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As Justice Should be Blind, So Should We: Analyzing the Federal Judicial Center's Reports on Cameras in the Courtroom & An Argument in Favor of Keeping Cameras Out of the Supreme Court

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The recent Supreme Court nomination proceedings have shown the level of public attention paid to a Supreme Court nominee; the media coverage consumed the nation. When it comes to the nomination of a Justice, there is no debate, the public demands transparency. However, what the public continues to debate is the level of transparency due once the judge becomes a Justice. Should the public have an internal view on Supreme Court proceedings?

As a constitutional matter, cameras in courtrooms do not violate the United States Constitution. In *Chandler v. Florida*, the United States Supreme Court held that a state could televise coverage of a criminal trial for public broadcast, despite defendants' argument that cameras violated their due process rights.[2] However, as a formal matter, Federal Rule of Criminal Procedure 53 prohibits "broadcasting of judicial proceedings from the courtroom." [3] Likewise, the Judicial Conference of the United States prohibits the "broadcasting, televising, recording, or taking photographs in the courtroom . . ." for civil proceedings.[4]

Despite this, Senator Grassley, in partnership with numerous Senators, introduced the "Cameras in the Courtroom Act of 2017".[5] which would require the Supreme Court to allow television coverage for all open sessions, unless a majority of the Justices voted otherwise.[6] This is one out of a vast array of attempts by the Senate to introduce cameras into the Supreme Court.[7] Discussing a similar topic, Senator Patrick Leahy stated, "At a time when the country and court itself is polarized, granting the public expedited access to hour-long lessons in civics and collegiality seems prudent." [8] However, there remains an essential question: why are cameras the solution to this polarization?

Senators are not the only ones discussing this topic, the Justices themselves have diverse views on the matter. Justice Kennedy once stated, "We are judged by what we write We're not judged by what we say." [9] In a famous interview with C-SPAN, Justice Scalia stated:

I wouldn't mind having the proceedings of the court [televised] . . . if I thought it would only go out on a channel that everyone would watch gavel to gavel But . . . what will happen is for every one person who sees it on C-SPAN gavel to gavel . . . ten thousand will see fifteen-second takeouts on the networks news, which, I guarantee you, will be uncharacteristic of what the court does. [10]

However, Justices Ginsburg, Sotomayor, and Kagan all support the proposition.[11] Justice Kagan stated, "If everybody could see [the Court], it would make people feel so good about this branch of government and how its operating" [12]

I. FACTUAL FINDINGS: MIXED RESULTS

Fortunately, this question is not entirely speculative. The Federal Judicial Conference published two studies, from 1994 and 2016, which provide factual findings and an analytical framework regarding the effects of cameras in courtrooms.

A. Video Recordings of Courtroom Proceedings

The 2016 report analyzed the effects of video recordings in fourteen district courts, for a total of 158 proceedings.[13] The study found:

The majority of judges in the pilot courts think most hypothesized effects of video recording occur to little or no extent, whether the impact is on witnesses, jurors, attorneys, or judges A majority . . . think video recording has a moderate to great effect [regarding the increased] public access to the federal courts and educating the public about courtroom procedures and legal issues.[14]

Likewise, regarding the effects on the public, the study found that:

21,530 . . . viewers accessed a video recording at www.uscourts.gov during calendar year 2014. The 258 viewers who completed a "pop-up" survey . . . were primarily students, educators/ librarians, members of



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the general public, and lawyers or other law firm employees. They accessed the videos primarily because of a general interest . . . or because they had an educational reason to do so.[15]

Despite these positive findings, the study has certain analytical limitations:

First, the [fourteen] courts self-selected into the pilot project and are not necessarily representative of all 94 U.S. district courts . . . Second, because recordings were made only with consent of the participants, we might expect that the views of participating judges and attorneys would, on average, be more favorable than the views of judges and attorneys who would not agree to video recording. Further, it is impossible to measure the actual [versus perceived] effects of video recording, which would require comparison of proceedings that were video recorded with otherwise similar proceedings that were not video recorded.[16]

Even disregarding these limitations, there are two additional issues. First, regarding Justice Kagan's argument of increased public confidence, forty-two percent of judges felt cameras increased public confidence to little or no effect.[17] Second, when asked about the central argument in favor of introducing cameras—whether the recordings educated the public about legal issues in each case—thirty-nine percent of judges stated they felt cameras educated the public to little or no effect.[18]

Regardless, most of the public who accessed the recording did so for educational or work-related reasons. Doesn't this beneficial public access outweigh any of the perceived negative effects?

B. Electronic Media Coverage in the Courtrooms

Fortunately, again, this question isn't entirely speculative. The 1994 report analyzed the effects of allowing electronic media coverage of civil trial and appellate proceedings.[19] The report found that, originally, the judge's attitude to media coverage was neutral with attitudes becoming more favorable throughout the process.[20] In addition, judges generally observed limited effects on participants in the courtroom.[21] Likewise, almost all judges believed the coverage succeed better than traditional media in educating the public about federal courts.[22] Finally, most judges believed electronic media access enhanced news coverage.[23] However, like the previous study, this report had the same inherent issues: self-selection bias and the measurement of perceived effects, rather than actual effects.[24]

In addition, the *measurable* data on the usage of media coverage actually bears out Justice Scalia's concern:

First, most footage was accompanied by a reporter's narration rather than the story being told through the words and actions of the participants; thus, the visual information was typically used to reinforce a verbal presentation, rather than to add new and different material to the report. Second, plaintiffs and their attorneys received more air time than defendants and their attorneys. Third . . . the amount of courtroom footage was not related to the amount of information communicated. Fourth, the coverage did a poor job of providing information to viewers about the legal process.[25]

Therefore, the media is more prone to craft a narrative for "newsworthy"[26] content and overdub their narration of courtroom footage as opposed to allowing the footage to speak for itself. In addition, as one media representative stated, "Video tells a much better story than a sketch artist's rendition—one can see when a judge gets angry and the facial and body expressions of the parties." [27] This comment ought to recall Justice Kennedy's admonition, "We are judged by what we write . . . We're not judged by what we say." [28] It could be added, "and not by how we react in the moment."

II. TO PROCEED WITH CAUTION

As both reports on the topic find, the issue is not entirely clear for either side. Judges mostly feel that cameras have a positive effect on the process. However, the data shows that camera footage is susceptible to media oversimplification. The threat of becoming a viral video, or the desire for the same, is something that will constantly be on the minds of both the Justices and the attorneys present. In conclusion, a return to the original question is warranted. Why is this solution necessary? The most recent Gallup polls show that the Supreme Court, by far, receives the highest public approval.[29] If transparency is the goal, it's important to remember, "The Supreme Court is already the most transparent institution in the country. After all, the Justices explain their decisions in detailed written opinions." [30]

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[2] *Chandler v. Florida*, 449 U.S. 560, 570–83 (1981).

[3] *FED. R. CRIM. P.* 53.

[4] *History of Cameras in Courts*, U.S. CTS., <http://www.uscourts.gov/about-federal-courts/cameras-courts/history-cameras-courts> (last visited Oct. 22, 2018).

[5] *Cameras in the Courtroom Act*, S. 649, 115 Cong. (2017).

[6] *Cameras in the Courtroom Act*, H.R. 464, 115 Cong. § 678 (2017).

[7] See Robert Kessler, *Why Aren't Cameras Allowed at the Supreme Court Again?*, *THE ATLANTIC* (Mar. 28, 2013), <https://www.theatlantic.com/national/archive/2013/03/case-allowing-cameras-supreme-court-proceedings/316876/> ("Then, in 1999, Iowa Sen. Chuck Grassley introduced legislation that would have allowed cameras into Supreme Court proceedings.")

[8] John Eggerton, *Sens. Seek Same-Day Audio From Supreme*, *BROADCASTING & CABLE* (July 2, 2018), <https://www.broadcastingcable.com/news/sens-seek-same-day-audio-from-supremes>.

[9] Kessler, *supra* note 7.

[10] *Id.*

[11] *Id.*

[12] *Id.*; see generally Katherine Geldmacher, *Behind Closed Doors: Why the Federal Judiciary's Decision to Keep Cameras out of District Courts Was a Mistake*, 30 *Geo. J. LEGAL ETHICS* 753, 753 (2017) (discussing the program

and the author's view in favor of extending the pilot program).

[13] MOLLY TREADWAY JOHNSON, CAROL KRAFKA & DONNA STIENSTRA, FED. JUDICIAL CTR., VIDEO RECORDING COURTROOM PROCEEDINGS IN UNITED STATES DISTRICT COURTS: REPORT ON A PILOT PROJECT 13 (2016).

[14] *Id.* at viii.

[15] *Id.* at ix.

[16] *Id.* at 3.

[17] *Id.* at 27.

[18] *Id.*

[19] MOLLY TREADWAY JOHNSON & CAROL KRAFKA, FED. JUDICIAL CTR., ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 4 (1994).

[20] *Id.* at 7.

[21] *Id.*; see Geldmacher, *supra* note 12, at 766 ("Allowing cameras in federal courts would improve the legal profession by providing extra educational tools to law students and professors. It would also give attorneys and judges more opportunities to evaluate their work and sharpen.").

[22] JOHNSON ET AL., *supra* note 19, at 24.

[23] *Id.* at 27.

[24] *Id.* at 8.

[25] *Id.* at 36. *But cf.* Geldmacher, *supra* note 12, at 762 (addressing the argument by distinguishing between media coverage and court-administered video recordings).

[26] JOHNSON ET AL., *supra* note 19, at 29.

[27] *Id.* at 30.

[28] Kessler, *supra* note 7.

[29] See *Supreme Court*, GALLUP, <https://news.gallup.com/poll/4732/supreme-court.aspx> (last updated July 11, 2018) (finding a 53% approval rating); *Presidential Approval Ratings – Donald Trump*, GALLUP, <https://news.gallup.com/poll/203198/presidential-approval-ratings-donald-trump.aspx> (last updated Sept. 24, 2018) (finding a 40% approval rating); *Congress and the Public*, GALLUP, <https://news.gallup.com/poll/1600/congress-public.aspx> (last updated Sept. 13, 2018) (finding a 19% approval rating).

[30] Nancy S. Marder, *Keep cameras out of Supreme Court: Opposing View*, USA TODAY (Mar. 27, 2013), <https://www.usatoday.com/story/opinion/2013/03/27/cameras-supreme-court-nancy-marder/2026517/>.

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