SCOTUS SCUTTLES PROP 8 VIDEO COVERAGE; THE HISTORY BEHIND THE DENIAL

As you may have heard (See here and here), the Supreme Court has entered a last minute stay to put a hold on the video feed of the seminal Prop 8 trial in the Norther District of California (NDCA) to select other Federal courthouses in the country as well as the delayed release of video clips of the proceedings via YouTube.

This is the full text of the order issued by the Supremes:

> Upon consideration of the application for stay presented to Justice Kennedy and by him referred to the Court, it is ordered that the order of the United States District Court for the Northern District of California, case No. 3:09-cv-02292, permitting real-time streaming is stayed except as it permits streaming to other rooms within the confines of the courthouse in which the trial is to be held. Any additional order permitting broadcast of the proceedings is also stayed pending further order of this Court. To permit further consideration in this Court, this order will remain in effect until Wednesday, January 13, 2010, at 4 p.m. eastern time.
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> Justice Breyer, dissenting.
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> I agree with the Court that further consideration is warranted, and I am pleased that the stay is time limited. However, I would undertake that consideration without a temporary stay in place. This stay prohibits the transmission of proceedings to other federal courthouses. In my view, the

> Court's standard for granting a stay is not met. See Conkright v. Frommert, 556 U. S. ___, ___ (2009) (slip op., at 1–2) (Ginsburg, J., in chambers). In particular, the papers filed, in my view, do not show a likelihood of "irreparable harm." With respect, I dissent.

This is, to say the least, a disappointing ruling. It had been my guess that Anthony Kennedy would field the issue, which went directly to him as the hot judge for emergency matters from the 9th Circuit, and see it as a matter within the discretion of the 9 Circuit and let them make the call, which they had done in favor of video dissemination. For those not aware, this idea of video from the courtroom was not germinated from the Prop 8 trial, even though that has been the focal point. Instead, the pilot program was the brainchild of the 9th circuit Judicial Conference, as described in this LA Times article from late last year:

> Federal courts in California and eight other Western states will allow video camera coverage of civil proceedings in an experiment aimed at increasing public understanding of the work of the courts, the chief judge of the U.S. 9th Circuit Court of Appeals said Thursday.
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> The decision by the court's judicial council, headed by Chief Judge Alex Kozinski, is in response to recommendations made to the court two years ago and ends a 1996 ban on the taking of photographs or transmitting of radio or video broadcasts.
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> "We hope that being able to see and hear what transpires in the courtroom will lead to a better public understanding of our judicial processes and enhanced confidence in the rule of law," Kozinski said. "The experiment is designed to help us find the right balance between

> the public's right to access to the courts and the parties' right to a fair and dignified proceeding."
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> The first proceedings to be taped or photographed will be chosen by the chief judge of each of the 15 districts in the 9th Circuit region in consultation with Kozinski, the court announcement said, noting that only non-jury civil cases would be subject to the new rules.

The Prop 8 trial became the hot button topic on the pilot program simply because the Chief Judge of the NDCA is Vaughn Walker and he chose the non-jury Prop 8 trial as the first proceeding for his district. It is hard to imagine a more appropriate case to televise and allow access to than one involving fundamental human and constitutional rights, as well as one that is in the forefront of the socio-political/legal conversation in the United States.

It is similarly hard to imagine anyone would object to that trial being disseminated by video to a wider audience unless, of course, you are the Proposition 8 supporters and do not want the world to see the ugliness of both your soft and hard bigotry. And so that invasive and discriminatory group did just that and filed a Petition for Stay to the United States Supreme Court to halt the video Judge Walker had ordered. There were three response briefs submitted, by the plaintiffs in the lower court (Perry) challenging the constitutionality of Prop 8, a Supplement by Perry, and one filed by an interested Media Coalition.

I could spend a couple of thousand words explaining my thoughts on why the order permitting the restricted video coverage which had been entered by Judge Walker, and upheld by the 9th Circuit, is appropriate and why the Supreme Court erred in setting it aside, even if temporarily, but the words and argument of the attorney for the Media Coalition, Tom Burke, really say it all better than I could. Take a

look at it, it is not long and is excellent.

It will be *very* interesting to see what the Supremes have to say at the end of the day Wednesday once they have had a chance to engage in "further consideration". I think there is a chance for bifurcation in their treatment between the live video feed to other selected Federal courtrooms and the dissemination of "YouTube" clips to the internet. We shall see. In the meantime, I would like to focus for a minute on the almost certain basis for the reticence of the Supreme Court, and it is their own longstanding, and somewhat self centered, interest.

The issue of video cameras in Federal courtrooms has, at root, historically been framed in terms of the First Amendment right to free press and the transparency it portends versus the Sixth Amendment right to a fair trial. As the top court, the US supreme Court has consistently ruled against permitting video cameras in courtrooms, generally citing the Sixth Amendment. Except where they haven't; for instance in *state* court cases that could not set a precedent which could eventually lead to cameras in – gasp – the US Supreme Court.

In the 1981 case of *Chandler v. Florida*, the Supreme Court stated (from the syllabus):

> The Constitution does not prohibit a state from experimenting with a program such as is authorized by Florida's Canon 3A(7).
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> This Court has no supervisory jurisdiction over state courts, and, in reviewing a state court judgment, is confined to evaluating it in relation to the Federal Constitution.
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> Estes v. Texas, supra, did not announce a constitutional rule that all photographic, radio, and television coverage of criminal trials is inherently a denial of due process. It does not stand as an absolute ban on

> state experimentation with an evolving technology, which, in terms of modes of mas communication, was in its relative infancy in 1964 when Estes was decided, and is, even now, in a state of continuing change.
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> An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, conduct of the broadcasting process or prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The appropriate safeguard against juror prejudice is the defendant's right to demonstrate that the media's coverage of his case – be it printed or broadcast compromised the ability of the particular jury that heard the case to adjudicate fairly.
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> Whatever may be the "mischievous potentialities [of broadcast coverage] for intruding upon the detached atmosphere which should always surround the judicial process," Estes v. Texas, supra at 381 U. S. 587, at present no one has presented empirical data sufficient to establish that the mere presence of the broadcast media in the courtroom inherently has an adverse effect on that process under all circumstances. Here, appellants have offered nothing to demonstrate that their trial was subtly tainted by broadcast coverage – let alone that all broadcast trials would be so tainted. (page citations omitted)

See? Broadcast is not inherently bad, and it certainly does not violate the Constitution, by the Supreme Court's own words. But they sure sing a different tune when the thought of video coverage gets closer to their own hallowed

halls; thus they have consistently fought off allowing video in Federal courts, because once it permeates lower Federal courts, it *will* get to the Supreme Court. And the cloistered Supreme Justices simply do not want the scrutiny that such transparency would yield to their process.

Many attempts have been made over the years to get video coverage of Supreme Court sessions permitted, the most recent championed in the US Senate in 2007 by Arlen Specter and, believe it or not, John Cornyn (who had experience in the Texas Supreme Court and found the camera coverage quite acceptable). But none other than Justice Anthony Kennedy and Justice Clarene Thomas schlepped down to the Senate to implore Congress not to pass legislation sanctioning camera coverage of the Supreme Court. Justice Kennedy testified on March 8, 2007:

> But I don't think it's in the best interest of our institution…Our dynamic works. The discussions that the justices have with the attorneys during oral arguments is a splendid dynamic. If you introduce cameras, it is human nature for me to suspect that one of my colleagues is saying something for a soundbite. Please don't introduce that insidious dynamic into what is now a collegial court. Our court works…We teach, by having no cameras, that we are different. We are judged by what we write. WE are judged over a much longer term. We're not judged by what we say. But, all in all, I think it would destroy a dynamic that is now really quite a splendid one and I don't think we should take that chance.

Fine for thee, but not for me has long been the Supreme Court view. Justice Souter famously declared in Congressional testimony back in 1996 when an earlier move to televise Supreme Court proceedings was raised:

> The day you see a camera come into our

> courtroom it’s going to roll over my dead body.

For a complete breakdown on the respective views of the Supreme Court bench on televised proceedings, see this summary page from CSPAN on Cameras In The Court. The reticence to permit cameras in the Court is palpable, even though several couch their views to give the appearance of being open minded. The salient point is that every time Congress renews the subject, emissary Justices are immediately dispatched to give committee testimony against permitting video coverage; there are never corresponding Justices sent *in favor* of camera coverage. To be fair, Breyer and Ginsberg expressed no opposition during their confirmation hearings; but never on the record at regular hearings.

The bottom line for the Prop 8 case is that once Anthony Kennedy decided to take it upon himself and the Supreme Court to remove the decision power from the applicable circuit and trial court, there was not going to be ready approval for Judge Walker’s plan under the 9th Circuit pilot program. If history is any guide, the decision come Wednesday will be consistent with the long history by the Supremes of protecting their turf from the transparency eyes of the video courtroom by forbidding encroachment even in lower courts. But it is a new day, maybe the Justices will lend a new vision and openness. Here’s hoping.