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Presidential Commission on the Supreme Court of the United States
Panel on Access to Justice and Transparency in the Operation of the Supreme Court
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Thank you for the invitation to testify before the Commission. I am honored to have this opportunity to discuss an issue that is central to my work covering the Supreme Court. It seems particularly appropriate to be testifying about the Supreme Court at the end of June, when the Court and its decisions occupy more of the public's attention than at most other times of the year.

I am the co-founder of SCOTUSblog, a website devoted to coverage and analysis of the Supreme Court. I currently serve as a reporter and independent contractor for SCOTUSblog, but my views today are (unless otherwise indicated) my own, although they are informed by discussions with other members of the Supreme Court press corps. I no longer practice law, but in my former life as a lawyer my practice also included cases before the Court.

When I speak about the Supreme Court, I often note that in some ways, the Court is a very transparent institution. In non-pandemic times, it holds its oral arguments in public and announces its rulings on the merits in open court, accompanied by the release of written opinions that explain the justices' reasoning.

The Court has also taken a number of steps in recent years to make itself and its work more accessible and transparent to the public. I am old enough to remember, for example, that as recently as the early 2000s transcripts of oral arguments didn't include the name of the justice who was speaking; the transcript only noted "question."

Until 2010, the audio of oral arguments was not generally available until the following term, unless it was one of the rare cases in which the Court made the audio available on the same day as the argument. But beginning in 2010 and continuing until the pandemic begin in 2020, the Court made the argument audio available to the public at the end of each week.

In 2015, the Supreme Court began to flag revisions to its opinions after they are released. The move came in the wake of an article in the *Harvard Law Review* that revealed a practice of changing opinions after their release, but before publication in the Court's bound volumes, without providing the public with notice when such changes are made.

In 2017, the Court fully implemented an electronic filing system, so that documents in a case can be viewed online by anyone with Internet access at no charge – unlike other federal courts.

And in 2020, the Court responded to the pandemic by holding oral arguments remotely and providing – for the first time ever – live audio of those arguments. When the Court shifted to the completely online release of its opinions during the pandemic, it initially released opinions (when there was more than one) at five-minute intervals. But after several weeks, it increased the

length of those intervals to 10 minutes – an increase that makes no difference for the Supreme Court (which could in fact release them all at once) but makes life easier for reporters.

Despite these steps, however, there is in my view still significant work to be done to improve transparency at the Court. During the past few days, two federal courts of appeals – the Federal Circuit and the Second Circuit – have announced that they will return to in-person arguments in the fall. I hope that the Supreme Court not only returns to in-person arguments in the fall, but that it also follows the Second Circuit's lead and continues to offer a livestream of the oral argument audio, as it did for a year during the pandemic. The live audio of oral arguments at the Supreme Court was an overwhelming success. Although it is difficult to arrive at exact numbers because the oral arguments were streamed on multiple platforms, it appears that hundreds of thousands of people tuned in to listen to some of the high-profile arguments. And the live audio served as a jumping-off point for a national civics lesson of sorts, with Court watchers liveblogging and livetweeting analyses, as well as online educational programs on the arguments.

There were very few technical problems during a full year of live argument audio at the Court. The rare technical problems that the justices did have – occasionally forgetting to unmute themselves when it was their turn to speak and an errant toilet flush in May 2020 – would not have happened in the Courtroom, which is not itself immune from technical issues: In April 2017, Justice Stephen Breyer's cellphone began to ring during an argument; he moved quickly to turn it off.

Nor were there any other problems arising from the live broadcast of argument audio. Between May 2020 and April 2021, the Court livestreamed oral arguments in several high-profile cases – involving, for example, efforts to obtain access to the president's financial records, a challenge to the constitutionality of the Affordable Care Act, a clash between LGBTQ rights and religious liberties, and the challenge to the Trump administration's plan to exclude unauthorized immigrants from the state-by-state breakdown used to allocate seats in the House of Representatives. Despite the stakes in each of these cases, there was no "grandstanding" for the outside audience by either the lawyers or the justices. Nor were there any efforts to alter or otherwise misuse the audio, as the Republican National Committee did with audio from the 2012 arguments in the challenge to the individual mandate (although, to be sure, the RNC could have done the same thing had the audio been released later in the week, rather than the same day, as it was in 2012).

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.

Live audio of opinion announcements should be an even easier call than live audio of oral arguments. The opinion announcements are entirely within the justices' control: There are no lawyers involved. Moreover, to the extent that the justices' objection to live audio or video of oral arguments has been that it would give outsized importance to the role of oral argument in the justices' decision-making process, the Court's results are, by contrast, the end result of that process. Allowing live coverage of opinion announcements would also prevent confusion as a result of the (admittedly rare) incidents in which members of the press inadvertently mischaracterized the Court's decisions.

Although the Court should at the very least continue with live audio when it returns to the Courtroom, in my view it is long past time to add cameras in the courtroom. In 2020, during the pandemic, Justice Stephen Breyer did a Zoom discussion with students at the United Nations International School. At the end, he invited them to come to Washington to hear a case being argued. But not everyone has the resources to travel to Washington, D.C., for oral arguments.

More importantly, even if you are able to travel there, unless you have an invitation from a Supreme Court justice, there is no guarantee that you will be able to actually attend an argument. For much of the Court's 2019-2020 term, SCOTUSblog studied (and then reported on) public access to Supreme Court arguments. Particularly for high-profile cases, lines can form days in advance: For the 2019 oral arguments in the cases involving whether federal employment discrimination laws protect LGBTQ employees, for example, a member of the public would have had to get in line approximately 35 hours ahead of time to secure one of the 50 tickets set aside for the public. (Alternatively, you could hire someone to wait in line for you, at a cost of somewhere between $35 and $48 per hour for a professional line-standing service.) But even cases with lower profiles can draw a crowd. To get one of the 50 tickets for the 2020 oral argument in the dispute over efforts to build a pipeline that would cross under the Appalachian Trail, you would have had to spend the night on the sidewalk outside the Court – in February.

To be sure, some people who are willing to spend the night outside the Court in the hope of gaining access to the oral argument do so because they see value in being in the Courtroom itself. But there simply aren't enough seats for everyone who wants to see the justices in action, and live audio (although certainly better than no livestreaming at all) is not the same as being able to see the justices in action – to see their expressions, their body language, how they interact with the arguing lawyers, and how they interact with each other. When the Supreme Court is hearing oral arguments in cases that will affect our everyday lives, the American public should be able to see those arguments.

The justices have advanced a variety of arguments in opposition to cameras in the courtroom. Most of those arguments – involving "grandstanding" and the misuse of footage – would apply equally to live audio, and the Court's experiment with live audio during the pandemic has shown them to be unfounded.

More broadly, other courts have shown that live video of oral arguments can go smoothly. The U.K. Supreme Court has routinely broadcast video of its proceedings since it was created in 2009. In 2019, millions of people tuned in for three days of argument on whether Prime Minister

Boris Johnson had shut down Parliament illegally in the run-up to Britain's exit from the European Union – a case that some U.S. commentators compared to *Marbury v. Madison*. On the other side of the Atlantic Ocean, the U.S. Court of Appeals for the 9th Circuit has been providing live video of oral arguments – including in high-profile cases like the challenge to the Trump administration's travel ban – since April 2015. And over 30 states and the District of Columbia stream video of at least some oral arguments in the highest courts in their states.

Beyond oral arguments and the announcement of opinions, there are a variety of other ways in which the Court could improve its transparency. Each year, the justices are required to file financial disclosure reports that list, among other things, their assets, liabilities, outside income, and reimbursements. However, reporters who want to obtain a copy of those disclosures must submit a form to the Administrative Office of the U.S. Courts by a specified deadline; the disclosures are then released on a thumb drive, which in 2021 was, because of the pandemic, mailed to reporters. The nonprofit group Fix the Court has, in recent years, requested the disclosures and put them online, but the public shouldn't have to rely on an outside group to do that.

The disclosures also fall short as a measure of transparency because they are not filed for a particular calendar year until May 15 of the following year, and they are not provided to reporters for roughly a month after that. (The justices may also receive an extension to file their disclosures; last year disclosures for Justices Samuel Alito and Neil Gorsuch were not made public until late June.) Because of this gap in time, the financial disclosures serve largely as a historical snapshot of the justices' finances and investments, rather than an insight into their recusal practices in real time.

Transparency could also be improved by providing more information about the justices' public appearances outside the Court. Advance notice to reporters is currently sporadic at best, but coverage of the justices' travel and public appearances serves two purposes. First, the justices may make remarks that (intentionally or not) are of interest to the public. Video of these remarks may sometimes be available, but as a general matter the Court itself does not actively collect or otherwise make available the text of the justices' remarks. (The Court's website does contain a collection of speeches, but the most recent speech by an active justice dates back to May 2011. All of the speeches in the last 10 years are by Justices Ruth Bader Ginsburg and John Paul Stevens, both of whom have since passed away.) Second, such coverage would provide the public with more real-time information about the groups to whom the justices are speaking – again, especially important given the lag in the justices' disclosures and the lack of information in their recusals. For several years, a website called SCOTUSmap attempted to track the justices' events outside the Court, but the site is apparently no longer operating (and, again, private groups should not have to step in to provide information that the Court itself should provide).

More information about the justices' health is also necessary. After Justice Antonin Scalia's sudden death in 2016, reporter Tony Mauro wrote to the Court and asked for information about the justices' health. Chief Justice John Roberts declined to furnish any information at that time, instead responding that the Court's Public Information Office "will continue to provide health information when a need to inform the public arises."

The late Justice Ginsburg was generally forthcoming about her health problems, and she released several statements through the Public Information Office about her health issues in the months before she died. But, despite the Chief Justice's assurances to Tony Mauro, we know that the justices have not always voluntarily informed the public about other health problems. Last year, for example, Chief Justice John Roberts was taken by ambulance to a local hospital and stayed there overnight after a fall while walking near his home. The public learned about it only after the *Washington Post* received a tip, which prompted reporter Robert Barnes to ask the Court's Public Information Office. The Public Information Office confirmed to Barnes that the Chief Justice had been hospitalized and indicated that dehydration was likely the cause of his fall, but the Court did not explain why the hospitalization had not been disclosed when it happened.

I know that the shadow docket will likely be covered in more detail by others, so I will only discuss it from a reporter's angle. I understand that, particularly in capital cases, the justices sometimes have to act quickly and release orders and opinions late at night. Over the last year or so, however, several orders and opinions on emergency applications have been released late at night – in one case, shortly before midnight on the Wednesday before Thanksgiving. Rightly or wrongly, these late-night orders give the impression that law is being made in the shadows, so to speak – especially when the justices do not have to indicate how they voted on an order or unsigned opinion. And regardless of when an order or opinion on an emergency application is issued, knowing how each justice voted would benefit litigants, in what could literally be a matter of life and death, as well as the general public, by eliminating the confusion and even errors that often surround orders on the shadow docket.

Finally, despite my numerous suggestions of ways in which the Court can improve its transparency, I would be remiss if I did not acknowledge that as a reporter with a "hard pass" – a credential specifically to cover the Court – I enjoy a privileged position in comparison with many reporters. The Court's Public Information Office works hard to keep reporters with hard passes informed about issues such as emergency applications, the cases set for a particular conference, and the Court's schedule. But there is no reason why reporters who do not have a hard pass (and I have been one of those reporters) can't also receive this information, either through a general email list or through a social media account like Twitter.