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APPELLATE LAW

Appellate TV

By Aaron S. Bayer

On Oct. 1, the U.S. Supreme Court will hear its first arguments of the term. Chances are, you won't see it. The arguments won't be broadcast on television or the Internet. But if you're arguing a state supreme court appeal, there's a decent chance you'll find yourself on TV, as states are increasingly allowing electronic media coverage of appellate courts.

Debate over the wisdom of televising federal appellate arguments has focused, understandably, on the U.S. Supreme Court. The benefits of allowing the public to see how the highest court in the land engages counsel in arguments on issues of public importance would seem to be self-evident. In 2000, for example, allowing C-SPAN to televise the oral argument in *Bush v. Gore* would have allowed the public to see one of the most consequential judicial arguments in recent memory.

High court has long resisted televising its arguments

The court, however, has long resisted cameras and television. Many justices have been outspoken in their opposition, including Justice David Souter, who made the oft-repeated statement that "the day you see a camera come into our courtroom, it's going to roll over my dead body." Opponents of televising the court's oral arguments contend that it would result in misleading sound bites, distort the public's understanding of the court's overall decision-making process, cause grandstanding during oral argument, intrude on the justices' relative anonymity and pose security risks.

Critics have rejected these concerns as unfounded. 6th U.S. Circuit Court of Appeals Judge Boyce F. Martin Jr., for example, has said that he is "reminded of Chicken Little's famous mantra as I listen to some Supreme Court Justices' reactions to the prospect of televising oral arguments," and characterized their fears as "overblown." B. Martin Jr., "Gee Whiz, the Sky Is Falling!," 106 Mich. L. Rev. First Impressions 1 (2007).

■ *Congressional action*. In recent years, Congress has entered the fray, seeking to mandate television coverage of Supreme Court arguments. Current legislation (S. 344 and H.R. 1299) would compel the Supreme Court to permit television coverage of oral arguments unless a majority of the justices decides that it "would constitute a violation of the due process rights" of a party before the court.

Justice Anthony M. Kennedy, the court's diplomatic point-person on this issue, recently urged Congress not to inject itself into what his colleagues view as an internal matter for the court to decide. Before the Senate Judiciary Committee, he testified that "[a] majority of my court feels very strongly...that televising our proceedings would change our collegial dynamic." He urged senators not to "introduce into the dynamics that I have with my colleagues the temptation, the insidious temptation, to think that one of my colleagues is trying to get a sound bite for the television. We do not want that." If Congress respected "separation of powers and checks and balances," he argued, it "would...accept our judgment in this regard." Judicial Security and Independence: Hearing Before Comm. on the Judiciary, U.S. Senate, 110th Cong. 12-13 (2007).

■ *Constitutional authority*. The prospect of congressional action has sparked debate about Congress' constitutional authority to require television coverage of court arguments. That authority arguably rests on Article III § 2, which subjects the Supreme Court's appellate jurisdiction to "such regulation as the Congress shall make," and Congress' supplementary authority under the "necessary and proper" clause.

Some argue that, just as Congress has statutorily determined how many justices sit on the court, what constitutes a quorum and when the court's term begins, 28 U.S.C. 1, 2, it has authority to expand public access to Supreme Court arguments. Others contend that the authority to decide whether to broadcast arguments, like the court's inherent power to control the time and length of oral argument, the nature of its conferences, and how it votes on cases, falls within the court's core judicial powers under Article III, § 1. See B. Peabody & S. Gant, "Debate: Congress's Power to Compel the Televising of Supreme Court Proceedings," 156 U. Pa. L. Rev. PENNumbra 46 (2007).

Even if constitutional, statutorily requiring television coverage of Supreme Court arguments may undermine traditional principles of comity and respect among branches of government—what has been referred to as "constitutional etiquette." B. Peabody, "Constitutional Etiquette and the Fate of 'Supreme Court TV,' " 106 Mich. L. Rev. First Impressions 19 (2007). Just as the Supreme Court has used the "political question" doctrine to avoid intrusion into the elected branches, Congress should consider staying its hand to allow the court to determine

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how its arguments should be presented to the public. Id.

■ Federal Appellate Courts. From 1990 to 1993, the Judicial Conference of the United States ran a pilot program that allowed photographing and broadcasting of civil cases in six federal district courts and two appellate courts (the 2d and 9th circuits). Though the participating appellate judges' overall attitude toward media coverage of arguments was favorable (see Electronic Media Coverage of Federal Civil Proceedings, Federal Judicial Center 18 (1994)), the conference continued to bar cameras and television in all federal courts. In 1996, perhaps recognizing that many concerns about televising trials are not present in appellate proceedings, the Judicial Conference allowed each appellate court to decide whether to permit television coverage. Only the 2d and 9th circuits have chosen to do so.

Judge Diarmuid O'Scannlain of the 9th Circuit reported to Congress that from 1991 to 2005, the circuit granted 133 of the 205 requests for video coverage of arguments. Cameras in the Courtroom: Hearing Before Comm. on the Judiciary U.S. Senate, 109th Cong. 111 (2005). Many involved high-profile cases, such as the recall election of Governor Gray Davis, but some—like C-SPAN's coverage of a "duty to inform" case under ERISA—did not. Id. at 113-14. Based on the court's experience, O'Scannlain found that concerns about television coverage leading to grandstanding and politicizing in the courtroom were "overstated." He concluded that increased media access actually "might depoliticize appellate proceedings and the public's perception of the appellate legal process," and avoid "the unfortunate view that appellate courts are result-oriented bodies." Id. at 116-17.

Other circuits have taken some small steps. The 7th, 8th and Federal circuits make audio tapes of arguments available for free on their Web sites. In marked contrast, the 11th Circuit (Local Rule 34-4(g)) precludes disclosure of its audio tapes and transcripts of oral arguments to anyone, though the circuit is considering an amendment to allow the U.S. Supreme Court access to its argument tapes upon request. See H. Bashman, "At 11th Circuit, What Happens at Oral Argument Stays at Oral Argument," Law.com (Sept. 4, 2007).

■ *State supreme courts*. Justice Louis Brandeis' famous dictum that states are the laboratories for policy experiments, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (dissent), applies well to electronic coverage of courts. States have developed a wide variety of rules governing television coverage of court proceedings. See *Cameras in the Court: A State-by-State Guide, Radio-Television News Directors Association*.

Proposed legislation has sparked debate about Congress' authority to require television coverage of Supreme Court arguments.

It is beyond the scope of this article to catalogue the variations in state rules governing media coverage of appellate arguments. In general, though, most states' rules require advance notice and court permission to televise arguments, and vest discretion in the presiding judge or panel to limit or preclude coverage— though the scope of that discretion varies from state to state. Many states allow parties to object to television coverage, and some require the parties' consent. Some states bar television coverage in certain sensitive cases, such as child custody or sexual offenses.

Connecticut revamps its rules for cameras

Connecticut recently revamped its rules on cameras in the courtroom, after studying the issues and reviewing the practices in all other states. Its new rules establish a presumption that all appellate arguments are subject to electronic media coverage; unless the appeals panel determines there is "good cause" to limit coverage, there are "no reasonable alternatives" to limiting coverage, and the limitation is "no broader than necessary to protect the competing interests at issue." Conn. Practice Book § 70-9(b)(III). The presumption does not apply in cases involving sexual assault, child abuse or neglect, risk of injury to a minor, child custody or termination of parental rights, though electronic coverage is still permissible if the court determines that the need for it outweighs the privacy interests involved. Id. § 70-9(c).

In most states, the media only infrequently seeks permission to televise appellate arguments. Increasingly, however, state supreme court arguments are broadcast on what are state equivalents of C-SPAN. A number of states, including Alaska, Florida Michigan and Washington, have been broadcasting state supreme court arguments on their state public television networks for years, some for more than a decade. The arguments are broadcast live, aired on tape or webcast on the Internet.

Few problems have been reported, and, contrary to the view of many appellate judges that no one would be interested in seeing technical legal arguments, the broadcasts of supreme court arguments are among the most watched government programs broadcast in those states. Their experience should provide some comfort and incentive to other courts to consider expanding video coverage of appellate arguments. NLJ