

# GEE WHIZ, THE SKY IS FALLING!

*The Honorable Boyce F. Martin, Jr.\* †*

I am reminded of Chicken Little's famous mantra as I listen to some Supreme Court Justices' reactions to the prospect of televising oral arguments. Their fears—such as Justice Kennedy's warning that allowing cameras in the courtroom may change the Court's dynamics—are, in my opinion, overblown. And some comments, most notably Justice Souter's famous exclamation in a 1996 House subcommittee hearing that “the day you see a camera come into our courtroom, it's going to roll over my dead body,” make it sound as if the Justices have forgotten that our nation's court system belongs to the public, not merely the nine Justices who sit atop it. I write this essay in order to give my own perspective. Having served as a judge on the Sixth Circuit Court of Appeals for nearly twenty-eight years, I believe that I am in a unique position to understand the concerns raised by televising oral arguments. I can make this guarantee—televising the Supreme Court's oral arguments will not produce the disastrous results predicted by some frightened Justices; rather, it will yield positive results. Most notably, it will increase the public's knowledge of the appellate process.

Recent studies have revealed disturbing data about our country's understanding of how its government works. A survey of 1213 adults conducted by Zogby International last year showed that only 42% could name the three branches of the federal government. Moreover, while 77% of those surveyed could identify two of Snow White's seven dwarfs, only 24% could name two current Supreme Court Justices. Recognizing this discrepancy, I am baffled that we have not done more to exploit visual media as a way of educating the public about our system of government. We are a visual society. Americans, and particularly young Americans, turn to television and the Internet as their main sources of news. I believe that the importance of increasing public awareness trumps many of the concerns expressed by the Justices when they consider allowing cameras in the Court.

One of these concerns, as Justice Kennedy has recognized, is the “soundbite” problem. He believes that televising oral arguments will give the Justices the “insidious temptation” to speak in short, catchy soundbites that can be easily relayed to a general audience—perhaps this is because most television channels, save for a few such as C-SPAN, will not devote precious airtime to televising an oral argument in its entirety. While Justice Kennedy's fear of grandstanding is understandable, I believe it is exaggerated.

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Although the production of soundbites might be an adverse consequence of televising arguments, this problem is not terribly different than the problems that exist under our current practices. Reporters already attend oral arguments, so any Justice who truly wants to create a stir with a catchy soundbite already has the means by which to do so. And can't it be said that appellate judges' *written* opinions yield a soundbite problem of equal magnitude? To speak from personal experience, I do not believe that the press has ever printed a full copy of one of my opinions. Indeed, I am lucky to get an entire paragraph printed. Not surprisingly, the parts of my opinions that do get quoted are never the mundane details. Standards of review and complex procedural postures are not the stuff that keeps the media in business. Quite to the contrary, the press focuses on the most controversial or entertaining parts of my opinions, even if those parts are relatively unimportant to the legal issues in dispute. The advent of blogs has dramatically increased the quantity of these—shall we call them—“wordbites” dispensed to the public. It is true that video broadcasts of Supreme Court oral arguments will make it easier for the media to deliver the most interesting tidbits of legal proceedings to the public, as written opinions and audio recordings clearly have their limitations. However, the remote chance that a Supreme Court Justice will become the appellate version of Judge Judy is significantly outweighed by the very real possibility that even snippets of the Justices in action will help improve public awareness of how the Court operates.

I find it rather bewildering that some of the same Justices who have serious reservations about placing cameras in the courtroom have also thrust themselves into the public spotlight through their lectures, debates, and books. While in some instances the Justices have refused to discuss certain areas of law, generally their views and individual approaches to resolving legal issues are not exactly shrouded in secrecy. We are not usually privy to this information because we have actually read the Justices' books cover-to-cover or attended each of their lectures. Rather, on a nearly daily basis, we read articles and blogs summarizing the Justices' writings or watch video footage of the Justices, so that by the time the Justices' views reach us, they have been reduced to easy-to-swallow bites. Given that we already have so many snippets of the Justices' attitudes and reasonings from these extracurricular activities, I am not persuaded that it is a bad idea to receive so-called soundbites from the Justices while they are performing their duties for the country.

I trust that even with cameras aimed at them, the Justices will maintain the same degree of decorum and decency. I do not deny there is a risk that some lawyers arguing before the Court will use their time to pander to public opinion, perhaps jeopardizing their clients' interests or making a mockery of the Court. But this is quite unlikely to become a big problem. In the Sixth Circuit, without a television camera in sight, my colleagues and I have our fair share of grandstanding lawyers. When lawyers' arguments exceed the bounds of propriety, we simply rein them in. Likewise, the Justices of the Supreme Court (as I am sure they have done many times before) can do the same. Even if cameras do encourage some lawyers to showboat, other

lawyers will surely take advantage of the opportunity to study oral arguments in order to improve their own appellate advocacy, which will in turn serve the interests of their clients.

One upshot of allowing cameras in the Supreme Court, which will perhaps allay some of Justice Kennedy's fears, is the fact that the Internet—not television—will likely be the primary medium over which Supreme Court oral arguments will be broadcast. Unlike television, the Internet will allow viewers to watch entire oral arguments anytime and anywhere, thus minimizing the number of people who receive their "Supreme Court TV" solely in soundbite format.

The most serious concern posed by placing cameras in the Supreme Court is the danger that the due process rights of the parties—particularly criminal defendants—could be undermined. This is easily preventable. In fact, the legislation introduced in January by Senator Arlen Specter contains an explicit exception to televising oral arguments where a majority of the Justices finds 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." Such a provision creates a win-win situation: the public has access to proceedings before the Supreme Court, but consideration of the parties' interests remains paramount.

Of course, judges in most states have the option of allowing trial court proceedings to be televised. The televising of a trial is undeniably far more dangerous to a party's rights than the televising of an appellate argument over discrete issues of law. Such public portrayal can often affect the behavior of the trial's key players, ultimately influencing the verdict. And even if a mistrial was declared due to this influence (or any other trial errors), the damage already may have been done: after all, following a highly publicized trial where the proceedings were on display for a nation to witness, the parties would be hard-pressed to find unbiased jurors in *any* venue. In addition to affecting the substance of the proceedings, televising a highly publicized trial could also threaten the safety of witnesses and jurors. Yet, despite the dangers inherent in televising trials, we have long recognized the importance of transparent trials. Why then are we reluctant to televise those proceedings that adjudicate the issues of law that may ultimately determine the outcome of future trials?

I, like many Americans, have been a spectator to some of the more unfortunate instances of televised trials. Most memorable is the infamous trial of O.J. Simpson, which was nothing short of an embarrassment. And recently we have found ourselves baffled by the carnivalesque antics of Florida Circuit Judge Larry Seidlin, whose handling of the Anna Nicole Smith case was replete with sobbing, jokes, and confessions of his personal feelings about the case. At least we can take comfort in knowing that in states like California and Florida, judges are elected. Considering the fact that people rarely read judicial opinions, I can think of no better way of informing the public than to allow them to observe how their elected jurists run their courtrooms. Of course, federal judges have the benefit of lifetime tenure, which might eliminate some incentive to act with justice and fairness

in the courtroom. But the elected officials who nominate and confirm judges are still accountable to the public, and many voters consider the issue of judicial appointments before casting their ballots. If placing cameras in courtrooms reveals flaws in our system or causes judges to behave differently, then so be it. The costs of televising oral arguments are surely outweighed by the reward of a more well-informed public. Nationwide exposure of these flaws will do more to hasten their elimination than will continuing with the status quo.

Finally, another fear expressed by some is that televising oral arguments will jeopardize the Justices' safety. Such an argument is untenable. A quick Google search of my name yields nearly everything I have ever done in my judicial career, complete with photographs. The same can clearly be said for each of the nine Supreme Court Justices. Thus, while safety is a legitimate concern, the televising of oral arguments presents no new security risks.

In sum, I believe that allowing cameras into the Supreme Court will have an overall positive effect. The public's knowledge of the appellate process and awareness of the most important legal issues facing our nation will surely increase. As I need not remind our Justices, our court system was not created for their benefit. The proceedings over which they preside are intended to resolve the legal disputes of the parties before them and to interpret the law for all of us. Just as the public has a right to know what its Congress and President are up to, it has a right to know what happens at the Supreme Court. As the recent slew of cases involving executive powers and Congress's authority under the Commerce Clause have illustrated, the high Court's business is just as important as that of the other two branches. Televising the Justices' questions and comments on the bench will facilitate the public's understanding and appreciation of how the Supreme Court reaches decisions that are often deemed controversial (but perhaps are simply misunderstood). Our nation's highest court is open to the public, and theoretically anyone can get a firsthand glimpse of oral arguments, so long as he or she arrives in time to get seat. Yet given the technology we have at our disposal, it is disappointing that right now only those who have the honor of arguing before the Court, the privilege of being one of the select members of the press for whom a seat is reserved, or the fortitude to camp out on the courthouse steps in hopes of obtaining a seat not so reserved may view its proceedings.