

THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

ESSAYS

JUST A MATTER OF TIME? VIDEO CAMERAS AT THE UNITED STATES SUPREME COURT AND THE STATE SUPREME COURTS

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I. INTRODUCTION

The long-running debate over webcasting and broadcasting oral arguments in the Supreme Court of the United States has recently moved to the United States Senate.¹ As the material collected in this article suggests, all indications are that the Supreme Court will continue to drag its heels on the subject. In marked contrast, however, state supreme courts have blazed a

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1. I use the term "webcast" for those states that send live video to court websites. I use the term "broadcast" for those states that send video to third parties like educational television stations for broadcasting. This article does not address allowing entities like C-Span, CNN, NBC, or the like to bring television cameras into the courtroom to broadcast particular oral arguments

significant technological trail with some twenty-one state supreme courts now offering live video webcasts of their oral arguments, and four additional states planning to do so in the immediate future. This article examines the reluctance of the United States Supreme Court to take the lead in this area, but it also highlights the considerable strides made by the state supreme courts that have assumed the mantle of leadership.²

II. BACKGROUND

In March of 2006, we in Arkansas were presented with two seemingly disparate views on the subject of broadcasting oral arguments in the Supreme Court. There was, first, an opinion expressed by Justice Breyer that televising oral arguments in the Supreme Court was “almost inevitable.”³ Yet he saw pros and cons to such a development. It would be a “terrific education” in cases like the term-limit litigation that originated in Arkansas.⁴ But the countervailing considerations, he pointed out, were the potential for opening the door to televising all criminal trials and for perpetuating the misconception that oral arguments actually decide cases on appeal, when in actuality they are only a “small part” of the appellate process.⁵ He cautioned that the Court should “go slow” in this area so as to protect its institutional integrity.⁶

Then, from Nina Totenberg, National Public Radio’s legal correspondent, came a less encouraging statement. In an interview following a panel discussion at the Winthrop Rockefeller Center, she raised the chimera of justices transformed into celebrities, which would increase the number

2. This article is limited to a discussion of the proceedings in appellate courts. It does not address, and it is not intended to express an opinion about, the televising of trials, which raises a host of issues unrelated to those discussed here.

3. Stephen G. Breyer, J., S. Ct. of the U.S., Speech, Clinton Sch. of Pub. Serv., U. of Ark. (Mar. 15, 2006).

4. *Id.* (referring to *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779 (1995)).

5. *Id.*

6. *Id.*; see also Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. App. Prac. & Process 91, 98 (2006) (noting that the justices are “reluctant to make any administrative decision that would diminish the Court’s reputation,” and that “[n]o justice wants to risk damaging that treasured institution”).

of security threats made against them.⁷ More recently, she expressed a fear, first imparted to her, she says, by ABC commentator George Stephanopolous, that this most impressive institution—the Supreme Court of the United States—with its formalities and mystique, would be diminished if television cameras were allowed to intrude into its courtroom.⁸ Presidents, she went on, might then be more inclined to select Supreme Court nominees based on their attractiveness to the public rather than on their legal acumen.⁹

These statements prompted me to consider reviewing both the recent history of the debate over web-based or broadcast access to arguments at the United States Supreme Court and the experiences of state supreme courts that have entered the webcast or broadcast arena. The pages that follow are the result of that review.

III. THE UNITED STATES SUPREME COURT

A. Inside the Court

Despite the hopes of some—the media in particular—that a new Chief Justice would lead the Supreme Court into an age of televised oral arguments, this has not proven to be the case. Last year, the Chief Justice announced his disenchantment with such an innovation at the Ninth Circuit’s annual Judicial Conference.¹⁰ In his remarks on that occasion, he pointed out that educating the public is not the purpose of oral argument, but rather oral argument helps appellate judges “learn about a particular case in a particular way.”¹¹ Still later, the Chief Justice voiced a hesitancy to “tinker” with the procedure for oral

7. Hilary Hilliard, *Experts Divided on Filming High Court—Some on Panel Say It Would Open Doors*, Ark. Democrat-Gazette (Little Rock) (Mar. 16, 2006).

8. Telephone interview with Nina Totenberg, Correspondent, Legal Aff., Wash. Desk, Natl. Pub. Radio (Feb. 3, 2007).

9. *Id.*

10. John G. Roberts, Jr., C.J. of the U.S., Remarks, Jud. Conf., U.S. Ct. of App. for the 9th Cir. (July 13, 2006) (audio recording available at <http://www.twv.org/MediaPlayer/Archived/REAL.cfm?EVNum=2006070110&TYPE=A>) [hereinafter “Roberts Remarks”].

11. *Id.*

argument.¹² It is, he concluded, a “valuable tool” that has in its present form served the court well.¹³ He did point out, however, that audio discs or tapes are made available by the court in certain cases and that the Court’s experience with audio has been “generally good.”¹⁴

Other justices on the Court have been even more caustic about video recording of oral arguments. Justice Souter, in his now famous remark, offered that “the day you see a [television] camera come into our courtroom, it’s going to roll over my dead body,”¹⁵ and Justice Scalia has mused that video recordings made during oral argument would “miseducate and misinform,”¹⁶ and he has also noted that the Justices “don’t want to become entertainment.”¹⁷ Justice Thomas echoed those misgivings during a recent visit to the Arkansas Supreme Court.¹⁸

Still other members of the Court, like Justices Stevens and Alito, appear to be more receptive to the prospect of televised proceedings.¹⁹ It falls, however, to Justice Ruth Bader Ginsberg to summarize the current state of affairs:

Right now, the view is that our proceedings should not be

12. Telephone interview with John G. Roberts, Jr., C. J. of the U.S. (Feb. 14, 2007).

13. *Id.*

14. *Id.*; see also Roberts Remarks, *supra* n. 10.

15. See e.g. Assoc. Press, *On Cameras in Supreme Court, Souter Says, “Over My Dead Body,”* 155 N.Y. Times 24 (Mar. 30, 1996) (referring to Justice Souter’s testimony before a subcommittee of the House Appropriations Committee).

16. See U. News (Georgetown U.), *Supreme Court Justice Scalia Gives Civics Lesson*, <http://explore.georgetown.edu/news/?ID=19322> (Oct. 19, 2006).

17. *Today*, “Justice Antonin Scalia Discusses the Supreme Court” (NBC News Oct. 10, 2005) (TV newsmagazine).

18. Clarence Thomas, J., S. Ct. of the U.S., Comments to Ark. S. Ct. and Staff (Jan. 26, 2007).

19. See e.g. Henry Weinstein, *Televised High Court Hearings Backed: Public Understanding Would Be Enhanced, Stevens Says*, L.A. Times 3 (July 14, 1989) (indicating that Justice Stevens thought then that televising Supreme Court proceedings was “worth a try”); C-SPAN, *Cameras in the Court*, <http://www.c-span.org/camerasinthe-court> (quoting both Justice Stevens’s 1985 acknowledgement that more people are interested in viewing oral arguments in the Supreme Court than can observe them firsthand and his expressed concern that television might have “an adverse impact on the process that cannot be foreseen”) [hereinafter “*Cameras in the Court*”]; Robert Barnes, *A Renewed Call to Televis High Court*, Wash. Post A15 (Feb. 12, 2007) (noting that Justice Alito “favored” allowing cameras in the courtroom while he was on the Third Circuit, and that he appeared “open to the possibility during his confirmation hearing” when nominated to the Supreme Court).

televised. That may change based on the experience of state supreme courts. Several of our states are experimenting with televised trials. Televised appeals. And if it works, in time it will spread, and if it doesn't, then it won't Our courtroom is generally packed, sometimes there are long lines to get in . . . and this would be another way of opening the court further.²⁰

Public sentiment agrees with Justice Ginsberg. In late 2006, the Congressional Research Service issued a report that listed these same arguments for and against televising Supreme Court arguments.²¹ Importantly, the CRS Report alluded to a public survey in April of 2006, which found that seventy percent of those polled thought televising Supreme Court oral arguments was a good idea.²² This approval percentage had risen twenty points in five years, the Report said, possibly due to increasing support for more transparency in government, the Court's recent issuance of controversial decisions, and the public's expectation that future Supreme Court cases were likely to involve constitutional issues of great public interest.²³

Whatever might motivate public sentiment, Justice Breyer is undoubtedly correct: Videotaping of the Court's oral arguments is probably inevitable. More and more, we see Supreme Court justices eschewing anonymity and stepping into the light of day. For example, some justices now publicly engage in debates over judicial philosophy, and some write books that yield insights into their judicial development.²⁴ Certainly, the unknown Supreme Court Justice is less the norm today than in the past. And two federal courts of appeal, the

20. *Cameras in the Court*, *supra* n. 19 (quoting Justice Ginsburg's 2000 interview with Canadian Lawyers Weekly).

21. Lorraine H. Tong, *Televising Supreme Court and Other Federal Court Proceedings: Legislation and Issues* (Cong. Res. Serv. Nov. 8, 2006) [hereinafter "Televising Court Proceedings"].

22. *Id.* at 1 (indicating that April 2006 poll was by Fox News/OpinionDynamics).

23. *Id.* (indicating that December 2000 poll was by CNN/USA Today).

24. See e.g. C-SPAN Broadcast, Stephen G. Breyer, J., S. Ct. of the U.S. and Antonin Scalia, J., S. Ct. of the U.S., *A Conversation on the Relevance of Foreign Law for American Constitutional Adjudication* (Jan. 13, 2005) (transcript and archived video available at <http://www.wcl.american.edu/secl/founders/2005/050113.cfm>); see also, e.g., Stephen G. Breyer, *Active Liberty: Interpreting our Democratic Constitution* (Knopf 2005); Sandra Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (Random House 2003); William H. Rehnquist, *The Supreme Court* (Knopf 2001); Antonin Scalia, *A Matter of Interpretation* (Princeton U. Press 1997).

Second Circuit and the Ninth, have opted to allow their oral arguments to be televised by entities like CNN and C-Span after the Judicial Conference of the United States made it discretionary for appellate courts to do so in 1996.²⁵

B. Outside the Court

No less an old-line institution than the American Bar Association states that it is “committed to the belief that all federal courts, including the Supreme Court, should experiment with electronic media coverage of both civil and criminal proceedings.”²⁶ But the most significant development on this issue in the last few years has occurred in the United States Senate. In January of this year, Senator Specter of Pennsylvania and five co-sponsors introduced legislation mandating that the Supreme Court televise its oral arguments.²⁷ Senator Specter said at the time that he championed the increased public understanding and better access to Court proceedings that would result from his bill’s becoming law. The focus on the Court that live television would bring, he said, might result in the Court’s taking more than eighty-seven cases a year, which he maintains was the number of cases taken in the 2005 term, when only sixty-nine opinions were actually signed that year by the justices. He also speculated that it might go a long way towards offsetting the Court’s remoteness and adding to its credibility.²⁸

25. See *Televising Court Proceedings*, *supra* n. 21, at 4 (referring to resolution adopted by the Judicial Conference of the United States in March 1996); see also *Judicial Conference Acts on Cameras in the Courts*, Third Branch 1 (Apr. 2006) (indicating that Judicial Conference resolution permits “[e]ach court of appeals . . . [to] decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt”).

26. Letter from Robert D. Evans, Dir. of Govtl. Aff., Am. Bar Assn., to Senator Arlen Specter (Nov. 17, 2005) (available at http://www.abanet.org/poladv/letters/judiciary/051117letter_cameras.pdf) (accessed June 29, 2007; copy on file with Journal of Appellate Practice and Process).

27. A Bill to Permit the Televising of Supreme Court Proceedings, Sen. 344, 110th Cong. (Jan. 25, 2007); see also Sen. 1768, 109th Cong. (Mar. 30, 2006) (same). An identical bill was introduced in the House of Representatives on March 1, 2007, as H.R. 1299 by Representative Ted Poe of Texas.

28. Remarks of Sen. Specter (Jan. 29, 2007) (reprinted in 153 Cong. Rec. S1257-58, 110th Cong. (daily ed. Jan. 29, 2007)); see also *Sen. Specter Introduces “Cameras in Courtroom” Legislation*, News Rel. (U.S. Fed. News Jan. 29, 2007).

Not surprisingly, Senator Specter's bill does not sit well with the members of the Court. In fact, Justice Kennedy had before its introduction voiced his objection to legislative mandates, saying

We've always taken the position and decided cases that it's not for the Court to tell the Congress how to conduct its proceedings, what its rules ought to be on markup and reporting bills from one house to the other, or how to conduct itself. And we feel very strongly that we have 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 inconsistent with that deference, that etiquette that should apply between the branches.²⁹

The recent hearings on Senate Bill 344 have given Justice Kennedy an opportunity to restate his earlier objections. He noted when testifying against the Specter bill that televised oral arguments would change the collegial dynamic between the Court and counsel.³⁰ And as no other member of the Court has testified about the issue recently, Justice Kennedy appears to speak for a majority of the Court at this time.

IV. STATE SUPREME COURTS

A. The State Experience in General

So what has been the experience in those state supreme courts that have taken the lead and now provide video of their oral arguments for public consumption? At this writing, twenty-one state supreme courts make video of their oral arguments available, either using in-house production staffs and methods or working in conjunction with third parties, and most archive those recordings for future public access.³¹ This development is

29. H.R. Appropriations Comm., Trans., Treas., Hous. & Urban Dev., the Jud., & Dist. of Columbia Subcomm., Hearings on FY2007 Budget Request, S. Ct. of the U.S., 109th Cong. (Apr. 4, 2006) (remarks of Anthony M. Kennedy, J., S. Ct. of the U.S.).

30. See e.g. Joan Biskupic, *Justice Pleads with Senate: No Cameras in High Court*, USA Today 8A (Feb. 15, 2007).

31. The states making live video available are Arizona, California, Georgia, Indiana, Florida, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana,

relatively new, but the trend definitely favors more states doing so, with four states primed and ready to begin in the immediate future.³² The public's response, according to those state supreme courts that provide these video broadcasts, borders on the exuberant. New Jersey³³ finds webcasting to be "very positive for the court" and to provide "[g]reat exposure to the workings of the court."³⁴ Florida pronounces the broadcasts "an unqualified success"³⁵; Minnesota terms the experience and the feedback "fantastic"³⁶; and Chief Justice George of the California Supreme Court says that its videos provide "the best P.R. you can imagine."³⁷

The primary motivation for state supreme courts to provide video of their oral arguments is to enhance public education about what appellate courts do. Part and parcel of this goal is the decision to increase public access to our appellate courtrooms, which Justice Ginsberg noted so appropriately when she discussed "long lines" outside the United States Supreme Court and spoke of "opening" that Court to the public.³⁸ Rather than a school class of twenty-five children attending oral argument in an appellate courtroom, thousands of children can with a broadcast or webcast see a single argument at the same time. The Director of Communications for the New Jersey Supreme Court makes the point simply and succinctly: The proceedings

Nebraska, New Hampshire, New Jersey, New York, Ohio, Texas, Vermont, Washington, and West Virginia. Iowa only archives videotapes for public access at a later time. Alaska and Connecticut make video available by delayed broadcast. This list is in a state of constant flux. Other states provide audio broadcasts only. Those states are Colorado, Idaho, Kansas, Missouri, North Dakota, South Dakota, Utah, and Wisconsin. Sixteen states do neither, or make audiotapes, CDs, DVDs, or videotapes available only upon request. Admin. Off. of the Courts, Ark. S. Ct., Unpublished Study (Jan.-June 2007).

32. Those states are Delaware, Illinois, Kentucky, and Connecticut. *Id.*

33. For ease, I will use the name of its state as a shorthand reference for each supreme court mentioned in this part of the discussion.

34. Telephone interview with Winnie Comfort, Dir., Off. of Comm., N.J. S. Ct. (Feb. 19, 2007) [hereinafter "Comfort Interview"].

35. Telephone interview with Craig Waters, Dir. of Info., Fla. S. Ct. (Mar. 28, 2007) [hereinafter "Waters Interview"].

36. Telephone interview between Tasha Taylor, Law Clerk, Robert L. Brown, J., Ark. S. Ct., and Kyle Christopherson, Commun. Specialist, Minn. J. Branch (Feb. 23, 2007).

37. Telephone interview with Ronald M. George, C.J., Cal. S. Ct. (Feb. 27, 2007).

38. *Cameras in the Court*, *supra* n. 19.

are “public and important,” she says, and because not everyone can be accommodated in the courtroom, “we air for all to see.”³⁹

Few cases in recent memory have illustrated this point as well, and captured the public’s imagination as completely, as did the oral argument before the Florida Supreme Court in the 2000 presidential balloting case of *Gore v. Harris* and, more recently, in the oral argument before the same court in the Terri Schiavo appeal.⁴⁰ In both cases, members of the public were riveted to their television screens by the arguments of counsel and questions by the justices, and were transfixed by the process. For many, the arguments provided a first, albeit brief, glimpse into the arcane world of appellate procedure. Both oral arguments were educational and each inspired respect for the judicial process, even while the issues involved in those cases divided the country.

B. Specific Examples: Florida, Indiana, Massachusetts, New Hampshire, and Ohio

Florida is a true innovator in this area. In 1997, the Florida Supreme Court made the decision to broadcast its oral arguments. The public television station in Tallahassee agreed then to do the videotaping and archiving,⁴¹ and the Florida legislature appropriated start-up funding of \$300,000.00 in the first year. The legislature has continued that funding—to the tune of some \$135,000.00 a year—ever since.⁴²

Today, the Florida Supreme Court’s courtroom has four robotic, broadcast-quality cameras recessed into its architecture. The feed is sent to the Florida State University television channel but also to the Florida Channel, the state’s version of C-Span, which reaches three million households. Any television station can downlink the live broadcasts free of charge, and many took advantage of this opportunity during both the

39. Comfort Interview, *supra* n. 34.

40. *Gore v. Harris*, 772 So. 2d 1243 (Fla. 2000); *Bush v. Schiavo*, 885 So. 2d 321 (Fla. 2004).

41. Waters Interview, *supra* n. 35 (referring to educational television station WFSU-TV).

42. Email message from Craig Waters, Dir. of Info., Fla. S. Ct., to Jack Garvey, Website Coord., Admin. Off. of the Courts, Ark. S. Ct. (Jan. 25, 2007) [hereinafter “Waters Email”].

Schiavo appeal and the 2000 presidential balloting case. In fact, one estimate was that the court's live broadcast of the arguments in the 2000 election case reached about fifty million Americans and an untold number of foreign viewers.⁴³

The Indiana Supreme Court, which first began webcasting oral arguments in 2001, has followed the Florida model with four remotely operated cameras in the courtroom. The initial set-up cost for the project was less than \$100,000.00, and today the court is looking forward to upgrading its system and offerings.⁴⁴ But Indiana has taken a quantum leap forward in its effort to educate the public about the judiciary. It has developed a "Courts in the Classroom" program, which has been a highly successful offshoot of its webcasts, making the supreme court an active participant in public education through the public schools' internet capability.⁴⁵ The Indiana Supreme Court has also partnered with the Indiana Department of Education, Purdue University, Indiana University, and various historical bureaus to aid in the program's production and dissemination. Creative ideas such as focusing on featured cases of interest, dramatic reenactments of famous cases, and lessons on the right to trial by jury and the like have increased public understanding of the role of the appellate courts, while the webcasts also enable the court to provide CLE programs for lawyers and judges. Archived oral arguments collected in a database are available to lawyers for legal research and to the public at large as well.⁴⁶

A relative newcomer to broadcasting oral arguments is the Supreme Judicial Court of Massachusetts, which began its live video broadcasts in 2005. Like Florida, Massachusetts also archives its videotapes for future review. A spokesperson for the court says the program has been "a great success," indicating that she frequently receives "positive comments from lawyers, the media, and students in particular."⁴⁷ The New Hampshire Supreme Court, using Massachusetts as a model but on a much

43. *Id.*

44. Elizabeth R. Osborn, *Courts in the Classroom: Indiana's Educational Outreach through the Web*, 27 *Just. Sys. J.* 286, 297-98 (2006).

45. *Id.* at 289.

46. *See generally id.*

47. Email message from Joan Kenney, Pub. Info. Off., S. Jud. Ct. of Mass., to Martha Patton, Admin. Asst. to Robert L. Brown, J., Ark. S. Ct. (Feb. 20, 2007).

smaller scale, began televising its oral arguments later in 2005,⁴⁸ and now makes audio recordings of oral arguments available on the Web.⁴⁹ The Ohio Supreme Court began a similar program in 2004, and tries to limit commercial and political use of the broadcasts.⁵⁰ Ohio also makes archived video of oral arguments and other programs held at the Court since the spring of 2004 available via links from its homepage.⁵¹

C. The Mechanics: Producing a Broadcast or a Webcast

The way in which the broadcasting and webcasting is accomplished varies from state to state. Several supreme courts, like those in Michigan, Washington, Florida, Ohio, and California,⁵² broadcast through state public television channels or government telecommunication agencies. Some supreme courts, like those in New Jersey, Massachusetts, and Florida, broadcast in partnership with a university.⁵³ New Hampshire has installed a camera at its own expense—the cost of doing so starting as low as \$5,000.00—and feed the video directly to its website.⁵⁴

The configuration of the cameras in the courtroom also runs the gamut. New Hampshire has installed one camera facing the court, while New Jersey has seven (one for each justice).⁵⁵

48. Telephone Interview between Tasha Taylor, Law Clerk to Robert L. Brown, J., Ark. S. Ct., and Laura Kiernan, Jud. Branch Commun. Dir., N.H. S. Ct. (Feb. 23, 2007) [hereinafter “Kiernan Interview”].

49. Supreme Court of New Hampshire, *Listen to Oral Arguments*, <http://www.nh.gov/judiciary/supreme/recordings/index.htm> (offering audio recordings of oral arguments dating from the summer of 2004) (accessed June 29, 2007).

50. Supreme Court of Ohio, *Terms of Use*, <http://www.sconet.state.oh.us/privacy/conditions.asp> (describing copyright, licensing, and site-access policies) (accessed June 29, 2007).

51. Supreme Court of Ohio, *The Supreme Court of Ohio*, http://www.sconet.state.oh.us/default_highres.asp (containing links to “archived video” and “other Court Programs”).

52. Only one of California’s three permanent courtrooms is set up to broadcast, and only selected cases are chosen for this purpose.

53. The New Jersey Supreme Court works with Rutgers University; the Supreme Judicial Court of Massachusetts works with Suffolk University; and the Florida Supreme Court works with Florida State University.

54. Kiernan Interview, *supra* n. 48.

55. Comfort Interview, *supra* n. 34.

Other courts, like Florida's and Indiana's, have four cameras.⁵⁶ Those courts with multiple cameras typically provide for a close-up of the justice or the attorney speaking. Court staff, or hired personnel, operate the joysticks for the camera work.

The manner of the video feed varies considerably. It may fall to the government channel or university to execute the feed for purposes of streaming the video to the internet or to other stations. Mississippi, for example, allows outside media to observe and tape arguments for broadcast only after giving the court notice and receiving its consent, and allows only one broadcast camera in the courtroom at a time.⁵⁷ Similarly, Ohio has required the media to form pooling agreements in order to limit the disruption likely to be caused by additional equipment in the courtroom should the Court's own video feed be unavailable or inadequate.⁵⁸ Other states, like Alaska and Iowa, delay their webcasts.⁵⁹

Some state supreme courts, like Michigan's, provide that the Chief Justice may exclude coverage relating to sensitive subjects, such as the identities of sex-crime victims, police informants, and relocated witnesses.⁶⁰ Reaction shots of

56. Waters Email, *supra* n. 42; Email Message from Elizabeth R. Osborn, Asst., C.J., Ind. S. Ct., to Jack Garvey, Website Coord., Admin. Off. of the Courts, Ark. S. Ct. (Jan. 26, 2007).

57. Mississippi Supreme Court, *Rules for Electronic and Photographic Coverage of Judicial Proceedings*, <http://www.mssc.state.ms.us/rules/RuleContents.asp?IDnum=41> (accessed June 27, 2007).

58. Supreme Court of Ohio, *Guidelines for News Organizations Broadcasting, Televising, Recording and Photographing Sessions of Court*, http://www.sconet.state.oh.us/Communications_Office/MediaRequestInfo/default.asp (describing situations in which, and terms upon which, outside cameras and other recording equipment may be permitted); see also State of Connecticut, Judicial Branch, *Protocol for Broadcasting, Televising, Recording, or Photographing Supreme Court Oral Arguments*, http://www.jud.ct.gov/external/supapp/sup_film.html (suggesting that Connecticut Supreme Court does not itself record oral arguments, and requiring media outlets to form pooling arrangements if more than one asks to record, broadcast, or photograph a particular argument) (accessed June 27, 2007).

59. See KTOO-TV, *Gavel-to-Gavel Alaska*, <http://www.ktoo.org/gavel/court.cfm> (indicating, among other things, that Alaska Supreme Court arguments are broadcast in prime time) (accessed June 27, 2007); Iowa Judicial Branch, Iowa Supreme Court, *Oral Argument Video*, http://www.judicial.state.ia.us/Supreme_Court/Oral_Argument_Video/ (accessed July 18, 2007).

60. Admin. Order 1989-1, Mich. S. Ct. at 2(b), <http://courts.michigan.gov/supreme/court/Press/mediainfo.pdf> (accessed July 19, 2007; copy on file with Journal of Appellate Practice and Process).

audience members designed to sensationalize the issues before the court are universally prohibited.⁶¹ And any movement of equipment or personnel that might cause a distraction during oral argument is *verboten*.

D. The Risks

Although most state courts that broadcast or webcast their arguments have had positive experiences, several concerns remain. First and foremost is the impact of cameras in the courtroom and the threat that justices or attorneys might have a tendency to play to the cameras, or, at the very least, to be unsettled by their presence. Despite this concern, no state that currently provides video of its oral arguments cites grandstanding as a problem, and some court administrators, like the New Jersey communications director, have specifically concluded that televising has had no negative effect.⁶² But there are exceptions. An attorney appearing before the Ohio Supreme Court made reference, for example, to an argument “for your viewers at home.”⁶³ He was promptly admonished by the chief justice.⁶⁴

Unfavorable film clips that can be taken out of context by the media or (in those states in which appellate judges are elected) by political opponents is a second oft-stated worry about videotaping.⁶⁵ The fear that a justice’s political opponents might make use of unflattering clips, however, does not appear to be borne out in reality. Nevertheless, legislation is pending in Texas at the time of this writing to make political use of audio or video tapes of oral arguments a misdemeanor.⁶⁶

61. *E.g.* Email message from Mike Bay, V.P. for Programming, Wash. State Pub. Aff. Network, to Jennifer Flinn, Law Clerk to Robert L. Brown, J., Ark. S. Ct. (Oct. 24, 2006).

62. Comfort Interview, *supra* n. 32.

63. Telephone interview with Chris Darcy, Public Info. Off., Ohio S. Ct. (Feb. 26, 2007) [hereinafter “Darcy Interview”].

64. *Id.*

65. States that elect their appellate court justices in some form—either in traditional political campaigns or in some variation of retention elections following merit selection—total thirty-nine. See National Center for State Courts, Conference of Chief Justices, *Declaration: Judicial Elections Are Different from Other Elections* (Feb. 7, 2007), <http://ccj.nesc.dni.us/JudicialSelectionResolutions/DeclarationJudicialElections.html> (accessed July 18, 2007).

66. Tex. Sen. 1385, 80th Reg. Sess. (Mar. 6, 2007).

Examples of adverse political use occurring as a direct result of videotaping oral arguments have not surfaced in my research.⁶⁷ In New Jersey, media reports about the Supreme Court may on occasion be unfavorable because of disagreement with an opinion, but this could happen “with or without recording.”⁶⁸ And in Florida, archived oral arguments on videotape are regarded as providing a check against the possibility that a justice will be misquoted,⁶⁹ while attorneys appearing before the Florida Supreme Court tend now to be “far more professional because they know they are being watched by their bosses and clients.”⁷⁰

Another potential problem that has surfaced recently is the open microphone. According to Judge Raker of Maryland’s highest court, comments by judges between oral arguments, though largely inaudible, were on one occasion picked up by the court’s sound system. Trial judges watching the broadcast wrote to the court, urging its members to be more careful.⁷¹

V. CONCLUSION

Most state supreme courts that now broadcast or webcast video of oral arguments entered the game within the past ten years. Several supreme courts—those in New Jersey, Delaware, New Hampshire, Minnesota, Iowa, and Massachusetts—began their videotaping in the last two years. More state supreme courts undoubtedly will take up the challenge, particularly in light of the favorable responses from lawyers, schools, the media, and the public at large⁷² in the states where video is already available.

Indiana has been a bright beacon in using video of its Supreme Court’s proceedings as an outreach tool and a platform

67. In Ohio, political use has been attempted with a videotape of a swearing-in ceremony held in the courtroom, but even there, no incidents involving a videotape of an oral argument have been reported. Darcy Interview, *supra* n. 63.

68. Comfort Interview, *supra* n. 34.

69. Waters Interview, *supra* n. 35.

70. Email message from Craig Waters, Dir. of Info., Fla. S. Ct., to Jennifer Flinn, Law Clerk to Robert L. Brown, J., Ark. S. Ct. (Feb. 21, 2007).

71. Conversation with Irma S. Raker, J., Maryland Ct. of App. (Mar. 29, 2007).

72. Unhappily, while I champion the webcasting of oral arguments before the Arkansas Supreme Court, the matter is only in the early discussion stage at my court.

for enhanced public education about the judiciary. At a time when courts are criticized as insular and unnecessarily mysterious, Indiana and other state supreme courts have opened up the appellate process for students and the public by using technology and innovation.

In contrast, the United States Supreme Court's disinclination to provide video of its oral arguments by either broadcasting or webcasting them thwarts public understanding of a vital branch of our national government. While Senator Specter's bill to *order* the court to broadcast its oral arguments is clearly misguided, and probably unconstitutional, the Court should begin to explore how best to release video of its oral arguments.⁷³ Access to videos of those important proceedings is long overdue, and the nation's highest court should not continue to lag behind the state supreme courts in this significant area of technological change.

73. An interesting series of papers addressing the constitutionality of the Specter bill and related matters can be found at First Impressions, the online companion to the Michigan Law Review (available at <http://www.michiganlawreview.org/index-fi.htm>) (accessed Jul. 6, 2007; copy of index page on file with Journal of Appellate Practice and Process).

