

**Statement of Steve Leben  
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September 26, 2019**

**For the hearing, “The Federal Judiciary in the 21st Century: Ensuring the Public’s Right of Access to the Courts,” Subcommittee on Courts, Intellectual Property, and the Internet, Committee on the Judiciary, United States House of Representatives.**

Chairman Johnson, Ranking Member Roby, and members of the Subcommittee, I appreciate the opportunity to submit these comments for your consideration. I am a member of the Kansas Court of Appeals, a statewide intermediate appellate court, where I have served since 2007. Before that, I served as a Kansas state trial judge for nearly 14 years. I am a past president of the American Judges Association (2007), and I also teach part-time at the University of Kansas School of Law. I speak here only on my own behalf, not as a representative of my court or any organization.

We all know that we live in a time of diminished levels of trust for public institutions and public officials. While our country functions best with a healthy level of respect for and a strong sense of the legitimacy of the United States Supreme Court, the events of the past two decades have diminished those levels in ways we should be concerned about. One important way the Court can address this problem of diminished public trust is by increasing the transparency of its work. Opening its oral arguments to the public—through real-time radio, television, and web access—would be an

important move toward the transparency that could bolster public perceptions of the Court's legitimacy and fairness.

The Gallup organization regularly surveys public opinion about the Supreme Court.<sup>1</sup> Since the *Bush v. Gore* decision in 2000, there has been a partisan divide in the way Americans view the Court. In 2001, Republican approval of the Court was at 80% but Democratic approval was only 42%. The same numbers were fairly close—60% (for Republicans) and 70% (for Democrats)—before the start of the Court's October 2000 term.

Since 2000, the partisan divide has been noticeable. Republican approval levels remained high—and Democratic approval levels low—until the election of President Obama. But they quickly flipped, with 75% of Democrats approving and only 49% of Republicans approving of the Court as it started its October 2009 term. After the Court's 2015 decisions upholding the Affordable Care Act and the right to same-sex marriage, Republican approval fell to 18%—with Democratic approval at 76%. And before the Court began its October 2018 term last year, with a Republican president and two new

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<sup>1</sup> The Gallup data cited here can be found at Justin McCarthy, *Women's Approval of SCOTUS Matches 13-Year Low Point*, Gallup online, Sept. 28, 2018 (includes link to past data), available at <https://bit.ly/2lipxcC>.

Republican appointees, Republican approval was back at 67%, with Democratic approval at 36%.

I have great concerns about the long-term ability of our Supreme Court to carry out its role in our democracy if public support for its decisions comes through such a starkly partisan lens. Another divide in views about the Court emerged in Gallup's survey before the opening of the Court's October 2018 term—a gender divide. In the past, there had been no significant difference between men and women in approval levels; in one 2017 survey, 50% of men and 49% of women approved of the Court. But in the September 2018 Gallup survey, 60% of men approved compared to only 42% of women. That too would be a troubling divide should it persist.

So what can the Court do about this? Obviously the justices must continue to decide cases based on their best understanding of the law. But a *process* change to make the Court more transparent—by opening its hearings to cameras—would be an important step toward greater public legitimacy.

Social-science scholars have shown in both law-enforcement and justice-system contexts that heeding procedural-justice principles leads to a greater sense of legitimacy, more positive opinions, and greater compliance with orders. Professor Tom

Tyler of Yale Law School, who has worked in this field for decades, has identified four elements to procedural justice in the justice system:

- Voice: the ability of court participants to participate by expressing their own viewpoints.
- Neutrality: the consistent application of legal principles by unbiased decision makers who are transparent about how the decisions are made.
- Respect: that individuals are treated with courtesy and respect, which includes respect for people's rights.
- Trust: that the decision makers are perceived as sincere and caring, trying to do the right thing.<sup>2</sup>

Perceptions of all of these would be furthered if the public could watch the justices at work.

Transparency itself is important; it lets viewers make their own judgments about the Court's neutrality. It also lets viewers see the justices trying to work through legal issues in a sincere manner, especially when considering some of our country's most difficult legal issues. The public could assess for itself whether the Court's hearing was

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<sup>2</sup> The research in this area is summarized, along with links to other resources, in a bench card for judges, *Procedural Fairness/Procedural Justice: A Benchcard for Trial Judges* (2018), produced by the American Judges Association, the Center for Court Innovation, the National Center for State Courts, and the National Judicial College, available at <https://bit.ly/2liC3c8>.

fair, how difficult the issues might be to decide, and what arguments were the most convincing.

There's a significant contrast between the United States Supreme Court and other high courts in the United States and elsewhere. Most of our state supreme courts live-stream or televise their arguments. The Kansas Supreme Court has done so since 2012, and the archived argument video in each case is linked along with the opinion when it is issued. The United Kingdom's Supreme Court recently allowed live coverage of both the arguments and the decision announcement in its latest Brexit-related case. More than four million viewers were tuned in at some point. They had a chance to hear the arguments on the most important legal issue before their government.

Our Supreme Court had a similar opportunity back in 2012 when it heard the first cases over the Affordable Care Act. The Court set aside three days for oral argument, and the nation's 24-hour news cycle was focused on the cases. But the public had no ability to hear the arguments or even excerpts of them during those news cycles. The public had no chance to see for itself whether the Court had provided fair hearings.

Had the hearings been broadcast, I'd argue that the public's perception of the Court's hearings would have been positive. Minneapolis trial judge Kevin Burke and I

looked at the justices' performance during those oral arguments. On the whole, we found that the justices acted even-handedly and asked appropriate questions of both sides.<sup>3</sup> That was especially true for the two most critical members of the Court, Chief Justice John G. Roberts, Jr., who presided, and Justice Anthony Kennedy, widely regarded then as the key swing vote for most cases on the Court.

Some have argued that live broadcasting may change the proceeding, that either lawyers or the justices will change their behavior. If lawyers do so, the justices have ample power to control it. And if the justices' own behavior is inappropriate in some way (whether because of cameras or in spite of their presence), the public should see that—and hopefully the justices would change that behavior. Judges throughout the United States attend regular training courses about every aspect of their jobs, including how to conduct themselves on the bench and how to regulate the behavior of others in the courtroom. The justices of the United States Supreme Court could surely learn these same lessons if need be.

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<sup>3</sup> For a detailed review of how the justices met expectations for procedural justice during these arguments, see Steve Leben & Kevin Burke, *Supreme Court Gets a Passing Grade on Procedural Fairness—So Far*, Procedural Fairness for Courts and Judges Blog Posting, April 13, 2012, available at <https://bit.ly/2kTkWgz>. Suggestions for how the Supreme Court can project procedural-justice principles when hearing oral arguments are at Steve Leben & Kevin Burke, *Supreme Court Will Be Tested as It Hears Health-Case Arguments*, MINN. POST, March 26, 2012, available at <https://bit.ly/2mS5H8e>.

I had the opportunity as a trial judge to preside over two murder trials that drew broadcast-media attention (including from national networks). I allowed broadcast cameras in the courtroom throughout those trials with no problems for attorneys, witnesses, or jurors. If we can do that in the context of murder trials—and if most of the state supreme courts can do that for their oral arguments—so can the United States Supreme Court.

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