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Smile for the Camera

The long lost photos of the Supreme Court at work—and what they reveal.

By Sonja West



In 1932, photojournalist Erich Salomon sneaked a camera into a Supreme Court argument, being held in what was known as “The Old Senate Chambers.”

Erich Salomon/Berlinische Galerie.

At 10:07 a.m. on June 28, 2012, more than 5 million people were glued to **SCOTUSblog**, a popular legal website, waiting to receive word of the Supreme Court’s decision on the constitutionality of the Affordable Care Act. Inside the courtroom, Chief Justice John Roberts was reading his

opinion from the bench, as Justices Ruth Bader Ginsburg and Anthony Kennedy waited to share their views. The press, meanwhile, **was rushing to transmit the news** via an awkward process reminiscent of a child’s game of “telephone.”

Later we **would be told** that Justice Sonia Sotomayor appeared “exhausted” and that Justice Antonin Scalia “looked like he wasn’t very happy.” We would hear tale of the “collective head-snap” in the courtroom when the Chief Justice announced the controversial individual mandate would survive as a tax. Of course, almost none of us actually witnessed these moments. We were staring helplessly at our blinking cursors, repeatedly refreshing our screens for another morsel of news.

It didn’t need to be this way. In a day when even our cellphones can capture images unobtrusively, why were we forced to stare at pixels on our computer screens or at a static televised image of the Supreme Court’s exterior? In 2012, why is there a wall of separation between the American people and their high court?

The Supreme Court has never wavered in its opposition to allowing cameras into its courtroom. It has steadfastly held that position despite the fact that all 50 states allow camera access in some form and that lower federal courts have been “experimenting” with the practice since the early 1990s—at roughly the same time that the Canadian Supreme Court let them in without incident.

For decades, the debate over cameras in the court has gone something like this: the press **pleads for permission** and the court says no; academics **make policy arguments** that the court ignores; and **Congress threatens to force cameras into the court**, but the justices don’t blink. The argument remains deadlocked, with the justices insisting that they will not risk the integrity of the court until they can be certain of the effects and camera proponents arguing that it is impossible to know the effects until cameras are allowed inside.

Yet few people know that twice in the court’s history cameras did get in. It was stealthy and illicit, but two rogue photographers managed to capture what few have seen—the justices at work. And the resulting photographs give us a small glimpse of what we have been missing.

In 1932, photojournalist Erich Salomon sneaked a camera into a Supreme Court argument, being held in what was known as “The Old Senate Chambers.” To pull this off, he faked a broken arm and hid a camera in his sling. His single **photograph** was published in *Fortune* and promoted as the first image ever taken of the court in session. It is a clear and close-up shot of the bench, with a bearded Chief Justice Charles Evans Hughes presiding. Two chairs down, most court devotees would recognize the wavy locks of Justice Louis Brandeis. The justices appear to be listening to

the argument being presented by an unseen attorney.

Five years later, *Time* published another clandestinely shot photo. This one, the magazine reported, was taken by “an enterprising amateur, a young woman who concealed her small camera in her handbag, cutting a hole through which the lens peeped, resembling an ornament.” The unnamed photographer “practiced shooting from the hip, without using the camera’s finder which was inside the purse” in order to capture the court in action. To my knowledge, this photo hasn’t been reprinted since it was first published 75 years ago.



This 1937 photograph was taken by a young woman who concealed her small camera in her handbag, cutting a hole through which the lens peeped.

Time via Getty Images.

While taken from a more distant vantage point, the second photo is in many ways the more striking one. The justices by this time had moved into their current home at the Supreme Court building. The image is grainy, but the details are unmistakable. It shows the waist-high bronze gate that separates the public from members of the Supreme Court Bar. The court’s towering marble columns and draping curtain form the backdrop. The large, simple clock over the bench marks the time, just as it does now. The justices can be seen sitting, several with their heads resting in their hands, while a white-haired lawyer argues before them. Justice James McReynolds, sitting on the chief’s left, appears to be studying the ceiling.

The edges of the photo are framed in black, presumably from the cutouts of the purse, giving the tunneled feeling of traveling back in time—which, of course, is exactly what the photo allows us to do. The justices captured here are members of the 1937 court that ended what lawyers refer to as the “*Lochner* Era” through a series of decisions that upheld the New Deal. On the far left sits Justice Owen Roberts, the author of “the switch in time that saved nine,” who put a halt to President Franklin Delano Roosevelt’s court-packing plan.

Justice Scalia recently argued against cameras by suggesting that watching the Supreme Court would be boring since the justices “just sit there like nine sticks on chairs.” The lines of would-be spectators stretching outside the courtroom before every argument suggest the public feels otherwise. These images, moreover, tell us that there is much to be gleaned from even still photographs. They display an intimacy that is missing in the public’s access to the court, and offer us a brief connection to our Constitution in action by opening the doors of our government to more than the fortunate few who get to fill the courtroom’s 250 seats. They are a fleeting hint at what we have missed over the past century as well as what we lose with each passing term.

The justices today give different reasons for keeping cameras out, but they share one central element: fear of the unknown. It is “not a logical argument” but “a psychological argument,” **admits Justice Stephen Breyer**. “Some of us may think if we were to vote for something with the implications for change we know not what—be careful.”

These two photographs make the argument that the justices’ fear comes at a price. Their inertia means that we have no photos or videos of Thurgood Marshall arguing *Brown v. Board of Education*, just as we have no images of the justices contemplating *Roe v. Wade* or *Bush v. Gore*. The photos remind us that it was a choice—their choice—to allow those moments and countless more to slip away. Caution is a virtue—until it becomes paralysis. In trying to preserve what we have, we are losing far too much.

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