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GRANTING CERTIORARI TO VIDEO RECORDING BUT NOT TO TELEVISING

Scott C. Wilcox* †

Cameras are an understandable yet inapt target for Supreme Court Justices apprehensive about televising the high Court's proceedings. Notwithstanding Justice Souter's declaration to a congressional subcommittee in 1996 that cameras will have to roll over his dead body to enter the Court, the Justices' public statements suggest that their objections are to televising—not to cameras. In fact, welcoming cameras to video record Court proceedings for archival purposes will serve the Justices' interests well. Video recording can forestall legislation recently introduced in both houses of Congress that would require the Court to televise its proceedings. The Court's desired result—the legislation disappearing from the congressional agenda—will become more plausible once the Justices have acknowledged legislators' legitimate arguments for improving access to the Court. When initiating video recording, however, the Justices can allay the concerns they have expressed about televising by strictly limiting the distribution of the archival footage.

I propose that the Supreme Court voluntarily begin video recording its proceedings and make the footage available for viewing at the National Archives. The Court could arrange with the Archives to prohibit copying of oral argument video; visitors would be permitted to view the footage and to take notes but not to duplicate the recordings. The College Park, Maryland branch of the Archives, accessible to anyone (but only with photo identification), serves as the federal government's multimedia depository. Traditionally, anyone can copy recordings warehoused there because government materials are generally in the public domain and fall outside the protections of copyright.

But preventing the copying of video recordings of the Court should not demand too much of the Archives. Dubbing and recording equipment is already prohibited within the Motion Picture, Sound, and Video research room's Restricted Media Viewing and Listening Area. Moreover, precedent for placing copying restrictions on government recordings, although rare, definitely exists. According to Susan Cooper, Director of Public Affairs for the U.S. National Archives and Records Administration, visitors interested in the Nixon tapes originally were permitted only to listen to the audio recordings and to make notes; copying the tapes was at first prohibited. (Litigation over the Nixon tapes resulted in the limitations initially being placed on their

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distribution. Since then, most of the collection has become available for copying, but this relaxation of copying restrictions does not foreordain the eventual loosening of access to Court videos; the unique context of the Watergate-inspired criminal proceedings in *United States v. Nixon* is easily distinguished. Instead, sitting Justices would retain control over the disposition of any video recordings made as they currently do with respect to audio recordings.)

Utilizing the National Archives as a depository for Supreme Court recordings is a familiar concept for the Justices. The Court has made audio recordings of its public proceedings since 1955 and began depositing the recordings annually with the Archives in 1969. Recordings are stored in the office of the Marshal of the Supreme Court for the duration of each current term, and the Marshal transfers the term's recordings to the Archives at the beginning of the following term. After the recordings arrive at the Archives, anyone may listen to them or freely copy them. Because the Court relaxed its policy governing the copying of tapes of its proceedings in 1993, the public can now use and copy the recordings even for commercial purposes. Adding to the Justices' familiarity with the Archives, the main Archives facility in Washington, D.C. also stores printed transcripts of Court proceedings.

Because I have tailored my proposal to address the Justices' express concerns about televising, it is best evaluated in the context of the Justices' past statements about televising Court proceedings. Over the past twenty-five years, the current Justices each have reacted, at least briefly, to the concept of televising the Court's proceedings. The four Justices who outright oppose televising—Kennedy, Scalia, Thomas, and (as already noted) Souter—have expressed several concerns: televising may adversely affect the institution, televising would intrude on the Justices' privacy, soundbites shown on the nightly news would mislead the public about the Court's work, and televising could imprudently signal to lower courts that the Justices believe televising all federal court proceedings is advisable. Other Justices, however, have recognized the potential merits of greater public access to the Court. Justice Stevens, for example, expressed concern in a 1985 statement about the fact that, in many high-profile cases, members of the public were being turned away from the Supreme Court after a long wait; he alluded that television might be a solution to the problem yet acknowledged the unforeseeable impact televising might have on the Court. Justice Bader Ginsburg indicated in a 2000 interview that she personally had no objections to televising but that she respected the positions of her colleagues who do.

Bearing these considerations in mind, permitting cameras into the Court in order to record oral arguments for archival purposes is a modest step that will eliminate the express concerns motivating judicial opposition to televising. The Justices' apprehension about providing fodder for television programming too often comprised of truncated soundbites will disappear. (Understandably, the Justices would likely prefer to foreclose the possibility of a clip of oral arguments being featured in the *Daily Show with Jon Stewart*'s "A Moment of Zen" or in some other humorous but anti-contextual

frame of reference.) While oral arguments theoretically could be viewed out of context at the Archives, this approach presents no greater danger of distortion than the “three-minute line” at the Court, which provides visitors only the briefest glimpse of the Justices at work.

Additional reasons given for opposing televising also fail to resonate in the different realm of archival recording. In Justice Thomas’s March 2007 testimony before a congressional subcommittee, he vocalized some Justices’ privacy concerns. Their apprehensions, it seems, stem from a belief that regular television coverage of Court proceedings will erode the relative anonymity that a few Justices have managed to preserve. Archival recording, however, avoids widespread media exposure and will impact the Justices’ privacy and security minimally, if at all. Also, because the footage will no longer be released for media distribution, the worry that the Supreme Court might indicate to lower courts that televising is advisable in all cases will also evaporate.

Archival recording should mollify even Justices who have expressed the concern that televising will negatively affect the character of oral arguments. The limited distribution of archival footage should allay most fears that video recording will exacerbate this problem. Even if a few arguing counsel are tempted to overly dramatize their arguments for the cameras, most Supreme Court litigators will exercise self-restraint out of respect for the Court, especially once they recognize the film will not be airing on the 11 p.m. news.

While my proposal will likely address the Justices’ concerns, substituting archival recording for televising may fail to satisfy many advocates of greater media access to the Court. Admittedly, financial and time constraints will prevent some prospective viewers of the archived oral arguments from traveling to the depository at the Archives. This reality is a consequence of our federal system, one in which many government institutions are located in the Washington, D.C. metropolitan area. The John F. Kennedy Center for the Performing Arts and the Smithsonian Institution are merely two examples. But the availability of Court video on demand at the Archives may afford to many other viewers even greater access than if the footage instead were televised on a fixed schedule. Television coverage is most likely to air within the days or weeks after Court proceedings are recorded, whereas archival footage will be accessible for the foreseeable future. Moreover, acknowledging the inadequacy of archival recording for some purposes does not undercut the great benefits that access to the recordings will bring to historians, legal practitioners, law students, and even the media. Video recordings of oral argument will prove invaluable resources as law students and practitioners study Supreme Court advocacy, as legal scholars study the Court’s jurisprudence, and as historians study the Justices and the operation of the Court. This value should not be surprising because oral arguments offer a rare glimpse into the inner workings of a largely private Court and into the inner minds of the nine individuals who guide our nation’s jurisprudence. To be sure, transcripts and audio recordings are valuable. But oral arguments take place in three dimensions, and the next best thing to experi-

encing them live is watching a video. Video can capture the nuances of communication—among the Justices as well as between the Justices and counsel—that tend to be understated in transcripts and even in audio recordings. The Court should not overlook these benefits to society when they easily may be attained without sacrificing the Justices' control over the Court's proceedings.

In light of the value of archival recording, expanding the Archives' Supreme Court collection surely will increase the attractiveness of the depository to scholars, students of the Court, budding advocates, and interested members of the public. The Archives already are popular destinations, drawing over a million visitors each year. Of course, the majority of visitors tour the main Archives in Washington, D.C., which house the original Declaration of Independence, Constitution, and Bill of Rights. Nevertheless the College Park branch housing the multimedia depository, which is conveniently located only ten miles outside of Washington, D.C., also draws significant numbers of visitors.

Notwithstanding the skepticism that this proposal may face from advocates for televising the Court, it is the most viable means of achieving greater access to the Court at present. The current Court seems unwilling to consider televising its proceedings voluntarily, and the political and constitutional viability of the legislation pending in both houses of Congress is uncertain. But video recording should be both judicially acceptable and politically achievable.

The Court may fear that allowing archival cameras would only strengthen the position of those advocating the televising of oral arguments, but this concern is misplaced. Justices have shared their concerns about televising with Congress in no uncertain terms. Congress will likely defer to the Justices once the Court has acknowledged legitimate arguments for improving access to its proceedings, even if the Justices take only this incremental step. Legislators will not lightly provoke a constitutional showdown with the Supreme Court, and most will be unwilling to do so when the Court has supplemented its reasoned defense of continued non-televising with archival recording. Even if a minority of legislators feels that requiring the Court to distribute its video footage would be a more natural exercise of congressional power than would be forcing the Court to permit the installation of cameras, such reasoning is unlikely to carry the day—especially in light of several Justices having made an impassioned appeal to Congress to respect the Court's perspective and purview.

Eventually, the Supreme Court may be ready to air the highest (and most consequential) reality television show in the land. Until such time, however, video recording will allow the Court to document for posterity the most public aspect of its important work without compromising the character and dignity of the Court's proceedings. This simple step will also stave off an undesirable conflict between the Supreme Court and the other branches. Stay tuned for further developments.