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COMMENTARY

THE DAY ANTHRAX CAME TO THE SUPREME COURT

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To explain the title of my talk, "The Day Anthrax Came to the Supreme Court," I have an anecdote. So that you can fully understand the context, I have to remind those of you from outside Washington—those who live here need no reminding—exactly what it was like here in those post-9/11 weeks when Capitol Hill was virtually shut down by the anthrax-laden mail that had contaminated the Hart Senate Office Building. Fear was palpable. There were barricades everywhere. Postal workers actually died, and anyone who had even walked through the lobby of the Hart building to use the cash machine was advised to start taking Cipro. Anthrax scares were regularly shutting down whole city blocks. These were no routine fire drills.

That was the atmosphere on a Friday morning in late October, when I was at my desk in the Supreme Court pressroom reading cert. petitions. The Court was not scheduled to make news that day, and there were only a few other reporters in the room. I was getting ready to go out for a lunch appointment when the word came from the press-office staff that people were being asked not to leave the building. There was a possibility of anthrax contamination, and the Capitol

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physician was scheduled to come to the Court at two o'clock for a briefing.

I canceled my lunch date, called my office, called my husband, and waited for two o'clock, when I would learn, along with everyone else at the Court, what the situation was and what we were supposed to do about it. As the time approached, I joined the press-office staff, who were closing their doors in preparation for going upstairs to the West Conference Room, where the briefing was to be held. As I started to walk with them down the corridor, I was amazed to be told that the briefing was only for Court employees.

"Well, I'm here, and I'm coming," I said. The staff members looked abashed as they repeated their instructions. When it became clear that they actually intended to keep me out while they got the facts on what could quite plausibly be a life-or-death situation for us all, it appeared to me that the bonds of civility that normally defined our relationship were about to snap. I'm usually a very civil, nonconfrontational person—in fact, I hate the confrontational, theatrical, 60-Minutes style of journalism—so the Court staff was rather surprised when (I'll clean up my language a little bit, but you'll get the general idea) I said to them: "I'm breathing your [blank] air, and I'm going to your [blank] briefing."

And so I did. Leaving my equally surprised colleagues in the pressroom, I walked alone up the stairs and through the wooden gate that separates the public space of the Great Hall from the private domain of the conference rooms. Another press-office staffer was at the entrance to the West Conference Room. "You can't come in," she said, looking embarrassed. I positioned myself in the doorway, leaving enough room for the employees to squeeze by me. "I'm not leaving," I said.

For some moments, we were at a standoff. Many of the dozens of people who came through the door knew me, quickly sized up the situation, and walked by me, their faces averted in embarrassment. Eventually, Sally Rider, the Chief Justice's administrative assistant, came along. Someone had evidently briefed her, because she displayed no surprise at seeing me. "Hello, Sally," I said. "Hello, Linda," she said. "You are welcome to come in. But the briefing is off the record."

And so I took a seat in the West Conference Room, learned from the Capitol physician about suspected anthrax contamination in the Supreme Court mailroom, got his medical advice, heard about the plan to evacuate and close the building and move to the federal courthouse down the street, and then went to the hastily called on-the-record press briefing outside on the plaza, where the Capitol physician

said precisely the same things he had said inside. So that's my account of the day that anthrax came to the Supreme Court.

Why am I telling you this? Because it seems to me, in retrospect, a useful metaphor for the odd relationship between the Supreme Court and the press. We inhabit their building. We do breathe their air (and eat their food). We know more about them than anyone else outside the building. (If that sounds arrogant, I think it's forgivable from someone who has looked at every paid cert. petition that has been filed at the Court and sat in on every opinion announcement over the last twenty-plus years.) We go to their musicales and receptions. We sometimes, I think, care more about them than they seem to care about themselves—at least, I felt that way during *Bush v. Gore*.[1] And yet we have to remember that despite all the trappings of familiarity, we are not part of the Court family, and any passing illusion that we are is silly, if not debilitating to our ability to do our work. We can probably never really understand one another's perspective. At the end of the day, we remain strangers.

One more anecdote. Last fall, the Court had a special bombproof coating applied to the windows of the pressroom, which is on the ground floor and faces west toward the Capitol. I said to a Court employee that I was touched by this show of concern for the welfare of the press corps. "Don't kid yourself," he said. "The concern is for the structural integrity of the building."

So what stance should the Court and the press take toward one another? It's a simple question with a many-layered answer. To ask it raises the threshold question of how the Court conceives of its audience. To the extent that the Court's audience is the lower federal courts and the state courts—and I suppose that is the formal answer—the Court doesn't need the press at all, and that's probably a fair reflection of the view of some justices over time, some of the time. But I think most of us, and most justices, most of the time, would find that an unduly constricted description of the role of a constitutional court in a democracy. It's clear that most justices see themselves as communicating to a wider public. That explains the public statement of irredentism in the four-justice dissent in the *Federal Maritime Commission*[2] case. That's why justices from Scalia to Stevens an-

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1 531 U.S. 98 (2000).

2 Fed. Mar. Comm'n v. S.C. State Ports Auth., 122 S. Ct. 1864, 1881-89 (2002) (Breyer, J., dissenting; Stevens, Souter, and Ginsberg, JJ., joining). Justice Breyer's dissenting opinion concluded with a list of the recent federalism decisions from which the four had dissented, and the declaration: "Today's decision reaffirms the need for continued dissent—unless the consequences of the Court's approach prove anodyne, as I hope, rather than randomly destructive, as I fear." See Linda Greenhouse, 5-to-4, Now and Forever; At the

nounce their dissents from the bench when they feel strongly enough that the majority has made a mistake. Their written dissents, of course, go into United States Reports. Their oral dissents are likely to be reflected in the next day's stories.

The Court is in a continual dialogue with other institutions of government, with specialized publics such as the legal academy, and with the public at large as mediated through the press.

Even in this day and age, when anyone with an Internet connection can download a Supreme Court opinion, for free, within half an hour of its announcement, the public learns about the work of the Court primarily through the press. A scary thought, perhaps, but an inevitable one. I strongly feel that it's in the Court's interest to keep that perhaps uncomfortable fact in mind. I'm agnostic on whether the Court should allow television, but I do think it's ridiculous that the official transcripts of oral arguments take two weeks and then don't identify the justice who asked the question. I think it's unfortunate that the Court sits only one day a week in May and most of June, leading to the issuance of four, five, six major opinions in a single day—and on one notorious June day in the late 1980s, to the issuance of an entire volume of United States Reports.[3]

A few years ago, I mentioned this problem to the Chief Justice, who replied quite amiably: "Well, just because we put them out on the same day doesn't mean you have to write about them all on the same day. Save some for the next day." I don't think he actually meant that literally, but I do think he was trying to tell me that while it may be a problem for the press, it's not the Court's problem. However, I do think it's the Court's problem.

At the risk of sounding self-righteous, I see the press very much as a surrogate for the public. It's to the public, to the cause of public understanding, that the Court's obligations run. That's what the Supreme Court of Canada thinks, anyway, when it gives a day's notice of which opinions are about to be announced. That enables the Canadian media to make considered judgments about how much space or time to set aside and which experts—whether the education reporter or the antitrust specialist—to call in for extra duty. In other words, it allows the Canadian media to do the best possible job it can. And I think the Canadian constitutional system has not been damaged by this accommodation, nor by the staff lawyer whom the Canadian Su-

Court, Dissent Over States' Rights Is Now War, N.Y. Times, June 9, 2002, § 4, at 3, LEXIS, Nexis Library, N.Y. Times File.

[3] The nine decisions, with a total of 446 pages, issued on June 29, 1988, comprise the entirety of Volume 487. See Linda Greenhouse, Telling the Court's Story: Justice and Journalism at the Supreme Court, 105 Yale L.J. 1537, 1558 n.81 (1996).

preme Court has designated to brief the press on the fine points of the decisions once they come down. That would have saved a lot of confusion on the night of December 12, 2000, when the press-office staff simply shoved the slip opinions of *Bush v. Gore*[4] into the hands of the waiting press corps and turned out the lights.

If the Court has some obligations to the press, I also strongly believe that the press has obligations to the Court: Getting it right, for starters. That's rather basic, but not always easy. I invite you to test yourselves by reading *Ashcroft v. American Civil Liberties Union*,[5] last month's plurality opinion on the Child Online Protection Act and writing a story on deadline. I suspect that any law school professor who received a product this sloppy and basically unfinished in response to a classroom assignment would have turned the paper back and marked it incomplete. I didn't have that luxury.

The press also has an obligation to put opinions in context, to treat them as something other than random events that occasionally fall out of the sky. I don't limit that observation to published opinions. The Court's management of its cert. docket, its handling of its agenda-setting function, is journalistically an elusive and challenging subject, much disfavored by editors because it involves a big commitment of staff time and resources with only an occasional payoff. But without knowing the entire context, the entire docket from which the Court selects its cases and sets the country's legal agenda, there is no way of evaluating how it is performing that function.

And by "evaluating," I don't mean value judgment. Again, I mean context. Or another way of putting it, perhaps, is the journalistic obligation to add value to the simple posting of orders and opinions that is available at www.supremecourtus.gov. Some sort of ordering, prioritizing, and contextualizing is essential, it seems to me. Sometimes, of course, the docket actually produces authentic news. The fact that the Bush Administration had adopted John Ashcroft's personal view that the Second Amendment includes an individual right to bear arms, and had communicated that view to the Court in a footnote to a brief in opposition—filed in typescript—to an *in forma pauperis* petition for cert. was unquestionably newsworthy.[6] In fact, it was a page-one story. (It was also a little scary. Although I told you that I read a lot of cert. petitions, I don't read many of the *pauper* cases, and I might not have seen this filing unless someone outside the government had brought it to my attention. Since the cases turned

[4] 531 U.S. 98 (2000).

[5] 122 S. Ct. 1700 (2002) (Thomas, J.).

[6] See, e.g., Linda Greenhouse, U.S., in a Shift Tells, Justices Citizens Have a Right to Guns, N.Y. Times, May 8, 2002, at A1, LEXIS, Nexis Library, N.Y. Times File.

out simply to be denied,[7] as the Solicitor General suggested,[8] I might not have seen it at this juncture at all, and it would have been a tree falling in the forest for only the National Rifle Association to hear.)

In any event, the question I ask myself quite consciously about whatever I write is: How can this story be most useful? If I were an ordinary, intelligent, interested, but not particularly well-informed *New York Times* reader, what would I have to know in order to make sense of this judgment, to be able to come to my own judgment about it?

To accomplish that goal, it seems to me that one thing a Supreme Court story should not be is a forum for self-interested reactions from various stakeholders, except insofar as they are really illuminating. In a story of 1100 words or, for a really important decision, perhaps 1400 words, there's simply not enough space for everyone to have their say. Not that they don't try. The private bar's public-relations machinery has grown exponentially since I've been writing about the Court. These contacts can occasionally be helpful, but just as often they are ludicrous.

Let me give just one example: When the decision came down some weeks back in *Ashcroft v. American Civil Liberties Union*,[9] the decision that dealt with "virtual" child pornography and struck down the Child Pornography Prevention Act of 1996, my phone rang almost as soon as I got back downstairs to my desk from the opinion announcement in the courtroom. The call was from a big New York law firm offering me a partner with special First Amendment expertise. I knew the partner slightly and had no aversion to talking to him on the chance that he might have something interesting, beyond the obvious, to say. But since I had not yet read the opinion, I was quite sure that he had not had time to read it yet either. I told the PR agent that I would call the partner back after we had both had a chance to read the opinion. A few minutes passed, and as I sat reading the opinion, the telephone rang again. It was the partner himself. Would I like to hear his thoughts? I was a little surprised by this, and I told him I would call him after I had read the opinion and had a chance to think about it myself.

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[7] United States v. Emerson, 270 F.3d 203 (2001), cert. denied, 122 S. Ct. 2362 (2002); United States v. Haney, 264 F.3d 1161 (2001), cert. denied, 122 S. Ct. 2362 (2002).

[8] Brief for the United States in Opposition, Emerson v. United States, No. 01-8780, filed May 6, 2002 (on file with the *New York University Law Review*); Brief for the United States in Opposition, Haney v. United States, No. 01-8272, filed May 6, 2002 (on file with the *New York University Law Review*).

[9] 122 S. Ct. 1700 (2002) (Thomas, J.).

I thought the opinion was pretty straightforward, but I eventually did call the partner, thinking that maybe he had some out-of-box observation that might enrich the story. Here was his comment: "It's a very strong First Amendment decision." "Yes?" I said. "And?"

"It's a really strong First Amendment decision," he repeated. "Well, thanks," I said.

The Cleveland voucher case[10] had appeared a likely candidate to unleash a paroxysm of spin, because it was obvious that with even a nuanced green light from the Court, the battle over "school choice" would quickly shift to the political arena. But with Justice O'Connor fully subscribing to the majority opinion, there was not much nuance for the two sides to fight over. But if my initial concern, keeping the story from becoming a message board on which the parties could simply post their claims, was misplaced, I acquired a new concern as the day wore on: to steer clear of the winners' powerfully appealing, but essentially propagandistic, claim that this decision was the *Brown v. Board of Education*[11] for our time.[12]

So, I have tried to share a little of my own perspective on how I see my job. Twenty-four years is a long time to do anything in journalism, let alone a beat like the Supreme Court. But what has kept me satisfied, indeed enthusiastic, about the job is that it is a continual adult education. I'm learning all the time.

Let me return for a minute to my title, "The Day Anthrax Came to the Supreme Court." I said it was a metaphor for the relationship between the Court and the press. But it's also a metaphor for the community of all of us whose lives are entwined with the life of the Supreme Court. We *are* all breathing the same air. Whether the Court likes it or not—indeed, whether the Court realizes it or not—we're all in this together.

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10 In Zelman v. Simmons-Harris, 122 S. Ct. 2460 (2002), the Court held that the Ohio school-voucher program did not violate the Establishment Clause. Although a majority of the participating students had enrolled in religiously affiliated schools, the Court found that the program was neutral in all respects toward religion. Id. at 2463-65.

11 Brown v. Bd. of Educ., 347 U.S. 483 (1954).

12 See, e.g., George F. Will, Implacable Enemies of Choice, Wash. Post, June 28, 2002, at A29; see also Linda Greenhouse, Win the Debate, Not Just the Case, N.Y. Times, July 14, 2002, § 4, at 4.