Cameras in the Courtroom?

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Whether cameras should be allowed in the courtroom at the Supreme Court has been debated for decades. Some of the justices, past and present, have voiced strong opposition to any effort to change the Court’s “no cameras” policy. In fact, Supreme Court advocate and blogger Tom Goldstein has quipped that the justices are among the few people in Washington not trying to get on television. Recent legislation has raised the issue once again, leading to a renewal of the debate on the pros and cons of cameras in the Court.

Recent Legislative Consideration

In December of 2011, less than a month after the Court granted certiorari in the health care cases, Senators Dick Durbin and Chuck Grassley introduced a bill to require Supreme Court arguments to be televised. The bill would require television coverage of all open sessions of the Court except in individual cases where a majority of the Court decides that the practice would violate the due process rights of one or more of the parties. The senators’ statements in support of the bill referred to the upcoming health care arguments as an example of the sort of case that ought to be televised. The bill was passed out of the Senate Judiciary Committee on February 9, 2012, by an 11–7 vote.

This is not the first time that such legislation has been
introduced. Former Senator Arlen Specter introduced legislation in 2005 and 2007 that would have required the Court to televise its proceedings. Senator Specter also has proposed what he calls “milder” forms of congressional action, such as a nonbinding “Sense of the Senate” recommendation to “urge” the Court to permit its proceedings to be broadcast—which he described as a means of avoiding a “constitutional clash” on the separation of powers with the Court.

At the Senate Judiciary Committee hearing on the current bill, Senator Durbin argued that “[i]n a democratic society that values transparency and participation, there can be no valid justification for such a powerful element of government to operate largely outside the view of the American people.” Allowing television coverage of Supreme Court arguments, he asserted, would “improve the public’s understanding of the Court’s operations, enhance public confidence, and increase the number of informed and engaged citizens.”

Former Senator Specter, testifying at the same hearing, responded to objections that Congress should not try to dictate the Court’s internal processes. He cited Congress’s authority to determine other administrative matters for the Court, such as the day on which the Court convenes, the number of justices required for a quorum, and the timetable on habeas corpus cases. Senator Specter acknowledged, however, that the Court would “exercise the last word” on the subject “if it decided that the doctrine of separation of powers precludes a congressional mandate.”

On March 21, Senator Durbin tried to call for a unanimous consent vote on the current bill to permit passage in time for the health care arguments scheduled for later that month. Senator Jeff Sessions opposed that effort on the ground that Supreme Court justices had objected to its passage. As a result, the bill will not move forward unless it is approved in a floor vote.

PROS AND CONS

The issue of televising Supreme Court arguments has strong supporters and detractors. As many judges and commentators have acknowledged, there are reasonable and thoughtful arguments on both sides. Without taking a position on the matter, we summarize some of the central arguments here.

ARGUMENTS AGAINST CAMERAS

The principal arguments against televising Supreme Court proceedings have come from the justices themselves. Chief Justice Warren E. Burger was adamant on the subject, declaring that there would never be cameras in the Court as long as he was the chief. Chief Justice William Rehnquist stated similar views, noting that it would be “unwise to depart from our current practice,” and that he would not allow camera coverage if even one justice was opposed.

The arguments against cameras in the Court take several forms. First, some argue that televising the Court’s oral arguments would change the Court’s longstanding practice, and that any such change should come from the Court itself—not from Congress. For centuries, the Court has shaped its own evolving traditions, many of which serve to enhance the thoughtfulness and care of the justices’ decision-making process. These traditions are part of the Court’s internal processes, the argument goes, and the Supreme Court has the power under Article III to shape those processes. As the Court itself noted, “courts of justice are universally acknowledged to be vested, by their own creation” with the “power to impose silence, respect and decorum, in their presence” and “to preserve themselves and their officers from the approach and insults of pollution.” Anderson v. Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821). Justices Anthony Kennedy and Clarence Thomas, among others, have raised similar separation of powers concerns over the prospect of Congress telling a coordinate branch of government how to conduct its proceedings, and have
strongly urged Congress not to force the cameras issue.

Second, opponents of cameras in the Court have expressed the concern that the practice would change—and detract from—how Court proceedings are conducted. Justice Kennedy and Justice David Souter have expressed concerns that lawyers and even the justices would engage in “grandstanding” for the camera or otherwise would tailor their behavior to the public eye. Perhaps more troubling, the justices might censor their questions or remarks for fear they may be misunderstood or quoted out of context. This concern was expressed by retired Justice Souter, who had firsthand experience with cameras in the New Hampshire Supreme Court and reported that he found himself self-censoring when cameras were present. Justice Souter was famously quoted as saying, “I can tell you the day you see a camera come into our courtroom, it’s going to roll over my dead body.” Justice Kennedy, in opposing the recent legislation, testified that an important dynamic would be lost if cameras were introduced—namely, that the justices communicate with each other through the lawyers at the argument, and that the introduction of cameras would lead to an “insidious temptation to think that one of my colleagues is trying to get a sound bite for the television” and would “alter the way in which we hear our cases, the way in which we talk to each other, the way in which we use that precious hour.” Justice Antonin Scalia, while recognizing the educational benefit that “gavel-to-gavel” coverage might provide, expressed concern that snippets of arguments would be taken out of context and could distort the public’s understanding of how the Court operates.

A third argument against televising arguments is that it would provide little added benefit. The Court’s work already is transparent in the most crucial way: its decisions are described and defended in writing and made part of the public record, with concurring and dissenting views aired simultaneously. Justice Kennedy and others have emphasized that this is the principal way in which the Court’s work can and should be judged. The Court proceedings themselves also are open to the public (although seating can be very limited). In recent years, the Court has used technology to make its work more accessible: published decisions are available online upon release; a full transcript of each argument is available on the Court’s website hours after argument; and audio recordings are available online each week. Opponents of cameras question what added benefit the public would receive from being able to see the justices’ faces—other than to make the cases more readily clipped for news sound bites and quips from Jon Stewart and Stephen Colbert.

A fourth argument expressed by some justices against cameras is that televising arguments would make the justices more recognizable by members of the public and thus increase security concerns. Currently, the justices can travel throughout Washington and beyond with relative anonymity and they enjoy their resulting privacy. Cameras likely would compromise this anonymity and create a need for more security.
ARGUMENTS IN FAVOR
OF CAMERAS

Those who support televising Supreme Court arguments usually point to three countervailing arguments.

First, by advancing transparency, televising the arguments would help strengthen our democracy. This is more than just lofty talk, supporters urge; only an informed citizenry can hold accountable both the Court and the politicians who appoint the justices. Former Senator Specter noted that people must know what the Court is doing so that they can take action when the Court fails to reflect their values. And there is broad public demand for greater access to the Court. Before the arguments in the health care case, people waited in line for days and in the rain in hopes of getting one of the precious seats inside the courtroom. As one woman told reporters, “Insurance coverage for 30 million people is on the line, and we’re having to sleep on the sidewalk to get a peep at what goes on in there?” In a recent survey of nine hundred registered voters, a reported 70 percent stated that televising Court arguments was a “good idea.”

Second, televising Supreme Court arguments would help educate the public about the workings of our government and the Court itself. Granted, short news clips will not substitute for reading the Court’s opinions. But proponents of cameras argue that the television coverage will bring conversations about the Court into more homes and classrooms. Such progress is important given what many perceive as the American public’s lack of civic awareness.

Third, although opponents of televising arguments note that the Supreme Court proceedings already are open in many ways, the reality is that they are not equally open to all. Few people can afford to leave work and travel to Washington, D.C., to wait in the public line to view an argument. The prospect of getting a seat becomes even dimmer with the advent of professional line standers, like those from LineStanding.com, who are paid up to $50 an hour to secure spots in the long line, and then are relieved at the last minute by their “customers.” The Court’s written opinions are sometimes hard for nonlawyers to understand and do not substitute for observing the arguments. The online audio recordings are less convenient than television and harder to navigate. If the Court is to maintain the public’s trust, supporters of cameras argue, it must be visible and accessible to all of the Americans whose lives it affects, and televising arguments would go far toward achieving that end.

RECENT CHANGES IN THE
JUSTICES’ VIEWS

Several newer justices have expressed more flexible views than their predecessors on the subject of televising Su-
Supreme Court proceedings, suggesting that the Court’s current policy is not set in stone. Current Chief Justice John Roberts, for example, was asked about cameras during his confirmation hearings and responded that “it’s not something that I have a settled view on and I do think it’s something that I would benefit from the views of my colleagues, and I know that some of them have particular views and some may not.” More recently, Chief Justice Roberts again suggested an open mind on the point, noting that an ongoing pilot program designed to test the use of cameras in the federal courts might provide useful data bearing upon the question of cameras in the Supreme Court. The chief emphasized, however, that the considerations at the Supreme Court are different from those in other courts, and that any changes to the Court’s procedures necessarily will be gradual.

Other justices have made similar statements during their confirmation hearings. When questioned about cameras by Senator Orrin Hatch in 1993, Justice Ruth Bader Ginsburg said she saw “no problem at all televising proceedings in an appellate court.” She noted, however, a concern that arguments before the Supreme Court might be “distort[ed] if editing is not controlled,” and that she “would be very respectful of the views of my colleagues.”

Justice Sonia Sotomayor noted support for cameras in the lower courts, although she would not commit to bringing them into the Supreme Court. But, she said, she wouldn’t “come in [to the Court] with prejudgments” on the issue. If confirmed, she would “go in and try to share my experiences, to share my thoughts, and to be collegial and come to a conclusion together . . . on the . . . question of cameras in the courtroom.”

Perhaps the most enthusiastic statement on bringing cameras into the Court came from Justice Elena Kagan, who stated in her confirmation hearing that it would be a “terrific thing” to have cameras in the courtroom because it would educate the American public about the serious work the Court does. In a later statement, Justice Kagan indicated that although she still favors a switch to allow cameras, she now better understands the other justices’ opposing views, including the concern that parties and justices would change their behavior so that the “thing that is so good about the institution will diminish.”

**CONCLUSION**

It seems fair to conclude that the Court will not voluntarily allow cameras in the courtroom anytime soon. As Chief Justice Roberts recently remarked, there is a reason one of the prominent architectural motifs at the Supreme Court building is a turtle—to indicate “that we move slowly but surely.” On the other hand, if the Durbin-Grassley legislation passes, the “constitutional clash” alluded to by former Senator Specter may well come to pass, and the Court will be in a position to decide whether Congress can force its hand on this sensitive issue of Court protocol. Cameras or no, we will need to stay tuned.

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**NOTES**

2. Fox News/Opinion Dynamics (source: Roper Center at University of Connecticut). A Gallup poll on the same question produced a 50 percent “yes” vote for cameras in the Supreme Court, versus 48 percent “no” and 2 percent “undecided.” See the Gallup Organization (source: Roper Center at University of Connecticut).