

# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## ESSAYS

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### THE SUPREME COURT – THEN AND NOW

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The modern Supreme Court differs in significant ways from the Court I knew more than sixty years ago as senior law clerk to Chief Justice Earl Warren during the 1957 Term.<sup>1</sup> I propose to compare the 1957 Court to the 2014 Court, focusing not on doctrinal shifts but on institutional matters and internal practices. I select 2014 to precede the death of Justice Scalia in 2015, which left an eight-member Court during half of that year and most of 2016.

I turn first to the Justices' law clerks. In 1957, most of the clerks came to the Court right after graduating from law school.

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\*Senior Judge, United States Court of Appeals for the Second Circuit. Thanks to Jeffrey Minear, Counselor to Chief Justice Roberts, for useful information, and to Dallin Oaks, one of my co-clerks at the Supreme Court, Earl Pollock and Bill Dempsey, law clerks for Chief Justice Warren shortly before and after my clerkship, and Amy Mason Saharia, law clerk for Justice Sotomayor during the 2010 Term, for their helpful comments.

1. Since 1916, the Court's Term has begun on the first Monday in October, *see An Act to Amend the Judicial Code; to Fix the Time When the Annual Term of the Supreme Court Shall Commence; and Further to Define the Jurisdiction of That Court*, Pub. L. No. 258, § 230, 39 Stat. 726, 726 (1916) (now codified in 28 U.S.C. § 2 (2018)), and for many years ended when the Court recessed for the summer, usually in June, although with occasional special Terms thereafter. In 1990, the Court amended its rules to provide that its Term is "continuous," Sup. Ct. R. 3 (1990), and made a further amendment in 1995 to provide that the continuous Term ends on the day before the first Monday in October of the following year, Sup. Ct. R. 3 (1995).

Only three (two for Justice Harlan, one for Chief Justice Warren) had previously clerked for a year at a federal court of appeals. In 2014, all the law clerks had previously worked for a court of appeals judge.

The first law clerk came to the Court in 1882, but the practice was not institutionalized until several years later.<sup>2</sup> Justices Holmes and Brandeis were the first to hire a recent law school graduate as the one law clerk each was then allotted.

Law clerks, then and now, assist a Supreme Court Justice in three general ways, but some aspects of their work have changed. The clerks write brief memos on the thousands of certiorari (cert.) petitions asking the Court to review decisions of the thirteen federal courts of appeals and the fifty state supreme courts. Law clerks also write long memos analyzing each case that the Court has accepted for argument. Sometimes law clerks draft opinions and usually edit drafts that their Justice has prepared and give suggestions for improving draft opinions from other Justices. Law clerks serve for one year, although in the Court's early years, some served for several years, a few for the lifetime of their Justice.<sup>3</sup>

That first task of writing memos on cert. petitions has changed. In 1957, the clerks in the chambers of each Justice (except Justice Frankfurter, who read all petitions himself<sup>4</sup>) wrote cert. memos for their Justice. By 2014, a so-called "cert. pool" had been formed.<sup>5</sup> The cert. petitions are divided among the law clerks for all the Justices participating in the pool, and each clerk writes for the Justices in the pool a memo on his or her assigned petitions. The cert. pool started in 1972 with five Justices participating.<sup>6</sup> In some years as many as eight Justices were in the pool.

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2. See Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 301 (1961).

3. See STEPHEN M. SHAPIRO ET AL., *SUPREME COURT PRACTICE* 38 (10th ed. 2013).

4. See ARTEMUS WARD & DAVID L. WEIDEN, *SORCERERS' APPRENTICES—100 YEARS OF LAW CLERKS AT THE UNITED STATES SUPREME COURT* 115 (2006). The authors report that Justice Brennan "largely reviewed cert. petitions himself." *Id.*

5. See H.W. PERRY, *DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT* 41–49 (1991).

6. WARD & WEIDEN, *supra* note 4, at 119 (noting that Chief Justice Burger and Justices Powell, Rehnquist, White, and Blackmun joined the original pool).

I think the cert. pool is an unfortunate development. The Justices are better served when each receives a cert. memo prepared by his or her own law clerks. When nine law clerks prepare cert. memos on each petition, there's a better chance at least one of them will identify a petition that really should be granted. In some chambers, law clerks give their Justice comments on cert. pool memos. Perhaps the cert. pool is an inevitable consequence of the huge increase in the number of cert. petitions.

In 1957, there were just eighteen law clerks. Seven Justices had two, Justice Douglas had one, and the Chief Justice had three. In 2014, each Justice had four clerks for a total of thirty-six.<sup>7</sup> The reason Warren had three clerks in 1957 was our primitive technology. There were no Xerox machines or other means for quickly reproducing copies of documents. When people without lawyers asked the Supreme Court to review their cases, they usually filed just one copy of the cert. petition, often handwritten.<sup>8</sup> Most of these pro se petitioners were prisoners challenging either their convictions or the conditions of their confinement.

With that one copy from the pro se, the law clerks for the Chief Justice prepared a short memo—usually two or three pages—for all nine Justices of the Court.<sup>9</sup> We made copies of our memos by typing them on carbon sets with eight sheets of carbon paper between nine pages of tissue paper. Our memos were appropriately called “flimsies.” The ninth copy was barely legible. In 2014, cert. memos in pro se cases were prepared by the cert. pool.

One day during my clerkship, Justice Frankfurter, who had a rather strained relationship with Chief Justice Warren, stopped me in the hallway on the way to my office and told me he wanted me to come with him to his chambers to discuss one of

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7. The number of law clerks for each Justice increased from one to two in 1947, *see* SHAPIRO, *supra* note 3, at 38 n.82, from two to three in 1970, and from three to four in 1974, *see* WARD & WEIDEN, *supra* note 4, at 45.

8. Those who could not afford filing fees were permitted to file one copy of their papers. Sup. Ct. R. 53(1), (2) (1954). Currently, they are required to file an original and ten copies, Sup. Ct. R. 39 (2) (2013), although inmates confined to an institution may file just the original, *id.*

9. The practice of having the Chief Justice's chambers initially consider pro se cert. petitions began with Chief Justice Stone. *See* Newland, *supra* note 2, at 304.

the pro se cert. memos I had written. “That is,” he added with a twinkle in his eye, “unless you’re quarantined from my chambers.” On another occasion, when I had used a colloquial term in a memo, Justice Frankfurter sent me a note stating, “You have permitted the gaiety of conversation to intrude upon the permanence of print.”

The increase in the number of clerks has had one consequence not usually reported. Anyone looking at the thickness of the books containing opinions of the Supreme Court will notice that as the number of law clerks increased over the years, so did the number of pages of the Court’s opinions. There were not more opinions. In fact there were fewer.<sup>10</sup> The opinions just got longer.<sup>11</sup> Law clerks draft many opinions, and Justices often do not take the time to edit them down to an appropriate size.<sup>12</sup>

A few words about my title “senior law clerk,” in later years changed to “chief clerk.” The Chief Justice customarily bestowed the title on the one of his three clerks who had been a law clerk at a court of appeals. Since I had been a law clerk at the District of Columbia Court of Appeals, I got the title. It was not a merit designation. The title carried one perk—a large office all to myself—and the responsibility for choosing the monthly speakers for lunches at the Court with the entire group of law clerks. Our drawing power was apparently significant. Dean Acheson came. Justice Brennan came. And then there was the time I invited a young senator from Massachusetts. The other clerks gave me a lot of grief for selecting John F. Kennedy, but I assured them this fellow had a big future.

In 1957 most of the small group of eighteen law clerks had lunch together almost every day in a room set aside for that purpose. The conversations covered lots of ground, and frequently one or more of us would urge the others to take a careful look at a cert. petition that we thought was a strong

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10. See *infra* page 8.

11. See *id.*

12. One reported vignette suggests another reason for tolerating long draft opinions prepared by law clerks. Once when the concerns of Chief Justice Burger about a majority opinion were accommodated by a revision, the Chief Justice nonetheless issued a concurring opinion drafted by his law clerk, explaining that to withdraw it “would break [the] clerk’s heart.” DAVID M. O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 322 (1990).

candidate for Supreme Court review. The law clerks were first given a room for lunch during the 1954 Term, after some Justices overheard clerks talking about cases in the public cafeteria. The 2014 Court had no lunchroom for the clerks, and today's clerks never have lunch together as a full group and rarely even in smaller groups. I think that change is a loss, not just in collegiality but in opportunities for useful exchanges.

A final fact about the law clerks. Eight of them have become Justices of the Court, including Justice Gorsuch, who is the first former law clerk to serve alongside a Justice for whom he clerked, Justice Kennedy.<sup>13</sup> Justice White clerked for Chief Justice Vinson, Justice Stevens clerked for Justice Rutledge, Chief Justice Rehnquist clerked for Justice Jackson, Justice Breyer clerked for Justice Goldberg, Chief Justice Roberts clerked for then-Justice Rehnquist, Justice Kagan clerked for Justice Marshall, and Justice Kavanaugh also clerked for Justice Kennedy.

I turn now to the Justices themselves—first, their number. There were nine in 1957 and nine in 2014. But the number has not always been nine. The first Court, appointed by George Washington in 1789, had six Justices.<sup>14</sup> Congress increased the number to seven in 1807, to nine in 1837, and to ten in 1863.<sup>15</sup> The size was reduced to nine in 1866, fell to eight in 1868, and went back to nine in 1869, where it has remained ever since.<sup>16</sup>

Although the number of Justices is the same today as it was in 1957, there has been a marked change in their backgrounds. In 1957 only two, Justices Harlan and Whittaker, had previously served on a federal court of appeals; Justice Brennan had served on a state supreme court. From 2005 until Justice Kagan came to the Court in 2010 after serving as Solicitor General of the United States, all nine Justices had been judges on federal courts of appeals. And for the twenty-three years from 1991 to 2014, there were always at least six Justices who had been judges of

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13. Justice Gorsuch also clerked for Justice White after White retired from the Supreme Court and sat with the Tenth Circuit.

14. *The Supreme Court of the United States and the Federal Judiciary*, FED. JUDICIAL CTR. (n.d.), <https://www.fjc.gov/history/courts/supreme-court-united-states-and-federal-judiciary>.

15. *Id.*

16. *Id.*

federal courts of appeals. There were eight in 2014, and there are eight today.

I think the appointment of so many former federal appellate judges is unfortunate, although no one would expect me, of all people, to suggest that a federal court of appeals judge would not make an admirable member of the Supreme Court. My point is that the Court benefits from an array of Justices with varied backgrounds, especially political experience. On the 1957 Court, Justices Black and Burton had been United States Senators, and Chief Justice Warren had been a governor. Justice Clark had been the Attorney General of the United States, Justice Douglas had been a professor at Yale Law School and chairman of the Securities and Exchange Commission, and Justice Frankfurter had been a professor at Harvard Law School. I should acknowledge that on the 2014 Court Justices Scalia, Ginsburg, Breyer, and Kagan had been full-time professors before their appointment, and others had taught part-time.<sup>17</sup>

The 1957 Court comprised nine White men.<sup>18</sup> Thurgood Marshall became the first Black Justice in 1967, and Sandra Day O'Connor became the first female Justice in 1981. The Court in 2014 included one Black Justice and three women. Three Justices were Jewish, and six were Catholic. In fact, a remarkable feature of the 2014 Court is that no member of the Court was a Protestant, a complete change from the Court during most of the nineteenth century when all nine Justices were Protestant.<sup>19</sup>

How the Justices were confirmed has significantly changed.<sup>20</sup> We are now so used to televised hearings of nominees before the Senate Judiciary Committee that it is worth recalling the earlier practice. No Supreme Court nominee even attended a Senate committee hearing until Justice Stone, then the

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17. See Barry Sullivan & Megan Canty, *Interruptions in Search of a Purpose: Oral Argument in the Supreme Court Terms 1958–60 and 2010–12*, 2015 UTAH L. REV. 1005, 1006.

18. I always capitalize “White” and “Black” when referring to Caucasians and African-Americans. The words connote more than skin color. I began this practice and explained its use in one of my early district court opinions, *Moss v. Stamford Bd. of Educ.*, 350 F. Supp. 879, 880 n.2 (D. Conn. 1972).

19. See Sullivan & Canty, *supra* note 17, at 1007 n.8.

20. See generally Paul A. Freund, *Appointment of Justices: Some Historical Perspectives*, 101 HARV. L. REV. 1146 (1988).

Attorney General of the United States, was questioned in 1925.<sup>21</sup> The next to attend was Justice Frankfurter, who showed up in 1939 and briefly answered questions, as did Justice Jackson in 1941 and Justice Harlan in 1955.<sup>22</sup> Extensive grilling began in 1959 with the nomination of Justice Stewart.<sup>23</sup> Of course, it was the hearing for Robert Bork in 1987 that significantly changed the hearing process, probably forever.<sup>24</sup>

The rejection of Judge Bork, however, was not the first time that the Senate failed to confirm a nominee for the Court. Before Bork, rejection was more frequent than is generally thought.<sup>25</sup> Thirty-six nominations were not confirmed, but this represents thirty-one people because some were nominated again, and six of those thirty-one were later confirmed. That leaves twenty-five people not confirmed, and the Senate's refusal to hold a hearing on President Obama's 2016 nominee, Merrick Garland, increased the number not confirmed to twenty-six.<sup>26</sup>

The number of cases that the Supreme Court is asked to review has been steadily increasing over the years. The 1957

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21. Shortly after Attorney General Stone was nominated to be a Justice, he took the unexpected step of convening a grand jury in Washington, D.C., to seek a second federal indictment of Montana Senator Burton K. Wheeler, already indicted in Montana. Although the Judiciary Committee had unanimously approved his nomination to the Supreme Court, the nomination was recommitted. Attorney General Stone testified at a hearing of the committee on January 28, 1925, was questioned extensively, and again approved. *Stone Will Push Action on Wheeler; Sees an Oil Plot*, 74 N.Y. TIMES 1 (Jan. 29, 1925) (reporting that “the nomination of Mr. Stone as an Associate Justice of the Supreme Court has been held up because of the criticisms which have been leveled at him,” but also that the Judiciary Committee had concluded after questioning him that the nomination “would be further considered”); *Committee Approves Nomination of Stone; Reports It Out to the Senate, Where It Is Likely to Be Confirmed Today*, N.Y. TIMES 2 (Feb. 3, 1925).

22. See, e.g., Paul L. Collins, Jr. & Lori A. Ringhand, 41 L. & SOC. INQUIRY 126, 132 (2016).

23. See, e.g., Freund, *supra* note 20, at 1162 (indicating that Justice Stewart was “questioned at length . . . by Senator John McClellan of Arkansas on racial segregation”).

24. See, e.g., L.A. Powe, Jr., *The Not-So-Brave New Constitutional Order*, 117 HARV. L. REV. 647, 671 (2003) (noting in a review of Mark Tushnet's *THE NEW CONSTITUTIONAL ORDER* that “the Bork hearings changed the nominating process”).

25. See, e.g., Geoffrey R. Stone, *Understanding Supreme Court Confirmations*, 2010 SUP. CT. REV. 381, 391 (discussing six nominees rejected on ideological grounds between 1795 and 1930).

26. The Senate maintains a complete list of nominees to the Supreme Court. *Supreme Court Nominations: Present–1789*, U.S. SENATE (n.d.), <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm>.

Court was asked to review nearly 1,400 cases<sup>27</sup> and granted review in 110 cases.<sup>28</sup> The 2014 Court was asked to review more than 7,000 cases<sup>29</sup> and granted review in only sixty-eight cases.<sup>30</sup> Despite this five-fold increase in the number of requests for review, the output of the Court has actually declined. The 1957 Court decided 117 cases with full opinions.<sup>31</sup> The 2014 Court decided only seventy-six cases with full opinions,<sup>32</sup> about two-thirds as many as the 1957 Court. Between those years, the Court's output hit a high of 167 cases decided with full opinions in the 1981 Term and has declined ever since then.<sup>33</sup>

Although the number of cases decided has decreased, the length of the Court's opinions has significantly increased. In the 1950s, the median length of Supreme Court opinions was 2,000 words.<sup>34</sup> In the 2009 Term, the median length was more than 8,000 words.<sup>35</sup> Parkinson's Law holds: "Work expands to fill the time available for its completion." Apparently the Supreme Court has a variation: "Opinions expand to fill the time available to write them."

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27. The exact number was 1,396. *Caseloads: Supreme Court of the United States, Petitions for Certiorari, 1923–1969*, FED. JUDICIAL CTR. (n.d.), <https://www.fjc.gov/history/courts/caseloads-supreme-court-united-states-petitions-certiorari-1923-1969>.

28. *Statistics—October Term 1957*, J. SUP. CT. U.S. at I (n.d.).

29. The exact number was 7,032. John G. Roberts, Jr., *2015 Year-End Report on the Federal Judiciary* 13 (Dec. 31, 2015), available at <https://www.supremecourt.gov/publicinfo/year-end/2015year-endreport.pdf>.

30. *Statistics as of June 30, 2015*, J. SUP. CT. U.S. at II (n.d.).

For a detailed examination of the decline in recent years in the number of cert. petitions that the Supreme Court has granted, see David R. Stras, *The Supreme Court's Declining Plenary Docket: A Membership-Based Explanation*, 27 CONST. COMMENT. 151 (2010). Judge Stras, then a professor at the University of Minnesota Law School, reported that changes in Court personnel beginning after the 1989 Term precipitated a decline in the numbers of cert. petitions granted. The average number of times that a Justice voted to grant plenary review was 129.25 from 1986 to 1989 for Justice Brennan compared to eighty-three from 1990 to 1993 for Justice Souter, who replaced him; 124.6 from 1986 to 1991 for Justice Marshall compared to 71.7 from 1991 to 1993 for Justice Thomas, who replaced him; and 215.6 from 1986 to 1992 for Justice White compared to sixty-three during the 1993 Term for Justice Ginsburg, who replaced him. See *id.* at 157–58.

31. By my count.

32. By my count. The seventy-six cases with full opinions in the 2014 Term exceeded the total of sixty-eight cert. petitions granted in that term because some of these opinions resulted from cert. petitions granted toward the end of the 2013 Term.

33. The total of 167 cases decided with full opinions in the 1981 Term is by my count.

34. Adam Liptak, *Justices Are Long on Words but Short on Guidance*, N.Y. TIMES (Nov. 17, 2010), <https://www.nytimes.com/2010/11/18/us/18rulings.html>.

35. *Id.*

Which Justice wrote the most opinions? In the 1957 Term, counting majority, concurring, and dissenting opinions, Justice Harlan led with thirty-five, closely followed by Justice Douglas with thirty-four, and Justice Frankfurter with thirty-one, although fourteen of the Douglas opinions were three pages or fewer.<sup>36</sup> In the 2014 Term, Justices Scalia, Thomas, and Sotomayor were tied with twenty-eight opinions.<sup>37</sup>

By tradition, not rule, the votes of four Justices are sufficient to grant a request for review. Even when four Justices might vote to hear a case, they sometimes decline to do so because they anticipate that if the case is accepted for review, they will be out-voted five to four when the case is decided. The four might prefer to wait for a case presenting the same issue but with stronger facts supporting their side of the issue. Or, if there is a vacancy on the Court, the four might prefer to wait for the arrival of a fifth Justice who might vote for their side when the issue arises in a similar case. Occasionally, when there are only three votes in favor of granting review, another Justice will cast a so-called “courtesy vote,” on the theory that if three colleagues feel strongly that the case should be reviewed, that Justice should supply a fourth vote.<sup>38</sup>

The courts of 1957 and 2014 differ in a minor way with respect to the internal procedure for informing the staff about the disposition of cert. petitions reached at the weekly voting conference of the Justices. In 1957, after each conference, the Chief Justice called the clerk of the Court to his chambers and, with the Chief’s personal law clerks present, announced which petitions had been granted and which had been denied. Sometime after 1957, the junior Justice was assigned the task of reporting cert. grants and denials to the clerk of the Court and a few other members of the Court’s staff.

The earlier practice led to one bizarre occurrence during my clerkship. A prisoner named Harold Rogers, sentenced to death for murder, sought review of a decision limiting the authority of a district court to hear new evidence in a habeas corpus proceeding he had brought, claiming that his state court

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36. By my count.

37. By my count.

38. See David M. O’Brien, *Join-3 Votes, The Rule of Four, the Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket*, 13 J.L. & POL. 779, 798 (1997).

conviction violated his constitutional rights. I recommended to the Chief Justice that the Court grant Rogers's cert. petition, and he seemed inclined to do so. When Warren reported the cert. orders to the Court Clerk, however, he said that Rogers's petition had been denied. As soon as the Clerk left, I reminded the Chief Justice that this was a petition he favored granting. "Oh, yes," he said, "I think Felix suggested we just add some extra language to the denial order."

Warren telephoned Frankfurter, wrote out the words Frankfurter wanted added, and silently showed them to me with the phone still at his ear. The words explained that the Court understood the court of appeals to have ruled that the habeas corpus judge could generally accept the state court's findings, but said nothing about hearing new evidence. I thought the words were inadequate because Rogers wanted the federal judge to hear new evidence that his confession had been coerced. With just seconds to keep the case (and Rogers) alive, I scribbled the added words "and may take testimony." Warren read my words to Frankfurter who, for some reason I never understood (or asked about), agreed to them. That is how an order was issued stating that certiorari had been denied because the Supreme Court understood the court of appeals to have said exactly the opposite of what it had really said.<sup>39</sup>

The outcome provoked three law review articles commenting on the Supreme Court's aberrational procedure of reversing while denying certiorari.<sup>40</sup> The case continued before an understandably perplexed district court judge and later came back to the Supreme Court, which ruled on the merits that the confession had been coerced.<sup>41</sup> Ultimately, the state permitted Rogers to avoid the death penalty, and he was eventually paroled.

The two Courts differ on when they filed their opinions. The 1957 Court followed the earlier practice of filing all

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39. *Rogers v. Richmond*, 357 U.S. 220, 220 (1957).

40. Note, *Federal Habeas Corpus Review of State Convictions: An Interplay of Appellate Ambiguity and District Court Discretion*, 68 YALE L.J. 98, 108 (1958); Ernest J. Brown, *The Supreme Court, 1957 Term, Foreword: Process of Law*, 72 HARV. L. REV. 77, 93 (1958); Recent Development, *Supreme Court Scuttles Attempt to Limit Discretion of District Court to Hold Hearing De Novo in Habeas Corpus Proceedings Brought by State Prisoners*, 58 COLUM. L. REV. 895, 899 (1958).

41. *Rogers v. Richmond*, 365 U.S. 534 (1961).

opinions only on a Monday. That practice changed in 1965, when the Court began to file opinions on two days of some weeks, especially in the final weeks of the Court's term. The 2014 Court continued the modern practice.

I can take some slight credit for that change. During my year as a law clerk at the Court, the Supreme Court reporter for the New York Times was Anthony Lewis, then the Nation's best journalist covering the Court, a tradition later continued for the Times by Linda Greenhouse and now by Adam Liptak. Tony Lewis and I discussed the problems created for the press by the Court's habit of filing many important opinions in late June only on a Monday.

I broached the matter to Chief Justice Warren, who was receptive to adding opinion-filing days and suggested the idea to the Court. Justice Frankfurter was strongly opposed. Hearing of his opposition, I had the temerity to suggest to him that more than one opinion day a week would help the press explain the Court's work to the public. He told me that was none of the Court's business. Soon after he died in 1965, the Court abandoned the Monday-only filing of opinions.<sup>42</sup>

The Court's communication with the public has significantly changed. Before 1954, oral arguments were not recorded. During the 1954 Term, the future Chief Justice, Warren Burger, argued a case<sup>43</sup> for the Government in his capacity as an Assistant Attorney General. A dispute arose as to whether he had made a concession during his argument. As a result of that controversy, Chief Justice Warren ordered all oral arguments to be recorded.<sup>44</sup> However, for several years those recordings were not made available to the public. Only the Justices and their law clerks could hear them. In later years, researchers could hear them at the National Archives. Still later, the Court made recordings from one term available to the public at the beginning of the next term. Then, starting in 2010, the

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42. See Jon O. Newman, *Opinion Days in the Supreme Court*, XXXVI S. CT. HIST. SOC'Y QUARTERLY 7, 7 (2014) (noting that "[b]eginning with the 1971 Term, the Court abandoned Mondays . . . for the normal release of written opinions in argued cases").

43. *Peters v. Hobby*, 349 U.S. 331 (1955); see also Newman, *supra* note 42, at 7.

44. *Argument Audio*, SUP. CT. OF THE U.S. (n.d.), [https://www.supremecourt.gov/oral\\_arguments/argument\\_audio/2018](https://www.supremecourt.gov/oral_arguments/argument_audio/2018) (noting that the Court's recording of oral arguments began in 1955).

Court made the recordings available to the public at the end of each argument week. And in 2013 recordings going back to 1955 were digitized and made available to the public through an online archive. Starting with the 2006 Term, transcripts of oral arguments have been released within hours of each argument.<sup>45</sup>

The Court's increased willingness to let the public hear the oral arguments stands in sharp contrast to its adamant refusal to let the public see the arguments via television. The Justices have advanced several reasons against televised arguments. Some of them have expressed concern about becoming more recognizable and increasing security risks.<sup>46</sup> Others have said that the public will get a distorted view of how the Court functions, both because oral argument is only part of the process of presenting cases to the Court and because television stations will air only snippets from an hour-long argument.<sup>47</sup> Concern has also been expressed that some Justices would be tempted to grandstand for the viewing public.<sup>48</sup>

I think none of these arguments has sufficient validity to outweigh the enormous public benefit of letting the public see oral arguments. I agree there would be increased recognition, but many Justices already show up frequently in televised interviews, and, even without live television, their photos are flashed on the screen while a reporter recounts some of the more interesting exchanges. It is likely that most newscasts would air only snippets, but the print media now inform the public only of small portions of arguments, and public understanding has not thereby suffered. As for the risk of grandstanding, my guess is that television cameras would have the opposite effect. Justices

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45. See SHAPIRO ET AL., *supra* note 3, at 787.

46. See, e.g., Edward L. Carter, *Supreme Court Oral Argument Video: A Review of Media Effects Research and Suggestions for Study*, 2012 BYU L. Rev. 1719, 1727 (reporting that Justice Thomas believes that "security issues" are "foremost" in Justices' minds, and that "they would certainly become even more significant with more exposure" (footnote omitted)).

47. See, e.g., Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 97 (2006) (explaining that "oral argument comprises only one small portion of an entire case," and expressing fear that those watching an oral-argument broadcast might "incorrectly believe that they are witnessing the process in its entirety").

48. Chief Justice Roberts is among those who have raised this possibility. See, e.g., Carter, *supra* note 46, at 1724 (referring to concerns about "possible 'grandstanding' by lawyers and Justices" expressed by Chief Justice Roberts (footnote omitted)).

would be less inclined to provoke laughter, either at the expense of counsel or even their colleagues. Thirty-five state supreme courts regularly live stream or televise oral arguments, with no adverse effects.<sup>49</sup>

The benefit would be significant. I would not predict high ratings for a typical Supreme Court oral argument, but interested viewers would come to appreciate that the Justices are engaged in the serious enterprise of probing to understand the lawyers' arguments and discussing the issues among themselves on the bench before their private voting conference. C-SPAN could be expected to air oral arguments in full, at least in major cases, and even a chance to see excerpts would have great educational value.

The conduct of oral arguments has changed since the 1957 Term. The Court then allowed each side one hour for argument, except for cases placed on the summary calendar, for which each side was allowed a half hour.<sup>50</sup> By 2014 the Court had changed its rules to allow a half hour for all cases.<sup>51</sup> However, the Court has allowed extended argument time for some major cases. For example, the case challenging the Affordable Care Act was argued for six hours over a three-day period.<sup>52</sup> The modern practice stands in sharp contrast to the Court's earliest decades when there were no time limits on oral arguments, which sometimes lasted for several days.<sup>53</sup> Lengthy written briefs were then unknown.

More significant than the change in time for oral arguments is the change in the extent of the Justices' participation. A recent study meticulously counted and analyzed the number of words spoken by the Justices and by counsel in arguments during years shortly after the 1957 Term and shortly before the 2014 Term. The results are startling. In the earlier years' arguments, counsel frequently began with long uninterrupted statements, some running hundreds of words, and, after a brief question or two,

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49. See Edwin Chemerinsky & Eric J. Segall, *Cameras Belong in the Supreme Court*, 101 JUDICATURE 14, 14 (Summer 2017).

50. See Sup. Ct. R. 44(3) (1954).

51. See Sup. Ct. R. 28(3) (2007).

52. Order Allocating Oral Argument Time, *Natl. Fed'n of Indep. Business v. Sibelius*, 565 U.S. 1193 (Feb. 21, 2012) (Nos. 11-393, 11-398, 11-400).

53. See Sullivan & Canty, *supra* note 17, at 1021.

continued with more long uninterrupted statements. In 1961 one lawyer even gave his entire argument for more than half an hour without interruption.<sup>54</sup> However, in the later years' arguments, the authors of the study report, "[t]here were few cases in which counsel was able to say more than a sentence or two before being interrupted."<sup>55</sup> On average in the earlier years, the Justices spoke only about one-fourth as many words as counsel did.<sup>56</sup> In the later years' argument, the Justices spoke nearly two-thirds as many words as counsel did.<sup>57</sup> And, in the more recent arguments, the Justices frequently interrupted each other and asked several questions in a row before counsel could answer the first one.<sup>58</sup>

Both the 1957 and 2014 Courts have continued the practice of filing all the Term's opinions in argued cases before the Court adjourns for the summer. On the Court's last day, the Chief Justice states, "All cases submitted to the Court for decision which were ready for disposition have been acted upon by the Court"<sup>59</sup> or a variation of that phrasing.<sup>60</sup> That phrase "ready for disposition" can obscure an interesting maneuver. If the Court is not ready at the end of the Term in June to file a major opinion in a case that has been argued, the case is set for re-argument at the beginning of the next Term in October, and an order is entered to that effect.

That rarely happens, but occurred at least once to very good effect. In June 1953, the Court was not ready to file opinions in the historic school-desegregation cases. At that time, the Court was divided on the outcome. It has been widely reported, based on the Justices' papers, that Justice Frankfurter urged re-argument for the specific purpose of gaining support for the

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54. See *id.* at 1052 & n.185 (noting that Robert L. Stern, then First Assistant Solicitor General, spoke 4,343 words without interruption in just under thirty-five minutes in *United States v. du Pont*, 366 U.S. 316 (1961)).

55. *Id.* at 1056–57.

56. See *id.* at 1052 & n.45.

57. See *id.* at 1052, 1043 n.124 (explaining methodology).

58. See *id.* at 1068–71.

59. See, e.g., J. SUP. CT. U.S. 780 (Statement of Chief Justice Burger) (July 2, 1981).

60. Before the summer recess in 1994, Chief Justice Rehnquist said, "I am authorized to announce that all cases submitted to the Court have been acted upon by the Court. . . . Accordingly, it is ordered that those cases remaining on the docket, but not ready for consideration, are continued to the next session of the Court beginning October 3, 1994 . . . ." *Id.* at 989 (June 30, 1994).

eventual ruling. The Court ordered re-argument and asked for briefing on five detailed questions.<sup>61</sup>

The delay had a significant consequence that affected the outcome. During the summer, Chief Justice Vinson, who was not prepared to rule segregated schools unconstitutional, died. After re-argument in December 1953, the new Chief Justice, Earl Warren, persuaded the recalcitrant Justices to reject the separate-but-equal doctrine, and he then wrote the historic opinion in *Brown v. Board of Education*,<sup>62</sup> which was filed in May 1954. The decision would not have been unanimous had the case been decided in June 1953.<sup>63</sup>

The Court's normal practice of filing all opinions before the summer recess has one unfortunate consequence. In the rush to file all opinions before the Term ends, the Court occasionally permits some ill-advised language to remain in some opinions.

All thirteen federal courts of appeals file opinions during the summer months, and I believe all the state supreme courts also do so. I suppose there is some slight virtue in assuring the Justices a three-month restful summer uninterrupted by refining two or three opinions not quite ready for filing in June, but I think a slight interruption of a three-month vacation would be tolerable. With modern technology, the Justices could easily exchange views for finalizing opinions without re-assembling in Washington. Indeed, the Court on rare occasions has reconvened during the summer recess to hear and quickly resolve emergency matters.

There are two well-known examples. On June 15, 1953, after announcing a recess,<sup>64</sup> the Court considered the application filed by Julius and Ethel Rosenberg to obtain a last-minute writ of habeas corpus to avoid execution and denied it the same day.<sup>65</sup> On June 24, 1971, the Court heard arguments in the

61. *See id.* 236–37 (June 8, 1953).

62. 347 U.S. 483 (1954).

63. Another famous case ordered to be re-argued was *Roe v. Wade*. *See* J. SUP. CT. U.S. 695 (June 26, 1972) (noting that “No. 70-18. Jane Roe et al., appellants, v. Henry Wade” and

“No. 70-40. Mary Doe et al., appellants, v. Arthur K. Bolton, as Attorney General of the State of Georgia, et al.” were among the cases “restored to the calendar for reargument”).

64. *See id.* 255 (June 15, 1953).

65. *See id.* 256 (June 15, 1953). The Court convened again on June 18, 1953, to consider the Attorney General's application to vacate a stay of the Rosenbergs' execution

Pentagon Papers cases and four days later permitted their publication.<sup>66</sup>

Since 1957, the Court has added significant staff. During the 1972 Term, the Court created the position of Legal Counsel to serve as the Court's lawyer on institutional matters. The Legal Counsel, assisted by one staff counsel, gives advice on budget matters, questions of ethics, and suits against the Court, such as those arising from protests on the Court's plaza. The Legal Counsel also serves as a career law clerk to all the Justices, preparing memos on petitions for rehearing, lawsuits brought by one state against another state, and special applications such as mandamus petitions and petitions for an original writs of habeas corpus.

A more significant position, also created in 1972, is Administrative Assistant to the Chief Justice,<sup>67</sup> retitled in 2008 as Counselor to the Chief Justice.<sup>68</sup> That officer assists the Chief Justice in a variety of administrative tasks.

The membership of the 1957 Court bears one striking resemblance to the membership of the 2014 Court. Both Courts had a four-member liberal wing, a four-member conservative wing, and one Justice in the middle. The liberals in 1957 were Chief Justice Warren and Justices Black, Douglas, and Brennan. The conservatives were Justices Frankfurter, Burton, Clark, and Harlan. The man often in the middle was Justice Whittaker. I need not remind readers of this journal of the names of the four liberals, the four conservatives, and often the swing voter on the 2014 Court.

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granted by Justice Douglas, see *id.* 257 (June 18, 1953), and vacated the stay the following day, see *id.* 258–59 (June 19, 1953).

66. *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971). Other significant cases argued and decided after the Court began a summer recess are *Ex Parte Quirin*, 317 U.S. 1 (1942) (cert. granted July 29, 1942, decided July 31, 1942), and *Cooper v. Aaron*, 358 U.S. 1 (1958) (cert. granted Sept. 11, 1958, decided Sept. 12, 1958 (making “prompt announcement of our judgment affirming the Court of Appeals,” and explaining that “[t]he expression of the views supporting our judgment will be prepared and announced in due course”) & Sept. 29, 1958 (pointing out that the Court had “unanimously affirmed the judgment of the Court of Appeals for the Eighth Circuit” on September 12, 1958, and that it had “immediately issued the judgment, reserving the expression of [the Justices’] supporting views to a later date,” and explaining that “[t]his opinion of all of the members of the Court embodies those views”)).

67. See Pub. L. No. 92-238, § 1, 86 Stat. 46 (1972).

68. See Pub. L. No. 110-402 § 1(b)(3)(A), 122 Stat. 4254 (2008), *codified at* 28 U.S.C. § 677.

I do not mean to leave the impression that either Court routinely divided along liberal and conservative lines. They did not. Indeed, of the 117 opinions of the 1957 Court, twenty-eight were unanimous.<sup>69</sup> And of the seventy-six opinions of the 2014 Court, again twenty-eight were unanimous.<sup>70</sup> But both Courts issued a number of five-to-four decisions, twenty out of 117 in 1957, and nineteen out of seventy-six in 2014.<sup>71</sup> When both Courts divided five to four, the liberal and conservative blocs were often—but not always—intact. Some unusual voting alignments occasionally occurred. In the 1957 Term, the members of the five-member majority affirming one conviction were Chief Justice Warren and Justices Black, Clark, Burton, and Whittaker.<sup>72</sup> In 2014, the members of two five-member majorities were Chief Justice Roberts and Justices Alito, Ginsburg, Breyer, and Sotomayor.<sup>73</sup> But in most important five-to-four decisions, the blocs were usually intact, and the swing voter determined the outcome.

Two five-to-four decisions of the 1957 Term raised the most fundamental issues considered that Term. They both concerned the power of Congress to take citizenship away from a native-born citizen.<sup>74</sup> The cases were *Perez v. Brownell*<sup>75</sup> and *Trop v. Dulles*.<sup>76</sup> In surprising outcomes, the Court voted five to four in *Perez* to uphold a law removing citizenship from a native-born citizen for voting in a foreign election<sup>77</sup> and, on the

69. By my count.

70. By my count.

71. By my count.

72. *United States v. Masciale*, 356 U.S. 386 (1958).

73. *Yates v. United States*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1074 (2015); *Dart Cherokee Basin Operating Co. v. Owens*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 547 (2014).

74. This denationalization, sometimes called expatriation, should be distinguished from denaturalization, which is taking citizenship away from a person who acquired citizenship by becoming naturalized. A naturalized citizen can be denaturalized if the naturalization was unlawfully obtained. See 8 U.S.C. § 1451.

75. 356 U.S. 44 (1958), *overruled by* *Afroyim v. Rusk*, 387 U.S. 253, 268 (1967).

76. 356 U.S. 86 (1958).

77. The majority in *Perez* ruled that the statute was “reasonably related,” 356 U.S. at 58, to the power of the National Government to “regulate foreign affairs,” *id.*, because the act of voting in a foreign election was “potentially embarrassing to the American Government and pregnant with the possibility of embroiling this country in disputes with other nations,” *id.* at 60. Chief Justice Warren’s dissent started by considering the nature of citizenship. “Citizenship *is* man’s basic right for it is nothing less than the right to have rights.” *Id.* at 64 (Warren, C.J., Black & Douglas, JJ., dissenting) (emphasis in original).

very same day, voted five to four in *Trop* to declare unconstitutional a law imposing loss of citizenship as a punishment for wartime desertion.<sup>78</sup> In *Perez* the Court upheld the denationalization as a reasonable exercise of Congress's implied power to regulate the Nation's foreign affairs. But in *Trop* the Court invalidated the denationalization, ruling it a cruel and unusual punishment in violation of the Eighth Amendment.

In these two five-four decisions, Justice Brennan voted for both results, outcomes he acknowledged were "paradoxical."<sup>79</sup> But in many of the five-four cases in 1957 Justice Whittaker cast the key vote.

Unlike the able Justice Kennedy, whose vote was decisive in many of the five-four decisions of 2014, Justice Whittaker was a jurist of modest accomplishments. He found the task overwhelming. When some of us told a Whittaker law clerk one day that their Justice looked nervous, the clerk replied, "You'd be nervous too if you were deciding every case in this building."

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And, he added, "This Government was born of its citizens, it maintains itself in a continuing relationship with them, and, in my judgment, it is without power to sever the relationship that gives rise to its existence." *Id.* He acknowledged that a citizen could renounce citizenship or forfeit citizenship by performing some act that "compromise[s] his undivided allegiance to his country," *id.* at 78, and that an act that interfered with the conduct of foreign affairs could be punished, but that citizenship could not be involuntarily taken away. Justice Douglas wrote an additional dissenting opinion, joined by Justice Black. *See id.* at 79. Justice Whittaker agreed with the majority that Congress could take citizenship away under its power to regulate foreign affairs, but dissented on the limited ground that the vote cast by *Perez* was lawful in Mexico, where he had voted, and therefore could not have caused any embarrassment with another country. *See id.* at 84.

Although Chief Justice Warren's view was rejected in the five-four decision that upheld the power of Congress to take citizenship away for voting in a foreign election, it was vindicated in 1957 when the Court abandoned *Perez* in *Afroyim v. Rusk*, 387 U.S. 253 (1967). The *Afroyim* decision ruled five to four, largely on the basis of the Fourteenth Amendment, that Congress could not take citizenship away for voting in a foreign election.

78. In a plurality opinion in *Trop*, joined by Justices Black, Douglas, and Whittaker, Chief Justice Warren stated that taking away citizenship as punishment for the offense of desertion was cruel and unusual because it was "the total destruction of the individual's status in organized society." 356 U.S. at 101. Justice Brennan, who had voted in *Perez* to uphold denationalization for voting in a foreign election, stated that taking away citizenship for desertion did not have "the requisite rational relation" to Congress' war power. *See id.* at 114 (Brennan, J., concurring). Justice Frankfurter, in an opinion joined by Justices Burton, Clark, and Harlan, dissented on the ground that denationalization for desertion was a regulatory measure within Congress' war power, *see id.* 118–22 (Frankfurter, Burton, Clark & Harlan, JJ., dissenting), and, even if viewed as a punishment, was not cruel and unusual within the meaning of the Eighth amendment, *see id.* at 125–28 (Frankfurter, Burton, Clark & Harlan, JJ., dissenting).

79. *Id.* at 105 (Brennan, J., concurring).

The most interesting aspect of 1957's swing voter was the way his vote was sought by the two blocs. No fair damsel was ever courted more assiduously. It was embarrassing. My favorite recollection concerns a particularly difficult case, *Harmon v. Brucker*.<sup>80</sup> The question was whether the military could give a soldier a less-than-honorable discharge for misconduct occurring before he joined the armed forces. It was the Court's practice to vote at a Friday conference on cases argued the previous four days. At the first voting conference after *Harmon* was argued, no votes were cast. The case remained undecided at the next two conferences. With no Justice voting even at the fourth conference, Justice Whittaker stunned the brethren by saying, "Chief, how about I try my hand at a draft?"

Eight hypocritical voices, having no idea what Whittaker had in mind, chorused, "Charlie, that's a great idea!" A few weeks later Whittaker circulated a draft opinion. It was just awful, poorly reasoned and poorly written. "What the hell is this?" we asked the Whittaker clerks. Their reply: "We're seeing it for the first time, just as you are." For several days no Justice said or wrote anything. They were all determined not to offend the object of their affection.

Finally, Justice Frankfurter acted, and did so in an astonishing way. He took Whittaker's draft opinion to the print shop in the Supreme Court building and had the opinion reset with triple spacing. Then, Frankfurter applied his pen to the Whittaker draft and, in the manner of a school teacher, crossed out all the wrong words and inserted words that made sense. Frankfurter circulated the revision to the entire Court. I could not believe he would so humiliate another Justice, but I was sure he was clueless about how his handiwork would be perceived—by Whittaker and the other Justices. It was a failing of the brilliant Frankfurter that he could be so unintentionally tactless. The case was ultimately decided in an unsigned opinion, ruling that the discharge was invalid.<sup>81</sup>

As far as I am aware, the two blocs of the 2014 Court engaged in no similar courtship of Justice Kennedy. Indeed, the late Justice Scalia took just the opposite tack, going out of his

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80. 355 U.S. 579 (1958).

81. *Id.* at 583.

way to use hostile language that was certain to drive Justice Kennedy away. In his dissent in the same-sex marriage case,<sup>82</sup> Justice Scalia famously wrote, “[i]f . . . I ever joined an opinion for the Court that began [and here he quoted the first sentence from Justice Kennedy’s opinion], I would hide my head in a bag.”<sup>83</sup> Justice Scalia managed to insult Justice Kennedy and all four Justices who had joined his opinion.

Chief Justice Warren’s plurality opinion in *Trop* provides the basis for comparing the 1957 and 2014 Courts in two respects. The first stems from the well-known sentence in the *Trop* opinion interpreting the Eighth Amendment, a sentence frequently quoted in whole or in part in many later Supreme Court majority opinions, one as recently as March of 2017.<sup>84</sup> Chief Justice Warren wrote: “The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>85</sup> That sentence from the 1957 Term, declaring that the meaning of “cruel and unusual punishment” was not limited to its original meaning in 1787, prompted an extraordinary retort from Justice Scalia in the 2014 Term. In his dissenting opinion in *Glossip v. Gross*,<sup>86</sup> Justice Scalia said that the *Trop* case “has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind.”<sup>87</sup>

Chief Justice Warren’s opinion in *Trop* and Justice Scalia’s opinion in *Glossip* exemplify the fundamental divide between those who view the Constitution in some respects as a living

82. *Obergefell v. Hodges*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2584 (2015).

83. *Id.* at 2630 n.22 (Scalia & Thomas, JJ., dissenting).

84. *See, e.g.*, *Moore v. Tex.*, \_\_\_ U.S. \_\_\_, 137 S. Ct. 1039, 1048 (2017); *Brumfield v. Cain*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2269, 2274 (2015); *Hall v. Fla.*, 572 U.S. 701, \_\_\_ 134 S. Ct. 1986, 1992 (2014); *Miller v. Ala.*, 567 U.S. 460, 469 (2012); *Graham v. Fla.*, 560 U.S. 48, 58 (2011).

85. *Trop*, 356 U.S. at 101.

86. \_\_\_ U.S. \_\_\_, 135 S. Ct. 2726 (2015).

87. *Id.* at 2749 (Scalia & Thomas, JJ., dissenting). Although thus scorning Chief Justice Warren’s formulation in *Trop* that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,” 356 U.S. at 101, Justice Scalia had earlier acknowledged that “this Court has ‘not confined the prohibition embodied in the Eighth Amendment to ‘barbarous’ methods that were generally outlawed in the 18th Century,’ but instead has interpreted the Amendment ‘in a flexible and dynamic manner.’” *Stanford v. Ky.*, 492 U.S. 361, 369 (1986) (quoting *Griggs v. Ga.*, 428 U.S. 153, 171 (1976)). And, he added, “[O]ur job is to *identify* the ‘evolving standards of decency.’” *Id.* at 378 (quoting *Trop*, 356 U.S. at 101 (emphasis in original)).

document, adaptable to new conditions, and the so-called originalist view that the Constitution means today exactly what it meant in 1787 when it was adopted. I say the “so-called” originalist view because no originalist really believes that every clause of the Constitution means today exactly what it meant then. Of course, a person still has to be thirty-five to be eligible to become President,<sup>88</sup> and every state still gets just two senators,<sup>89</sup> but even Justice Scalia agreed that the Fourteenth Amendment should not be understood in the twentieth century to perpetuate the separate-but-equal doctrine of the nineteenth century.<sup>90</sup> Another example: the Fourth Amendment prohibiting unreasonable searches originally meant that only searches conducted pursuant to so-called “general” warrants were prohibited,<sup>91</sup> but Justice Scalia agreed with the modern Court that “unreasonable searches” now means any search where the state’s legitimate law enforcement needs do not outweigh the individual’s reasonable expectation of privacy.<sup>92</sup>

Some clauses retain their original meaning. Some do not. Reasonable Justices can differ as to which are which. In 1957, there was little, if any, talk about originalism. Those critical of the Warren Court’s liberal decisions usually argued that the Court was not observing appropriate judicial restraint.

Chief Justice Warren’s *Trop* opinion also reveals another difference between the Court’s view in the 1957 Term and Justice Scalia’s view in the 2014 Term. Chief Justice Warren surveyed the laws of the nations of the world, then numbering

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88. See U.S. CONST. art. II, § 1, cl. 4.

89. See *id.* art. I, § 3, cl. 1.

90. See, e.g., Ronald Turner, *The Problematics of the Brown-is-Originalist Project*, 23 J. L. & POL’Y 591, 624–31 (2015) (analyzing Justice Scalia’s apparent position on *Brown*).

91. See Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547, 724 (1999) (characterizing the amendment’s text as “a specific response to a specific grievance that had arisen in a specific historical context,” and concluding that “[t]he Framers aimed the Fourth Amendment precisely at banning Congress from authorizing use of general warrants,” that “they did not mean to create any broad reasonableness standard for assessing warrantless searches and arrests,” and that “they did not intend [the amendment] to guide officers in the exercise of discretionary arrest or search authority”).

92. The Supreme Court has said that the reasonableness of a search “is determined by weighing ‘the promotion of legitimate governmental interests’ against the degree to which [the search] intrudes upon an individual’s privacy.” *Md. v. King*, 569 U.S. 435, 448 (2013) (quoting *Wyo. v. Houghton*, 526 U.S. 295, 300 (1999)).

eighty-four, and his opinion reported that only two used taking away citizenship as a punishment for desertion.<sup>93</sup> Decades later, Scalia would argue vehemently that it is improper even to cite foreign law in interpreting our Constitution. What is noteworthy about Chief Justice Warren's reference to foreign law in *Trop* is that not even the four dissenting Justices expressed the slightest concern that he had done so,<sup>94</sup> nor did any contemporaneous commentary. Indeed, in a 2005 opinion, *Roper v. Simmons*,<sup>95</sup> ruling that the death penalty could not be imposed on those under the age of eighteen at the time of their crime, Justice Kennedy pointed out that almost all other nations took the same position, and cited Chief Justice Warren's reference to foreign law in *Trop*.<sup>96</sup> In his *Roper* dissent, Justice Scalia said that the invocation of foreign law "should be rejected out of hand."<sup>97</sup>

My final comparison of the Supreme Court then and now takes me back a few years before the 1957 Term to 1952 when the Court decided the *Steel Seizure Case*.<sup>98</sup> That case is often recalled because of Justice Jackson's well-known concurring opinion, which the 2014 Court discussed in the *Zivotofsky* case.<sup>99</sup> I consider that concurring opinion here because this article originated as my 2017 Robert H. Jackson Lecture on the Supreme Court.<sup>100</sup>

The *Steel Seizure Case*, as many remember, was a challenge to President Truman's seizure of the steel mills on the eve of a nationwide strike. The litigation presented a major confrontation between the executive and legislative branches. In his concurring opinion, Justice Jackson divided Presidential power into three categories. In the first, the President acts pursuant to the authority of Congress. In that situation, said Jackson, the President's power is at its maximum. In the second category, the President acts in the absence of any statute that

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93. The Philippines and Turkey. See *Trop*, 356 U.S. at 103.

94. In fact, Justice Frankfurter's dissenting opinion said that "[m]any civilized nations impose loss of citizenship for indulgence in designated prohibited activities." *Id.* at 126 (Frankfurter, Burton, Clark, & Harlan, JJ., dissenting) (citing a United Nations document).

95. 543 U.S. 551 (2005).

96. See *id.* at 575.

97. *Id.* at 624 (Scalia, J., Rehnquist, C.J., & Thomas, J., dissenting).

98. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

99. *Zivotofsky ex rel. Zivotofsky v. Kerry*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 2076 (2015).

100. Delivered at Chautauqua, N.Y., on August 16, 2017.

either authorizes or prohibits his action. In that situation, said Jackson, the President must rely on his own independent powers, but, he added, “there is a zone of twilight in which he and Congress may have concurrent authority.”<sup>101</sup> In the third category, the President acts contrary to the will of Congress. In that situation, said Jackson, presidential power is “at its lowest ebb,”<sup>102</sup> and he can rely “only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”<sup>103</sup> To succeed in this third category, Jackson added, the President’s power must be both “exclusive” and “conclusive” on the matter.<sup>104</sup> Agreeing with the Court’s unanimous decision, he said that President Truman’s seizure of the steel mills was in the third category because it was in violation of an implied prohibition of Congress and unlawful because it was beyond any exclusive power of the President.

The 2014 case, *Zivotofsky*, also presented a conflict between the executive and legislative branches. Menachem Zivotofsky was born in Jerusalem. His mother asked the U.S. embassy to list Israel as her son’s place of birth on his U.S. passport. The embassy refused, relying on a State Department policy stating that, while the birthplace of a U.S. citizen born abroad could normally be recorded as the country having sovereignty over the city of birth, Menachem’s birthplace would be recorded as Jerusalem—not Israel—because the United States did not recognize any country as having sovereignty over that city.

However, in a 2002 statute, Congress had included a provision that sought to overturn the State Department’s policy and permit births like Menachem’s to be listed on U.S. passports as occurring in Israel.<sup>105</sup> The mother sued, invoking the Congressional enactment.

A divided Supreme Court ruled the statutory provision unconstitutional because it was an impermissible encroachment on the exclusive power of the President to recognize foreign

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101. *Youngstown Sheet & Tube*, 343 U.S. at 637 (Jackson, J., concurring).

102. *Id.*

103. *Id.*

104. *Id.* at 638.

105. See Foreign Relations Authorization Act, Fiscal Year 2003, § 214(d), 116 Stat. 1350 (2002).

states and their territorial boundaries. In reaching that decision, the Court invoked Justice Jackson's concurring opinion in the *Steel Seizure Case*.<sup>106</sup>

In *Zivotofsky*, as in the *Steel Seizure Case*, the Court placed the President's action in Jackson's third category because the President had again acted contrary to the will of Congress, but this time the Court upheld the President's power.<sup>107</sup> It ruled that his action was within the President's exclusive recognition power and the act of Congress was therefore unconstitutional.

Justice Jackson's much-cited three categories in the *Steel Seizure Case* provide a useful framework for beginning analysis of presidential power, but I doubt that they get us very far. All cases in the first category, where the President acts in accordance with an act of Congress, are clear. Most close cases will arise in the second category, and Jackson told us nothing about the standards he would use for testing presidential action when Congress has neither authorized nor prohibited such action. Jackson's third category, where Congress directly or impliedly prohibits presidential action, also provides little basis for determining outcomes as the opposite results in the *Steel Seizure* and *Zivotofsky* cases, both in the third category, illustrate. If I may be permitted to express a minor heresy, I think Justice Jackson's three-category analysis reveals somewhat less than meets the eye.

I am much more enthusiastic about his most frequently quoted judicial sentence. In *Brown v. Allen*<sup>108</sup> he wrote the best aphorism ever applied to the Supreme Court: "We are not final because we are infallible, but we are infallible because we are final."<sup>109</sup> So well said and so true—in the 1957 Term, the 2014 Term, and, I can safely predict, in all future terms.

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106. *Zivotofsky*, 135 S. Ct. at 2083 (recognizing "Justice Jackson's familiar tripartite framework").

107. *Id.* at 2090, 2096 (pointing out that "[t]he Executive is not free from the ordinary controls and checks of Congress merely because foreign affairs are at issue" but holding that "Congress cannot command the President to contradict an earlier recognition determination in the issuance of passports").

108. 344 U.S. 443 (1953).

109. *Id.* at 540 (Jackson, J., concurring in the result).