

'Kodak' Moments

New research reveals more secret photos from inside the Supreme Court than previously known.

BY TONY MAURO

A protestor leaps up to interrupt a U.S. Supreme Court session, and somewhere nearby, someone takes a secret photo of the justices, flouting the long-standing custom barring cameras in the courtroom.

The date of this dramatic event was not 2014 or 2015, when protestors against money in politics rose to make their point loudly inside the court chamber, with secretly taken video to amplify their message online.

Instead, the episode took place on Oct. 4, 1937, the first day that the controversial new justice Hugo Black took the bench. The protestor asserted Black was not qualified to serve, and the photograph of the justices was displayed on the front page of the next day's *New York Daily News*.

Newly published research in the latest *Judicature* magazine has revealed that more secret photos were taken inside the Supreme Court than previously known. The additional episodes point to the likely rationale behind the first camera ban, imposed in the 1890s. Spoiler alert: The court was worried about something other than lawyers and justices grandstanding for the cameras.

Kyle Kopko, a political scientist at Elizabethtown College in Pennsylvania who did the research along with undergraduate Erin Krause, said that at the very least the new "secret camera" episodes



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show that there has been a "clear demand" for camera access to the court for more than a century—not just since the inception of television around the early 1940s.

Kopko became interested in the subject when he was in graduate school at Ohio State University, and his mentors were two Supreme Court experts: political science professor Lawrence Baum, and law professor Edward "Ned" Foley. Kopko began looking for contemporary copies of the two well-known secret photo shoots of the court from the 1930s.

One set of photos was taken in 1932 by German "candid camera" photographer Erich Salomon,

who hid his camera in a fake arm sling. The photos were published in *Fortune* magazine. In June 1937, an unnamed "enterprising amateur" photographer hid her camera in her purse for what was the first secret photo taken during a session in the court's new building. *Time* published that photo.

Kopko contacted the Supreme Court curator's office in his quest, and it was only then that he learned that the *Time* and *Fortune* pictures were not the only secret photos taken during a court session.

The first evidence of photography inside the court came in a brief but amusing story in the *New York Sun* in November 1895.

It stated that an unidentified “kodak fiend” took a photograph inside the court, which was then housed in the basement of the U.S. Capitol.

The photo itself was not published in the newspaper. But the article said the justices were “deeply mortified” by the picture, because it depicted Justice Horace Gray as “dozing on the bench.” Gray, best known as the first justice to hire law clerks, was apparently also known for napping during oral arguments, which at that time could drone on for days.

“When he takes a nap his head falls low upon his breast, his mouth hangs open, and he could not truthfully be called a ‘sleeping beauty,’” the article said of Gray.

In any event, the article stated unequivocally—though without citation to any rule or law—that “visitors and tourists to Washington are not allowed to take kodaks into the Supreme Court room.” The Kodak company first began selling small pocket cameras in 1895, and they became known generically as kodaks, without capitalization.

“EMBARRASSING SITUATIONS”

Kopko said the Sun article points to what may be the first clue about the reason behind the court’s first ban on cameras.

“The Horace Gray article provides a very different reason why the ban was introduced,” Kopko said. “It wasn’t out of concern that the lawyers and justices would be playing to the cameras. It was to protect the justices from embarrassing situations.”

From 1895, the new research fast-forwards to Oct. 4, 1937. Hugo Black sat as a justice for the first time then, just days after weathering a storm of controversy over his past ties to the Ku Klux Klan.

According to the Daily News article, Patrick Kelly, a member of the Supreme Court bar, rose just



SECRET SNAPS: Research by Kyle Kopko, above, showed there’s been a demand for cameras for more than a century. An 1895 story in the New York Sun, right, said justices were “deeply mortified” to learn about a photo taken inside the court.

minutes after the court session began to make a motion to keep Black from taking his seat. It was “brazen and unfathomable” at the time for anyone to make an oral motion to the court, Kopko wrote, as it would be today.

But Kelly persisted, asserting that Black should not have been allowed to join the high court because, as a U.S. senator, he had voted to create a retirement pension for justices. In Article 1, Section 6, the Constitution bars members of Congress from being appointed during their term to any office for which they approved a pay raise.

Chief Justice Charles Evans Hughes, with his “celebrated benignancy,” ruled Kelly out of order and told him and an accomplice, Albert Levitt, to put their motion in writing, according to the Daily News article. They did, and it was denied for lack of standing.

The newly discovered Hugo Black episode now stands, apparently, as the last time a photo was taken inside the court during a

formal sitting, until the modern-day disruptions.

None of the published photographs from the 1930s resulted in any fine or punishments, and in the recent video episodes, protesters have been charged with disrupting the court, not photographing it.

No formal rule, ordinance or statute on the books specifically prohibits cameras in the Supreme Court.

The court’s website does make a brief mention of cameras that echoes the admonition of 1895. A “Frequently Asked Questions” guide for visitors states, without citing any rule of the court: “Yes, visitors may take photographs in public spaces for personal use. However, no photography is allowed inside the courtroom at any time.”

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