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Cameras in the Supreme Court

On Tuesday April 28th, 2015, the Supreme Court heard oral arguments on whether there is a constitutional right to same-sex marriage. The line to get one of the handful of seats in the courtroom started forming at 6 am the prior Friday morning.ⁱ While the First Amendment “mandates that, absent special security or privacy concerns, court proceedings should be open to the press and public,”ⁱⁱ and while bi-partisan bills have been repeatedly introduced in both the House and the Senate to require that oral arguments before the Supreme Court be televised, cameras are not permitted in the Court building, and neither oral arguments nor other Court proceedings have ever been shown on TV. As a result, people who wish to observe an oral argument must be at or near the front of the line or pay others to stand on line for them.ⁱⁱⁱ The public’s right to know is a fundamental tenet of American democracy. The founding fathers believed that a citizenry that was informed about their government and its operations lay at the heart of a democratic society. Although the public’s right to know is not absolute and battles for supremacy with conflicting issues of security and privacy, the government does the public’s business, and the public has a right to watch its government at work. C-SPAN provides in depth coverage of the legislative branch at work. The executive branch is subject to scrutiny from the press on a daily, if not hourly, basis. The judicial branch is arguably the least public of America’s three branches of government. Oral arguments and other Court proceedings should be televised to avoid the “danger we pose to our society and our democracy when we close off our institutions to the people they are supposed to serve.”^{iv}

The arguments in favor of permitting cameras into the Court focus mainly on the twin pillars of government transparency and accountability. In American democracy, there is a nexus between openness and a perception of fairness. The First Amendment exists in part so that the press has the

ability to gather and disseminate information. Open Court proceedings help confirm that the process is a fair one. Unlike state judges, federal judges serve lifetime appointments. They never are elected or have to stand for re-election. Thus they are less accountable to the electorate than state judges. This lack of accountability through the polls puts more pressure on federal courts, including the Supreme Court, to provide accountability through transparency. An “open” Court is a core component of the desire for an open government. In an oft-quoted remark, Supreme Court Justice Louis Brandeis said over 100 years ago that “sunshine is the best disinfectant.”^v Public polling has indicated that there is a greater interest in and expectation of transparency in our government today than ever before.^{vi} Permitting cameras to record and televise Court proceedings would also be of educational value and would provide important civic lessons on issues of constitutional importance to Americans.

There are also many arguments against allowing cameras in the Supreme Court. There is an over-arching concern about the erosion of due process from the excess publicity that comes with television cameras. Opponents fear that the Court will become a form of entertainment, that lawyers and even the Justices themselves will grandstand or perform for the camera. There is a further concern that television would trivialize or erode the respect that Americans have for the system and the process. Oral arguments are a small portion of the whole process through which a case is decided. Televising only this part, or even a small portion of this part, has the potential to mislead the public about how the Court operates. In addition, while C-SPAN has promised to cover oral arguments “gavel to gavel,”^{vii} local and national news stations might only share a small portion of an oral argument, and these “sound bites” might be taken out of context or otherwise create a misinterpretation of the issues and the arguments. Justices value their privacy and their security and have expressed concern that televising Supreme Court sessions would erode both.

The Justices of the Supreme Court are key stakeholders in this debate, and they deny that there is a need for cameras in the Court, arguing that the Court already is transparent and accessible, and that

television cameras are not necessary.^{viii} Justice Kennedy said that “the Supreme Court is different from other branches of government and should do its work without the intrusive commentary that follows the camera and the potential for changing the behavior of the judges and lawyers that appear before us.”^{ix} Justice Roberts commented that oral arguments are not intended for educational purposes and that therefore the educational value of televising them is not relevant.^x Justice Kagan noted that the current system is working well and that the Court should not make changes that upset its dynamic.^{xi} Justice Sotomayor stated that she feels that cameras alter the way that lawyer and judges interact and that cameras create a temptation to use the courtroom as a stage.^{xii} Justice Breyer acknowledged that cameras are inevitable but that the Court must have a certain comfort level with them first.^{xiii}

The media is also an important stakeholder in the debate over cameras in the Supreme Court. The press already has access, which potentially creates an unfair advantage over television stations in reporting on oral arguments and other Supreme Court developments. Brian Lamb, the founder, Chairman and retired CEO of C-SPAN has said “If you can’t do this in public and you are doing the public’s business, then something is wrong with this picture.”^{xiv} The National Press Photographers Association has noted that the founders of the country thought it was important to make courts open.^{xv} The Coalition for Court Transparency is an organization comprised of several agencies among the media and proponents of open government that has been formed to urge the Justices to allow cameras into the Courtroom.^{xvi} Gabe Roth, the former manager of the Coalition for Court Transparency, has founded a grassroots organization called Fix the Court, which was created to promote accountability and transparency in the Supreme Court and to urge the Justices to enact reforms to make the Court more open and honest.^{xvii} Members of Congress are stakeholders as well, as they have had to adjust to cameras in both the House and the Senate and grapple with the conflict between open government and permitting each branch of government to determine how it operates. The parties to the lawsuits before the Court are also stakeholders, and they may be concerned about the impact of televised oral

arguments on their privacy and the due process of their cases. In addition, it has been estimated that at least 3/4s of the American public would like to have cameras in the Supreme Court so that they can watch oral arguments and other matters of interest on television.^{xxviii} Public support has increased over the last several years, as controversy has resulted from various Court decisions and anticipation has grown over future constitutional questions.

On March 18, 2015, Senators Durbin, Grassley and Blumenthal co-sponsored a bill entitled “Cameras in the Courtroom Act.” The full text of the bill is as follows: “The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices that allowed such coverage in a particular case would constitute a violation of the due process rights of one or more of the parties before the Court.”^{xxix} A bill with identical language was introduced by Representatives Poe and Quigley in the House on January 6th, 2015.^{xx} Similar bills have been introduced several times in both the Senate and the House for almost 15 years.^{xxi} While the bills often have bi-partisan support and are approved by the Judiciary Committee, no such bill has come to the floor of either the House or the Senate for a vote. “Bills on the issue have few vocal opponents in Congress, but tend to die as members shy away from possibly offending the high court.”^{xxii} The separation of powers that is embedded in the constitution means that the Supreme Court has largely been left to determine how it operates, and there is sentiment in Congress to defer to the Justices on this and other Court issues.^{xxiii} Thus, while Congressional action is possible, it appears that it is more likely that any change in the current policy will come, if at all, from the Justices themselves.

Chief Justice Berger once wrote that “people in an open society do not demand infallibility from their institutions but it is difficult for them to accept what they are prohibited from observing.”^{xxiv} Throughout its history and certainly today, Supreme Court proceedings have never been simply government events. They are and have often been important historic moments that are of national interest. In the 21st Century, the public’s expectation of how knowledge is acquired and how the world

is understood has been transformed by the arrival of the Information Age. All 50 states permit some form of television coverage in their courtrooms, so there is real knowledge and insight into the impact of televised proceedings, rather than speculation and guesswork. Given that audio recordings of oral arguments are released weekly and in some cases on the same day as they occur, it seems a small step forward to permit oral arguments to be televised. In fact, adding television coverage would give the public “a visual element and an immediacy or simultaneous aspect, not found in print media.”^{xxv} The Justices’ arguments against letting the public watch cases of import are patronizing and lack substance. There is no difference between the sound bites they fear and the current use of out of context quotations. Live coverage might actually be more respectful than the cartoon drawings shown on the nightly news. The status quo unfairly favors the press over other methods of communication. Due process concerns are minimal in a proceeding without witnesses, jurors or litigants. Fundamentally, it appears that the only compelling reason to deny cameras access to Court proceedings is a wish on the Justices’ part to retain their anonymity. However, the Justices of the Supreme Court are public figures. “They chose to accept a nomination to the highest court in the land – and in a democracy that means being accountable and available to the people you serve.”^{xxvi} The fact that Justices are lifetime appointees underscores the need for transparency. As Justice Frankfurter noted, “the institutions of government are created to serve the people. So they must be accountable to the people.”^{xxvii} If Congress cannot legislate cameras into the Court, it is time for the Justices to get there on their own. They can start by live streaming oral arguments and permitting them to be shown on closed circuit TV both in overflow rooms within the courthouse and in other courthouses, and law school classrooms, across the country. This will open up access in a controlled environment that will let the Justices assess the impact of a larger audience. It is likely that this impact will be minimal, which will in turn pave the way to televising the arguments that “decide the cutting edge questions of our day”.^{xxviii} It is time.

Talking Points

1. The public must have confidence in the government, including the judicial branch of the government. Confidence comes from accountability, openness and transparency.
2. Concerns about due process and the potentially intimidating impact of cameras are relevant in the context of trials involving litigants, jurors and witnesses. These concerns are not relevant to Supreme Court oral arguments.
3. We have sound bite already. They are called quotations. There is no difference between a 15-second TV clip and a 15-second audio clip or between a 15-second TV clip and listening to an anchorperson read from the transcript of an oral argument for 15 seconds.
4. In accepting a nomination to a lifetime position on the country's highest court, a Justice should understand that he or she will become a public figure, and that public figures are public, not anonymous.
5. Expand access slowly by broadcasting the audio of oral arguments live and by allowing closed circuit TV coverage in overflow rooms and in other courthouses and classrooms around the country.

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ⁱ There are approximately 50 seats available to the public in the courtroom, and there are an additional 30 seats available on a rotating three-to-five minute basis. *See* Huetteman 2015.

ⁱⁱ Dorf 2010.

ⁱⁱⁱ *See, e.g.*, Washington Express (washingtonexpress.com/services/seatholding.asp) and Linestanding.com

^{iv} Schumer, C. *Cameras in the Courtroom* (2005), 6

^v Tong 2006, 15

^{vi} Tong 2006, 1

^{vii} Collins 2007, 12

^{viii} McElroy 2012, 2

^{ix} Cohn and Dow 1998, 118

^x Thornberry 2012, 483

^{xi} Coyle 2015

^{xii} McGough 2013

^{xiii} Sundquist 2010, 2

^{xiv} Hentoff 2011

^{xv} Mauro, December 2014

^{xvi} The members of the Coalition are the American Society of News Editors, the National Association of Broadcasters, the National Press Foundation, the National Press Photographers Association, the Radio Television Digital News Association, the Reporters Committee for Freedom of the Press, the Society for Professional Journalists, the Tully Center at Syracuse University, the American Society of Magazine Editors, the Alliance for Justice, Citizens for Responsibility and Ethics in Washington, Citizens Outreach, Constitutional Accountability Center, Liberty Coalition, National Forum on Judicial Accountability, National Judicial Conduct and Disability Law Project, OpenTheGovernment.org, Public Interest Institute and the Taxpayers Protection Alliance. *See* more broadly <http://www.openscotus.com/>

^{xvii} <http://fixthecourt.com/about/>

^{xviii} Tong 2006, 1

^{xix} *Cameras in the Courtroom Act* S. 780, 114th Congress (2015).

^{xx} Quigley, March 2015

^{xxi} *See, e.g.*, H.R. 1299 (110th Congress), S. 344 (110th Congress), H.R. 4380 (109th Congress), S. 1768 (109th Congress), S. 3086 (106th Congress),

^{xxii} Mauro, November 2012

^{xxiii} Hoffman 2012

^{xxiv} McElroy 2012, 2

^{xxv} Cohn and Dow 1998, 45

^{xxvi} *A Camera in the Court*, June 3, 2014

^{xxvii} Cohn and Dow 1998, 48

^{xxviii} Spector, A, *Cameras in the Courtroom* (2005), 1