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It's Time to Modernize the Right of Court Access to Provide True Judicial Transparency

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Former President Donald Trump is facing four criminal cases totaling more than 80 felony counts in New York, Georgia, and Florida. These trials will be the most important criminal proceedings in our nation's history. But nearly all the public, including millions of voters, will be shielded from seeing—or hearing—at least three of the trials (all but Georgia) because recording those proceedings will be barred. Although the U.S. Supreme Court has generally recognized a First Amendment right to physically attend certain court proceedings, this fundamental right has never been extended to recording audio or video of court proceedings. Instead, in federal courts, audio and video recording are essentially banned, except for in a few circumstances. States have a patchwork of archaic policies that similarly favor secrecy. These rigid rules render the right of court access a narrow privilege for only the few who have the time, physical ability, and resources to travel to a court typically miles away. A right is only as robust as the ability to exercise it. To truly recognize the right of court access in 2024, courts should allow audio and video recording.

History of the right of court access

The right of court access is based on the First Amendment's protections for freedom of speech ("Congress shall make no law . . . abridging the freedom of speech") and the Sixth Amendment's "right to a speedy and *public* trial."

In *Richmond Newspapers, Inc. v. Virginia*, the U.S. Supreme Court held in 1980 that the public has a presumptive right to attend criminal trials under the First Amendment.¹ In a pair of cases in the mid-1980s, the U.S. Supreme Court acknowledged a right of access to attend jury selections in criminal cases and preliminary criminal proceedings.² The Supreme Court has never directly addressed whether the public has a constitutional right of access to *civil* proceedings, but in *Richmond Newspapers* it noted that "historically both civil and criminal trials have been presumptively open."³ On the other hand, many federal appellate courts have found a First Amendment qualified right of access to civil proceedings.⁴ Federal Rule of Civil Procedure 77(b) reflects this view, stating that that "[e]very trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom."

¹ 448 U.S. 555, 598 (1980) (plurality opinion).

² *Press-Enter. Co. v. Superior Court of California, Riverside Cnty.*, 464 U.S. 501, 513 (1984); *Press-Enter. Co. v. Superior Court of California for Riverside Cnty.*, 478 U.S. 1, 15 (1986).

³ 448 U.S. at 580 n.17.

⁴ See, e.g., *N.Y.C.L.U. v. N.Y. City Transit Auth.*, 684 F.3d 286, 298 (2d Cir. 2012); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253–54 (4th Cir. 1988); *In re Continental Ill. Secs. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir. 1983); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983).

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Courts have uniformly declined to recognize a right to make or disseminate audio or video recordings of court proceedings. In 1965, the U.S. Supreme Court overturned the conviction of a Texas man because it believed that camera coverage distracted trial participants and deprived the defendant of a fair trial.⁵ Restrictions eased less than two decades later when the U.S. Supreme Court held that the U.S. Constitution does not prevent states from allowing broadcast coverage of criminal trials.⁶

Federal and state policies on audio and video recordings

In 1946, the Judicial Conference adopted Federal Rule of Criminal Procedure 53, which prohibits photographs or the broadcasting of criminal proceedings.⁷ For civil cases, the Judicial Conference has adopted a policy that generally prohibits broadcasting, televising, recording, or capturing photos in courtroom for public dissemination.⁸ There are a few exceptions, such as during ceremonial proceedings, for appellate arguments, and “for other purposes of judicial administration” (among others).⁹

From 1991–94 and 2011–15, the federal judiciary ran pilot programs that permitted the recording of proceedings in limited federal courts.¹⁰ Since then, the Second and Ninth Circuits and the Northern District of California, the District of Guam, and the Western District of Washington have continued to allow cameras under certain circumstances.¹¹ In 2010, the U.S. Supreme Court took a positive step toward transparency by beginning to release delayed audio recordings of oral arguments.¹² But SCOTUS has never allowed video recording of any kind.

By contrast, the high courts in many other countries—[Australia](#), [Brazil](#), [Canada](#), [India](#), [Israel](#), [Mexico](#), the [United Kingdom](#), the [European Court of Human Rights](#)—allow for audio or video recording or permit the press to provide recordings to the public.

⁵ *Estes v. State of Tex.*, 381 U.S. 532, 585 (1965).

⁶ *Chandler v. Florida*, 449 U.S. 560, 575 (1981).

⁷ “Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.”

⁸ See [Guide to Judiciary Policy](#), Chapter 4, Cameras in the Courtroom.

⁹ *Id.*

¹⁰ See United States Courts, [History of Cameras, Broadcasting, and Remote Public Access in Courts](#); Jordan M. Singer, [Judges on Demand: The Cognitive Case for Cameras in the Courtroom](#), Col. L. Rev. 115.

¹¹ See United States Courts, [Cameras in Courts](#).

¹² See Supreme Court of the United States, [Argument Audio](#).

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At the state level, there is no uniformity. Nearly all states allow cameras in courts under certain circumstances.¹³ Generally, state policies vary from court-to-court.¹⁴

Arguments against audio and video recordings are overstated

Opponents of audio and video recording in courts have raised many reasons for secrecy, most of which are not supported by evidence. Some have argued that cameras are disruptive, invasive, and expensive. But technology has evolved such that cameras are largely cheap and unobtrusive. Small, silent cameras are already used in many courts and other government buildings and are inconspicuously located away from participants. Other detractors have complained that cameras are disruptive and will change participants' behaviors and create a "circus" atmosphere. But during the federal court pilot program, most participants did not perceive cameras to have adverse effects.¹⁵ Judges and lawyers agreed that the presence of cameras had little to no effect on participants' behavior or the overall fairness of proceedings.¹⁶

Privacy concerns, which are understandable, can be mitigated. For example, it's largely accepted that jurors are not shown on camera; microphones are muted when counsel is conferring with a judge; and sensitive testimony, particularly from minors, can be protected. Other arrangements to address privacy concerns can be made as needed.

These, and other, fears have not come to fruition. Court TV alone has broadcast more than 1,000 civil and criminal trials without major issues. In *Hollingsworth v. Perry*, Justice Stephen Breyer explained in dissent that there was not a shred of empirical data showing that the mere presence of cameras adversely effected the judicial process.¹⁷ Instead, many studies have concluded that in-court cameras have not impaired the administration of justice.¹⁸

The benefits of audio and video access are abundant

¹³ See Radio Television Digital News Association, *Cameras in the Courts*, [*A State-by-State Coverage Guide*](#); Reporters Committee for Freedom of the Press, [*Cameras and other technology in the courtroom*](#).

¹⁴ See Reporters Committee for Freedom of the Press, [*Open Courts Compendium*](#).

¹⁵ See Jordan M. Singer, [*Judges on Demand: The Cognitive Case for Cameras in the Courtroom*](#), COL. L. REV. 115.

¹⁶ *Id.*

¹⁷ 558 U.S. 183, 205 (2010).

¹⁸ See, e.g., *In re Petition of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 768, 775 (Fla. 1979) (finding that, after a one-year experiment, concerns that cameras in the courtroom would negatively affect lawyers, judges, witnesses, or jurors was "unsupported by any evidence."); M. Cohn & D. Dow, [*Cameras in the Courtroom: Television and the Pursuit of Justice*](#) (1998) (canvassing studies, none of which found harm, and one of which found that witnesses "who faced an obvious camera, provided answers that were more correct, lengthier and more detailed").

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Any downsides that may exist are substantially outweighed by the many significant benefits of audio and video recordings.

First, providing remote access will help educate the public about the legal system. Knowledge about the courts and the law is at an all-time low. In a recent poll, only 77% of respondents knew that the First Amendment protected the freedom of speech.¹⁹ Worse, only 17% of people could name no branch of government (with only 66% naming all three).²⁰

This lack of knowledge is likely at least, in part, because most people have not seen the inside of an actual courtroom (*Law & Order* does not count), much less watched or listened to court proceedings. Access to courts “fosters an appearance of fairness, thereby heightening public respect for the judicial process.”²¹

Second, allowing audio and video recording should increase public trust in the judicial system when it is declining. Only 41% of adults approve of how the Supreme Court is functioning; the federal judiciary fares slightly better at 49%.²² But 70% of voters say that allowing television coverage would build trust in the court system.²³

Having a more complete view of court proceedings will help the public fully understand—and trust—court rulings and the logic behind them.²⁴ Although you can read court transcripts and opinions, there is a unique benefit to seeing and hearing justice in action.²⁵ Body language, visual cues, and inflection in voices can drastically change one’s perspective.

Third, increased access to courts allows the public to better hold public officials accountable. After all, the public is paying judges’ salaries and the other many expenses involved in operating a court. Indeed, “[w]hat transpires in the court room is public property.”²⁶

¹⁹ [*Many don’t know key facts about U.S. Constitution, Annenberg civics study finds*](#), UNIVERSITY OF PENNSYLVANIA, September 14, 2023.

²⁰ *Id.*

²¹ *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982).

²² Megan Brenan, [*Views of Supreme Court Remain Near Record Lows*](#), GALLUP, September 29, 2023.

²³ [*C-SPAN/Pierrepoint Supreme Court Survey 2022*](#), C-SPAN, March 15, 2022.

²⁴ *Press Enter. I*, 464 U.S. at 508 (openness “enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system”).

²⁵ See *ABC v. Stewart*, 360 F.3d 90, 99–100 (2d Cir. 2004); *United States v. Antar*, 38 F.3d 1348, 1360 n.13 (3d Cir. 1994).

²⁶ *Craig v. Harney*, 331 U.S. 367, 374 (1947).

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Views and policies on recording court proceedings are slowly evolving

Much more should be done so that the right of access reflects today's norms. When the Supreme Court decided *Richmond Newspapers* in 1980, there was no internet, no cable news, no YouTube, no TikTok. At that time, it made sense to restrict the right to physical access. But now, television and internet are ubiquitous.

Justice John Marshall Harlan II shrewdly had the foresight to recognize that “the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.”²⁷ That day is today. With technology's rapid development and today's fast-paced lifestyle, it's a natural extension of the right of court access to permit audio and video recording. Limiting the right to observe judicial proceedings to only those with the means and opportunity to physically be present in court has become a de facto bar to access.²⁸

After decades of resistance, the tide is slowly turning in support of greater court transparency. The COVID-19 pandemic and the trial of Derek Chauvin serve as strong examples that cameras in courts are feasible, effective, and largely risk-free. The Supreme Court allowing live audio recordings of oral arguments during the pandemic is also step in the right direction.²⁹ As of 2022, 65% of voters agreed that the Supreme Court should allow television coverage of oral arguments.³⁰

There have been positive signs of progress from the legislative branch as well. In 2021-22, the Senate proposed the [Cameras in the Courtroom Act](#) (S.807). In September 2023, the Judicial Conference approved changes to permit civil and bankruptcy judges to provide live audio access in non-trial proceedings that do not involve witness testimony. Last year, Congress considered the [Sunshine in the Courtroom Act of 2023](#) (S.833), which would establish a framework to allow federal court proceedings to be photographed, recorded, and broadcast.

This past fall, in response to a [letter](#) from Congress, the U.S. Judicial Conference's Advisory Committee on Criminal Rules established a subcommittee to consider easing the ban on broadcasting federal criminal proceedings.³¹ Because rule-making is an extensive process, any new rules would not take effect before Trump's trials.³² But there is at least hope that eventually recording court proceedings will become the norm. Between the promise of a working subcommittee, increased public support, and ever-evolving technology, Justice Harlan's prediction could become a reality sooner rather than later.

²⁷ *Estes*, 381 U.S. at 595–96.

²⁸ See *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994) (“[F]or what exists of the right of access if it extends only to those who can squeeze through the door?”).

²⁹ U.S. Supreme Court, [Live Oral Argument Audio](#); Erik Wemple, [Supreme Court gives in on live audio of oral arguments](#), WASHINGTON POST, April 14, 2020.

³⁰ [C-SPAN/Pierrepoint Supreme Court Survey 2022](#), C-SPAN, March 15, 2022.

³¹ Suzanne Monyak, [Judiciary Won't Revise Courtroom Camera Ban Before Trump Trial](#), BLOOMBERG LAW, October 26, 2023.

³² Nate Raymond, [As Trump's trials loom, US judicial panel to reexamine TV ban](#), REUTERS, October 26, 2023.