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Let the Sun Shine on the Supreme Court⁺

by MARJORIE COHN^{*}

When the Supreme Court entertained arguments in one of the most notorious cases ever decided, it worked virtually in private. In *Bush v. Gore*,¹ the Court handed victory to a President who would usurp unprecedented executive power.² The ramifications of that decision will reverberate for years to come. But the nine justices convened before just 80 members of the public.

C-SPAN chairman Brian Lamb had written to Chief Justice Rehnquist: “We respectfully suggest that televised coverage . . . would be an immense public service and would help the country understand and accept the outcome of the election.”³ CNN attorney Floyd Abrams wrote, “There has never been a case where the public’s right to observe judicial proceedings has been more important than this one.”⁴

The high court’s rejection of the petition filed by C-SPAN and CNN to allow television broadcast of the historic argument was a foregone conclusion. As is their custom, the justices forbade cameras from crossing their threshold. “[A] majority of the Court remains of the view that we should adhere to our present practice of allowing public attendance and print media coverage of argument sessions, but not allow camera or audio

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1. *Bush v. Gore*, 531 U.S. 98 (2000).
2. See MARJORIE COHN, *COWBOY REPUBLIC: SIX WAYS THE BUSH GANG HAS DEFIED THE LAW* 103-121 (PoliPointPress 2007).
3. Kevin Goldberg & Tony Mauro, *Court Denies Video Coverage of Two Highly Charged Events*, *THE FIRST AMENDMENT & THE MEDIA*, 2002.
4. MARJORIE COHN & DAVID DOW, *CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE* xi (Rowman & Littlefield, 2002).

coverage,” read the terse denial.⁵ Indeed, Justice David Souter had informed a House appropriations subcommittee in 1996: “The day you see a camera come into our courtroom it’s going to roll over my dead body.”⁶

The Court, however, took a small but significant step by allowing the immediate release of an audiotape of the *Bush v. Gore* argument. It was broadcast on television with a stock photograph of each justice who was speaking displayed on the screen. NBC anchor Tom Brokaw called it “thrilling,” and a network producer said it was “historic.”⁷

Before *Bush v. Gore*, audiotapes were not made public for several months.⁸ In fact, the justices’ practice of making the audiotapes of its arguments readily available is of relatively recent vintage. In 1955, Chief Justice Earl Warren began audio taping the Court’s oral arguments.⁹ But though the tapes were turned over to the National Archives, scholars who checked them out had to sign a lending agreement that they would not reproduce them. University of California-San Diego political science professor Peter Irons defied the agreement in 1993 and marketed the tapes with a transcript entitled, “May It Please the Court.” The Court was not pleased. Furious, it threatened “legal remedies” but never followed through with its threat.¹⁰

Six years after the Supreme Court released its first immediate audio taped argument, it cracked open its door a bit more by making argument transcripts available on the same day the argument takes place.¹¹ The Court approved the speedy release of audiotapes in several high-profile cases,¹² including the 2003 landmark affirmative action cases,¹³ the cases addressing the rights of the Guantánamo detainees¹⁴ and detained U.S. citizens,¹⁵ and the public right of access to information about secret meetings of Vice President Dick Cheney’s energy task force.¹⁶ But Tony Mauro, Supreme Court correspondent for American Lawyer Media, said the Court probably thinks, “We’re giving you all this access here, so don’t

5. *Id.*

6. *Souter Won’t Allow Cameras in High Court*, L.A. TIMES, Apr. 9, 1996, at A6.

7. COHN & DOW, *supra* note 4, at xii.

8. Ellia Thompson, *Courtroom Cameras: Issue Moves In and Out of Focus*, THE QUILL, Sept. 1, 2004, <http://find.galegroup.com.ezproxy.sfpl.org/itx/start.do?prodId=ITOF>.

9. COHN & DOW, *supra* note 4, at 121.

10. *Id.*

11. See Thompson, *supra* note 8.

12. *Id.*

13. *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003).

14. *Rasul v. Bush*, 542 U.S. 466 (2004).

15. *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

16. *Cheney v. U.S. Dist. Court*, 542 U.S. 367 (2004).

bother us about TV cameras in the court.”¹⁷ Mauro stated, “Although having audio feeds of oral arguments in front of the Supreme Court was a good thing, the downside is that the Supreme Court may have done all it wants to do in terms of recognizing the 21st century and may not take another step toward technology until we enter the 22nd century.”¹⁸

The justices continue to close their doors to cameras—each for different reasons. Chief Justice William Rehnquist told a 1992 conference of judges that if the justices didn’t look good on camera, “it would lessen to a certain extent some of the mystique and moral authority” of the Court.¹⁹ Former CNN Supreme Court correspondent Charles Bierbauer recalls the time Rehnquist made an unexpected foray into the Court’s pressroom looking for someone. Rehnquist was surprised there was so much public interest in the *Bush v. Gore* arguments.²⁰ “Rehnquist was never that interested in the way the rest of us got our information about the court,” Bierbauer told a JURIST conference.²¹

Justice Antonin Scalia would also prefer to keep the law far from public reach.²² He told an audience, “I am about to appeal to the principle that the law is a specialized field, comprehensible only to the expert.”²³ The “this is too complicated for you to understand” argument “has unique validity in the field of judging,” Scalia added.²⁴

Yet millions of people sat glued to their television sets as the Florida Supreme Court grappled with technical legal issues of statutory construction in *Bush v. Gore* before the case was appealed to the U.S. Supreme Court. The underlying question was who would be the next President of the United States.

Justice Ruth Bader Ginsburg told a group of University of Virginia law students that she generally favors gavel-to-gavel cameras in the room,

17. Peter Hart, JURIST Conference: Law and Media in the Age of the Internet, U. Times (U. Pitt. L. Sch., Pittsburgh, PA), Apr. 5, 2007, at 15, available at <http://mac10.umc.pitt.edu/u/FMPro?-db=ustory&-lay=a&-format=d.html&storyid=7487&-Find>

18. Thompson, *supra* note 8.

19. Marjorie Cohn, Commentary, *Presidential Election Law: High Court Hides from Camera’s Glare*, Dec. 5, 2000, <http://jurist.law.pitt.edu/election/electioncohn.htm>. [hereinafter Cohn, Commentary].

20. Peter Hart, JURIST Conference: Law & the media: Convergence or collision?, U. Times (U. Pitt. L. Sch., Pittsburgh, PA), Apr. 5, 2007, at 15, available at <http://mac10.umc.pitt.edu/u/FMPro?-db=ustory&-format=d.html&-a&sortfield=issueid%3a%3aissuedate&-sortorder=descend&keywords=bierbauer&-max=50&-recid=39159&-find=>

21. *Id.*

22. See Elliot E. Slotnick, *Media Coverage of Supreme Court Decision Making: Problems and Prospects*, 75 JUDICATURE 128, 130 (1991).

23. *Id.*

24. *Id.*

but she didn't specifically include the Supreme Court room.²⁵ Ginsburg said, "The problem is the dullness of most court proceedings," adding, "It's often tedious."²⁶ But public interest in *Bush v. Gore* was overwhelming.

The jury is no longer out on Chief Justice John Roberts's willingness to let the camera into his Court. During his 2005 confirmation hearing before the Senate Judiciary Committee, Roberts denied having "a settled view" on the issue.²⁷ Roberts said he "would benefit from the views of my colleagues," adding, "I know that some of them have particular views and some may not."²⁸ Apparently the views of his anti-camera colleagues convinced Roberts, who declared in July 2006, "We don't have oral arguments to show the public how we function. We have them to learn about a particular case in a particular way."²⁹ Citing the concern of his brethren about "the impact of television on the functioning of the institution," Roberts said, "We're going to be very careful before we do anything that might have an adverse impact" on the arguments.³⁰ Justice Anthony Kennedy told a House Appropriations Committee, "We feel very strongly that [televising] would affect the dynamics of the argument."³¹

Kennedy drew a distinction between the arguments and the Court's ultimate written decision. "We're judged ultimately by what we write and the U.S. reports . . . and the oral argument is just a preface to that," he said, indicating a concern about how the justices are perceived.³²

When Justice Samuel Alito was on the Third U.S. Circuit Court of Appeals, he favored televising its proceedings. But during his confirmation hearing for the high court, Alito said he would keep an open mind. "We had a debate within our court about whether we should allow television cameras in our court room. And I argued that we should do it," Alito said, adding he thought televised proceedings would be "useful."³³ "The issue is a little bit different on the Supreme Court," he noted.³⁴ "And it would be presumptuous for me to talk about it right now, particularly since, I think, at least one of the justices [David Souter] has said that a television camera

25. Cohn, Commentary, *supra* note 19.

26. *Id.*

27. *Roberts on the First Amendment: Excerpts from Hearings*, FIRST AMENDMENT CENTER ONLINE, Sept. 14, 2005, <http://www.firstamendmentcenter.org/news.aspx?id=15793>.

28. *Id.*

29. Bob Egelko, *Supreme Court: Chief Justice Vetoes Idea of Televised Hearings*, S.F. CHRON., July 14, 2006, at B6.

30. *Id.*

31. FDCH Capital Transcripts, Apr. 4, 2006, 2006 WLNR 581184.

32. *Id.*

33. *Alito Discusses Religious Liberties*, FIRST AMENDMENT CENTER ONLINE, Jan. 1, 2006, <http://www.firstamendmentcenter.org/news.aspx?id=16302>.

34. *Id.*

would make its way into the Supreme Court room over his dead body. So I wouldn't want to comment on it."³⁵

In testimony before the House Appropriations Committee, Justices Kennedy and Clarence Thomas expressed strong opposition to cameras in the Supreme Court. Thomas, who generally sits mute during oral arguments, displayed uncharacteristic loquaciousness before the committee. In a multi-pronged attack, Thomas expressed doubt whether ERISA pre-emption cases would have broad public appeal, worried about security if the justices lost their "anonymity," and predicted separation of powers problems if Congress were to mandate the televising of Supreme Court arguments.³⁶

Kennedy concurred with Thomas' concerns about separation of powers, calling it "a very sensitive point."³⁷ "[I]t's not for the Court to tell Congress how to conduct its proceedings," Kennedy said.³⁸ "And we feel very strongly that we have an intimate knowledge of the dynamics and the needs of the court, and we think that proposals which would mandate direct television in our court in every proceeding is [sic] inconsistent with that deference, that etiquette that should apply between the branches."³⁹

The most recent proposal, however, does not mandate cameras in every proceeding, only the Court's oral arguments. It does not suggest televising the justices' deliberations. In March 2006, the Senate Judiciary Committee approved a bill, sponsored by Arlen Specter (R-Pa.) and three senators from each party that would require the Supreme Court to allow television coverage of all open sessions, unless a majority of the justices decides that televising a particular hearing would violate the due process rights of one or more of the parties.⁴⁰ Although the final decision would rest with the justices themselves, there is considerable resistance among the justices to such proposals.

Rule 53 of the Federal Rules of Criminal Procedure specifies, "Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or

35. *Id.*

36. FDCH Capital Transcripts, *supra* note 31, at 23.

37. *Id.* at 24.

38. *Id.*

39. *Id.*

40. The bill proposed to amend chapter 45 of title 28 of the United States Code to read as follows: "The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of 1 or more of the parties before the Court." A Bill to Permit the Televising of Supreme Court Proceedings, S. 1768, 109th Cong. (2d Sess. 2006).

the broadcasting of judicial proceedings from the courtroom.”⁴¹ Federal appellate court judges currently have the power to decide whether their proceedings will be televised but district court judges do not have that option.⁴² Senator Patrick Leahy (D-VT), Chuck Grassley (R-Iowa), and Charles Schumer (D-N.Y.) introduced a bill in January 2007, titled Sunshine in the Courtroom Act of 2005. It would give federal trial and appellate judges sole discretion to allow their proceedings to be televised. The bill contains a three-year sunset provision for district courts.⁴³

The Office of Legislative Affairs in the Department of Justice strongly opposes S. 829, although most of its objections are directed at televising trials in the district courts.⁴⁴ In a March 2006 letter to Senator Specter, Assistant Attorney General William E. Moschella expressed concern about privacy implications “from a Government information perspective.” He worried that media exposure may prevent the government from being able to use information protected by the Privacy Act.⁴⁵

The National Association of Criminal Defense Lawyers took a more nuanced position in November 2005. In testimony before the Senate Judiciary Committee, National Association of Criminal Defense Lawyers President Barbara Bergman said, “Cameras should be permitted to televise criminal proceedings in the United States district courts and interlocutory appeals to the Circuit Courts with the express consent of the parties; cameras should be permitted in the United States Courts of Appeals and the United States Supreme Court in all other proceedings.”⁴⁶

The Sixth Amendment guarantees the accused in a criminal case the right to a public trial.⁴⁷ In 1980, the Supreme Court held in *Richmond Newspapers, Inc. v. Virginia* that the public has the right of access to trials.⁴⁸ “To work effectively,” Chief Justice Warren Burger wrote for the majority, “it is important that society’s criminal processes satisfy the

41. FED. R. CRIM. P. 53.

42. See generally COHN & DOW, *supra* note 4, at 112-16.

43. The bill would have authorized the presiding judge of a federal appellate court, including the U.S. Supreme Court, or a federal district court to, “in the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising to the public of court proceedings over which that judge presides.” Sunshine in the Courtroom Act, S. 829, 109th Cong. (2d Sess. 2006).

44. See letter from William E. Moschella, Ass’t Att’y Gen., Dep’t of Justice, to Sen. Arlen Specter (Mar. 20, 2006) (on file with author).

45. *Id.*

46. Barbara Bergman, Testimony to the Senate Committee on the Judiciary on “Cameras in the Courtroom” (Nov. 9, 2005), available at http://judiciary.senate.gov/testimony.cfm?id=1672&wit_id=4801.

47. U.S. CONST. amend. VI.

48. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980).

'appearance of justice,' . . . and the appearance of justice can best be provided by allowing people to observe it."⁴⁹

It is not clear, however, whether a public trial means a televised trial.⁵⁰ When a defendant appears in court, there may be valid reasons for excluding a camera, if the publicity could harm his/her constitutional right to a fair trial.⁵¹ But when the Supreme Court hears arguments, there are no witnesses or jurors to be influenced or intimidated by the cameras.

The precious few public seats in the Supreme Court hearing room are carefully allocated. Spectators are limited to a mere three minutes apiece and those unlucky enough to sit behind one of the courtroom's giant pillars are unable to see the proceedings. Twenty-three hours before the Supreme Court's 1989 hearing in *Webster v. Reproductive Health Services*,⁵² which many thought might overturn *Roe v. Wade*,⁵³ hopeful spectators began lining up in front of the courthouse to vie for the few public seats. A scalper sold the eleventh place in line for 100 dollars.⁵⁴

C-SPAN has tried to get its camera into the Supreme Court for nearly two decades, offering to provide gavel-to-gavel coverage of the proceedings.⁵⁵ Scalia worries that other networks would cut snippets of the arguments and broadcast them out of context.⁵⁶

Justice Harry Blackmun often took a noontime stroll around the courthouse.⁵⁷ The author of the landmark abortion rights decision, *Roe v. Wade*, Blackmun once strolled right by a lively anti-abortion demonstration.⁵⁸ Nobody recognized the eminent bystander, and he liked it that way.⁵⁹ Justice Byron White also said he was "very pleased to be able to walk around, and very, very seldom am I recognized. It's very selfish, I know."⁶⁰

49. *Id.* at 571.

50. *See generally* COHN & DOW, *supra* note 4, at 39-61.

51. *Id.* at 26-38.

52. *Webster v. Reprod. Health Serv.*, 492 U.S. 490 (1989).

53. *Roe v. Wade*, 410 U.S. 113 (1973).

54. *See* COHN & DOW, *supra* note 4, at 121.

55. Interview by Brooke Gladstone with Brian Lamb, founder and CEO, C-SPAN, for *On the Media* from NPR (Jan. 13, 2005), available at http://www.onthemedial.org/yore/transcripts/transcripts_011306_camera.html.

56. Charlene Carter & Laura Blinkhorn, *S1768 - A Bill to Permit the Televising of Supreme Court Proceedings*, CONG. Q. BILLANALYSIS, Aug. 30, 2006, available at 2006 WLNR 15268797.

57. COHN & DOW, *supra* note 4, at 119.

58. *Id.*

59. *Id.*

60. COHN & DOW, *supra* note 4, at 120.

Thomas admitted that some of his colleagues feel more strongly about cameras than others.⁶¹ But he said “the general consensus is that it’s not one of glee about that.”⁶² Chief Justice Earl Warren wrote that broadcast coverage was “inconsistent with the Anglo-American conception of ‘trial’.”⁶³ He suggested there was a better chance of getting cameras on the moon than in the Supreme Court.⁶⁴ But we have taken cameras to the moon.

It is in the Supreme Courtroom that the law of the land is made. When the Court argues about how the next President is selected, whether a woman can choose to have an abortion, whether a detainee may be held in custody for the rest of his life, or whether the government will take the threat of global warming seriously, the public has a right to be there. There is no cogent reason to deny the public a window into the high court.

Justice Sandra Day O’Connor said, “Eventually we will probably have television. But it probably won’t be for a good while.”⁶⁵ As Tony Mauro pointed out, the symbol of the Supreme Court is the tortoise, representing the slow but steady pace of the law. How long a while we will have to wait remains to be seen. Hopefully, Justice Souter will live to see the day.

61. FDCH Capital Transcripts, *supra* note 31, at 24.

62. *Id.*

63. COHN & DOW, *supra* note 4, at 117.

64. *Id.*

65. *Id.* at 121.