before Barkett left the Court. In early 1994, she approved a request by the Office of the State Courts Administrator to place a small collection of pages on a new medium still virtually unknown to the public: the World Wide

Web. From the start, this was a limited website dealing solely with issues falling within the purview of the State Courts Administrator, who helps the Chief Justice run Florida's unified state courts system. There is reason to believe this was the first judicial page ever placed on the Web, though final proof is impossible to find. Much of the early history of the burgeoning Internet was lost simply because, in its infancy, no one took it seriously enough. Though these first webpages were primitive by today's standards, they marked the beginning of the Florida Supreme Court's unbroken presence on the Internet.

After Grimes became Chief Justice, he approved a request from two other Justices³⁵ to create a separate website collection dedicated solely to information about the Florida Supreme Court itself. Responsibility for creating and maintaining this new website was assigned to Justice Kogan's legal staff, specifically to me. This was done in part to guarantee continuity when Kogan became the next Chief Justice and partly because I was one of only two or three people on the payroll who understood how to create webpages. That was how I became the Florida Supreme Court's first webmaster in 1995, which was, of course, just before the Internet began the great expansion that would make it by the late 1990s the world's newest and most flexible major communications medium. So, when Kogan became Chief Justice in 1996, the Court's new website was well established and growing daily.

In another unusual move, Kogan announced the major policy initiative of his administration shortly after being named Chief Justice-elect by his colleagues. He called it the Access Initiative, and its goal was to improve public and media access to the state courts.³⁶ Based on two years of study, the Access Initiative was rooted in reports and surveys by the Florida Judicial Management Council, which Kogan had chaired even before becoming Chief Justice. Among the problems identified by the Council were a widespread lack of understanding about what courts do, the wholesale abandonment of civic education as

35. These were Grimes's successor as Chief Justice, Gerald Kogan, and the dean of the Court, Justice Ben F. Overton.

36. For a discussion of the Initiative, see Robert Craig Waters, *The Future of the Florida Judiciary: Chief Justice Gerald Kogan's Access Initiative*, 71 Fla. B. J. 28 (May 1997).

the Cold War ended, and the massive failure of courts to assist the one group that reached the most people—the media. Kogan’s decision to open his inauguration to the public and the press was thus only the first in a series of access-related projects that he put in place during his two years as Chief Justice.

For starters, he named the first court PIO in Florida Supreme Court history, a job that broadly entailed daily management of his Initiative, and he assigned that responsibility to me. One of my first efforts was outreach to the press. I invited reporters from the state capital press corps to meet with me personally or by phone to discuss how the Court could better help them in their jobs. The complaints I heard were virtually the same from one news organization to the other. One stood out: For years, reporters said, the Court had charged them a dollar per page for photocopies of briefs and other material in case files and made them come to the clerk’s office to obtain and pay for them. One reporter put it bluntly: She knew we were receiving at least some of the attorneys’ briefs in electronic format under a voluntary program established years earlier by Chief Justice Barkett, who thought the Justices should be able to read briefs from laptops due to their busy schedules. “So why not put them on your website?” the reporter asked.

As a former Tallahassee capital reporter myself, I thought the question a very good one. So, I looked into the matter and was startled by what I found: Business as usual really did not make much sense as the technology had changed. There indeed was an old state statute approved in the days when photocopying was still new and expensive. It required every clerk of court in the state to charge a dollar per page for any material photocopied from a court file. Our clerk’s office actually disliked the task of making photocopies and handling payment, because it took so much time from regular duties. Moreover, the statute was silent about providing electronic access to the same documents. In fact, it made no sense to charge for copies posted on our website. The act of placing them on line took only a few minutes per document at most and was easily automated. Once they were on line, all the work and cost in viewing or printing the files was up to the end-users. At the time, their numbers were not large.

The result was that, shortly after Kogan became Chief Justice, the Court's first "Press Page" was added to its website collection. In its earliest incarnation, the Press Page contained the briefs only in cases scheduled for oral argument. But over time, the material would expand greatly. Kogan soon authorized me to prepare press summaries providing a basic neutral explanation of each oral argument case along with other useful information, such as the city or county of origin. This was an unmistakable break with a longstanding Court tradition providing that no one was allowed to talk about pending cases, even if only to say what the facts and issues were. In time we found that the press summaries increased both the accuracy and frequency of reporting on these cases.

But the innovations did not stop there. All high-profile case materials were soon added as Florida's increasingly diverse population turned ever more litigious, sending more and more controversial cases to its highest court. Detailed reference material was added to help answer the most frequently asked questions. It rapidly became obvious that, with each improvement in electronic media access to information, reporters came to trust the Court more and to produce more accurate and timely news stories. One of the great ironies is that the Office of Public Information's roots were firmly planted in the Internet two years before the office was formally created in 1998. With most other courts, it was the other way around.

Over time, I expanded the Press Page whenever reporters brought a valid complaint about any obstacle that limited their access to Supreme Court information or when I saw a recurring problem that caused reporters to inaccurately report official acts. It makes little sense to adhere to a longstanding practice that now is creating widespread mischief.

1. An Example: The Florida Supreme Court, the Judicial Qualifications Commission, and the Press

The most instructive of the situations in which change became imperative involved judges accused of ethical misconduct. Under Florida's Constitution, the state Supreme Court is the sole body that can discipline state judges for ethical misconduct other than the legislature through its cumbersome and seldom-used impeachment power. Impeachment almost

always resulted in acquittal even when a judge's misconduct was flagrant. So, in the 1960s, the voters had approved a constitutional amendment creating an independent Judicial Qualifications Commission (JQC) that could recommend discipline, with the Supreme Court having the final say in imposing it.³⁷

But the entire JQC process was so arcane and counterintuitive that it became a frequent source of error-ridden news stories, or worse. Over time I became concerned with repeated news reports and editorials suggesting that the Florida Supreme Court was somehow helping cover up for wayward judges. Why would reporters think so, when I knew it was not true? One thing was clear. This sort of pattern almost always means that the problem has arisen at least in part from the Court's own method of operations.

Looking into the matter, I discovered that reporters simply were not finding out about these JQC cases in a timely manner. Reporters did not find out for days that formal charges against a judge had been filed. To them, this looked suspicious. Journalists also labored under serious misunderstandings caused by the JQC's easily misinterpreted rules. A major source of the negative news stories was the fact that the JQC, having very limited resources of its own, had used its independent rulemaking authority to designate the Florida Supreme Court Clerk as the custodian of its public records. This gave reporters the incorrect impression that each ethics charge was directly pending before the Court, when in fact the Justices are constitutionally powerless to act until the JQC makes its final recommendation. In this sense, the JQC acts somewhat like a prosecutor bringing to court whatever charges are deemed appropriate—except here, the prosecutor routinely files investigative papers with the court even before final charges are approved. This was indeed counterintuitive. And the infrequency of JQC cases—at most four or five a year—added to the lack of institutional memory in a press corps noted for its high turnover.

The solution was simply to expand the Court's Press Page yet again. A new JQC Webpage was added that included a

37. See Fla. Const. art. V, § 12.

detailed set of “Frequently Asked Questions” along with all filings in pending investigations and in cases submitted to the Court for final action. Archives of earlier files also were added later. So, the public and the press can readily find a complete file on current and past misconduct charges. To make sure that members of the media did not come to the story late—and angry—I began notifying the press corps of all new electronic filings in the pending JQC cases as soon as they were added to the website. Notification at first was by facsimile machine only to the capital press corps, though this process quickly shifted to e-mail sent out to a long list of all interested media. Over the years, an RSS feed³⁸ was added so that not only the press but the general public and the legal community can receive rapid notification of Florida Supreme Court news developments. This feed was quickly picked up by Google’s world-wide “News Alert” system,³⁹ adding further redundancy to the public notices of newsworthy developments at the Court. Eventually, the Court would make the filing of all case documents mandatory with few exceptions, and it did so specifically so they could be put on the Website.

It deserves emphasis that all of this began at the behest of the media. To meet their needs, immediate posting to the Website followed by rapid notification became the standard model for all new material added to the Press Page. Though reporters were the intended beneficiaries, the Press Page quickly drew a much larger audience. Attorneys discovered it early and began to use it as a resource to follow similar-issue cases and even to find examples of briefs they could use as models in

38. “RSS” is the acronym for “rich site summary” or its techie version, “really simple syndication.” It differs from e-mail notification in that end-users can install special free software on their own computers or use a feature of Outlook 2007 (and later versions) that will automatically check for new developments announced by the Office of Public Information. Users literally can subscribe or unsubscribe themselves without any further involvement by the Court or its staff. For this reason, RSS is called a “pull” technology whereas e-mail is a “push” technology. The bottom line is that RSS imposes far less workload on the Office than maintaining an e-mail list does. More information on the Court’s RSS Feed is available at http://www.floridasupremecourt.org/pub_info/rss.shtml (accessed Feb. 26, 2008; copy on file with Journal of Appellate Practice and Process).

39. Google News Alerts allow anyone to fill out a simple form so that they will receive customized e-mail alerts about news items containing particular key words or phrases. This service is very flexible and permits users to specify how often they want to be notified and what categories of source material they want included, which can include blogs.

writing their own. Later, the public around the globe would discover the Press Page in a case involving Florida's notorious malfunctioning electric chair. But that would come after Chief Justice Kogan's administration had ended. There still were more innovations he would put in place before leaving office and retiring on the last day of December 1998.

2. Another Example: The Florida Supreme Court, Florida State University, and the Advent of Live Video

The second most notable Kogan project—and one that put in place the technology underlying the *Bush v. Gore* broadcasts—grew out of a meeting soon after his inauguration. FSU's President, and former ABA head, Talbot D'Alemberte came calling with an idea that he thought fit squarely within the Access Initiative. At the start, the project was fairly simple: D'Alemberte wanted to put live audio of Florida Supreme Court oral arguments on the Web. At the time, Realplayer had developed a viable technology (called "streaming") for broadcasting audio in real time to anyone with Internet access, some free software, and a computer with speakers. Some courts already were experimenting with it. Kogan quickly agreed to authorize the broadcasts if D'Alemberte could find start-up funding. As for the details, both the Chief Justice and the FSU President left those to staff. That was the beginning of a truly remarkable collaboration. Those of us working on the project had no idea at the time how far and how fast the constantly changing technology would take us.

Work began in earnest in the fall of 1996. But at every turn, the technological landscape shifted. Between our first meeting and the time the Legislature funded the project, Realplayer finally had perfected a workable method of streaming video with synchronized audio, meaning the Internet could act something like a cable television connection. We shifted gears and began looking at the possibility of buying robotic cameras to install in the courtroom. Even then, we fully understood how limited "Webcasting" was—and it remains so today. With the money we anticipated receiving, the Court would only be able to provide Internet video to a few hundred viewers at a time. Then as now, the quality of the Web video would be erratic and far below broadcast quality, sometimes

failing altogether in mid-broadcast. Our courtroom video feed would never be usable by television news or cable networks, and it certainly would never be a “mass” medium. Or so we thought.

D’Alemberte’s staff was the first to discover just how wrong our assumptions about video had been, though for an utterly unexpected reason. It turned out that the State of Florida through its education budget had actually bought a satellite transponder some years earlier, earmarking it for distance-learning programs. This meant the state already owned the one crucial and most expensive⁴⁰ asset that could enable us to feed broadcast-quality video and audio to anyone with a satellite downlink dish. Television news departments and local cable systems were only the most notable. Instead of a few hundred viewers, a satellite transponder could reach untold millions—a fact that likely will remain unchanged for many years to come. The implications of this discovery would change the entire nature of our project: FSU’s Communications Center already had satellite uplink dishes, so if we could connect our video and audio to their dishes, the Florida Supreme Court could indeed become an “elegant television studio.”

In the next weeks, staff cobbled together a broad outline of the new proposal. We would need broadcast-quality robotic cameras installed in the courtroom and connected by fiber optic cable to the Communications Center at FSU. Architectural modifications would be needed to recess the cameras into unobtrusive niches. And the cameras, in turn, would be controlled by FSU staff and communications students from inside an old electrical room at the top rear of the courtroom, which would be converted into a control booth invisible to anyone on the bench or in the well or gallery. We priced the four cameras at a total of about \$110,000.00, though their replacements seven years later would cost half as much because technology prices continued to fall.

Webcasts were still part of the plan, so we would need to arrange for the video feed to be split and connected into a computer server that could stream the same signal in Realplayer’s video and audio formats. In addition, all of the Webcasts would be archived for round-the-clock access

40. The transponder reportedly cost the state \$12.8 million. Lucy Morgan, *Supreme Court to Get Trial Run on State Channel*, St. Petersburg Times 5B (Sept. 16, 1997).

anywhere the Internet was accessible. The total start-up costs came to about \$300,000.00, which D'Alemberte was able to obtain in the form of a one-time legislative grant. The Court threw in an additional \$50,000.00 for the needed architectural modifications.

Most crucial was the satellite, and it was here that our evolving plans hit their only serious roadblock. As it turned out, the Florida Distance Learning Network Board controlled the satellite transponder, but it had largely turned management over to a private Boston company that leased air time for as much as \$800.00 an hour, chiefly to news and sports networks.⁴¹ In return, the company received a percentage of the lease amount as its fee. Unsurprisingly, it opposed giving free air time to the Florida Supreme Court or to any other state office. It also swayed a significant number on the satellite board to the same view, a strategy that soon backfired in a most ironic way: Some members of the satellite board announced opposition to giving free air time to the Legislature, the branch that had created and funded the board, and more to the point, the branch that had bought the transponder.

These shenanigans over the state's "educational" satellite quickly drew serious criticism from the press, becoming a spectacle the Legislature had little use for. Chief Justice Kogan's request for free time on the state satellite already had languished for weeks, and in September 1997, he decided to appear personally to make his case before the reluctant satellite board. The Court's first satellite broadcasts⁴² were planned for November, just weeks away, and everything was in place except the satellite. Despite growing scrutiny from the press and unhappy legislators, the board still seemed unlikely to muster the unanimous vote required by its rules to waive the usual fee. Only intervention by a key state senator prompted the board on September 15, 1997, to grudgingly give the state Supreme Court a "one-month" trial in November 1997.⁴³

41. When questioned by reporters, the company would not absolutely rule out past or future leases to adult entertainment networks like the Playboy Channel. *Id.*

42. Our plan was to phase in broadcasts over a three-month period. The first broadcast in September 1997 would be run solely on a local cable access channel controlled by FSU. Webcasts would begin in October 1997, and satellite broadcasts the next month.

43. Morgan, *supra* n. 40.

That was all Kogan needed. Statewide response to the broadcasts was so positive that the trial period was first extended and then made permanent. Soon, the oral arguments would be added to the normal roster of programming fed statewide via this satellite to cable systems through the newly created Florida Channel, which rapidly became Florida's version of C-SPAN.⁴⁴

The second of the major technological elements was now in place at the Florida Supreme Court. But their debut on a world stage would come a year before *Bush v. Gore*. Something in 1999 would catch the world's attention in a most unusual way.

3. A Third Example: "Old Sparky," the Florida Supreme Court, and the Worldwide Reach of the Web

In the 1990s, Florida developed the ignominious distinction of having the world's least reliable method of execution—a malfunction-prone electric chair nicknamed "Old Sparky." The first bungled execution came in May 1990 when flames unexpectedly danced around the head of death-row inmate Jesse Tafero once the electric switch was thrown.⁴⁵ State officials assured the public that it was one-time human error: Someone had replaced the natural saline-soaked sponge in the headpiece with an artificial sponge. Unable to carry electricity efficiently, the synthetic material had promptly caught fire. It would never happen again. Or at least not for seven years.

In March 1997, it was Pedro Medina's turn in the fickle chair. Once again, the power surged, and fire and smoke erupted around his head. Officials later contended that, this time, the fault lay with a sponge insufficiently soaked in saline. Though every court hearing the case would uphold Florida's chosen execution method once again, a strong voice of dissent arose from Florida Supreme Court Justice Leander J. Shaw, Jr. He described Old Sparky as "a home-made affair, fashioned by inmates on-site from a single oak tree."⁴⁶ It was "jerry-built,"

44. The Florida Channel was yet another FSU project spearheaded by D'Alemberte.

45. See *Buenoano v. State*, 565 So. 2d 309 (Fla. 1990) (describing circumstances of Tafero execution).

46. *Jones v. State*, 701 So. 2d 76, 82 (Fla. 1997) (Shaw, J., dissenting) (footnote omitted).

with the leg electrode “haphazardly constructed from an old Army boot and other spare parts.”⁴⁷ In sum, Shaw argued, it was cruel, unusual, and unconstitutional.⁴⁸ Two other Justices agreed, splitting the Court four-to-three.⁴⁹ Old Sparky had barely survived.

Justice Shaw was more determined when the electric chair malfunctioned in a quite different manner two years later on July 8, 1999. Inmate Allen Lee Davis, who weighed some 350 pounds, had been tied into the chair with a leather head strap so tight it severely compressed his nose. Human error again? Perhaps, but the result was a profuse nosebleed that most likely began before the voltage first hit him. Because Davis’s head was shrouded in a hood, however, none of the witnesses noticed until the blood ran all the way down to his white shirt and grew into a crimson stain the size of a dinner plate. Some thought he was bleeding from the chest as electricity passed through his body. By sheer chance, an inspector general’s employee was present with a camera and took eleven photos of the body still strapped in Old Sparky. No one knew at the time, but these macabre pictures eventually would prove to be the electric chair’s undoing.

Up to this point, the Florida Supreme Court had never before been at the center of a news story attracting global attention mainly over the Internet. Few courts had, as the Web was still quite new. Now things would change. Events accelerated rapidly as the Court stayed a pending execution, petitions flooded in from Florida’s death row, and the international press began to focus on Florida’s loyalty to Old Sparky. Reporters quickly discovered the execution photographs and obtained copies of them under Florida’s broad public records laws. To no one’s surprise, newspapers and television stations refused to publish or broadcast them. The pictures were just too gruesome.

Nonetheless, the mere existence of the photographs created media interest far broader than anything that had come before. Within hours, demand for documents filed with the Florida Supreme Court became so great that it was impossible to

47. *Id.* at 82, n. 11.

48. *Id.* at 82-83 (Fla. 1997) (Shaw, J., dissenting).

49. Chief Justice Kogan and Justice Anstead concurred in Justice Shaw’s dissent.

distribute copies by hand or via facsimile machine. So, I followed the same model first used in 1996: I created a new Death Warrants Page on our website and began placing all filings, orders, and decisions on line. This quickly satiated media requests coming from as far away as Europe. There was no way of knowing then that, only a few weeks later, this website would itself become a world-wide news story.

In time, the Florida Supreme Court scheduled oral arguments addressing the electric chair's latest troubles. The date was August 24, 1999, in the case of *Provenzano v. Moore*.⁵⁰ Photographs of the earlier execution were the most striking evidence, and attorneys liberally flashed them about in proceedings that were sent to all takers over the Court's satellite, cable, and Internet broadcasts. It was impossible, however, to see any of the detail the photographs contained. The robotic cameras simply were too far away to display anything but a blurred hulk slumped in a chair. And the media had not budged from their determination never to print or broadcast anything so ghastly, and most never would. Although the photographs were public records in Florida, no one had conceived the idea of obtaining copies and placing them on the Web. Only a few officials and lawyers had ever seen them.

When the decision of the Court finally issued on September 24, 1999, the vote once again was four-to-three to uphold the constitutionality of the electric chair. Justice Shaw wrote a blistering dissent. "The color photos of Davis depict a man who—for all appearances—was brutally tortured to death by the citizens of Florida," Shaw wrote.⁵¹ To back up this claim, Shaw then did something entirely without precedent: He attached to his dissent three full-sized color photographs of Allen Lee Davis's body still strapped in Old Sparky.

The technology behind embedding color photographs into a document was not as simple in 1999 as it is today. In fact, the Clerk's Office, which still released paper opinions at the time, had to manually insert the three separately printed pages of color photographs into each copy of the decision released that day. They were stapled deep inside the lengthy opinion at the very

50. 744 So. 2d 413 (Fla. 1999).

51. *Id.* at 440 (Shaw & Anstead, JJ., dissenting).

end of Justice Shaw's dissent. But the truly unexpected problem arose from the Court's brand-new Death Warrants Website, which had been created solely to distribute information quickly to the global press. Every document in the *Provenzano* case had been scanned and posted without any editing or censorship. There was no question that the Court's final decision would go on the website, too, along with Shaw's dissent. But what about the photographs?

Then, as now, I normally did not receive finalized copies of opinions until about an hour before their official release. When I saw the photographs, I approached Justice Shaw's staff and asked what he wanted me to do. The answer came quickly: The photos should be posted on line, just like any other official document. They were an important part of the dissent, meant to be distributed with it. But by this point, only thirty minutes remained before the official release. I soon found electronic copies of the three photographs already in a standard Internet format, but it was far too late to begin the process of inserting them into the on-line electronic opinion. Instead, the only way to include them on such short notice was to post them as three separate links on the Death Warrants Website. Though the link to the Court opinion would be right above these links, the upshot was that the public could view the pictures without ever looking at the opinion or Justice Shaw's dissent. In this sense, the pictures of the Davis execution became three freestanding wordless dissents.

I waited with some alarm. For years now, I had labored every workday on the Web, and I knew that nothing like this had ever been posted on line. But the explosion I expected did not happen for exactly one week.

Perhaps some members of the media did not see the Web photographs because they still were so accustomed to receiving all Court opinions in paper. But it was clear that at least a few reporters saw the pictures on line. And a couple of newspapers even noted that Justice Shaw had taken the unusual step of including the photographs, but said little more.⁵² Despite such

52. See e.g. Steve Bosquet, *Electric Chair Staying on the Job*, Miami Herald 1A (Sept. 25, 1999) (referring to Justice Shaw's inclusion of the photographs as an "unusual step"); John Kennedy, *Court Upholds Use of Chair; Justices Ask Legislature to Consider Switch to Injection*, Sun-Sentinel (Ft. Lauderdale, Fla.) 1A (Sept. 25, 1999) (characterizing Justice

comments, few people bothered to dig into the Court's Press Page to find these images. It looked as though the images of Davis might go unnoticed.

Then on October 1, 1999, seven days after the decision was released, the Miami Herald was the first to publish a news account that gave the direct Web address to the photographs.⁵³ Within hours, the story sped by e-mail and the Internet across the entire world.⁵⁴ Global wire services and other media picked up the story, resulting in saturation coverage by the next morning. Our first indication that an extraordinary event was happening came soon thereafter: The Court's server began to fail under the intense demand for access to the photographs. And with that, something wholly unexpected loomed over all of official Florida: Justice Shaw's dissent—the photographic version—ignited an intense worldwide debate about the death penalty in general and Florida's electric chair in particular.⁵⁵

Commentators high and low joined the multi-faceted discussion. A few were completely disgusted that the photographs were on line. Many more, especially in the United States, wrote or e-mailed the Court to congratulate it on using the photos as a deterrent to would-be murderers. One father e-mailed to say that he and his wife intended to show the pictures to their children to teach them the wages of crime. And many others, especially in Europe, wrote messages full of outrage that Florida was reveling in its own barbarity. There was even a march on the United States Embassy in Madrid, complete with protesters carrying signs emblazoned with images of Davis's body in the electric chair. Not having read Shaw's dissent, nearly all of these people simply made their own assumptions about why these photographs were on line.

Shaw's inclusion of the photographs as an "unprecedented move," and including a two-sentence description of the scene depicted in them).

53. Lesley Clark, *Execution Photos, Racist Tape On-line*, Miami Herald 1B (Oct. 1, 1999).

54. Harry Lee Anstead, Gerald Kogan, Thomas D. Hall, & Robert Craig Waters, *The Operation & Jurisdiction of the Supreme Court of Florida*, 29 Nova L. Rev. 431, 443-44 (2005).

55. See Carl S. Kaplan, *Execution Debate Is Broadened by Photos on Web*, <http://partners.nytimes.com/library/tech/99/10/cyber/cyberlaw/29law.html> (Oct. 29, 1999) (summarizing controversy sparked by posting of photos) (accessed Feb. 26, 2008; copy on file with Journal of Appellate Practice and Process).

Many legal scholars have speculated about the impact of media reports on the United States Supreme Court's decisionmaking. This would again become a point of much dispute a year later when the 2000 presidential election cases booted every other news story off the front pages for more than a month. Well before then, however, on October 26, 1999, the nation's highest Court accepted certiorari jurisdiction in a case brought by a Florida death row inmate who had been scheduled for execution in Old Sparky.⁵⁶ The question at issue was simple: Did Florida violate the Eighth Amendment prohibition against cruel and unusual punishment in the way it operated its electric chair?

The leaders of Florida's executive and legislative branches were stunned. Most had assumed that the Florida Supreme Court, not its counterpart in the nation's capital, would be the one most likely to seek the chair's permanent retirement. In fact, they had been working for years to build a statutory and constitutional bulwark that insulated it from scrutiny by Florida courts. But something about the Davis execution caught Washington's eye, and Tallahassee could neither ignore nor forestall what might come next.

Florida's Attorney General swiftly recommended that the Legislature be called into special session to revise the capital punishment statute. The Governor agreed, and the Legislature quickly enacted a new law making lethal injection the state's sole method of execution unless the inmate chose the electric chair. After being advised of these actions, the United States Supreme Court dismissed its case based on the assurances of Florida officials.⁵⁷

The seventy-five year epoch of Old Sparky was over. This had happened with such rapidity as to be almost unimaginable. Just under four months had passed from the execution of Allen Lee Davis until the grant of certiorari sealed the electric chair's fate. And in the end Justice Shaw got exactly what he had advocated, far sooner than anyone normally would have expected.

56. *Bryan v. Moore*, 528 U.S. 960 (1999) (granting certiorari).

57. *Bryan v. Moore*, 528 U.S. 1133 (2000) (dismissing writ of certiorari as improvidently granted).

Such a result would have been impossible before the Web existed. It heralded a change of such moment that two researchers from Oxford and Cambridge published a brief study of the event. They first noted that Justice Shaw's ability to publish the execution photographs directly to the public "uniquely contributed to the political environment of reform."⁵⁸ Then they wrote:

[I]t is clear from Florida's experience that the Internet offers the prospect of circumventing or manipulating established media as much as working with [them]. It may become possible for courts to become a major source of information on their own decisions, organization, and situation.⁵⁹

Although the word "manipulating" is too cynical, it now is perfectly clear that the academics in Great Britain were right. The use of high technology such as the Web and live courtroom broadcasts is an extremely valuable tool in cooperating with privately owned media to convey court information as quickly and completely as possible. More important, these high-tech tools also enable courts to talk directly with the public, apart from anything reported in the press. And by using them, courts can reach almost anywhere on earth, instantaneously. This conclusion was underscored in 2008 when a Florida State Courts survey showed that a clear majority of court customers either use or would use courts' websites to obtain official information, a startling reversal from a similar survey conducted in 1996 that showed a clear majority relying on the news media for such information.⁶⁰

Though most events in courts will never arouse worldwide demand, some inevitably will. It thus was fortuitous that the 2000 presidential election appeals—raising issues that would alter world history—happened in the one state that had most fully explored and tested court ownership of the new communications technology. And that brings us back to

58. Patrick Schmidt & Paul Martin, *To the Internet and Beyond: State Supreme Courts on the World Wide Web*, 84 *Judicature* 314, 314 (May-June 2001).

59. *Id.* at 315.

60. Fla. Off. of the St. Cts. Adminstr., *Public Opinion Telephone Survey* (Jan. 23-Feb. 10, 2008) (available from Florida Office of the State Courts Administrator, Florida Supreme Court).

Tallahassee on December 7, 2000, when oral arguments began in what we then called the “recount case.”

V. THE NEW MEDIA AND *BUSH V. GORE*

A. *Setting the Stage*

After the Court was seated at 10:00 a.m. on December 7, 2000, Florida Chief Justice Charles T. Wells made a preliminary announcement that came directly from the media plan I had developed with him. Looking out at an audience that included world-renowned journalists and politicians, he said that when arguments concluded an hour later, “counsel [will] be allowed to leave the building, together with their parties, prior to the time that any of the visitors leave the building, and then hold all interviews outside.”⁶¹ These words were little noted by the millions watching on television, but they were a crucial part of the Court’s on-site plan to get the attorneys outside and send them as gracefully as possible to the only place where interviews realistically could be held: on the front steps.

All such details had been set when oral arguments were first scheduled a few days earlier. Attached to the December 5 scheduling order was a Special Procedures Order⁶² that contained instructions on all aspects of media coverage, and not merely the plan for post-argument interviews. This document also included rules for reserved seating of the twenty-eight credentialed reporters chosen by lottery,⁶³ placement of the three

61. See Fla. S. Ct. & Fla. St. U., *Gavel to Gavel Online*, Archives, December 2000, *Gore vs. Harris*, Docket No. 00-2346/00-2348/00-2349/00-2431, transcr. (Dec. 7, 2000), <http://www.wfsu.org/gavel2gavel/transcript/00-2349.htm> (accessed June 5, 2008; copy on file with Journal of Appellate Practice and Process).

62. See *Procedures for Oral Argument*, http://www.floridasupremecourt.org/pub_info/election/courtprocedures.pdf (accessed May 12, 2008; copy on file with Journal of Appellate Practice and Process). Some courts call an order of this type a Decorum Order.

63. *Id.* The lottery system was the method the Justices felt to be fairest. It instantly became controversial, since it left open the possibility that random chance might prevent major news organizations from getting a seat in the gallery. This problem did not materialize due to another unexpected facet of the presidential election cases. The rules of the lottery limited each news organization, broadly defined, to only one seat. Thus, before the lottery even began, I put only a single card in the lottery box for each organization even if it had submitted business cards from dozens of its reporters. The rules also required that reporters who “won” had to be reachable by telephone to verify that they would accept the

pool still photographers, information about downlinking the satellite signal, and the name of the media representative designated to serve as the broadcast news liaison to the Court.⁶⁴ But this was not a one-sided edict. It arose from extensive discussion between the media and me and daily consultations with the broadcast liaison. Earlier, an on-site television editor for ABC News had pleaded (and I'm quoting from memory here): "Just tell us what the rules are, and we will follow them." We did, and they did.

Even as arguments progressed that morning, the marshal's staff and local police officers used the stanchions to create a roped-off area where the attorneys could stand and be interviewed. Reporters, photographers, and videographers were told that their best chance would be to claim their space in front of the stanchions. The five major American television news networks already had established a voluntary outdoor pooling arrangement under which one of them would supply video and audio to the others on a daily rotating basis.⁶⁵ They had done so, as Florida Rules of Court suggested, without any regulation by the Office of Public Information.

Once arguments ended, the attorneys and parties walked out the courthouse doors and down to the stanchions, and the press interviews began. Everything was orderly, and the group interviews were over in about thirty minutes. Our hand-off at the Court's front doors had succeeded in two senses: We brought the attorneys outside without incident or embarrassment to anyone, and the broadcasts going out to the globe moved seamlessly from our own cameras inside the courthouse to the ones outside, which were owned by the news organizations themselves. A few reporters still chased lawyers or party

seat. Each time the lottery was used, about half of the "winners" could not be reached, so they forfeited any chance of getting a seat. The larger media organizations more diligently monitored their phones, so nearly everyone got a seat. When I informed one reporter that she had lost her seat because her cell phone was off when I called, she burst into sobs.

64. This was C. Patrick Roberts, the president of the Florida Association of Broadcasters, who served as liaison for both televised arguments.

65. Videography outside the building was entirely controlled by the networks, which fed broadcasts via cable laid under a kind of metal "speed bump" across Duval Street to a massive switching device in the capitol. From there, it then usually was fed directly to the satellite trucks for uplink. By contrast, video of arguments inside the Florida Supreme Court moved directly to satellite without using the trucks, since that inside-the-courtroom broadcast process is controlled by the Court.

officials down the street, but this drew no attention from the video cameras focused on the front steps. The overall scene on television was as orderly as the circumstances could possibly permit.

Then the waiting began. What would Florida's Supreme Court decide, and when would it decide?

B. Dead-Air Time

When the twenty-four-hour cable news networks were created, starting with CNN in 1980, few analysts really understood how they would fundamentally change the news business. Their news cycle was endless, unlike those of newspapers or the three major broadcast networks. So, the round-the-clock networks had a special dread of the infamous slow news day and the unthinkable phenomenon it could produce: "dead air time," the ultimate sacrilege for any network. No one, the networks knew, would watch a television screen that had nothing much on it. Their ratings depended on keeping a grip on viewers who would hit the remote control in an instant if the lively drumbeat of daily news faltered. As a result, their reporters and anchors had to keep talking even if nothing of much interest was available. This could be the biggest challenge they ever faced—how to make a boring news day sound interesting. After all, they had twenty-four hours each day to fill with some sort of news, however trivial it might be.

The predictable result was that, on many occasions, trivia did in fact become news simply because nothing else was available. Yet the mere fact of being on television automatically transforms such reports into something more than mere trivia. It thus can create surreal situations in which minor events receive major attention, compounded by a tendency to "follow the leader" if one network has found the most interesting story angle of the moment. And as these all-news networks have gained viewership, they pressure all other media—including the historically staid newspapers—to follow suit. I became fully aware of this phenomenon early in the election dispute, when cable news reporters begged for anything I could give them. Some of them came back to me every hour with this exact same request. I obliged them.

C. The Public Information Officer as Trusted Source

From providing the cable networks with frequent updates, I learned that there is an unexpected benefit from providing so much information: The networks' need to avoid dead-air time gives courts a chance to send out information of their own choosing, and also to show a human face, not just a row of white columns. One such incident happened earlier in the election appeals during the week of Thanksgiving 2000. A major decision by the Florida Supreme Court had not been issued as the long holiday weekend approached, and reporters anxiously and repeatedly quizzed me about whether they would have to give up their holiday to stand outside in the unseasonably cold weather and wait. I had tried to reassure them, but I knew that I could not predict the exact date and time of release. So, the same query returned again and again. Finally, during a routine question-and-answer period on live television, I made a wholly unplanned remark trying to allay their concern. I had an interest in this, too, I told them, because I already had told my extended family that I would be in Elberta, Alabama, for the Thanksgiving family reunion. And, I pointed out, my Aunt Ethel was going to be really upset if I didn't make it.

What happened next was astounding. With no news of real importance on hand, my remark about Aunt Ethel became the news that was replayed all afternoon. I received innumerable e-mails and letters on the subject for weeks to come. The Miami Herald published my aunt's Thanksgiving menu, and Diane Sawyer mentioned her on ABC's morning show. Local television news organizations in the Mobile-Pensacola media market tracked Aunt Ethel down for an interview. The BBC, which often seemed more fascinated with the local southern culture than with real electoral news, actually put in a request to attend and videotape my family reunion. And when Vice President Gore scotched my trip to Alabama by filing a mandamus petition on Thanksgiving morning, a poem titled "The Gore-inch That Stole Thanksgiving" quickly began circulating via e-mail. Much to my surprise, a large number of e-mails and letters said that this single event humanized the Florida Supreme Court in the writers' minds, letting them see

for the first time that people inside the building had lives much like theirs.

Many more such incidents occurred during the countless hours when the election remained in doubt but no real news was happening. I quickly learned to accommodate the networks. They were eager for anything they could report, so I used the opportunity. I gave them information on the Court's history, its award-winning website, its unprecedented use of broadcast cameras, the careers of the Justices, and the openness of our state courts, to name only a few. The networks also showed great interest in what life was like inside the Florida Supreme Court building during this period, so I provided as many details as security would permit, especially about the long hours put in by the Justices and the members of the Court's staff. Other events provided simple comic relief, including one time when a Court staff attorney's wife made the mistake of bringing his lunch to the front door. She was instantly mobbed by reporters demanding to know what was in the brown paper bag. All of these events helped us show as much as we could of the real people who worked behind the six white columns at the court's front portico.

Most importantly, I used the opportunity given by the cable news networks to engage in rumor control, a critically important function as the long days passed without final resolution. There were many baseless reports circulating on the Web, some even broadcast or printed as fact without checking with me first. At times, false reports even circulated that I was about to make an announcement, when no such thing was true. I did not hesitate to call reporters to correct them. Partly because I was the only official pipeline into the Court, they listened. But sometimes more was required to stanch a rumor. There were times when I summoned reporters to the front steps simply to put an end to a rumor, though I carefully chose the ones I would dignify in this manner.

The most vexing and dangerous rumor occurred on Sunday, December 10, 2000, when reporters learned that more than a million ballots from Palm Beach and Miami-Dade Counties had been moved into our courthouse the night before. A lower court official had told the press Sunday morning—a slow news day—creating a runaway news story. Rumors became rampant, some

saying the ballots were now on their way to Washington, others saying that the move soon would begin, and others saying that the move had been countermanded and the ballots were on their way back. What if they had been stolen, lost, or damaged? They were, after all, more than a million pieces of crucial evidence. Reporters scoured major roads between Tallahassee and Washington hoping to find a vehicle that might contain the ballots. No one in the media knew what was really going on.

Though I had been at the Court earlier that morning,⁶⁶ I soon had gone home because there were few reporters outside at that early hour. Shortly after I got home, I received a call: Our security office was alarmed. Turning on the television, I instantly saw the problem. A large and agitated crowd was forming. So, I put on a coat and tie and returned to find the building completely ringed by reporters, photographers, videographers, and the casual spectators they tended to attract, all waiting to capture any visual image of the ballots. Our security office had only a light crew working on Sunday and was now faced with the possibility of calling in others.

After giving advance notice that I would make a statement on the front steps, I went out and quickly disposed of the rumor. All the ballots still were secure in our building under armed guard, I said. They had never left and would not leave for the time being. With that, the crowds and the potential security issues that they posed simply vanished.⁶⁷

This ability to control a crowd by dispelling rumors by disseminating the truth is a highly consequential benefit of an open approach, especially when its advantages are viewed in light of the near-riot that had broken out earlier in Miami when a crowd accused a Democratic Party official of trying to steal a single ballot. Any hint that something amiss had happened to so many ballots would have sparked a media firestorm. The Court could ill afford for this rumor to get out of hand.

66. I had come in to help transfer the court record to a Florida Highway Patrol cruiser so that our Clerk of Court could be driven to the state-owned plane that would fly it to Washington, D.C., and enable the Clerk to deliver the record in person at the United States Supreme Court. This was in advance of the December 11, 2000, arguments in Washington.

67. The high tension of this particular moment and the effective use of rumor control are reflected in a detailed article published in the New York Times the next day. See Dexter Filkins, *Contesting the Vote: The Rumors; As News Shifts, Town's Talk Turns to Tracking the Ballots*, 159 N.Y. Times A1 (Dec. 11, 2000).

There were other advantages to focusing media attention on a single official spokesperson. One of the most obvious dealt with the security of the Justices themselves as they left the building. We began to arrange some of my official announcements for times when the Justices could leave and drive home. Quite simply, reporters had begun to trust that the Florida Supreme Court indeed would give them a full and fair account of its official acts, but only from the front steps. Nowhere else. By this point, I knew it was impossible to modify the “front steps” protocol for the time being, if only because most journalists and spectators were content to wait out front as the count-down began for my announcements from the podium. The visual image of security staff hauling the podium outside quickly became a sort of symbol in itself. Video of the vacant podium often was broadcast live, implying that an announcement soon would come. So reporters and spectators alike waited out front until I came out, even as the Justices drove away with little attention. This was a sharp contrast to other courts where reporters desperate for any photo or video sometimes chased judges’ cars down the street—and then published or broadcast this visual image because they had nothing else.

There were still other considerations in the Court’s decision to have a spokesperson routinely briefing the media. In November 2000, the reporters who came to Tallahassee from around the world had virtually no knowledge of Florida’s Supreme Court. This was in sharp contrast to the broader worldwide knowledge of the United States Supreme Court. I thus faced the daunting challenge of educating a burgeoning international press corps not only about media procedures that we would craft with their cooperation, but also about the very nature of the Court. Partly in response, I quickly expanded the media interviews I was giving in the days before the two major oral arguments. The overall goal was to give the media a crash course in the operations of the Florida Supreme Court and the backgrounds of the Justices. So, I began to bring reporters up to speed on some of the legal jargon they would likely encounter. The internal operations of the Court were a complete mystery to most out-of-state journalists, and I began explaining the entire process and the key ways in which it differed from procedures in

other more familiar courts. If asked about my expertise on this subject, I simply gave out copies of a law review article I had coauthored on this subject with Justice Kogan.⁶⁸

It is easy in retrospect to misunderstand how I came to hold such a public role, constantly going out the doors to talk to the press. Many thought this was a fully conceived plan set forth in advance. The truth was far more complex. For the four years I already had served as PIO, my role usually was behind the scenes and seldom on camera. In fact, my words and my face became public property mostly when security or ethical concerns dictated that no one but the PIO could speak to the press. None of us ever imaged that, because of an election gone absurdly awry, this exact situation would persist for more than a month. Nor had Court officials ever imagined the sheer numbers of people who would be drawn to Tallahassee.

When the crowds came, the first target was Secretary of State Katherine Harris's offices across the street from the Court in the Capitol; she drew crowds because of her role as head of the state's Division of Elections. The Florida Supreme Court marshal took note and promptly locked our doors. Because this was the antithesis of openness, I adamantly opposed the lockdown, worried that the media would savage us much as they had begun to do with Secretary Harris. I took my concerns to the Chief Justice, who told me that he was unwilling to countermand his chief of security. Instead, he suggested that I simply go out and talk to the press whenever it seemed necessary. At that early point most people believed that the entire controversy would be settled in just days. There would be a few headlines, and a few sound bites, and not much more. I soon would learn otherwise.

D. The Evolution of the PIO's Role as a Trusted Source

In the first days, my visits with reporters were never a major event. I often spent time out on the courthouse steps just chatting with them (a fortunate event that gave me time to get to know many key reporters before the big controversies hit).

68. See Gerald Kogan & Robert Craig Waters, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 *Nova L. Rev.* 1151 (1994).

When the Court issued something significant, I stood in front of a small semi-circle of a half dozen or so television cameras and reporters and read from notes. Many interviews were one-on-one, and I often would do as many as six or seven in a row. And that was the norm until ten days after the election, on November 17, 2000, when the Florida Supreme Court issued a stay order preventing Katherine Harris from certifying the result of the presidential election. The Court simultaneously scheduled oral arguments for the following Monday: The issue was whether Harris had improperly shortened the period for reporting the result of recounts provided by state law. From that moment on, my role would become increasingly formal in a story now dominated by the twenty-four-hour news networks.

As this change occurred, I soon came to see another special problem that arose from the creation of the all-news networks. It occurs when major news clearly is about to happen, but it is not clear exactly when. Florida's presidential election appeals could not have been better designed to trigger the intense stress cable news reporters endure in this situation. Pressure is enormous to get the story first, even if this "scoop" is measured in mere seconds. This virtually guarantees some erroneous reports, which themselves must be refuted. Many reporters begged for favorable treatment, but I politely refused. Instead, I met with the broadcast liaison and the on-site managers of the five major news networks—ABC, CBS, CNN, Fox, and NBC. And I asked them what would be the fairest way to release major news, specifically the results of Florida Supreme Court decisions.

They agreed without dissent: Releasing paper opinions of such tremendous importance without an oral press summary was inherently unfair because some reporters would be first in line and others last. Moreover, reporters would be pressured to rush to camera live while still reading the opinions. The scene on live television would be bedlam. Much the same problem would arise if major decisions were released only on the Website, which raised the additional specter of a sudden spike in demand causing Internet gridlock. Instead, they all said they preferred that I come out, as I already had been doing, and announce the bottom-line holdings from the decisions. They also wanted thirty minutes' advance notice of these announcements. This would

leave time for them to prepare to break into normal programming and to make sure that their crews were ready on scene.

In sum, a single televised announcement by an authorized court spokesperson was the best way to be fair to all media. It could not eliminate all the rumors and speculation, but it could and did allow the public and an enormous press corps to hear an official summary of the decision all at the same time, in an orderly setting. Thus, there never was a chaotic scene of reporters clamoring for paper copies and trying to interpret them on the fly.

The broadcast media had one final request. When it became clear on any given day that no further decisions would be released, they asked if I could come out to “put a lid on the day,” which would allow all reporters to leave without fearing that a surprise announcement might follow. This proved to be an invaluable idea that might never have occurred to me if I had not called the news networks in to talk. With so much at stake, all reporters felt obliged to continue standing in front of the courthouse if there was any possibility that a newsworthy event or announcement would occur. They would not leave until someone with official authority assured them they could. It was to the advantage of both the Court and the media to promptly tell them when the day’s work was over, so we did. The result was that reporters left, followed by the crowds. Not only did this practice end pointless broadcasts from our front steps, but it also allowed the Marshal to reallocate our already overstretched security staff.

The Chief Justice agreed to nearly every request or recommendation that the media representatives made. Major aspects of the broadcasters’ requests were actually included in the Special Procedures Order, including the fact that I would announce any decision from the courthouse steps.⁶⁹ During the days of the controversy, we gradually added other unwritten procedures to help refine the written ones. The use of the podium began, for example, to give media a place to attach their microphones. This soon became unworkable as the number of microphones grew so large that the podium was top-heavy and

69. See *Procedures for Oral Argument*, *supra* n. 62, at 2.

liable to fall over mid-broadcast. By the end, the broadcast pool whittled the number down to a few and also took the precaution of attaching a wireless microphone to my tie before I made announcements, with the strict requirement that sound would be turned on only when I reached the podium, and turned off as soon as I turned away from it. Finally, we had to add a public loudspeaker system as the crowds grew larger. The need was brought home one day when, worried by a restless crowd of spectators, police suddenly put a megaphone in front of my face and asked me to repeat what I had just told the press.

VII. ANNOUNCING THE DECISION IN *BUSH V. GORE*:
NEW TECHNOLOGY, OPEN ACCESS, AND CAREFUL PREPARATION

In sum, the technology put in place before 2000 made transparency possible, but it also required the Court both to reexamine and to make substantial changes in its routine media-relations protocols. This news event, however, was anything but routine. It required us to fine-tune and augment that same technology to meet the special problems caused by a previously unimaginable level of global demand for information. And that brings us back once again to the rising air of tension in Tallahassee on the afternoon of December 7, 2000, after the recount arguments had ended. Everyone was waiting as television pundits scoured transcripts of the day's proceedings, most concluding that a majority of Florida's Supreme Court would likely rule against Vice President Gore.

Others were not so sure.

A. "*By a Vote of Four to Three . . .*"

Tallahassee sits on the westernmost edge of the Eastern Time Zone, meaning that the nightfalls of December come early. As darkness set in around 5:00 p.m. on December 7, it became clear that no opinion would go out that day. I asked the Chief Justice's permission to "put a lid on the day" so that reporters and the many onlookers that followed them all could leave. He quickly gave it, knowing full well by now that the crowds would remain outside all night if no one told them otherwise. While in earlier weeks most of my end-of-day announcements went

unreported, tonight would be different. The very fact that no opinion could issue until the next day, Friday, December 8, 2000, was highly newsworthy. After all, Gore's own attorney David Boies, had agreed in earlier oral arguments that the deadline was December 12. If that was true, only four days would remain for any appeal to be argued and decided by the United States Supreme Court.

Knowing this, I left the Court shortly after nightfall—earlier than I had done in weeks. Driving on Duval Street past the glowing tent city set up on the Capitol terraces, I saw a number of media and political celebrities talking in front of cameras and portable studio lights just behind the huge wall of trucks feeding video and audio up to the satellites. I was glad not to be among them. Tensions now were running so high that the debate had become electric, and I knew that I was close enough to the live wire that I had to be extremely careful.

I came in early on Friday just in case the Court directed me to make an announcement early. That did not happen. The day drew on, and I received only messages that no opinion was ready. Until mid-afternoon.

At that time the Court gave me a draft opinion to begin summarizing. My goal was for the announcement of any decision to be three minutes or less. Although question and answer sessions with media went considerably longer, different concerns governed the length of the oral summary of the Court's decision. First, the latter would not be interactive, so I would not take any questions.⁷⁰ Second, my words and actions had to be completely neutral, with no hint of partisanship. This meant that any ambiguous adjectives would be stripped out, my tone of voice would be "affectless,"⁷¹ my face would be just serious enough, and I would only provide the bottom-line factual results of the opinion with no attempt at spin. Reporters and the public at large seemed especially to note what the New York Times

70. In the first such announcement I had made, I concluded the statement by saying I would not take questions. This drew a number of e-mailed complaints, so I dropped the statement from all future announcements. I received no similar complaints once I did. Though the e-mail I received during this time was voluminous, some of it did provide very helpful feedback that I used to adjust my public appearances.

71. This was the description used by Jeffrey Toobin. *See* Toobin, *supra* n. 1, at 237.

called my “uninflected”⁷² tone of voice. None seemed to realize that this was both deliberate and highly necessary.

As I began reading the draft opinion and worked to summarize it, I knew that my statement later that afternoon must be in plain English. No cryptic legal jargon would be allowed. Moreover, the Florida Supreme Court, like its Washington counterpart a few days later, was deeply divided. My statement had to note this division without appearing to take sides. I was crafting a summary of a majority decision with which three of my bosses, including the Chief Justice, strongly disagreed. My announcements about the Court’s earlier unanimous opinions had left the actual vote count until the last sentence. Here, I noted it first.

“By a vote of four to three,” I wrote, starting the first clause of the first sentence.

In delivery on camera, I later would insert a deliberate pause after these seven words. This gave people time to grasp an implication that I would not directly explain—the Court had split as closely as possible. The 2000 election cases had become a round-the-clock television news story, so I knew there was a strong expectation that my very first words should provide the context of everything else I said. Descending into vague old legal phrases at this point would have seemed evasive, or worse.

I continued writing: “. . . the majority of the court has reversed the decision of the trial court in part.”

Again, there would be a pause before I continued reading on camera. Reversed in part? If so, which of the trial court’s numerous orders remained valid and which were overturned?

The words to follow would be short sentences or phrases describing the major actions ordered by the majority opinion. First, the case would be sent back to the trial court in Tallahassee to immediately begin a manual recount of some of the ballots from Miami-Dade County. Second, the vote totals

72. Linda Greenhouse, *The 43rd President: Another Kind of Bitter Split*, 159 N.Y. Times, A1 (Dec. 14, 2000). I received a large number of e-mails asking why I never smiled. This again was influenced by some of the e-mail I had received. During an announcement much earlier, a Tallahassee reporter had given me a thumbs up, causing me to smile on camera. Shortly thereafter I received a number of e-mails that read, in effect, “Quit smirking.”

must be adjusted to include some manual recounts already reported from Miami and Palm Beach.⁷³

Finally would come the most stunning point of the majority decision that afternoon. Summarizing it on a word processor, I began to feel more anxious. There had been an unmistakable tone of anger toward me personally in many e-mails I had received recently. One simply said, "Run while you still can." About a week earlier I had been cursed in public by a man I did not know, using the foulest language known to English. This had prompted the Marshal to assign me an armed security officer whenever I left the courthouse during working hours. I also had stopped going out for the time being. Even my shopping was done by friends, who also delivered lunch and dinner to the courthouse when I could not bring them myself in portable coolers.

Today would be the hardest day, but the difficulty also brought a sense of hope. My time on camera soon would end. Nothing could have made me happier. I knew I was riding a tiger.

Shortly before 3:30 p.m. on December 7, 2000, the Court's majority made final edits to the statement and authorized me to give thirty minutes' notice to the press, which was done through the broadcast media liaison and the Marshal. My announcement thus would begin precisely at 4:00 p.m. according to the Court's clocks.⁷⁴ I went back to my office, added the majority's edits to the typed version, and printed it out. With the copy in hand, I put on my coat and went downstairs to wait in the abnormally quiet rotunda until the time came.

By coincidence, there was a television located in the security office just inside the front entrance, tuned to one of the all-news networks. So, I watched the highly surreal television image showing the vacant podium standing in front of one of the Court's three sets of silver-colored aluminum double doors. I was standing just on the other side, though the doors blocked any view of me from outside.

73. The script of the HBO movie *Recount* substantially changed my actual December 7 statement for dramatic effect.

74. Several different times have been given by the various authors writing on this subject, such as 3:50 p.m. See Toobin, *supra* n. 1, at 237. My recollection is that we deliberately waited for the top of the hour.

I also could see that the crowds outside now filled all the available space, partly because our own security staff aided by other state law officers had pushed the crowds farther away from the courthouse than they had done before. One officer explained that the people outside were unusually restless and officers were having trouble separating those carrying Bush signs from those carrying Gore signs.

The officer then suggested that I ought to consider wearing a bullet-proof vest.

I might as well have been struck by lightning.

Until that time, I had refused to even imagine that someone might pull a gun as I announced decisions. Now the idea was squarely before me. But even so, none of the security officers told me until later that law enforcement had placed trained police snipers on the roofs of nearby buildings.⁷⁵

I did ask the officer what was involved in donning a bullet-proof vest, since I had never worn one. After some discussion, one thing became obvious: I could not put my suit coat back on to conceal the vest. I would be standing on live television wearing body armor. There was no worse thing I could imagine. It instantaneously would have sent the message, "We do not trust you, and we are scared of you." Moreover, I had no idea how much longer the controversy would last, meaning I could be on television many more times. If I telegraphed a lack of trust, then I might as well have told the world I was worried about an assassin, which could have become a self-fulfilling prophesy. I put my faith in trust.

So, we went on with the normal countdown. Five minutes before I walked out, the Marshal went out and gave a notice to that effect. One minute beforehand, the broadcast liaison walked out and stood near the podium, signaling the networks to break into programming. Once that last minute expired, I said simply, "Okay." Two security officers opened the double door—ironically, it was one of a series of double doors that still held a bullet hole from a 1970s drive-by shooting—and I walked

75. After all, this was a day when the Twin Towers still stood over the Manhattan skyline and before "Al Qaeda" was a household phrase. Later, I would come to view the 2000 presidential elections as the end of a friendlier era, one in which little towns like Tallahassee still could treat out-of-town media and casual spectators as though they were just new neighbors.

toward the opening. I then went straight to the podium a few feet away, and the security officers promptly closed the door behind me. By some later estimates, as many as fifty million Americans were watching, and millions more around the world.

My remarks began with a preliminary statement that the Court had reached a decision. I barely got these words out when a large piece of equipment fell to the ground somewhere to my right, causing me to flinch instinctively. But I continued. Neither the crowd nor the media could hear anything except what the microphone picked up. Everything else I heard, including the crash of the falling equipment, was inaudible to them.

As I announced the partial reversal of the trial court, a moan came up from the people standing closest to me—the press corps. One reporter later told me that media had hoped my announcement would end the controversy forever, so they could go home. But that was not to be. This fact was brought home again and again as I read through each of the rulings, until I came to the most controversial of them all.

“In addition,” I read, “the Circuit Court shall order a manual recount of all undervotes in any Florida county where such a recount has not yet occurred. Because time is of the essence, the recount shall commence immediately.”

I turned away from the podium after a brief concluding statement, and the two officers immediately opened the double door again. I walked inside. The door closed.

After letting the network sound technician remove the remote microphone from my tie, I walked up to my office to triage my e-mail for any important messages that needed a quick response. I had a few “urgent” phone messages from reporters, most trying to get advance notice of the contents of the decision just announced. I knew many more such messages would be on my cell phone, which I had turned off as soon as I began drafting the summary.

More decisions would be made here in the next few days, and I would announce each from the front steps. But the focus quickly moved to Washington when the United States Supreme Court the next day issued a stay order blocking the statewide recount. The hardest of my work on *Bush v. Gore* was over. And with genuine satisfaction, I realized one important point: The Court had succeeded in deploying a robust and effective public

information program well in advance of the 2004 deadline set out in its Long-Range Strategic Plan.⁷⁶

VIII. COURT PIO AS A NEW COURTHOUSE PROFESSION

The events in 2000 had a deep impact nationwide on the way courts viewed their own media relations. Innovative concepts of managing communications already had been developed in the public relations field, but they had not yet been embraced by much of the nation's judiciary. It had seemed an uneasy fit because of the courts' longstanding view that, when dealing with media, aloofness was the best approach. But that view has long been eroding, especially in the state courts. There is little doubt now that this move toward more active media relations is being driven by factors outside the courts, especially the changing technology. First there came the twenty-four hour news channels in the 1980s, followed by the Web in the 1990s, and continuing to this day with ever-dropping prices of communications technology. The way in which all of these media innovations interact is increasingly complex, but that interaction is unavoidable, and the new challenges that accompany it are in need of proper management. And the person best positioned to manage them for a court is a court PIO.

Not surprisingly, the current dean of American court PIOs, Ron Keefover, was hired in 1980 precisely because the Kansas Supreme Court had become alarmed at the number of inaccurate press accounts. Keefover's continuing value to Kansas's judiciary is attested by his longevity, and by the fact that he became founding president of the international Conference of Court Public Information Officers during its formation in 1999 and 2000.

76. Florida Judicial Management Council, *Taking Bearings, Setting Course: The Long-Range Strategic Plan for the Florida Judicial Branch* 12, http://www.flcourts.org/gen_public/stratplan/bin/long-rg.pdf (1998) (characterizing as a "desirable outcome" of the plan the development by 2004 of "an institutionalized outreach program to . . . the general public") (accessed Mar. 1, 2008; copy on file with Journal of Appellate Practice and Process).

Something like the 2000 election appeals was bound to happen sooner or later. However, the happenstance of a Florida venue guaranteed that it would be watched in full detail around the globe. The emerging role of court PIOs was significantly shaped by the state's post-election lawsuits and appeals. To varying degrees, they put court PIOs in the media crucible throughout Florida and in Washington, D.C. Although practices varied from court to court, they included common themes. All of the PIOs were constantly available to assist members of the media, and all sooner or later used some form of Web and broadcast technology to get information out directly to the public and the press, improving the accuracy of reporting. In the case of the United States Supreme Court, audio broadcasts were for the first time released in a tape-delayed format⁷⁷—a practice the Court continues to use in some high-profile cases.

But perhaps the most important aspect of the court PIO's work today is to build an ongoing relationship of trust with media that routinely cover their courts and to establish a method that provides quick, accurate oversight of anything the press gets wrong. The very fact that the Florida Supreme Court's video arguments and closed-captioning transcripts are archived on line itself provides a powerful incentive for reporters to get the story right, because they know that their accuracy can quickly be checked by anyone. I routinely refer reporters to our on-line transcripts when they call to check quotations. And as the media have cut staff to save costs, many reporters now rely entirely on the Webcasts, Florida Channel cablecasts, or the direct satellite downlink to produce their stories about oral arguments in the Florida Supreme Court.

Of course a PIO provides other benefits to the Court. Even the closely watched oral arguments in the 2004 case of *Bush v. Schiavo*⁷⁸ did not fill up our courtroom in Tallahassee or produce a large crowd outside. Most people were content to watch the entire arguments live on CNN and C-SPAN, which were fed directly by our satellite. People were further encouraged to watch the news networks when I arranged for all post-argument interviews to be pooled and broadcast the same

77. Tony Mauro, *Glasnost at the Supreme Court*, in *A Year at the Supreme Court 198* (Neal Devins & Davison M. Douglas eds., Duke U. Press 2004).

78. 885 So. 2d 321 (Fla. 2004).

way. This meant that reporters did not have to be on scene to get a complete news story unless they wanted to be. Indeed, no crowd of reporters ever formed outside the building for any of the nine *Schiavo* petitions filed at the Florida Supreme Court, including the five filed in March 2005 alone. By that time, the official release of opinions was entirely electronic and occurred by simultaneous posting to our website and by e-mail messages that I sent to a large media list. As the Court released five *Schiavo* orders between March 17, 2005, and March 26, 2005, all of them reached the media instantaneously and often were reported on live television within minutes. This time, there was no need for me to make announcements outside on the steps.

It is even more important to make concerted efforts at managed cooperation with media when a case unexpectedly draws a horde of reporters from out of state. High-profile cases like the ones involving Kobe Bryant, Anna Nicole Smith, or Terri Schiavo literally can happen in any community and may be appealed. No court can afford to be unprepared when reporters arrive by the hundreds. If not handled properly and cooperatively, media can quickly overwhelm a court, slow its routine operations, and make the court look foolish—all in the same stroke. Indeed, that is exactly what happened in the Hauptmann trial.

For practical and ethical reasons, judges should not be the ones talking to the media about high-profile cases. This is instead the place for a PIO. Large crowds of reporters are becoming more common at courthouses as specialized cable channels proliferate. My workday during the 2000 presidential election appeals rapidly grew to as much as sixteen hours, all of it dedicated to making sure that high quality information went out to the press and public. Moreover, I scrupulously avoided any analysis of the actual legal controversies or commentary on decisions, though a few reporters tried hard to knock me off this stance.⁷⁹ Judges would only be knocked harder, and then they would face possible ethics complaints if they succumbed.

79. The most artful effort came when one reporter followed up on the ground rules I had given to the press at the start. One was that I would not predict what any court involved in the controversy would do. After the United States Supreme Court remanded the first election case to the Florida Supreme Court, this reporter promptly asked me if our Justices intended to ignore the Justices at the United States Supreme Court. If I had said “no

Even for routine press inquiries at the Florida Supreme Court, I personally vet each media request to talk to a Justice. Reporters usually do not understand the ethical problems involved in a judge commenting about issues involved in the cases before the Court, and they can be offended if this is not explained to them properly. Most journalists are accustomed to executive and legislative officials speaking their minds. Media often do not understand that the ABA Model Code of Judicial Conduct as adopted in the various states restricts judges in commenting about pending or impending cases.⁸⁰ At the same time, judges and their employees live in a world where the canons of ethics are a familiar routine, so they may misinterpret a reporter's question about a pending or impending case by assuming it to be malicious. In my experience, this is seldom true. Reporters just do not understand the Code of Judicial Conduct. Many have never heard of it. Each time a question of this type comes in, I patiently explain the canons and the reasons they exist, never assuming malice.

Likewise, a growing problem in the age of instant communications is that judges' actions outside the court are scrutinized far more closely. In particular, their participation in meetings that might be viewed as fundraisers has become a growing problem. My job includes assisting the Florida Justices in their public appearances as needed, so I often must look into a particular event to see if it is a fundraiser. Surprisingly, even attorneys often misunderstand the principal ethics rule on this subject: Canon 1.3 of the 2007 Model Code of Judicial Conduct forbids judges to lend the prestige of their office to advance the private interests of themselves or others. The Florida Supreme Court decades ago established a Judicial Ethics Advisory Committee that has produced a large body of advisory opinions on this subject. Read together, they have established the principle that an event is a fundraiser if there is any intent to make a profit, however slight. I have been surprised how many

comment," this would have been spun as saying, in effect, "That is a possibility." It then would have exploded into an international news story of the worst kind. Instead I flexed my rule a bit and said simply that you do not ignore the highest Court in the land. My rule was bent but unbroken.

80. See ABA Ctr. for Prof. Resp., *Model Code of Judicial Conduct* 2.10(A) (ABA 2007).

times groups say that their event is not a fundraiser, and then I find other evidence—most frequently on their websites—that supports the opposite conclusion. I have on occasion had to ask the press for corrections of news stories when either the reporter or the organizers created a false impression that a Justice was involved in a fundraiser. Sometimes we have had to cancel Justices' appearances when we learned at the last minute that funds would be raised. Many people find the ethics rule counterintuitive. They simply assume that fundraising for worthy causes is not only acceptable but praiseworthy. It's the PIO's job to explain the Model Code's provisions on this point again and again.

There are many other reasons why courts now need people to manage communications between themselves and the media. One of the most novel is how to deal with blogs.⁸¹ Blogs pose two largely unresolved issues of great significance to courts. First, must the people who write blogs be treated as "citizen journalists" entitled to the full protections of the First Amendment, even though anyone can create a blog at very little cost? PIOs around the nation already are seeing their schedules and media plans complicated by bloggers who claim all the rights of journalists but who usually lack any of the technology or training common in established media organizations. And second, what about the ethical issues raised by the work of lawyers who create their own blogs? How do lawyer-advertising rules apply, and can a lawyer break the rules of professional conduct by criticizing fellow lawyers or judges on a blog? I suspect that these issues will vex courts and their PIOs for many years to come as we proceed further into the Information Age, which now has been tinged with the anxiety of global terrorism.

IX. THE PIO IN THE POST-SEPTEMBER 11 WORLD

The terrorist attacks on the World Trade Center and the

81. "Blog" is a shortened version of "Web log." Originally it meant a kind of a daily Web-based diary of someone's views on a particular subject. Those dealing with legal issues occasionally are called "blawgs." Some blog owners now allow others to post messages, and this practice often gives some blogs a racy tone. Verbal tirades are not uncommon. All of these factors make blogs of special concern to courts.

Pentagon were quickly followed by the murder by anthrax contamination of a worker at the Media General Building near Boca Raton in South Florida. He clearly was a random victim in another act of terrorism. These events started months of white powder scares in courthouses nationwide and prompted Chief Justice Wells to appoint a Florida Supreme Court Workgroup on Emergency Preparedness to explore what courts must do. After study and taking testimony, our Workgroup forwarded a detailed report to the Chief Justice. Among the details was a recommendation that each division of Florida's courts system should have at least one PIO. This part of the report was a direct outgrowth of the experience many Florida courts had endured with the disruptions caused by the 2000 presidential election cases. The Workgroup concluded that if communications had been crucial then, they certainly could only be more crucial if the courts were attacked.⁸²

While the new Florida court PIOs could have other duties,⁸³ the Workgroup suggested that they should be trained in the proven techniques of court communications with the press and the public. All of the trial courts and lower appeals courts complied, and in 2005, the first statewide training of the new PIOs was held at the state Supreme Court building. The program was grant-funded and held in cooperation with the National Judicial College and the Conference of Court Public Information Officers.⁸⁴ This directly led to the creation in 2007 of Florida Court Public Information Officers, Inc. FCPIO is a nonprofit created to promote education and mutual assistance among its members, making it the first statewide court PIO organization in the United States.

Many other changes arose because of the advent of global terrorism. In 2004, the Florida Supreme Court's emergency planners revisited the techniques used in *Bush v. Gore*, with an eye toward what might happen in that fall's presidential elections. We also met with local and state law enforcement

82. The emergency plans created through this process were first tested and proven in Florida's disastrous hurricane seasons of 2004 and 2005.

83. Full-time PIOs are used only at the Florida Supreme Court and in trial courts in the state's most populous cities.

84. Funding was provided directly to the National Judicial College by the Florida Bar Foundation.

agencies and other agencies that had decisionmaking authority. While all agreed that communications in 2000 had been very effective, we also agreed that many of the events held on Duval Street posed risks that no longer were acceptable. In fact, unlike in 2000 we would do everything possible to discourage formation of huge crowds on the road between the two most likely targets of attack: the Capitol and the Supreme Court. Our earlier methods had served their purpose at the time, but the world had changed. So, we drafted a new proposal that would await the Chief Justice's approval if it were ever needed. The proposal's major point was that the Court should rely even more on high technology to create transparency while keeping everyone as secure as possible. Bombs or anthrax tossed into a Tallahassee crowd now were real concerns.

This was my assessment, too. Instead of announcing decisions from the steps, I would make them on live television from inside the courthouse. There would be no audience at all, simply a live feed going up to the satellite from our own cameras, showing me announcing the bottom line of any decision. No audience would be necessary because, as had happened in 2000, I would not take any questions after I read the approved statement. Question-and-answer sessions still would be held, but would be organized in one of two ways, depending on the significance of the events at hand. Rumor control and other less substantive discussion with media would be held on live television in the courthouse with only a few reporters designated in advance as a pool. This, too, would be broadcast live. Major question-and-answer sessions, if needed, would be held in a large auditorium inside the Capitol, which would require all who attended to go through security devices. Finally, there would be no press tents on the Capitol terraces and no satellite trucks parked at its curb. All media operations would be moved down the hill to an area near the city civic center. But nearly everything else would remain the same.

The wisdom of this planning became obvious when huge crowds of reporters again came to Tallahassee in the days before the November 2, 2004, election. Reporters seemed certain it all would happen here again. And our concerns about potential violence were confirmed in a somewhat comical way. Officers in Tallahassee allowed Kuwaiti Television and Al Jazeera to set

up their broadcast operation bases too close to one another. After tensions between the two networks became worrisome, they had to be separated as diplomatically as possible.

Then November 2 came, and the contested state proved to be Ohio. I watched in contented bemusement as Tallahassee's media tents hastily came down, reporters crowded to the airport, and satellite trucks lumbered north. A day later, John Kerry conceded to George W. Bush.

There would be no *Bush v. Kerry*.

