SOME REFLECTIONS ON CAMERAS IN THE APPELLATE COURTROOM

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I. INTRODUCTION

In the last issue of the Journal of Appellate Practice and Process, Justice Robert Brown of the Supreme Court of Arkansas discussed the various ways in which state high courts around the country are beginning to embrace technology to record and to broadcast their oral arguments.[1] I plan to pick up where Justice Brown left off, by discussing my personal experience with cameras in the appellate courtroom as an active Circuit Judge on the United States Court of Appeals for the Ninth Circuit. In the course of this article, I hope to articulate what I will call a cautious approach to the recording and broadcasting of appellate arguments. In adopting and articulating such an approach, I hope to explore not only the positive consequences that such broadcasting efforts can have, but also the extent to which the oft-expressed concerns raised about such broadcasting efforts ought to be considered in any given case. And, although my experience with the videotaping of oral arguments has generally been positive, I hope to show that such a cautious approach is preferable in that it recognizes the integrity and independence of each court to move forward

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1. Robert L. Brown, *Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts*, 9 J. App. Prac. & Process 1 (2007).

with technological experimentation on a case-by-case basis as its own members see fit.

II. MY EXPERIENCE AT THE NINTH CIRCUIT

The United States Court of Appeals for the Ninth Circuit has been at the forefront of a movement expanding technological access to federal appellate courtrooms. Our court currently provides live streaming audio on our internal website and additionally makes audio playback of all oral arguments available to the public through our external website the day after the hearing. Further, as I noted in my testimony before the Senate Judiciary Committee, all oral arguments (except in Anchorage, Alaska and Honolulu, Hawaii) are recorded on the court's internal videotaping system for the court's own records.[2] In most of our courtrooms, the cameras are so tiny and unobtrusive as not to be noticeable. In Portland, Oregon, where I have chambers in the Pioneer Courthouse, the camera is hidden behind a grate in the courtroom. This allows, among other things, a live feed to be broadcast into our attorney waiting room.

In addition to the audio recording and internal video recording, the Ninth Circuit allows media organizations to request camera access to our appellate arguments. To gain such access, a member of the media need only fill out a simple form requesting very basic information, including the name of the requesting organization, the case in which the request is being made, and the intent of the media organization (i.e., whether it will be broadcast live or taped for later broadcast).[3] The Clerk of the Court will then transmit the request to the panel, which can grant or deny the request by majority vote of the judges assigned to the case. If the request is granted, the Ninth Circuit requires media representatives to obey modest guidelines which request proper attire, ban the use of flash photography or other

2. Senate Testimony, supra n. *, at 112.

3. *See* U.S. Ct. of App. for the 9th Cir., *Guidelines for Photographing, Recording, and Broadcasting in the Courtroom*, http://www.ce9.uscourts.gov/media/photography_rules.html?OpenDocument (providing access, in section (1)(b), to required form and describing acceptable practices) (accessed Feb. 4, 2008; copy on file with Journal of Appellate Practice and Process).

potentially distracting filming, prohibit the broadcast of any audio conversations between clients and attorneys, and limit the total number of cameras that can be present for any single oral argument.[4]

In my own experience, requests for camera access are more often than not granted. For instance, as I noted in my testimony before the Senate Judiciary Committee, from the time my service began on the Ninth Circuit in 1986 until the end of 2005, I personally ruled, with fellow panel members, on forty-four requests for camera access. Of those forty-four instances, the panel voted to grant access in thirty-five cases, or roughly eighty percent of the time.[5] These numbers are not anomalous across our circuit. Since June of 1991, the Ninth Circuit has received 225 requests for camera access to our courtrooms. In eight of those cases, either because the case was removed from the oral argument calendar or because the request was withdrawn, we were absolved from making a determination on whether to grant or deny access. In the remaining 217 cases, however, the request for access was granted by the panel members in 144 cases. That means that across our circuit, since 1991, we granted access in two thirds of the cases in which such access was requested![6]

And lest you think that camera requests are limited to high-profile cases, let me discuss just a few of the cases in which I have personally dealt with such requests. An en banc panel of our court on which I sat granted a request for camera access by C-SPAN in *Bins v. Exxon*,[7] which considered whether an employee benefits plan administrator has a duty to inform participants that it is considering a mere proposal for more generous retirement benefits under the Employee Retirement Income Security Act. Another case, *Keshishian v. Gonzales*,[8] is

4. *Id.* at § (3)(a)-(f).

5. Senate Testimony, *supra* n. *, at 113.

6. A recent concrete example of our circuit's practice may have been beamed into your home on C-SPAN, which was granted camera access to one of our San Francisco courtrooms in August 2007 to broadcast oral arguments in two high-profile cases, *Hepting v. AT&T*, 508 F.3d 898 (9th Cir. 2007) (severing cases), and *Al-Haramain Islamic Found., Inc. v. Bush*, 507 F.3d. 1190 (9th Cir. 2007), both of which involved the federal government's assertion of the state secrets privilege in litigation involving claims alleging widespread domestic surveillance.

7. 220 F.3d 1042 (9th Cir. 2000).

8. 201 Fed. Appx. 445 (9th Cir. 2006).

illustrative of many of the cases that increasingly make up our everyday workload on the Ninth Circuit. It presented the question of whether an Immigration Judge's adverse credibility finding in an asylum proceeding was supported by substantial evidence. Hardly an unimportant legal issue, but also not the type of television likely to overtake *CSI* in the weekly ratings. Nonetheless, the three-judge *Keshishian* panel granted the request of C-SPAN to videotape the proceedings.

Of course, I have also served on panels that granted camera access in high-profile cases. Perhaps the most well known revolved around the en banc rehearing in *Southwest Voter Registration Education Project v. Shelley*,[9] a case presenting the question of whether the California recall election of Governor Gray Davis should be enjoined as a violation of the Fourteenth Amendment because of the use of punch-card balloting machines. In other high-profile cases, however, my fellow panel members and I have not allowed camera access in the courtroom. One such example is *Compassion in Dying v. State of Washington*, where the panel grappled with the question of whether a state statute criminalizing the promotion of suicide violated the Fourteenth Amendment.[10] This broad range of experience provides me with some context in which to evaluate the arguments in favor of, and against, cameras in the appellate courtroom.

III. CONSIDERING THE QUESTIONS RAISED BY CAMERAS IN THE APPELLATE COURTROOM

A. Potential Drawbacks

I begin by pointing out the obvious: The willingness of many members of my circuit to allow camera access to the appellate courtroom, as documented in our overall statistics, does not mean that we are indifferent to the concerns raised by

9. 344 F.3d 914 (9th Cir. 2003).

10. The original three-judge panel opinion in *Compassion in Dying* is published at 49 F.3d 586 (9th Cir. 1995). That opinion was vacated and the case reheard en banc. The opinion on rehearing en banc is published at 79 F.3d 790 (9th Cir. 1996). That opinion was subsequently reversed by the Supreme Court in the case reported as *Wash. v. Glucksberg*, 521 U.S. 702 (1997).

the presence of cameras in the courtroom. In particular, I am mindful of the concern that television cameras may increase the possibility of grandstanding by appellate lawyers or (dare I say it) judges themselves. My personal experience, fortunately, has been that as a general rule my colleagues and practitioners have acted with the civility and decorum appropriate to a federal appellate courtroom, by and large resisting the temptation to play to the television audience. That observation does not mean, however, that this is a concern which should not be part of the calculus in deciding whether to grant media access in a particular case.

Another possible criticism leveled against allowing camera access to appellate courtrooms is that such access might encourage politicization of the decision process. My intuition, as well as my experience, suggests that this concern may be overstated. First and foremost, my colleagues and I on the federal bench, as Article III judges, have the benefit of life tenure—subject of course to a good behavior requirement—which serves to insulate us from political pressures and public disapproval.[11] Add to that the fact that a normal day in the appellate courtroom rarely includes cases on the order of *Hepting* or *Al-Haramain*, and it becomes clear that our docket is hardly the stuff that provides the storylines for *Law & Order*. While every case is interesting and important in its own right, especially to the parties, most cases are unlikely to engender a great deal of emotion from spectators or from the public at large.

In addition to the rather mundane content of our daily docket, we on the appellate bench have the benefit of time and reflection. Whereas trial courts are often fast paced, thus requiring immediate decisions and rulings from thoughtful district judges, an appellate argument is typically followed by several months of deliberation and opinion-writing before any final disposition is reached. Even if the public is riveted by oral arguments, unlikely in itself, the measured pace of the appellate decisionmaking process may help alleviate public pressure even further. This is especially true in the so-called controversial or

11. This fact may distinguish in part the federal appellate courts from some state appellate courts, on which the judges are elected and thus in theory are not as isolated from political pressures and public disapproval.

difficult cases, which one can safely presume will take a longer time from argument to decision.

Finally, another possible criticism is that the broadcasting of oral arguments in controversial cases (however one defines such cases) may present an additional security risk to appellate judges. Although I recognize that there is such a potential, appellate judges, no less than district judges or legislators, are public officials who must stand behind their decisions. I think a better overall response to security concerns than banning media access to appellate courtrooms is to provide a more comprehensive approach to judicial security, an issue that has received considerable public attention following a number of tragic incidents.[12]

B. Potential Benefits

These potential drawbacks must be weighed in any individual case against the overall positive benefits that might be gained by the recording and broadcasting of appellate arguments. In particular, I think the broadcasting of oral arguments may help educate the public about the work that we do as appellate judges. I suspect that many Americans may not understand the multi-tiered review that is provided by our judicial system, and I believe that it would improve confidence in the judiciary as a whole if ordinary citizens were able to see appellate judges performing their daily job. My sense is that by watching oral arguments, Americans, by and large, will come away with a more positive outlook on our court system and on the great protections that they are afforded.

In addition, the televising of oral arguments may increase the accuracy of reporting on the cases that we hear, thereby helping—I hope—to de-politicize the perception of the federal judiciary. As I noted in my testimony before the Senate Judiciary Committee,

> [w]hen barred from the courtroom, the news media is able only to report on court *holdings*, rather than *process*. This propagates the unfortunate view that appellate courts are

12. *See e.g.* Court Security Improvement Act of 2007, Sen. 378, 110th Cong. (Jan. 24, 2007) & H.R. 660, 110th Cong. (Jan. 24, 2007).

> results-oriented bodies, rather than thoughtful, deliberative error-correcting panels engaged in technical analysis and the application of legal reasoning.[13]

For instance, in the case involving the California gubernatorial recall election, our limited en banc court of eleven judges, appointed by various Presidents over the years, was ultimately unanimous in deciding that the election should not be enjoined.[14] The televising of oral arguments in that case may have helped to inform the public and the news media that these eleven judges were not partisan advocates, but were non-political actors attempting to reach the proper legal resolution to a difficult case in a very brief period of time. In short, putting the entire process out may have actually de-politicized the proceedings by allowing the public to make its own informed judgments, rather than having its experience of the case filtered through some other medium.

Finally, I think there is a general benefit to showing America that our courts are open and our proceedings are not secretive. The appearance of impropriety or bias is often best counter-acted by allowing the public to witness proceedings first-hand. And while for obvious reasons there will be much of our deliberative process that the average citizen will never see, the broadcasting of oral arguments might go a long way towards convincing parties and bystanders alike that appellate judges are competent, careful, and well-intentioned protectors of the ideals of an independent judiciary.

IV. CONCLUSION

Of course, every court is unique and I would not presume to decide for any other appellate court (most of all, the Supreme Court of the United States) whether broadcast organizations should be allowed camera access to the courtroom. Moreover, I believe strongly that such decisions must be made not on the basis of any blanket rule, but instead should be considered on a

13. Senate Testimony, *supra* n. *, at 117 (emphasis in original).

14. *See Shelley*, 344 F.3d 914, 920 (holding that "the district court did not abuse its discretion in concluding that plaintiffs will suffer no hardship that outweighs the stake of the State of California and its citizens in having this election go forward as planned and as required by the California Constitution").

case-by-case basis, with a thoughtful and complete inquiry into the particular circumstances presented. It may be in some cases that security concerns are more prevalent, or that the potential for grandstanding is more real. A case-by-case inquiry provides due allowance for such variations.

Notwithstanding these preliminary cautions, my own experience on the appellate bench with cameras in the courtroom has been overwhelmingly positive. In my view, at least at the intermediate federal appellate level, the concerns over the broadcasting of oral arguments are minor, while the corresponding potential benefits are compelling. And while it is important to recognize that not all courts are alike, and that each court must decide for itself how much access to allow and at what pace, I am greatly pleased by the increased willingness on the part of other courts, as documented by Justice Brown, to move in a more open direction.