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Televise US Supreme Court arguments

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The time has finally come, and it is long overdue, for the U.S. Supreme Court to allow its public proceedings to be broadcast. The issue, which has been debated for years, has reemerged because of the intense interest in the oral arguments coming in March 2012 concerning the constitutionality of the

Affordable Care Act.

Last week, Congressman Gerry Connolly (D-Va.) introduced the "Cameras in the Courtroom Act of 2012 - H.R. 3572," to permit live broadcast of Supreme Court arguments. Sen. Dick Durbin (D-Ill.) and Sen. Charles Grassley (R-Ia.) have introduced a similar bill in the Senate. Last Tuesday, Sen. Amy Klobuchar (D., Minn.), chairman of the Senate Judiciary subcommittee on administrative oversight and the courts, held a hearing on cameras in the Supreme Court.

Ideally, the Supreme Court will change its own rules to permit broadcasting of oral arguments and other proceedings, such as the announcing of opinions, which occur in open court. But if not, Congress should adopt the proposed legislation under its authority to make rules of procedure for the federal judiciary.

Supreme Court proceedings, of course, are government events and there should be a strong presumption that people should be able to watch government proceedings. Arguments in the Supreme Court always have been open to the public, but relatively few can attend in person. There are only 250 seats and people literally camp out all night, or for even longer, to be able to attend arguments in high profile cases. Broadcasting allows the entire nation to watch a crucial branch of government at work. In fact, many of the arguments against allowing cameras in the courtroom are really arguments against allowing the public and reporters to be there at all, something that is thankfully unthinkable as well as unconstitutional.

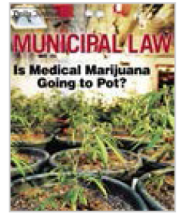
At least since *Bush v. Gore*, 531 U.S. 98 (2000) almost exactly 11 years ago, the Supreme Court has on occasion, in high profile cases, allowed broadcasting of the audiotapes of oral arguments immediately after they conclude. *C-Span* has taken advantage of this opportunity, broadcasting the audiotapes as soon as they become available and showing still photographs of the justices and advocates as their voices are heard. But if people can hear the tapes just minutes after the arguments conclude, it is impossible to see the harm in allowing them to see the proceedings live just an hour earlier.

What possible rationale is there for excluding cameras from Supreme Court proceedings? One concern is that broadcasting arguments will change the behavior of lawyers and justices. Perhaps that concern has some basis in trial courts where there is worry about the effect of cameras on witnesses. Even there, however, the experience of many jurisdictions with cameras in the courtrooms and many studies

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refute any basis for concern.

There is no reason to believe that prohibiting live broadcasts helps the Supreme Court's legitimacy.

But especially in the Supreme Court, there seems little basis for worry. The lawyers, who are focused on answering intense questioning from the justices, are unlikely to alter their arguments to play to the cameras. Besides, anyone who has witnessed a Supreme Court argument knows that the justices are firmly in control of the proceedings. Justices and lawyers know that the arguments, especially in high profile cases, are going to be extensively covered in the media and audiotapes will be publicly available. In this context, there is no reason why live broadcasting will change behavior.

I have heard justices express concern that if television cameras were allowed, the media might broadcast excerpts that offer a misleading impression of arguments and the Court. But that is true when any government proceeding is taped or even when reporters cover any event. A newspaper or television reporter could quote a justice's question or a lawyer's answer out of context. The Supreme Court should not be able to protect itself from misreporting any more than any other government institution can do so.

The justices might be afraid that an excerpt of oral arguments might appear on "The Daily Show with Jon Stewart" or "The Tonight Show with Jay Leno" and be used for entertainment purposes; perhaps they will even be mocked. But that is a cost of being a democratic society and of holding a prominent position in government. In no other context would Supreme Court justices say that government officials can protect themselves from possible criticism by cutting off public access.

Indeed, the Court's decision to preclude live broadcasts seems to be about protecting its own credibility. Over a decade ago, there was a panel discussion at the 9th Circuit Judicial Conference about cameras in the courtroom. Fred Graham, from Court TV, challenged Justice Stephen G. Breyer as to why Supreme Court proceedings could not be broadcast. Justice Breyer responded by saying, "Compare the public approval ratings of the Court compared to the other branches of government."

But this mistakenly blames the messenger. There is no reason to believe that prohibiting live broadcasts helps the Supreme Court's legitimacy. Quite the contrary, I believe that the Court's credibility only will be enhanced if more people see the justices at work. Anyone who watches a Supreme Court argument will see nine highly intelligent, superbly prepared individuals grappling with some of the nation's hardest questions. The public will see, too, that there are not easy answers to most constitutional questions and that there are usually compelling arguments on both sides. That only can increase the public's understanding of the law.

The easiest solution is for the justices to change the Court's rule and allow live broadcast of its proceedings. If this does not occur, Congress should pass one of the bills that have been introduced to require this. Some have questioned, however, whether it would be constitutional for Congress to regulate another branch of government in this way.

It is an interesting and unresolved question, but my own sense is that this would be permissible. Federal statutes regulate many aspects of procedure in the federal courts. In fact, all of the rules of procedure are promulgated pursuant to a federal statute, the Rules Enabling Act. A law requiring cameras in the Supreme Court would not intrude on its decision-making in any way.

But hopefully it won't come to Congress forcing the Supreme Court to finally enter the 21st century. The justices should decide now to allow broadcasting of Supreme Court proceedings.

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U.S. Supreme Court

Televise US Supreme Court arguments

The issue of cameras in the U.S. Supreme Court reemerges as oral arguments over the Affordable Care Act approach. By **Erwin Chemerinsky** of UC Irvine, School of Law

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