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# The Monster in the Courtroom

Sonja R. West\*

*"There are very few monsters who warrant the fear we have of them."*<sup>1</sup>

It is well known that Supreme Court Justices are not fans of cameras—specifically, video cameras.<sup>2</sup> Despite continued pressure from the press,<sup>3</sup> Congress,<sup>4</sup> and the public<sup>5</sup> to allow cameras into oral

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\* Associate Professor of Law, University of Georgia School of Law. I would like to thank Morgan Duncan, Matthew Noller, and Ryan Tuck for their valuable research assistance. I also am indebted to the University of Georgia Law librarians, specifically Anne Burnett and Thomas J. Striepe, for their help on this piece.

1. ANDRÉ GIDE, *AUTUMN LEAVES* 180 (Elsie Pell trans., 2007).

2. This article will refer generally to the issue of "cameras" in the Supreme Court, although most of the focus is on the issue of video cameras specifically.

3. See, e.g., Michael D. Shear, *Neither Phones, Nor Cameras, Nor Tweets in the Court*, N.Y. TIMES, Mar. 26, 2012, at A12 (describing the Court's policy against cameras as "stubbornly stick[ing] to traditions that predate the communications revolution"); Andrew Cohen, *For Democracy's Sake, Supreme Court, Let the Cameras In*, THE ATLANTIC (Mar. 22, 2012, 11:30 AM), <http://www.theatlantic.com/national/archive/2012/03/for-democracys-sake-supreme-court-let-the-cameras-in/254753/> ("While the legal and political elite gleefully plan their big week at the High Court, while members of the Washington establishment applaud themselves for their inside connections to the courtroom, the rest of the country will be left, as usual, in the dark. The contrast gives new meaning to the phrase 'unequal justice.'"); Dahlia Lithwick, *Lights! Cameras! It's the Supreme Court!*, SLATE (Mar. 30, 2012, 4:11 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2012/03/obamacare\\_and\\_the\\_supreme\\_court\\_the\\_court\\_s\\_arguments\\_might\\_as\\_well\\_be\\_on\\_television.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2012/03/obamacare_and_the_supreme_court_the_court_s_arguments_might_as_well_be_on_television.html) ("Why bar television cameras from the court's proceedings if, in the end, oral argument unfolds in unapologetically made-for-television fashion?").

4. See, e.g., A Bill To Permit the Televising of Supreme Court Proceedings, S. 446, 111th Cong. (2009) (requiring televising of Supreme Court open sessions unless a majority of the Court determined that doing so would violate the due process rights of one or more of the parties before the Court); Sunshine in the Courtroom Act, S. 352, 110th Cong. (2007) (requiring televising of Supreme Court open sessions in the absence of a due process violation); H.R. 2422, 109th Cong. (2005) (allowing the presiding judge in federal courts to allow broadcasting); Sunshine in the Courtroom Act, S. 829, 109th Cong. (2005) (same); Sunshine in the Courtroom Act, S. 986, 107th Cong. (1999) (allowing photographing, broadcasting, and televising of federal court proceedings); S. 721, 106th Cong. (1999) (same).

5. See, e.g., Press Release, Fairleigh Dickinson Univ., Public Says Televising Court is Good for Democracy (Mar. 9, 2010) (on file with author), available at <http://publicmind.fdu.edu/courtvtv/final.pdf> (finding that 61% of American voters believe that televising Supreme Court hearings would be "good for democracy"); Press Release, C-SPAN, What Americans Know About the U.S. Supreme Court and What Changed About the Court (Sept. 24, 2009) (on file with author), available at <http://supremecourt.c-span.org/assets/pdf/CSPANSupremeCourtPollSept242009.pdf> (noting that about 65% of Americans

arguments, the Justices have steadfastly refused. They have, moreover, shown no inkling of reconsidering their position any time soon. They have yet to deem any case to be of sufficient importance or public interest to allow even a single camera in the courtroom while they are in session.<sup>6</sup>

Many observers have argued in favor of televising oral arguments as a matter of public policy, and these important arguments merit the Justices' attention. The public policy debate centers on the virtues of openness in the work of courts in general and the work of the Supreme Court in particular.<sup>7</sup> Arguments for cameras as a means to increased transparency of judicial work, however, tend to gloss over a significant point about the Court—it is not secretive. The Court allows several avenues of public access to its process, making it a relatively open and transparent government body. This is particularly true with oral arguments.<sup>8</sup> Chief Justice John Roberts was correct when he told the Fourth Circuit Judicial Conference recently that “[e]verything we do that has an impact is done in public.”<sup>9</sup> The openness of the Court's arguments

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want cameras in the Supreme Court).

6. See, e.g., Robert Barnes, *Supreme Court Will Not Allow Cameras for Health-Care Arguments, Will Release Audio*, WASH. POST, Mar. 17, 2012, at A3 (discussing the Supreme Court's rejection of a request to broadcast the oral arguments in *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012) and the Patient Protection and Affordable Care Act health care case, which parallels the Court's similar rejection of a request to broadcast the oral arguments in *Bush v. Gore*, 531 U.S. 98 (2000), the 2000 presidential election case). The Court allowed the same-day release of audio from the oral arguments in the health care and *Bush v. Gore* cases, which is a rarity in itself. *Id.* “The [J]ustices have never allowed cameras inside the courtroom and decided not to make an exception for the health care case, despite what the court called ‘extraordinary public interest.’” *Supreme Court Says No TV Cameras at Health Care Arguments*, USA TODAY, Mar. 16, 2012.

7. See, e.g., Erwin Chemerinsky & Eric J. Segall, Op-Ed, *Lift the Blackout*, L.A. TIMES, Mar. 22, 2012, at A15 (“Supreme Court proceedings are not simply government events; they are important historic moments and are of major educational, civic and national interest. There is a strong presumption that people should be able to watch government proceedings, and in ones as vitally important as this, the public has an especially great interest in transparency.”); Kenneth W. Starr, Op-Ed, *Open Up High Court to Cameras*, N.Y. TIMES, Oct. 3, 2011, at A25 (“The benefits of increased access and transparency are many. Democracy's first principles strongly support the people's right to know how their government works.”); Joe Mathewson, *Put U.S. Supreme Court Arguments on TV*, CNN (Feb. 2, 2012, 8:04 AM), <http://www.cnn.com/2012/02/02/opinion/mathewson-televis-supreme-court/index.html> (“TV coverage would greatly enhance public understanding of the [C]ourt and its work.”).

8. No one is arguing for increased access to the Justices' internal deliberations or conferences. See sources cited *supra* note 7 (compiling arguments for allowing cameras during oral argument, not any other aspect of Court procedure).

9. *Annual Fourth Circuit Court of Appeals Conference*, C-SPAN (June 25, 2011), <http://www.c-span.org/Events/Annual-Fourth-Circuit-Court-of-Appeals-Conference/10737422476->

starts with the presence of the press and hundreds of members of the public in the audience. For those who cannot be physically present, transcripts of the arguments are released daily,<sup>10</sup> and audio recordings are released weekly.<sup>11</sup> There is now even live blogging of opinion announcements through the website "SCOTUSblog."<sup>12</sup> These various means of access make clear that this is not simply an issue of transparency versus secrecy. Oral arguments at the Supreme Court are, in all fairness, open and public events.

This makes it all the more curious why the Justices have drawn the line at cameras. Yet draw the line they have. They have drawn it firmly (not even for purely archival purposes),<sup>13</sup> and they have drawn it forcefully (Justice David Souter famously told the House Appropriations Committee that "the day you see a camera come into our courtroom, it's going to roll over my dead body"<sup>14</sup>). The opposition to video cameras also crosses ideological lines.<sup>15</sup>

Time has shown, moreover, that this is not simply a matter of waiting out older, technologically fearful Justices and replacing them

1/ [hereinafter *Fourth Circuit Conference*].

10. *Transcripts and Records of Oral Arguments* (Oct. 2010), SUPREME COURT OF THE UNITED STATES, [http://www.supremecourt.gov/oral\\_arguments/availabilityoforalargument/transcripts.aspx](http://www.supremecourt.gov/oral_arguments/availabilityoforalargument/transcripts.aspx).

11. *Id.*

12. See, e.g., Kali Borkoski, *Live Blog of the Health Care Decision*, SCOTUSBLOG (June 28, 2012, 9:29 AM), <http://www.scotusblog.com/2012/06/live-blog-of-the-health-care-decision-sponsored-by-bloomberg-law/>.

13. See, e.g., Scott C. Wilcox, *Granting Certiorari to Video Recording but Not to Televising*, 106 MICH. L. REV. FIRST IMPRESSIONS 24, 24 (2007), <http://www.michiganlawreview.org/firstimpressions/vol106/wilcox.pdf> (suggesting the Court begin video recording its proceedings and make the footage available for viewing at the National Archives).

14. See, e.g., *On Cameras in Supreme Court, Souter Says, "Over My Dead Body,"* N.Y. TIMES, Mar. 30, 1996, at A24 [hereinafter "*Over My Dead Body*"]; see also John Paul Stevens, Q&A (Oct. 9, 2011), <http://www.q-and-a.org/Transcript/?ProgramID=1360> (quoting Justice John Paul Stevens telling a reporter "I wouldn't hold my breath, that's for sure.").

15. See, e.g., "*Over My Dead Body*," *supra* note 14 (quoting Justice David Souter during a 1996 appearance before the House Appropriations Committee stating, "I can tell you the day you see a camera come into our courtroom, it's going to roll over my dead body."); *id.* (quoting Justice Anthony Kennedy as confirming that cameras would not be allowed in the Court); *Supreme Court Justices Take a Seat at the Witness Table*, C-SPAN (Oct. 5, 2011), <http://www.c-span.org/Events/Supreme-Court-Justices-Take-a-Seat-at-the-Witness-Table/10737424545> (noting that both Justices Stephen Breyer and Antonin Scalia testified before the Senate Judiciary Committee that they were reluctant to allow cameras in the Court). *But see* Editorial, *Live, from the Supreme Court*, N.Y. TIMES, Feb. 1, 2012, at A26 (noting the bipartisan backing for recent congressional bills to open Supreme Court to cameras).

with their younger, tech-savvy counterparts. Some of the older<sup>16</sup> as well as some of the younger<sup>17</sup> Justices have vigorously opposed allowing cameras in the courtroom. Notably, Supreme Court nominees almost always speak in favor of cameras in the courtroom during their confirmation hearings, yet once on the Court they become opposed.<sup>18</sup> The newest member of the Court, Justice Elena Kagan, appears to be following this trend. At her confirmation hearings, she said that she thought “it would be a terrific thing to have cameras in the courtroom,”<sup>19</sup>

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16. E.g., Stephanie Condon, *Scalia: Cameras in the Court will “Miseducate” People*, CBS NEWS (July 26, 2012, 11:37 AM), [http://www.cbsnews.com/8301-503544\\_162-57480640-503544/scalia-cameras-in-the-court-will-miseducate-people/](http://www.cbsnews.com/8301-503544_162-57480640-503544/scalia-cameras-in-the-court-will-miseducate-people/) [hereinafter Condon, *Cameras in the Court*] (discussing Justice Scalia, who is 76, on his opposition: “Somehow when you see it live, an excerpt pulled out of an entire, when you see it live, it has a much greater impact . . . . No, I am sure it will miseducate the American people, not educate.”).

17. Ariane de Vogue, *What Do the Supreme Court Justices Think of Cameras in Court?*, ABC NEWS (Dec. 1, 2011, 9:00 AM), <http://abcnews.go.com/blogs/politics/2011/12/what-do-the-supreme-court-justices-think-of-cameras-in-court/> [hereinafter de Vogue, *Cameras in Court*] (quoting Chief Justice John Roberts, who is 57: “We worry about the impact on lawyers. . . . I worry about the impact on judges. . . . We, unfortunately, fall into grandstanding with a couple of hundred people in the courtroom . . . . I’m a little concerned about what the impact would be.”).

18. Compare *Nomination of Judge Clarence Thomas to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 102d Cong. 385 (1991) (“I have no objection beyond a concern that the cameras in the court room be unobtrusive or as unobtrusive as possible.”), with Gina Holland, *Two Justices Criticize Cameras in High Court*, BOSTON GLOBE, Apr. 5, 2006 (“[Allowing cameras in the courtroom] runs the risk of undermining the manner in which we consider the cases. . . . Certainly it will change our proceedings. And I don’t think for the better.”) (quoting testimony before a House appropriations panel); also compare *Nomination of Ruth Bader Ginsberg to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 103d Cong. 262 (1993) (“I don’t see any problem with having appellate proceedings fully televised. I think it would be good for the public.”), with *The Role of the Judiciary: Panel Discussion with United States Supreme Court Justices November 10, 2005*, 25 BERKELEY J. INT’L L. 71, 85 (2007) [hereinafter *Panel Discussion*] (“I think what bothers many people, at least me, on the other side, is that if it were in the Supreme Court, I think it would become a symbol for every court, and therefore it would be in every criminal trial in the country. And when I start thinking about witnesses . . . I don’t want them thinking how they look to their neighbors.”) (quoting Justice Breyer); see also Dahlia Lithwick, *I Want My Court TV*, THE GUARDIAN, Oct. 13, 2011 (noting how Justice Thurgood Marshall, once a supporter of cameras in courtrooms, has declared that the rancorous confirmation hearings had changed his mind); Alicia M. Cohn, *Justice Scalia: Cameras in Supreme Court Would ‘Miseducate’ Americans*, THE HILL (July 26, 2012, 12:15 PM), <http://thehill.com/video/in-the-news/240519-justice-scalia-cameras-in-supreme-court-would-miseducate-americans> [hereinafter Cohn, *Cameras in Supreme Court*] (quoting Justice Scalia as stating, “I was for it when I first joined the [C]ourt, and switched and remained on that side.”).

19. *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 83–84 (2010) (“I have said that I think it would be a terrific thing to have cameras in the courtroom. . . . I think it would be a great thing for the institution, and more important, I think it would be a great thing for the American people.”).

but just over two years later she was not so sure, confessing she had “a few worries” about the potential presence of cameras.<sup>20</sup>

Nor has internal opposition to filming Court sessions softened as video equipment has become less intrusive. Today, the use of video technology causes no more light or noise and takes up no more space than other tools.<sup>21</sup> Almost fifty years ago Justice Harlan predicted “the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.”<sup>22</sup> Surely the day Justice Harlan predicted has arrived; tiny and quiet cameras are commonplace.<sup>23</sup> No one has argued for years that the cameras would be too loud or too big and thus a disruption.<sup>24</sup>

20. Debra Cassens Weiss, *Kagan Has Second Thoughts on Televised Arguments*, ABA JOURNAL (Sept. 10, 2012, 5:00 AM), [http://www.abajournal.com/news/article/kagan\\_has\\_second\\_thoughts\\_on\\_televised\\_arguments](http://www.abajournal.com/news/article/kagan_has_second_thoughts_on_televised_arguments). Justice Sonia Sotomayor expressed support for cameras at her confirmation hearing, stating “I have had positive experiences with cameras. When I have been asked to join experiments of using cameras in the courtroom, I have participated. I have volunteered.” *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 83 (2009). Chief Justice Burger, however, opposed cameras while on the bench but after retirement “said he had changed his mind and now saw that there was an edifying possibility.” *Allowing Cameras and Electronic Media in the Courtroom: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 106th Cong. 56 (2000) [hereinafter *allowing Cameras Hearing*] (statement of Ronald Goldfarb).

21. During his confirmation hearings, Justice Anthony Kennedy told a story from his days on the Ninth Circuit Court of Appeals of a high-profile case before a packed courtroom. He explained that

[a] person came in with all kinds of equipment and began setting it up. He disturbed me. He disturbed the attorneys. He disturbed everybody in the room.  
He was setting up an easel to paint our picture, which was permitted. If he had a little Minox camera, we would have held him in contempt.  
So, the standard doesn’t always work.

*Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 100th Cong. 219 (1987) [hereinafter *Nomination of Anthony M. Kennedy*] (Statement of Justice Anthony Kennedy).

22. *Estes v. Texas*, 381 U.S. 532, 595 (1965) (Harlan, J., concurring).

23. See *Allowing Cameras Hearing*, *supra* note 20, at 52 (statement of David Busiek) (“Technological advances in recent decades have been extraordinary, and the potential for disruption to judicial proceedings has been minimized. The cameras available today are small, unobtrusive, and designed to operate without additional light. Moreover, the electronic media can be required to ‘pool’ their coverage in order to limit the equipment and personnel present in the courtroom, further minimizing disruption.”).

24. See *Allowing Cameras Hearing*, *supra* note 20, at 55 (statement of Ronald Goldfarb) (“In the early days of the *Sol Estes* case, the concern was that there would be wires snaking across courtrooms and cumbersome television cameras getting in the way and inhibiting witnesses. Of course, we now know that the new technology is such that those kinds of concerns are well beyond

All of this raises the central question—why the fear of video cameras? After allowing so much access, why not add this additional avenue of communication with the public? Each time the Justices ascend to the bench, they know they are at the center of the most high-profile show in the American legal system. Why close this single door when the walls around them are made of glass? This Article seeks to answer that question by identifying the qualities of video that make an otherwise open Court suddenly so fearful.

This Article proceeds in four parts. Part I examines the history of the Supreme Court and cameras. Part II offers a review of the public policy arguments for and against allowing cameras in oral argument. Part III details how video differs from other access already allowed by the Court, focusing on its critical qualities of vividness and accessibility. Part IV offers an analysis of whether these video-specific differences—what I call the “video differential”—support the Justices’ main arguments against cameras in the courtroom to see if they justify the Court’s no-camera policy. All of this leads to a conclusion that corresponds with the observation of many: there is simply no good reason for the Justices’ distrust of cameras.

## I. SUPREMELY CAMERA SHY

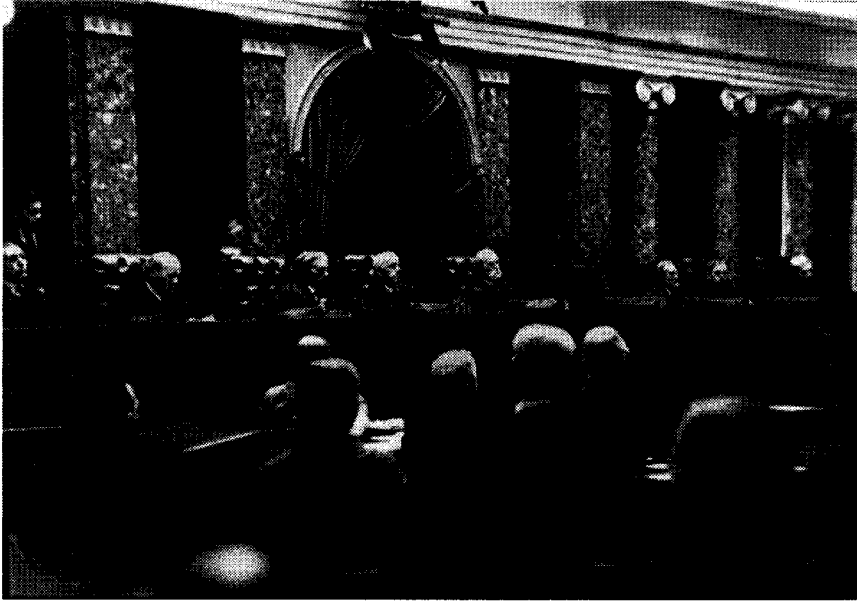
In 1932, a photojournalist named Erich Salomon snuck a camera into a Supreme Court argument, being conducted in what is known as “The Old Senate Building.” To pull this off, he faked a broken arm and hid the camera in his sling.<sup>25</sup> The photo was published in *Fortune* magazine. It provides a clear and close-up shot of the bench, with a bearded Chief Justice Charles Hughes presiding. Two chairs down, most Court

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us.”); ROGER L. SADLER, ELECTRONIC MEDIA LAW 360–61 (2005) (noting how courts like the Florida Supreme Court, which has allowed cameras in state courts since the 1970s, have reasoned that cameras are “less obtrusive” than in the past); Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1107, 1110 (2010) (“Today’s cameras are small, easily concealed and capable of operating without obtrusive lighting or microphones.”); Letter from Kevin Benz, Chairman, Radio Television Digital News Ass’n, to The Hon. John G. Roberts, Chief Justice, U.S. Supreme Court (Nov. 16, 2011) (arguing that technology advances have nullified any concerns about the intrusiveness of cameras); Am. Judicature Soc’y, *Cameras in Our Federal Courts—The Time Has Come* (Feb. 21, 2010), [http://www.federalevvidence.com/pdf/2010/CamerasICt/AJS-Cameras\\_SupportCameras-2\\_21\\_2010.pdf](http://www.federalevvidence.com/pdf/2010/CamerasICt/AJS-Cameras_SupportCameras-2_21_2010.pdf) (noting that in the thirty years since Florida started allowing cameras in courtrooms, “[c]ameras are now routinely installed in such a way as to make them inconspicuous, and most participants are not even aware of their presence”).

25. Sierra Duren, *This Day in History*, NOTRE DAME PHOTO (Apr. 28, 2010, 7:08 PM), [http://notredamephoto.blogspot.com/2010/04/this-day-in-history\\_28.html](http://notredamephoto.blogspot.com/2010/04/this-day-in-history_28.html).

devotees would recognize Justice Louis Brandeis. The Justices appear subdued yet attentive as they presumably listen to argument by an unseen attorney.



Session of the Supreme Court of the United States, June 1932. bpk, Berlin/Erich Salomon/Berlinische Galerie/Art Resource, NY.

Five years later, *Time* magazine published another photo. This one, the magazine reported, was taken by “an enterprising amateur, a young woman who concealed her small camera in her handbag, cutting a hole through which the lens peeped, resembling an ornament.”<sup>26</sup> The article went to explain that the young woman “practiced shooting from the hip, without using the camera’s finder which was inside the purse”<sup>27</sup> in order to capture the Court in action. By the time this second photo was taken, the Justices had moved to their much-improved quarters and current home at the Supreme Court building. The photo was taken from a more distant vantage point and reveals the waist-high bronze gate that separates the public from members of the Supreme Court Bar. In the background are the now-familiar towering marble columns and draping curtain of the Court’s current sanctuary. The large, simple clock behind

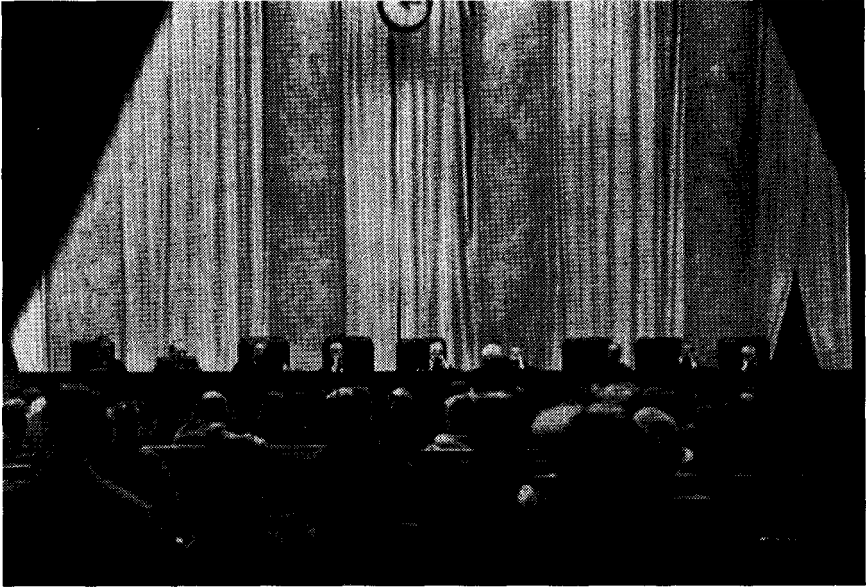
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26. *Judiciary: Farewell Appearance*, *TIME*, June 7, 1937, at 12.

27. *Id.* at 12–13.



them reports the time. The edges of the photo are framed in black, presumably from the cutouts of the purse. The Justices are sitting, several with heads resting in hands, while a white-haired lawyer argues before them.



Session of the Supreme Court of the United States, May 1937. Time & Life Pictures/Getty Images.

These two enterprising individuals acted clandestinely and are the only two photographers known to have captured images of the Justices in session. Both photos are striking even though they depict little action.

Other than these two rogue photos, the Supreme Court's interaction with cameras in its courtroom has consisted of little more than denying the occasional request to use them. In their judicial opinions, however, the Justices have addressed the use of cameras in lower courts, specifically in criminal trials. The Court has recognized possible conflicts between camera access and the constitutional fair trial rights of defendants.

Even on this matter, the Supreme Court has decided only a few cases. In the first, the Court overturned the swindling conviction of Billie Sol Estes on the grounds that extensive media coverage of his Texas trial, which included live television, radio, and still photography, denied

him his due process rights.<sup>28</sup> The Court's concerns focused on actual disruption of the proceedings caused by the presence of reporters and their equipment. Justice Tom Clark, writing for the Court, noted that "[c]ables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table."<sup>29</sup> The atmosphere, he explained, "was not one of that judicial serenity and calm to which petitioner was entitled."<sup>30</sup> Suggesting that the presence of the equipment was central to the disruption, he reasoned that a print reporter "is not permitted to bring his typewriter or printing press" into the courtroom and of particular significance to the question considered here, he added that "[w]hen the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case."<sup>31</sup>

Sixteen years later, the Court again addressed the issue of cameras in a criminal trial, this time in a case involving two police officers charged with burglary of a Miami Beach restaurant.<sup>32</sup> Over the defendants' objections, television cameras were allowed in the trial. Ultimately less than three minutes of the trial were aired.<sup>33</sup> The defendants argued that, even if not physically disruptive, the physical presence of the equipment violated their constitutional rights because cameras are "psychologically" disruptive.<sup>34</sup> The Supreme Court disagreed. In an opinion by Chief Justice Burger, the Court held that "[t]he risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage."<sup>35</sup>

The Court's early response to cameras in courtrooms, therefore, was focused on fair trial rights and the physical disruption of equipment and noise. In a recent ruling, however, the Court ventured further, suggesting that the effects of television cameras—even in non-criminal trials—for reasons other than physical disruption. In 2010, the Court issued a 5–4 decision to stay a lower court order that would have allowed television coverage of the high-profile federal trial challenging California's ban on

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28. *Estes v. Texas*, 381 U.S. 532, 534–35 (1965).

29. *Id.* at 536.

30. *Id.*

31. *Id.* at 540.

32. *Chandler v. Florida*, 449 U.S. 560 (1981).

33. *Id.* at 568.

34. *See id.* at 575.

35. *Id.*

same-sex marriage. The televising of the trial would have taken place as part of a pilot program designed to test the effects of cameras in the Ninth Circuit. The Court wrote that this case was “not a good one for a pilot program. Even the studies that have been conducted thus far have not analyzed the effect of broadcasting in high-profile, divisive cases.”<sup>36</sup> The majority claimed it was not “expressing any view on whether such trials should be broadcast” but rather reached its decision because “the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting.”<sup>37</sup> Even so, the Court pointed to concerns that televising the trial could lead to witness intimidation and harassment.<sup>38</sup>

## II. THE CASE FOR CAMERAS

While the Justices have made it clear that they have little interest in debating the pros and cons of cameras, others have found much to discuss. The press, scholars, and legislators alike have advocated that the time has come to allow cameras into courtrooms of all kinds, including the Supreme Court. These debates center on policy arguments about the costs and the benefits of opening courtrooms to cameras. A brief review of three of the main arguments follows.

The first argument posits that the First Amendment includes a right to bring cameras into courtrooms.<sup>39</sup> Judge Stephen Reinhardt of the Ninth Circuit predicted in 1995 that “some day, perhaps far in the future, this question will be resolved on First Amendment grounds.”<sup>40</sup> Justice Scalia strongly disagrees with any suggestion that the issue has a constitutional dimension. In a C-SPAN interview, he stated in 2012 that “[t]he First Amendment has nothing to do with whether we have to televise our proceedings.”<sup>41</sup> While describing himself as a First

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36. *Hollingsworth v. Perry*, 130 S. Ct. 705, 714 (2010) (per curiam) (granting the application for stay).

37. *Id.* at 706.

38. *Id.* at 712–13; *see also* *Estes v. Texas*, 381 U.S. 532, 587 (1965) (Harlan, J., concurring) (“[T]here is no constitutional requirement that television be allowed in the courtroom.”); *see also* *Chandler v. Florida*, 449 U.S. 560, 571 (1981) (same).

39. *See* Erwin Chemerinsky, *A Failure to Communicate*, 2012 BYU L. REV. 1705 (this Symposium).

40. Stephen Reinhardt, *Judicial Speech and the Open Judiciary*, 28 LOY. L.A. L. REV. 805, 812 (1994–1995).

41. Cohn, *Cameras in Supreme Court*, *supra* note 18.

Amendment advocate, Justice Scalia contended that the amendment “doesn’t require us to televise our proceedings.”<sup>42</sup>

Members of the press have argued that the Constitution protects their right to cover the Court through use of their own preferred method of newsgathering.<sup>43</sup> In their view, the Press Clause of the First Amendment supports this result, as does the Equal Protection Clause.<sup>44</sup> In its earliest treatment of the issue, however, the Supreme Court has rejected the constitutional right to bring cameras into courtrooms.<sup>45</sup> Chief Justice Warren declared in *Estes* that “[o]n entering [the courtroom], where the lives, liberty and property of people are in jeopardy, television representatives have only the rights of the general public, namely, to be present, to observe the proceedings, and thereafter, if they choose, to report them.”<sup>46</sup>

Proponents of the right to use cameras also have pointed to more recent Supreme Court rulings suggesting that televised judicial proceedings are part of the public’s First Amendment right to follow the workings of its government. Judge Reinhardt explained that “[t]he public has an overriding interest in knowing what is happening in its courtrooms, and we, as judges, have no right to ban the medium which provides the public with the vast majority of its information.”<sup>47</sup> Close examination suggests that this argument has roots that reach back to at least the mid-twentieth century.<sup>48</sup> In 1947, the Supreme Court declared that “[a] trial is a public event. What transpires in the court room is public property.”<sup>49</sup> The public, as the Second Circuit put it, has “First

42. *Id.*

43. See Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 42 (1982) (arguing that the Supreme Court, in its cases rejecting or severely limiting any distinct First Amendment right to gather news, has improperly failed to account for the societal interests favoring the press’s preferred methods of newsgathering).

44. See, e.g., *Garrett v. Estelle*, 556 F.2d 1274, 1279 (5th Cir. 1977) (rejecting the plaintiff’s argument that denying camera access amounted to an Equal Protection Clause violation).

45. *Estes v. Texas*, 381 U.S. 532, 585–86 (1965) (Warren, C.J., concurring).

46. *Id.*

47. Reinhardt, *supra* note 40, at 812.

48. See *Chandler v. Florida*, 449 U.S. 560, 578–80 (1981). The court rejected the notion that allowing television, radio, and photographic coverage of criminal trials, even over the defendant’s objection, violated the Constitution. *Id.* It noted that “[t]o stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation.” *Id.* at 579 (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)); see also *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580–81 (1980) (concluding that the public and the press have a right to attend criminal proceedings).

49. *Craig v. Harney*, 331 U.S. 367, 374 (1947).

Amendment interests that are independent of the First Amendment interests of speakers (in this instance, the parties to the trial).<sup>50</sup> Building on this principle, Ronald Goldfarb has suggested that the burden of proof rests on those who oppose cameras rather than those who support them.<sup>51</sup> He goes on to advocate rejection of the traditional view that the Constitution does not speak to the issue of video equipment in courtrooms.<sup>52</sup> He urges instead “a more positive position—that the First Amendment mandates all media equal access to courts.”<sup>53</sup>

The second argument for televising judicial proceedings posits that doing so would enhance transparency and accountability of government.<sup>54</sup> Justice Brandeis famously remarked that “[s]unlight is . . . the best of disinfectants.”<sup>55</sup> Video cameras, the argument goes, would provide the public with more information about the courts and thus produce more accountability. The connection between access to the judicial system and accountability is one the Court has recognized before. As the plurality noted in *Richmond Newspapers*, “[p]eople in an

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50. *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 22 (2d Cir. 1984); *see also* *Bates v. State Bar*, 433 U.S. 350, 364 (1977) (noting that “[t]he listener’s interest is substantial”); *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 76 (1976) (Powell, J., concurring) (arguing that it is “vital . . . that there be full opportunity for everyone to receive the message”); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (noting that First Amendment protection “is to the communication, to its source and to its recipients both”).

51. RONALD L. GOLDFARB, *TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS* 187 (1998) (“The party claiming the problem should have the responsibility of proving it.”).

52. *Id.*

53. *Id.*; *see also* Kathleen Cullinan, *Cameras a Bit More Welcome in Arizona Courts*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS (Sept. 16, 2008), <http://www.rcfp.org/node/97061> (reporting a 2008 order from the Supreme Court of Arizona that “requires judges to make ‘specific, on-the-record findings that there is a likelihood of harm . . . that outweighs the benefit to the public of camera coverage’ before banning broadcasts of court proceedings” and “allows more room for appeal when judges do opt to restrict cameras, by eliminating a provision giving the judge ‘sole’ discretion”).

54. *See supra* note 8 and accompanying text; *see also* Al Tompkins, *A Case for Cameras in the Courtroom*, POYNTER.ORG (Aug. 21, 2002, 4:17 PM), <http://www.poynter.org/uncategorized/1990/a-case-for-cameras-in-the-courtroom/> (“There are some side benefits to having cameras in the courtroom. The public will hold journalists more accountable for the accuracy of coverage. At least some members of the public will have listened word for word what the journalists witnessed. Coverage is less likely to be spun, positioned or slanted when everyone has access to the unfettered truth.”); Letter from Charles E. Grassley, U.S. Senator, Senate Judiciary Comm., to John G. Roberts, Chief Justice, U.S. Supreme Court (Nov. 15, 2011) (requesting that the Supreme Court televise the oral arguments in the PPACA case because “[l]etting the world watch these historic and important proceedings will bolster confidence in our judicial system and the decisions of the Court”).

55. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>56</sup> Speaking out in support of cameras in state courts, Illinois Chief Justice Thomas Kilbride explained that, “[b]y having the public keeping an eye on what is going on in the courtroom, [they] can act as a check in the balance of power.”<sup>57</sup>

Finally, and closely related to the argument based on accountability, is the claim that there is educational value in allowing Americans to watch their Court at work.<sup>58</sup> On this view, video cameras would provide a vital civics lesson on the United States judicial system. Such a lesson, it is urged, is desperately needed in a nation where two-thirds of its citizens cannot name a single Supreme Court Justice<sup>59</sup> and six out of ten do not know that there are nine members of the Court.<sup>60</sup> Sixth Circuit Court of Appeals Judge Boyce F. Martin Jr. stated that he is “baffled that we have not done more to exploit visual media as a way of educating the public about our system of government.”<sup>61</sup> Chief Justice Kilbride agrees: “If we

56. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

57. Scott Reeder, *Illinois Supreme Court Gives OK for Cameras in Trial Courts*, ILLINOISWATCHDOG.ORG (Jan. 23, 2012), <http://watchdog.org/40136/ilshn-illinois-supreme-court-gives-ok-to-cameras-in-trial-courts>.

58. Lisa T. McElroy, *Cameras at the Supreme Court: A Rhetorical Analysis*, 2012 BYU L. REV. 1837, 1869 (“Cameras at the Supreme Court would allow the public to decide on the story it perceives, rather than having that story filtered through and interpreted (perhaps sensationalistically) by the media. Were the American public to have the opportunity to see the Court—part of its own government—it could form educated opinions about the legitimacy of the Court as an institution. And, with a peek inside the Court’s building, a look at what the Court does, the public would be less likely to reject or accept the Court wholesale and more likely to view it in shades of gray.”); Nat Hentoff, *Supreme Court Bans Our Seeing It in Action*, ASPEN DAILY NEWS ONLINE (Dec. 21, 2011), <http://www.aspendailynews.com/section/columnist/150833#.TvIA6zWXRLc> (noting that Justice William Brennan supported allowing cameras in the Court because it would help educate Americans about how the Court works and how its opinions can have a “widespread” impact on daily life); see also *Panel Discussion*, *supra* note 18, at 84 (“[T]elevision can be a teacher. And if we were going to have a debate on television in the courtroom, and you drew the affirmative side of the debate, you could make probably more positive points. And we sometimes wish lawyers were better prepared, but they haven’t seen us at work. If they had a videotape or a DVD, then they could see it. So you can make a lot of arguments for [allowing cameras in the courtroom].”) (quoting Justice Kennedy). Despite his comments, Justice Kennedy still opposes allowing cameras in the Court, arguing that not allowing cameras also is a form of teaching. *Id.* at 84–85.

59. Press Release, FindLaw.com, Two-Thirds of Americans Can’t Name Any U.S. Supreme Court Justices, Says New FindLaw.com Survey (June 1, 2010) (on file with author), available at <http://company.findlaw.com/pr/2010/060110.supremes.html>.

60. *60 Minutes/Vanity Fair Poll: August Edition*, 60 MINUTES (July 29, 2012, 7:58 PM), [http://www.cbsnews.com/8301-18560\\_162-57476746/60-minutes-vanity-fair-poll-august-edition/?pageNum=7&tag=contentMain;contentBody](http://www.cbsnews.com/8301-18560_162-57476746/60-minutes-vanity-fair-poll-august-edition/?pageNum=7&tag=contentMain;contentBody).

61. Boyce F. Martin, Jr., *Gee Whiz, the Sky Is Falling!*, 106 MICH. L. REV. FIRST

don't have cameras in courtrooms, it's left up to shows like *Law & Order* to give the public an impression of what is going on in the judiciary."<sup>62</sup>

### III. THE VIDEO DIFFERENTIAL

#### *A. How Is Video Different?*

A great deal of information about the Court's oral arguments is available to the press and the public—verbatim transcripts provide detail; audio recordings capture expressiveness; live-blogging ensures timeliness. So what is left for video cameras to do?

The following paragraphs seek to identify what the public stands to gain from the Court's oral arguments through video coverage that goes beyond what is already available. The focus of the debate about cameras belongs in the gap between the status quo and what video might offer. This Article refers to this added value as the "video differential." Because there is already so much access to the Court's arguments, the video differential is not especially large, but it might be significant. This Part identifies two primary traits that make up the video differential: vividness and accessibility.

#### *I. Vividness*

Video offers vividness. Why? Because it is fundamentally different to see and hear an event than it is to be told about it, to read it, or even to listen to it. Video is more vivid than other types of openness in two key ways. First, video allows the viewer to gain more information than she otherwise would receive. Second, the information that video recordings deliver has a stronger impact on the audience than does any other form of presentation.

Video of oral arguments would allow the public to gain additional insights about the Court. By viewing the Justices on the bench, the audience would see the Justices' facial expressions. They would see—in a way that is up close and personal—if the jurists smile, smirk, or frown when the Justices ask questions.<sup>63</sup> Likewise, the Justices' body language

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IMPRESSIONS 1, 1 (2007).

62. Reeder, *supra* note 57.

63. See Kristin Cantu, *Cameras in the Courtroom*, 19 MASS. LAW. J. 1, 15 (2012), available at <http://www.massbar.org/publications/lawyers-journal/2012/june/cameras-in-the-courtroom> (quoting retired U.S. District Court Judge Nancy Gertner saying, "I tried cases that were covered by the media . . . I would go home each evening and watch the preceding day's video on Court TV. [I] could critique my performance, better understand how the defense was playing, etc. It was a plus on

would become visible, including nods, winks, crossed arms, and expressions of exasperation. The audience could witness first-hand interactions between the Justices and attorneys and among the Justices themselves. For example, they would see if the Justices whisper to each other or exchange looks. Those outside the courtroom would become privy to nonverbal activities, including instances when a Justice stares up at the ceiling or rises from his chair and walks away (as Chief Justice Rehnquist frequently did).<sup>64</sup> Members of the viewing audience could take in the physical appearance of the members of the Court and decide for themselves if the Justices look healthy, alert, confused, or attentive.<sup>65</sup> None of this information is now available to anyone who does not have a seat in the courtroom, and televising proceedings would permit assessment of these matters over the long haul, rather than only in an argument or two.

Vividness also contributes to the power with which information registers an impact. It is one thing to read or hear about a matter. It is another thing to experience that matter by seeing and hearing it actually unfold. Common sense confirms this point. Take, for example, a witness's testimony during a trial. What would make the strongest impression: (a) an account by someone in the courtroom that the witness appeared nervous and evasive; (b) an audio recording of the testimony; or (c) a video that reveals the details of the witness's demeanor? Video works to put the viewer in the middle of an event and has the most impact because it is experienced in a way nearest to real life. It also allows the viewer the benefit of first-hand information rather than the need to rely on a third-party narrator. Thus, while the public currently has the ability to learn much of the same information through press accounts or audio recordings, the idea of vividness suggests that even

more would be gained by letting members of the public see and hear Supreme Court arguments for themselves.

An example from the Supreme Court also illustrates the potential

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all sides.”).

64. Ellen Gamerman, *Trial Is Back-Breaking for Rehnquist*, BALT. SUN, Jan. 15, 1999, at 7A (“In the Supreme Court, Rehnquist is well known for leaving the bench about once an hour and disappearing behind a curtain to pace and take a break from his black high-backed chair.”).

65. See, e.g., Dahlia Lithwick, *A Historic Day for John Roberts and the Court*, SLATE (June 28, 2012, 2:02 PM), [http://www.slate.com/articles/news\\_and\\_politics/the\\_breakfast\\_table/features/2012/\\_supreme\\_court\\_year\\_in\\_review/supreme\\_court\\_year\\_in\\_review\\_john\\_roberts\\_made\\_history\\_at\\_the\\_court\\_today\\_.html](http://www.slate.com/articles/news_and_politics/the_breakfast_table/features/2012/_supreme_court_year_in_review/supreme_court_year_in_review_john_roberts_made_history_at_the_court_today_.html) (describing a day in the courtroom where “Justice Sonia Sotomayor looked exhausted [and] Justice Antonin Scalia looked like he wasn’t very happy”).



impact of vividness. Anyone can hear or read about the racial and gender make-up of the Court. It is simply a different, much more vivid experience to see a predominantly white or male Court taking the bench. When the Court heard the 2009 case of thirteen-year-old Savanna Redding, who sued her school after being strip-searched, some reporters attempted to capture the image of a Court with eight male Justices grappling with facts that hinged on issues of gender. Reporter Joan Biskupic noted that Justice Ginsburg's "status as the court's lone woman was especially poignant."<sup>66</sup> During the oral arguments, Biskupic described a scene in which other Justices "minimized the girl's lasting humiliation, but Ginsburg stood out in her concern for the teenager."<sup>67</sup> Likewise, another Supreme Court reporter, Nina Totenberg, reported that after her male colleagues made certain comments, "Justice Ginsburg, the court's only female justice[,] bristled, her eyes flashing with anger."<sup>68</sup> Totenberg claimed that "Ginsburg seemed to all but shout" that the other Justices were failing to grasp the impact of a search like this one on a young girl.<sup>69</sup> While members of the public were able to read these press depictions and listen later to the audio of the actual questions, they could not see Justice Ginsburg's eyes, her gestures, or her facial expressions—all of which occurred as she was surrounded by eight men. The reporters claimed these images were powerful. Perhaps they were. Perhaps they were not. But only a video would have given all members of the public the needed materials with which to make an informed judgment on the matter.

There are in fact many courtroom moments that transcripts and audio recordings cannot fully capture. Some of these were evident on the last day of the Court's 2009 Term, when Justice John Paul Stevens made his last appearance on the bench and Justice Ginsburg took her seat just one day after her husband, Martin, had died. Reporter Mike Sacks attempted to paint the scene for his readers by describing how emotional the other Justices and courtroom spectators became, as "jaws dropped and eyes welled."<sup>70</sup> According to Sacks, Ginsburg "stared wistfully forward

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66. Joan Biskupic, *Ginsburg: Court Needs Another Woman: Panel's Lack of Diversity Wears on Female Justice*, USA TODAY, May 6, 2009, at A1.

67. *Id.*

68. Nina Totenberg, *Supreme Court Hears School Strip Search Case*, NPR (Apr. 21, 2009), <http://www.npr.org/templates/story/story.php?storyId=103334943>.

69. *Id.*

70. Mike Sacks, *It's Time to Watch the Justices' Real Life—on Real TV*, ABA JOURNAL (July 1, 2010, 6:44 PM), [http://www.abajournal.com/news/article/its\\_time\\_to\\_watch\\_the\\_](http://www.abajournal.com/news/article/its_time_to_watch_the_)

toward her own memories” as the Chief Justice read a statement about her late husband.<sup>71</sup> When it became time for Justice Stevens to read his farewell letter to the Court, Sacks again described emotional moments as Justice Stevens’s “voice broke twice”<sup>72</sup> and Chief Justice Roberts “paused to take a deep breath and collect his emotions.”<sup>73</sup>

Justice Scalia, however, disagrees that there is anything worth seeing during the public sessions at the Court. Rather than being a vivid experience, he has said that the Justices “just sit there like nine sticks on chairs . . . there is not a whole lot of visual motion. It’s mostly intellectual motion.”<sup>74</sup> But there is no doubt that video cameras would bring the people more fully and more authentically into the courtroom. And in special moments—the timing of which can never be predicted—the vividness that only video recordings can convey would reveal much about the humanity of the Justices to whom countless decisions of the weightiest matters—about abortion,<sup>75</sup> the death penalty,<sup>76</sup> health insurance,<sup>77</sup> even who will be our President<sup>78</sup>—are entrusted.

## 2. Accessibility

The second component of the video differential concerns accessibility. Video of oral arguments is simply available to more people both in actual terms and practical terms than are transcripts or audio recordings. Watching a video is infinitely more feasible than actually attending a Supreme Court argument in person. But even when compared to the other forms of remote access, video is more accessible to more people than any possible substitute.

In testimony before the Senate Judiciary Committee, the Chief Justice of the Iowa Supreme Court, Mark Cady, reflected on these matters. As it turns out, Iowa has had cameras in their courtrooms for more than thirty years. Justice Cady’s overarching conclusion was clear: “With online video of court proceedings, more people will watch court

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justices\_real\_life\_on\_real\_tv/.

71. *Id.*

72. *Id.*

73. *Id.*

74. De Vogue, *supra* note 17 (quoting comments Justice Scalia made to Congress in 2011).

75. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

76. *Kennedy v. Louisiana*, 554 U.S. 407 (2008).

77. *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566 (2012).

78. *Bush v. Gore*, 531 U.S. 98 (2000).

proceedings. Our experience bears this out.”<sup>79</sup> What is more, he bolstered this claim with powerfully detailed evidence. According to Chief Justice Cady:

During the first six months of our online videos of oral arguments in 2006, our site logged a total of 5700 views of 40 oral arguments. The next year, 2007, the site had 75,000 views of our oral argument videos. During 2007–2008, the average number of views per oral argument video was 1425.

Compare the numbers of our video views to the number of people who attend our court proceedings. When the Iowa Supreme Court was discussing whether to start making videos of oral arguments available online, we wondered if many people would take advantage of the opportunity. After all, it is a rare case when there is someone in our courtroom listening to oral arguments other than attorneys waiting to argue their case. For this reason, the strong interest in our online arguments was a nice surprise.<sup>80</sup>

Technically, any additional medium stands to reach a certain percentage of new people. But video is not just any medium—it is *the* medium. Americans watch, on average, five hours and eleven minutes of television a day.<sup>81</sup> That number, moreover, does not include video that viewers access on the Internet. And one recent report predicted that the popularity of online videos will surpass broadcast television by the year 2020,<sup>82</sup> even while readership of print media by all demographic groups is dropping year after year. Thus as Judge Nancy Gertner testified to the Senate Judiciary Committee: “[I]n the 21st century, meaningful access to the courts means television”<sup>83</sup>—particularly as the term “television” encompasses Internet video. More people watch television than read newspapers and certainly more than those who attend oral arguments or download transcripts.

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79. *Access to the Court: Televising the Supreme Court: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 112th Cong. 6 (2011) [hereinafter *Access to the Court Hearing*] (testimony of Mark Cady, Chief Justice of Iowa Supreme Court), available at [www.judiciary.senate.gov/pdf/11-12-6CadyTestimony.pdf](http://www.judiciary.senate.gov/pdf/11-12-6CadyTestimony.pdf).

80. *Id.* at 6–7.

81. *Who Watches What (and How Much)? U.S. TV Trends by Ethnicity*, NIELSEN WIRE (Mar. 30, 2011) [hereinafter *Who Watches What*], <http://blog.nielsen.com/nielsenwire/consumer/who-watches-what-and-how-much-u-s-tv-trends-by-ethnicity/>.

82. Megan O’Neill, *Online Video to Surpass US Broadcast TV By End of Decade*, SOCIALTIMES (May 24, 2010, 2:52 PM), [http://socialtimes.com/online-video-to-surpass-us-broadcast-tv-by-end-of-decade\\_b13470](http://socialtimes.com/online-video-to-surpass-us-broadcast-tv-by-end-of-decade_b13470).

83. *Allowing Cameras Hearing*, *supra* note 20, at 21 (testimony of Judge Nancy Gertner).

The accessibility factor is not just about numbers. Video promises to connect the Court not only with *more* members of the public, but also with *different* members of the public than those currently following the proceedings. Today, the print media only reaches a limited audience—primarily older, white, more educated, and affluent.<sup>84</sup> Newspaper readership among all groups, moreover, is dropping every year, according to a 2011 Pew Report.<sup>85</sup> Although the “[f]requency of daily newspaper readership rises steadily with level of education,” “the less educated are quicker to drop the newspaper habit.”<sup>86</sup> The same pattern is true for income level.<sup>87</sup> The report also concluded that Caucasians had the highest level of newspaper readership, followed by African-Americans, with Hispanics reported as the least likely to read newspapers.<sup>88</sup>

Conversely, television reaches both a wide and a diverse audience. Nielsen studies have found that on average, women watch more television than men,<sup>89</sup> and African-Americans use their television on average almost two hours more a day than the national average.<sup>90</sup> Men, Asian-Americans, and young people, meanwhile, spend more time streaming video online or over their smart phones.<sup>91</sup>

Of course, the television news media can and do report on the proceedings of the Supreme Court, but their viewers turn to television in large part to seek images. As Judge Martin explained, “[w]e are a visual society. Americans, and particularly young Americans, turn to television and the Internet as their main sources of news. I believe that the importance of increasing public awareness trumps many of the concerns expressed by the Justices when they consider allowing cameras in the Court.”<sup>92</sup>

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84. Rick Edmonds et al., *Newspapers: By the Numbers*, PEW RESEARCH CENTER’S PROJECT FOR EXCELLENCE IN JOURNALISM (2011), <http://stateofthemediamedia.org/2011/news-papers-essay/data-page-6/>.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *American Video Habits by Age, Gender and Ethnicity*, NIELSEN WIRE (Aug. 1, 2011), [http://blog.nielsen.com/nielsenwire/online\\_mobile/american-video-habits-by-age-gender-and-ethnicity/](http://blog.nielsen.com/nielsenwire/online_mobile/american-video-habits-by-age-gender-and-ethnicity/).

90. *Who Watches What*, *supra* note 81.

91. *Id.*

92. Martin, *supra* note 61, at 1.

To be sure, many or even most Americans would choose not to watch videos of Supreme Court oral arguments. Even so, the availability of video would reach a significant percentage of people who are not currently exposed to information about the Court. No less important, some viewers—particularly those who eschew print media—are far more likely to learn about the Court if its proceedings were to become available through their preferred medium of communication.

#### IV. DOES THE VIDEO DIFFERENTIAL SUPPORT THE JUSTICES' OBJECTIONS?

The concept of video differential is an attempt to hone in on the true difference between the information about the Court's work that video cameras would provide versus the information currently available. Accurately weighing the validity of an objection to cameras requires comparing the addition of video to the status quo. Thus, the next question is whether the reasons the Justices have offered for excluding cameras are justified based on the true differences between what is currently allowed and what video would provide.

This Part analyzes the main reasons the Justices give for not wanting video cameras, and analyzes whether the reasons support the exclusion of cameras based on the video differential. While, as an institution, the Court has never addressed this issue, the Justices as individuals have spoken about it often, most commonly in question-and-answer sessions at law schools and bar events. The reasons they provide reflect concerns about how video would affect all involved—the attorneys, the Justices, the media, and the public. Three primary reasons emerge. First, the Justices express concern that the lawyers, and even the Justices themselves, will begin grandstanding or showboating. Second, they fear the media would use the video to show out-of-context sound bites. Finally, they worry about the public's ability to comprehend the process they are observing.

##### *A. Grandstanding: Fears About the Participants*

The Justices have often expressed concern that video cameras in the courtroom will affect how lawyers, and perhaps even Justices, act. The fear is that they will show off for the cameras. Or, at a minimum, the presences of cameras will change for the worse the interactions between the Justices and the advocates.

Former Chief Justice Rehnquist noted the fear that video "affects the way at least the lawyers behave. And I suspect it may affect the way

judges behave too.”<sup>93</sup> Justice Alito explained that television coverage of the Court “would also in some ways change what now goes on. . . . Some lawyers arguing before the court in televised cases would use the occasion to address the television audience for political or other purposes.” In addition, Alito said televised proceedings could affect how Justices ask questions during arguments.<sup>94</sup> Justice Kennedy expressed similar concerns: “If you introduce cameras, it is human nature for me to suspect that one of my colleagues is saying something for a soundbite. Please don’t introduce that insidious dynamic into what is now a collegial court. Our court works.”<sup>95</sup>

To pinpoint the video differential when it comes to grandstanding, the first task is to determine the status quo. Even without cameras, Supreme Court oral arguments are already the biggest show on earth for lawyers and Justices. They take place in a packed room that seats roughly 250 people, with a revolving “three-minute line” that allows more members of the public to circle through for a short glimpse of the Court in action.<sup>96</sup> The line to get one of the coveted seats inside begins hours or even days before the arguments.<sup>97</sup> Lawyers, meanwhile, prepare for months for their short time before the bench. They pore over briefs and case law, strategize arguments, and sometimes fly all over the country to take part in moot courts in preparation.<sup>98</sup> Both the Justices and lawyers are well aware that members of both the media and the academy will analyze their every word, looking for clues as to how the Justices might vote. Professional observers watch closely for which Justices seem

93. Tony Mauro, *Rehnquist Drops Hints on Retirement Thinking*, LAW.COM (Apr. 5, 2001), <http://www.law.com/jsp/article.jsp?id=900005527835> (subscription required); see, e.g., *Nomination of Anthony M. Kennedy*, *supra* note 21, at 218 (“My initial reaction is that I think it might make me and my colleagues behave differently than we would otherwise.”).

94. *Cameras in the Court*, C-SPAN, <http://www.c-span.org/The-Courts/Cameras-in-The-Court/> (quoting a speech that Justice Alito gave to the Association of the Federal Bar of New Jersey prior to joining the Supreme Court).

95. *Id.* (quoting Justice Kennedy’s remarks made to a House subcommittee in 2007).

96. *Visitor’s Guide to Oral Argument*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/visiting/visitorsguidetooralargument.aspx>.

97. Emmarie Huetteman, *Waiting (and Sleeping) in Line, for View of Health Care History*, N.Y. TIMES (Mar. 25, 2012), <http://www.nytimes.com/2012/03/26/us/waiting-in-line-to-see-supreme-court-argue-health-law.html> (discussing members of the public who began lining up three days before the oral arguments in the PPACA case).

98. Nina Totenberg, *Law Professor Beats the Odds in Detainee Case*, (NPR radio broadcast Sept. 5, 2006), available at <http://www.npr.org/templates/story/story.php?storyId=5767777> (describing Neal Katyal’s year and a half of preparation before arguing *Hamdan v. Rumsfeld*, including fifteen moot courts all over the country).

hostile or friendly to which attorneys. The Justices' words are analyzed not just for substance but also for how often they do<sup>99</sup> (or do not)<sup>100</sup> ask questions,<sup>101</sup> make jokes,<sup>102</sup> or even interrupt each other.<sup>103</sup> In short, there is simply no expectation—or anything close to it—that this is a private conversation. And no one is fooled into thinking that the stakes are anything but titanic.

The key question, then, is how if at all video would change the situation. This is mostly a fear of accessibility. Even though there are already numerous scrutinizing eyes on Supreme Court arguments, opponents of video fear that a larger viewing audience, more closely tied to the drama via television, will cause the players to act in a less lawyerly way. At a judicial conference in 2011, Chief Justice Roberts expressed the concern this way: "We, unfortunately, fall into grandstanding with a couple of hundred people in the courtroom, I'm a little concerned about what the impact [of televising] would be."<sup>104</sup>

But is this concern about video valid? Without running the experiment of actually allowing the filming of arguments, the only way to answer this question is to look to similar situations. The most comparable situations are found with other courts that have allowed cameras and in other settings in which Supreme Court Justices interact with cameras.

A close look at both of these situations suggests that video is not a high-risk cause of grandstanding. Numerous state and federal judges have allowed cameras in their courtrooms for years or even decades.

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99. See, e.g., Robert Barnes, *Sotomayor Takes Active Role on Court's First Day*, WASH. POST, Oct. 6, 2009, at A3, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/10/05/AR2009100503341.html> (observing that "Justice Sonia Sotomayor displayed no reticence on the first day of her first term on the court; in the two cases on the docket, she asked as many questions and made as many comments as Chief Justice John G. Roberts Jr.").

100. See, e.g., Amber Porter, *Six Years of Silence for Supreme Court Justice Clarence Thomas*, ABC NEWS (Mar. 27, 2012, 4:44 PM), <http://abcnews.go.com/blogs/politics/2012/03/545532/> (noting that Justice Thomas has not spoken during oral argument in six years, including during the recent health care case).

101. See, e.g., Lee Epstein et al., *Inferring the Winning Party in the Supreme Court from the Pattern of Questioning at Oral Argument*, 39 J. LEGAL STUD. 1, 25 (2010) (documenting the frequency with which Justices ask questions at oral argument).

102. See, e.g., Adam Liptak, *So, Guy Walks Up to the Bar, and Scalia Says . . .*, N.Y. TIMES, Dec. 31, 2005, at A1 (discussing the Justices' varied tendencies to employ humor during oral argument and a recent study that quantified the Justices' "relative funniness").

103. Adam Liptak, *Nice Argument, Counselor, but I'd Rather Hear Mine*, N.Y. TIMES, Apr. 5, 2011, at A12 (discussing how Justices often interrupt one another and ask questions as a thinly veiled attempt to persuade other Justices to join their side of an opinion).

104. *Fourth Circuit Conference*, *supra* note 9.

They have done so for high-profile criminal trials<sup>105</sup> and in closely watched appeals.<sup>106</sup> For example, the federal courts conducted a pilot program in the early 1990s, which was restarted in July 2011, that experimented with cameras in some of the federal courts.<sup>107</sup> The resulting consensus was that cameras did not cause problems of grandstanding in the courtroom. The Ninth Circuit Court of Appeals has allowed video of its oral arguments on a case-by-case basis for years. Judge Diarmuid O'Scannlain noted that "[m]y personal experience, fortunately, has been that as a general rule my colleagues and practitioners have acted with the civility and decorum appropriate to a federal appellate courtroom, by and large resisting the temptation to play to the television audience."<sup>108</sup>

All fifty states now allow cameras in their courtrooms in some form.<sup>109</sup> In his recent congressional testimony, Iowa Supreme Court Chief Justice Cady summarized that in the state's three decades of experience with cameras, "our judges rarely have problems with

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105. See, e.g., Ken Lombardi, *Michael Jackson's Doctor Conrad Murray Trial to Be Televised*, CBS NEWS, (Sept. 21, 2011), [http://www.cbsnews.com/8301-31749\\_162-20031062-10391698/michael-jacksons-doctor-conrad-murray-trial-to-be-televised/](http://www.cbsnews.com/8301-31749_162-20031062-10391698/michael-jacksons-doctor-conrad-murray-trial-to-be-televised/).

106. See, e.g., Amanda Beck, *Ninth Circuit to Hear and Broadcast Appellate Arguments Today*, PROP 8 ON TRIAL, (Dec. 6, 2010, 5:38 AM), <http://prop8.berkeleylawblogs.org/2010/12/06/ninth-circuit-to-hear-and-broadcast-appellate-arguments-today/>.

107. *Courtroom Video Camera Pilot Project Advances*, FED. EVIDENCE REV. (June 13, 2011), <http://federalevidence.com/node/1185> (describing the new pilot program, in which fourteen district courts may allow cameras in civil cases if the parties and presiding judge consent during the next three years); see Linda Greenhouse, *U.S. Judges Vote Down TV in Courts*, N.Y. TIMES, Sept. 21, 1994, at A18 (describing the initial pilot program, under which select federal trial and appellate courts could allow cameras in civil cases for three years from 1991–1994, and how the Judicial Conference of the United States voted against extending the program to allow cameras nationwide on a permanent basis).

108. Diarmuid F. O'Scannlain, *Some Reflections on Cameras in the Appellate Courtroom*, 9 J. APP. PRAC. & PROCESS 323, 327; see also Kathleen M. Krygier, *The Thirteenth Juror: Electronic Media's Struggle to Enter State and Federal Courtrooms*, 3 COMMLAW CONSPECTUS 71, 80 (1995) (Likewise, the 1994 Federal Judicial Center report on the three-year pilot program in nine federal courts noted "'small or no effects' of cameras upon the trial participants, courtroom decorum, and the administration of justice.") (citing MOLLY JOHNSON & CAROL KRAFFKA, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 7 (1994)).

109. See generally *Freedom of Information, Cameras in the Court: A State-by-State Guide*, RADIO TELEVISION DIGITAL NEWS ASS'N, [http://www.rtnda.org/pages/media\\_items/cameras-in-the-court-a-state-by-state-guide55.php](http://www.rtnda.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php) (last updated Aug. 2012).



expanded media coverage.”<sup>110</sup> Chief Justice Cady added that “[t]his process works so well that it has become expected.”<sup>111</sup>

Iowa’s experience is not unusual. Testifying before the Senate Judiciary Committee’s Subcommittee on Administrative Oversight and the Courts in 2000, Ronald J. Goldfarb described the key findings in his book *TV or Not TV: Television, Justice and the Courts* in this way:

In the process of my research, I read every State study that led to every State rule that resulted in permission for one form or another of televised trial. . . . And in every one of those studies, the result was once skeptical lawyers and judges found that the presence of the television camera, generally unseen, had no impact, and that the real disturbances in the justice system were what went on outside the courtroom as opposed to what went on in the courtroom.<sup>112</sup>

Judge Gertner agreed that the Supreme Court should look to the experiences of the many state courts that have had success with cameras even at the trial level. She told Congress, “if the grandstanding and inflammatory concerns that we have here didn’t occur in those State proceedings, they shouldn’t occur in the Federal proceedings. The State courts are dealing with rape and murder and child abuse, and they have conducted this experiment over the past several years without problems.”<sup>113</sup>

Judges in other courtrooms have said repeatedly that the novelty of cameras wears off quickly and the equipment soon fades into the background. Chief Justice Cady called cameras “the new normal.”<sup>114</sup> Judge Hiller Zobel, a state trial court judge from Massachusetts, told Congress that “[w]itnesses, in my experience, tend to focus on being witnesses and they very soon forget about the camera, if they think about it at all. Lawyers, the same thing.”<sup>115</sup> Goldfarb agreed, stating that “[t]he

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110. *Access to the Court Hearing*, *supra* note 79, at 2 (testimony of Mark Cady, Chief Justice of Iowa Supreme Court).

111. *Id.* at 3.

112. *Allowing Cameras Hearing*, *supra* note 20, at 55 (statement of Ronald Goldfarb).

113. *Allowing Cameras Hearing*, *supra* note 20, at 21 (testimony of Judge Nancy Gertner).

114. *Access to the Court Hearing*, *supra* note 79, at 7 (testimony Mark Cady, Chief Justice of Iowa Supreme Court).

115. *Allowing Cameras Hearing*, *supra* note 20, at 24 (testimony of Judge Hiller B. Zobel); see also Raleigh Hannah Levine, *No Lights, No Camera, No Action*, 65 BENCH & BAR MINN. 23, 25 (July 2008) (discussing the Minnesota state courts’ consideration of cameras and noting that an advisory committee report found no concern that the cameras would affect the participants’ actions, stating “on this issue, the majority and minority agreed there was no need for concern, as they heard of no such ‘grandstanding’ from witnesses who work in states that allow cameras”).

general consensus even by skeptics was after a while the camera was like a piece of furniture in the room, and after 30 or 40 seconds one failed to even notice it.”<sup>116</sup>

Outside of the United States, jurists have also found cameras have little effect on courtroom participants. In the course of a panel discussion, Canadian Supreme Court Chief Justice Beverly McLachlin told Justice Ginsburg that she could think of only one instance in the past twenty-one years since her court allowed cameras when a showboating attorney was a problem. The solution, she said, was simply to order the lawyer to sit down, “[a]nd he did.”<sup>117</sup> Judge Zobel agreed, noting, “in my experience it is the judge who decides who is going to be a showboat. And to the extent that showboating begins, the judge has ample tools and presumably an ample temperament for dealing with the showboats.”<sup>118</sup>

Similarly, a frequent advocate before the Supreme Court, Tom Goldstein, reassured Congress that there should be little fear of lawyers’ pandering to the cameras, explaining that “as someone who is getting ready to argue his twenty-fifth case I can say that our only concern is persuading the Justices, not annoying them and potentially losing votes by grandstanding.”<sup>119</sup>

Another point of comparison can be found in the Justices’ interaction with cameras off the bench. It is often argued that the admittance of cameras to the Justices’ confirmation hearings led to grandstanding.<sup>120</sup> The conventional wisdom is that there used to be short, respectful confirmation hearings, until 1981 when Justice Sandra Day O’Connor’s hearings were the first to be televised.<sup>121</sup> Then, the narrative continues, the hearings became long-winded public spectacles during which the players preached to the cameras.<sup>122</sup>

116. *Allowing Cameras Hearing*, *supra* note 20, at 56 (statement of Ronald Goldfarb).

117. *In Canada’s Supreme Court, Cameras Are No Big Deal*, THE BLT: THE BLOG OF LEGAL TIMES (Aug. 31, 2010, 10:13 AM), <http://legaltimes.typepad.com/blt/2010/08/in-canadas-supreme-court-cameras-are-no-big-deal.html>.

118. *Allowing Cameras Hearing*, *supra* note 20, at 25 (testimony of Judge Hiller B. Zobel).

119. *Access to the Court Hearing*, *supra* note 79, at 7 (testimony of Tom Goldstein).

120. See, e.g., JUDICIAL ROULETTE: REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 10 (1988) (suggesting that hearings not be recorded and that television cameras be banned from the hearings); Paul E. Vaglica, *Step Aside, Mr. Senator: A Request for Members of the Senate Judiciary Committee to Give Up Their Mics*, 87 IND. L.J. 1791, 1791, 1803 (2012) (arguing that “[t]he addition of television cameras, coupled with the drama of the Bork and Thomas hearings,” has led senators to use the hearings “as a forum to voice their own political beliefs instead of focusing their undivided attention on the qualifications of the nominee”).

121. Vaglica, *supra* note 120, at 1803.

122. See Kashmir Hill & David Lat, Opinion, *5 Myths About Making It to the Supreme Court*,

Extensive research on confirmation hearings, however, does not support this popular story. In their exhaustive empirical analysis of every available transcript of Supreme Court confirmation hearings, law professor Lori Ringhand and political scientist Paul Collins found that televising confirmation hearings did not make them longer.<sup>123</sup> The increased length of these hearings, they found, took hold before Sandra Day O'Connor's hearing, the first with television access, and occurred around the time of the nomination of William Rehnquist to Associate Justice.<sup>124</sup> To the extent that hearings have lengthened in modern times, Ringhand and Collins found a rise in nonsubstantive "chatter" to be the culprit.<sup>125</sup> Because this "chatter" has leveled off over time since 1981, the authors conclude that television is not to blame for the increased length of the hearings.<sup>126</sup>

Ringhand and Collins also found no evidence that cameras made the hearings more contentious. Several hearings that were notable for the high level of political and ideological debate were not televised, including the hearings for Thurgood Marshall and Abe Fortas as well as William Rehnquist's associate justice hearing.<sup>127</sup> Ringhand observed that "[p]eople just forget how nasty these things have always been. Or, more accurately, how much the nastiness has always ebbed and flowed."<sup>128</sup>

Although commonly cited, the fear of grandstanding if cameras are present is not yet a fear that is supported by the vast and growing experience with cameras in courtrooms of the United States. Nor is there any reason to conclude that the experience of the Supreme Court would be different from the state and lower courts. Common sense suggests, moreover, that a broader television audience would encourage rather than discourage professional behavior. As Goldfarb argued to Congress, we

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WASH. POST, May 16, 2010, at B3 ("Confirmation hearings as televised spectacle began with Justice Sandra Day O'Connor's nomination in 1981.").

123. Lori A. Ringhand & Paul M. Collins, Jr., *May It Please the Senate: An Empirical Analysis of the Senate Judiciary Committee Hearings of Supreme Court Nominees, 1939-2009*, 60 AM. U. L. REV. 589, 601 (2011).

124. *Id.* at 598.

125. *Id.* at 602.

126. *Id.* at 601.

127. *Id.* at 621.

128. E-mail from Lori A. Ringhand, Assoc. Professor of Law, Univ. of Ga. Coll. of Law, to Author (Jan. 22, 2012) (reprinted with permission); see also PAUL COLLINS & LORI RINGHAND, *MAY IT PLEASE THE PEOPLE: SUPREME COURT CONFIRMATION HEARINGS AND CONSTITUTIONAL CHANGE* (forthcoming 2013).

usually “presume that people behave better when they are being observed than when they are not being observed.”<sup>129</sup>

*B. Sound Bites: Fears About the Media*

Some Justices have voiced concern that if cameras enter their courtroom, the media will reduce complicated issues to thirty-second sound bites that will gloss over the subtleties of cases and the broader context in which questions for counsel arise.<sup>130</sup> Justice Scalia took this tack in testifying before the Senate Judiciary Committee in 2011:

[I]f I really thought the American people would get educated, I'd be all for it. And if they sat through a day of our proceedings gavel to gavel—boy would it teach them a lot. . . . But for every ten people who sat through our proceedings gavel to gavel, there would be 10,000 who would see nothing but a thirty-second takeout from one of the proceedings, which I guarantee you would not be representative of what we do. So they would, would in effect be given a misimpression of the Supreme Court. I am very sure that that would be the consequence and therefore I am not, I'm not in favor of televising.<sup>131</sup>

Former Justice David Souter told a House appropriations subcommittee that he had similar concerns when he was a judge in New Hampshire. He feared that his comments might be taken out of context on the evening news and warned that the judiciary is not a political institution, “nor is it part of the entertainment industry.”<sup>132</sup> Justice

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129. *Allowing Cameras Hearing*, *supra* note 20, at 56 (statement of Ronald Goldfarb).

130. LEONARD E. NOISETTE, NEW YORK STATE COMMITTEE TO REVIEW AUDIOVISUAL COVERAGE OF COURT PROCEEDINGS: MINORITY REPORT 3 (April 1, 1997) (“[T]he overwhelming majority of footage of court proceedings actually consists of short features—snippets, which shed little light on the complexity of court proceedings.”)

131. *Constitutional Role of Judges* (C-SPAN television broadcast Oct. 5, 2011), *available at* <http://www.c-spanarchives.org/program/RoleofJ> (start video at 01:50:45).

132. “*Over My Dead Body*,” *supra* note 14. *See also* *Cameras in Court*, ONLINE NEWS HOUR (PBS television broadcast Nov. 30, 2000), *available at* [http://www.pbs.org/newshour/bb/media/july-dec00/cameras\\_11-30.html](http://www.pbs.org/newshour/bb/media/july-dec00/cameras_11-30.html) (quoting Chief Judge Edward Baker saying, “The oral argument process is very intense, rigorous. It’s rough. Judges play devil’s advocate. Sometimes you even deride a counsel’s argument so as to bring him or her out and to test the argument. You do it to both sides. The problem with televising arguments is that they can be edited, and if the public sees me giving a rough time to one lawyer, they think I’m biased. They don’t see the whole picture, and they don’t see me giving the same rough time to the other lawyers, as a result of which courts being under criticism, judges will alter . . . judges will change their mode of questioning, and this changes the dynamic of the oral argument process to the detriment of the system.”).

Kennedy has expressed reluctance to becoming part of what he deemed “the national entertainment network.”<sup>133</sup>

Once again, to truly hone in on the video differential, we must take stock of how things currently stand. And the current situation is that the threat of sound bite coverage already exists—audio recordings, transcripts, and reporters’ notes can all be used or abused in the same way. Print reporters emphasize particular moments of argument at the expense of all the rest. When then-eighty-nine-year-old Justice John Paul Stevens stumbled while reading his dissent in *Citizens United* from the bench, for example, numerous reporters focused on this seconds-only moment.<sup>134</sup>

Thus, does the risk of sound bites increase significantly with video? Because it is more accessible, more people would be exposed to sound bites caught on video, and they would be different people. The vividness of the video, moreover, would make the sound bites have a greater impact on the audience. This combination concerns Justice Scalia. He made this point in a recent interview, saying that “when you see it live, it has a much greater impact.”<sup>135</sup> He also told C-SPAN’s Brian Lamb that video is different than the other access the Court allows like audio because “[t]he audio is not of interest to the 15-second take-out people, the 30-second take-out people . . . precisely because it doesn’t have that kind of impact [of live clips].”<sup>136</sup> He further contrasted the vividness of video with reading an account of an argument in a newspaper, noting that “[p]eople read that and they say, ‘Well, it’s an article in a newspaper, and the guy may be lying, or he may be misinformed,’ but somehow when you see it live, an excerpt pulled out of an entire—when you see it live, it has a much greater impact.”<sup>137</sup>

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133. Justice Anthony Kennedy, Remarks at the American Bar Association Rule of Law Symposium Panel on the Role of the Judiciary (Nov. 10, 2005), available at <http://www.c-span.org/The-Courts/Cameras-in-The-Court>.

134. See, e.g., Dahlia Lithwick, *The Pinocchio Project: Watching As the Supreme Court Turns a Corporation into a Real Live Boy*, SLATE (Jan. 21, 2010, 2:15 PM), [http://www.slate.com/articles/news\\_and\\_politics/supreme\\_court\\_dispatches/2010/01/the\\_pinocchio\\_project.html](http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2010/01/the_pinocchio_project.html); Debra Cassens Weiss, *Justice Stevens Decided to Retire After Stumbling During Citizens United Dissent*, ABA JOURNAL (Apr. 29, 2011, 8:06 AM), [http://www.abajournal.com/news/article/justice\\_stevens\\_decided\\_to\\_retire\\_after\\_stumbling\\_during\\_citizens\\_united\\_di](http://www.abajournal.com/news/article/justice_stevens_decided_to_retire_after_stumbling_during_citizens_united_di).

135. Condon, *Cameras in the Court*, *supra* note 16.

136. Cohn, *Cameras in Supreme Court*, *supra* note 18.

137. *Id.*

With video, we take in the actual image of a Justice saying something in a fifteen-second clip, likely viewed over and over again. His or her facial expression, gestures, and voice inflection are emphasized. This means that it is different for an audience to see and hear a remark than it is for them to simply read about it or even listen to it. And this, at least to a large extent, is the focus of Justice Scalia's hesitation.

To test whether these differences justify the Justices' argument against cameras, we must again look for useful comparisons,<sup>138</sup> and this steers us back to confirmation hearings. The threat of the thirty-second sound bite is no less real in the confirmation-hearing setting. Yet Justices have not complained about video coverage of these newsworthy events. Perhaps the sitting Justice who could most credibly complain about the impact of cameras on his confirmation hearings would be Justice Clarence Thomas. Yet in his autobiography, he expresses a positive view about the presence of cameras. He credits them for allowing him to take his side of the Anita Hill controversy directly to the people.<sup>139</sup> He opines that the televised coverage turned public opinion in his favor. He does not argue that his comments were cut into snippets or taken out of context; rather he credits it for allowing him to speak "directly to the public in prime time instead of having my words reflected in the fun house mirror of the evening news-casts."<sup>140</sup> He further states: "I thanked God for C-Span and its gavel-to-gavel coverage."<sup>141</sup>

Some might also conclude that the problem with sound bites has been an issue for the Justices in their off-the-bench talks. For example, a video of a speech or interview could be edited unfairly before distribution. Yet a look at recent controversies surrounding the Justices' off-the-bench activities shows that none of them was caught on film.

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138. *Access to the Court Hearing*, *supra* note 79, at 5–6 (testimony of Tom Goldstein) ("If the Court adopted the use of cameras during its proceedings, it would of course not be the Justices' first experiences in front of the lens. As a result of the modern confirmation process, nominees are exposed to cameras at an early stage of the process. There is great fanfare that surrounds a nomination; television cameras roll from the President's initial announcement of a candidate, through the dizzying array of nominations interviews that follow, and through the sometimes contentious hearings before this very Committee. The nominee gains experience and familiarity working in front of the camera while responding to difficult questions during those hearings, in what is the most challenging point in the process of ascending to the bench.").

139. CLARENCE THOMAS, *MY GRANDFATHER'S SON: A MEMOIR* 272 (2007).

140. *Id.*

141. *Id.*

These controversy-stirring remarks and activities include opining on the meaning of the Fourteenth Amendment,<sup>142</sup> duck hunting with parties to cases,<sup>143</sup> or allegedly soliciting donations for favored nonprofits,<sup>144</sup> which all occurred off camera.

Indeed, the Justices frequently volunteer to go on camera for interviews and lectures that raise much the same risk of producing an out-of-context sound bite. In 2009, Justice Scalia spoke before a group in Palm Beach, Florida. A college student asked the Justice if his opposition to cameras in the Court was vitiated “since the court allows the public to watch oral arguments in person, provides transcripts of those arguments, and is known to have ‘Supreme Court justices going out on book tours.’”<sup>145</sup> Justice Scalia, who was on a book tour at the time,<sup>146</sup> replied, “That’s a nasty, impolite question.”<sup>147</sup> Whatever one might think about the etiquette of the question, it is worth thinking hard about how cameras in the courtroom would create a special risk of sound bites over that which is tolerated by video recordings of speeches, interviews, and panel presentations by Justices.

### *C. Miscomprehension: Fears About the Public*

The final argument the Justices raise is one of comprehension. The worry is that the television audience will not understand what is happening in the proceedings they are viewing and why it is happening. The Justices fear the public will be confused or fail to grasp why the Justices ask certain questions or focus on one issue over another. They fear that, without being able to see the entire decision-making process, members of the public will reach false conclusions about how the

142. Stephanie Condon, *Scalia: Constitution Doesn't Protect Women or Gays from Discrimination*, CBS NEWS, (Jan. 4, 2011, 5:33 PM), [http://www.cbsnews.com/8301-503544\\_162-20027240-503544.html](http://www.cbsnews.com/8301-503544_162-20027240-503544.html) (recounting controversial comments Justice Scalia made to a California publication).

143. David G. Savage, *Trip with Cheney Puts Ethics Spotlight on Scalia*, L.A. TIMES, Jan. 17, 2004, at A1 (discussing outcry about Justice Scalia's fraternizing with Vice President Dick Cheney three weeks after agreeing to take up Cheney's appeal of certain lawsuits).

144. Seung Min Kim, *Dems Call for Clarence Thomas Ethics Probe*, POLITICO (Oct. 5, 2011, 8:07 PM), <http://www.politico.com/news/stories/1011/65275.html> (noting the movement by dozens of House Democrats to hold hearings on several alleged ethical violations by Justice Thomas).

145. Frank Cerabino, *Student Fails to Persuade Justice Scalia*, PALM BEACH POST, Feb. 8, 2009, at B1.

146. *Id.*; see also Ariane de Vogue, *Scalia Plans Book Tour, Interview*, ABC NEWS BLOGS (July 18, 2012, 2:11 PM), <http://abcnews.go.com/blogs/politics/2012/07/scalia-plans-book-tour-interview>.

147. Cerabino, *supra* note 145.

Supreme Court makes its decisions.

Justice Breyer articulated these concerns in testimony before the House Appropriations Subcommittee on Financial Services and General Appropriations in 2010:

[W]ill understanding be promoted if you can—because you can only show the oral argument, which is 1 percent of what goes on. And people relate to what they see much more than they relate to what is in writing. And we are deciding cases that we have results for 300 million people, and only 6 of them are in front of us, and we have to worry a lot about what our ruling will do to the 299,999,000, et cetera, that aren't there, and so will there be misunderstanding about that?<sup>148</sup>

Justice Scalia likewise questions the public's ability to understand the Court's work, once quipping in a speech: "That is why the *University of Chicago Law Review* is not sold at the 7-Eleven."<sup>149</sup>

Does video create a risk of miscomprehension by the public? Current circumstances present the same danger. Video-free news reports likewise have constraints that prevent completely comprehensive coverage. So why is there so much concern that video will increase misunderstanding by the public about the judicial system?

Justice Breyer's just-quoted argument—which emphasizes how "people relate to what they see"—directs attention to vividness. In another setting, Justice Breyer explained that he is wary of how the impact of video is stronger and perhaps more emotional than other types of communication. He explained:

A very nice quality about human beings [is that] they focus on individuals. You meet somebody, you relate. You see them in a picture, you relate a little less. You see them and you hear about them on the radio still a little less. News story, still less. [If] he's a statistic, you

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148. *FY 2011 Budget Request for the U.S. Supreme Court: Hearings Before a Subcomm. on Fin. Servs. and Gen. Gov't Appropriations of the Comm. on Appropriations*, 111th Cong. 93 (2010) [hereinafter *2011 Congress Appropriations Committee Hearing*] (statement of J. Breyer), available at <http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg62204/pdf/CHRG-111hhrg62204.pdf>; see also Condon, *Cameras in the Court*, *supra* note 16 (quoting Chief Judge Edward Becker discussing his opposition to cameras at the Supreme Court during the *Bush v. Gore* oral arguments by saying, "[W]e are dealing with an arcane statute, 100 and some odd years old. What the public will get out of this, if it were televised, is not any substantive education, but a sense of the process.").

149. Tony Mauro, *The Right Legislation for the Wrong Reasons*, 106 MICH. L. REV. FIRST IMPRESSIONS 8, 8 (2007), <http://www.michiganlawreview.org/firstimpressions/vol106/mauro.pdf>.



hardly can keep your eyes open. That is a characteristic of human beings.<sup>150</sup>

By emphasizing that “people relate to what they see much more than they relate to what is in writing,” Justice Breyer focused on the vividness of video and argued that seeing an actual person in the courtroom—the petitioner or the respondent—could cause the viewers to have an overly emotional reaction to the proceedings.

Justice Breyer has also stressed the factor of accessibility when it comes to video and audience miscomprehension, suggesting in effect that Supreme Court news should be channeled through expert press specialists, rather than broadly and directly dispersed to the general public. He explained:

[W]e have a group of people in our press room who know how the Court works, and when you read what they say, you know it is being written about by someone who knows how the Court works. That isn’t always so. The cameras don’t always have the time, and will there be misperception given?<sup>151</sup>

Justice Alito has also expressed concern about how the arguments would appear to a general television audience. When asked about the issue during an appearance at Drake Law School, he noted that the Justices frequently interrupt attorneys and ask questions that might seem unrelated and don’t follow a “logical order.”<sup>152</sup> At the end, the “attorney has not had a chance to make a structured coherent presentation . . . . After an hour of this, what would ordinary viewers think?”<sup>153</sup> Justice Alito further suggested that to combat the problem of misunderstanding by the public, the Court would need to consider making changes, such as allowing attorneys a certain amount of uninterrupted time to argue their case separate from the time Justices are allowed to ask questions. Justices have also expressed concern that the public will not understand that oral argument is only a small part of the decision-making process.<sup>154</sup>

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150. CSPAN, *Justice Breyer on Cameras in the Court*, YOUTUBE (July 7, 2009), <http://www.youtube.com/watch?v=mEnfwWD0qI0> [hereinafter *Justice Breyer on Cameras*].

151. 2011 Congress Appropriations Committee Hearing, *supra* note 148.

152. *Justice Alito Offers an “Oral” History Lesson and Opines on Televised Hearings*, DRAKE LAW (last modified Oct. 26, 2010, 3:08 PM), <http://www.law.drake.edu/news/Events/details.aspx?eventID=justiceAlito2>.

153. *Id.*

154. *Id.* (quoting Alito saying, “Many hours of study and thinking would have been devoted to the case before the arguments and many more would follow it”); *Justice Breyer on Cameras*, *supra*

Once again these fears find no support in the on-the-ground experiences of other courts. Chief Justice Ronald Moon of the Hawaii Supreme Court, for example, noted that in his state “the impact of television coverage had, overall, improved the public’s understanding of the judicial process, did not discourage people from serving as jurors, and had a positive impact on the judiciary in general.”<sup>155</sup>

When speaking off the bench, the Justices do not seem to experience problems with the public failing to understand them. Justice Breyer himself has stated that he felt his seventeen-and-a-half hours of confirmation hearings in front of cameras “was a great opportunity for people to learn about and participate in their supreme court.”<sup>156</sup> Similarly, Justice Thomas felt that live coverage of his confirmation hearing increased the public’s understanding of critical issues.<sup>157</sup> Whenever the Justices appear at talks or debates, frequently to discuss a complex legal matter, there is no complaint that the public failed to follow the substance. To the contrary, they are typically very well received.<sup>158</sup>

The experiences of other courts and the Justices’ off-the-bench activities do not support the argument that video results in less public comprehension. Rather, objecting to cameras based on the alleged lack of sophistication by the public is at best elitist and at worst deeply troubling. It is contrary to the Court’s general approach to free speech,

note 150 (“It wouldn’t be understood very well that this argument is only 5% of what goes on, most of it is in briefs.”).

155. Daryl Huff, *Cameras in the Courtroom: A Television Reporter’s Perspective*, ABOVE THE LAW (May 3, 2010, 4:17 PM), <http://abovethelaw.com/2010/05/cameras-in-the-courtroom-a-television-reporters-perspective> (describing Chief Justice Moon’s statements at the conference).

156. *Justice for Sale—Interview: Justices Stephen Breyer & Anthony Kennedy*, PBS.ORG, <http://www.pbs.org/wgbh/pages/frontline/shows/justice/interviews/supremo.html> (last visited Aug. 22, 2012); see also CSPAN, *Justice O’Connor on Cameras in the Court*, YOUTUBE (July 7, 2009), <http://www.youtube.com/watch?v=XB72bnqylHg&feature=relmfu> (discussing the upcoming confirmation hearing of Justice Sotomayor, which Justice O’Connor said is “always an educational experience for the country. Once a justice is confirmed and on the bench you don’t see a lot of them, certainly not much on television, because we don’t have cameras in the Supreme Courtroom at this point.”).

157. See *supra* Part IV.B.

158. See Dahlia Lithwick, *The Steve and Nino Show: Justices Stephen Breyer and Antonin Scalia Unintentionally Make the Case for Putting Cameras in the Courtroom*, SLATE (Oct. 6, 2011, 7:33 PM), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2011/10/breyer\\_and\\_scalia\\_unintentionally\\_make\\_the\\_case\\_for\\_cameras\\_in\\_t.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2011/10/breyer_and_scalia_unintentionally_make_the_case_for_cameras_in_t.html) (“But the two justices killed before the Judiciary Committee [discussion of constitutional interpretation], raising the question anew: Why don’t they do this every week? Why are they hiding this great light under a marble bushel?”).

which prohibits distinctions among speakers or audience members.<sup>159</sup> The Court might have a role to play in guarding against disruption and distraction inside the courtroom, but any attempt to control information because of the perceived reactions of those who might be outside the courtroom is suspect. As the Court itself has declared several times, the best antidote for bad speech is more speech, not a restriction on the flow of information.<sup>160</sup>

## V. CONCLUSION

The Justices often respond to arguments for video cameras in oral arguments by noting how very public the work of the Court already is<sup>161</sup>—and they're right. In many ways, the judiciary is the most open branch of government. And this is especially so with the Supreme Court, thanks to written opinions, public presence in the courtroom, and the release of transcripts and audio of oral arguments. Yet they continue to fight the use of video cameras as a means of bringing even more of the public into the courtroom.

If the Justices wish to continue this opposition, they need to do so fairly by addressing only that which is truly different about video—namely, that it provides a more complete and powerful picture of the Court to more people. Only by focusing on these specific qualities of vividness and accessibility can the Justices address questions about the sensibility of excluding cameras while other forms of access are allowed.

Viewing the three most common objections to cameras by the Justices through the lens of the video differential reveals that there are

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159. See, e.g., *Edenfield v. Fane*, 507 U.S. 761, 767 (1993) (“[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.”); *U.S. Dep’t of Justice v. Reporters Comm.*, 489 U.S. 749, 771 (1989) (noting that the identity of the requester of information has no bearing on the merits of a Freedom of Information Act request).

160. See *United States v. Alvarez*, 132 S.Ct. 2537, 2550 (2012) (“Society has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates.”); *Citizens United v. Fed. Election Comm’n*, 130 S.Ct. 876, 911 (2010) (“[I]t is our law and our tradition that more speech, not less, is the governing rule.”); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (“If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.”).

161. Press Release, Roanoke Coll., Roanoke College Celebrates Constitution Day with Justice Sandra Day O’Connor (Sept. 18, 2009) (on file with author), available at [http://roanoke.edu/News\\_and\\_Events/Campus\\_News/Sandra\\_Day\\_OConnor.htm](http://roanoke.edu/News_and_Events/Campus_News/Sandra_Day_OConnor.htm) (noting that O’Connor, in discussing whether the Supreme Court ever would allow in cameras, stressed that the Court conducts its business openly, in particular by releasing transcripts almost immediately).

few real reasons for concern. The state and lower courts have allowed cameras in courtrooms—many of them for decades—without encountering problems. Similarly, there is no reason to think the Supreme Court is different. The Justices themselves have not experienced these troubles in their public appearances off the bench.

Maybe Justice Stevens best summed up the Justices' fear, telling C-SPAN's Brian Lamb:

On the one hand, the [sic] televising the court would be good for the . . . court and for the country, because I think people would realize that the justices are very thorough in their preparation for arguments and their understanding of the cases. They ask intelligent questions . . . people, I think, are generally favorably impressed when they see the court at work . . . .

But the other side of the coin is that television often has unexpected and unintended consequences, and you're never 100 percent sure that it might not cause a change in the procedure that would have an adverse effect on it.<sup>162</sup>

Thus the fear is not necessarily grandstanding by attorney and Justices, out-of-context sound bites by the press, or misunderstanding by the public. The fear is simply the unknown. In what he admits is "not a logical argument" but "a psychological argument," Justice Breyer has stated, "Some of us may think if we were to vote for something with the implications for change we know not what—be careful."<sup>163</sup> After which Justice O'Connor chimed in by adding, "[J]ustice moves slow. And why does justice move slowly? It's because it's better to be sure than sorry."<sup>164</sup>

While there is no doubt that caution can be a virtue, there is a point at which caution becomes paralysis. The Court has come far in opening its work to the eye of the public, but that very movement has helped to show that there is no real danger in televising the Court's oral arguments.

A recent *USA Today/Gallup* poll found that seventy-two percent of the people surveyed think the Justices should have allowed cameras into the recent health care case oral arguments.<sup>165</sup> Several polls in the past

162. John Paul Stevens, Q&A, *supra* note 14.

163. Justice Breyer on Cameras, *supra* note 150.

164. *Id.*

165. Press Release, USA Today/Gallup, Televising U.S. Supreme Court Hearings on Healthcare Law (Dec. 6, 2011) (on file with author), available at <http://federalevideance.com/pdf/other/cameras/GallopPoll.pdf>.

decade have shown majority support for televising the Court's arguments, in general.<sup>166</sup> The public is right. It is time for the Justices to let the monster out of its box and see that it was never really a monster at all.

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166. *See supra* note 5 and accompanying text.