Shine a Light: A Judicial Independence Perspective on Televising Oral Arguments

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Abstract

The decision by a court whether to televise its proceedings is an increasingly salient one that could have bearing on the health of the court’s diffuse support among the public. Recently, C-SPAN called upon Chief Justice John Roberts to allow its cameras into the Supreme Court chambers for the first time so that it could broadcast to the public the landmark 5.5-hour oral argument over the constitutionality of President Obama’s signature health care reforms. Claiming that “the public interest is best served by live television coverage of this particular oral argument,” C-SPAN’s request is one episode in the larger debate over the transparency of the American judicial system’s decision making process. While Roberts did not grant C-SPAN’s request, other venues facilitate exploration of the thesis that televised court proceedings affect diffuse public support. It is well-established in the literature (Caldeira & Gibson 1992; Carrubba 2009; Staton 2010) that courts depend upon the public to enforce their rulings; this enforcement is mediated by two factors, transparency and legitimacy, which in turn may be endogenous to public relations activity propagated by the court. This paper presents a perspective informed by the judicial independence literature that explains why Roberts might have chosen not to allow televising because the risk to legitimacy was too high to warrant an increase in transparency.
Introduction

Whether or not Supreme Court proceedings should be televised is a contentious issue among observers, and it has only become more so in light of recent events. With C-SPAN’s recent request of Chief Justice John Roberts to allow them to televise oral arguments over the constitutionality of the Patient Protection and Affordable Care Act (PPACA), the long-time public affairs channel’s belief that “the public interest is best served by live television coverage of this particular oral argument,” and indeed all substantive arguments, is open to debate (Lamb 2011). On the one hand is the “sunshine” argument, that proceedings should be out in the open, advanced here by C-SPAN but also by members of Congress when arguing the need for legislation enabling the use of cameras in federal courtrooms.1 According to this argument, televising court proceedings makes them more accessible to the public, which in theory reinforces certain democratic tenets of American government (Tong 2006). On the other hand, critics of sunshine proposals have argued that the presence of a rolling camera could have such unintended consequences ranging from courtroom posturing or the use of “sound bites” by judges to potential retaliation against witnesses or the judges themselves to diminution of the institution of oral argumentation itself (Tong 2006; Smith 2009).

The televising debate pertains to theories about a conditional tension between a court’s legitimacy and its transparency. This tension manifests when judges weigh courses of action in decision making against their environmental constraints, and is apparent in a separation-of-powers framework. For example, justices weighing an issue of constitutionality might consider the preferences of other actors, such as the executive,

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1 Recent examples of proposed legislation are the “Sunshine in the Courtroom” (S.410) and “Cameras in the Courtroom” (H.R.3572) Acts in the 2011-2012 Congressional terms, neither of which has made it past the committee stage (THOMAS).
legislature, or the public. The justices, believing a policy to be unconstitutional, might sincerely strike down a policy supported by the president if the court enjoys broad institutional support from the public and believes the public will back it; in a similar situation where the court does not enjoy such support, the justices might strategically uphold the policy, not wanting to appear weak if it is defied. The logic behind this conditionality is that the court, reliant as it is upon the public as an enforcement mechanism (e.g. Caldeira and Gibson 1992; Carrubba 2009), will act sincerely in pursuit of its preferences when it expects the public will censure executive defiance, but will accede strategically to the preferences of the executive when it cannot expect the public to play this role.

Previous scholarly work identifies two necessary conditions for when a court can expect the public to play this role (Vanberg 2005; Staton 2010). These conditions, known generally as legitimacy and transparency, describe situations in which the court can realistically expect the public to rise in its defense if its will is defied by another political actor, be it the executive, legislature, a state, etc. Staton looks at the case of Mexico for how a constitutional court, knowing that it can game the system in its favor by manipulating these conditions, might engage in a public relations campaign intended to cultivate institutional support. While in Mexico this sort of campaign is done through such efforts as seeking to inform the media about important past rulings issued by the court, and selectively disseminating press releases that clarify and promote recent cases, the logic is the same for any sort of media campaign (Staton 2010, 57-62). A court may be able to grow its supply of institutional support by seeking to increase exposure in the
popular media that presents it as an impartial and important entity. Of course, this growth is only possible if the transparency presents the court in a positive, sincere light.

The design of this paper is as follows. First, I extend the logic of Vanberg and Staton about using the media to build diffuse support and show how it can cover a court’s decision to allow cameras into the courtroom. Second, I apply this logic to the case of C-SPAN’s requesting and Chief Justice John Robert’s considering whether to allow televising of oral arguments over the constitutionality of the PPACA. Finally, I discuss how these findings about how televised proceedings could be brought to bear on a court’s institutional support might be tested in the US Circuit Courts, given those courts’ fortuitous institutional arrangement.

**Public Support and a Court’s Decision to Promote in the Media**

Previous work on judicial independence has tended to utilize three different conceptualizations of independence: as a judge’s ability to decide free from the influence of other actors (impartiality); as a judge’s decision-making being both autonomous and effective at achieving her goals (power); and as the formal institutional protections that are prior to any decision making processes in which a judge might exercise independence (Clark and Staton 2011). Vanberg (2005) and Staton (2010) focus on the second type of independence, power. Vanberg’s argument recognizes that the exercise of judicial power in this sense depends on diffuse public support, a contention that is uncontroversial in the literature (e.g. Caldeira and Gibson 1992). Public support is crucial because a court, for want of its own enforcement powers, must rely on the public, through its ability to take recourse against political actors, such as through voting out an incumbent, to penalize defections from the court’s rulings. A public will only exercise this power if the court
enjoys broad institutional—“diffuse”—support. A court is believed to accrue this diffuse support through the public believing it to be an impartial entity (Caldeira and Gibson 1992) or by playing a valuable informative role for the public (Stephenson 2004).

Simply possessing diffuse support is not enough for the court to be independent, however; Vanberg delineates two necessary conditions that must be satisfied in order for a court to exercise power in Clark and Staton’s sense of being both autonomous and effective—ruling against a government actor and having that order obeyed. The two conditions are usually referred to as legitimacy and transparency—where “[t]here must exist sufficient public support for the court (or for a specific decision) to make an attempt at evasion unattractive”; and where “[i]t must be sufficiently likely that citizens will become aware of an evasion attempt” in the first place so that it might then bring to bear the diffuse support it has for the court and its rulings (Vanberg 2005, 21).

Staton extends Vanberg’s theoretical framework with a game-theoretic analysis that describes the strategic interactions among three actors in a judicial review game. This game includes a constitutional court, an executive, and the median voter; the court must choose whether to act sincerely or strategically regarding its preferences and beliefs about the preferences of other actors. Specifically, a court acts sincerely when its beliefs about a policy’s constitutionality are reflected in whether it strikes the policy down or upholds it, and it acts strategically when its beliefs do not match its actions, for fear of executive defection. The court’s behavior is conditional upon how salient the policy is to the executive, the voter’s beliefs about the extent to which the court is impartial, and how aware the voter is of the court’s actions. Staton’s model produces equilibria that help us to understand the tension between legitimacy and transparency described above. In
situations in which courts are minimally constrained by other actors, and are therefore
good, as the saying goes, “to know a court is to love a court,” and this
tension is not problematic (e.g. Gibson, Caldeira, and Baird 1998); however, in situations
where a court is constrained by its environment and has incentives to act strategically,
knowing a court does not lead to loving or respecting it. In fact, we should expect the
opposite: to the extent that courts appear to be political by taking into account the
preferences of other actors, Staton’s model suggests that the court’s level of diffuse
support should suffer.

Staton tests the hypotheses his model produces within the context of the Mexican
Supreme Court, which would disseminate press releases in the hopes of rendering its
rulings more transparent. Crucially, he finds that the court is less likely to rule against the
government as the policy in question gains in salience, and the court would seek to
induce press coverage “when public monitoring is needed and least likely to be available
for lack of media coverage,” in other words, when compliance was an issue because the
court had ruled against the government (Staton 2010, 88). Staton argues that these results
support his game-theoretic model’s hypotheses: the court is sensitive to policy salience
for the government in “[b]oth in its decisions in constitutional cases and in its choices to
publicize those cases…importantly, it behaves as if the public plays an important role in
ensuring its ability to control the constitutional order” (100). The insights of this
application of Staton’s theory are enlightening for a study of a much more established
constitutional court that nonetheless might wrestle with transparency issues of its own:
the United States Supreme Court.
To Televise or Not: Oral Arguments over the Affordable Care Act

Importantly, Staton’s thesis is that “judges go public to construct conditions favorable to the exercise of independent judicial power” (Staton 2010, 7 emphasis in original). We should expect high court judges and justices to pursue media coverage when they desire to exercise power in the autonomous and effective conceptualization of independence. He finds support for that thesis in the decision making and case promotion processes of the Mexican Supreme Court. My focus in this paper is to explore how Staton’s theory informs the case of PPACA’s constitutionality.

This section is laid out as follows. First, I reiterate the controversy. Next, I discuss what the Supreme Court would stand to gain and lose by allowing the oral argument to be televised. Finally, I articulate a perspective informed by Staton (2010) that seeks to explain Chief Justice Roberts’ decision to ultimately not allow the arguments to be televised.

As mentioned above, the case in question is significant for a number of reasons. It is a signature piece of President Obama’s domestic policy, and it faced considerable political obstacles to its passage. The policy’s breadth raises questions about the powers of Congress, especially in regulating so-called inactivity and the sweep of the Commerce Clause. Furthermore, all major candidates in the Republican primary have spoken out against the law, and the timing of the Court’s hearing the case ensures that their ruling will serve as election fodder. Finally, the case has been allotted 5.5 hours of oral argument as opposed to the customary 1. All of these factors contribute to C-SPAN Founder and C.E.O Brian Lamb’s claim that “the public interest is best served by live
television coverage of this particular oral argument,” so that the public might witness the deciding of this landmark case (Lamb 2011).

It is my belief that all of these factors also explain Roberts’ decision not to televise. My argument has two parts: first, the US Supreme Court does not suffer from a legitimacy problem, and so has little to gain from greater transparency; and second, the case is liable to being decided strategically, and greater media scrutiny than there already is could actually damage the Court’s diffuse support if the public were to witness the oral arguments.

According to Pew Research Center poll conducted in July 2010, the Court at that time had a favorable rating of just under 60% and an unfavorable rating of close to 25%, and 39% of respondents identified the Court as ideologically “middle of the road.” This compares with a 33% favorable, 56% unfavorable rating for Congress at the same time (Pew Research Center). Importantly, this data was gathered after the controversial *Citizens United* case, and in the absence of any controversial decisions since that poll was taken, we can expect that these numbers are perhaps even a conservative estimate. What these numbers suggest is that support for the Court is quite high and that a plurality of respondents see the Court as not being overly ideological. These numbers would suggest that the Court enjoys broad diffuse support and does not suffer from the same sort of legitimacy problems constitutional courts in other countries, like Mexico, might experience.

The second part of my argument concerns the politics of the case. Bailey and Maltzman argue that the likely outcome of the PPACA case, when viewed through a strategic lens, is that the policy will be upheld but its sweep narrowed; taking into
account the major influencing factors of justice ideology, justice treatment of precedent, and behavior of the other justices, they argue that “[r]espect for precedent pushes (Justice) Kennedy to support the law and Roberts comes along for the ride in order to keep the opinion out of Kennedy’s hands (and possibly writing an opinion that cabins the Commerce Clause more than it is now)” (Bailey and Maltzman 2011). In other words, Bailey and Maltzman expect Roberts, a usually conservative justice, to vote strategically: since Roberts will not likely be able to strike down PPACA, he is liable to join the majority and exercise his prerogative as Chief Justice to write the opinion as narrowly as will still command a majority.

As it is the same man who made the decision whether to televise who can expect to vote strategically in this case, it comes as no big surprise that he opted not to allow cameras into the courtroom. While one could argue that because the Court has never televised a case before why should we expect this one to be different, the fact of the matter is that, given the intense media coverage the case has already garnered, the possibility of televising it presents a huge publicity opportunity. A lesser-established court than the US might jump at such an opportunity to promote itself. However, given the diffuse support the US Supreme Court currently enjoys, and the strong likelihood that the case will be decided strategically, Roberts likely saw the option to televise as no-win.

**Televised Circuit Court Proceedings and Judicial Independence**

Currently, two US circuit courts allow for their proceedings to be televised—the Second and the Ninth—an institutional arrangement that could lend itself to a test of Staton’s theory. While the analysis above suggests that there would need to be significant fluctuations in the Supreme Court’s level of diffuse support for it to pursue greater
transparency through televising, the circuit courts would facilitate a test in an American environment. Significant theoretical work needs to be done to accommodate for the circuit courts not being constitutional high courts, extending the concepts of legitimacy and transparency to how these courts engage the public. Additionally, the theory would need to account for more political actors than just the executive, including the Supreme Court itself, whose preferences matter in strategic interactions. Nonetheless, I believe that the circuit court system is uniquely arranged in such a way that would allow for a test of Staton’s theory of media influence in an institutional setting that is already open to televising, and is quite different from constitutional high courts that lack the requisite power to be independent.

Sources


