

MLRC Media Law Conference
October 4-6, 2023
Lansdowne Resort Hotel, Leesburg, VA

PLENARY 3 Oct. 5th 9:00 – 10:00am

**The Supreme Court: Directions and Dynamics:
Roundtable with star Supreme Court journalists and litigators.**

Amy Howe. Until September 2016, Amy served as the editor and a reporter for SCOTUSblog; she continues to serve as an independent contractor and reporter for SCOTUSblog. She primarily writes for her eponymous blog, Howe on the Court. Before turning to full-time blogging, she served as counsel in over two dozen merits cases at the Supreme Court and argued two cases there. From 2004 until 2011, she co-taught Supreme Court litigation at Stanford Law School; from 2005 until 2013, she co-taught a similar class at Harvard Law School. She has also served as an adjunct professor at American University's Washington College of Law and Vanderbilt Law School.

Greg Stohr has been the Bloomberg News Supreme Court reporter since 1998. A former judicial clerk and Congressional and campaign press secretary, he graduated with honors from Harvard Law School in 1995. In covering the Court, Greg was on the scene for the Bush v. Gore decision, the Obergefell gay-marriage ruling and the Obamacare blockbusters and has interviewed multiple Supreme Court justices. He is the author of a well-received book on the 2003 University of Michigan affirmative action cases. He enjoys making arcane legal issues understandable and meaningful in both print and electronic media. He is also an adjunct professor at George Washington University Law School.

Donald B. Verrilli, Jr. is a partner with Munger, Tolles & Olson, and the founder of its Washington, D.C., office. He is one of the nation's premier Supreme Court and appellate advocates. He served as Solicitor General of the United States from June 2011 to June 2016. Since joining the firm after his government service, he has handled numerous significant cases in the United States Supreme Court, including his successful defense of the constitutionality of the federal law establishing the Financial Oversight and Management Board for Puerto Rico in *Federal Oversight and Management Board v. Aurelius*. He has also won victories for clients in high-stakes class action, antitrust, constitutional, government contracts and copyright appeals. During his time as Solicitor General, he argued more than 50 cases before the Supreme Court, including landmark decisions upholding the Affordable Care Act (*National Federation of Independent Businesses v. Sebelius* and *King v. Burwell*) and recognizing marriage equality (*Obergefell v. Hodges*).

Issues

- What access and oral argument changes adopted during the pandemic will be made permanent?
- Will live audio be made permanent?
- How important is live audio to media coverage of the Court?
- Will Supreme Court proceedings ever be televised?
- Will the Court keep its new structure for oral argument?
- Does the new format foster more substantive questioning by the Justices? How has the change affected SCT practitioners?
- Can/should Congress impose ethical rules on Supreme Court justices?
- Would that violate separation of powers principles?
- Following an unprecedented leak, precedent breaking decisions, and criticism of some Justices' ethics, what is the relationship between the Justices?
- Has Justice Roberts "lost control" of the Court? And is it overly politicized?
- Is there a new swing Justice?

ACCESS to SUPREME COURT PROCEEDINGS

Testimony of Amy Howe

Presidential Commission on the Supreme Court of the United States

Panel on Access to Justice and Transparency in the Operation of the Supreme Court June 30, 2021

<https://www.whitehouse.gov/wp-content/uploads/2021/06/Testimony-of-Amy-Howe.pdf>

At a minimum, the justices should continue with live audio of oral arguments when they return to in-person arguments in the Courtroom. But when they announce opinions in the Courtroom, they should also provide live audio of those proceedings. During the pandemic, because the justices are not in the Courtroom, there are no opinion announcements at all. Before the pandemic, opinion announcements were not released until the fall, long after the term in which they occurred had ended. In 2018, a group of reporters asked the chief justice to expedite the release of the opinion announcement audio in *Trump v. Hawaii*, the challenge to the travel ban, a case in which the Court had released the same-day audio. But the court declined to do so, indicating only that it did

“not plan to make an exception to its practice” of making opinion announcements available at the beginning of the following term.

Reporters Committee / Media Coalition Letter to the SCT to make permanent live audio feed of Court hearings. September 2023.

- Hearing the Supreme Court at work, either through journalism about the cases before it or by tuning in to a live audio feed of an oral argument, helps the public understand the vital role that the Court plays in our legal system and democracy. Though the Supreme Court only sets aside fifty seats for members of the public to attend oral arguments, 100,000 people tuned in to listen to the first two weeks of Supreme Court arguments in May 2020 when the live broadcasts began. See Melissa Wasser, Summary of Supreme Court Oral Argument Numbers, Reporters Committee for Freedom of the Press (Nov. 23, 2020), <https://perma.cc/6MUH-9P3K>. And oral arguments from the 2021–2022 term were streamed at least 3.8 million times. No More Lines: Millions Stream Live Supreme Court Arguments, Project on Government Oversight (Sept. 22, 2022), <https://perma.cc/WZ44-83R8>. Following this Court’s lead, all of the federal appellate courts have continued streaming audio of oral arguments live, and none has indicated any plan to reverse course. See As We Await Word from SCOTUS on its Broadcast Plans, We Can Report That All U.S. Courts of Appeals Are Still Livestreaming, Fix the Court (July 31, 2023), <https://perma.cc/Z75X-C2TU>.
- Live audio of Supreme Court proceedings unequivocally benefits the public and the press. It makes proceedings at the Court more accessible and helps the public understand how the Court functions. The Court has provided a live audio feed of its arguments for every term since the onset of the COVID-19 pandemic in 2020 and this practice has proven to be non-disruptive. Short of providing live video of proceedings, permanent live audio of the Supreme Court’s proceedings is the best way to keep the public informed and engaged with respect to its operations.

Bill to Allow Cameras in the Supreme Court

Sunshine in the Courtroom Act of 2023

Introduced by Sens. Chuck Grassley (R-Iowa) and co-sponsored by Amy Klobuchar (D-Minn.) and Richard Blumenthal (D-Conn.).

<https://www.congress.gov/bill/118th-congress/senate-bill/833/text?s=1&r=38>

Press Release from Sen. Grassley

<https://www.grassley.senate.gov/news/news-releases/grassley-renews-bipartisan-push-to-put-cameras-in-federal-supreme-courts>

The Sunshine in the Courtroom Act of 2023 would grant the presiding judge in all federal courts, including the Supreme Court, the discretion to allow cameras in the courtroom while protecting the identities of witnesses and jurors when necessary or upon request. It also prohibits media coverage of private conversations between clients and counsel, between opposing attorneys, and between counsel and the presiding judge. The bill contains a three-year sunset provision, requiring Congress to evaluate how media access is impacting the judiciary. Sens. John Cornyn (R-Texas), Dick Durbin (D-Ill.), Ed Markey (D-Mass.) and Richard Blumenthal (D-Conn.) are also cosponsors.

The Cameras in the Courtroom Act only applies to open sessions of the Supreme Court – sessions where members of the public are already invited to observe in person, but often cannot because there are a very limited number of unreserved seats in the courtroom. Sens. Amy Klobuchar (D-Minn.) and are also cosponsors.

See also

Bipartisan group of senators optimistic about push to allow cameras in federal courtrooms

CBS News

Grassley said support has been bolstered by the positive response to a recent change by the Supreme Court to live-stream audio of oral arguments, a shift that began during the pandemic. "I think it is just a matter of getting it on the agenda and it will become law," Grassley said of his legislation, which was officially introduced in March.

<https://www.cbsnews.com/news/cameras-federal-courts-sunshine-in-the-courtroom-act-grassley-blumenthal/>

How to Treat the Supreme Court's Camera Phobia

Daily Beast

Making fun of SCOTUS for being tech dinosaurs runs the risk of missing the bigger threat, which is the court's strategy to slow-roll the ability of technology to instantly shed light onto the workings of the high court and all of the federal judiciary.

Ethics and the Supreme Court

Background: Code of Conduct for United States Judges

<https://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges>

- The Code of Conduct for US Judges applies to governs most federal court judges but does not expressly apply to Justices of the U.S. Supreme Court. Although the Justices consult the Code, along with other sources, for guidance when performing their judicial duties, the Court is not presently subject to a defined body of general ethical rules. Some observers maintain that "Supreme Court justices should be bound by the same code of ethics that all other federal judges are required to follow." To that end, some Members of

Congress have introduced legislation that would require the Judicial Conference to “issue a code of conduct[] which applies to each justice” on the Court.

Supreme Court Ethics, Recusal, and Transparency Act of 2023 (introduced Feb. 9, 2023)
<https://www.congress.gov/bill/118th-congress/senate-bill/359/text>

Introduced by Sen. Sheldon Whitehouse (D-RI), this bill makes various changes related to the ethical standards, financial disclosure requirements, and recusal requirements that apply to Supreme Court Justices.

Status: On July 20, 2023, the Senate Judiciary Committee voted 11-10 along party lines to approve the bill. See, e.g., Senate committee approves legislation to impose stronger ethics standards on Supreme Court justices, Associated Press.

<https://apnews.com/article/supreme-court-ethics-senate-clarence-thomas-3e34958536ce4fa464b6ff8cc1d71260>

Among the changes, the bill requires the Supreme Court to

- adopt a code of conduct for Justices and establish procedures to receive and investigate complaints of judicial misconduct;
- adopt rules governing the disclosure of gifts, travel, and income received by the Justices and law clerks that are at least as rigorous as the House and Senate disclosure rules; and
- establish procedural rules requiring each party or amicus to disclose any gift, income, or reimbursement provided to Justices.

Additionally, the bill

- expands the circumstances under which a Justice or judge must be disqualified; and
- requires the Supreme Court and the Judicial Conference to establish procedural rules for prohibiting the filing of or striking an amicus brief that would result in the disqualification of a Justice, judge, or magistrate judge.

Can Congress regulate the U.S. Supreme Court? Does ethics regulation violate separation of powers principles?

A Code of Conduct for the Supreme Court? Legal Questions and Considerations
Congressional Research Service

<https://crsreports.congress.gov/product/pdf/LSB/LSB10255>

A related question is whether legislative efforts to require the Supreme Court to abide by a code of judicial conduct would violate the constitutional separation of powers. To ensure that federal judges would decide cases impartially without fear of political retaliation, the Framers of the Constitution purposefully insulated the federal judiciary

from political control. Chief Justice John Roberts invoked those ideals in his 2021 Year-End Report on the Federal Judiciary, asserting that the courts “require ample institutional independence” and that “[t]he Judiciary’s power to manage its internal affairs insulates courts from inappropriate political influence and is crucial to preserving public trust in its work as a separate and coequal branch of government.” Some observers have argued that imposing a code of conduct upon the Supreme Court would amount to an unconstitutional legislative usurpation of judicial authority. The House resolution discussed above notes that separation of powers and the independence of the judiciary “may be compromised by extensive legislative or executive interference into that branch’s functions” and would thus avoid imposing any binding requirement on the Court. On the other hand, some commentators emphasize the ways that Congress may validly act with respect to the Supreme Court, for example through its authority to impeach Justices and decide whether Justices are entitled to salary increases. By extension, according to this argument, requiring the Supreme Court to adopt a code of conduct would constitute a permissible exercise of Congress’s authority.

Because the Supreme Court possesses the authority to determine the constitutionality of legislative enactments, the Supreme Court itself would appear to have a critical role in determining whether Congress may validly impose a code of ethical conduct upon it. It is difficult to predict whether the Court would uphold the constitutionality of a legislatively mandated code of conduct, as existing judicial precedent offers minimal guidance on how the Court might resolve this constitutional question. For instance, the Supreme Court has never explicitly decided whether the federal statute requiring Supreme Court Justices to recuse themselves from particular cases is an unconstitutional legislative encroachment upon the judiciary, nor has the Court ever directly addressed whether Congress may subject Supreme Court Justices to financial reporting requirements or limitations upon the receipt of gifts.

Senate Judiciary Committee Hearing on Supreme Court Ethics Reform

May 2, 2023

<https://www.judiciary.senate.gov/committee-activity/hearings/supreme-court-ethics-reform>

Former Attorney General and S.D.N.Y. Judge Michael Mukasey

Basic principles of the separation of powers mean that the Court, as a separate branch of government and the only court specifically provided for in the Constitution, is solely responsible for its financial disclosure and ethics rules.

If the public has a mistaken impression that the integrity of the Court has been damaged, the fault for that lies with those who continue to level unfair criticism at the Court and its Justices. It is impossible to escape the conclusion that the public is being asked to hallucinate misconduct so as to undermine the authority of Justices who issue rulings with which these critics disagree, and thus to undermine the authority of the rulings themselves.

Former N.D. Cal. Judge Jeremy Fogel

For decades, the Court has been our most trusted governmental institution, far outpacing both the legislative and the executive branches in polls measuring public confidence. That status has eroded significantly; while only a decade ago more than two-thirds of Americans said that they had confidence in the Court almost the same number express the opposite opinion today. While some of that erosion likely has to do with controversy surrounding some of the Court's decisions, I think that there are other important factors at work, including a persistently hyper-partisan political environment, an increasingly contentious confirmation process, the near disappearance of civics curriculum from our schools, and the pervasiveness of social media as a source of misinformation and disinformation about the law, the judicial process and the judges and Justices to whom that process is entrusted. . . . Every other judicial officer in our country, whether state or federal and regardless of the type of court on which they serve, is guided by explicit ethical standards and is subject to at least some degree of oversight to assure their compliance. The same is true for virtually all officials in the legislative and executive branches.

Commentary

Case closed? Supreme Court silent after Thomas luxury travel raised ethics scandal USA Today

A push by Senate Democrats to require a Supreme Court code of ethics has devolved into a partisan fight. The court itself doesn't seem to be in a hurry to make changes. . . . What does seem clear, based on statements from the justices over the summer, is that there is little to no agreement on how to proceed. Congress, meanwhile, is unlikely for now to approve legislation Senate Democrats are pushing that would require a code of ethics at the court. Republican lawmakers have balked at the idea.

<https://www.usatoday.com/story/news/politics/2023/08/30/supreme-court-ethics-clarence-thomas-financial-disclosure/70697715007/>

Limits of congressional power to regulate Supreme Court untested

Roll Call

Comments from Justice Samuel A. Alito Jr. stirred debate about how much authority lawmakers could wield over court operations. . . . Supreme Court Justice Samuel A. Alito Jr. started a flurry of conversation among judicial and congressional experts when he expressed a self-proclaimed “controversial view” that Congress doesn't have “the authority to regulate the Supreme Court — period.”

<https://rollcall.com/2023/08/02/limits-of-congressional-power-to-regulate-supreme-court-untested/>

Congress Can Regulate the Supreme Court—But There Are Limits to That Power

Reason (Prof. Ilya Somin)

Supreme Court Justice Samuel Alito recently kicked off a controversy by saying that "No provision in the Constitution gives [Congress] the authority to regulate the Supreme Court — period." Taken literally, that statement is nonsense. Congress clearly does have power to regulate the Court in a variety of ways. Alito is also probably wrong if we interpret his statement more narrowly, as merely saying that Congress has no power to

impose an ethics code on the justices, as various critics of the Court have recently advocated. But congressional power over the Court is not unlimited. And some ethics rules could potentially run afoul of constitutional constraints.

<https://reason.com/volokh/2023/07/29/congress-can-regulate-the-supreme-court-but-there-are-limits-to-that-power/>

Brett Kavanaugh says justices are working on ‘concrete steps’ on ethics *CNN*

Justice Brett Kavanaugh said Thursday that the Supreme Court is working on “concrete steps” to address ethics issues at the high court amid an array of recent news stories on justices’ travel and relationships with political donors.

Justice Samuel Alito rejects calls from Democratic senators to recuse in case involving journalist who interviewed him *CNN*

Alito announced his decision not to recuse with the list of orders the Supreme Court released on Friday morning. His statement rattled off several examples of justices on the left and right ends of the ideological spectrum sitting for interviews with news outlets that were also parties in cases before the high court. Alito also said that his fellow justices had been interviewed by – and even written books with – lawyers who practice before the Supreme Court, and that those interviews “did not result in or require recusal.”

[Statement of Justice Alito: Moore v. US](#)

Politicization of the Supreme Court

Academic Commentary

The Imperial Supreme Court
Prof. Mark Lemley (Sep 2022)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4175554

The past two years have marked the emergence of the imperial Supreme Court. Armed with a new, nearly bulletproof majority, conservative justices on the Court embarked on a radical restructuring of American law across a range of fields and disciplines. Unlike previous shifts in the Court, this one isn’t marked by debates over federal versus state power, or Congressional versus judicial power, or judicial activism versus restraint. Nor is it marked by the triumph of one form of constitutional interpretation over another. On each of those axes, the Court’s recent opinions point in radically different directions. The Court has taken significant, simultaneous steps to restrict the power of Congress, the administrative state, the states, and the lower federal courts. And it has done so using a variety of (often contradictory) interpretative methodologies. The common denominator across multiple opinions in the last two years is that they concentrate power in one place: the Supreme Court.

Our Kardashian Court (and How to Fix It)

Prof. Suzanna Sherry

Iowa Law Review, Vol. 106, No. 181, 2020

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3425998

The Supreme Court is broken. After cataloging its dysfunctions, this Article suggests a contributing cause and proposes a solution. The contributing cause is that Justices have become celebrities, and, like other celebrities, play to their fan base. The solution is to limit their opportunities to use their official status to do so: Congress should pass a law prohibiting concurring or dissenting opinions and requiring each case to be decided by an unsigned opinion that does not disclose the number of Justices who join it. The Article outlines the advantages of such a law and considers possible objections to it, including both constitutional and nonconstitutional objections. It ultimately concludes that it would be constitutional and that although there are significant risks, the probable benefits outweigh the probable costs. And because it is a statutory solution rather than a constitutional one, it can be viewed as an experiment that can easily be terminated if it does not work out. In the current climate it is a risk worth taking.