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Bucking a Trend, Supreme Court Justices Reject Video Coverage

By ADAM LIPTAK

WASHINGTON — Justice Sonia Sotomayor, populist, revealed a paternalistic streak this month, announcing that she had rethought her enthusiasm for video coverage of Supreme Court arguments.

At her confirmation hearings in 2009, she said she was in favor of letting citizens see their government at work. “I have had positive experiences with cameras,” she said. “When I have been asked to join experiments of using cameras in the courtroom, I have participated. I have volunteered.”

She was singing a different tune a couple of weeks ago, telling Charlie Rose that most Americans would not understand what goes on at Supreme Court arguments and that there was little point in letting them try.

“I don’t think most viewers take the time to actually delve into either the briefs or the legal arguments to appreciate what the court is doing,” she said. “They speculate about, oh, the judge favors this point rather than that point. Very few of them understand what the process is, which is to play devil’s advocate.”

As a descriptive matter, she was right: making sense of a Supreme Court argument without substantial preparation is hard. But Justice Sotomayor’s approach also sounds like an intellectual poll tax that could just as well justify limiting attendance in the courtroom to people smart enough and diligent enough to know what is going on.

The court’s newest member, Justice Elena Kagan, has also done an about-face. At her confirmation hearings in 2010, she said video coverage “would be a great thing for the institution, and more important, I think it would be a great thing for the American people.” Two years later, she said she now had “a few worries, including that people might play to the camera” and that the coverage could be misused.

Even as the Supreme Court is digging in its heels, nations with legal systems similar to the one in the United States are moving in the other direction.

The Supreme Court of the United Kingdom, which was formed in 2009, allows camera coverage. Last month, Lord Chief Justice Igor Judge, the head of the judiciary for England and Wales, announced that cameras would be allowed in appeal courts starting in October, after judges receive media training.

Lord Judge agreed with Justice Sotomayor, to a point. "I suspect John and Jane Citizen will find it incredibly dull," he told a committee of the House of Lords. But that did not seem to him a reason to prevent them from trying to make sense of the proceedings.

Arguments in the Supreme Court of Canada have been broadcast since the mid-1990s, and more recently they have been streamed live on the Internet.

Owen M. Rees, the court's executive legal officer, said the experience had been positive.

"The filming of the Supreme Court of Canada's hearings has increased the public's access to the court and its understanding of the court's work," he said. "Of course, each court must make its own evaluation of whether introducing cameras in the courtroom would be appropriate."

In a speech last year, Chief Justice Beverley McLachlin of Canada suggested that the American court system might have things backward.

In the United States, cameras are commonplace in state trial and appeals courts, and the lower federal courts have experimented with them. Only in the Supreme Court is there categorical resistance.

"The general practice in Canada is precisely the opposite," Chief Justice McLachlin said. "Canadian trial courts have generally not permitted their hearings to be broadcast on television, where witnesses are involved."

Lord Judge made a similar point, saying he would draw the line at criminal trials before juries, for fear that witnesses might be intimidated.

A pair of new law review articles tries to make sense of the gaps between the American and international approaches.

In one of them, in The Arizona State Law Journal, Nancy S. Marder, who teaches at the Chicago-Kent College of Law at the Illinois Institute of Technology, noted correctly that "most countries do not allow cameras in their courtrooms" and concluded that "cameras in federal courtrooms will do more harm than good at this time." In an interview, she said she worried about a culture in which "everything becomes entertainment, focusing on the gaffe."

But Kyu Ho Youm, a First Amendment scholar at the University of Oregon's journalism school, said the United States Supreme Court was betraying a distinctively American commitment to free expression and access to information.

"The U.K. and Canadian justices had their own worries and concerns when they opened up their doors to cameras," he wrote in The Brigham Young University Law Review. "However, these justices now concede they were wrong."

"Many people outside the U.S. are wondering," Dr. Youm said in an interview, "why the U.S. is so calcified in its thinking about cameras in the Supreme Court."

Tony Mauro, a reporter with The National Law Journal and a student of the arguments for and against cameras, proposed an answer in an article in 2011. "The root of almost every objection the justices have expressed about camera access," he wrote, "is the justices' deeply held feeling that their court is exceptional — unlike any other public institution."

Mr. Mauro was onto something. At a judicial conference in 2011, Judge J. Harvie Wilkinson III of the federal appeals court in Richmond, Va., asked Chief Justice John G. Roberts Jr. for his position on cameras and got a telling response. The chief justice had been considering the international context.

"The Supreme Court is different," he said, "not only domestically, but in terms of its impact worldwide."

Chief Justice Roberts said he worried about the effect that cameras would have on lawyers and, perhaps more important, on the justices, who may have less self-control than their counterparts abroad.

"We unfortunately fall into grandstanding with a couple of hundred people in the room," the chief justice said.

This article has been revised to reflect the following correction:

Correction: February 18, 2013

An earlier version of this article reported incorrectly that an article by Nancy S. Marder would be published in The Brigham Young University Law Review next month. The article will be published in The Arizona State Law Journal later this month.