

Rare Supreme Court photos offer brief connection to the Constitution in action

BY ASSOCIATE PROFESSOR SONJA R. WEST

Editor's Note: This essay was adapted from a piece Associate Professor Sonja West published in Slate magazine, "Smile for the Camera: The Long Lost Photos of the Supreme Court at Work and What They Reveal." (Oct. 1, 2012.)



The moment I saw the photographs for the first time, I got goose bumps.

After opening an email from the law school's faculty librarians, two black and white images appeared on my screen. One I had only heard about but half suspected was apocryphal. The other was a complete surprise.

The images were the only two known photographs ever taken of the U.S. Supreme Court in session. Both from the 1930s, the two long-lost photographs capture what few have seen, and they offer a small glimpse of what we have been missing for decades.

The discovery of the photographs began as I was researching an article on the justices' resistance to admitting video cameras into oral argument.

The Supreme Court's opposition to cameras is well known, and the Supreme Court has never allowed the use of cameras while it is in session despite pleas from the press, Congress, scholars and the public.

It has steadfastly held that position even as all 50 states began to allow camera access in some form and while lower federal courts continued their "experiment" with the practice, which began in the early 1990s – roughly the same time the Canadian Supreme Court let them in without incident.

The justices' resistance to cameras crosses generational and ideological lines.

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 do not blink.

The argument remains deadlocked, with the justices insisting 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.

As a former reporter and now a scholar who teaches and writes about the press and the Supreme Court, the justices' uneasy relationship with cameras has long interested me.

While researching the issue, I remembered once hearing a story about a clandestine photo taken of the court in session.

Having no idea whether the story was true, I decided to try to track it down, and I learned the story is, indeed, real.

The year was 1932 and the photographer was Erich Salomon. Salomon was renowned for his photojournalism and, in particular, his clever ability to get his shot.

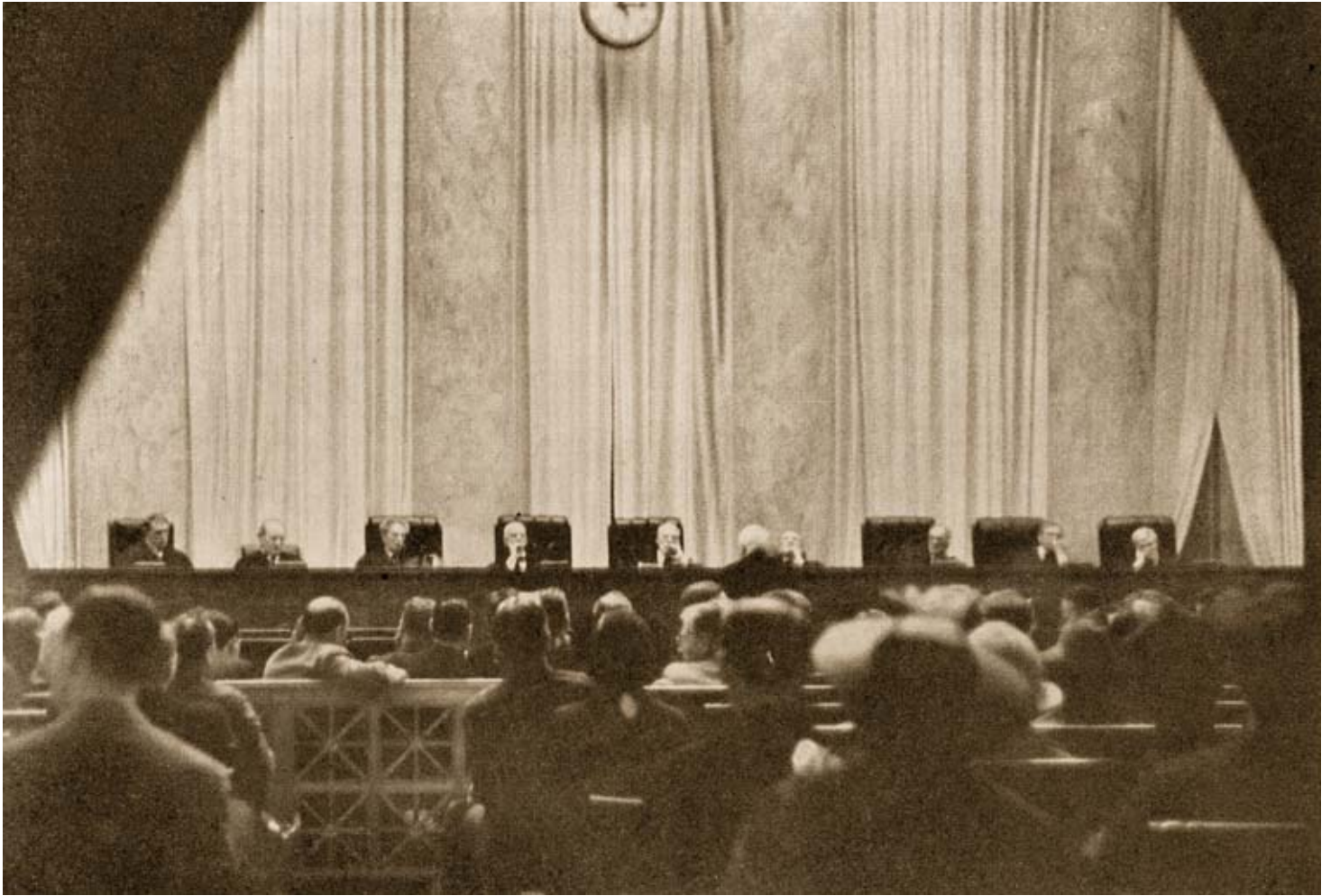
In this case, he sneaked a camera into a Supreme Court argument, being held in what was known as "The Old Senate Chamber," by faking a broken arm and hiding his camera in the sling. His single photograph was published in *Fortune* and was promoted as the first image ever taken of the court in session.

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.

The story of the renowned photographer, however, later takes a tragic turn. Salomon was Jewish and born in Germany. Prior to the beginning of World War II, he and his family settled in Holland but were captured by the Nazis during the Blitzkrieg in 1940. Salomon died in Auschwitz in 1944.

While researching this story, I stumbled across a stray reference to another photograph.

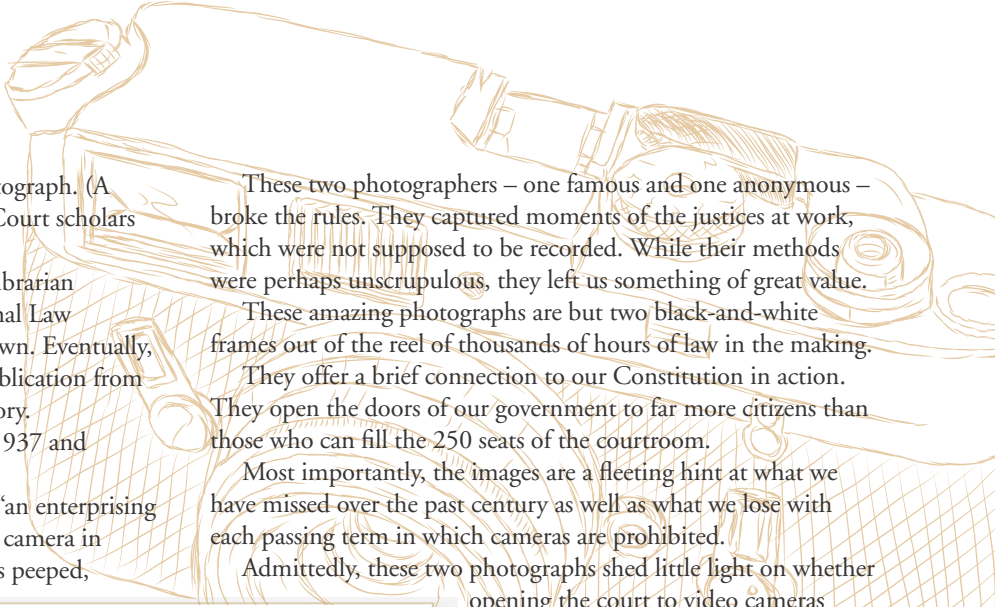




Above – This rare 1937 photograph of the Supreme Court in session is not very well known. It ran in *Time* magazine after it was taken by an amateur photographer who concealed her camera in her handbag to capture the justices in action at the Supreme Court Building. Source: Time & Life Pictures/Time & Life Pictures/Getty Images.



Left – This photograph, which was published in *Fortune*, was promoted as the first image ever of the Supreme Court in session. It was taken in 1932 when renowned photographer Erich Salomon had snuck a camera into an oral argument that was held in “The Old Senate Chamber” by faking a broken arm and hiding his camera in the sling. Source: bpk, Berlin/Erich Salomon/Art Resource, NY.



I had never even heard rumors of a second photograph. (A quick survey of several other media and Supreme Court scholars told me I was not alone.)

Working with Georgia Law's Faculty Services Librarian Thomas "T.J." Striepe and Foreign and International Law Librarian Anne Burnett (J.D.'90), we hunted it down. Eventually, we found the citation and retrieved the original publication from the University of Georgia Libraries' off-site repository.

The second photo was taken five years later in 1937 and published in *Time* magazine.

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.

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 Chief Justice Hughes' 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 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.

The law librarians and I again did more research.

To the best of our ability, we concluded that the 1937 photograph had not been republished in the 75 years since it first ran in *Time*. (The 1932 picture could be found on a few historical websites.)

I talked with the archivists at *Time* seeking any additional clues about the "enterprising" young woman who took the photograph. They, however, had nothing more about her in their records. Thus, her identity and story remain a mystery.

These two photographers – one famous and one anonymous – broke the rules. They captured moments of the justices at work, which were not supposed to be recorded. While their methods were perhaps unscrupulous, they left us something of great value.

These amazing photographs are but two black-and-white frames out of the reel of thousands of hours of law in the making.

They offer a brief connection to our Constitution in action. They open the doors of our government to far more citizens than those who can fill the 250 seats of the courtroom.

Most importantly, the images are a fleeting hint at what we have missed over the past century as well as what we lose with each passing term in which cameras are prohibited.

Admittedly, these two photographs shed little light on whether opening the court to video cameras would lead to the problems the justices say concern them such as grandstanding by lawyers, out-of-context sound bites captured by the press or miscomprehension by the public.

They are still photographs, not videos, and viewing them through the fog of decades is not equivalent to watching arguments contemporaneously. But the pictures display an immediacy and intimacy that is missing in the public's current access to the court.

Justice Antonin Scalia recently argued against cameras at oral argument

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.

A *USA Today*/Gallup poll found that 72 percent of the people surveyed thought the justices should have allowed cameras into the oral arguments for last year's health care case.

Several polls in the past decade have shown majority support for televising the court's arguments, in general.

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," Justice Stephen Breyer told an audience in 2009. "Some of us may think if we were to vote for something with the implications for change we know not what – be careful." After which Justice Sandra Day O'Connor chimed in by adding, "Justice moves slow. And why does justice move slowly? It's because it's better to be sure than sorry."

The two long-lost photographs make the argument that the justices' fear comes at a price.

Their inertia means 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 – the justices' 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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