



BY
ERWIN
CHEMERINSKY
AND
ERIC J.
SEGALL

On Jan. 24, 2017, the United Kingdom’s Supreme Court issued its monumental decision concerning the fate of Brexit, a legal ruling with major implications for the people of England, Europe, and the rest of the world. Few judicial announcements outside the United States have generated greater interest than the Brexit decision. Given the enormous implications of the case, it is not surprising that the people of the world were allowed to watch the decision come down from these judges through a streaming of the event in real time, just as it should be.

The United States Supreme Court is now and has been for over 200 years the most powerful and important legal tribunal in the world. As Alexis de Tocqueville said in the 19th century, “there is hardly a political question in the United States which does not sooner or later turn into a judicial one.”¹ Over the last ten years alone, critical decisions regarding

abortion, affirmative action, gun rights, Obamacare, campaign finance reform, voting rights, redistricting, and numerous other fundamental issues concerning how the people of the United States govern and define themselves have been made by our highest Court. Yet, the Supreme Court of the United States has never allowed a single oral argument or decision announcement to be broadcast or live streamed. This stubborn and anachronistic refusal to enter modern times is not just a national embarrassment but a great disservice to the rule of law and a government by and for the people.

Thirty-five state courts of last resort regularly live stream or televise their arguments. Some federal courts of appeals, such as the U.S. Court of Appeals for the Ninth Circuit, live stream arguments and make them available for viewing in an archive. Trial judges all over the country allow television in their courtrooms when there is public interest in the

proceedings. The Supreme Courts of Canada, Brazil, and numerous other countries allow their people to see their justices at work and have done so for a long time. Despite this overwhelming pattern of openness among state and international courts, our justices remain in hiding, doing their public work in the darkness of a television and internet blackout.

WHY CAMERAS?

Our Supreme Court's oral arguments and decision announcements are open to the public, which means a few hundred lucky people are allowed to witness them. The rest of us, however, are not so fortunate. Governmental hearings that are open to some should be open to all, especially when an organization like C-SPAN is ready, willing, and able to cover the event at its own expense. Supreme Court proceedings — oral arguments and the announcing of decisions — are public events; the public should be able to see them.

Allowing the American people to actually see the justices at work would have many positive effects. In addition to the usual democratic advantages of governmental transparency, there are educational, historical, and civic benefits to visible Supreme Court proceedings. We could observe lawyers and judges as they debate our most controversial, divisive, and often partisan issues with respect, civility, and moderation. During these increasingly partisan times, the oral arguments could set an example of how public officials can disagree, sometimes vehemently, without rancor or personal attacks. Ultimately, the public would see that Supreme Court justices are human beings conscientiously tackling difficult legal issues.

If the events were televised or live streamed, our museums could display the Court's most important oral arguments and decision days in a way that would appeal to both lawyers and non-lawyers. Students could gain improved insight and understanding about the Court and the justices. Potential Supreme Court litigators could view Justice Elena Kagan's sharp questioning, Justice Stephen Breyer's often scholarly approach to complex issues, and Justice Clarence Thomas' silence and body language.

Historic moments involving race relations, abortion, affirmative action, gun control, and voting rights would be captured for all time instead of being lost to history. It is just not enough in our ever-more visual society for people to listen to audio tapes while watching still images of the justices. And, when the Court hands down landmark decisions, like those involving same-sex marriage or

presidential power, millions of Americans could come together in a moment of national pride (or sorrow) and political engagement; it would be an entirely different and better experience than hearing the news second-hand and after-the-fact from a few select journalists.

THE ARGUMENTS AGAINST CAMERAS IN THE SUPREME COURT

In the face of these overwhelming benefits to televising or live streaming the Court's already open proceedings, the justices have made flimsy arguments at best to remain in the darkness. Some of these arguments against cameras are undermined by the availability of audiotapes released soon after the arguments. At least since *Bush v. Gore* in December 2000, the Supreme Court has, on occasion, in high-profile cases, allowed broadcasting of the audiotapes of oral arguments immediately after they conclude. In all cases, transcripts are available the day of the arguments and audiotapes at the end of the week in which the case was argued. On occasion, C-SPAN has taken advantage of this opportunity, broadcasting the audiotapes as soon as they become available and showing still photographs of the justices and advocates as their voices are heard. If people can hear the tapes just minutes after the arguments conclude, it is impossible to see the harm in allowing them to see the proceedings live just an hour earlier.

What possible rationale is there for excluding cameras from Supreme Court proceedings? One concern is that broadcasting arguments will change the behavior of lawyers and justices. Perhaps that concern has some basis in trial courts, where there is worry about the effect of cameras on witnesses. Even there, however, the experience of many jurisdictions with cameras in the courtrooms and many studies refute any basis for concern.²

But especially in the Supreme Court, there seems little basis for worry. The lawyers, who are focused on answering intense questioning from the justices, are unlikely to alter their arguments to play to the cameras. Justices and lawyers already know that the arguments, especially in high-profile cases, will be extensively covered in the media, and audiotapes will be publicly available. In this context, it seems highly unlikely that a live broadcast would change behavior. And anyone who has witnessed a Supreme Court argument knows that the justices are firmly in control of the proceedings.

The experience of other countries, states, and federal courts of appeals where appellate argu-

During these increasingly partisan times, the oral arguments could set an example of how public officials can disagree, sometimes vehemently, without rancor or personal attacks.

In no other context would Supreme Court justices say that government officials can protect themselves from possible criticism by cutting off public access.

ments are broadcast further shows no reason for concern that cameras will change what goes on in oral argument.³ We know of no jurisdiction that has allowed broadcasting of appellate arguments and then, because of bad experience, changed its policy. Judges and lawyers report that they simply forget the cameras are there as they participate in oral arguments.⁴

It is especially absurd that the justices do not allow broadcasting of their announcements of decisions. At times, these are quite dramatic, such as when justices read dissents from the bench or make comments that are not contained in their written opinions. These statements from the bench are not recorded or transcribed and are forever lost except for whatever reporters say about them.

We have heard justices express concern that if television cameras were allowed, the media might broadcast excerpts that offer a misleading impression of arguments and the Court.⁵ For example, Justice Breyer told Congress that “the first time you see on prime time television somebody taking a picture of you and really using it in a way that you think is completely unfair . . . in order to caricature [your position] . . . the first time you see that, you will watch a lot more carefully what you say.”⁶ But that is true when any government proceeding is taped or even when reporters cover any event. A newspaper or television reporter could quote a justice’s question or a lawyer’s answer out of context. The Supreme Court should not be able to protect itself from misreporting any more than any other government institution.

The justices might be afraid that an excerpt of oral arguments might appear on John Oliver or Jimmy Fallon and be used for entertainment purposes; perhaps they will even be mocked. But that is a cost of being a democratic society and of holding a prominent position in government. In no other context would Supreme Court justices say that government officials can protect themselves from possible criticism by cutting off public access. It is normal for the justices, whose only real currency is the prestige they carry with the public, to be concerned about their public image. But the most effective way to retain that faith is for the justices to perform their duties responsibly and in the public eye not to hide from the people via a television blackout.

Perhaps it is that the justices prefer to be anonymous and fear that cameras in the courtroom will make it harder for them to live their lives. This concern, though, is undermined by the increasing

public appearances of many of the justices. Justice Sonia Sotomayor has appeared on “Sesame Street” and dropped the ball in Times Square on New Year’s Eve. Justice Breyer has appeared on numerous television shows to promote his books. Justice Antonin Scalia frequently appeared in media. Justice Ruth Bader Ginsburg has embraced her reputation as the “Notorious RBG,” an internet meme that now is featured on t-shirts.⁷

A few years ago, while testifying in front of Congress about the Court’s budget, Justice Anthony Kennedy made some troubling remarks about his objections to cameras in their courtroom. Justice Kennedy said, “We are a teaching institution, and we teach by not having the television there, because we teach that we are judged by what we write, the reasons that we give. We feel . . . that our institution works. And in my own view, there would be considerable reluctance where I would have the instinct that one of my colleagues asked a question because we were on television. I just don’t want that insidious dynamic to come between me and my colleagues.”⁸

Justice Kennedy’s two objections to cameras have little merit. First, the Court is much more than a “teaching institution.” It is a coercive government body handing down rules that bind our cities, states, Congress, the President, and the American people. We have a right to see how the Court conducts its public business. Moreover, to the extent the Court plays a “teaching” role, its oral arguments and decision announcements, as noted earlier, are conducted politely and with respect, even where there are strong disagreements among the justices and the lawyers arguing the cases. Allowing millions of Americans, and people all over the world, to witness this dynamic in real time would provide excellent role modelling for our public debates in other fora.

To the extent Justice Kennedy is concerned about his colleagues misbehaving in front of the cameras, this worry is one totally in control of the justices. Moreover, it is extremely unlikely that the justices would want to appear in a negative light during the broadcast of its proceedings. If anything, perhaps the presence of cameras might entice better behavior or, in the case of Justice Thomas, maybe even a few questions.

We believe that the Court’s credibility only will be enhanced if more people see the justices at work. Anyone who watches a Supreme Court argument will see highly intelligent, superbly prepared individuals grappling with some of the nation’s hardest questions. The public will see, too, that there are

few easy answers to most constitutional questions, and that there are usually compelling arguments on both sides. That only can increase the public's understanding of the law.

CONCLUSION

The experience of so many other jurisdictions that broadcast or live stream oral arguments should make this a very easy question. Every Supreme Court proceeding that is conducted in public should be available to watch as it occurs and available later for all to see.

The problem, though, is that the decision as to whether to allow cameras has been left entirely to the justices themselves. There always is something uncomfortable being watched. Justices don't want to subject themselves to the additional scrutiny. But if the justices aren't willing to change, Congress should mandate — or at least strongly encourage — this reform. Several senators have introduced bills to foster broadcasting of Supreme Court proceedings.⁹

Congress should pass one of these bills and bring the Supreme Court into the 21st century. The American people should be allowed to watch a crucial branch of its government at work.



ERWIN CHEMERINSKY (left) is Founding Dean, Distinguished Professor of Law, and the Raymond Pryke Professor of First Amendment Law at the University of California at Irvine School of Law. **ERIC J. SEGALL** is the Kathy and Lawrence Ashe Professor of Law at George State University School of Law, where he teaches federal courts and constitutional law.

¹ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (George Lawrence, ed., J.P. Mayer, trans. Doubleday Press 1969) (1835).

² Maureen O'Connor, Letter to the Editor, *Cameras do belong in the courtroom*, WASH. POST, July 18, 2013, https://www.washingtonpost.com/opinions/cameras-do-belong-in-the-courtroom/2013/07/18/e4bc45bc-ee2f-11e2-bb32-725c8351a69e_story.html?utm_term=.9158f57684ed ("Given opponents' confident assertions that cameras cause showboating and other problems in the courtroom, there is a surprising paucity of recent studies on the topic. Most credible studies do not support camera opponents' claims. However, the objective evidence is persuasive that open, transparent courtrooms — including broadcast proceedings with reasonable restrictions — support public understanding of the courts and foster trust and confidence in the judicial system.").

³ Stephanie Condon, *Justices: Cameras would censor Supreme Court*, CBS NEWS, March 14, 2013, <http://www.cbsnews.com/news/justices-cameras-would-censor-supreme-court/2/>.

⁴ See, e.g., A.B.A., *Chicago Section Annual Conference. Cameras are in the Courts, Now What? Ethical Issues for Lawyers* (Apr. 24–26, 2013), available at http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/54_%20cameras_are_in_the_courts.authcheckdam.pdf.

⁵ Megan McHugh, *Allow video cameras in the Supreme Court*, THE HILL, Apr. 22, 2015, <http://thehill.com/blogs/congress-blog/judicial/239579-allow-video-cameras-in-the-supreme-court> ("The Justices are the most vocal opponents of this proposal [to allow cameras in the Court]. One of their arguments against permitting cameras in the courtroom is that the Justices and lawyers may 'play to the cameras' recognizing that the complex proceedings will be diminished to brief sound bites for the evening news. Essentially the Justices worry the media is going to interfere with how they do business.").

⁶ See *supra*, note 3.

⁷ Susanna Victoria Perez, *Justice Ruth Bader Ginsburg likes 'The Notorious BIG' reference*, AOL NEWS, Feb. 25, 2017, <https://www.aol.com/article/news/2017/02/25/justice-ruth-bader-ginsburg-likes-the-notorious-big-reference/21721720/>.

⁸ Tal Kopan, *At sequestration hearing, Breyer, Kennedy say cameras in the courtroom too risky*, POLITICO, Mar. 13, 2014, <http://www.politico.com/blogs/under-the-radar/2013/03/at-sequestration-hearing-breyer-kennedy-say-cameras-in-the-courtroom-too-risky-159328>.

⁹ Brainerd Dispatch, *Klobuchar, Grassley introduce bill to allow cameras in federal court*, BRAINERD DISPATCH, Mar. 17, 2017, <http://www.brainerddispatch.com/news/politics/4236174-klobuchar-grassley-introduce-bill-allow-cameras-federal-court>.

