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Cameras in the Courtroom

Should TV be allowed in federal courts?

Television cameras have been allowed in state courts for more than 30 years, but the Supreme Court and federal judiciary have been staunchly opposed to video coverage of trials or appeals. Media groups and others say that video coverage of courts helps educate the public about the legal process while strengthening public accountability over the judicial system. Some, but not all, criminal defense lawyers worry that televised trials can jeopardize defendants' rights. The most significant resistance to cameras in the courtroom comes from judges and some private lawyers who discount the claimed benefits and warn that cameras could invite grandstanding by lawyers or risk intimidating jurors and witnesses. The Supreme Court recently made audio tapes of arguments more readily available, but the justices show no sign of welcoming cameras into their hallowed courtroom in the foreseeable future.



Print and TV cameramen photograph former Ku Klux Klan leader Edgar Ray Killen during his 2005 trial in Mississippi for the murders of three civil rights workers in 1964. Mississippi began permitting audio and video coverage of trials in 2003.

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Cameras in the Courtroom

BY KENNETH JOST

THE ISSUES

For hard-core fans of "Law and Order" and other courtroom dramas, the live broadcast from inside a San Francisco courtroom was less than riveting. Still, the two-hour hearing televised by C-SPAN on Dec. 6 presented a rare opportunity to view a major federal court proceeding from afar.

During the hearing, lawyers traded arcane legal points over whether California should reinstate a ban on gay marriage, lifted a few months earlier. But what the session lacked in drama, it made up for in importance. It was not only the first federal gay-rights proceeding but also one of the few federal court proceedings to be broadcast on television nationwide.

Cameras are now commonplace in state courts, even during criminal trials, thanks in part to a 1981 U.S. Supreme Court ruling that cleared away constitutional obstacles. The rules on camera access vary from state to state, however, with significant limits on the practice in about 14 states and a complete ban in the District of Columbia. (*See chart, p. 28.*)¹

Federal courts, however, have generally stood steadfast against allowing either video or still cameras or microphones — sometimes called "extended coverage." The Federal Rules of Criminal Procedure, originally enacted by Congress, bar cameras or microphones in criminal trials or appeals. The U.S. Judicial Conference, the federal judiciary's policymaking arm, bars them in civil trials.

In the 1990s, the Judicial Conference rejected a recommendation by



Getty Images/Hartford Courant/Bettina Hansen

Dr. William Petit embraces his sister after jurors sentenced Steven Hayes to death on Nov. 8 for the murders of Petit's wife and two daughters in a home invasion. Cameras were barred from the New Haven, Conn., courtroom, but reporters were allowed to send short electronic messages — "tweets" — summarizing trial action. Cameras are now commonplace in state courts, but federal courts have generally opposed them, as has the Supreme Court.

the federal judiciary's research arm to permit camera coverage of appeals in civil cases. But it did allow the 13 federal appeals courts to permit cameras in individual cases if the two sides agree. Only two — the San Francisco-based Ninth Circuit, which encompasses nine Western states, and the New York-based Second Circuit, covering Connecticut, New York and Vermont — took up the idea.

Meanwhile, the Supreme Court shows no signs of allowing cameras or live audio coverage of proceedings, despite pressure from Congress and support from the court's newest justice, Elena Kagan. (*See box, p. 29.*) In September, the court began making audio tapes of all arguments available

on the court's website by the end of the week in which the arguments are held. Bruce Collins, C-SPAN's general counsel, calls the move "in one sense a step forward" but notes that it leaves radio and TV outlets with no access to the recordings on the day of the argument. (*See "At Issue," p. 41.*)

In the California gay-rights hearing last month, C-SPAN, which pioneered live gavel-to-gavel coverage of Congress in the 1970s, was one of many television outlets to request permission to broadcast the proceeding and the only one to broadcast it in its entirety nationwide. State court judges in several states had heard similar gay-marriage cases over the past decade, with many of the sessions televised or streamed live over the Internet.

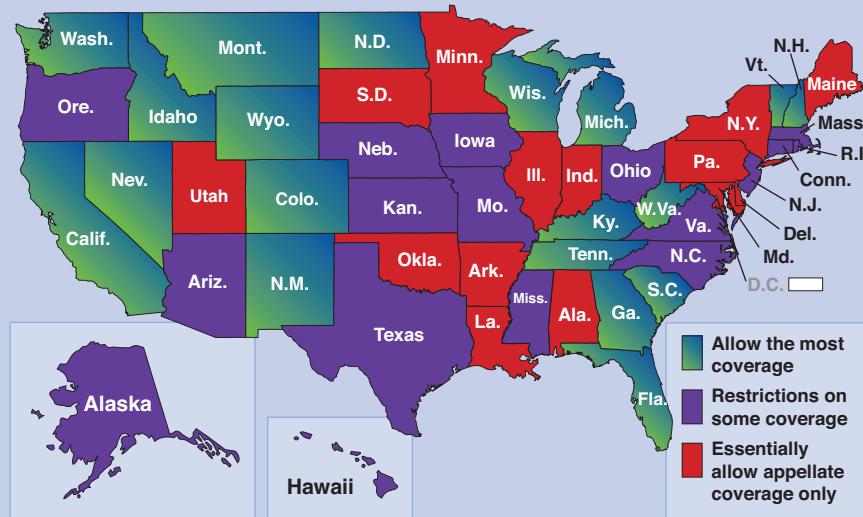
The California proceeding marked a pivotal point in the national debate over gay rights. A few months earlier, gay-marriage supporters had won a federal district court ruling striking down California's Proposition 8, a 2008 ballot measure barring marriage rights to same-sex couples. Now, the measure's sponsors were seeking reinstatement of the ban. Opposing lawyers in the case, *Perry v. Schwarzenegger*, argued the hotly contested issue of marriage rights for gays and lesbians in California and potentially all across the country. A broad ruling either way could set the stage for a Supreme Court decision with national implications.

With only a few hundred seats available for spectators at the James R. Browning Courthouse in San Francisco, however, few gay-marriage supporters or opponents could witness the arguments firsthand.

Two-Thirds of States Permit Cameras

More than one-third of the states generally permit cameras in the courtroom at both trial and appellate levels of criminal and civil trials, and another third have rules permitting camera coverage in many circumstances. The remaining 14 states either do not permit or have rules that effectively prevent camera coverage of trials. The District of Columbia is the only jurisdiction that prohibits cameras in either trial or appellate courts. Cameras are generally barred in both civil and criminal federal trials.

Courtroom Cameras in the States



Source: Radio Television Digital News Association, 2010, www.rtnda.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php

In San Francisco, Roberto Isaac Ordeñana, a spokesman for the San Francisco Lesbian Gay Bisexual Transgender (LGBT) Community Center, told The Associated Press he was pleased that the hearing had been broadcast so that “more people have access to the reality of countless lesbian, gay, bisexual and transgender people and their communities.” In San Diego, however, the Rev. Chris Clark, pastor of East Clairemont Southern Baptist Church, defended the marriage ban as he watched with other Prop 8 supporters. “Gay marriage is a fundamental redefinition of marriage,” Clark told the *San Diego Union Tribune*.²

Advocates of media access to court proceedings contend that courtroom cam-

eras have helped to educate people about the legal system and hold the judiciary accountable to the public. “There’s no better way to do reporting than to use the tools of the trade, including cameras and microphones, to allow somebody to have a virtual seat in the courtroom,” says Kathleen Kirby, general counsel for the Radio Television Digital News Association (RTDNA). *

Ronald Goldfarb, a lawyer who has written about the issue since the 1970s, says the need for camera coverage is increasing today because of the proliferation of online media. “As the number of media multiplies, the com-

mentary on cases becomes greater,” says Goldfarb, who also teaches at the University of Miami School of Law. “The fear of critics is that you’re only going to get snippets,” he says, “but unless you have TV that’s all you’re going to get.”

Courtroom-camera advocates are pushing, however, against strong, if below-the-surface, resistance that is motivated by judicial inertia and widespread revulsion to the most-watched case in the history of television: the 1995 murder trial of football hero-turned-actor O.J. Simpson. The trial, broadcast in its entirety by the cable network Court TV (now, truTV), gripped Americans’ attention for nearly a year, from jury selection in fall 1994 through nine months of testimony in 1995 and the largely unanticipated acquittal on Oct. 3, 1995.

In the aftermath, many critics blamed the length and seeming disorder of the trial on the blanket coverage not only by Court TV, but also by cable news channels and commercial broadcast networks. “Rather than renew trust in the nation’s system of justice — and in the American media,” New York University scholar Paul Thaler wrote two years later, “the Simpson story shattered the credibility of both.”³

Today, criminal defense lawyers continue to balk at camera coverage of trials unless both the prosecutor and defendant agree. “We think that the prosecutor and the defense lawyer are much more likely to know [about the potential impact of camera coverage] than the judge,” says Barbara Bergman, a professor at the University of New Mexico Law School representing the National Association of Criminal Defense Lawyers. “That’s why our recommendation is that if either the prosecutor or the defendant objects, that would end the discussion.”

Camera advocates are continuing to try to liberalize the rules in states with restrictions on the practice. Meanwhile, the federal judiciary is preparing to explore the possibility of permitting

* Formerly the Radio Television News Directors Association (RTNDA).

camera coverage of civil trials. In September, the Judicial Conference authorized a three-year pilot project permitting camera coverage of civil trials when the judge and lawyers on both sides agree. No further steps have been announced.

As camera-access advocates continue to press their case, here are some of the major questions being debated:

Has television coverage of state courts been a success?

The O.J. Simpson trial was not yet over before judges, lawyers and even some journalists began to turn against the idea of television in the courts. "Nothing like the O.J. Simpson case is going to happen in my courtroom," Sonoma County Superior Court Judge Lawrence Antolini declared as he announced his decision in mid-July 1995 to bar camera coverage in another high-profile murder case in California. Don Hewitt, the legendary executive producer of CBS's "60 Minutes," complained that TV coverage of the Simpson case had turned a murder trial into "an entertainment special."⁴

More than 15 years later, the Simpson trial remains Exhibit No. 1 in the critics' case against television in the courtroom. "What I remember is people being riveted to that case," says Carlos Williams, federal public defender in Mobile, Ala., and a former president of the National Association of Federal Defenders. "What that case represented was much more than what was going on in the courtroom. There's an additional factor that enters in when the cameras come in."

Then and since, supporters of cameras in the courtroom have argued that television has been unfairly blamed for the problems in the Simpson case or sensational trials of earlier days. "The camera is the antidote to the media circus," Court TV founder and legal journalist Steven Brill commented while the network was broadcasting the Simpson trial gavel to gavel.⁵

Most Justices Hesitant on Cameras

Chief Justice John G. Roberts Jr. said during his confirmation hearing in September 2005 that he had no "set view" on permitting camera coverage of the Supreme Court. Less than a year later, however, Roberts signaled the court was in no hurry to change the no-camera policy. Among other conservative justices, Antonin Scalia, Anthony M. Kennedy and Clarence Thomas have all strongly argued against TV coverage, but the court's newest members — liberals Sonia Sotomayor and Elena Kagan — favored TV coverage in their confirmation hearings.



Chief Justice John G. Roberts Jr.

"We're going to be very careful before we do anything that might have an adverse impact."

— Ninth Circuit judicial conference, July 13, 2006



Justice Antonin Scalia

"Not a chance, because we don't want to become entertainment."

— CNBC interview, Oct. 10, 2005



Justice Anthony M. Kennedy

"...[T]elevising our proceedings would change our collegial dynamic. . . ."

— House Appropriations subcommittee, March 8, 2007



Justice Clarence Thomas

"...[S]ecurity is on the foremost of all our minds now since 9/11. . . ."

— House Appropriations subcommittee, March 8, 2007



Justice Ruth Bader Ginsburg

"A decision of this issue . . . should be decided after really pretty serious research and study. . . ."

— American Bar Association panel, Nov. 10, 2005



Justice Stephen G. Breyer

"... [A]t the moment, I think it's quite uncertain what the answer is."

— Interview, C-SPAN, Dec. 4, 2005



Justice Samuel A. Alito Jr.

"I will keep an open mind despite the decision I took in the Third Circuit [in favor of permitting camera coverage]."

— Confirmation hearing, Jan. 11, 2006



Justice Sonia Sotomayor

"I have had positive experiences with cameras."

— Confirmation hearing, July 14, 2009



Justice Elena Kagan

"I think it would be a great thing for the institution, and more important, I think it would be a great thing for the American people."

— Confirmation hearing, June 29, 2010

Source: C-SPAN, "Cameras in the Court," www.c-span.org/The-Courts/Cameras-in-The-Court/.

CAMERAS IN THE COURTROOM

"It was easy to latch on to the circus in the O.J. trial and to place a large degree of blame on the fact that it was televised," RTDNA counsel Kirby says. "But in my opinion, O.J. would have been a circus no matter what. It was the failure of the judge to keep control of the trial participants and his courtroom that caused the circus, not the camera in the court televising the proceeding."

Among the early objections to cameras in the courtroom, one has become all but irrelevant. The bulky TV cameras of the past have given way to small video cameras, unobtrusively mounted in fixed locations and operated remotely. Even with the visual distractions removed, however, critics continue to voice concern that the presence of cameras affects the way judges, lawyers, litigants, witnesses and jurors behave.

Criminal defense lawyers have multiple concerns that the University of New Mexico's Bergman outlined for the Senate Judiciary Committee in 2005 when the panel was considering a bill to permit video coverage of federal trials with the judge's approval. Bergman cited fears that TV coverage of trials could discourage either the defendant or witnesses for either the prosecution or defense from testifying. She also said that TV coverage could pressure jurors to reach a verdict consistent with what they perceive as public sentiment about a case. Even judges might shape their decisions with an eye to public opinion, Bergman said.⁶

Prosecutors in state and local courts tend to be more supportive of TV coverage. "Overall, it's a good thing," says Joshua Marquis, a veteran district attorney in Oregon and longtime board member of the National District Attorneys Association. "It demystifies the courtroom."

Marquis, a former newspaper reporter, attributes opposition by criminal defense lawyers to the fact that the

vast majority of defendants are guilty. "Real-life courtrooms are so dramatically different from the fictional courtrooms that you see in movies or TV," he says. "And criminal defense lawyers don't want the public to see that."

Video coverage of state appellate courts is permitted under some circumstances in every state, even those with restrictive policies on cameras at trials. The practice appears to stir little controversy.

In California, for example, state Supreme Court hearings are routinely streamed live on a private, C-SPAN-like cable channel. A spokesman for the state court system says the effect has been "beneficial" in educating the public. "Citizens quickly see for themselves that cases are decided on concrete legal issues and not politics," says Philip Carrizosa, a spokesman for the state's Administrative Office of the Courts and a former newspaper reporter.

Coverage of criminal trials, however, continues to draw critical comments not only from judges and some lawyers but also from some media watchers. Critics complain that TV outlets' focus on sensational trials and use of dramatic excerpts give viewers a misleading picture of the judicial system. "When you've got the cameras in the courtroom, it tends to the dramatic, the sound bite, the crying witness and that sort of thing rather than the educational aspects of the trial that you tend to get when you don't have cameras," says C. Danielle Vinson, a political science professor at Furman University in Greenville, S.C., and co-author a decade ago of a study of local TV coverage of trials.⁷

Courtroom-camera advocates discount the fair-trial concerns raised by defense lawyers. "To date, there is no evidence that [TV coverage] impacted fair trials," says Kirby. As for the broader criticisms, they argue that TV simply lets the public see what actually goes on in the courtroom, for better or worse. "I'm all for getting informa-

tion before the people and letting them make up their minds," author Goldfarb says.

Should federal courts permit television coverage of trials, including criminal cases?

With Zacarias Moussaoui charged with conspiracy in the Sept. 11, 2001, attacks, C-SPAN and Court TV asked U.S. District Judge Leonie Brinkema in January 2002 to strike down the long-time ban on cameras in criminal trials and allow live, gavel-to-gavel coverage of the eventual trial of the man sometimes identified as "the 20th hijacker." Moussaoui's lawyer supported the plan, but government prosecutors strongly objected. They warned that witnesses might fear reprisals if their testimony were broadcast.

Brinkema, who sits in Alexandria, Va., outside Washington, refused the request. In a 13-page opinion, she upheld the constitutionality of the ban but said she would deny permission for cameras even if the prohibition were not on the books. Brinkema cited the risk of witness intimidation as well as the possibility that Moussaoui would try to turn a televised trial into a public spectacle.⁸

Nine years later, the ban on cameras and microphones in federal criminal trials remains on the books, and coverage of civil trials is also not permitted. But a committee of federal judges is drawing up plans for a pilot project of TV coverage of civil trials as authorized in September by the policymaking U.S. Judicial Conference, which is led by Chief Justice John G. Roberts Jr. and comprises a district court judge and an appellate judge from each of the 13 federal circuits.

The conference acted in September in response to growing interest in television coverage among a minority of federal judges. The action also followed a confrontation earlier in 2010 between the Supreme Court and the Ninth Circuit that thwarted a plan to

permit Internet streaming and later broadcast of the federal district court trial that led to the lifting of the California ban on gay marriage.

In an unsigned, 5-4 decision split along conservative-liberal lines, the high court ruled on Jan. 13 that Judge Vaughn Walker, chief judge of the federal district court in San Francisco, had not followed appropriate procedures in adopting a local rule change a week earlier to permit the TV coverage. The conservative justices said they were not taking a position on camera coverage. Liberal dissenters countered that video coverage would have benefited the public without adversely affecting the trial.⁹

The showdown helped drive the Judicial Conference to authorize the new pilot project, according to Judge John Tunheim, a federal district court judge in Minneapolis who headed the conference's committee on court administration and case management from 2005 through 2009. Tunheim's committee drew up possible rules for camera coverage if

Congress were to order the courts to permit the practice. At the same time, he testified in opposition to camera coverage when the House Judiciary Committee held a hearing on the issue in September 2007.¹⁰

In his testimony, Tunheim said camera coverage could encourage witnesses to "act more dramatically" and also could "produce intimidating effects" on litigants, witnesses and jurors. Today, however, Tunheim says he is not opposed to cameras in federal

courts. "I understand the concerns," Tunheim says. "I also understand the opportunity we have to show more of the public what goes on in the courtroom."

Appearing alongside Tunheim, Nancy Gertner, a federal district court judge in Boston, endorsed the pending bill, which would have given judges discretion to permit camera coverage under some limits. Gertner said cameras in the courts could be "an antidote" to what she described as "24/7 news coverage of proceedings and the anti-judge

tion on cameras, according to executive director Ronald Woods, a former federal prosecutor in Texas. "There are pros and cons," says Woods, now in private practice in Houston. The National Association of Federal Defenders also has no formal position, but Williams, the group's former president, is wary of the practice. "There are certainly dangers that one can foresee," he says.

The planned pilot project would leave the ban on cameras in criminal trials in place and allow cameras in civil cases only in courts where judges

were participating in the experiment and only in cases where both the plaintiff and defendant agreed. C-SPAN general counsel Collins says the restrictions mean very few trials will be open to cameras. "I don't think it's going to amount to much," he says.

RTDNA counsel Kirby says federal judges have resisted cameras in part to preserve their anonymity. But she also believes younger federal judges are more open to the idea. "Part of it is generational," Kirby says. "There are a large number of judges who are completely in favor of cameras in the courts."

Tunheim predicts the pilot project will help build support for allowing cameras. "As long as we manage this carefully, there's really nothing to be afraid of," Tunheim says. "Many state systems do this successfully, and there's no reason we can't do that too."

Should the Supreme Court permit live audio and video coverage?

Retired justice Sandra Day O'Connor, the first woman to serve on the Supreme Court, was back in the



The accuser in the 1991 rape trial of Kennedy family scion William Kennedy Smith testifies in a West Palm Beach courtroom during live television coverage, her face obscured to protect her identity. Smith was later acquitted.

AP Photo/Phil Sandlin

tirades one frequently sees in late-night programs."

In separate testimony, the Justice Department strongly opposed the legislation. The testimony, presented by then-U.S. Attorney John Richter of Oklahoma, said cameras would "adversely impact" witnesses, victims, jurors and others while contributing little to news coverage.

Despite the Justice Department's stand, the National Association of Former U.S. Attorneys has no posi-

Spectators Line Up Early to View High Court

"It was worth it to see first-hand what goes on in the court."

Mike Sacks knows what it takes to watch the Supreme Court in action: warm clothes, water, breakfast bars, a lawn chair — and patience.

That's what the former Georgetown law school student brought with him when he lined up hours before dawn some two dozen times from January through April 2010 to see and hear oral arguments before the nation's highest court.

Alone among the three branches of the federal government, the Supreme Court is never seen at work on television. And, in comparison to the capacious galleries overlooking the Senate and House of Representatives, the Supreme Court's courtroom has limited seating capacity, with no more than 250 seats available to the general public.

So would-be spectators have to line up early on the Supreme Court plaza, across the street from the U.S. Capitol, to see the justices in action. Sacks, then in his next-to-last semester at Georgetown University Law Center, decided to take advantage of his no-morning-classes schedule to try to be first in line for each of the argument sessions during the final four months of the Supreme Court's 2009-2010 term.¹

Typically, that meant showing up between 3 a.m. and 4 a.m., dressed in what Sacks calls "hobo gear" — thermal underwear, jeans, shirts, fleece jacket and hood. He fortified himself with water and breakfast bars and used a lawn chair to try to sleep.

In the most extreme instance, Sacks set up camp at 5:30 a.m. on Monday, March 1, to try to get the first spot for the argument in a critical gun rights case to be held at 10 a.m. the next day. Two others had already lined up before him.

As punishing as the schedule may seem, Sacks was far from alone in his early-morning vigils. The line begins to build once the subway starts running after 5 o'clock, he says, and is always 50 deep by 7 a.m. or so. Around then, the court's police officers begin handing out "place holders," small cards that guarantee admission for a full, hour-long argument. With place holder in hand, Sacks would then dash to his nearby apart-

courtroom last fall and liked what she saw. "It was absolutely incredible," O'Connor recalled during a Dec. 13 program at the John F. Kennedy Library in Boston. Three women on the bench: one on the far right, one toward the middle, one on the far left. "I just think that the image that Americans overall have of the court has to change a little bit when they look up there and see what I saw," O'Connor said.

Moderator Linda Greenhouse quickly noted that the sight was not as accessible as O'Connor suggested. "Not that many people actually get the chance to see" the Supreme Court in action, said Greenhouse, *The New York Times'* former correspondent at the court and now journalist in residence at Yale Law School in New Haven, Conn.¹¹

In fact, except for the working press, members of the Supreme Court bar and invited guests, all visitors to the

ment for a shower and change of clothes before returning around 9 o'clock for the 10 a.m. opening.

Out of the 250 seats, the court tries to reserve at least 50 for spectators to hear an entire argument, according to Kathy Arberg, director of the court's public information office. "It depends on the day," she says. Many of the people who line up early leave if they do not get one of the coveted place holders, according to Sacks. But visitors who wait it out can join the "three-minute" line and be ushered in and out of the courtroom for a brief look at the court in session.

Was the ordeal worth it? "Absolutely," says Sacks, who graduated in December and is now studying for the bar exam. "It was worth it to see firsthand what goes on in the court, particularly in a court where cameras are not allowed." Sacks also turned his experience into a blog, "First One at One First," referring to the Supreme Court's address: 1 First St., N.E. (<http://f11f.wordpress.com/>).

Sacks is similarly definite on the question of allowing cameras in the Supreme Court. "Absolutely," he says. He bats down the arguments on the other side one by one. "Lawyers already grandstand," he says. The lawyer who goes too far risks being put down — even humiliated — by the justices.

The justices grandstand as well, Sacks says. "They are already ready before a live audience." The risk of out-of-context sound bites on television is inconsequential, he says. "That's only a worry for people who have no faith in the public." And he scoffs at Justice Antonin Scalia's voiced concern that the court's sessions would be used for "entertainment."

"People attend the Supreme Court to watch the Supreme Court," he says. "It's a much better reality show than the reality shows we currently have on television."

— Kenneth Jost

¹ For a first-person account, see Mike Sacks, "By Dawn's Light," *ABA Journal*, Oct. 1, 2010, www.abajournal.com/magazine/article/by_dawns_light/.

Supreme Court face a time-consuming process in trying to see the justices in action. Would-be spectators typically line up hours in advance to claim one of the 250 seats available for the general public. At least 50 spectators are allowed to stay for an entire, hour-long argument, but others are ushered in for only a few minutes. (See sidebar, above.)

Camera-access advocates have been making their case over the past decade in large part by emphasizing

the public's limited access to the courtroom. "There is no reason why in the 21st century the American people should not be able to watch their democracy in action, and the Supreme Court should not be an exception," says Nan Aron, president of the liberal Alliance for Justice. The alliance was part of a 46-group coalition led by the American Civil Liberties Union

(ACLU) that urged the lame-duck Congress last year to pass legislation either requiring or calling on the Supreme Court to permit live TV coverage.

The pressure from Congress and outside groups has helped prompt the court to make audio recordings of arguments available sooner and more widely than in the past. But the justices have not allowed camera coverage of proceedings, whether live or delayed.

The three justices vocally opposed to cameras — Antonin Scalia, Anthony M. Kennedy and Clarence Thomas — warn that TV coverage could hurt collegiality on the court and endanger the justices' personal security. Scalia has also complained that TV coverage would reduce the Supreme Court to "entertainment."

Critics and skeptics of TV coverage of the court echo those concerns. "I do not see a good case for cameras in the courtroom and think it will inflict some real costs," says Edward Whelan, president of the Ethics and Public Policy Center, a conservative think tank in Washington, and a former Scalia law clerk. Jonathan Adler,

a conservative law professor at Case Western Reserve University in Cleveland, agrees, though with some ambivalence. "I understand what they're afraid of," says Adler. "Their fears may be completely overstated, but I understand them."

The media organizations and other advocacy groups in favor of camera access discount the fears that cameras would affect either the justices or the lawyers. In particular, they say fears of grandstanding by lawyers will not materialize. "Oral advocates are going to get up there and do their best, and so are the justices," says RTDNA counsel Kirby.

C-SPAN counsel Collins says the cable network's experience with coverage of other appellate courts shows that lawyers do not play to the cameras, as opponents fear. "They don't, and it's very simple why they don't," says Collins. "The only person who's going to determine the rights of their client are the judges. So they play to the judges. They do it respectfully and within the rule of law."

Whelan disagrees. "No one behaves exactly the same way when a camera is on him," he says. "It adds an addi-

tional element. It is not at all clear that it's a desirable element."

C-SPAN, supported by other media organizations, stepped up its requests for TV access to the court in advance of the two cases that resolved the Bush v. Gore presidential election contest in 2000. By letter, the late Chief Justice William H. Rehnquist responded that "a majority" of the justices remained opposed to TV cameras. But the court did take the then-unprecedented step of releasing audio tapes of arguments in the two

cases immediately after the conclusion of each session.

The court followed that procedure in a dozen or so cases over the next decade. The new practice, adopted at the start of the current term in October, makes the recordings of all arguments available, but only at the end of the week. "They wanted to get out of the business of making a case-by-case decision," Collins says.

Prospects for congressional legislation may be dim after the defeat of Pennsylvania Sen. Arlen Specter, the Republican-turned-Democrat who sponsored legislation calling for camera coverage and closely questioned Supreme Court nominees on the issue during confirmation hearings. In any event, it is unclear whether Congress has the power to require the court to let cameras in.

Collins says the court itself will have to change before cameras are allowed. "I think the court will be televised eventually, but it will be a result of generational change," he says. "There have to be enough justices who've had broad experience with video in their lives to be comfortable with it for them to open up" ■



Brothers Erik and Lyle Menendez confer during their 1993 trial in California for the shotgun killing of their parents. The brothers were retried and convicted after the jury deadlocked. The judge in the 1996 retrial did not permit TV coverage.

AFP/Getty Images/Kim Kulish

BACKGROUND

Trials of Centuries

Trials have been public proceedings and occasional media events in the United States ever since colonial times. The advent of modern technology — first the telegraph, then radio and television and now the Internet — allowed information about courtroom proceedings to be disseminated more widely and quickly. With each advance, public interest in trials increased, the rising interest reflecting the sensationalism of the case.

In the 20th century, cameras and microphones came to be blamed — fairly or not — for creating a “media circus” atmosphere at some major trials. The bar and judiciary responded with a ban on so-called “extended media coverage” for several decades.¹²

The unwritten English common law privilege of public trials was adopted by the American colonies and given constitutional status in the Bill of Rights, which guarantees in the Sixth Amendment a criminal defendant’s right to a public trial in federal court.

Even without mass media, trials sometimes attracted great public attention, as Goldfarb recounts in his book, *TV or Not TV*. The acquittal of New York City newspaper publisher John Peter Zenger in a celebrated press-freedom trial in 1735 produced a rousing outburst inside the courtroom and a roar of approval from the crowd outside on Wall Street. After independence, the treason trial of former U.S. Vice President Aaron Burr in Richmond, Va., in 1807 drew reporters from all over the country and throngs of spectators beyond the courtroom’s capacity to accommodate.

The invention of the telegraph in the 19th century allowed fast, nationwide coverage of celebrated trials.

Those that drew the greatest attention often involved illicit sex — notably, the alienation-of-affection suit brought in 1875 against the prominent preacher Henry Ward Beecher for an alleged affair with his best friend’s wife. The six-month trial in a Brooklyn court — one of the first to be referred to as “the trial of the century” — drew so many would-be spectators that tickets were black-marketed at \$5 apiece. The jury’s announcement that it could not reach a verdict produced bedlam in the courtroom.

The advent of radio and then television in the 20th century allowed the public truly instantaneous access to court proceedings beyond the courtroom. WGN, a Chicago radio station, is credited with the first live courtroom broadcast, the historic trial of high school teacher John Scopes in 1925 for violating a Tennessee ban on teaching evolution. The judge allowed placement of four microphones in the courtroom to permit coverage of what came to be called “The Monkey Trial.” Announcer Quinn Ryan provided occasional explanations of proceedings from inside the courtroom or longer commentary from an adjoining room. Sadly for historians, no recordings were made.¹³

Photographers were also gaining access to courtrooms to supplement print coverage of trials. In the most important case, the judge in the 1935 trial of Bruno Hauptmann for kidnapping the infant son of aviator Charles Lindbergh allowed photographers to take still pictures when the court was not in session. Newsreel cameramen were also allowed to station two sound cameras under the same restrictions. The rules were broken, but the breaches played no part in the confusion that reigned in the courtroom or the chaos outside.¹⁴

After Hauptmann’s conviction, however, the trial came to be viewed as a prime example of the adverse effects of publicity. Within two years, the Ameri-

can Bar Association (ABA) adopted an ethics rule, Canon 35, banning photographers or microphones in the courtroom because they detracted from “the essential dignity” of the proceedings. Nine years later, Congress in 1946 enacted Federal Rule of Criminal Procedure 53, banning photographic or broadcast coverage of criminal trials in federal courts.

The ABA’s rule — amended in 1952 specifically to encompass television in the ban — was adopted by many courts, but disregarded by some. An Oklahoma City case in 1953 was apparently the first to be covered by television; two years later, a murder trial in Waco, Texas, was the first murder case to be televised live. In 1956, the Colorado Supreme Court approved camera coverage statewide.

Despite those moves, a sharp controversy arose over the media’s conduct in the trial of Cleveland physician Samuel Sheppard in 1954 for the murder of his pregnant wife. The courtroom was filled with reporters and photographers, and the judge failed to control proceedings. More than a decade later, in 1966, the U.S. Supreme Court threw out Sheppard’s conviction, in part because of pretrial publicity and also because of the courtroom arrangements for the media. The justices cited in particular the “unprecedented” placement of a press table between the counsel table and jury box.¹⁵

A year earlier, the Supreme Court had dealt a broader blow to camera access in overturning the swindling conviction of Billie Sol Estes, a politically connected Texas financier. Photo, radio and television coverage of Estes’ 1962 trial had been allowed over his objection. By a 5-4 vote, the high court reversed the conviction — as in the later Sheppard case largely because of pretrial publicity. In the main opinion, however, Justice Tom C. Clark appeared to establish an absolute ban on camera coverage. In a partial concurrence,

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Chronology

Before 1950

Backlash after Lindbergh kidnapping trial leads to ban on cameras in courts.

1925

Tennessee trial of John Scopes for teaching evolution in a public high school draws live radio coverage.

1935

Limited photographic coverage is allowed in Lindbergh kidnapping trial; coverage later blamed for "circus atmosphere."

1937

American Bar Association (ABA) adopts Canon 35 to bar photographers, microphones from courtrooms; expanded in 1952 to include TV.

1946

Congress adopts rule to bar photographic coverage of criminal trials.

1950s-1960s

Some courts allow cameras, but Supreme Court rulings send strong signal against practice.

1953

First live television broadcast of a trial, in Oklahoma City.

1954

Dr. Samuel Sheppard is convicted in high-profile murder trial in Cleveland.

1956

Colorado Supreme Court adopts rule permitting camera coverage of courts with judge's approval.

1965

Supreme Court, reversing conviction of Texas financier Billie Sol Estes, stops just short of absolute ban of broadcast coverage of criminal trials.

1966

Supreme Court reverses murder conviction of Dr. Samuel Sheppard; blames publicity, courtroom arrangements for press.

1995

Nation engrossed by extensive live coverage of O.J. Simpson murder trial; acquittal sparks controversy, wide criticism of TV coverage; backlash finds judges less likely to grant camera access.

1970s-1980s

More states permit cameras in courts; Supreme Court gives grudging approval, but federal courts maintain ban.

1972

U.S. Judicial Conference adopts policy banning courtroom cameras, microphones in civil cases.

1978-1979

Florida Supreme Court initiates one-year statewide experiment of camera access to courtroom; makes rule permanent (April 12, 1979).

1981

U.S. Supreme Court, in Florida case, says states can allow coverage of criminal trials.

1982

ABA revises judicial ethics rules to allow cameras in courtroom.

1990s Televised trials become commonplace; federal courts reaffirm ban.

1991

U.S. Judicial Conference starts three-year pilot project for camera coverage in six district and two appeals courts (July 1). . . . Court TV debuts; draws viewers with coverage of William Kennedy Smith rape trial.

1994

U.S. Judicial Conference ends pilot project, maintains ban on cameras.

1996

Two federal appeals courts given Judicial Conference approval for TV coverage in civil cases.

2000-Present

Advocates of camera access see slow gains in states; Supreme Court maintains stance against cameras in courtroom.

2000

Supreme Court refuses TV coverage of Bush/Gore election case but agrees to same-day release of audio recordings of arguments; court follows similar practice in a dozen cases over next decade.

2005

Chief Justice-designate John G. Roberts Jr., in confirmation hearing, signals open mind on TV coverage of Supreme Court; backtracks in a speech less than a year later.

2010

Senate Judiciary Committee approves alternative bills to urge or require Supreme Court to allow TV cameras; third measure would allow cameras in federal trials, appeals (April 29). . . . U.S. Judicial Conference approves pilot project for video recording of some civil cases with approval of judge, parties (Sept. 15). . . . Supreme Court decides to release all audio recording of arguments by end of week but discontinues practice of same-day release in major cases (Sept. 28).

Tweeting and Blogging Get Mixed Reception in Courtrooms

"By shutting this down, you're really shutting down information."

Cameras and microphones were not allowed for the high-profile triple-murder trial of Steven Hayes in New Haven, Conn., last fall. But Superior Judge Jon Blue did allow reporters free rein to use more recent gadgetry — laptops, iPads and smartphones — to send out real-time accounts of the case from their courtroom seats.

Print and broadcast journalists alike turned to the micro-blogging service Twitter to update readers and viewers on testimony — and, not incidentally, to increase hits on their websites. Monthly hits for the *New Haven Register's* website were reported to have increased to 3.5 million during September from about 3 million the previous month.¹

Other judges, however, are less hospitable to the newest medium of instantaneous communication. In Baltimore, Circuit Judge Marcella Holland banned all posting to social sites from the courthouse in January 2010 after attorneys defending Mayor Sheila Dixon on corruption charges complained about tweeting by reporters. Holland's action helped lead to a statewide policy adopted on Dec. 29 requiring reporters and spectators alike to keep all electronic devices "off and inoperable" inside courtrooms unless the presiding judge has given "express permission" otherwise.²

The tweeting issue has moved to the fore in courtrooms around the country, both state and federal, as more and more people carry and depend on electronic devices that now come with cameras. The federal district court in Rhode Island adopt-

ed a policy in late December that bans blogging and tweeting. The state affiliate of the American Civil Liberties Union has opposed the ban.³

By contrast, the English judge in the bail hearing for WikiLeaks founder Julian Assange allowed courtroom tweeting during the Dec. 14 session. David Allen Green, a media lawyer in London, told The Associated Press that the ruling by District Judge Howard Riddle was the first to give explicit permission for a practice that reporters and others had engaged in surreptitiously for some time.⁴

The policies being adopted here and abroad apply not only to reporters but also to spectators and jurors. In Baltimore, judges were reportedly concerned that some spectators were using camera phones to take pictures of witnesses, including police informants. Jurors accustomed to Web surfing and status updating may need special admonitions against discussing or researching a case until a trial has ended.⁵

Federal judges who have clamped down on tweeting interpret the practice as falling within the established ban against "broadcasting" in federal courts. Tweeting advocates decry the attitude. "By shutting this down, you're really shutting down information," Ron Sylvester, a *Wichita (Kansas) Eagle* reporter and regular courtroom tweeter, told the *Baltimore Sun* last year.⁶

Journalists involved in coverage of the Hayes case were similarly enthusiastic about tweeting. "It has given us an insight into

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Justice John Marshall Harlan declined to go that far.

"The day may come," Harlan wrote, "when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."¹⁶

Trials of Television

Television became commonplace in courtrooms in the United States in the final decades of the 20th century. After tentative steps by some states, Florida tested the prevailing ban on cameras with a statewide experiment

allowing television in criminal trials. The Supreme Court's 1981 decision rejecting a constitutional challenge to the practice allowed other states to follow suit. A steady stream of trials and appeals open to TV coverage permitted the creation of the full-time cable channel Court TV in the 1990s. Even as televised trials became routine, however, the controversial murder trial of former football star O.J. Simpson hardened opposition to TV coverage among many judges and lawyers.

The ABA overhauled its judicial ethics rules into the Code of Judicial Conduct in 1972, preserving the ban on camera coverage as Canon 3A(7). Nevertheless, a few states, including Florida, began testing camera coverage of trials. Initially, Florida allowed

judges complete discretion whether to allow cameras. In response to a petition by television stations, however, the Florida Supreme Court in 1978 authorized a one-year pilot project under a rule establishing a presumptive right of access for cameras unless a judge specified reasons for refusing. After surveying judges, lawyers and others, the justices unanimously made the rule permanent on April 12, 1979. News organizations had to pool coverage, with only one still photographer allowed and TV cameras placed in fixed positions.¹⁷

Media groups hailed the move, but the Florida Bar Association warned the decision jeopardized defendants' right to a fair trial. Among the early trials with TV coverage was the murder case



a new way to reach our readers," Andrew Julien, a senior editor at *The Hartford Courant*, told *The New York Times*. *The Courant* assigned a columnist to tweet from the trial; another reporter provided regular coverage for the newspaper and its website while tweeting only occasionally.

Hayes was charged with killing three family members during a home invasion in Cheshire, Conn., in July 2007. Two of the victims — Jennifer Hawke-Petit, and her daughter, Michaela — were also raped. (A second daughter, Hayley, was the other victim.) Connecticut generally bars cameras in the courtroom except in a pilot project in Hartford and specifically bars cameras in sex-offense cases.

No broadcast outlets sought permission for cameras or microphones in the trial, which began in mid-September, but Blue ruled at the start that reporters could use electronic devices unless the practice became disruptive. The reporters took advantage of the decision to provide short, descriptive summaries — tweets are limited to 140 characters — as testimony proceeded.



Getty Images/Oli Scarff

For the first time in a British courtroom, reporters at a December bail hearing in London for WikiLeaks founder Julian Assange, above, were permitted to send live electronic updates, or "tweets."

Hayes was convicted on Oct. 5. Reporters tweeted the news instantly with the single word, "Guilty." The jury later sentenced Hayes to death for the killings; a co-defendant is scheduled to go on trial this spring.

— **Kenneth Jost**

¹ See William Glaberson, "A Grisly Murder Trial, in 140-Character Bits," *The New York Times*, Oct. 16, 2010, p. A14. Other background also drawn from article.

² The policy is posted on the Maryland court system's website: "NOTICE: Cell Phones, Other Electronic Devices, and Cameras in Court Facilities," Dec. 29, 2010, http://mdcourts.gov/reference/cell_phonenoice.html. For earlier coverage, see Tricia Bishop, "Tweets Could Be Silenced From Trials Statewide," *The Baltimore Sun*, Feb. 22, 2010, p. A1.

³ Katie Mulvaney, "Rule bars courtroom blogging, tweeting," *Providence Journal-Bulletin*, Jan. 4, 2011, p. 8.

⁴ Jill Lawless, "Judge allows tweeting from Assange court hearing," *The Associated Press*, Dec. 15, 2010.

⁵ See Nora Sydow, "'Can You Hear Me Now?'" *The Court Manager*, Vol. 25, No. 2 (summer 2010), pp. 45-51. The magazine is published by the National Center for State Courts, which also has a resource guide on the issue posted on its website: www.ncsc.org/topics/media-relations/social-media-and-the-courts/resource-guide.aspx.

⁶ Quoted in Bishop, *op. cit.*

against serial killer Ted Bundy, convicted and sentenced to death in 1979 for killing two female college students. Bundy blamed media coverage for the conviction, but his appeals failed.

In 1980, the U.S. Supreme Court decided to confront the TV-coverage issue squarely in an appeal by two Miami police officers convicted of burglarizing a well-known restaurant. In a unanimous ruling on Jan. 26, 1981, the justices found no constitutional bar to a state permitting TV coverage of criminal trials. One year later, the ABA amended its camera ban to permit TV coverage of trials under supervision of the state's highest court.¹⁸

As more and more states permitted TV coverage in the 1980s, Brill, the legal journalist, was inspired to plan

and find funding for a full-time cable channel to broadcast court proceedings gavel to gavel.¹⁹ Court TV debuted in July 1991 and drew national attention with coverage later that year of the Florida trial (and eventual acquittal) of Kennedy family scion William Kennedy Smith for rape.

Coverage of other sensational cases drew more attention, notably the 1993 trial in California of Erik and Lyle Menendez for the shotgun killings of their parents. (The jury deadlocked after the brothers blamed the killings on a history of sexual abuse by both parents; they were retried and convicted.) Brill responded to sniping about sensationalism by insisting that the network also covered trials and appeals with fewer lurid aspects.

The U.S. Judicial Conference, meanwhile, decided in 1994 to stick with its general ban on cameras in federal trial or appellate courts despite a three-year experiment pronounced successful by the federal judiciary's research arm.²⁰ The pilot project, authorized in 1990 under pressure from Congress, began in 1991 with coverage of civil trials in six district courts and appeals in the Second and Ninth federal circuits. In a detailed report, researchers for the Federal Judicial Center found that participating judges generally moved from neutrality to support for cameras. Even so, the Judicial Conference decided in September 1994 by a 2-to-1 margin to end the experiment and preserve the ban except to allow federal courts of appeals to permit TV coverage if they wanted.

The Simpson trial began the next week with jury selection supervised by Los Angeles County Superior Judge Lance Ito. Despite seven years on the bench and a previous high-profile trial, Ito came to be widely seen as having lost control of the case from the outset. Impaneling a jury took nearly a month (October/November 1994); the trial got under way on Jan. 24, 1995; testimony began on Jan. 26, and continued, often tediously, for nearly nine months. Court TV covered the trial gavel to gavel; CNN covered major portions live and the broadcast networks followed suit. Simpson's acquittal on Oct. 3, after only four hours of deliberation, was broadcast live, to widespread disbelief among white Americans and general approval from black Americans.

Across racial lines, however, TV coverage of the Simpson trial was blamed for what was widely seen as a judicial fiasco of the first magnitude. "Law and justice," New York University law professor Thaler wrote later, were turned into "entertainment and spectacle."²¹

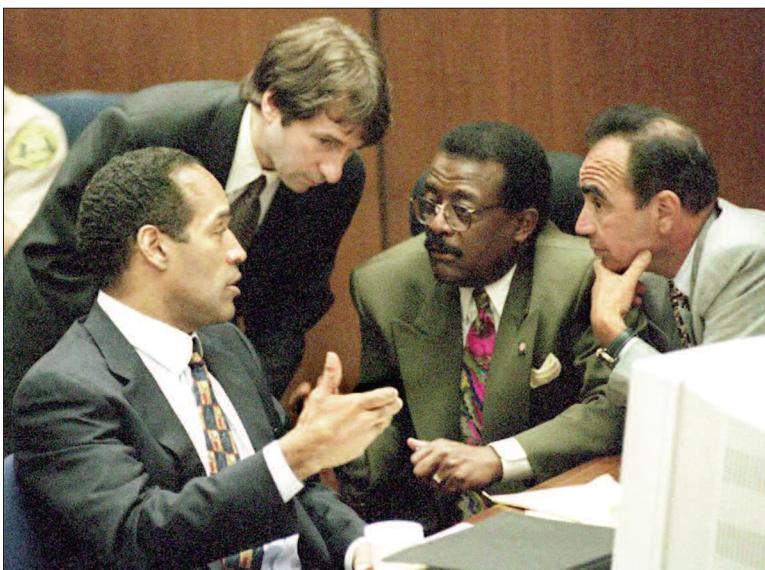
Media-access advocates argued in vain that the television cameras had simply shown the trial as it was actually occurring. Likewise, a former Los Angeles district attorney, Ira Reiner, argued that any adverse effects on high-profile trials come from "overwhelming media coverage," not "the live, unobtrusive camera."²²

Pro-access arguments and distinctions, however, gained little traction as

judges in California and elsewhere became less disposed to agree to camera access. In a notable example, the judge in the Menendez brothers' retrial in 1996 refused permission for TV coverage; they were convicted.

Trials of Patience

Camera advocates have made fitful gains in state courts since the late 1990s, but Court TV's transition to a part-time entertainment channel sharply reduced the visibility of trial



Football hero-turned-actor O.J. Simpson confers with his defense "dream team"—Barry Scheck, Johnny Cochran and Robert Shapiro—during his 1995 murder trial in California. Many critics blamed the length and seeming disorder of the proceedings on blanket coverage by Court TV and other broadcast outlets. "Rather than renew trust in the nation's system of justice—and in the American media—the Simpson story shattered the credibility of both," wrote New York University scholar Paul Thaler.

AFP/Getty Images/Pool

September 2010 discontinued the selective same-day releases in favor of releasing all audio tapes but only at week's end.²³

Media groups claimed a breakthrough in 2001 when supreme courts in Mississippi and South Dakota — the last two states with no camera coverage at all — decided to allow cameras for their arguments. Efforts at camera access continued over the rest of the decade, but with half steps forward interspersed with setbacks. In a major defeat for broadcasters, New York's Court of Appeals,

the state's highest court, in June 2005 unanimously upheld a legislatively imposed ban on audio-video coverage of trials. New York had reinstated the ban in 1997 after a decade of permitting TV coverage at the trial level. Even in states that permitted TV coverage, judges sometimes rejected broadcasters' request for access in high-profile cases.

In the meantime, editorial disagreements and financial problems at Court TV were reducing cable TV coverage of court proceedings. In 1998, Court TV's audience was the smallest of 38 cable channels rated, accord-

ing to an account of the network's transformation by Kent State University sociologist Hedieh Nasheri. Brill had sold his stake in 1997 amid disagreements with his financial partners: cable giant TCI, NBC and Time Warner.

When the dust settled, NBC had been bought out and Time Warner was in control. New TV-oriented executives overhauled the nighttime

schedule to focus on the criminal justice system with both informational and entertainment programming. Actual court coverage shrank further in 2008 when the network was rebranded as truTV (“not reality, actuality”). Since then, the TV show “In Session” has presented trial coverage only six hours a day.

With access battles ongoing in the states, attention shifted to the U.S. Supreme Court in 2000 thanks to a court proceeding as significant as it was unexpected: the Bush/Gore election contest. Even as the Florida Supreme Court’s proceedings were being broadcast, C-SPAN in Washington was asking the U.S. justices to permit television coverage of the eventual appeal. Chief Justice Rehnquist’s letter rejecting the request hinted at disagreements on the issue by saying that “a majority” of the justices had decided to stick with the existing ban on cameras. Still, the decision to release audio tapes immediately after arguments concluded brought the proceedings to millions of Americans, the vast majority of whom had probably never heard what happens inside the Supreme Court’s majestic courtroom.

Over the next decade, Congress kept up pressure on the issue by repeatedly considering separate bills to open lower federal courts and the Supreme Court to cameras. Three times — in 2006, 2008 and 2010 — the Senate Judiciary Committee approved bills on the issue, but none of the measures reached the Senate floor. In the latest action, the committee last April 29 gave 13-6 approval to three bills: one permitting cameras in civil trials in federal courts and separate measures either requiring or calling on the Supreme Court to allow cameras. Two Democrats and four Republicans voted against the lower court bill; a mostly overlapping group of one Democrat and five Republicans voted against the Supreme Court measures.²⁴



AP Photo



Getty Images/Hulton Archive

Trials of the Century

In the early 20th century, radio, newsreels and other emerging technology gave the public instant access to courtrooms. The 1925 “Monkey Trial” of high school teacher John Scopes for violating a Tennessee ban on teaching evolution was broadcast live by Chicago station WGN (top). Scopes was prosecuted by famed attorney and politician William Jennings Bryan, in white shirt with rolled-up sleeves, sitting behind a radio microphone. The equally famous Clarence Darrow defended Scopes. Bruno Hauptmann (bottom) testifies during his trial for kidnapping and murdering the infant son of aviator Charles Lindbergh. The judge allowed photographs when the court was not in session, but photographers broke the rules and snapped photos during the trial.

CAMERAS IN THE COURTROOM

The Supreme Court, meanwhile, was following the *Bush v. Gore* precedent by selectively approving same-day release of audio recordings of arguments in major cases. Among the cases approved were arguments in major affirmative action and campaign finance cases in 2003 and a trio of 2004 cases on post-9/11 detention policies. After Roberts became chief justice in September 2005, the court continued to approve requests for same-day release in some cases, but as C-SPAN made more requests the justices began to reject most of them. Then late last September the court announced the new policy of making all audio tapes available by the end of the week. Unmentioned in the court's press release — but confirmed by court officials — was the decision to do away with same-day release altogether.²⁵

The Judicial Conference's action authorizing a new pilot project for civil trials in federal courts two weeks earlier similarly amounted to a step forward for camera-access advocates, but with significant limits. The Sept. 14 press release stated that proceedings would be recorded by "participating courts," not by "other entities or persons" — such as news organizations. Recording would also require consent of parties to the case. The release stated that participating courts would have to amend their local rules before taking part in the project. No timetable was given for the start of the project.²⁶

way in opening up courts in states with rules that either prohibit or effectively prevent audio or video coverage of trials.

More than one-third of states generally permit camera access in trial and appellate courts, according to the RTDNA, the broadcast news group. A second group of states imposes restrictions that still allow camera coverage in many cases.

Fourteen other states, however, either prohibit cameras in trial courts altogether or impose conditions — most commonly, requiring consent of the parties — that effectively prevent camera coverage, according to the RTDNA. Pleas from media groups to change those rules are yielding only limited results.

"Where it's already been allowed, they're continuing to allow it," says Gregg Leslie, legal defense director for the Reporters Committee for Freedom of the Press. "Where they haven't, they're not changing the policy. There's not much good news that we're aware of in the states."

The new century began with a breakthrough when state supreme courts in Mississippi and South Dakota, the last two states with total bans, both opened their own courtrooms to cameras in 2000. The actions left the District of Columbia as the only non-territory jurisdiction to completely bar cameras in trial or appellate courts.²⁷

Mississippi adopted a rule three years later generally permitting cameras except in family court-type cases. Mississippi also prohibits photographing jurors and some witnesses, such as police informants. "We've covered hundreds of cases" since the rule was adopted, says Dennis Smith, news director of WLBT-TV in Jackson.

In South Dakota, the supreme court is considering alternate recommendations from a committee appointed to study the camera issue

after the state's legislature repealed the existing ban on trial coverage. A majority of the committee recommended allowing camera coverage but only with the approval of the judge and the consent of the parties; a minority favored leaving camera coverage solely up to the judge.²⁸

The court held a hearing on the proposals in October but has not given a timetable for a decision. John Petersen, news director at KOTA-TV in Rapid City and author of the more liberal proposal, says the majority's plan would effectively prevent camera coverage altogether. But David Gienapp, a judge in Madison, S.D., who wrote the majority's recommendation, says he does not expect many requests for camera coverage whichever proposal is adopted.

Indiana's supreme court is also considering a request by news media to ease an existing ban on cameras in trial courts. The state had a pilot project several years ago permitting camera coverage with the parties' consent, but it was not extended. The Indiana Broadcasters Association and Hoosier State Press Association submitted a request in November 2009 for a new test in four courts around the state with only the judge's approval required for cameras. The proposal is "under heavy consideration," according to Daniel Byron, an Indianapolis lawyer who serves as the broadcasters' general counsel.

The Nebraska Supreme Court, meanwhile, is watching for the results of the second of two pilot projects of camera coverage pushed by the Nebraska Broadcasters Association. A year-long project in 2008 covered two counties in the Omaha area; the second project, which began in June 2009, covered three others. But judges in Omaha (Douglas County) have refused to participate, according to Martin Riemenschneider, the association's executive director.

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CURRENT SITUATION

Slow Going in States

Advocates of camera access appear to be making only limited head-

At Issue:

Should Supreme Court proceedings be televised?



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WRITTEN FOR *CQ RESEARCHER*, JANUARY 2011

it is time to let the people see what goes on in the people's courtrooms. Last month, the Ninth U.S. Court of Appeals allowed cameras to witness debate over a contentious social matter: whether banning same-sex marriage is unconstitutional. No parade of horribles. No lurid sensationalism. Just orderly proceedings, principled and civil debate, thoughtful participants, nonpartisan inquiries. Viewers came away with a better comprehension of the constitutional questions presented.

Broad public access undoubtedly will enhance acceptance of the court's eventual decision about a controversial issue. The successful outcome was proof positive that camera coverage is overdue.

The U.S. Supreme Court is the ultimate arbiter of questions that shape our nation, yet it rejects transparency. Supreme Court nominees are widely seen in televised congressional hearings, but they disappear from public view once sworn in, without sound reason. The primary argument made by opponents of televised trials — depriving defendants of a fair trial by intimidating witnesses and jurors — has no application in the Supreme Court. Vague assertions about the court's authority and dignity are easily dispelled. The judges hearing the Prop. 8 case, whom many suggested would not rise above politics, likely gained the esteem of those who witnessed how well they acquitted themselves.

Empirical evidence undermines assumptions that televising proceedings changes the behavior of participants or the nature of the arguments. And the fear that television audiences may be misled by "sound bite" coverage is no reason the Supreme Court should claim exemption from the kind of public scrutiny applicable to the president and Congress.

A courtroom is a public forum where citizens have the right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place. As the Supreme Court has stated, people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. Audiovisual coverage, which allows for direct observation of the demeanor, tone, credibility, contentiousness, and perhaps even the competency and veracity of the participants, is the best means through which to advance the public's understanding of how justice is carried out.

The courtroom camera not only gets the story right, it opens a limited space to a broader audience. Its presence in many state courtrooms, and now in the United Kingdom's Supreme Court, is routine and well-accepted. Justices, it is time to let the sunshine in.



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WRITTEN FOR *CQ RESEARCHER*, JANUARY 2011

there is very little to be gained — and much at risk of being lost — from televising Supreme Court proceedings. Largely thanks to the Internet, those interested in following the Supreme Court live in a Golden Age that is dramatically different from even a decade ago. Supreme Court opinions — by far the most important material for studying the court — are posted online as soon as they are announced. Briefs, the best resources for learning about pending cases, are also widely available online, including on the Supreme Court's website. And instead of relying on generalist Supreme Court reporters, members of the public can consult a broad range of expert analysis and commentary on the Internet.

Oral arguments at the court attract a degree of attention that dwarfs their actual importance. But here too, anyone eager to read the tea leaves of oral argument now has ample opportunity to do so. The court makes argument transcripts available online on the very day of argument — typically within 90 minutes — and posts audio recordings of arguments at the end of each week. It is difficult to see how televising oral arguments would add much to the abundant stock of available information.

By contrast, the potential downside of televising Supreme Court proceedings is substantial. The culture of the court is, for good reason, predominantly textual. The overwhelming majority of the justices' work consists of reading and writing, with reasoned deliberation among the justices about the meaning of legal texts.

Because of the emotional power of images, cameras, far more than microphones, transform the behavior of those who know they are being recorded. In some contexts, that transformation will be for the better. But the likely consequences for the Supreme Court would be sharply negative — and far more so than for any other appellate court, given the Supreme Court's much higher profile.

In particular, cameras at oral argument and at sessions in which rulings are announced would encourage and reward political grandstanding by the justices (as well as by counsel and protesters in the courtroom). Whether or not the justices actually succumbed to the temptation to play to the national viewing audience — and what reason is there to think that, sooner or later, they wouldn't? — their colleagues would often suspect they had.

The court would become more politicized, and the resulting resentment and distrust among the justices would disserve the ideal of reasoned deliberation — an ideal, to be sure, that is often not realized but that is at least still professed and pursued.

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"It's been a long, slow, arduous process," Riemenschneider says, "but little by little we've made headway."

Camera-access proposals have been pushed in many other states with restrictive policies but without success. In Illinois, the newly reconstituted supreme court stuck with the existing ban in 2005 despite a plea from the state's broadcasters. The new chief justice, Robert Thomas, told The Associated Press at the time that there was "no sentiment for change." Minnesota's supreme court similarly refused a plea by broadcasters in 2007 to ease its rule requiring consent of the parties for cameras.

Leslie of the Reporters Committee for Freedom of the Press notes that New York state allowed camera coverage of trials in a succession of pilot projects extending through the 1990s. Camera-access advocates point to the TV coverage of the 2000 trial of four New York City police officers for the killing of an unarmed African immigrant as helping to defuse tensions after the officers' acquittal. Even so, the New York legislature has left the camera ban on the books after the last of the pilot projects lapsed and New York's highest court in 2005 upheld the ban as constitutional.²⁹

In Maryland, a committee of the state's judicial conference in February 2008 rejected calls to allow extended media coverage of criminal and other trials. "[T]he putative benefits of electronic media coverage are illusory," the committee concluded, "while the adverse impacts on the criminal-justice process are real."³⁰

Even in states where only the judge's approval is required, requests to allow cameras are sometimes turned down. "It's kind of hit or miss," says RTDNA counsel Kirby. But, she adds, "The vibe I'm getting from people in state courts is that they're more open."

U.S. Pilot Plan Awaited

The federal court system is working slowly on a plan for a limited test of cameras in civil trials that some media advocates fear will undermine efforts to get Congress to pass legislation on the issue.

The Judicial Conference committee charged with getting the pilot project under way began discussing the plan at its regularly scheduled, semiannual meeting in Washington on Dec. 8-9. A week later, Julie Robinson, a federal district court judge in Wichita, Kan., who chairs the conference's Committee on Court Administration and Case Management, sent word through an aide that there was "nothing to discuss at this time."

Tunheim, the former chair of the committee, says he expects that 30 to 50 district judges out of the total 677 may agree to participate in the project. Local rules will have to be changed to allow the test, and the necessary equipment obtained and tested. The plan specifies that audio and video recording equipment is to be operated by court personnel, not the news media.

As approved by the conference in September, the plan allows coverage in civil cases only, and only with the approval of the judge and the consent of all parties. The project is scheduled to last three years, with annual reports on the test from the Federal Judicial Center, the judiciary's research arm.

Leslie, with the Reporters Committee, notes that the federal courts refused to ease the ban on cameras in September 1994 despite the center's favorable evaluation of a three-year pilot project. "We're back at the stage where we're doing another experiment," he complains. "While it's a step forward, it's a very slow, frustrating process."

Unlike the statutory ban on cameras in federal criminal trials, the ban on cameras in civil trials is embodied in a policy adopted by the Judicial Conference in 1972 and reaffirmed at the end of the earlier pilot project in 1994. When the conference allowed individual circuit courts of appeals to permit cameras in civil cases in 1996, it also urged each circuit to "abrogate" — or eliminate — any local rules permitting cameras in civil trials.

Judges who have tested the ban on cameras in civil cases in recent years have had their wrists slapped by higher courts. In April 2009, the First U.S. Circuit Court of Appeals ruled that Judge Gertner, the longtime proponent of cameras in federal courts, had overstepped her authority in permitting Internet streaming of the trial of a major digital-music piracy case. Gertner had planned to allow the trial to be streamed live to a Harvard University center that would then have streamed it on the World Wide Web.³¹

Judge Walker's plan in late 2009 to permit Internet streaming of the Proposition 8 gay-marriage case in California drew a pointed rebuke from the Supreme Court. The majority in the 5-4 ruling said that Walker "attempted to revise [the court's] rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States."³²

In a third incident, U.S. District Judge Joe Billy McDade in Champaign, Ill., publicly apologized in October 2009 for having allowed news organizations to bring video and still cameras and microphones into a hearing in a local schools case. McDade, apologizing after the chief judge of the federal appeals court in Chicago had dismissed a misconduct complaint against him, said he "erroneously" thought he had authority to waive the general ban on cameras.³³

With a new Congress just getting under way, camera-access advocates are awaiting developments before deciding

how and when to push for pro-camera legislation for lower federal courts or the Supreme Court. Republican gains in the midterm elections combined with the defeat of a major supporter of Supreme Court cameras to create what appears to be a less favorable climate for media groups.

Sen. Specter went down to defeat in Pennsylvania's Democratic primary in May 2010, less than a year after having switched parties in anticipation of a loss in the GOP contest. Specter had been the principal sponsor of Supreme Court camera bills for several years.

Specter made the case for cameras in the Supreme Court one more time in his Senate farewell speech on Dec. 21, pointing to polls that show a substantial majority of Americans favor televising the high court. Senate Majority Leader Dick Durbin, D-Ill., responded by vowing to "carry that banner" after Specter's departure.³⁴

Both of the major Senate sponsors of bills on lower federal courts — Iowa Republican Charles Grassley and New York Democrat Charles Schumer — remain in office. But Republicans will gain seats on the Senate Judiciary Committee in the new Congress, and GOP senators have provided most of the votes against the pro-camera bills in the past. In the House, the Judiciary Committee has a new GOP chairman, Rep. Lamar Smith of Texas. The House panel has never reported legislation on the issue.

Apart from partisan changes, the Reporters Committee's Leslie fears that the planned pilot project, along with a spate of television interviews by previously camera-shy Supreme Court justices, will weaken the push for legislation. "We're not exactly thinking that that's on the brink of being passed any time soon," he says, "especially with the Supreme Court and the Judicial Conference basically trying to undermine it."

OUTLOOK

Two-Edged Sword?

The oft-quoted admonition against watching sausage factories — or legislatures — in operation may apply as well to the judicial system, at least according to one professor and long-time media watcher.

Writing several years before the O.J. Simpson case, Robert Hariman observed that the public attention to what he called "popular trials" often results in diminished public confidence in the outcome. "The more a trial appears to be a scene or product of public controversy and rhetorical artistry," Hariman wrote in an introduction to a compilation of essays on popular trials, "the less legitimate it appears."³⁵

Today, Hariman, now chair of the Department of Communication Studies at Northwestern University in Evanston, Ill., stands by that downbeat assessment of the effect of close-up viewing of the legal system. But he also favors increased visibility for the courts, including access for cameras in many cases and in particular in the Supreme Court.

The media are "fundamentally important to a democratic society," Hariman says. But we are also "profoundly anxious" and "fundamentally ambivalent" about media coverage, he says, because of the potential for demagoguery or other "destructive consequences."

Even so, "I come down on the side of transparency," Hariman continues. "I don't think the American legal system benefits from secrecy," he says. Any immediate drop in public confidence after a highly publicized case "is likely to lead to greater confidence in the long run."

Many judges, especially in the federal system, continue to be dead-set

against cameras. "The day you see a camera come into our courtroom, it's going to roll over my dead body," Justice David H. Souter famously told a congressional committee in 1996. Now retired, Souter reaffirmed that stance in the Kennedy Library program in December when moderator Greenhouse made a passing reference to C-SPAN's "fight" to gain camera access. "That's a fight I hope C-SPAN will lose," Souter said.³⁶

For now, the Supreme Court is indeed keeping cameras out and delaying any access to taped audio arguments until week's end. But the justices cannot stop the instantaneous news and comment about their cases on full-time cable news channels, instantly updated newspaper websites and the expanding number of blogs by commentators representing every ideological stripe.

For lawyer-author Goldfarb, the age of round-the-clock media underscores the need for camera access at the Supreme Court. And he believes the justices stand to gain, not lose, in public esteem. "In the election case," Goldfarb says, recalling the *Bush v. Gore* contest, "the more we knew, the better informed we were, whatever our opinion."

For now, however, the Supreme Court is ready to police not only its own courtroom but lower federal courts as well. The justices' intervention in the gay-marriage case in California blocked public access to the trial, although gay-rights groups tried to get around the camera ban by a Web-posted reenactment.

The appeal has now been delayed as the Ninth Circuit panel asks the California Supreme Court for a ruling on whether state law gives the sponsors of the anti-gay marriage initiative standing to defend the measure if state officials refuse. Whatever happens in the Ninth Circuit, it is all but certain that any eventual appeal to the Supreme Court will not be televised.

CAMERAS IN THE COURTROOM

Some federal civil trials may be televised as early as this year, according to Judge Tunheim's estimate of the likely timetable. But one reason for the three-year time period for the pilot project, Tunheim explains, is the need for enough camera-covered trials to evaluate the experience. Camera-access advocates such as C-SPAN's Collins remain unenthusiastic about the restrictions the Judicial Conference imposed in authorizing the test.

The outlook in the states is only slightly more hopeful for groups trying to open courtroom doors to cameras. By now, courts in every state have considered the issue — some of them, repeatedly — and have decided which way to go. As with the federal judiciary, any change in policy may be — as RTDNA counsel Kirby put it — “generational.” ■

Notes

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³ Paul Thaler, *The Spectacle: Media and the Making of the O.J. Simpson Story* (1997), p. 304.

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¹⁰ U.S. House of Representatives, Committee on the Judiciary, “Sunshine in the Courtroom Act of 2007,” Serial No. 110-160, Sept. 27, 2007, <http://federalevidence.com/downloads/blog/2010/Sunshine.in.the.Courtroom.Act.pdf>.

¹¹ An excerpt from the Dec. 13, 2010, program, “A Conversation With Justices Sandra Day O’Connor and David Souter,” was posted on YouTube: www.youtube.com/watch?v=e4D9RTCOD9E.

¹² Historical background drawn from Goldfarb, *op. cit.* See also Hedieh Nasheri, *Crime and Justice in the Age of Court TV* (2002).

¹³ See “WGN Radio Broadcasts the Trial,” “Monkey Trial, American Experience,” 2002, www.pbs.org/wgbh/amex/monkeytrial/people/events/e_wgn.html.

¹⁴ See Susanna Barber, *News Cameras in the Courtroom: A Free Press-Fair Trial Debate* (1989), pp. 3-7. The newsreel cameras ran in violation of the rules for several days, so unobtrusively that the judge learned of the breach only after footage was aired. Barber says the only violation by a still photographer came when the jury announced its verdict, but an archived photo shows Hauptmann in the witness chair.

¹⁵ The decision is *Sheppard v. Maxwell*, 384 U.S. 333 (1966). The vote in the case was 8-1; Justice Hugo L. Black dissented without opinion.

¹⁶ The decision is *Estes v. Texas*, 381 U.S. 532 (1965). The dissenting justices disapproved of televising trials but found no grounds for reversing the conviction.

¹⁷ The decision is *In re Petition of Post-Newsweek Stations*, 370 So.2d 764 (Fla. 1979). For coverage, see Thomas E. Slaughter, (no headline available), The Associated Press, April 13, 1979.

¹⁸ The Supreme Court decision is *Chandler v. Florida*, 449 U.S. 560 (1981).

¹⁹ For detailed accounts of Court TV’s history, see Goldfarb, *op. cit.*, pp. 124-153; Nasheri, *op. cit.*, pp. 31-50.

²⁰ See Molly Treadway Johnson and Carol Krafka, “Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals,” Federal Judicial Center, 1994, [www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/\\$file/elecmediacov.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf). For coverage, see Linda Greenhouse, “U.S. Judges Vote Down TV in Courts,” *The New York Times*, Sept. 21, 1994, p. A18. The story quotes a spokesman as describing the margin of the vote in the closed-door session.

²¹ Paul Thaler, “The O.J. Simpson Case,” in Lloyd Chiasson Jr. (ed.), *The Press on Trial: Crimes and Trials as Media Events* (1997), pp. 200-201. Thaler is a professor at New York University’s Gallatin School of Individualized Study.

About the Author



Associate Editor **Kenneth Jost** graduated from Harvard College and Georgetown University Law Center. He is the author of the *Supreme Court Yearbook* and editor of *The Supreme Court from A to Z* (both CQ Press). He was a member of the *CQ Researcher* team that won the American Bar Association’s 2002 Silver Gavel Award. His previous reports include “Government Secrecy” and “Free-Press Disputes.” He is also author of the blog *Jost on Justice* (<http://jostonjustice.blogspot.com>).

²² Reiner, *op. cit.*

²³ Coverage drawn in part from a keyword search ("cameras," "courts") of the website of the Reporters Committee for Freedom of the Press, for the period 2000-2010, www.rcfp.org/search.php.

²⁴ The bills were S. 657 (lower courts), S. 446 and S. Res. 339 (Supreme Court). Democrat Dianne Feinstein (Calif.) and Republicans Jeff Sessions (Ala.), Orrin Hatch (Utah), Jon Kyl (Ariz.) and Tom Coburn (Kan.) voted against all three bills. Sen. Benjamin Cardin, D-Md., voted against S. 657; Sen. Lindsey Graham, R-S.C., voted against the two Supreme Court bills. For coverage, see Joanna Anderson, "Senate Judiciary Backs Televising Federal Court Proceedings," *CQ Today*, April 29, 2010.

²⁵ For a complete list of same-day releases approved and denied, see "C-SPAN Timeline: Cameras in the Courts," www.c-span.org/The-Courts/Cameras-in-The-Court-Timeline/. The Supreme Court press release announcing the new policy, dated Sept. 28, 2010, is on the Court's website: www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_09-28-10.html. For coverage, see Lyle Denniston, "New policy on audio tape release," SCOTUSBlog, Sept. 28, 2010, www.scotusblog.com/2010/09/new-policy-on-tapes-release/; Robert Barnes, "Audio of arguments to be released more promptly," *The Washington Post*, Sept. 29, 2010, p. A6.

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FOR MORE INFORMATION

American Bar Association, 321 N. Clark St., Chicago, IL 60654; (312) 988-5000; www.abanet.org. Establishes ethical codes for the legal profession.

American Civil Liberties Union, 125 Broad St., 18th Floor, New York, NY 10004; (212) 549-2500; www.aclu.org. Defends individual rights as set out by the Constitution.

C-SPAN, 400 N. Capitol St., N.W., Suite 650, Washington, DC 20001; (202) 737-3220; www.c-span.org. Cable television network providing coverage of government proceedings.

Ethics and Public Policy Center, 1730 M St., N.W., Suite 910, Washington, DC 20036; (202) 682-1200; www.eppc.org. Institute dedicated to applying the Judeo-Christian moral tradition to issues of public policy.

Federal Judicial Center, 1 Columbus Circle, N.E., Washington, DC 20002; (202) 502-4000; www.fjc.gov. Education and research agency for federal courts.

Judicial Conference of the United States, 1 Columbus Circle, N.E., Washington, DC 20002; (202) 502-6000; www.uscourts.gov. Frames policy guidelines for the administration of judicial courts.

National Association of Criminal Defense Lawyers, 1660 L St., N.W., 12th Floor, Washington, DC 20036; (202) 872-8690; www.nacdl.org. Defends due process rights for those accused of crimes.

National Center for State Courts, 300 Newport Ave., Williamsburg, VA 23815; (800) 616-6164; www.ncsc.org. Works to improve the judicial administration in state courts.

National District Attorneys Association, 44 Canal Center Plaza, Suite 110, Alexandria, VA 22314; (703) 549-9222; www.ndaa.org. Professional organization representing state, county and city prosecutors.

Radio Television Digital News Association, 529 14th St., N.W., Suite 425, Washington, DC 20045; (202) 659-6510; www.rtna.org. Sets standards for news-gathering and reporting in the electronic news industry.

Reporters Committee for Freedom of the Press, 1101 Wilson Blvd., Suite 1100, Arlington, VA 22209; (703) 807-2100; www.rcfp.org. Nonprofit association providing free legal assistance to journalists.

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³³ See Ameet Sachdev, "U.S. judge's error may renew camera debate," *Chicago Tribune*, Oct. 6, 2009, p. 6.

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The Next Step:

Additional Articles from Current Periodicals

Criminal Cases

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Tweeting and blogging are changing the way the news industry covers blockbuster trials.

CITING CQ RESEARCHER

Sample formats for citing these reports in a bibliography include the ones listed below. Preferred styles and formats vary, so please check with your instructor or professor.

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Jost, Kenneth. "Rethinking the Death Penalty." *CQ Researcher* 16 Nov. 2001: 945-68.

APA STYLE

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