

Testimony before the Senate Judiciary Committee
Subcommittee on Administrative Oversight and the Courts
“Access to the Court: Televising the Supreme Court”

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Good morning, Madam Chairman, and Senators of the Judiciary Committee. Thank you for inviting me here to testify on the critical issue of the public's access to the Supreme Court, and particularly the question whether cameras should broadcast the Court's public proceedings. I am particularly honored to have been included among such an extraordinary panel of witnesses.

My name is Tom Goldstein. I am a partner in the law firm Goldstein & Russell, P.C., which specializes in Supreme Court litigation. For quite a few years, I have taught Supreme Court litigation at both Stanford and Harvard Law Schools. I have argued twenty-four cases in front of the Court. I am also the co-founder and publisher of SCOTUSblog, a website dedicated to providing publicly accessible information about the Court and the cases that come before it. SCOTUSblog is the only weblog to ever receive the American Bar Association's Silver Gavel Award for promoting public understanding of the law.

Seated behind me is my wife, Amy Howe, who is also a partner at Goldstein & Russell, and the editor of SCOTUSblog. I am pleased to be here with one of my two daughters, Nina.

There is well-founded interest in the public's access to the Supreme Court. As the final word on the constitutionality of legislation that is passed here by the elected representatives of the American people, the Court is a vital public institution. From the establishment of a defendant's right to counsel in *Gideon v. Wainwright* to the desegregation of schools in the landmark *Brown v. Board of Education*, it is difficult to overstate the far-reaching effects of the

Court's work. The esteemed members of this Committee of course need no education on that point, because the Senate has charged you with vetting nominees to the Court.

In discussing public access to the Court, we should recognize at the beginning that there is an unfortunate tendency to criticize the Court unjustifiably. The Justices are an easy target: they almost never respond to attacks. But here they deserve praise on a very basic level – they are among the few people in Washington *not* trying to get on television. Instead, they are completely committed public servants who simply want to do their jobs.

It is also worth acknowledging the several significant steps the Court has taken in recent years that have as their entire purpose increasing the public's access to its work. The Court of course publishes all of its work product, in the form of its decisions – an exercise in transparency that has existed throughout the nation's history. The Court has created an official website that now is updated in real time. For example, when the Court issues its opinions, as well as orders granting or denying review in a case, those materials are posted immediately on the Court's website. The Court also publishes transcripts of oral arguments within just a few hours. The Court also records the audio of the arguments, which it releases at the end of the same week. In the past, the Justices would release audio the same day in cases of great public interest; disappointingly, that practice has apparently been abandoned.

It is no less important to recognize that these efforts cannot overcome the significant remaining obstacles to access to the Court's public proceedings. The critical point in that respect is that these are "public proceedings" – they are conducted in a public building on a matter of public importance, and members of the general public are admitted to observe these

proceedings. The public arguments in particular are an important part of the Justices' deliberative process; they are not just for show.

There is of course great public interest in the Court. We anticipate that SCOTUSblog will receive between ten and twelve million "hits" this year, the largest proportion of which are from ordinary Americans – not lawyers – interested in the health care litigation. Another illustration is the *District of Columbia v. Heller* case, in which the Court announced its interpretation of the Second Amendment right to keep and bear arms. We had more visits on SCOTUSblog on the days of that oral argument and the eventual decision than for any prior case, by far. But of course, 99.999% of interested Americans were unable to see the oral argument or the proceedings in which the summary of the decision was read.

That is so because, for several reasons, only a trivial proportion of the American public will ever attend the proceedings, for reasons that are beyond the Justices' control. The Courtroom itself is quite small, and the Justices hear argument on only roughly forty days a year. In any given case, there may be as few as fifty or one hundred seats available to members of the public who stand in line. My personal best estimate is that roughly 10,000 members of the public attend the proceedings each year by standing in the line out in front of the Court. The line itself can be hours long. On top of that, the cost of traveling to Washington, D.C. – including staying in or near the city, which is quite expensive – is regrettably prohibitive for a very large part of the population, particularly in these harder times.

To be sure, that is not the entire story, and there are points that critics of the Court too quickly overlook. Members of the public traveling from out of town can attempt to request

reserved seating. The Court also has long provided a so-called “three-minute line,” which permits members of the public to witness a brief portion of the public proceedings without waiting in a significant line, although the visit is so short that it provides nothing more than a snapshot. And in cases of great public import, such as the health care litigation, there is every indication that the Court will place a premium on maximizing – not limiting – the number of public seats. But in the end, even 200 seats cannot accommodate the 100 million Americans who may be interested in those proceedings.

In addition, for the reasons I gave above, these concerns relate only to the public’s ability to see the proceedings. Decisions are released immediately, and transcripts are published the day of arguments. The audio for every argument is available at the end of the week. It is possible that in cases of extreme interest – such as the health care litigation – the Justices will allow same-day audio, as they have previously done.

Nonetheless, in spite of the need for a greater collective awareness of what happens there, the vast majority of the American public will never *witness* the work of the highest Court in the land. The Court has already recognized the public’s need for transparency, but despite recent efforts to increase accessibility to its work, significant barriers still remain. Allowing cameras inside the Courtroom is the next logical step.

Television is a tremendous vehicle for public accessibility, including because the United States is culturally a visual nation, with television (and more recently, webcasting) by far the most common way that Americans experience significant events. It is a culturally pervasive means of communication; there are televisions and computers in the vast majority of American

homes. Broadcasts of Court proceedings will reach segments of the public in a way that transcripts and audio recordings cannot. There cannot be any serious dispute that whereas at most a few hundred thousand people (almost all lawyers) will read the Court's opinion or oral argument transcript in the health care cases, tens of millions of ordinary Americans (at the very least) would watch all or part of the proceedings in the case with great interest.

If there were problems with televising court proceedings, we would know it. Numerous courts in this country – from state courts to lower federal courts, and courts of appeals, including the Second and Ninth Circuits – broadcast their proceedings. I have argued in the Washington Supreme Court, for example, which permits interested parties around the country and overseas to watch. To examine the possible effects of cameras in the courtroom, the United States Federal Judicial Center conducted an evaluation in 1994, in which lower federal court lawyers and judges responded that the presence of cameras in proceedings had had “small or no effects” on the decorum of the Court or on the proceedings.

If the Court adopted the use of cameras during its proceedings, it would of course not be the Justices' first experiences in front of the lens. As a result of the modern confirmation process, nominees are exposed to cameras at an early stage of the process. There is great fanfare that surrounds a nomination; television cameras roll from the President's initial announcement of a candidate, through the dizzying array of nominations interviews that follow, and through the sometimes contentious hearings before this very Committee. The nominee gains experience and familiarity working in front of the camera while responding to difficult questions during those hearings, in what is the most challenging point in the process of

ascending to the bench. By contrast, during Courtroom proceedings, and most notably during oral arguments, it is the Justices who shape the conversation, rather than the Senators who are posing questions to the Justices. To observe the Justices during these proceedings is to observe them at the height of advantage. If the Justices were to allow cameras into the Courtroom during proceedings and arguments, we would observe them at their time to shine most brightly.

Here as in so many contexts, the fault lies with Jon Stewart and Stephen Colbert. The Justices would be right to predict that excerpts of questions or opinion announcements will be taken out of context and mocked in some instances. But the Court can have greater confidence in the country. Most Americans get their news from real, not fake, news outlets.

The Justices should also have greater faith in themselves. Having not only argued two dozen cases but also attended hundreds of proceedings, they are not always scintillating, but they are uniformly serious and thoughtful and intelligent.

Thus, at a time when public confidence in government is flagging, this is a tremendous opportunity for the Court to use this technology as a vehicle to re-energize public faith in our democratic system. As a result of a number of factors that are unrelated to the Court, including an economic downturn, in addition to the many challenges that are faced by a nation at war, the public's faith in the democratic process is at a low ebb. By increasing accessibility to the Court's work, as a critical part of our government, the Justices have a rare opportunity to increase voters' faith in the democratic process by reminding them of the value of their vote. In an upcoming election year, there is an especially powerful need to remind voters of their civic

duty. Increased accessibility to the Court's work would reinforce the role that each vote plays in selecting a candidate, who in turn, will nominate individuals to serve on the bench.

Although the Justices may also have some concerns that the lawyers will pander to the cameras, as someone who is getting ready to argue his twenty-fifth case I can say that our only concern is persuading the Justices, not annoying them and potentially losing votes by grandstanding.

There are also constitutional values at stake. To be clear, there is no First Amendment right to televise court proceedings. But the First Amendment has almost at its core a significant interest in the public being able to receive as much information as possible regarding the operations of governmental institutions.

In recognition of these interests, a bi-partisan coalition of Judiciary Committee members has co-sponsored legislation to allow the Court to add cameras to proceedings. The Sunshine in the Courtroom Act of 2011 is a bill that demonstrates critical respect for the separation of powers by respecting the judiciary's autonomy in choosing whether to implement cameras for use. It represents an important step for those whose work is dedicated to creating an increasingly open and transparent government. Allowing cameras in the Courtroom will lead to greater civic awareness and engagement, and will create a mechanism through which the public can connect with a body that powerfully shapes their lives.

Again, I would like to thank the Committee members, and Madam Chairman, for giving me the opportunity to testify before you today. I am honored to be here and I would be pleased to answer any questions that you may have for me.