

2007

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Recommended Citation

Whitman, Christina B. (1976-). "Televising the Court: A Category Mistake (Symposium on Televising the Supreme Court)." *Mich. L. Rev. First Impressions* 106 (2007): 5-7.

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TELEVISIONING THE COURT: A CATEGORY MISTAKE

Christina B. Whitman* †

The idea of televising Supreme Court oral arguments is undeniably appealing. Consequently, it is not surprising that reporters and politicians have been pressuring the Court to take this step. The other branches have been media-friendly for years, and Supreme Court arguments are already open to the public. Why should those of us who neither reside in Washington, D.C. nor have the time to attend Court proceedings be asked to depend on reporters for descriptions of the event? Even lower courts permit cameras. There is an understandable hunger for anything that will help us understand these nine individuals who have so much power—who can even choose a President, or at least hasten his anointment. Are the Justices refusing to reveal themselves because they prefer mystery, because they do not want the public to realize that the Court is a human institution after all? Whatever the Justices' motives, televising the Court's arguments is a terrible idea. It is both misleading and unnecessary. Misleading because it would only randomly tell us something useful about the Court, and unnecessary because the Court is already more open than the other branches.

Oral arguments and announcements of decisions are the only moments of public performance in the work of the Court, but they are more performance than work. Arguments come in the middle of the Justices' consideration of a case—after considerable reading, discussion, and thought, but before more of the same. Individual Justices use arguments differently. Some Justices simply do not work out their thoughts orally. The Justice with whom I am most familiar, Justice Lewis F. Powell, Jr., preferred to communicate through memoranda—even with his clerks. He was an extremely successful litigator, but also a Southern gentleman. Showing off his intelligence, much less asking a snide question or making a cutting remark, was just not his style. Conversely, other Justices enjoy the give-and-take with each other and with the advocates for the sake of the encounter alone. Their dialogue may or may not focus on what really matters to their decision in a case. They might just be pouncing on a weak argument for the pure pleasure of the kill. Either way, every comment is already overanalyzed for a hint as to what is on the Justices' minds.

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† Suggested citation: Christina B. Whitman, *Televising the Supreme Court: A Category Mistake*, 106 MICH. L. REV. FIRST IMPRESSIONS 5 (2007), <http://www.michiganlawreview.org/firstimpressions/vol106/whitman.pdf>.

Oral arguments already receive too much of the wrong kind of attention because Court watchers enjoy the game of predicting outcomes, and arguments provide an occasion to justify a story or a comment on a blog. But this attention gives arguments a misleading importance. It is common to say that a lawyer cannot win a case by her oral argument, but that she can lose her case that way. This is as it should be. Ideally, we want effective advocates for both sides, but we should hope that the Justices can rise above a poor argument and reach a result that reflects judgment and justice despite the shortcomings of its advocate. Most arguments are lost not by embarrassing advocacy, but rather because a lawyer is not always able to avoid admitting under direct questioning to a weakness in his case that was concealed in his brief.

I enjoy reading the argument transcripts, which are now available almost immediately, and I use them in my classes. But they are a treat rather than a meal. On television and radio, the availability of transcripts already promotes emphasis on the kinds of insights and ripostes that can be conveyed in soundbites. There are Justices whose performances lend themselves to soundbites, who have a quick and provocative wit, and these Justices inevitably attract the most attention. Although these qualities are not inconsistent with greatness, they are not the qualities that make a Justice great. Despite the fun, focusing on these qualities distracts us from less flashy indications of excellence.

So, the televising of oral arguments is misleading. It is also unnecessary. The Court has always been an open institution on the matters that count. The judiciary, at least at the appellate level, has always been required to expose the reasons underlying its actions more than either of the other branches of government—through the discipline of writing published opinions. That is the process through which judges are publicly accountable, and it has no counterpart in the political branches. It is not easy to spot dishonest reasoning or evaluate quality of judgment as captured in opinions, but it is possible. It requires effort, and it is admittedly undemocratic in that it also requires expertise. But it is exactly the process of struggling with writing that gives the judiciary its unique character and disciplines the tendency to rely on first impressions or subjective reactions. The voices of individual Justices can be traced through their separate opinions and even found in their collegial opinions for a group. But the individual is not obscured just to create an insiders' guessing game. The collegial process is the whole point. A Justice who speaks for the greatest number of her colleagues speaks with the most authority.

Is it naive to take the collegial character of the Court and its written opinions so seriously? Perhaps Justices delegate all this effort to their law clerks and are not really subject to the discipline of forming the written work. Perhaps they are only really engaged while on the bench, if there. To the extent that has happened, it is a betrayal of their obligation as Justices, a rejection of the key justification for judicial review—and certainly not something to be accepted or encouraged by overemphasizing oral argument.

The standard arguments against televising the Court are true, too. Media attention might already be encouraging individual Justices to play to an

audience. It would be unfortunate and inappropriate if the most attractive, or even the fastest wit, were to become the public face of the Court.

Politicians are accustomed to performing in the spotlight. They may not appreciate how invasive the camera can seem to people who have not lived their lives this way. Justice Powell took media access seriously, but he saw it as a duty rather than a pleasure. Even more exposure to public scrutiny might have made his years on the Court deeply uncomfortable. For people like Powell, for whom public service is an obligation and public performance a necessary evil, becoming a media celebrity might be too costly. Yet we need people like Justice Powell in part because they understand the costs of public scrutiny and the value of privacy.

A narrow view of accountability, one that reduces it to public observation, has already turned too much governmental decision-making away from substance. Media attention already focuses on the sharpest tongue on the bench. Let us not give verbal skill more importance than it deserves, lest it change the character of our least democratic but most open branch.