

# ARTICLES

## COURTS AND INFORMATION TECHNOLOGY: A PREDICTABLY UNEASY RELATIONSHIP

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Courts and technology are uneasy bedfellows. This can probably be explained by a few simple observations. First, the people who populate courts—primarily lawyers and judges—have been steeped in the brew of the past; that is, they study and rely on prior decisions, history, and tradition. Legal rules result from reasoning that rests on long lines of decisions sometimes tracing back to Magna Carta. This sort of reasoning elevates the past to some exalted place so that any current event—legal or social or economic or technological—must vie for justification in terms of what occurred in some prior period. The courts' commitment to protect those values that are "deeply rooted in this Nation's history and tradition" reinforces the view that what we did yesterday or 100 years ago is sufficient for us to follow the same path today.<sup>1</sup> This perspective produces the ingrained view that what was good yesterday, or better still, what was good 50 years ago is probably still good today.

A second observation is also simple to state. Courts represent stability, and stability is the foundation of a legal system. Courts make decisions and we expect those decisions to be consistent with the past and to harmonize with the present to assure stability. Stability enables us to arrange our affairs knowing that the rules of the game will not change.

A third observation derives from the first two: acknowledging the inevitability of change, it should take place on a very small scale.<sup>2</sup> In short, (1) the past is the source of wisdom; (2) holding true to the past provides stability; and (3) change, when it comes, must be incremental rather than substantial. These observations are likely to strike you as familiar. Thus, it

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1. *Moore v. E. Cleveland*, 431 U.S. 494, 503 (1977).

2. "Judges do and must legislate, but they must do so only interstitially: they are confined from molar to molecular motions." *S. Pac. v. Jensen*, 244 U.S. 205, 221-22 (1917) (Holmes, J., dissenting).

should come as no surprise that lawyers and judges, and the courts they inhabit tend to view change of any sort with enormous skepticism.

A fourth observation may be necessary regarding the Supreme Court of the United States. It exists largely in its own world, disconnected from the legislative and executive branches. The Court is something akin to a life form that Darwin might have observed in the Galapagos Islands, adapting and surviving and perhaps thriving by adjusting to its unique environment. As a consequence of its independence stemming from separation of powers, the Court operates in its own world and it cares little for what others may think of its day-to-day operation.

Courts, like other government institutions, serve important democratic objectives. One of these aims is openness or transparency. This idea translates to the notion that the people have access to their government institutions and the decisions they render. Limiting citizen access to government undermines its democratic character. Moreover, as Brandeis observed, "sunlight is the best disinfectant."<sup>3</sup> Access to government operations assures some measure of "sunlight." In the past, the media accepted the responsibility to expose institutions for good or ill. But as the press has withered in the information age, the burden has shifted to citizens and to the institutions themselves.

Information technology offers an attractive path toward greater transparency in government. The courts have long been exemplars of openness with the assurance of public access so that the people can see and hear justice done. Some courts have taken steps to broaden the public sphere through audio- and video-taping of proceedings. Few courts, however, harness the power of information technology to store, index, and archive these courtroom events with free public access via the Internet. While courts may occasionally broadcast their proceedings, few courts consider the needs of the working public. Most employers look with disfavor on their employees watching televised court proceedings at work. Moreover, cable services such as C-SPAN impose real costs on subscribers. The idea of transparent government can easily morph into opaque government.

Technological change can be sustaining, revolutionary, or disruptive.<sup>4</sup> A sustaining technology improves the performance of an established

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3. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 92 (Frederick A. Stokes Co. 1914).

4. Joseph L. Bower & Clayton M. Christensen, *Disruptive Technologies: Catching the Wave*, HARV. BUS. REV., Jan. 1, 1995, at 43-45.

product.<sup>5</sup> For example, the electric typewriter was a sustaining innovation because it simply improved on the work of the manual typewriter.<sup>6</sup> A revolutionary technology “introduces products with highly improved new features.”<sup>7</sup> The automobile was revolutionary because it solved the problem of transportation in a radically new way.<sup>8</sup> Finally, disruptive technology is an innovation that improves a product or service in ways unexpected by the marketplace.<sup>9</sup> The musket is a classic example, replacing crossbows and longbows which required years of training and practice to master.<sup>10</sup> A contemporary disruptive innovation is the iPod in its many configurations.<sup>11</sup> It has spawned new and unexpected markets for audio, video, and assorted applications for its wireless relatives, the iTouch and the iPhone.

Judges and courts are not immune to the forces that confront the rest of the world. But their responses to technology are likely shaped by their go-slow, reliance-on-the-past approach to the law. However, revolutionary and disruptive technologies forever shift the world we inhabit. At some point, adjustments to a new reality are inevitable. Consider the problem of rising ocean levels. Pacific Islanders may be able to keep the waters at bay but at some point they must adjust for the long-term by moving to higher ground or face the deluge.

Judges and lawyers are also human, and consequently they are subject to the same human trait of misjudging the future. We humans tend to fall victim to “the merchants of hype,” as Eli Noam put it, and “overestimate the short-term impact of technology”: a helicopter in every garage; atomic power too cheap to meter; a car that will drive itself.<sup>12</sup> But we also err at the other extreme by underestimating the long-term impact of *fundamental* technological shifts. Consider a few examples. Plato attacked writing when it replaced oral culture:

This invention of yours [writing] will produce forgetfulness in the minds of those who learn it, by causing them to neglect their memory, inasmuch as, from their confidence in writing, they will recollect by the external aid of foreign symbols, and not by the internal use of their

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5. Bower & Christensen, *supra* note 4, at 43-45.

6. *Id.*

7. Wikipedia, *Disruptive Technology*, [http://en.wikipedia.org/wiki/Disruptive\\_Technology](http://en.wikipedia.org/wiki/Disruptive_Technology).

8. Bower & Christensen, *supra* note 4, at 43-45.

9. *Id.*

10. Wikipedia, *Disruptive Technology*, [http://en.wikipedia.org/wiki/Disruptive\\_Technology](http://en.wikipedia.org/wiki/Disruptive_Technology).

11. Bower & Christensen, *supra* note 4, at 43-45.

12. Eli M. Noam, *Will the Book Become the Dumb Medium?*, EDUCOM REV. Mar.-Apr. 1998, at 18-24. The examples in the next two paragraphs come from Noam.

own faculties . . . . [Your students] will appear to possess much knowledge, while, in fact, they will, for the most part, know nothing at all . . . .<sup>13</sup>

The invention of printing had its detractors. Johannes Trithemius observed that “[p]rinted books will never be the equivalent of handwritten codices . . . . The simple reason is that copying by hand involves more diligence and industry.”<sup>14</sup> But Trithemius was no Luddite. He used printed books but observed correctly that manuscripts prepared on vellum would easily last a thousand years but that books printed in paper might only survive a few hundred.

Today’s printed works we know lovingly as books and journals will some day be stored in a “data cloud” and delivered in the form of electronic ink to computers or other devices. And the day seems sure to arrive in our lifetime when devices that hold content like Kindle 2 will replace books as we have known and loved them. Not all books, of course, because some of us will pay a premium to retain the old medium. Such is the price of revolutionary or disruptive innovation, bringing low cost and new models into the activities we assumed were inviolable.

Other examples abound. The introduction of the telephone, declared a noted psychiatrist of the day, would drive people insane.<sup>15</sup> (He might have had a point.) The popularity of radio prompted a researcher to note: “Parents have become aware of a puzzling change in the behavior of their children.”<sup>16</sup> Television was the next threatening technology whose effects, especially on the young, are still debated.

The uneasy experience of the Supreme Court with technological change may offer some lessons for those of us—the early adopters—who may be more prescient than others regarding the power of information technology to change just about everything we do. A decade ago, we would have been dismissed as Pollyannas. Today, we have become Cassandras.

What has been the experience with the High Court and technological

13. WILLIAM ANTHONY CAMPS, *AN INTRODUCTION TO HOMER*, 81 (Clarendon Press 1980) (quoting Plato, *Phaedrus* 274).

14. JOHANNES TRITHEMIUS, *DE LAUDE SCRIPTORUM* (In praise of scribes) (1492), <http://www.nyupress.org/professor/webinteaching/history5.shtml> (last visited Feb. 19, 2009). See ANNE B. KEATING & JOSEPH HARGITAI, *THE WIRED PROFESSOR: A GUIDE TO INCORPORATING THE WORLD WIDE WEB IN COLLEGE INSTRUCTION* 22 (New York Univ. Press 1999).

15. ITHIEL DE SOLA POOL, *FORECASTING THE TELEPHONE: A RETROSPECTIVE TECHNOLOGY ASSESSMENT OF THE TELEPHONE 125* (ABLEX Publ’g Corp. 1983).

16. See AZRIEL L. EISENBERG, *CHILDREN AND RADIO PROGRAMS* 6 (Columbia Univ. Press 1936).

change? Perhaps it is too much a stretch to consider a building of one's own as a new technology, but in some elementary ways it did require a change of operating procedure for its inhabitants. The Supreme Court convened through most of the 19th century and for the first part of the 20th century in the old Senate chamber in the Capitol.<sup>17</sup> Space was at a premium; chambers did not exist as we know them today.<sup>18</sup> The Justices maintained offices in their homes.<sup>19</sup> The move to the newly constructed Supreme Court building, completed in 1935,<sup>20</sup> proved unsettling at least at first. Some of the Justices resisted the idea of working in their new chambers in the building. Of course, they met from time to time to hear arguments and confer, but they worked from home, which was fine with them. ("Nine beetles in the Temple of Karnak," Justice Harlan Fiske Stone observed tartly.<sup>21</sup>)

Innovations did not sit well with at least one Justice. Justice Louis D. Brandeis refused to use the telephone; he condemned it as an invasion of his privacy.<sup>22</sup> Justices communicated by note, letter, and messenger. That was how it always was and that was how it was to be. We have benefited enormously from the records the Justices left behind; the records allow us to reconstruct their lives and thoughts with enormous confidence since the physical objects (their papers) could be organized and stored with relative ease.

Change would come, however. One of Chief Justice Warren E. Burger's first housekeeping tasks was the introduction of the copy machine in 1969, a full decade after it had entered office mainstream. Prior to Burger's arrival, all correspondence among the Justices was typewritten and carbon copies were distributed to the chambers. The resulting multiple copies of memoranda and draft opinions were distributed among the Justices in order of seniority, with the least senior Justice as the recipient of the 8th copy of the original typescript.

It would not be a surprise to know that the Justices resisted the copy machine, just as they had the introduction of the telephone. You can imagine the arguments opposed and perhaps find evidence in the papers of

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17. Supreme Court of the United States, The Court Building, <http://www.supremecourt.us/about/courtbuilding.pdf> [hereinafter The Court Building]. See also The Supreme Court Historical Society, Home of the Court, [http://www.supremecourthistory.org/history/supremecourthistory\\_history\\_homes.htm](http://www.supremecourthistory.org/history/supremecourthistory_history_homes.htm) [hereinafter Home of the Court].

18. Home of the Court, *supra* note 17.

19. *Id.*

20. *Id.* See also The Court Building, *supra* note 17.

21. *Profiles*, The New Yorker, Nov. 30, 1940, at 24.

22. Melvin Urofsky, *Louis D. Brandeis: Advocate Before and On the Bench*, 30 J. SUP. CT. HIST. 31, 42 (2005).

the Justices to confirm my speculation. For example, with the freedom to copy at will, the Court and particularly the Justices would be inundated with paper which would make for more work; and, the availability of easy copying would risk a security breach in an institution that prides itself on keeping its deliberations and opinions secret.

The Court jumped on the Internet—in the caboose, of course—in 2000 when it rolled out its own website five years after most government agencies had established a presence on the World Wide Web.<sup>23</sup> The Court does not administer the site; rather, web master tasks have fallen to the Government Printing Office.<sup>24</sup> To its credit, the Court posts opinions as they are announced in the courtroom, which can be downloaded in the form of PDFs identical to the slip opinions handed to the press and the public.<sup>25</sup> The website also provides access to docket sheets, which serve as roadmaps to the activities and participants in all cases; oral argument transcripts; calendars; and links to merits briefs.<sup>26</sup>

Email and Internet access to chambers came to the Court around 2003 or 2004. As late as 2002, Internet access was available only in a few locations in the building. Security concerns seemed to be driving the resistance. Clerks and others would have to use dedicated stations in the library for Internet access. Even then, it was not possible to stream or download some file types. For such access, employees would have to navigate to a subbasement in the building where a communications specialist would allow access to such files. Today, the Justices and their employees have easy access to the internet but with few exceptions, this is a one-way street. While some of the day-to-day offices in the Court (such as the Clerk, the Marshal, and the Public Information Officer) have published email addresses, neither the Justices nor their staffs have a listing of email addresses. It seems reasonable to believe that they use email and perhaps other trappings of today's information-rich world, but such information is not for public consumption, at least not yet. For example, we know that some of the Justices work remotely either from home offices or from locations away from Washington, relying on VPN (virtual private network) to allay security concerns.

With this good news comes bad news. Though the Court provides access to the docket sheets, it does not maintain an archive of docket sheets.

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23. Supreme Court of the United States, <http://www.supremecourtus.gov>.

24. Supreme Court of the United States, Proprietary and Security Notice, <http://www.supremecourtus.gov/security.html>.

25. See Supreme Court of the United States, <http://www.supremecourtus.gov/opinions/opinions.html>.

26. See generally Supreme Court of the United States, <http://www.supremecourtus.gov>.

And although it claims to maintain access to these documents for the current and preceding terms, in point of fact it has not done so.<sup>27</sup>

The Court now requires that all briefs shall be filed in print and electronic form.<sup>28</sup> It would be a simple matter to archive the briefs on the Court's website, and posted documents from the Clerk gives every indication of this intent. In reality, the American Bar Association carries this burden, although not very well.<sup>29</sup> Perhaps the strangest feature of the ABA's collection is the watermark it attaches to every brief, as if to claim the document as its own, adding an extra measure of security to prevent the removal of the offending watermark from a public document.

The Court significantly improved in 2000 when it started posting oral argument transcripts, usually within a week or two of the argument date.<sup>30</sup> At the start of the 2004 Term, the Court decided to shed a 40-year-old policy that stripped the identity of the Justices from the transcripts, a practice attributed to Justice Byron R. White.<sup>31</sup> So now the transcripts identify each speaker with reasonable, though hardly perfect, accuracy.

The Court took an additional step at the start of the 2006 Term when it posted the argument transcripts on the day of the argument.<sup>32</sup> The Supreme Court press corps was ecstatic with this change. Reading, hearing, or watching these stories one would have thought that the Messiah had arrived because now the print and broadcast media could identify who said what to whom in the courtroom with some sense of authority, rather than relying on notes taken in the haste of a proceeding.

The Court relies on an internal computing system that streamlines document preparation from memoranda to opinions. And, most of the Justices and surely all of their clerks are consumers of electronic legal

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27. E-mail from Kathy Arberg, Public Information Officer, to Jerry Goldman, author, Aug. 28, 2008, 12:52 CST (on file with author).

28. SUP. CT. R. 25.8, 37.3(a) (2008). The first electronic submission was *Bush v. Gore*, 531 U.S. 98 (2000).

29. "Briefs submitted electronically should be available on the Court's website the next business day." Supreme Court of the United States, Electronic Merits Briefs Submissions Guidelines, [http://www.supremecourtus.gov/oral\\_arguments/2008ElectronicMeritsBriefsSubmissionsGuidelines.pdf](http://www.supremecourtus.gov/oral_arguments/2008ElectronicMeritsBriefsSubmissionsGuidelines.pdf) (last visited Apr. 3, 2009).

30. Linda Greenhouse, *Contesting the Vote: The Supreme Court; Justices Stand by No-Camera Policy*, N.Y. TIMES, Nov. 28, 2000, at A20.

31. THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 1003 (Kermit L. Hall ed., 2d ed. Oxford Univ. Press 2005) [hereinafter OXFORD COMPANION]; see also Adam Liptak, *So, Guy Walks Up to the Bar, and Scalia Says...*, N.Y. TIMES, Dec. 31, 2005, at A1, available at <http://www.nytimes.com/2005/12/31/politics/31mirth.html>.

32. Tony Mauro, *High Court to Provide Same-Day Argument Transcripts Online*, Sept. 15, 2006, <http://www.law.com/jsp/article.jsp?id=1158224729519>.

research. One holdout appears to be Justice John Paul Stevens, whose workmanlike chambers suggest an appreciation for the physical volumes of the United States Reports.<sup>33</sup> A quick look around his office tells you something about how he works: he has a computer but it does not appear in a location where it would be used with regularity, and his books are chockablock with placeholders suggesting that he has perused them.<sup>34</sup> One gets a different impression from a view of Justice Ruth Bader Ginsburg's chambers, whose large-screen monitor sits at her desk and whose bookshelves are really useful for mementos but not as a utilitarian library.<sup>35</sup>

There is one area where the Supreme Court has taken leadership with new technology in recording its public sessions, yet true to form it has remained behind the times. The Court introduced a recording system in the courtroom in the summer of 1955.<sup>36</sup> The first recording of the Court's public sessions occurred on October 10 with *Texas v. New Mexico*<sup>37</sup> heard under the Court's original jurisdiction for one hour and thirty-two minutes. Though the case was nominally resolved in 1952, hearings continued on and off thereafter. The recordings were to be used by the Justices and their staffs to assist in writing opinions. The recording medium was iron oxide on acetate tape using a reel-to-reel tape deck. In time, the tapes were transferred to the National Archives where they remain today.<sup>38</sup>

When CBS television aired part of the recordings in the Pentagon Papers case in a 1971 program, Burger halted the annual tapes transfer to the Archives.<sup>39</sup> Annual transfers were restored in 1986 only on the condition that those accessing the tapes would agree in writing that the tapes would not be duplicated and that their use was solely for educational, research, and noncommercial purposes.<sup>40</sup>

In 1993, political scientist Peter Irons, in cooperation with the New

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33. The Oyez Project, Supreme Court Tour, Justice John Paul Stevens' Chambers, <http://www.oyez.org/tour/jps-room>.

34. *Id.*

35. The Oyez Project, Supreme Court Tour, Justice Ruth Bader Ginsburg's Chambers, <http://www.oyez.org/tour/rbg-room>.

36. OXFORD COMPANION, *supra* note 31, at 1003. By way of contrast, President John F. Kennedy installed a recording system in the White House in 1961. Kennedy only recorded selected events. President Lyndon Johnson was more systematic in his use of this recording system, but again not all conversations were recorded. It was President Richard Nixon who installed a multi-location, voice-activated recording system and systematically recorded all conversations in his several offices. See [www.whitehousetapes.net/tapes/Kennedy/overview](http://www.whitehousetapes.net/tapes/Kennedy/overview).

37. 344 U.S. 906 (1952).

38. OXFORD COMPANION, *supra* note 31, at 1003.

39. *Id.*

40. *Id.*

Press, produced a set of six audiocassettes containing nine hours of oral argument excerpts in twenty-three Supreme Court cases.<sup>41</sup> Irons, and his co-author Stephanie Guitton, maintained that the agreement not to reproduce the Court's tapes violated public policy and was therefore void. The Court threatened legal action against Irons, encouraging every press outlet—especially broadcasters—to air selections from the oral arguments as part of the story, thus defeating the Court's efforts to restrict distribution. The Court quickly backed down because the tapes held at the National Archives were now available without restriction for anyone who wanted to listen or copy them.<sup>42</sup>

The introduction of the taping system was not without challenges. The lectern for advocates was wired with a live microphone and lights to signal when time was running out and when time had expired. The Justices were required to turn on their microphones when they spoke, though the rule was often observed in the breach, much to our regret today. The result is that the advocate's microphone picked up the faint voice of a Justice with a question or comment.

Starting around the 1980 Term, the Court installed a second recording station to capture public events on audiocassette. That system served as a backup to the principal recording system and as support for the creation of official transcripts of proceedings. Transcripts were made available since 1980 through Lexis-Nexis and WestLaw.<sup>43</sup> Beginning with the 2000 Term, the Court posted transcripts on its website.<sup>44</sup>

The removal of restrictions on copying and sharing Supreme Court audio enabled the Oyez Project to begin the creation of a permanent online archive in 1992 with the vision that anyone, anywhere could search the audio to find and use any and all appropriate bits. It would take 15 years to realize this dream.

The creation of an audio archive has puzzled some Court-watchers. After all, if you have the transcript of proceedings, why do you need the audio? There are at least three answers. First, the transcript is merely a representation of what transpired in the courtroom. It is a secondary source, not a primary source. The transcript has a function, mainly the ability to

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41. MAY IT PLEASE THE COURT: 23 LIVE RECORDINGS OF LANDMARK CASES AS ARGUED BEFORE THE SUPREME COURT (Peter H. Irons & Stephanie Guitton eds., The New Press 1993) [hereinafter MAY IT PLEASE THE COURT].

42. *Id.* The free advertising for Irons was a great boon. It was reported that New Press sold seventy-five thousand copies of the collection. *Id.*

43. OXFORD COMPANION, *supra* note 31, at 1003.

44. *Id.*

index and search it. But, by linking transcript to audio, it should be possible to search the audio, providing access to the event as it was recorded. Second, a transcript that fails to identify the Justices loses much of its utility. The only way to determine and validate who said what is to listen to the audio. And third, the audio contains much more information than would be revealed in a transcript. For example, the official transcript reveals when laughter occurs, leading at least one scholar to troll for data to rank the justices for their cleverness.<sup>45</sup> But there's another side to this coin. In fairness, we should be listening for the laugh that never comes. Attempts at humor may be misplaced or harmful to an argument, but in the absence of listening (do you listen for silence?), you will never find the data to address the issue.<sup>46</sup>

The Oyez archive starts with so-called "master reels." These are the recordings preserved by the Archives and from them subsequent generations of recordings have been made. Each successive duplication of tape from tape further degrades the audio quality. Starting with a master tape assures the highest quality from the source. It can only go downhill from there.

The master tapes are far from flawless. In fact, they present many problems for audio engineers. When the tape decks used by the Court were in pristine condition, and the Court used high-quality recording media, the resulting audio quality was excellent. On too many occasions, though, the actual recordings depart from this ideal.

When the decks were no longer in specification, the effects became obvious. Normal voices could be off-pitch by as much as half an octave. The effect moves a familiar human voice up or down a register. For example, Justice Sandra Day O'Connor might sound like a chipmunk. On occasion, Chief Justice William H. Rehnquist was a basso rather than a baritone.

The recording media was sometimes to blame for poor recording results. In the 1970s and 1980s, the recording industry faced a crisis when a new formula for the binding agent that holds the magnetic particles to the base tape began to degrade. It produced a phenomenon known as "sticky-shed syndrome." The result of the syndrome quickly became apparent because the tape reels would literally stick together. Any attempt to play

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45. Liptak, *supra* note 31, at A1.

46. A good example to illustrate this point comes in the first oral argument in *Roe v. Wade*, 410 U.S. 113 (1974). To listen to the *Roe v. Wade* oral argument, see Recording of Oral Argument, *Roe v. Wade*, 410 U.S. 113 (1974), [http://oyez.com/cases/1970-1979/1971/1971\\_70\\_18](http://oyez.com/cases/1970-1979/1971/1971_70_18).

the tape would destroy it. The industry quickly changed the formula and engineers cobbled a fix requiring that the offending reels be baked in a slow oven for several hours, then mounted on a tape deck for a final playback and duplication. The process of playing these offending reels caused their destruction.<sup>47</sup>

Yet another problem emerged in the early 1990s when there was a sudden degradation of recording quality. After months of communication and subsequent investigation, it appears that a deputy clerk failed to check the recording systems and the tape deck ran out of tape before the completion of an argument. In addition to an admonishment, the clerk reset the tape deck to reduce the amount of tape that would record each second of sound. Typically, this would be set at 7.5 ips (inches [of tape] per second). Now the machine was reset to record at 3.75 ips. While this new setting assured that twice as much audio would be recorded for each reel of tape, the cost would come in reducing the quality of the recording by half since only half as much data was now captured on tape.

Oral arguments comprise most of the tapes. The tapes occasionally contain oral announcements from the bench. In the current period, the Court dutifully records and archives these opinion announcements. And many such announcements have been found in earlier periods. The following note may explain the inconsistencies in the archived materials. The note accompanied the 1988 Term tapes sent to the Archives in November 1989:

Nothing is missing in the latest shpmt. of Supreme Court tapes. Tapes 654 thru 666 were retained by the Marshal's Office because they were not oral arguments; they were decisions or investitures. Supreme Court transfers are not inclusive.<sup>48</sup>

The Archives never accessioned the opinion announcements; their discovery has proved enlightening to researchers. In close cases dealing with important public issues, the justices will express substantial emotion in articulating their views. Sometimes, they will prepare remarks that depart from the written text. This is an opportunity for a justice to speak to current or future generations.<sup>49</sup>

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47. The "sticky-shed" syndrome inexplicably appeared again in the Supreme Court when tape stock used in 2002 exhibited the same syndrome that appeared in the 1980s. See The Oyez Project, <http://oyez.org/about>.

48. A copy of the note is on file with author.

49. See Recording of Opinion Announcement, *United States v. Virginia*, 518 U.S. 515 (1996), [http://www.oyez.org/cases/1990-1999/1995/1995\\_94\\_1941](http://www.oyez.org/cases/1990-1999/1995/1995_94_1941) (Ginsburg, J.); Recording of Oral Dissent, *Lawrence & Garner v. Texas*, 539 U.S. 558 (2003), [http://www.oyez.org/cases/1990-1999/1995/1995\\_94\\_1941](http://www.oyez.org/cases/1990-1999/1995/1995_94_1941) (Scalia, J.).

Every once in a while, ephemera will surface and warrant a closer examination. One such recently discovered item is the administration of the oath of office to Lewis A. Powell, Jr. This dispensation is in some ways akin to the recent snafu regarding the administration of the presidential oath to Barack Obama, which was misstated by Chief Justice John G. Roberts, Jr. But in Powell's case, it was Powell who clearly failed to state the oath as given. And although Chief Justice Burger, who administered it, hesitated at the error—as if to signal, “Let's take this again from the top”—the show proceeded without the do-over. Of course, this leads to speculation whether Powell satisfied the oath and could therefore exercise the power granted by his commission. But the matter now is only one for idle minds to contemplate.

In 2004, the Supreme Court abandoned its reel-to-reel recording system and replaced it with a digital recording system. Digital recordings make flawless results possible with copies that are exact replicas of the originals. However, the Court has chosen to employ a non-archival standard for recording its proceedings: MP3. This standard is familiar to most people who download and share digital audio. However, MP3 is not an archival standard, it is a distribution standard. This means that by recording its proceedings with MP3, the Court has made a choice to reduce the quality of the resulting recording from the start.<sup>50</sup> Archival quality recordings should follow accepted practice, recording to WAV.<sup>51</sup> As if to make matters worse, the Court elected to capture far less data in its digital recording system than would be optimal using MP3. The recording results were audibly flawed. After several months of back-and-forth between the Archives and the Court, the data levels were increased, but only marginally so. Today, the recording system does not meet archival standards, questioning the long-term viability of a treasured resource.

Historic events can be a contributing factor in the adoption of technological change. And the events surrounding the 2000 presidential election brought modest change to the Supreme Court. The story is familiar by now. No clear winner emerged following the November election results; neither George W. Bush nor Al Gore commanded enough electoral votes to declare victory. The results hinged on which candidate was victorious in Florida.

The litigation spawned by this struggle focused enormous attention on

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50. MP3 is a *lossy* format. This means that any recording gives up a certain portion of the audio spectrum in return for a smaller, and presumably more manageable, file size.

51. WAV and AIFF are *lossless* formats. This means that no information is cast aside during the recording process.

the Supreme Court, first in *Bush v. Palm Beach County Canvassing Board*<sup>52</sup> and then in *Bush v. Gore*.<sup>53</sup> When the Court granted certiorari, the press rose up in near-unison demanding television coverage in real time from the Court. Of course in hindsight such a request had to be viewed with enormous skepticism from within the Court. Instead, the Court temporized. Its usual practice was to release its audio materials to the National Archives after the end of a Term. In these two cases, it would mean that the public would not have a chance to listen as the Justices struggled to resolve the legal controversy—and perhaps the election itself—for another ten months. Rather than be viewed as totally out of touch with the heightened needs of the public, the Court chose to release its audio proceeding to a broadcast news feed following the completion of the argument. It was then delivered via satellite to feed subscribers and broadcast in real time to the public on television, radio, and the World Wide Web.

The upshot of this change in procedure was to allow for same-day release of its proceedings in cases warranted by sufficient public interest. Of course, “sufficient public interest” remains in the mind of the Chief Justice and tends to be trotted out whenever he believes that threshold has been met. Same-day release has now occurred in just a few cases since 2000. The reason is simple: several Justices dread the thought of video in the courtroom. The closer the Court comes to same-day release of audio, the lesser the ability for possible line drawing that might ward off same-day release of video in the courtroom. Better to titrate the release of audio and put off the day of reckoning for video.

At some point, though perhaps not in my lifetime, the Supreme Court will grant live video streaming from the courtroom. Like the rising of the oceans, this step is probably inevitable. For now, the Court can continue to sandbag and keep the demand for transparency at bay. After all, this institution prides itself on living in the past. It still hands out quill pens to advocates,<sup>54</sup> although dip pens using metal nibs started to replace quills around the time of *Marbury v. Madison*.<sup>55</sup> The Court’s commitment to tradition is quaint but the public deserves more than allegiance to practices like the quill pen or the spittoon.<sup>56</sup> But this untenable position will erode in time. Perhaps the first step will come with additional audio release: same

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52. 531 U.S. 70 (2000).

53. 531 U.S. 98 (2000).

54. Supreme Court of the United States, *The Court and its Traditions*, <http://www.supremecourtus.gov/about/traditions.pdf>.

55. 5 U.S. (1 Cranch) 137 (1803). Wikipedia, *Dip Pen*, [http://en.wikipedia.org/wiki/Dip\\_pen](http://en.wikipedia.org/wiki/Dip_pen).

56. Beneath the bench at every location sits a spittoon. The last time a justice used one was probably at the turn of the 20th century. The Oyez Project, [http://www.oyez.org/tour/courtroom/Advocate\\_lectern/](http://www.oyez.org/tour/courtroom/Advocate_lectern/).

week, same month, or prior to summer recess when the essential work of the Term is over. Delayed release reduces the risk of news byte journalism because there's no interest in yesterday's news. Such delayed release will still allow scholars, advocates, teachers, and the public an opportunity to hear what transpires in the courtroom while public discussion and debate may still be fresh. If the transcripts can be released within hours of the event, it is difficult to fathom a good reason explaining a delay of ten months to make the Court's audio public on a timely basis. However, delay has been the hallmark the Court's policy for the last fifty-four years, which is sufficient reason to expect it to continue along this path.

In keeping with the practice of taking small steps toward innovation, there is one small step that would generate huzzahs among the courts' many audiences. Any court that hosts a website should implement the use of RSS, an acronym for Really Simple Syndication ("RSS"). RSS is a format for delivering regularly changing web content. Think of it the way you subscribe to a magazine or newspaper. Every day or every week, your publication arrives with no special effort on your part. The same is true for digital content. When a court posts some new bit of information on a topic to which you have subscribed, you receive a chunk of that information. For a court website, RSS might signal changes to its calendar or briefs posted in a case you have been following or transcripts or media added or opinions released. A user "subscribes" to the RSS service using a browser or an email client or an application that aggregates all such subscriptions in a single place. Content changes on a court website will appear automatically in the user's browser or email, requiring no further effort on the user's part. Thus, a small bit of code can provide an enormous public benefit at virtually no cost except for the attention it will bring to the institution and its mission.

Courts will continue to struggle with their uneasy accommodations to new technology. As the chorus swells for greater transparency from government institutions, advances in information technology will lay the path. Will the Supreme Court—and other courts—follow the path now or will it await a crisis to chart the course?