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ACCESS TO THE COURT: TELEVISING THE SUPREME COURT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

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ACCESS TO THE COURT: TELEVISING THE SUPREME COURT

TUESDAY, DECEMBER 6, 2011

U.S. SENATE,
SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice, at 10:03 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Amy Klobuchar, Chairman of the Subcommittee, presiding.

Present: Senators Klobuchar, Whitehouse, Durbin, Blumenthal, Sessions, Grassley, and Lee.

OPENING STATEMENT OF HON. AMY KLOBUCHAR, A U.S. SENATOR FROM THE STATE OF MINNESOTA

Chairman KLOBUCHAR. Good morning. I am pleased to call this hearing of the Senate Judiciary Subcommittee on Administrative Oversight and the Courts to order. We have an extremely distinguished panel of witnesses here today. We especially do want to welcome back Senator Specter to this Committee where he has spent many, many hours. I will introduce the panel after the members make their opening statements.

Today we will be discussing the proceedings of the United States Supreme Court and the bipartisan Durbin-Grassley bill that will televise the proceedings. There have been hearings and proposals in the past on televising all levels of the Federal courts, and although I have supported those proposals, I do recognize as a former prosecutor that there are more complicated factors when you are dealing with trials in the lower courts and that there should be discretion in those matters. But my focus today, our focus today, will be on the Supreme Court, and I would like to begin with a quote from the Court itself.

In the *Richmond Newspaper* decision, which upheld the press and public's right of access to the courts under the First Amendment, Justice William Brennan observed: "Availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the cold record is a very imperfect reproduction of events that transpire in the courtroom." I could not agree more. And while Justice Brennan was talking about actual attendance in a courtroom, I think his argument is just as persuasive with respect to allowing cameras in the courtroom.

Although the Supreme Court is open to all Americans in theory, the reality is that public access is significantly restricted. There are only a few hundred seats available, some of which are reserved for specific individuals. That means visitors often get just 3 minutes of observation time before they have to give up their seats to the next person in line.

Those friends of mine that have attended when their spouses or colleagues were arguing before the Supreme Court say it is an amazing experience, and we do not in any way want to lessen the experience. We would just like to expand that experience to other people.

More importantly, over 99 percent of Americans do not live in Washington, DC, and, thus, their opportunity to visit the Court is limited, not only by the number of chairs in the room but by geography. And it should not be a once-in-a-lifetime experience to be able to see the Court in action.

The impact of the Court's rulings has significant and often immediate consequences for real people. For proof, we do not need to look much further than landmark cases like *Brown* v. *Board of Education*, *Loving* v. *Virginia*, *Miranda* v. *Arizona*.

In recent years, the Supreme Court has made some strides toward increasing transparency. Chief Justice Roberts enacted a new policy making audio recordings of oral arguments available on the Court's website, though not usually on the same day. But before coming to the Senate, you should know, in my time as the county attorney—and I speak from personal experience—I said that transcripts and audio recordings just are not the same as actually watching judges question lawyers live, as actually seeing the exchange of ideas and the expressions of the participants.

That is why I find there to be a compelling need for regular televised coverage of the Supreme Court's oral arguments and decisions. The public has a right to see how the Court functions and how it reaches its rulings. It is the same argument for televising speeches on the Senate floor, press conferences by the President, or for that matter hearings like this one.

Democracy must be open. Members of the public, especially those who do not have the time or means to travel to Washington, DC, should be able to see and hear the debate and analysis on the great legal issues of the day or, frankly, on any issues that come before the United States Supreme Court. And, of course, even if you live across the street from the Court, it is not a reasonable proposition to attend on any sort of a regular basis.

So, in reality, public access to the Court is very limited, and I believe that greater access would be an important tool to increase public understanding of our system of law and demonstrate the judges' integrity and impartiality in engaging with lawyers from both sides.

I have always felt that it was a shame that the overwhelming majority of Americans only get to see the Justices during their confirmation hearings in the Senate. I recognize that there are legitimate and deeply held concerns about televising Court proceedings or making them available on the Internet, and I would note that in reality those two mechanisms are becoming more and more intertwined and indistinguishable.

We thought it was important to have several witnesses here today that would take the opposite side on this bill. That is why we are very glad that we have such a distinguished panel of people of differing viewpoints.

But as I mentioned earlier, I think the more difficult concerns to address are at the trial court level, in part due to the presence of witnesses, jurors, and criminal defendants. Those issues are not present in the United States Supreme Court.

As we will hear from one of our witnesses, the Supreme Court in Iowa has successfully adopted cameras in the courtroom, as have other State courts. Through the experiences of the State courts, two Federal circuit courts, and a pilot program running in 14 district courts around the country, we have had a chance to examine in real life the questions that opponents of cameras have raised, such as potential issues of due process; and we have seen that in some cases the concerns have not materialized as feared, and in other cases there have been ways to address the concerns.

In terms of due process, it is important to note that the Senate legislation championed by Senators Durbin and Grassley—I am a cosponsor as well as, I know, Senator Cornyn and several others—specifically provides that if a majority of Justices believe that any party's due process rights would be violated, the case would not be filmed. I think that is important.

But for all the reasons I have stated, I believe the Court should no longer remain isolated from the average Americans who bear the real-world consequences of its decisions. I am confident that the Justices of our Supreme Court are capable of ensuring the dignity and the decorum of their courtroom and that the presence of cameras will not interfere with the fair and orderly administration of justice but, rather, it will make it stronger.

With that, I will turn to Ranking Member Sessions for his remarks.

STATEMENT OF HON. JEFF SESSIONS, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator SESSIONS. Thank you. I thank the Chair, and you always do such a good job at these hearings and do allow a fair and open discussion, and I look forward to today's hearing.

It is good to see Senator Specter back. He is teaching a course. He is writing the fourth book and practicing some law and is still active in the great issues of our time. He is one of the Senators I have most admired in my time in the Senate.

This is what I am thinking about the matter, and I do not claim to have it all correct. The power of the Court, its role, its legitimacy, its moral authority, arises from the fact that it is removed from the hustle and bustle of everyday life, its passions, its ideologies, its politics. It is a place justice is done under the Constitution and laws of the United States. The Court seeks to discover the legal issue in the case. It then endeavors to decide that legal issue based on objective and long-established rules of interpretation and adjudication.

It is a complicated process at times. It is most certainly not a forum for policy debate, and that is why judges where robes: to make clear their objectivity, their neutrality. The moral authority

of a court I believe arises from its production of an objective judgment.

The only thing that is important is the judgment, the order. That decision speaks. It is what is important. It speaks for itself. It speaks for those who rendered it, and their visage, their personality, or lack of it, is not what a court is about. A court is about its decision.

They say we want to see that process in action, but I am not sure how you see a judgment being formed. To the extent that cameras in the courtroom undermine the sense of objectivity, they cause the courts to be perceived more as a policy or a political entity, the courts' moral authority has perhaps slightly been reduced.

To the extent that our Justices worry about that, I think we should give them deference, whether or not it is constitutionally—whether or not Congress can constitutionally direct a court to have cameras or not, it seems to me that we should take very seriously their views about it and respect it. It is their domain. They do not tell us how to run our offices here.

So I think that there are real concerns about the issues that are before us. I know Senator Grassley and you, Madam Chairwoman, and Senator Specter have strong views and have advocated those for years. But I remember when I became United States Attorney, Judge Dan Thomas, who was appointed by Harry S. Truman, gave me some advice about the good office I was about to enter. He said, "If it ain't broke, don't fix it." So I am pretty pleased, really, with the effectiveness of the great court system in America, and I think we should be cautious about making significant changes.

Thank you.

Chairman KLOBUCHAR. Thank you very much.

Senator Grassley.

STATEMENT OF HON. CHUCK GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Thank you, Madam Chairman, for holding this very important hearing. Before I speak, I wanted to announce to my colleagues and to the witnesses that I am going to have to at 10:45 go over to the floor for a nominee that is up.

Over 10 years ago, Senator Schumer and I introduced the Sunshine in the Courtroom Act to grant Federal judges the authority to allow cameras. Since that time, this bill has been brought before the Committee many times, and each time it has been scrutinized, improved upon, and reported out of Committee with broad bipartisan support.

Today's hearing focuses upon a companion issue: whether or not the Supreme Court should permit cameras in its courtroom. Just yesterday Senator Durbin and I introduced what we call the "Cameras in the Courtroom Act of 2011," a bill which would require the Supreme Court to broadcast and televise.

Like the Sunshine in the Courtroom Act, this bill has also been brought before the Committee on several occasions. It, too, was reported out favorably with bipartisan support and was championed by one of our witnesses today, my friend Senator Arlen Specter, who, as I told him privately, I am glad to see back in action again.

My interests in expanding the people's access to the Supreme Court increased 11 years ago when the Supreme Court decided to hear arguments in the Florida recount case in the 2000 Presidential election. Senator Schumer and I urged the Supreme Court to open the arguments to live broadcast. In response, the Supreme Court took the then unprecedented step of releasing an audio recording of the arguments shortly after they occurred. It was a sign of progress that gave the entire country the opportunity to experience what so few get to, and that is, the Supreme Court at work.

Just last year, the Supreme Court began releasing audio recordings of its proceedings at the end of each week. This is another step in the right direction, and I applaud the Court for transparency and great access. But it is not enough. I believe that the nature of our Government and the fundamental principles upon which it was built require even more.

Abraham Lincoln said, "Ours is government of the people, by the people, and for the people." Our Constitution divides power through checks and balances. But most importantly, it makes the Government accountable to the people. The best way that we can ensure the Federal Government is accountable to the people is to create transparency, openness, and access.

The vast majority of people do not believe that they have adequate access to the Supreme Court. We had a poll released last year; 62 percent of Americans believe that they hear too little about the workings of the Supreme Court. Two-thirds of Americans want to know more. What could be a better source of the workings of the Supreme Court than the Supreme Court itself?

In 1947, the Supreme Court stated, "What transpires in the courtroom is public property." Well, if it is public property, then it belongs to the whole public, not just the 200 people who can fit inside the public gallery.

With today's technology, there is no reason why arguments could not be broadcast in an easy, unobtrusive, and respectful manner that would preserve the dignity of the Supreme Court's work and grant access to millions of Americans wishing to know more.

My State of Iowa knows something about this. For over 30 years, it has permitted the broadcast of its trial and appellate courts. In fact, I am pleased to welcome, as you all know, our Supreme Court Chief Justice Mark Cady today. He has come to share with this Committee his unique perspective of presiding over a court that broadcasts its proceedings. He is a strong proponent of transparency and continues to pioneer new ways to give the public greater access to the court system.

Before we begin, I would ask for three things to be included in the record:

First, a letter I wrote to Chief Justice Roberts asking for the health care law case to be televised. I would like to put that in the record.

And the second thing and third thing to put in the record would be editorial opinions, one written by the second largest newspaper in Iowa, the Cedar Rapids Gazette, an editorial board stating its support of legislation; and the other, the editorial board of the Washington Post. Both express the belief that the Supreme Court must permit its proceedings to be broadcast. It is not often that

America's heartland and the Washington establishment agree on too much, and so that brings a unique perspective to this issue.

Thank you very much.

Chairman KLOBUCHAR. Thank you. Those will be included in the record.

[The information appears as a submission for the record.]

Chairman KLOBUCHAR. I know Senator Durbin is going to join us at some point here and has a few words to say about his legislation, but I think we will start with our witnesses first, and we will ask that you stand so you can take the oath.

Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. SPECTER. I do.

Mr. GOLDSTEIN. I do.

Justice CADY. I do.

Judge SCIRICA. I do.

Ms. MAHONEY. I do.

Chairman KLOBUCHAR. Thank you very much. I am going to mention and go through and introduce each of you, and then we will have you each give your remarks for 5 minutes.

First, as has been well acknowledged, Senator Specter is here with us. He served in this chamber for 30 years, the longest-serving Senator in his State's history. As Chairman of the Judiciary Committee, he was a tireless advocate for televising Supreme Court proceedings. He did not have to come back at this point. He has a lot of things going on, as Senator Sessions pointed out, but we were just honored that you would join us today and make, I think, your first official return to the Senate. So thank you so much for being here, Senator Specter.

We also will hear from Tom Goldstein. Mr. Goldstein is a founding partner of Goldstein & Russell, an appellate firm specializing in Supreme Court litigation. Mr. Goldstein has argued before the Supreme Court 24 times—but who is counting? He also teaches Supreme Court litigation at Harvard and Stanford law schools and is the publisher of the popular SCOTUS blog, always the place to look for insights and rumors—true rumors, and things like that. But you cannot put that on your blog.

Next we have Chief Justice Mark Cady of the Iowa State Supreme Court. Justice Cady served as an assistant county attorney, a district court judge, and as chief judge of the Iowa Court of Appeals before his appointment to the State Supreme Court in 1998.

Next is Judge Anthony Scirica of the Third Circuit Court of Appeals, who has previously served as chief judge of that circuit and as a district court judge. Prior to his appointment to the Federal bench, Judge Scirica served as an assistant district attorney and State representative in Pennsylvania.

Finally, Maureen Mahoney, who is a graduate of the University of Chicago Law School. She founded the Supreme Court and appellate practice in the Washington, DC, office of Latham & Watkins, where she works today, and from 1991 to 1993, served as a United States Deputy Solicitor General.

We thank you all for joining us, and we will begin our testimony with Senator Specter.

STATEMENT OF HON. ARLEN SPECTER, FORMER U.S. SENATOR FROM THE STATE OF PENNSYLVANIA, AND ATTORNEY AT LAW, PHILADELPHIA, PENNSYLVANIA

Mr. SPECTER. Madam Chair, Ranking Member Sessions, thank you for scheduling the hearing on this very important subject, and I am pleased to be back in this room where I have spent many interesting hours on the other side of the dais.

I believe that it is vital that the public really understands what the Supreme Court does, and in our electronic age, the information comes from television.

The Supreme Court decided in 1980 in a case captioned *Richmond Newspapers* v. *Virginia* that the public had a right to know what goes on in Court. It applied not only to the print media but to the electronic media.

The Supreme Court decides all of the important cutting issues of the day. The Court decided who would be President in *Bush* v. *Gore* by one vote. The Court decides who lives through the abortion rights, who dies on the death penalty, and every subject in between.

Not only does the Court affect the daily lives of all Americans, it has a tremendous impact upon the separation of powers, and I believe that Congressional authority has been very seriously eroded by what the Court has done on the decisions which they have decided and on the decisions on the cases which they have not decided.

The authority of the Congress under the Commerce Clause was unchallenged for 60 years and then in *Lopez* and *Morrison* cut back. Chief Justice Rehnquist said in *Morrison* that the legislation was unconstitutional because of the Congressional "method of reasoning." I have often wondered what transformation occurs when the nominees leave this room, walk across the green, and are sworn into the Supreme Court.

The Court is very ideologically driven at the moment, and I think the public needs to understand that. The case of the Affordable Care Act is coming up for Supreme Court review, and that is a case which touches every American, and it ought to be accessible to the public.

The chamber holds only 250 people, and when the American people were polled on the subject, 63 percent said they thought the Supreme Court ought to be televised. When the other 37 percent found out that the people could stay only for 3 minutes and the chamber was limited, the number rose to 80 percent.

The highest court of Great Britain is televised. The highest court of Canada is televised. Most of the State Supreme Courts are televised.

When the nominees appear before the Committee on confirmation, they speak about the favorable opinion of television, or at least an open mind. Somehow that position, as well as many others, gets a 180-degree reversal when they get to the Court.

The issues which are coming up in the Affordable Care Act really ought to be subject to really close public scrutiny. I believe that the legitimacy of the Court itself is at stake for the people to understand what the Court does.

There have been no good reasons advanced why not to televise the Supreme Court. There was an article which appeared in the National Law Journal by Tony Mauro. He attributes, as he puts it, "the defiant stance of the Supreme Court" is their view that they are entitled to be characterized as under exceptionalism. Justice Kennedy said, "We operate on a different timeline, a different chronology, we speak a different grammar."

Well, that is not true in a democracy. I think Senator Sessions has it right when he says they consider it their domain. Well, it is not. It is the public's domain and it ought to be accessible to the public.

Thank you.

[The prepared statement of Mr. Specter appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much, Senator Specter.

Mr. Goldstein.

STATEMENT OF TOM GOLDSTEIN, PARTNER, GOLDSTEIN & RUSSELL, P.C., WASHINGTON, DC

Mr. GOLDSTEIN. Thank you, Madam Chair, other members of the Committee. It is quite an honor to be here with four panelists, all of whom have been mentioned seriously, as has the Chair, as a potential nominee to the Supreme Court. That is not a problem I am ever going to have.

My perspective is as someone who does argue regularly before the Court and also, as you mentioned, operates a website that will have roughly 10 million visits this year relating to the Court where people come to find information about the Court.

I appreciate the fact that you have taken the time to hold this hearing on an issue that everyone agrees is fantastically important. Just to follow up on Senator Specter's point about the health care case, one can only imagine that if the oral arguments in that case and the eventual decision were televised, then at least 50 million people would watch that in this country. It is so important, the contentious decision to pass that legislation in this body, the obvious serious questions about the statute's constitutionality, but only 100 or 200 people will be able to be in the room for those oral arguments. And we are a visual culture. People watch television. That is how they get a lot of their news. And so it would make a big difference to have television there.

You have my written testimony, and I will not repeat it, so I will just make three points:

First, that televising proceedings would be good for the Supreme Court, not bad for the Supreme Court;

Second, that I think you can pass a law constitutionally that requires the Justices to do this, but that I would not.

I think that televising would be good for the Supreme Court because experience shows that sunshine increases public confidence. It does not decrease it. The Justices are tremendously serious people doing the public's work. The oral arguments are not scintillating. They are sometimes not very interesting. As someone who argues in front of the Court, I can say that. But they are incredibly important. The power to strike down a law passed by the people's representatives is the most serious power that exists under the

community, in my opinion. And for the public to understand what is going on and to see the serious questions and the serious answers I think would make the public believe in the Justices and the good work that they are doing even more than it does now. And we are at a time when there is a flagging confidence in our democracy, and doing things to increase that confidence would be a good thing.

Second, can you force them to do it? Nobody knows. There has never been a case like this, and it is always quite a challenge to pass a law that would require the Supreme Court to do something and then invite the Supreme Court to decide whether you can do it. The Justices would end up deciding that case in all likelihood. In my opinion, though, the answer is probably yes. These are public proceedings. You are not talking about televising the private deliberations. The Justices have already decided to let the public in. There is a significant First Amendment interest in the public being able to see what is going on. It is an important part of our governmental structure. And the very fact that it is part of the deliberations—the questions, the answers—suggests to me that there is a significant interest in having the proceedings be seen.

I would, however, if you were going to do it, attach findings to the legislation that explains why it is that you have found that it does not disrupt the Court's proceedings, would not present a security risk, and the like. The legislation standing alone invites the Court—and a district court that would hear the case in the first instance—to reach its own judgments about that. So I think in hearings like this you would need to find facts that support the legislation.

But, third, I just would not do this. I happen to agree with Senator Sessions. We should begin by recognizing that it is really easy to criticize the Court. It does not have a PR operation. It does not respond. And the Justices deserve praise. They are practically the only people in Washington trying not to get on television. They are just trying to do their jobs. And they have taken significant strides. They do not just say that they care about public access. They are doing things. They not only publish their opinions, they have created a website that is accessible in real time. They publish the transcripts of the arguments the same day. They now publish the audio in the same week. And they are headed in this direction on their own. And as Senator Sessions has pointed out, they have asked for some deference in the process of reaching this conclusions.

And like other Courts before them, this has always been done, I think, pretty much by the judiciary voluntarily rather than the legislature telling them to do it. And the trajectory is that it is inevitable that television will be in the Supreme Court, and I would not provoke the constitutional controversy of requiring them to do it.

Thank you.

[The prepared statement of Mr. Goldstein appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much.

Justice Cady.

STATEMENT OF HON. MARK CADY, CHIEF JUSTICE, IOWA SUPREME COURT, DES MOINES, IOWA

Justice CADY. Senator Klobuchar, Madam Chairperson, members of the Committee, it is my pleasure and my honor to be with you this morning to tell you about Iowa's experience with video court proceedings.

The Iowa Judicial Branch has been a leader in video and audio media coverage for courts. For more than 30 years, Iowa courts have allowed audio, photographic, and video coverage of our court proceedings.

In 1979, following a thorough study, the Iowa Supreme Court adopted rules to allow for expanded media coverage of court proceedings in both trial and appellate courts. These rules are carefully designed to prevent disruption of the court hearings and to safeguard the rights of litigants to a fair, impartial trial and appeal; and in summary, Iowa rules provide for the media to file first a request to cover a media court coverage trial. That request is filed with a media coordinator who then submits it to the court. Litigants are then given a right to object to the coverage. The media must pool its equipment, and the rules prohibit coverage of certain sensitive subjects and segments of a hearing.

Our rules have worked very well. They limit the number of cameras in the courtroom, require the cameras to be stationary so as not to distract from the proceedings, and they ensure that the judge always has control of the process. Our judges rarely have problems with this expanded media coverage, and journalists who cover our courts respect the rules and the rights of litigants.

The process has worked so well that it has become expected. Expanded media coverage of trials, especially high-profile trials, is a matter of routine. Expanded media coverage of appellate hearings is less common. I estimate that we might have expanded media coverage in perhaps one or two arguments a year.

But in addition to our procedure for expanded media coverage of the courts, the Iowa Supreme Court streams all of its oral arguments online. We also then archive the videos for later viewing. Our court began recording its oral arguments and making them available online in 2006, and we have continued that practice today.

As you know, the strength of our democracy—indeed, any democracy—requires a well-informed citizenry. This principle holds true for each branch of Government. The strength and the effectiveness of our court system depends on the confidence in the courts. As former Supreme Court Justice Thurgood Marshall said, "We can never forget that the only real source of power that we as judges can tap is the respect of the people." That respect obviously depends on how well we do our job of administering justice. But it also depends on the public's understanding of our job and the information the public has about how we are doing our job.

Our experience in Iowa has shown that media coverage of our courts tends to boil down at times to just a few seconds of a video of a high-profile trial with a report of the proceedings filtered by a reporter. And so what the public gets is simply a snippet of the process. Although we would like to allow more coverage of our court arguments, we believe the media in Iowa provides a great

service. Their efforts increase the visibility of our courts and our court procedures.

At the same time, it has become easier for courts to direct them to our proceedings through modern information technology. And with our online video of court proceedings, more people watch our courts, and our experience bears this out.

I think I want to leave you with simply one anecdote, perhaps best described. There has been a strong interest in our online arguments in our court proceedings, and this has been a tremendous surprise, and it has revealed an opportunity—an opportunity for greater public understanding. And my observation and conclusion is this: Cameras expose courts to what they do and what they are—a proud institution of justice. The more the public sees our courts operate, the more they will like and the more they will respect our court system. And this was vividly shown to me a few months ago when the Iowa Supreme Court heard arguments in a community outside our seat of government in Des Moines. The case involved a criminal violation of an ordinance prohibiting local Mennonite farmers from driving their steel-wheeled tractors on hard surfaced roads. The issue in the case was whether the ordinance violated the First Amendment. Our arguments in this community drew about 350 people from the area. Afterwards, at a reception, the father of the young Mennonite boy who was the subject of the prosecution patiently waited to shake my hand. And when he did, he looked me in the eye and he said this: "Having seen your court work, it seems like a pretty honest thing." Our courts are an "honest thing," and cameras can help show it to the public.

I would now like to briefly pause so we could watch a short excerpt from one of our court hearings.

Thank you.

[The prepared statement of Justice Cady appears as a submission for the record.]

Chairman KLOBUCHAR. Well, certainly, since this is about cameras in the courtroom, we will allow the showing of that. Thank you.

[Videotape played.]

Justice CADY. Thank you.

Chairman KLOBUCHAR. Well, we want to know what happened in the case, but we will ask you later.

OK. Next, Judge Scirica.

STATEMENT OF HON. J. ANTHONY SCIRICA, CHIEF JUDGE, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, PHILADELPHIA, PENNSYLVANIA

Judge SCIRICA. Chairman Klobuchar, Ranking Member Sessions, and distinguished members of this Committee. Good morning, and thank you for inviting me here to discuss these proposals for televising the oral arguments of the Supreme Court. I do not speak for the Court, but I am pleased to offer my own perspective, which is shaped by my service in the judiciary.

At issue is whether televising oral arguments will affect the integrity of the judicial process. In ways we may not fully comprehend or cannot always anticipate, communication through different media can affect how an institution functions.

You will hear a broad range of views with thoughtful arguments on both sides. Reasonable people disagree about the best course. But let me make three general points that I believe merit consideration: transparency, accessibility, and respect among the branches that allows each to govern its own deliberations.

First, transparency. The most important work of the Supreme Court, deciding the difficult cases it hears, is transparent. The Court explains its decisions in detail. Traditionally this was done through the printed word; now it is done through the electronic word as well.

As you know, only the Court's opinions are binding precedent on questions of Federal law. This process of reasoned deliberation confers legitimacy and permits litigants and the public to evaluate for themselves the soundness of the Court's judgment.

Second, over time the Supreme Court has become more accessible and more transparent. It has embraced the Internet to enhance access to its work. Lawyers' briefs, the Court's opinions, transcripts of oral arguments, audio recordings of oral arguments are all available on the Court's website free of charge. Its opinions are online as soon as the decision is announced.

Third, each of our three branches of Government is responsible for its own deliberations and self-governance. This separation of powers underscores the considerable latitude that should be afforded each branch in determining its own internal procedures. Deciding whether to televise oral arguments at the Supreme Court goes to the heart of how the Court deliberates and conducts its proceedings.

Those of us outside the Court all have individual and institutional interests in the decision. But we do not have the responsibility to decide these difficult cases of national importance. The Justices do. They are the ones most familiar with the operation of the Court. They understand the dynamics and nuances of Supreme Court oral arguments and how that exchange affects their deliberations. They can best evaluate whether the introduction of cameras might affect the quality and integrity of the dialog with the attorneys and, just as important, the dialog among the Justices.

There is a common bond between members of the Supreme Court and Members of Congress: Each serves as a trustee of the long-term interests of an essential institution in our country. The Court has proceeded cautiously in evaluating whether to televise oral arguments. This should give pause when seeking to impose a decision on a coordinate branch of Government.

A Congressional mandate that the Supreme Court televise its proceedings is likely to raise a significant constitutional issue. Lawyers and Members of Congress have expressed this possibility. But there should be no need to test the constitutional separation of powers. There is a compelling reason for caution apart from avoiding a possible constitutional question.

The co-equal branches of the Federal Government have long respected each branch's authority and responsibility to govern its own internal affairs and deliberations. This history is deeply rooted in the American political and constitutional tradition. Congress has honored this legacy by guarding judicial independence and self-governance. These long-standing principles of comity among the co-

ordinate branches of government—that is, mutual respect for each branch's essential functions—counsel moderation and deference.

It is not unreasonable to defer to the Court on how it conducts its deliberations and speaks to the American people. The Court should be afforded a measure of comity in its own governance to decide for itself whether, when, and how cameras should be present during its oral arguments.

Thank you very much, Madam Chair.

[The prepared statement of Judge Scirica appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much.

Ms. Mahoney.

STATEMENT OF MAUREEN MAHONEY, OF COUNSEL, LATHAM & WATKINS LLP, WASHINGTON, DC

Ms. MAHONEY. Good morning. I want to thank the Chair and members of the Committee for giving me the opportunity to testify today in opposition of the legislation that has now been proposed.

I come to this Committee having served 30 years as a Supreme Court advocate. I have argued 21 cases before the Court, and I have had the privilege of working with the Court and the Judicial Conference on the rulemaking process. So I have come to know them and respect them.

A few years ago, Justice Kennedy testified before Congress, and he expressed the hope that Congress would accept the Court's judgment on the issue of televised arguments. I would like to highlight four reasons why Congress should respect Justice Kennedy's request.

The first is that there is a serious reason to believe that legislation overturning the Supreme Court's policy on this issue would be unconstitutional. I agree with Tom Goldstein that the issue is debatable. It certainly has not been settled. But I think the text of the Constitution, the doctrine of separation of powers, and Congress' historical practices all point in the direction that this legislation would be unconstitutional. It would, after all, be an effort to strip the Court of its historic authority to decide how to control proceedings in its own chamber.

When you look at the text, Article III vests the judicial power of the United States in the Supreme Court, not in Congress. Congress did not create the Supreme Court. The Constitution did.

From the earliest days of the Republic, the Supreme Court has made clear that the judicial power does include the authority to adopt rules necessary to conduct its proceedings and to protect the integrity of its decisionmaking processes. Although Congress surely has some power to adopt laws that affect the Court, it cannot, as the Court says, "impermissibly intrude on the province of the judiciary," or disregard a "postulate of Article III" that is "deeply rooted" in the law. Those concerns are directly implicated here. It would be difficult to describe a statute that strips the Court of its deeply rooted power as a mere administrative regulation, especially when it is done in the context of a disagreement with the Court about how it has come down on this issue.

History also lends support to this conclusion. From 1789 to the present, Congress has always left the Supreme Court free to adopt

its own rules governing its proceedings without any oversight or legislative approval.

Second, any benefit from the televised proceedings is not great enough to warrant a constitutional confrontation, and I think Tom Goldstein agrees with me on this issue. I would just say on the benefit side, this is not a one-sided debate. As Justice Stevens has put it, this is a "difficult issue." Those are his words. It is easy to posit some educational benefits, but it is all about what are the incremental benefits once the public already has full access to the audio and the transcripts. And Justice O'Connor, who has been very devoted to public education on the judicial branch and the Supreme Court, said that, in her view, televising Supreme Court proceedings "wouldn't enhance the knowledge [of the public] that much" due to the availability of other information, and she notes that arguments are "technical and complicated."

Third, I think television poses genuine risks to the Court's decisionmaking processes, and we just need to look at what a few of the Justices have said and have told Congress.

First, let us look at what Justice Souter said. In 1996, he told Congress that the case against cameras is "so strong" that "[t]he day you see a camera coming into our courtroom it is going to roll over my dead body." And it bears emphasis that Justice Souter based this view on his own personal experience when he was sitting as a Justice of the New Hampshire Supreme Court. He said that in his experience, television cameras definitely "affected [his] behavior," that "lawyers were acting up for the camera" by "being more dramatic," and that he was "censoring his own questions." Similar concerns have been shared by a large number of Federal appellate judges who participated in a pilot project of televising oral arguments a number of years ago.

And let me just run through what the other Justices have said on this topic about how it would affect their decisionmaking process because I think it is essential that the Committee be aware of this.

Chief Justice Roberts has said that "grandstanding" may be expected to increase.

Justice Kennedy has said that television would "alter the way in which we hear our cases, the way in which we talk to counsel, the way in which we talk to each other, the way in which we use that precious hour."

Justice Thomas says television would have an "effect on the way the cases are actually argued" and "undermin[es] the manner in which we consider the cases."

Justice Alito said that television would "change the nature of the arguments" because the participants' "behavior is changed" when proceedings are televised.

Justice Breyer sees "good reasons" for television, but he counsels caution because there are also "good reasons against it."

And Justice Stevens recognized potential benefits but said he "ultimately came down against it," because it might negatively affect the arguments and the behavior of the Justices and lawyers.

And, finally, I would just like to say that I would like to echo the sentiment that the Court is in the best position to assess the im-

pact of electronic media on its proceedings, and it can be trusted to continue to give the issues careful consideration.

As Justice Kennedy has explained, it is the Justices, not Congress, who "have intimate knowledge of the dynamics and the needs" of the Court. And when the shoe was on the other foot, the Supreme Court refused to second-guess the Senate's procedures for conducting impeachment trials. A Federal judge who was being impeached came to the Court and challenged those procedures, and the Supreme Court said that the Senate had authority to determine for itself what procedures would govern. And the same should be true here.

The matter has not been finally decided. The Court, as one of the witnesses explained, has actually altered its policies in cases of high public interest, as it did in *Bush* v. *Gore*, and it now has requests pending before it about the health care cases. There is ample time to consider those.

So, in summary, I would just urge the Subcommittee to stay its hand. Justice Kennedy informed Congress that "we feel very strongly that this matter should be left to the courts," and that view is entitled to respect under our constitutional system of governance.

Thank you.

[The prepared statement of Ms. Mahoney appears as a submission for the record.]

Chairman KLOBUCHAR. Thank you very much, Ms. Mahoney.

I did want to, before I turn it over for questions here, also quote our newest and youngest member of the Court, Justice Elena Kagan, who recently said—in fact, was asked at our Supreme Court confirmation hearing if she favored televised proceedings. She said she did. But she recently said in August, "If everybody could see this, it would make people feel so good about this branch of Government and how it is operating." And I actually got that out of an article recently in the New York Times by Ken Starr, Judge Ken Starr, former Solicitor General. I am going to put that in the record as well.

[The article appears as a submission for the record.]

Chairman KLOBUCHAR. I also want to add that I spoke with Justice Souter for about half an hour about his views, and I think you expressed them well. But I also talked to Ken Starr, who obviously had a different view. And I am going to turn it over to two of my Republican colleagues who have time commitments, so I am going to have them go first here. But I did want to note two things from Ken Starr's editorial in the New York Times where he talks about the people that would like to be able to see this. Whether they understand every procedural question or not, Ms. Mahoney, I am not sure is relevant because I think they understand a lot of what is going on. He points out older Americans affected by health care decisions would like to see an argument. He talks about women or other groups affected by important class action cases like the Wal-Mart discrimination case last term.

So I think we have to remember that while they may not understand every single detail, they understand the bulk of what this is about.

I turn this over to my co-chair, Senator Sessions, and then over to Senator Lee, who I know has a time commitment.

Senator SESSIONS. Thank you very much.

I do think there is a matter of respect, Ms. Mahoney. I remember, perhaps Senator Specter was part of the little Committee that went to Chief Justice Rehnquist during the impeachment proceedings to ask him how the Senate should proceed. And I so vividly remember, he said, "Well, you are the Senate. You decide how to proceed." And he would not give any advice. The idea was to get some advice about how the Senate should conduct its business, and he said that.

Judge Scirica, oral argument in the court of appeals is optional. To what extent is it traditionally optional in the Supreme Court and changing the rules might alter the amount of oral argument that occurs?

Judge SCIRICA. In most of the courts of appeals throughout the country, Senator, oral argument is not held in all cases. In cases where it is held, eight of the circuits put their oral arguments on audio, usually within the same day. Five do not. But some of those are presently considering doing so.

If the Supreme Court were to change its view, obviously it is something I think the courts of appeals would take into account. But it is worth noting that since the experiment from 1990 to 1994 in the lower federal courts, only two of the federal courts of appeals have allowed videoing oral argument. The Ninth Circuit does it a great deal. They do it in all their en banc cases and on a case-by-case basis on other cases. The Second Circuit, the other court of appeals, does it quite infrequently. They have only done it four times in the 4 years between 2006 and 2010.

Senator SESSIONS. One of the things that bothers me a little bit—I do not know that it is a defining thing, but in the letter that was written, there was a quote about older people might want to be watching this. You have, of course, a complete record of what happens. It is audio transcribed, and it is typed and produced. But I guess my thought is that we do not want to be in a position in which courts feel they are pressured by one group or another group to render a decision.

Senator Specter, Justice Kennedy testified a few years ago here, in 2007, "The majority on my Court feel very strongly, however, that televising our proceedings would change our collegial dynamic and we hope that this respect that separation of powers and balance of checks and balances implies would persuade you to accept our judgment in this regard. . .We are judged by what we write. . .We think it would change our dynamic. We feel it would be unhelpful to us. . .We have come to the conclusion that it will alter the way in which we hear our cases, the way in which we talk to each other. . ."

I thought that put forth a pretty good statement of the feeling on the Court. I think it is a legitimate feeling produced within integrity. How do you feel the Senate should consider overturning that and imposing our view of how the courtroom in the judicial branch should be conducted?

Mr. SPECTER. Well, I think the public's right to know and the benefit of an informed citizenry vastly outweigh what you quote Justice Kennedy as talking about collegial dynamics.

Justice White boiled it down in the article that I referred to by Tony Mauro, which I would like to have made a part of the record, saying that the Court's view of not televising, "It's very selfish, I know."

[The information referred to appears as a submission for the record.]

Mr. SPECTER. I believe that if the Court were televised, there would be an understanding and an accountability, and let me be very specific. It is hard to get into sufficient detail in the brief time allowed.

The Court came down with a monumental decision in Citizens United which allows unlimited anonymous corporate expenditures. Yet a book recently published by Professor Larry Lessig of the Harvard Law School called "Republic, Lost," he goes to a critical part of Justice Kennedy's fifth vote which decided the case in a 5–4 decision and points out that when Justice Kennedy made a conclusion that unlimited anonymous corporate expenditures would not affect citizens' participation in the electoral process, he had absolutely no factual foundation.

The Congress, under separation of powers, has the authority to find the facts, and then there is need only for a rational relationship between what Congress finds factually and the legislation which Congress enacts.

The Court in Citizens United disregarded, as Justice Stevens pointed out, a 100,000-page record and literally yanked the rug out from Congress where Congress had relied upon the *Austin* case in enacting McCain-Feingold. Nobody really understands what is happening in these cases, and it is hard to have it conveyed even if there is television. But at least that is an enormous start.

So I would consider the collegial dynamics that Justice Kennedy refers to, but I believe it is vastly outweighed by the public interest and transparency. As Brandeis said, sunlight is the best disinfectant.

Senator SESSIONS. Well, I would just say that you express your policy view well. It is obvious the Court has a different policy view in whether or not we should overturn that is the question before us, I suppose.

Mr. SPECTER. Well, Senator Sessions, I have been battling this issue for decades. Three times this full Committee has reported a bill out. One of the real sad parts about leaving the Senate was not being able to carry the fight forward. But now that Senator Durbin has joined the panel, if I may have his attention, he promised to carry on the battle in my absence. I am precluded under the ethics rules from asking Senator Durbin what he has done, except when I testify before the Committee.

[Laughter.]

Senator SESSIONS. And before the camera, and you are holding him to the promise he gave you. Is that right?

Mr. SPECTER. You bet.

Madam Chair, may I just add that I have a commitment to make the 12 o'clock train, so I have to excuse myself before it is all over.

Senator SESSIONS. Thank you very much.

Chairman KLOBUCHAR. Very good. We will make sure that Senator Durbin has that opportunity so that you can ask him questions, Senator Specter. But we are going over to Senator Lee first.

Senator LEE. Thank you, Madam Chair. I really appreciate you accommodating my time constraints, and I want to thank each of our panelists for being here today.

I come at this issue with a certain internal conflict that I am hoping you can help me resolve today, and in many respects you have helped me resolve that. The conflict of which I speak stems from the fact that I am an unapologetic, open law geek. I started attending and watching Supreme Court arguments at the age of 10. I listen to oyez.com sound recordings of oral arguments from the Supreme Court as background music when I am going about my work. And on one level there is absolutely nothing that I would love more than to watch Supreme Court arguments on television. That would be the greatest Christmas gift that I can imagine receiving.

And, on the other hand, at the same time, I feel that as a coordinate branch of Government the Supreme Court is entitled to a very significant degree to determine how it operates, and this does lead us to some conflict, but I appreciate the testimony that has been given today and the insight that you have provided for us.

We have here assembled a very distinguished panel. I have seen Maureen Mahoney argue before the Supreme Court. I have seen Tom Goldstein argue before the Supreme Court. I have not seen Senator Specter argue before the Court, but I understand that it has happened. And as a law clerk, I saw Judge Scirica preside over many appellate arguments. And so it is great to have each of you here.

But I would like to direct my first question toward Ms. Mahoney. I would imagine that in the following scenario some heartburn would be felt. Imagine that at some future point Congress decided that although today most of our proceedings are televised, including most of our Committee processing—at least they can be, if anyone wants to televise them—at some future point that Congress decided that some Committee hearings would not be open to television cameras. That is sometimes the case today. Some of our Committee hearings are, in fact, closed to the public. Those are rare, but it may be the case that some that, while not closed to the public, would no longer be televised.

In that circumstance suppose further that the courts got involved, that the courts looked at it and we ended up with a decision from the Supreme Court of the United States saying, in effect, we have examined the Constitution, and we have found emanations and penumbras flowing out of various free-standing constitutional provisions and concluded that from those emanations and penumbras we can conclude only that it is unconstitutional for the Senate not to allow all of its proceedings to be televised, whether Committee or floor or voting or otherwise.

How would that be distinguishable from us telling the Supreme Court that it must open up its oral arguments to television?

Ms. MAHONEY. Well, it is well settled under the Constitution that it is the Supreme Court's responsibility to say what the law is. Just

to quote Federalist Paper No. 78, whenever a particular statute contravenes the Constitution, it will be the duty of the judicial tribunals to adhere to the latter and disregard the former.

So it is just settled that the Supreme Court gets the last word, which is really one of the reasons why I think it would be a mistake for Congress to go down this path because it would create the potential for a constitutional confrontation between the branches.

Senator LEE. And regardless of who gets the last word as a practical matter, as far as——

Ms. MAHONEY. Why is it different as a matter of First Amendment? Well, for one thing, this is—you are doing an elective responsibility. You are elected by the people. The Constitution was designed to set the judiciary apart and independent. They are not elected. The whole notion of life tenure was to preserve their independence and, in fact, to insulate them from popular opinion. That is not true with the way that the legislative branch is structured.

But, again, going back to the *Nixon* case, impeachment proceedings are public but, nonetheless—the Court said it was up to the Senate to decide what procedures it would use for those proceedings and the Court would not second-guess that. They would only second-guess it if, in fact, the Constitution required a different conclusion.

Senator LEE. Part of what I understand you to be saying is that, regardless of what we can do as a matter of raw political power, there is a question of what we should do.

Ms. MAHONEY. That is certainly the case, but I also think there is a serious question about whether you can do it. A very serious question.

Senator LEE. OK. Senator Specter, how do you respond to this point about the appropriateness of our telling a coordinate branch of Government how to operate?

Mr. SPECTER. The Congress has the authority to handle administrative matters legislatively. For example, the Congress decides what a quorum is on the Court—six. The Congress decides how many Justices there will be on the Court. Recall the famous Court-packing plan. The Congress has the authority to tell the Court when it begins its arguments—on the first Monday in October. Congress has the authority to tell the Court what cases it should hear. And I believe that the Congress has the authority to tell them what cases—if they ought to be televised.

It is true that the Court has the last word, and I believe that is the way it should be. The finality of the Court is vital, and the independence of the judiciary is vital. That is the backbone of the rule of law in our Republic.

So the Court can come back and say it is a violation of separation of powers. I frankly do not think they would because you have very strong public opinion in favor of having the Court televised. And in the final analysis, the Court does listen to the public, and there are very strong arguments. I think, for example, in the 1980 decision that I referred to, there is not equal protection of the law. When the newspaper people could come in, the Court complains about news clips which were taken out of context. Well, that is what you have, a quotation. I think you may have been victimized by that some time in the past. But that is a free press. And I be-

lieve that it would really benefit this country to have that kind of accountability and that kind of understanding.

If I may add just one additional thought, the Court has been expanding its authority in a variety of ways. Since *Maryland* v. *McCullouch*, the rational basis for legislation was the test. In a case captioned the City of Boerne in 1997, they came up with a new test of what is congruent and proportionate, and nobody knows what that means. In the Americans with Disabilities Act within the past decade, two cases were decided entirely differently-one *Garrett* v. *Georgia* involving employment, and one *Lane* v. *Tennessee* on accessibility. And Justice Scalia said that that test was a "flabby test," as he put it, to enable the Court to engage in policy decisions. And I think the Court does engage in policy decisions, and I think the ideological tilt of the Court, both ways—the Warren Court, the Rehnquist Court. And I think the public needs to know, and I think it is a restraining influence if the public knew.

And we know that the Court reflects the changing values in a society. Well, the public has to know what the Court is doing in order to be able to express those values.

Senator LEE. Fair enough. Thank you. I see my time has expired. Thank you very much, Madam Chair.

Chairman KLOBUCHAR. Thank you very much, Senator Lee.

I am going to just ask one quick follow-up here before turning it over to my colleagues, and then I will do my questions at the end.

Ms. Mahoney made the argument that it is not constitutional, this bill, to require the Supreme Court, with many exceptions for due process, to televise. And I wondered, Mr. Goldstein, while you are not a fan of having Congress do this, you would rather have the Court do it themselves, and I think—how long have you been working on this, Senator Specter, trying to get the proceedings televised? How many years?

Mr. SPECTER. How many years?

Chairman KLOBUCHAR. Yes.

Mr. SPECTER. Twenty-five.

Chairman KLOBUCHAR. Twenty-five years.

Mr. SPECTER. Give or take five.

Chairman KLOBUCHAR. Give or take five. So you can see, Mr. Goldstein, why hoping that this will just happen gets somewhat frustrating. So could you just give the argument for why it is constitutional before I turn it over to my colleagues, building on what Senator Specter spoke about?

Mr. GOLDSTEIN. Sure. It is my pleasure, and thank you for the opportunity. As Maureen Mahoney says, Article III of the Constitution vests judicial power in the Supreme Court, which is the only Court that the Constitution requires. But as Senator Specter points out, there are lots of pieces of the administration of the Supreme Court, from things as simple as budgeting to more detailed points, like what is a quorum, what the scope of the Court's jurisdiction is, and the like, that this body has a lot to say about under the Constitution. And there is no clear line here.

I do think one thing that would be on the other side of the line that clearly would be unconstitutional is Congress could not pass a law that says the Justices are having their private deliberations,

but we are going to put a camera in there because we think sunshine is the best disinfectant. That would really be what is classically a private part of what the Justices are doing.

To me, the critical point is that these are public proceedings, and it seems to me that once the Justices make the threshold decision that these are going to be open to the public, absent some compelling reason to believe that it really would be distortive of how oral argument works, that is not—what would end up being characterized as whether it is an undue interference in the operation of the Court. And given with extraordinary deference to the Justices about their view about how this would affect the proceedings, given the experience of other courts, it seems to me hard to conclude that this would really undermine how the Court is operating. I would not go there. As you indicated, I do not think it is a step that is necessary. I think that one compelling thing that this body could do would be to pass a unanimous resolution urging the Court to do it, to give them a sense of what the Senator has pointed to as the great public interest in televised proceedings. But with no promises, I think that ultimately the legislation would be upheld.

Chairman KLOBUCHAR. Very good. So what you are saying is that if suddenly the legislation were that the private proceedings be made public, that would be a different matter?

Mr. GOLDSTEIN. Yes.

Chairman KLOBUCHAR. But when you are dealing with something that is already public and what you are really trying to do is expand the room to Iowa and other places. Very good. Thank you.

Senator Blumenthal.

Senator BLUMENTHAL. I am going to yield to Senator Durbin.

Chairman KLOBUCHAR. Very good. Senator Durbin.

Senator DURBIN. Thank you, Senator Blumenthal.

Senator Specter, it is great to see you again. And I think it is unprecedented, but it is the first time a witness has asked a Senator a question, and I believe because of your many years of great service in the Senate, you are entitled to that. And the question is: What are we doing to pass the bill that we both like so much? We are holding a hearing and you came.

[Laughter.]

Senator DURBIN. And that is an important development. I thank you for being here, Senator Specter.

Ms. Mahoney, I guess one of the things that troubles me is part of your testimony that suggests that the public just cannot understand the complexity of the arguments, the technical aspects that are often brought before the Court, and because we cannot "solve the problem of educating young people," we really should not complicate their lives by exposing them to these complex arguments.

I do not think that that kind of conclusion is in the spirit of what we call democracy. I think in the spirit of democracy, educating the people and giving them exposure to even the most technical arguments is considered appropriate. When you leave a monarchy, you really get down to a level where people who are chosen for public office are held to some standard of accountability. So tell me, if we allow the public to sit in the Supreme Court and listen without any proof that they have college degrees or law degrees, and if we allow

the press to cover the proceedings without any guarantee that a Supreme Court Justice may make certain that the question that is posed would look good in tomorrow's newspaper, what is the difference here?

Ms. MAHONEY. If I could first say, Senator, that I did not say that there was no benefit to the public. This is a more complicated, more difficult issue. It is what are the incremental benefits. And it was Justice O'Connor who said that arguments would not enhance the knowledge of the public that much, and the reason——

Senator DURBIN. But you quote it in your statement.

Ms. MAHONEY. Yes, I was quoting Justice O'Connor, and I think that is important because I think we all know she cares deeply about these educational issues. And here the question is: What is the incremental benefit? You have to weigh the incremental benefit against the cost.

If there was no risk to the Court's deliberative process, I would agree with you. We should go ahead and televise all the proceedings. Hardly anyone would probably watch. But so what?

And the other thing is that the audio is available. As Senator Lee was saying, he can listen to the entire audio, and does so.

Senator DURBIN. As released by the Court, but I——

Ms. MAHONEY. You can hear every word——

Senator DURBIN.—would just say——

Ms. MAHONEY.—of every argument, Senator.

Senator DURBIN. Ms. Mahoney.

Ms. MAHONEY. Yes.

Senator DURBIN. The point I am getting to is this—and we live a little different life than you do. As I travel around Illinois, I continue to be amazed, and even amused, by the number of people who watch C-SPAN night and day. I do not know if these are insomniacs or people who are, you know——

Ms. MAHONEY. Sure. Right.

Senator DURBIN. I will not go any further. But whatever their motive may be, they not only know who we are and what we are saying and what we have just argued on the floor of the U.S. Senate; I will have friends at home—I have one in particular, Joe Kelly, a World War II veteran, who says, "Bernie Sanders looked pretty sad this week. Is something wrong?"

Ms. MAHONEY. Sure.

Senator DURBIN. Honestly, they will watch closely and carefully and draw their own conclusions about the Government that they have elected.

Ms. MAHONEY. Right.

Senator DURBIN. I think it is a healthy thing.

Ms. MAHONEY. It can be, and C-SPAN I think sometimes plays the audios and they can run pictures of the Justices if they want.

Senator DURBIN. So why isn't it healthy that we take this to the next logical step? Why are we drawing these boundaries and saying when it comes to televising or putting these matters on the Internet, it is somehow a leap too far?

Ms. MAHONEY. Because we have to ask what is the impact on the deliberative process in the Supreme Court, and the people who know the answer to that best are the Justices who ask the questions and listen to the answers and observe the behavior of lawyers

and decide how it influences their own decisionmaking process. If they believe as a collegial body that these benefits are substantial and that the risks to their process are not significant, they will allow television in the courtroom. And that day may come.

Senator DURBIN. Ms. Mahoney, first, let me correct the record. It was Joe Flynn and not Kelly. It was another good Irish name, but it was Joe Flynn who raised the question about Bernie Sanders' disposition.

But, Senator Specter, as you listen to this, why are we intruding—I am giving you a soft ball here. Why are we intruding into the proceedings of the Court and their own decorum in establishing a standard that there will be television cameras in the courtroom?

Mr. SPECTER. Because it is so important for the public to know how its Government functions, and because the Supreme Court affects the lives of Americans in such great detail. You cannot do much more than elect a President by a single vote, and you cannot have a more important decision than health care. And the Citizens United case, when exposed to sunlight, just does not make any sense. It is based upon an assumption without any facts to back it up when you come right down to it. It is illustrated by Professor Lessig's book. It is illustrated by Justice Stevens' dissent. And the Supreme Court does reflect the changing values of a society.

Senator DURBIN. Well, let me ask you this, Senator: I believe that you served in the U.S. Senate before the proceedings on the Senate floor were televised, did you not?

Mr. SPECTER. That is correct.

Senator DURBIN. And how would you react now to critics who say that we are now more theatrical in our performances on the floor than before?

Mr. SPECTER. I would cite the tremendous number of quorum calls. A Senator can get the national camera anytime he or she wants it, virtually, but people do not do it. And there are no theatrics there. And to the extent that there could be theatrics—and there might be some—that is vastly outweighed by the benefit, by the benefit of public understanding and having the public see how its Government functions. And the Supreme Court is the most powerful part. When they refuse to decide a case like the Terrorist Surveillance Program warrantless wiretaps, contrasted with Congressional authority under the Foreign Intelligence Surveillance Act, they take tremendous power away from the Congress and give it to the executive branch. People ought to know that.

And when they decide that Congress cannot legislate to protect women against violence because Chief Justice Rehnquist said it is our method of reasoning, it really -it does not verge on insulting. It is.

I do not think we are being too assertive if we say to the Supreme Court, "Televise. And if you want to declare it a violation of separation of power, we acknowledge your authority."

Senator DURBIN. Thank you, Senator Specter.

Madam Chair, I ask that my statement be placed in the appropriate place in the record.

Chairman KLOBUCHAR. It will be placed in the record.

[The prepared statement of Senator Durbin appears as a submission for the record.]

Chairman KLOBUCHAR. I did want to reiterate what Senator Durbin just said. You think no one is really watching you sometimes? I was in a small town in southern Minnesota a few years ago, and four older women called me aside after I gave a little talk. And they said, "You know, we tuned in every day to see you preside at 4 o'clock over the Senate." They are just watching me sitting in the chair. "And we noticed you are not doing it anymore," because they changed the time. And they said, "Are you in some kind of trouble in the Senate?" And it just struck me again how regular citizens are tuning in, and while I know right now the reputation of Congress has some issues, for good reason, I do not think that means we shut them out. And, in fact, I see it as part of the democracy, that people are able to watch this and come to their own conclusions about issues.

So, with that, I turn it over to Senator Blumenthal.

Senator BLUMENTHAL. Thank you, Senator Klobuchar. I tune in every time you preside as well, so I just want you to know you have a lot of fans out there.

I have not argued as many cases as you have, Ms. Mahoney and Mr. Goldstein. I have done several. And I recognize the dangers that the Justices of the Supreme Court see in the possibility of grandstanding and theatrics. But I have to tell you, there is no more intimidating and challenging experience than to argue before the United States Supreme Court. And bar none, I think there are constraints built into the forum and the pace and the difficulty of questioning that would really preclude—and I have been there, and I have had in mind sort of applause lines that I might use. But it is impossible, given that forum to responsibly do it. And I would suggest that the great fear in the back of every advocate's mind is the possibility of a rebuke from the Court, which is very close to happening to any lawyer, especially one in the position of trying to use it as a public grandstand, so to speak, from one of the nine Justices, and any nine of them can offer that rebuke.

So I think that the fear of that happening is greatly overstated in the minds of the Justices perhaps because they have not recently been an advocate before the Court, if they have been at all. And I come down on the side of permitting televised proceedings, obviously depending on how it is done. The example we saw here akin to what is done in many State courts I think would be a plausible and prudent way to do it. And, obviously, the State courts have gone through this debate. We did in Connecticut at the trial level where the potential for grandstanding is much greater in the midst of an evidentiary proceeding where waving a piece of evidence before a jury is always a real possibility.

But all of that said, I want to come to the constitutional question, which I agree is serious. I believe, as you do, Mr. Goldstein, without promises, that it would be upheld because I think that it is in the nature of a rule of procedure or a rule of infrastructure, so to speak.

With that in mind, let me ask all of you, but beginning with Ms. Mahoney, couldn't the Congress, if it wished, move the Supreme Court into a building five times the size of the present one, admitting an audience many times larger than what we have now, in fact, maybe even the Civic Center? I do not know what the Civic

Center in Washington, DC, is called, but we have one in Connecticut which will admit thousands of people. Couldn't it expand the size of the physical audience? And isn't that very much in the same nature as this rule would do?

Ms. MAHONEY. Well, certainly the Supreme Court cannot build its own building—although maybe it could. It could probably get the Supreme Court Historical Society to raise money for a building for it. But certainly the Congress has the power of the purse and for that reason does have control over some things like where the Supreme Court will sit. And, yes, I assume that Congress could, in fact, build a new building with a bigger chamber.

I do not think that means they can put the Court in a Coliseum if the Court felt that it adversely impacted the integrity of its decisionmaking, and that is really what we are talking about here, is how do these Justices assess the impact of television on their deliberative process.

If I could just speak to this issue of the nature of the power that Congress has, certainly they have some. Appropriations is one. The power to determine the number of Justices, well, that is because while the Constitution creates the Court, the Court is not self-appointing. That power, the power of appointment, is given to the President with the consent of the Senate. So as an ancillary matter, it makes sense to say they can come up with the numbers.

But when the President tried to enlarge the number of Supreme Court Justices back in the Court-packing days, when President Roosevelt did that, what this Senate did was they refused to go along. They defeated the legislation, and this Committee issued a report that said it was essential that the judiciary be completely independent of both executive and legislative branches. So even the powers Congress does have, it has to use in a way that does not interfere with independence, and it has never exercised oversight responsibility over Supreme Court rules. From 1789 the Court has solely had that authority on its own.

So I think in the textual case for the Congress' authority in this area, it is not really there. I am not saying that I am sure this is unconstitutional, but this is a very, very serious question.

Senator BLUMENTHAL. I disagree. I do not know why it is do serious. If the Court can be moved to a forum much, much larger, if the Congress can control, in effect, the kind of record that is made, can't it also, in effect, open the proceedings to the public in a different forum?

Ms. MAHONEY. If it is doing that in a manner which impacts directly on the Court's ability to control its own proceedings, then there is a very serious question because that is part of the judicial power, Senator.

Senator BLUMENTHAL. And I agree with you that if the Congress passed a law that said in the course of these proceedings every Justice has to be televised individually close up and the litigant or the lawyer for the litigant should be given permission to move around the courtroom and show whatever physical evidence was presented at trial, that would change the nature of the proceeding. But simply to leave the proceeding as it is now but open it to larger viewership I do not think changes——

Ms. MAHONEY. But that just begs the question of who is supposed to decide whether it changes the nature of the proceeding, because so far the Justices of the Supreme Court have concluded that they think it would, and that is why—they are not being arbitrary. They are not just saying no television for no reason. They have a different assessment than you do, Senator, and the whole nature of the independence of the judiciary——

Senator BLUMENTHAL. But the Supreme Court Justices also believe that the judiciary is underfunded——

Ms. MAHONEY. Yes, they do.

Senator BLUMENTHAL.—so that it is inadequately performing its present function. I think that is a much more fundamental separation-of-powers issue——

Ms. MAHONEY. It is a very fundamental issue.

Senator BLUMENTHAL.—than whether or not we put cameras in the courtroom. For the United States judiciary to be inadequately funded seems to me a much more serious and profound——

Ms. MAHONEY. It is a very serious and profound issue, and it is one that I think Congress should address and correct.

Senator BLUMENTHAL. Why is that not also a constitutional issue then?

Ms. MAHONEY. Well, because Congress clearly has the delegated authority to establish the budget and to fund appropriations. So its authority there is textual in basis. What is its textual authority to——

Senator BLUMENTHAL. Well, then——

Ms. MAHONEY.—impose rules on the Supreme Court——

Senator BLUMENTHAL. And I apologize for taking too much time, Madam Chairman. Just one last question.

Why could the Congress as a matter of its appropriations power fund cameras in the United States Supreme Court with the mandate that they be installed?

Ms. MAHONEY. Well, they could have a provision to fund them, but the issue of whether they can mandate that they be used intrudes into the core power, judicial power of the Court to decide how to conduct its own proceedings. That is the difference. If it is all about line drawing—and, Senator, I agree there, it is very difficult to know where to draw the lines, but that is why we need to let the Court draw its own line.

Senator BLUMENTHAL. Thank you very much.

Thank you, Madam Chairman.

Chairman KLOBUCHAR. Very good. Thank you very much, Senator Blumenthal.

I want to go to the heartland now with you, Justice Cady. We have a lot of jokes about Iowa and Minnesota, but I will tell them to you later. But we do know some good things come out of Iowa, and one of them is your experience and knowledge that you bring today to this hearing.

What concerns did you hear in Iowa before cameras were introduced into the courtroom? What year was it again that they were introduced?

Justice CADY. 1979.

Chairman KLOBUCHAR. OK. Well, that was quite a while ago. So do you know what the concerns were raised back then?

Justice CADY. I do, and I think there is a tendency to want to brush the issue aside by addressing it on a constitutional framework. But I really think that this distracts from the real conversation because this issue does involve public policy, and it seems to be—the disagreement seems to be based upon certain assumptions. You think that it is going to cause some bad reaction, and others think that cameras in the courtroom is a healthy response.

But our experience in Iowa has been that it has dispelled the fears that we had when we addressed this issue. We talked about the very same things that we have talked about in this chamber this morning. We talked about the same fears and concerns about how cameras would change the fundamental nature of the decisionmaking. But what we have found out is that we do not even see the cameras; we do not even remember that they are in the courtroom. We go about doing our business as we have always done our business, and any fear of any problems have always been minimized or eliminated by the fact that the judge or the justices still maintain control of the courtroom. Allowing cameras into the courtroom does not give up control over the proceedings.

Chairman KLOBUCHAR. How about relationships with colleagues? Because oftentimes that is important as you look can you get consensus on a certain decision and get things done. Has that affected it at all, the cameras?

Justice CADY. Well, it has not. We have had cameras in our Supreme Court proceedings since 2006. I have served on the court throughout that period of time, and I can cite no instance, no example where in any way the decisionmaking of the court has been altered by the presence of cameras during an oral argument.

There may be times when I have thought twice about asking a question in a sensitive case, in a case that is followed closely by the public. But there were times before we had cameras in the courtroom that I thought twice about——

Chairman KLOBUCHAR. Because it would have been reported in some way?

Justice CADY. Well, yes, you know that the work that you are doing is being examined more carefully by more people.

Chairman KLOBUCHAR. And I think that is a thing here, when we are already doing audios, I think every Friday or a few days after the hearings. It is just really one step away, yet it would make it so much more accessible for so many people.

How about some restrictions? Do you have limitations like we have in the Durbin-Grassley bill that would, say, a majority of the justices could decide because of due process reason that it would not be filmed?

Justice CADY. Well, we do have restrictions, and we were very concerned about those restrictions when we first implemented cameras in our courtroom. But it is as if the restrictions are no longer there because we just do not run into any problems anymore.

Chairman KLOBUCHAR. Do you remember if there were instances where you did not film something because of some reason that the justices felt it should not be filmed?

Justice CADY. No. The only time that we have—in our Supreme Court proceedings, the only time when we have not filmed something is because we had to shut down our cameras for a period of

time because of budget cuts. But at no time have we ever thought this was not a case that is appropriate.

Chairman KLOBUCHAR. Very good.

Judge Scirica, just hearing all this, I know there are some pilot projects going on across the country in the Federal district courts. I think maybe there is one in the Ninth Circuit and other places, or maybe it is just in the district courts in the Ninth Circuit. Are you aware of those pilot projects and do you know what the outcomes are?

Judge SCIRICA. Yes, very much. The pilot projects are only in the district courts, in 14 district courts around the country, and they involve civil trials, not criminal trials. And the project started last summer. It will go for 3 years. There already have been ten trials that have been televised, transmitted, and we will have some good experience after a 3-year period as to how they function.

You know, going back to the earlier trial, in 1990 there was a very significant number of federal appellate judges, one-third, who thought that televising oral arguments actually affected the way they asked questions. They trimmed their sails on matters that were quite sensitive, very high publicity cases, and they did not engage in the kind of rigor that they ordinarily would have had the cameras not been present.

In the trial courts there were a lot more problems with the impact on witnesses and jurors, and for that reason the Judicial Conference declined to adopt a principle that allowed the trial courts to televise their proceedings. Of course, the courts of appeals were given the authority to do it.

But I think there is an important point that has not been mentioned yet, and that is, with respect to the state supreme courts that have adopted either televising or putting their proceedings on audio, practically all of these have been done through court rule. They have not been imposed by the State legislatures. A few have, but most of them have been done by the courts themselves. Right now there are 22 state courts that televise their proceedings, another 15 that do audio, and there are some pilot projects in some of the other states. And that is what I am saying here. This is something that is so essential to the courts' function, particularly the Supreme Court, that is in a different arena from the state supreme courts and the federal courts of appeals. The Supreme Court is much more visible. The possible uses to which video clips could be employed, we do not know. But it is something, I think, that the Congress ought to consider before deciding whether or not to mandate this kind of coverage.

Chairman KLOBUCHAR. So given that we are talking about cameras in the Supreme Court where we are not having trials go on, and I think many people up here, there is a knowledge that your district judge should have the ability to decide whether or not things should be filmed and the effect it might have on witnesses. But are there any pilot projects going on where they are actually filming appellate courts, which would be——

Judge SCIRICA. Not right now.

Chairman KLOBUCHAR.—the circuit courts, which would be the best example, I think, for the Supreme Court situation.

Judge SCIRICA. There are none right now. It is only in the district courts.

Chairman KLOBUCHAR. And then I will go back and end with you, Justice Cady, this notion that it is somehow going to change what people do. And I keep coming back to the fact that these things are audiotaped anyway now and that maybe with some of these earlier situations they were not audiotaped. But they are audiotaped now, so people are going to be able to broadcast things anyway, and it is just a way of making—by filming them, you make them more available to more people.

And then I would also go to the fact of what would cause a lifetime-appointed judge to not want to ask that question. I suppose you could make the argument that a judge who is going to have a term limit and will be re-elected again, that somehow that would change. But I am just trying to get to this mentality of someone who has a lifetime appointment, unless they do not want to have protesters—but they already have protesters. So could you just discuss that, just that motivation from your perspective? And obviously Judge Scirica and Ms. Mahoney have made the point that they think it does have an impact. Justice Cady?

Justice CADY. Well, the impact or the perceived impact of any change certainly must be considered, but so, too, must the benefits that are available from change. And as I said earlier, we have gone through this transformation, and what we have found out is that all that is left in the end is the benefits to the public. And we do not encounter problems. We, as I said, do not even remember that our cameras are in operation. They are set up in our courtroom in a way that is unobtrusive, barely noticeable. And as you saw from the small clip that I brought along with me this morning, you could see that the questioning was tough, it was vigorous, it was to the point of the issue. And it illustrated what our courts are really all about, and that is, digging into the bottom of the issue and entering a result and a decision that we call justice. And what the cameras do is expose that to the public, and it is critical in this day and age that the public be exposed to the way our courts truly operate, not how they are perceived to operate.

Chairman KLOBUCHAR. Thank you very much.

Senator Sessions.

Senator SESSIONS. Well, this has been an excellent panel, and, Justice Cady, our court decided to have the cameras. Is that correct?

Justice CADY. Correct.

Senator SESSIONS. Mr. Goldstein and Ms. Mahoney, isn't it true that oral arguments often do not—if someone only saw the oral arguments and had not studied the brief and studied the record, they would get a misimpression of the nature of the case because the Justice may be focusing on just, say, a small part of it? Have you been surprised at the tack that the arguments have taken when you have prepared diligently for the issues you thought were going to be most important?

Mr. GOLDSTEIN. There is no question that for the members of the public in the audience who are admitted, as well as anybody who listens to the audiotape that is made available, and anybody who would watch on television, you can get dropped down into the mid-

dle of a very complicated story. So it may not be the easiest thing to comprehend, just like this hearing, if you were to turn it on, might not be the easiest thing to comprehend. The question then is the overall effect and the benefit to public understanding and also the effect on the Court's proceedings.

Senator SESSIONS. Ms. Mahoney.

Ms. MAHONEY. Certainly, and especially if you just listened to a short video clip, you might get a very wrong impression about what was transpiring there. I know Justice Souter, for instance, said that his opposition was based in part on the fact that he felt that television could run a very short clip of him that would maybe make it seem that he was not impartial, for instance, because questioning can be aggressive and devil's advocate, that sort of thing, and that because of the nature of the TV news, they can only pick a very small excerpt. And Justice Scalia has said that he thinks it would actually contribute to the miseducation of the public.

Senator SESSIONS. Well, Judge Scirica, it seems to me that there is a lot of truth to that. In other words, if you are on television and you are used to bringing a lawyer here, like Ms. Mahoney or Mr. Goldstein, and you ask them about a 40-year-old complex case but they know precisely what the question is about, wouldn't the judge feel obligated to maybe have a prolonged part of the preamble to explain and make sure those people out there understood what he was saying so they would not misunderstand what he was saying when the lawyers would know immediately what the judge was asking?

Judge SCIRICA. Quite possible. Quite possible. I think the other thing that I find troubling, Senator, is the possible uses to which film clips might be put in subsequent situations; that is, after the entire oral argument is shown, let us say, on C–SPAN, there may be excerpts or snippets that might be used for other purposes, and I do not know how we can anticipate whether that would happen or not or what form it would take.

But I think it is something that the Supreme Court has thought about, primarily—and we have heard from Ms. Mahoney about some of their statements, and I think they are quite concerned whether it might affect the way they conduct oral argument, the kinds of questions they ask. A death penalty case, for example, where there are very serious constitutional issues, and the family of the victim happens to be in the room—I think judges are going to think very carefully about how they probe those difficult constitutional issues. And there are other sensitive cases as well.

So I think it is not quite right to say that there will be no impact on the conduct of the argument before the Supreme Court.

Senator SESSIONS. I have a memory of when I first started prosecuting cases that when the jury returned the verdict, the judge would tell them not to discuss their verdict. And then the Supreme Court, I think, said, well, free speech, you cannot tell them not to discuss their verdict. Well, I do not know—to me some majesty of the authority of that decision is a little bit eroded when one juror says, "I thought he was a skunk, but there was not enough proof," and this one says this and this one says that, and it becomes a—so I think to some extent that you should judge a court—not to some extent, but virtually totally judge a court on the merit of the

opinion. Isn't that what we should judge a court on and evaluate, Judge Scirica, basically the power and the authority of the opinion as rendered?

Judge SCIRICA. Of course.

Senator SESSIONS. And oral arguments often give very little insight into how that opinion would come out, and sometimes judges change their minds from the oral argument date to the time they write an opinion.

Judge SCIRICA. Of course. Each of us who has served on an appellate court has had oral argument affect the way we think, and once we get into the meat of the case and start writing the opinion, you find out that you may come out the other way.

The real work is done in preparing for oral argument, reading the briefs, reading the opinions, studying the law. Oral argument is helpful. It is a slice. Sometimes you play devil's advocate. Sometimes you ask very provocative questions. But it is the written opinion that counts, and the public will judge the court, particularly the Supreme Court, on the soundness of its opinions, whether it is persuasive, and that is fully transparent.

Senator SESSIONS. But that principle may be less so if they like the visage of one judge and not that of another one or the personality of one judge. I would just say, Madam Chairman, the Court seeks in an ideal world always to determine law based on the facts and determine what the law as applied to the facts should be. To the extent to which it becomes even a little more political, ideological, religious based or whatever, it comes up in the course of these arguments and the teeming cauldron of emotions that are out there in the world around that courthouse when it makes its decision, to the extent to which it is in any way moved from that ideal I think is not healthy. So it would seem to me the Court is a little uneasy—more than a little. The Court is uneasy that this would move them away from law. To that extent, I would be prepared to show deference to their conclusion on it.

I would note that the legislation as now drafted, different from previous legislation, would mandate the cameras and operating the cameras in the courtroom unless in every case the Court votes to the contrary.

Thank you for an excellent hearing and an excellent panel.

Chairman KLOBUCHAR. It is not quite over because Senator Blumenthal has a question. I was trying to picture, though, as I was listening to you, Ruth Bader Ginsburg turning into Judge Judy, and I just do not think it is going to happen.

[Laughter.]

Chairman KLOBUCHAR. I do not think it is going to change her demeanor if she is on TV. This is just my view.

But I will turn it over to Senator Blumenthal for a few more questions, and then we will wrap it up.

Senator BLUMENTHAL. A very few more questions. Thank you, Madam Chairman, and thank you also for having this hearing, which I agree has been excellent due to the excellent witnesses that we have. And I have just a couple of questions I guess for Mr. Goldstein and Ms. Mahoney, and anyone else.

You know, I am wondering, in light of the increased openness that we have in the Court, to its credit—I was a law clerk in the

1974–75 term for Justice Blackmun, and there were no recordings, there were no tapes available. Even we as law clerks had to attend physically the arguments if we wanted to hear what the advocacy was. And so I wonder whether the accessibility, which, as you said—I think correctly, Ms. Mahoney—for anyone who really wants to hear what is going on, it is available—whether that has changed the nature of argument. I sense not, but you have been doing it more than I have.

Ms. MAHONEY. I do not think it has changed the way I argue cases, but I cannot really speak to what the Justices might think.

Mr. GOLDSTEIN. I have never heard anyone articulate the idea that because it is being taped and now the tape is available at the end of the week that the oral arguments have happened differently. Television is a different kettle of fish, of course, for all the reasons that it invites more people to witness the proceedings, so it conceivably could have an effect. I do not see it happening for the reason that you gave, as someone who did have considerable oral argument experience and the great fear of being slapped down for grandstanding is a really serious one. And nobody wants to lose their case or embarrass themselves.

And to the extent it changes how the Justices comport themselves, well, they are comporting themselves in front of the American public, and that I think is an acceptable cost, to the extent it is a cost.

I would only make one other point, and that is, we have talked about this as if it were just about oral arguments and changing how oral argument is conducted. That is not quite right. The Court has other public proceedings. It announces decisions, and nobody would, I think, say that there is an interaction between lawyers that would change there. Yet those are not televised. And the Court also has proceedings where, for example, a Justice will be invested into the Court, and those are not televised either. And, again, not something that you would say ordinarily could somehow be affected by televising it, and yet it is a part of the democratic process that would be affected by the legislation as well.

In your view—and any of the panelists can respond—could the Court decide that it felt that the intrusive nature of the writing press, given that the transmission of those writings now is virtually instantaneous, was so intrusive that it would just bar all reporting?

Mr. GOLDSTEIN. The answer to that question is clearly no. The Court's own decisions about public access make fairly clear that there is that form of access. But as Ms. Mahoney indicates, there is a different historical tradition that is involved there.

I will say that the Court does have certain restrictions even with respect to the press and who can be a member of the press and how it is that the press functions inside the building, trying, I think, as with the website, as with the release of the audio, to get as much public access as they can. But that is an example, I think, where there would be a First Amendment prohibition to what they are doing here. I do not think anybody has made the serious argument that there is a First Amendment right to have a television camera in a court.

Senator BLUMENTHAL. Because it is in the nature of a time, place, and manner?

Mr. GOLDSTEIN. Yes, that it is more—because of its greater relative intrusion on the proceedings, that it requires some physical installation, it is just—as has been said, it is a line-drawing difficulty, and the fact that there are other avenues of receiving the information through the written press that satisfies the First Amendment. The question whether you have the legislative power to, nonetheless, enact such a law and in your own view say, well, there is a real First Amendment value here—not everything has to be a Federal case. Not everything has to be a constitutional violation. But we can all say, gosh, it is really good for the American people to see how their Government operates. That is really what the First Amendment is about, and so that motivates us to pass legislation like this. That would be a different question.

Senator BLUMENTHAL. Thank you.

Thank you, Madam Chairman.

Chairman KLOBUCHAR. Thank you.

Senator Sessions, do you want to add anything?

Senator SESSIONS. No, just thank you. It is a good panel. I enjoyed this. These are important issues. I do not think it is the most crucial issue in the world, but it is a tough issue to know precisely what the right thing is, and we thank you for participating.

Chairman KLOBUCHAR. Well, very good. I think you saw from all of the Senators that attended today, with Senator Blumenthal, Senator Whitehouse, Senator Durbin, Senator Lee, Senator Grassley, and Senator Sessions and myself, that there is big interest in this. And I am one to believe, as Mr. Goldstein has pointed out, that this would be best if the Supreme Court made the decision themselves. So hopefully they are watching C–SPAN and they see all of us here and hear these arguments instead of having it done legislatively. But one of the reasons that we are focused, some of us, on the legislation is, as Senator Specter pointed out, it has been 25 years and waiting. And the idea here is, as my colleague Senator Sessions talked about, the importance of the dignity of the Court and the majesty of the Court, which I think we all can understand.

On the other hand, we want other people to be able to see that besides the 250 people that are crammed into a room to watch, that the people in Justice Cady's home State should be able to tune in and watch this and watch important issues of the day that I believe, while we, as Senator Sessions pointed out, have a lot of things going on, a lot of those things end up in the Supreme Court in one way or another. And I think that is what this is about, understanding that we want to respect the decisionmaking process and not get into the private decisionmaking process and the debates going back and forth and how harmful that would be, but, in fact, just the public portion of it and the pronouncement of the decisions as well, as Mr. Goldstein has pointed out.

So I wanted to thank all of you. This has been a highly interesting hearing, and I hope that we will be able to have people watch it. As it is recorded, they will be able to see the arguments. So I wanted to thank Senator Specter, who had to go back to his home State, as well as Mr. Goldstein. Thank you especially, Justice

Cady and Judge Scirica, for being willing to talk about your own personal experience and kind of get beyond the comfort level of where you get to ask the questions and we get to ask the questions instead. We kind of like that. And then also thank you, Ms. Mahoney, for your vast experience that you bring to this, also, I should have mentioned, being a clerk for Justice Rehnquist, so the experience that you bring to this as well.

So thank you, everyone. We will keep the record open——

Senator SESSIONS. Madam Chair, could I offer a letter from former Senator Bob Kerrey in opposition to the legislation?

Chairman KLOBUCHAR. OK.

Senator SESSIONS. Thank you.

[The letter appears as a submission for the record.]

Chairman KLOBUCHAR. Very good. Then I will also offer the—not to be one-upped, I will also offer the statement of Chairman Leahy supporting the cameras in the courtroom.

[The prepared statement of Chairman Leahy appears as a submission for the record.]

Chairman KLOBUCHAR. I want to thank all of you for being here. We will keep the record open for 1 week for people to submit further statements.

So thank you very much, and we look forward to debating this issue in the months to come. The hearing is adjourned.

[Whereupon, at 12:01 p.m., the Subcommittee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

Mark Cady

Response to Questions from Senate Judiciary Committee
December 19, 2011

1. In your statement, you shared an example of how broadcasting Iowa Supreme Court arguments has increased the public's trust in the court. Have you noticed if broadcasting court proceedings has led to any educational benefits to the legal profession, the education system, or the public-at-large? If so, please explain in what ways?

Answer. *We are encouraged by the number of website views of the oral argument videos, which suggest to us that the public is interested in the work of the court and taking advantage of the online videos. For example, in 2007, after one year of operation, the videos had 75,000 views—the most number of views recorded in one year. However, we do not have information that identifies who is watching the videos. We have heard from lawyers who watch the videos to learn about the cases argued or to help them prepare for oral arguments. When the court dropped the videos during a time of deep budget cuts, we heard from some law students and professors who asked the court to restore the videos.*

2. There was testimony that audio tapes and transcripts are as effective as video. Do you agree with this statement? If not, please explain what benefits video offers over the currently available audio recordings and transcripts.

Answer. Video provides a complete picture of the proceeding, For example, a video enables viewers unfamiliar with the appellate process to see the differences between a trial and oral arguments.

3. Have you changed your approach or strategy in preparing for a case because you knew that the oral argument was going to be broadcast? If so, please describe.

Answer. *Video coverage has not led me to change my case preparation practices.*

4. Have you or your colleagues changed, or refrained from asking, certain questions because the proceedings were broadcast?

Answer. *I do not recall ever refraining from asking a question because of the broadcast. I cannot answer for my colleagues.*

5. Have you noticed that your own performance during argument is different when you know you are being televised? If so, in what ways?

Answer. *I do not think the broadcasts affect my conduct on the bench. During oral arguments, I do not think of the cameras.*

Mark Cady

6. Has the broadcast of Iowa Supreme Court arguments affected the way you and the associate justices deliberate and reach conclusions in the cases you hear?

Answer. *I have no reason to believe that the broadcasts affect the manner in which the court deliberates and makes decisions.*

7. Has the broadcasting of the Iowa Supreme Court ever materially affected the outcome of a case? If so, please explain.

Answer. *No.*

Senator Chuck Grassley
Tom Goldstein
Cameras in the Supreme Court Hearing
Questions for the Record

1. Have you changed your approach or strategy in preparing for an oral argument because you knew that the argument was going to be broadcast? If so, please describe.
   Answer: I have argued one case that was simultaneously broadcast. It was before the Supreme Court of the State of Washington. My preparations were no different than any other case. I argue most of my cases before the Supreme Court of the United States. Those arguments are of course not simultaneously broadcast; they are available online, however.

2. Have you noticed that your own performance during argument is different when you know you are being televised? If so, in what ways? Did it materially affect the outcome of the case?
   Answer: I do not believe my performance during the argument before the Supreme Court of Washington was any different as a result of the simultaneous broadcast. I do not believe it affected the outcome in any way. I was not conscious of the cameras, and I do not believe that the judges were either.

3. There was testimony that audio tapes and transcripts are as effective as video. Do you agree with this statement? If not, please explain what benefits video offers over the currently available audio recordings and transcripts.
   Answer: I disagree. As I said in my written testimony, we are a visual nation. People tend to watch television news. It seems obvious to me that many times more people would watch an oral argument than would listen to an audio tape or read a transcript. Substantively, I do believe that audio and visual broadcasts are the same, because there is not visual "action" in an appellate court argument. There is not even much in the way of "body language." But the simple matter of fact is that more people will watch than will listen. There is the further point that audio "tapes" released at the end of the week are of course not immediately available, unlike a simultaneous broadcast.

4. If a bill mandating televised Supreme Court proceedings were limited to only apply to cases of appellate jurisdiction, explicitly exempting cases of original jurisdiction, do you think it would violate the Separations of Power doctrine? Please explain.
   Answer: I do not believe any bill mandating televised proceedings would violate the Separation of Powers, although the answer is not certain. As I explained in my oral testimony, I believe that such a requirement is analogous to legislation specifying the number of members of the Court, the standards for a quorum, and the Court's budget. Excluding original jurisdiction cases would perhaps strengthen the statute's constitutionality (because Congress has substantial control over the Court's appellate docket) but I do not think it is necessary.

Maureen E. Mahoney
Direct Dial: (202) 637-2250
maureen.mahoney@lw.com

LATHAM&WATKINS LLP

555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: +1.202.637.2200 Fax: +1.202.637.2201
www.lw.com

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December 27, 2011

The Honorable Patrick Leahy
Chairman, Committee on the Judiciary
United States Senate
224 Dirksen Senate Office Building
Washington, DC 20510-6275

Re: "Access to the Court: Televising the Supreme Court"

Dear Senator Leahy and Committee members:

As you know, I testified before the Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts at a hearing entitled "Access to the Court: Televising the Supreme Court" on December 6, 2011. Senator Charles Grassley subsequently submitted the following question for my response: "If a bill mandating televised Supreme Court proceedings were limited to only apply to cases of appellate jurisdiction, explicitly exempting cases of original jurisdiction, do you think it would violate the Separations of Power doctrine? Please explain." My response follows.

This question appears to be based on the view that Article III, Section 2 provides Congress with broad textual authority to adopt rules controlling the manner in which the Court adjudicates cases falling within its appellate jurisdiction, while withholding that authority for cases within the Court's original jurisdiction. I addressed this possible interpretation of Article III in footnote 7 of my written testimony. It is based on a misreading of the wording of Article III and it is implausible. Articles III does not grant Congress textual authority to control the manner in which the Supreme Court adjudicates *any* case properly within its jurisdiction.

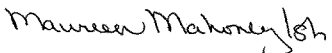
As I previously explained, Article III provides that, for certain enumerated controversies, "the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such Exceptions, and under such Regulations as the Congress shall make."[1] That wording, however, only grants Congress authority to create "Exceptions" and "Regulations" to "appellate jurisdiction," which plainly refers to the scope of the Court's jurisdiction over certain types of controversies, and not to the procedures the Court uses to control its own courtroom in cases that properly fall within its jurisdiction. It is also implausible to conclude that Congress would have

[1] U.S. CONST. art. III, § 2.

the constitutional power to mandate cameras in an "appellate" case heard at 10:00 a.m. but not in an "original" case heard at 11:00 a.m. in the same courtroom.

In summary, the scope of Congress's power to strip the Court of its authority to control its own courtroom is no greater in appellate cases than it is in original cases. My written and oral testimony--which expressed serious doubts about the constitutionality of legislation requiring the Supreme Court to televise oral arguments--applies fully to cases within the Court's appellate jurisdiction. Those constitutional concerns cannot be evaded by adopting legislation limited to cases within the Court's appellate jurisdiction.

Respectfully,



Maureen E. Mahoney
of LATHAM & WATKINS LLP

SUBMISSIONS FOR THE RECORD

Opening remarks of Chief Justice Mark Cady,
Iowa Supreme Court,
Senate Judiciary Subcommittee on Administrative Oversight and the Courts
December 6, 2011

Introduction

It is my pleasure and privilege to speak with you today about Iowa's experience with video coverage of court proceedings. First, I will address our procedures and processes. Later, I will explain what I see as the benefits of this type of coverage.

Video and Photographic Coverage of Iowa's Courts

The Iowa Judicial Branch is a leader in allowing video and audio media coverage of courts. For more than 30 years, Iowa's courts have allowed audio, photographic, and video coverage of the courts. We refer to this type of coverage as "expanded media coverage."

In 1979, following a thorough study, the Iowa Supreme Court adopted rules to allow expanded media coverage of court

proceedings in both the trial and appellate courts. These rules are carefully designed to prevent disruption of the court hearing and to safeguard the rights of litigants to a fair trial and appeal. In summary, Iowa's rules provide that the media must file a request for coverage with a designated media coordinator who files the request with the court, litigants have the right to object to such coverage, the media must pool equipment, and the rules prohibit coverage of certain sensitive subjects and segments of a hearing.

Our rules have worked very well. The rules limit the number of cameras in the courtroom, require that the cameras be stationary so as not to distract from the proceedings, and ensure that the presiding judge always has control of the process. But our judges rarely have problems with expanded media coverage. The journalists who cover the courts respect the rules and the rights of litigants.

This process works so well that it has become expected. Expanded media coverage of trials, particularly in high profile trials, is a matter of routine. Expanded media coverage of appellate hearings, however, is less common. I estimate that we might have expanded media coverage of one or two oral arguments a year.

In addition to our procedure for expanded media coverage of the courts, the Iowa Supreme Court streams all of its oral arguments online. We also archive the videos for later viewing. Our court began recording video of its oral arguments and making them available online in 2006. We stopped this practice for a couple of years due to state budget cuts in 2009. However, earlier this year, we found a way to reinstitute video coverage. This time, however, we added live online streaming of hearings.

Why allow cameras in the courts?

Now I want to turn to the benefits of video coverage of court proceedings.

As you know, the strength of our democracy, indeed any democracy, requires a well-informed citizenry. This principle holds true for each branch of government. The strength and effectiveness of our court system depends on public confidence in the courts. As former United States Supreme Court Justice Thurgood Marshall once said, "We can never forget that the only real source of power that we as judges can tap is the respect of the people." That respect obviously depends on how well we do our job of administering justice. But, it also depends on the public's understanding of our job and the information the public has about how we are doing our job.

So, how can the people learn about courts and court cases?

In our country, court proceedings are, as a general proposition, open to the public. As a general proposition, case records are available for public inspection. In addition, judicial decisions are written, public documents. Also, trials and hearings are for the most part open to the public, which allows people to attend court proceedings to learn about the courts firsthand. Realistically, however, most people do not have the time, the ability, or the inclination to attend a court hearing. For these reasons, we need to make it convenient for the public to stay informed about the work of the courts—take the courts to the people so to speak.

Naturally, the media is an important conduit for informing the public about court cases. Our experience in Iowa shows, however, that expanded media coverage of the courts tends to be boiled down to a few seconds of video of a high profile trial, with a report of the proceedings filtered by the reporter. The public gets a snippet of the process. Although we would like more coverage of trials and oral arguments, we believe the media in Iowa

provides a great public service. Its efforts increase the visibility of courts and court procedures.

At the same time, it has become easier for us to bring the courts directly to the people through modern information technology. With online video of court proceedings, more people will watch court proceedings. Our experience bears this out.

During the first six months of our online videos of oral arguments in 2006, our site logged a total of 5700 views of 40 oral arguments. The next year, 2007, the site had 75,000 views of our oral argument videos. During 2007–2008, the average number of views per oral argument video was 1425.

Compare the numbers of our video views to the number of people who attend our court proceedings. When the Iowa Supreme Court was discussing whether to start making videos of oral arguments available online, we wondered if many people would

take advantage of the opportunity. After all, it is a rare case when there is someone in our courtroom listening to oral arguments other than attorneys waiting to argue their case. For this reason, the strong interest in our online arguments was a nice surprise.

Let me leave you with two final observations. The first is camera coverage of Iowa court proceedings is the new normal. As I mentioned earlier, the cameras in our Supreme Court courtroom became a victim of budget cuts for a couple of years. The operation of our cameras does not cost a lot, but money has been tight. Within a short time, however, we heard many rumblings from attorneys, the public, educators, and students who missed watching our proceedings and wanted the videos reinstated. We realized our cameras had become a normal and expected component of our proceedings. It is the way we do business, and the public likes it and has grown to expect it.

My second observation is this: cameras expose the courts to what they are—a proud institution of justice. The more the public sees our courts operate, the more they like and respect the court system. This was vividly shown to me a few months ago when the Iowa Supreme Court heard oral arguments in a community outside our seat of government in Des Moines. The case involved a criminal violation of an ordinance prohibiting steel wheels on surfaced roads. The issue on appeal was whether the ordinance violated the First Amendment. Our oral arguments drew approximately 350 people from the area. Afterwards, the father of the young Mennonite boy who was the subject of the prosecution approached me and said, "Having seen your court work, I can tell this is a pretty honest thing." Our courts are an "honest thing," and cameras can help show this to the people.

Now, I will pause briefly so we can watch a short excerpt of one of our court's oral argument videos. After the video, I'll be happy to answer questions.

Thank you.

Statement of Senator Richard J. Durbin
Hearing on "Televising the Supreme Court"
United States Senate Judiciary Committee
Subcommittee on Administrative Oversight and the Courts
December 6, 2011

Thank you, Senator Klobuchar, for holding this hearing.

Most Americans Are Prohibited from Observing Supreme Court

"[P]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

These words are as true today as they were in 1986 when Chief Justice Burger wrote them in the Supreme Court's *Press-Enterprise Company v Superior Court* opinion.

For too long the American public has been prevented from observing open sessions of the Supreme Court.

Except for the privileged few who can travel to Washington, DC, brave long lines, and secure one of a few hundred seats to watch Court sessions, the most powerful court in our country is inaccessible and mysterious.

As the final arbiter of constitutionality, the Supreme Court decides the most pressing and often most controversial issues of our time.

Whether you encountered a "butterfly ballot" in the 2000 presidential election, watch political advertisements during campaign season, or are trying to provide health care for your family, the Supreme Court wields great power over issues that touch all of our lives.

In a democratic society that values transparency and participation, there can be no valid justification for such a powerful element of government to operate largely outside the view of the American people.

Cameras In the Courtroom Act of 2011

Justices should consult with each other, review cases, and deliberate privately. These private deliberations should not be televised.

Open sessions of the Court, however, where members of the public are already invited to observe, should be televised in real time.

Doing so will improve the public's understanding of the Court's operations, enhance public confidence, and increase the number of informed and engaged citizens.

This is why I introduced the *Cameras in the Courtroom Act of 2011* with Senator Grassley.

I thank Senators Klobuchar, Cornyn, and Blumenthal for cosponsoring this legislation.

I especially thank one of our distinguished witnesses and former colleagues, Senator Arlen Specter, for his leadership on this issue during his long tenure on this Committee. Senator Specter is the original author of the Cameras in the Courtroom Act. On the floor of the Senate last December, following his farewell address, I promised Senator Specter that I would continue the fight that he began to televise Supreme Court proceedings by reintroducing the Cameras in the Courtroom Act. I am so pleased that he has joined us today to testify in support of his legislation.

The Cameras in the Courtroom Act will:

- Require open sessions of the Supreme Court to be televised. With the benefit of modern technology, Court proceedings can be televised with unobtrusive cameras and the Court's existing audio recording capability.

- Respect the constitutional rights of the parties before the Court and the discretion of the Justices by permitting the Court to not televise proceedings where the Justices determine, by a majority vote, that doing so would violate the due process rights of one or more parties.

Arguments Against Televising Supreme Court Proceedings

Some say we should not allow cameras in our courts because only bits and pieces of proceedings would be televised and taken out of context.

That reminds me of a *Washington Post* editorial from a few years ago. It stated: "Keeping cameras out to prevent people from getting the wrong idea is a little like removing the paintings from an art museum out of fear that visitors might not have the art history background to appreciate them."

Public scrutiny of Supreme Court proceedings will produce greater accountability, transparency, and understanding of our judicial system.

For almost two decades the legislative sessions and committee meetings of the United States Senate and House have been broadcast live on C-SPAN and webcast.

The majority of states permit live video coverage in some or all of their courts.

It's time the Supreme Court did the same.

PATRICK J. LEAHY, VERMONT, CHAIRMAN

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United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510–6275

BRUCE A. COHEN, *Chief Counsel and Staff Director*
KOLAN L. DAVIS, *Republican Chief Counsel and Staff Director*

November 15, 2011

The Chief Justice
The Supreme Court of the United States
Washington, DC 20543

Dear Chief Justice Roberts:

I am writing to request that the Supreme Court exercise its discretion to permit television coverage of Supreme Court proceedings when the Court hears arguments in the case of the federal health care reform law. It is my understanding oral arguments will take place in March of next year.

The decision in this case has the potential to reach every American. The law is massive in size and scope. The effect of the law, and the Court's decision, will reverberate throughout the American economy.

The constitutional questions presented in the case are momentous. The public has a right to witness the legal arguments likely to be presented in the case: (1) the constitutionality of the individual mandate; (2) the severability of the individual mandate and whether or not the remainder of the law is valid without the mandate; and (3) the authority of Congress to impose mandatory Medicaid coverage thresholds on states. Given the nature of the topic, everyone in the country would benefit from following the proceedings in this landmark case.

Modern technology makes televising the proceedings before the Court simple and unobtrusive. A minimal number of cameras in the courtroom, which could be placed to be barely noticeable to all participants, would provide live coverage of what may be one of the most historic and important arguments of our time. Letting the world watch would bolster public confidence in our judicial system and in the decisions of the Court.

Providing live audio and video coverage of the oral arguments will be of great benefit to the Court and to the public. Letting the world watch these historic and important proceedings will bolster confidence in our judicial system and the decisions of the Court.

Sincerely,

Chuck Grassley

Charles E. Grassley
United States Senator

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

cc: The Honorable Antonin Scalia
The Honorable Anthony M. Kennedy
The Honorable Clarence Thomas
The Honorable Ruth Bader Ginsburg
The Honorable Stephen G. Breyer
The Honorable Samuel Anthony Alito, Jr.
The Honorable Sonia Sotomayor
The Honorable Elena Kagan

jeffteckleniburg
Opinion Page Editor, The Gazette

jeff.tecklenburg@gazcomm.com

Updated: 23 November 2011 | 12:54 am in Editorial

Allow the cameras

Gazette Editorial Board

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The U.S. Supreme Court last week agreed to decide the constitutionality of the landmark health care reform law championed by President Barack Obama. The key issue is the mandate requiring everyone to have health insurance. Lower courts have split in their opinions.

Much is at stake. If the high court rules that the law is not constitutional, what then? And will the entire Affordable Care Act be thrown out?

Iowa's Sen. Chuck Grassley argues that this issue has such far-reaching effects that the Supreme Court should allow television coverage of the proceedings. We agree.

Such coverage not only would give Americans the opportunity to witness the arguments and learn more about this law, it could enhance understanding of how the federal courts work and set the stage for more transparency in the future.

While Iowa and many other states have long allowed cameras in their courtrooms, federal courts generally have been reluctant. Grassley has been pushing related legislation since 1999. A three-year pilot project to evaluate cameras' effect in federal courtrooms launched last year.

But the Supreme Court begins hearing the health care case in late February or early March. Chief Justice John Roberts should allow the cameras — on behalf of all Americans.

n Comments: thegazette.com/category/opinion/editorial or editorial@sourcemedia.net

http://thegazette.com/2011/11/23/allow-the-cameras/

Testimony before the Senate Judiciary Committee

Subcommittee on Administrative Oversight and the Courts

"Access to the Court: Televising the Supreme Court"

Tom Goldstein

Partner, Goldstein & Russell, P.C.

Publisher, SCOTUSblog

Lecturer, Stanford and Harvard Law Schools

December 6, 2011

Good morning, Madam Chairman, and Senators of the Judiciary Committee. Thank you for inviting me here to testify on the critical issue of the public's access to the Supreme Court, and particularly the question whether cameras should broadcast the Court's public proceedings. I am particularly honored to have been included among such an extraordinary panel of witnesses.

My name is Tom Goldstein. I am a partner in the law firm Goldstein & Russell, P.C., which specializes in Supreme Court litigation. For quite a few years, I have taught Supreme Court litigation at both Stanford and Harvard Law Schools. I have argued twenty-four cases in front of the Court. I am also the co-founder and publisher of SCOTUSblog, a website dedicated to providing publicly accessible information about the Court and the cases that come before it. SCOTUSblog is the only weblog to ever receive the American Bar Association's Silver Gavel Award for promoting public understanding of the law.

Seated behind me is my wife, Amy Howe, who is also a partner at Goldstein & Russell, and the editor of SCOTUSblog. I am pleased to be here with one of my two daughters, Nina.

There is well-founded interest in the public's access to the Supreme Court. As the final word on the constitutionality of legislation that is passed here by the elected representatives of the American people, the Court is a vital public institution. From the establishment of a defendant's right to counsel in *Gideon v. Wainwright* to the desegregation of schools in the landmark *Brown v. Board of Education*, it is difficult to overstate the far-reaching effects of the

Court's work. The esteemed members of this Committee of course need no education on that point, because the Senate has charged you with vetting nominees to the Court.

In discussing public access to the Court, we should recognize at the beginning that there is an unfortunate tendency to criticize the Court unjustifiably. The Justices are an easy target: they almost never respond to attacks. But here they deserve praise on a very basic level – they are among the few people in Washington *not* trying to get on television. Instead, they are completely committed public servants who simply want to do their jobs.

It is also worth acknowledging the several significant steps the Court has taken in recent years that have as their entire purpose increasing the public's access to its work. The Court of course publishes all of its work product, in the form of its decisions – an exercise in transparency that has existed throughout the nation's history. The Court has created an official website that now is updated in real time. For example, when the Court issues its opinions, as well as orders granting or denying review in a case, those materials are posted immediately on the Court's website. The Court also publishes transcripts of oral arguments within just a few hours. The Court also records the audio of the arguments, which it releases at the end of the same week. In the past, the Justices would release audio the same day in cases of great public interest; disappointingly, that practice has apparently been abandoned.

It is no less important to recognize that these efforts cannot overcome the significant remaining obstacles to access to the Court's public proceedings. The critical point in that respect is that these are "public proceedings" – they are conducted in a public building on a matter of public importance, and members of the general public are admitted to observe these

proceedings. The public arguments in particular are an important part of the Justices' deliberative process; they are not just for show.

There is of course great public interest in the Court. We anticipate that SCOTUSblog will receive between ten and twelve million "hits" this year, the largest proportion of which are from ordinary Americans – not lawyers – interested in the health care litigation. Another illustration is the *District of Columbia v. Heller* case, in which the Court announced its interpretation of the Second Amendment right to keep and bear arms. We had more visits on SCOTUSblog on the days of that oral argument and the eventual decision than for any prior case, by far. But of course, 99.999% of interested Americans were unable to see the oral argument or the proceedings in which the summary of the decision was read.

That is so because, for several reasons, only a trivial proportion of the American public will ever attend the proceedings, for reasons that are beyond the Justices' control. The Courtroom itself is quite small, and the Justices hear argument on only roughly forty days a year. In any given case, there may be as few as fifty or one hundred seats available to members of the public who stand in line. My personal best estimate is that roughly 10,000 members of the public attend the proceedings each year by standing in the line out in front of the Court. The line itself can be hours long. On top of that, the cost of traveling to Washington, D.C. – including staying in or near the city, which is quite expensive – is regrettably prohibitive for a very large part of the population, particularly in these harder times.

To be sure, that is not the entire story, and there are points that critics of the Court too quickly overlook. Members of the public traveling from out of town can attempt to request

reserved seating. The Court also has long provided a so-called "three-minute line," which permits members of the public to witness a brief portion of the public proceedings without waiting in a significant line, although the visit is so short that it provides nothing more than a snapshot. And in cases of great public import, such as the health care litigation, there is every indication that the Court will place a premium on maximizing – not limiting – the number of public seats. But in the end, even 200 seats cannot accommodate the 100 million Americans who may be interested in those proceedings.

In addition, for the reasons I gave above, these concerns relate only to the public's ability to *see* the proceedings. Decisions are released immediately, and transcripts are published the day of arguments. The audio for every argument is available at the end of the week. It is possible that in cases of extreme interest – such as the health care litigation – the Justices will allow same-day audio, as they have previously done.

Nonetheless, in spite of the need for a greater collective awareness of what happens there, the vast majority of the American public will never *witness* the work of the highest Court in the land. The Court has already recognized the public's need for transparency, but despite recent efforts to increase accessibility to its work, significant barriers still remain. Allowing cameras inside the Courtroom is the next logical step.

Television is a tremendous vehicle for public accessibility, including because the United States is culturally a visual nation, with television (and more recently, webcasting) by far the most common way that Americans experience significant events. It is a culturally pervasive means of communication; there are televisions and computers in the vast majority of American

homes. Broadcasts of Court proceedings will reach segments of the public in a way that transcripts and audio recordings cannot. There cannot be any serious dispute that whereas at most a few hundred thousand people (almost all lawyers) will read the Court's opinion or oral argument transcript in the health care cases, tens of millions of ordinary Americans (at the very least) would watch all or part of the proceedings in the case with great interest.

If there were problems with televising court proceedings, we would know it. Numerous courts in this country – from state courts to lower federal courts, and courts of appeals, including the Second and Ninth Circuits – broadcast their proceedings. I have argued in the Washington Supreme Court, for example, which permits interested parties around the country and overseas to watch. To examine the possible effects of cameras in the courtroom, the United States Federal Judicial Center conducted an evaluation in 1994, in which lower federal court lawyers and judges responded that the presence of cameras in proceedings had had "small or no effects" on the decorum of the Court or on the proceedings.

If the Court adopted the use of cameras during its proceedings, it would of course not be the Justices' first experiences in front of the lens. As a result of the modern confirmation process, nominees are exposed to cameras at an early stage of the process. There is great fanfare that surrounds a nomination; television cameras roll from the President's initial announcement of a candidate, through the dizzying array of nominations interviews that follow, and through the sometimes contentious hearings before this very Committee. The nominee gains experience and familiarity working in front of the camera while responding to difficult questions during those hearings, in what is the most challenging point in the process of

ascending to the bench. By contrast, during Courtroom proceedings, and most notably during oral arguments, it is the Justices who shape the conversation, rather than the Senators who are posing questions to the Justices. To observe the Justices during these proceedings is to observe them at the height of advantage. If the Justices were to allow cameras into the Courtroom during proceedings and arguments, we would observe them at their time to shine most brightly.

Here as in so many contexts, the fault lies with Jon Stewart and Stephen Colbert. The Justices would be right to predict that excerpts of questions or opinion announcements will be taken out of context and mocked in some instances. But the Court can have greater confidence in the country. Most Americans get their news from real, not fake, news outlets.

The Justices should also have greater faith in themselves. Having not only argued two dozen cases but also attended hundreds of proceedings, they are not always scintillating, but they are uniformly serious and thoughtful and intelligent.

Thus, at a time when public confidence in government is flagging, this is a tremendous opportunity for the Court to use this technology as a vehicle to re-energize public faith in our democratic system. As a result of a number of factors that are unrelated to the Court, including an economic downturn, in addition to the many challenges that are faced by a nation at war, the public's faith in the democratic process is at a low ebb. By increasing accessibility to the Court's work, as a critical part of our government, the Justices have a rare opportunity to increase voters' faith in the democratic process by reminding them of the value of their vote. In an upcoming election year, there is an especially powerful need to remind voters of their civic

duty. Increased accessibility to the Court's work would reinforce the role that each vote plays in selecting a candidate, who in turn, will nominate individuals to serve on the bench.

Although the Justices may also have some concerns that the lawyers will pander to the cameras, as someone who is getting ready to argue his twenty-fifth case I can say that our only concern is persuading the Justices, not annoying them and potentially losing votes by grandstanding.

There are also constitutional values at stake. To be clear, there is no First Amendment right to televise court proceedings. But the First Amendment has almost at its core a significant interest in the public being able to receive as much information as possible regarding the operations of governmental institutions.

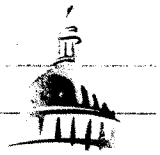
In recognition of these interests, a bi-partisan coalition of Judiciary Committee members has co-sponsored legislation to allow the Court to add cameras to proceedings. The Sunshine in the Courtroom Act of 2011 is a bill that demonstrates critical respect for the separation of powers by respecting the judiciary's autonomy in choosing whether to implement cameras for use. It represents an important step for those whose work is dedicated to creating an increasingly open and transparent government. Allowing cameras in the Courtroom will lead to greater civic awareness and engagement, and will create a mechanism through which the public can connect with a body that powerfully shapes their lives.

Again, I would like to thank the Committee members, and Madam Chairman, for giving me the opportunity to testify before you today. I am honored to be here and I would be pleased to answer any questions that you may have for me.

U.S. Senator Chuck Grassley • Iowa

Ranking Member • Senate Judiciary Committee

http://grassley.senate.gov



Prepared Statement of Senator Chuck Grassley
Ranking Member, Senate Committee on the Judiciary
Hearing of the Subcommittee on Administrative Oversight and the Courts
"Access to the Court: Televising the Supreme Court"
Tuesday, December 6, 2011

Madam Chairman, I want to thank you for calling a hearing on increasing the public's access to the Supreme Court. Over ten years ago, Sen. Schumer and I introduced the Sunshine in the Courtroom Act, a bill which would grant federal judges the authority to allow cameras in the courtroom. Since that time, this bill has been brought before the committee many times. And each time it has been scrutinized, improved upon, and reported out under broad bi-partisan support.

Today's hearing focuses on a companion issue: whether or not the Supreme Court should permit cameras in its courtroom. Just yesterday, Sen. Durbin and I introduced "The Cameras in the Courtroom Act of 2011," a bill which would require the Supreme Court to broadcast and televise its proceedings. Like the Sunshine in the Courtroom Act, this bill has also been brought before the committee on several occasions. It, too, was reported out favorably with bi-partisan support and was championed by my friend, Senator Arlen Specter, who I am pleased to see here today.

My interest in expanding the people's access to the Supreme Court increased eleven years ago when the Supreme Court decided to hear arguments on the Florida recount during the 2000 Presidential Election. Senator Schumer and I urged the Supreme Court to open the arguments to live broadcast. In response, the Supreme Court took the then unprecedented step of releasing an audio recording of their arguments shortly after they occurred. It was a sign of progress that gave the entire country the opportunity to experience what so few get to: the Supreme Court at work.

Just last year, the Supreme Court began releasing audio recording of its proceedings at the end of each week. This is another step in the right direction and I applaud the court for increasing its transparency and access. But it is not enough. I believe that the nature of our government and the fundamental principles upon which it was built require more.

As Abraham Lincoln said, ours is a government of the people, by the people, and for the people. Our Constitution divides power. It creates a system of checks and balances. But most importantly, it makes the government accountable to the people. The best way we can ensure that the federal government is accountable to the people is to create transparency, openness, and access.

Sadly, the vast majority of the people do not believe they have adequate access to the Supreme Court. According to a poll released last year, 62 percent of Americans believe that they hear too little about the workings of the Supreme Court. Two-thirds of Americans want to know more. What could be a better source of the workings of the Supreme Court than the Supreme Court itself?

In 1947, the Supreme Court stated, "what transpires in the courtroom is public property." Well, if its public property, then it belongs to the whole public, not just the 200 people who can fit inside the public gallery. With today's technology, there is no reason why arguments could not be broadcast in an easy, unobtrusive, and respectful manner that would preserve the dignity of the Supreme Court's work and grant access to the millions of Americans wishing to know more.

My state, Iowa, knows something about this. For over 30 years, it has permitted the broadcast of its trial and appellate courts. In fact, I am pleased to welcome Iowa Supreme Court Chief Justice Mark Cady here today. He has come to share with this committee his unique perspective of presiding over a court that broadcasts its proceedings. He is a strong proponent of transparency and continues to pioneer new ways to give the public greater access to their court system. I look forward to hearing his testimony and thank him for his time here today.

Before we begin, I ask that three things be included in the record. First is a letter I wrote to Chief Justice Roberts last month, urging him to permit cameras during the court's upcoming arguments over the constitutionality of President Obama's healthcare law. This upcoming case is the perfect example for why the Supreme Court should televise its proceedings. It is a case which will address the role and reach of the federal government. All of us deserve to see and hear the legal arguments in a case which will have a lasting effect on every single American.

The second and third are newspaper editorial opinions. One is written by the Editorial Board of Iowa's second largest paper, The Gazette. The other is written by the Editorial Board of the Washington Post. Both express belief that the Supreme Court must permit its proceedings to be broadcast. It isn't often that the American Heartland and the Washington Establishment agree on something. I ask that each of these be made part of the record.

Once again, I want to thank Sen. Klobuchar for organizing this hearing. I would also like to thank each witness in advance for their testimony. This is a distinguished panel of witnesses who will provide excellent insights. I am eager to hear what each of you has to say.

Thank you, Madam Chairman.

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Bob Kerrey
CHAIRMAN
M & F WORLDWIDE EDUCATION HOLDINGS

December 2, 2011

The Honorable Jeff Sessions
United States Senate
326 Russell Senate Office Building
Washington, D.C. 20510-0104

Dear Senator Sessions,

I am writing to express my opinion on the issue of allowing the proceedings of the Supreme Court to be televised.

In 1989 after taking my oath of office I became a member of the United States Senate. I had no previous legislative experience and had not attended law school. My education was as a pharmacist. My background included service in the military, business, and a term as Nebraska's Governor.

Although my duties as Governor gave me a deeper appreciation for the power of the law and the workings of representative democracy, I had less understanding of either the connections between the ideas of our democracy and our Constitution or the kinds of Federal laws our Constitution permitted. Four years as Governor had introduced me to some of the historical arguments which are essential to our current debates but left me short of what I felt I would need as a U.S. Senator.

Thus it was that I made regular visits to the Court to listen to oral arguments on the cases which come before the Justices. Quite simply I was stunned by the high quality of the critical thinking, had my eyes opened to the excitement surrounding even relatively mundane appearing cases, and acquired an even deeper appreciation for the genius of our founders as well as the heroic contribution to our Republic made by Chief Justice John Marshall in establishing the Court as the final arbiter of what is and what is not Constitutional.

As I spoke to Nebraskans at home or to those who visited our Capitol, I quite often said: "You must visit the Court when you come to Washington. It will cure you of the pessimism you feel from time to time when watching Congressional debates or observing the actions of the Executive Branch." This enthusiasm led me at first to think that televising the Court would give Americans just what they need to have their confidence in democracy restored.

35 EAST 62ND STREET · NEW YORK, NEW YORK 10065
TEL: 212-572-8676 · bkerrey@globalscholar.com

Upon reflection and after experiencing the impact that television has had on the performance of the other two branches of our Federal Government, I now believe strongly that the Court must remain the one branch that must be experienced physically. The formal grandeur of the place would be lost. The quality of the arguments would be corrupted as lawyers found themselves yielding to the temptation of playing to the larger audience. It is hard enough making judgments that are disconnected from the whims and demands of public opinion without the cameras. With them I fear this one remaining nearly holy place would become desecrated with the kinds of spectacles we witness daily when men and women stand and perform on the stage of televised public debates.

My hope is that the understandable instinct of wanting to open up the Court to Americans will be resisted by Congress. The Court is already open enough. I can read briefs on your website. I can listen to arguments on my iPod. I can listen to cases being discussed in many other public settings. And most of all I can come to the District of Columbia, and sit quietly for an hour and be inspired by the power this relatively small body of men and women have given and continue to give to the Citizens of the United States of America.

Sincerely,

Bob Kerrey

Statement of Senator Leahy
Chairman, Senate Judiciary Committee
On hearing entitled: "Access to the Court: Televising the Supreme Court"
December 6, 2011

Today, Senator Klobuchar is chairing a timely hearing of national importance, entitled "Access to the Court: Televising the Supreme Court." I have long supported transparency measures in the Federal Government. That is why I cosponsored the Sunshine in the Courtroom Act. This bipartisan legislation seeks to shine light on our Federal court system and improve access to Federal court proceedings by allowing judges to determine whether to permit televising of public proceedings. Many Americans are unable to take time off from work and to wait in long lines in the hope of securing one of the limited seats in these public proceedings in order to see their courts in action. Technology is the key to increasing access to these public proceedings.

Last Congress, I also supported efforts by the former Chairman of this Committee, Senator Arlen Specter, to require the televising of oral arguments in the Supreme Court. His legislation is being reintroduced this Congress by Senator Durbin. The goal of this bipartisan bill is laudable and I believe it would increase public understanding of the reasoning and role of the highest court in the Nation.

The Supreme Court announced it will hear arguments next spring regarding the constitutionality of the Affordable Care Act. Regardless of a person's political leaning, all Americans have a stake in this court proceeding and they ought to be able to witness the public oral argument live. I hope the Court, having ordered an extraordinary oral argument of unusual scope and duration, will allow these proceedings to be viewed by the American people.

As a lesser measure, the Supreme Court has released audio files of important cases. In the past, the Supreme Court has released several audio files the same day as cases were argued. Notable examples include *Bush v. Gore*, *Northwest Austin Municipal Utility District Number One v. Holder, District of Columbia v. Heller* and *Citizens United v. Federal Election Commission*. However, the Court's current practice is only to release argument audio files at the end of the week. In our fast-paced society, delaying release of these public proceedings by several days makes the oral arguments less relevant, and prevents the American people from receiving a first-hand account of the important news of the day. If the Supreme Court is unwilling to provide live video access to its proceedings, it should at least consider live audio to be heard by the American people.

Except for rare closed sessions, the proceedings of Congress and its Committees are open to the public and are carried live on cable television and radio, and with increasing frequency, are streamed live online. These technologies welcome the American people into the Senate's work, including the Supreme Court confirmation process. Allowing the public access to the Court will deepen Americans' understanding of the high court and better inform them about how important judicial decisions are made and the impact these decisions have on all of our lives.

I believe the time has come for the Supreme Court to voluntarily open their proceedings to the American people. The high court's review of the Affordable Care Act, is a significant moment

in our nation's history and our understanding of our fundamental charter. This decision will affect every one of us in this country. The American people deserve to know what is being said as it is being said.

I thank the chairman of the Subcommittee on Administrative Oversight and the Courts for holding this important hearing and the witnesses, in particular, our former Committee Chairman, Senator Arlen Specter, for being with us today.

# # # # #

STATEMENT OF MAUREEN MAHONEY

Latham & Watkins LLP

United States Senate

Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary

Hearing On:

Access to the Court: Televising the Supreme Court

PRESENTED ON DECEMBER 6, 2011

STATEMENT OF MAUREEN MAHONEY

Good morning, Chairwoman Klobuchar, Ranking Member Sessions, and Members of the Subcommittee. I thank you for the opportunity to appear today so that I may explain the basis for my strong opposition to any legislation that would seek to strip the Supreme Court of its own authority to decide whether oral arguments should be televised. My views on this issue are informed by my professional experience as an appellate advocate and by my study of the serious constitutional questions such legislation would raise.

My experiences as an advocate and constitutional lawyer have spanned more than thirty years. I am a member of the Supreme Court and Appellate Practice in the Washington, D.C. office of Latham & Watkins, and I previously served as a United States Deputy Solicitor General and as a law clerk to then Associate Justice William H. Rehnquist. I have argued 21 cases in the Supreme Court, including many that presented difficult constitutional questions. By way of example, I successfully defended the constitutionality of the University of Michigan Law School's affirmative action program in the Equal Protection case of *Grutter v. Bollinger*, which was the subject of extensive media interest. I also serve on the Executive Committee of the Supreme Court Historical Society and previously served as the Chair of the Supreme Court Fellows Commission and as a member of the Judicial Conference Advisory Committee on Appellate Rules.

In my view, Congress should not seek to require the Supreme Court to televise its proceedings for two central reasons. First, congressional interference in the Court's conduct of its own proceedings would represent a sharp departure from historical practice that would raise serious constitutional questions. Second, there is no sufficient justification to precipitate the

potential for a constitutional conflict with the judicial branch on this issue. The Court is actively considering requests to televise its proceedings and has good reason to proceed cautiously. Proponents of televised arguments commonly overstate the incremental benefits to public education while underestimating potential risks to the integrity of the Court's decision making process. The Court is in the best position to evaluate and weigh these competing considerations and can be trusted to reach a reasonable decision entitled to respect by the Legislative Branch.

Turning to my first concern, there is substantial reason to doubt that Congress has the authority to overturn the Supreme Court's policy on this issue and legislatively mandate televised proceedings. Although Senator Specter believes that Congress possesses the requisite authority, he has nonetheless acknowledged that "[s]uch a conclusion is not free from doubt."[1] Indeed, a recent article analyzed the issue extensively and concluded that a congressional mandate would "impermissibly undermine[] the role of the judiciary and violate[] the separation of powers" established by the Constitution.[2] Justice Kennedy has also referenced the doctrine of separation of powers as a "sensitive point" in this context,[3] and it is one reason for his "hope" that Congress would "accept [the Court's] judgment" on the issue of televised arguments.[4]

There is nothing in the text of the Constitution that should provide the Subcommittee with any comfort that legislation mandating televised arguments would be a permissible exercise of legislative power. Article III vests "[t]he judicial Power of the United States" in "one Supreme Court," and that power surely includes the power to exclude television cameras from

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[1] 155 CONG. REC. S2335 (daily ed. Feb. 13, 2009) (statement of Sen. Arlen Specter).

[2] Brandon Smith, *The Least Televised Branch: A Separation of Powers Analysis of Legislation to Televise the Supreme Court,* 97 GEO. L.J. 1409, 1433 (2009).

[3] *Hearings before a Subcomm. of the H. Comm. on Appropriations*, 109th Cong. 226 (2006)

[4] *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 12 (2007) ("2007 Senate Hearing").

the Court's chamber as a means of protecting the integrity of its decision making process.[5] As the Supreme Court explained nearly two centuries ago, "courts of justice are universally acknowledged to be vested, by their very creation" with the "power to impose silence, respect and decorum, in their presence" and "to preserve themselves and their officers from the approach and insults of pollution."[6]

Although Congress unquestionably has some power to adopt laws that affect the Court in various ways, the Constitution does not grant Congress any express power to regulate the manner in which the Supreme Court exercises its decision making authority in proceedings properly before the Court.[7] Moreover, it is well settled that Congress cannot exercise whatever powers it does have in a manner that would "impermissibly intrude on the province of the judiciary,"[8] or disregard a "postulate of Article III" that is "deeply rooted" in the law.[9] It would be difficult to describe a statute stripping the Court of its deeply rooted power to control its own courtroom and

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[5] U.S. CONST. art. III, § 2. The judicial power, at its core, is the ability to decide cases and controversies. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995). It is, however, accompanied by ancillary powers that are necessary to execute that core function.

[6] *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

[7] Some proponents have suggested that an express textual justification for mandating televised proceedings resides in Article III, which provides that the Supreme Court's appellate jurisdiction is subject to "Exceptions" and "Regulations" created by Congress. U.S. CONST. art. III, § 2, cl. 2. The text, however, only refers to the "regulation[]" of "jurisdiction" and not "proceedings." Thus, for example, the Clause gives Congress the authority to enact a "regulation" limiting diversity jurisdiction to cases with more than $75,000 in controversy. 28 U.S.C. § 1332. Even if the text were less clear, it would also be implausible to read the Clause to authorize "regulation" of the Supreme Court's decision making processes because it would only give Congress authority to regulate some, but not all, of the Court's oral arguments. The Clause plainly does not authorize any "regulations" governing cases that fall within the Court's original jurisdiction. As a consequence, Congress would only have authority to mandate television for the appellate cases on the Court's docket, even though original cases are often heard on the same day in the same room.

[8] *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851-52 (1986).

[9] *Plaut*, 514 U.S. at 218.

decision making processes as a mere administrative regulation—especially when done in the context of a disagreement with the Supreme Court's own evaluation of the impact of cameras.

In considering the scope of congressional power, it is also significant that a mandate of this type would represent a stark departure from Congress's historic refusal to adopt legislation encroaching on the Supreme Court's independence and its authority to conduct its own proceedings. As the Supreme Court explained in *Plaut v. Spendthrift Farm, Inc.*, such "prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed."[10] Proponents who claim there is no separation of powers problem with legislation requiring the Supreme Court to televise its arguments have pointed to Congress's assertion of control over the number of Justices, the composition of a quorum, the date for the start of each term, standards for recusal, and the scope of the Court's jurisdiction.[11] Even if we assume *arguendo* that all such legislation is constitutional, we know that Congress steadfastly refused to exercise its powers in a manner that would encroach on the Court's decision making authority and undermine the independence of the judiciary. The Senate voted down President Roosevelt's effort to enlarge the size of the Court based on the conclusion that it was "essential . . . that the judiciary be completely independent of both the executive and legislative branches."[12]

But in any event, the imposition of a requirement that the Court televise arguments bears little resemblance to these laws. Unlike the *ex ante* rules establishing the size of the Court (each Justice must be appointed by the President with the consent of the Senate), and the regulation of

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[10] *Id.* at 230

[11] *See* 28 U.S.C. §§ 1, 2, 455, 1251, 153-54, 1257-59, 1292.

[12] S. COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711, at 14 (1937).

the scope of the Court's appellate jurisdiction (which is textually committed to Congress), the law under consideration here would go to the heart of how the Court considers pending cases. Oral argument is a core part of the Court's deliberative process. As Justice Kennedy explained in testimony to Congress, at oral argument "[w]e are talking with each other" and "we are using the attorney to have a conversation with ourselves and with the attorney."[13] While deference to all federal courts on these types of internal deliberative issues is appropriate, special deference is owed to the Supreme Court. Unlike the lower federal courts, which Congress created, the Supreme Court was established by the Constitution itself. Congress has recognized the special status of the Supreme Court in the constitutional structure and declined to assert any supervisory authority over the promulgation of Supreme Court rules.[14] Legislation requiring televised arguments would be an historic departure from Congress's longstanding practice of noninterference with the Court's deliberative process—which has served to fulfill the Founders' view that the "complete independence of the courts of justice is peculiarly essential in a limited Constitution."[15]

Given these serious questions, Congress should not test the boundary between the legislative and judicial powers unless it is truly essential for the protection of the public interest. Even if this Subcommittee believes that television is a good idea, there is certainly no compelling necessity to seize control of the debate and tell the Court that it must televise its proceedings. It is not as if the Judiciary has arbitrarily refused to give any serious consideration to the issues. To the contrary, the Judicial Conference is currently conducting a pilot project in the lower

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[13] 2007 Senate Hearing, 110th Cong. 12 (2007).

[14] The Rules Enabling Act establishes a mechanism for congressional review of rules of practice, but it only governs rules applicable to proceedings in the lower federal courts, which were created by Congress. *See* 28 U.S.C. §§ 2071-75, 2077.

[15] THE FEDERALIST NO. 78, 426 (Alexander Hamilton) (E.H. Scott ed., 1898).

courts that is likely to provide useful empirical information on the effects of cameras in the courtroom.[16]

The Supreme Court has itself also shown a willingness to consider requests respecting media coverage of oral arguments and has made exceptions to its standard policies in response to showings of special public interest. For example, when Senators Grassley and Schumer sought television coverage of the argument in *Bush v. Gore*, Chief Justice Rehnquist advised them that the Court "carefully considered the question of televising these proceedings," that "a majority of the Court remains of the view that we should adhere to our present practice," but that the Court "decided to release a copy of the audiotape of the argument promptly after the conclusion of the argument" in recognition of "the intense public interest" in the case.[17] Press reports indicate that there are pending requests for permission to televise or allow live or promptly released audio of the arguments in the cases addressing the Patient Protection and Affordable Care Act. The petitions for certiorari in the health care cases were granted on November 14, and argument will reportedly be scheduled in March. There is accordingly ample time for the Court to determine how to proceed, and there is every reason to expect that the Court will again give careful consideration to those pending requests.

Moreover, Congress should not preempt the Court's study and deliberation on these issues because there is still a genuine risk that televising the proceedings of this Court would do more harm than good. This is not a one-sided debate. As Justice Stevens put it, this issue is

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[16] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11-12 (Sept. 14, 2010).

[17] Letter from William H. Rehnquist, Chief Justice, U.S. Supreme Court, to Senators Charles E. Grassley and Charles E. Schumer (Nov. 28, 2000).

"difficult."[18] It is easy to posit that there would be some educational benefits to televised proceedings. But benefits and risks cannot properly be weighed without first assessing the *incremental* benefit of videotape to the public's understanding of the Court's work. Members of the public can already read the Court's opinions, listen to every word of every Supreme Court argument within a few days after it occurs, and read a full transcript within hours. How much more will the public learn about the Court by seeing the faces of the Justices? Video would likely hold public interest better, but it adds little in the way of useful information. Nor would the public's understanding of the Court's work be materially enhanced by the availability of short video clips. Oral arguments cannot properly be understood through sound bites. As Justice Scalia has observed, "[f]or every ten [television viewers] who sat through our proceedings gavel to gavel, there would be 10,000 [viewers] who would see nothing but a 30-second takeout . . . which I guarantee you would not be representative of what we do,"[19] and could ultimately contribute to "the miseducation of the American people."[20]

While many state courts have televised proceedings (which may serve different interests in jurisdictions where judges run for re-election), there is at least some evidence that television has not delivered on its promise of a better informed populace. A New York study concluded that the introduction of televised proceedings "had no impact on public understanding of the

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[18] *John Paul Stevens on Cameras in the Court,* C-Span Q & A Interview (Oct. 3, 2011), *available at* http://www.youtube.com/watch?v=2x_qNe-z_dA.

[19] *Considering the Role of Judges Under the Constitution of the United States, Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (Oct. 5, 2011), *available at* http://www.c-spanvideo.org/program/301909-1.

[20] George Bennett, *Scalia on 2000: 'Get over it,'* The Palm Beach Post, Feb. 3, 2009, *available at* http://www.palmbeachpost.com/hp/content/local_newspaper/2009/02/03/0203scalia.html.

judiciary."[21] And we can surely all agree that there is no public interest in televising arguments for their entertainment value. As Justice O'Connor sees it, televised proceedings simply "wouldn't enhance the knowledge [of the public] that much" due to the availability of other information, and it would not "solve the problem of educating young people" because the arguments are "technical and complicated."[22]

As for the risks, we can be certain that they are not imaginary. In 1996, Justice Souter told Congress that the case against cameras is "so strong" that "[t]he day you see a camera coming into our courtroom it is going to roll over my dead body," and he explained that his opposition was a product of his own "personal experience" with televised proceedings while serving on the New Hampshire Supreme Court.[23] Justice Souter testified unequivocally that the presence of cameras adversely "affected [his] behavior" by altering the way he questioned advocates.[24] He explained that when he had a "15 second question" that could "create a misimpression either about what was going on in the courtroom or about me or about my impartiality or about the appellate process" then "I did not ask that question."[25] He also told his colleagues that "lawyers were acting up for the camera" by "being more dramatic" and that he was "censoring his own questions."[26] Similar concerns were shared by a large number of federal

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[21] Marjorie Cohn & David Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* 54 (1998).

[22] Jess Bravin, *Excerpts: Sandra Day O'Connor*, WALL ST. J., Aug 20, 2009, *available at* http://online.wsj.com/article/SB124994452340020825.html

[23] *Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for 1997, Hearing before a Subcomm. of the H. Comm. on Appropriations,* 104th Cong. 31 (1996).

[24] *Id.*

[25] *Id.*

[26] *Life in the Federal Judicary,* C-Span coverage of the 10th Cir. Bench and Bar Conference, Aug. 27, 2010, *available at* http://www.c-spanvideo.org/program/id/231797.

appellate judges who had first-hand experience with televised arguments during an experimental program sponsored by the Judicial Conference. More than 40% of the judges reported that television caused attorneys to change the content of their arguments and to be "more theatrical," and a full third of the judges acknowledged that cameras caused them to change their questioning of advocates.[27]

It is accordingly not surprising that a number of Justices have voiced serious concerns that cameras will adversely affect the usefulness of oral argument in the Court's deliberative process. Chief Justice Roberts has observed that "grandstanding" may be expected to increase with the advent of television.[28] Justice Kennedy told Congress that the introduction of television would create an "insidious temptation to think that one of my colleagues is trying to get a sound bite for the television," and that it would "alter the way in which we hear our cases, the way in which we talk to counsel, the way in which we talk to each other, the way in which we use that precious hour."[29] Justice Thomas has concurred, advising Congress that television would have an "effect on the way the cases are actually argued" and could "undermin[e] the manner in which we consider the cases."[30] Justice Alito has also expressed the view that television would "change the nature of the arguments" because the participants' "behavior is changed" when proceedings

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[27] Molly Treadway Johnson & Carol Krafka, FEDERAL JUDICIAL CENTER, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 17 (1994).

[28] *A Conversation with Chief Justice Roberts, Fourth Circuit Judicial Conference*, June 25, 2011, *available at* http://www.c-spanvideo,org/program/FourthCi.

[29] *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 12, 13 (2007).

[30] *Hearings before a Subcomm. of the H. Comm. on Appropriations*, 109th Cong. 225 (2006).

are televised.[31] Justice Breyer sees "good reasons" for television but counsels caution because there are also "good reasons against it."[32] And Justice Stevens recognized potential benefits but "ultimately came down against it," because cameras might negatively affect arguments and the behavior of Justices and lawyers.[33]

This is not to say that the matter has been finally decided or that the Court should not continue to consider changes to its current practices. But Congress should not presume that it knows the best way for these nine Justices to conduct their oral arguments. Justice Kennedy has informed Congress, in no uncertain terms, that "we feel very strongly that this matter should be left to the courts."[34] As he explained, it is the Justices, not Congress, who "have intimate knowledge of the dynamics and the needs" of the Court.[35] And when the shoe was on the other foot, the Supreme Court refused to second guess the Senate's procedures for conducting impeachment trials. It held that Congress had the authority to determine for itself what procedures should govern.[36] Congress should afford the Supreme Court no lesser deference and recognize, in the words of the 75th Congress, that Senators must not be "the judges of the

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[31] Debra Cassens Weiss, *U.S. Supreme Court: Justice Alito cites 'observer effect' in opposing cameras in court,* First Amendment Coalition, Oct. 1, 2010, *available at* http://www.firstamendmentcoalition.org/2010/u-s-supreme-court-justice-alito-cites-observer-effect-in-opposing-cameras-in-court.

[32] *Q & A with Stephen Breyer*, C-Span, Nov. 28. 2005, *available at* http://www.c-spanvideo.org/program/190079-1.

[33] Wayne Grayson, *Former high court justice defends unpopular decision*, TUSCALOOSA NEWS, Nov. 17, 2011, *available at* http://tuscaloosanews.com/article/20111117/NEWS/111119604?p=2&tc=pg.

[34] *Hearing before a Subcomm. of the H. Comm. on Appropriations*, 109th Cong. 226 (2006).

[35] *Id.*

[36] *Nixon v. United States*, 506 U.S. 224 (1993).

judges."[37] With all due respect to the Senators' views on the merits of televised proceedings, I urge you to continue your historic respect for the independence of the judiciary by allowing the Court to structure its own proceedings in the manner that it determines will best serve the public interest.

Thank you, Ms. Chairwoman, for the opportunity to testify on this issue. I look forward to answering the Subcommittee's questions.

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[37] S. REP. NO. 75-711 at 14.

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Let the cameras roll

Cameras in the courtroom and the myth of Supreme Court exceptionalism.
The Supreme Court's defiant stance against cameras is born of fear of change, nostalgia, a self-interested desire for anonymity, but most of all exceptionalism: the Court's view of itself as a unique institution that can and should resist the demands of the information age.

Tony Mauro
November 14, 2011

Editor's note: This term of the U.S. Supreme Court is shaping up as a blockbuster, with issues of health care reform, affirmative action, high-tech surveillance and church/state separation already on the docket or soon to be considered. With attention focusing on the Court, the drumbeat in favor of allowing cameras in the Court is likely to increase in intensity — and the Court is just as likely to say no. NLJ Supreme Court correspondent Tony Mauro wrote about the Court's objections to camera access in a recent article in the Reynolds Courts & Media Law Journal. *A condensed version of the article appears below.*

The Supreme Court has never allowed the broadcast news media to bring the tools of their trade — cameras and microphones — into its courtroom for coverage of its proceedings. Unlike almost every other public institution in the United States, it has been able to maintain such a ban to this day, ignoring the successive winds of change brought by radio, television and the Internet.

That defiant stance is born of fear of change, nostalgia, a self-interested desire for anonymity, but most of all exceptionalism: the Court's view of itself as a unique institution that can and should resist the demands of the information age.

"We operate on a different time line, a different chronology. We speak a different grammar," Justice Anthony Kennedy once said in response to questions from members of Congress about allowing cameras in. As recently as June, when Chief Justice John Roberts Jr. was asked about cameras in the Supreme Court, he acknowledged that many states have allowed cameras in, but said, "The Supreme Court is different, not only domestically but in terms of its impact worldwide."

Neither Kennedy nor Roberts explained why that "differentness" justifies keeping cameras out of the Supreme Court, however. In this article I examine whether the Court's exceptionalist self-image or the other reasons it offers for its resistance to cameras can or should stand in the way of the demands of the modern era for access and transparency.

Why are the cameras kept away? In part it is because the Court can keep them away, as it always has. One by one, major institutions in the executive and legislative branches of the federal government, and all branches of state governments, have let the cameras in — some eagerly, some reluctantly. But the Supreme Court has resisted the trend altogether, and the other branches, as well as the public, have not insisted otherwise.

THE COURT REMAINS HIDDEN

As a result, the Court is allowed to deprive the public of an educational feast. Justices debate endlessly the importance of oral argument to their deliberations, but its value and content as a public event are undeniably important. And yet, it is not visible to the public, beyond the 250 or so members of the public, the bar and the press who are able to view it in person. As the momentum of the information age has brought almost every government institution into greater public view — even the Central Intelligence Agency has a YouTube channel — the Supreme Court remains hidden, at least in terms of visual coverage of its proceedings.

Over the decades, the Court has flirted with the idea of cameras. In 1988, it allowed an unpublicized demonstration of how cameras would work inside the Court chamber. Led by then-media lawyer Timothy Dyk of what was then Wilmer Cutler &

Pickering — now a judge on the U.S. Court of Appeals for the Federal Circuit — a coalition of media organizations wanted the justices to see how far video technology had advanced, and how unobtrusive cameras could be. Cameras were brought in at 7 a.m., three justices sat in their regular seats and posed questions to Dyk to replicate an oral argument. Then they watched the videotape. Nothing came of the demonstration.

Under pressure from Congress, the Judicial Conference undertook a more formal experiment in the lower courts. Camera coverage of civil proceedings was permitted on an experimental basis in two appeals courts and six district courts. The experiment, which ran from 1991 to 1994, went well. "Overall, attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program," according to a Federal Judicial Center evaluation.

In spite of its success, however, the experiment did not come close to winning over the federal judiciary. Outside influences ranging from the Clarence Thomas confirmation hearing in 1991 to the O.J. Simpson trial in 1995 set back the cause for years.

During a judicial conference in 1993, then-justice Byron White candidly offered one of the most fundamental reasons for the Court's disdain for cameras. "I am very pleased to be able to walk around, and very, very seldom am I recognized" because of the absence of television coverage of his court, he said. "It's very selfish, I know." Interestingly, White predicted that someday the Court would be made up of justices supportive of cameras who would ask, "What was wrong with those old guys?"

INCREMENTAL STEPS

That has not yet happened, but the Court has made incremental steps. Better late than never, in 2000 the Supreme Court launched its own Web site, a generally user-friendly site that enabled readers to access the Court's docket and opinions quickly for the first time.

Also in 2000, the Court took perhaps a more important step by allowing audio recordings of certain high-profile oral arguments to be released to the media shortly after they occurred. The Court did so in response to a request from C-SPAN in the historic cases of *Bush v. Palm Beach County Canvassing Board* and *Bush v. Gore*, after turning down a request from the major broadcast networks for live television or radio access. For several terms thereafter, the Court approved same-day release of audiotapes of a handful of major cases each term. That tapered off as the Court became uncomfortable about deciding which cases warranted special treatment. Now, the tapes of all arguments — newsy or not — are released on the Friday of the week they are argued, guaranteeing they will arrive too late for use in same-day news coverage.

These changes have been viewed as welcomed improvements in public access to the Court, but they fall short of the biggest and most public-minded step the justices could take — namely, allowing television and radio broadcast of Court proceedings on a par with the way other public institutions are covered. In fact, it sometimes seems that the small concessions are aimed at warding off pressure to take that larger step. Justice Samuel Alito Jr. implied as much when he was asked about cameras in the Court during a 2007 appearance at Pepperdine University. He rattled off the innovations in access to transcripts and audio, and asked why "that extra bit of information," the video, was so important.

The Roberts Court, now six years old, is in some ways the Court that Byron White predicted it would be back in 1993. Refreshed by four recent vacancies, the Court now has younger members who don't remember a time without television. Most of them are battle-hardened when it comes to television, because of their experience with confirmation hearings that have become highly polarized and almost always contentious.

THE EXCEPTIONALISM ARGUMENT

Yet the justices still resist. The root of almost every objection the justices have expressed about camera access is the justices' deeply held feeling that their Court is exceptional — unlike any other public institution. The Supreme Court is not like any other court, they say. It is also unlike the other two branches of government, both of which are led by officials who stand for election — as do many, if not most, state judges. As life-tenured justices, the theory goes, the members of the Supreme Court stand above and apart from the political fray. They are the most powerful, largely invisible, government officials in the nation, if not the world.

"We teach, by having no cameras, that we are different," Kennedy once said.

From that uniqueness, the justices conclude that the Supreme Court should remain immune from the glare of the broadcast media. But does that conclusion really follow from the Court's exceptionalist view of itself? It could be argued, in fact, that justices' unique independence makes the broadcast of their proceedings more justifiable, not less so, than for other institutions.

Although cameras might, and probably do, distort the behavior of elected officials bent on pleasing their constituents, they

should have little negative effect on contemplative, life-tenured judges who insist they are apolitical. If they are truly independent and different, one would think that Supreme Court justices should be uniquely inattentive to the presence of cameras and should be able to carry on undisturbed.

And if the Supreme Court has unique worldwide impact, as Roberts said, then why should its work not be televised? Using the Court's global influence as an argument for invisibility seems contradictory, unless Roberts is suggesting that the Court's stature would somehow shrink by becoming more visible. I would argue the opposite. When the Supreme Court is under intense scrutiny — whether during the 1993 release of the Thurgood Marshall papers, or in the context of controversial decisions ranging from *Snyder v. Phelps* to *Bush v. Gore* — the Court usually emerges favorably as an institution that strives to be fair and get it right, even if the result is unpopular.

In September 2010, the Judicial Conference, which sets policy for the lower federal courts, voted to undertake another three-year experiment with camera access that echoes the pilot project of nearly 20 years earlier. Spurred again by pressure from Congress, the conference decided the time had come to take another look.

What comes next in the long and spectacularly unsuccessful campaign for cameras in the Supreme Court? We wait, yet again, for the results of another three-year experiment with broadcast of a limited category of civil proceedings in lower federal courts. In his June remarks, Roberts said, "I'll be very interested to see what the results of the pilot program look like. I'm sure we will take that into account." He reminded his audience of a recurring architectural motif at the Supreme Court: depictions of tortoises at the base of outdoor lamps and elsewhere. "That's to indicate we move slowly but surely on a stable basis."

Those who argue for cameras in the Supreme Court are not, however, asking for sudden, destabilizing change. The justices have had more than 60 years to contemplate the impact of cameras on their cherished institution — longer than that, if one includes the era of newsreels. During that period, the Court has become a powerful force in American society — more muscular than ever before, in fact, on issues of life and death, privacy and new technology, commerce and communications. It is unique and exceptional, but not in ways that should make it invisible. The Supreme Court is far from the fragile flower that its protectors make it out to be by shielding it from a news medium that is no longer new or especially threatening. Courts throughout the world have allowed broadcast coverage for years or decades and survived.

SUPPORT FROM NEWEST JUSTICES

The Court's newest justices seem to know this, and may be able to work on reducing their colleagues' timidity. In 2009, after seeing the Court's oral arguments from the perspective of a U.S. solicitor general, Justice Elena Kagan said, "I think if you put cameras in the courtroom, people would say, 'Wow.' They would see their government working at a really high level." Justice Sonia Sotomayor, who saw courtroom cameras as a judge on the U.S. Court of Appeals for the 2d Circuit, also appears to be a fan.

If they work on their colleagues inside the Court, while at the same time the three-year experiment with civil proceedings at the district court level shows positive results, then maybe, just maybe, in three years or so, the Supreme Court will realize that the time has arrived to allow cameras in. Even a tortoise crosses the finish line eventually.

Tony Mauro can be contacted at tmauro@alm.com.

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The New York Times

October 2, 2011

Open Up High Court to Cameras

By KENNETH W. STARR

Waco, Tex.

TODAY, the nation welcomes back nine justices who toil quietly and, for the most part, outside public view. But there is no reason the public should be denied access to their consideration of and arguments about urgent questions — from global warming to health care — that affect us all. Cameras in the courtroom of the United States Supreme Court are long overdue.

To hear oral arguments and the handing down of decisions, citizens and countless school groups line up outside the Supreme Court building, completed in 1935, for a chance to experience the court in action for two fleeting hours. Crowds camp out all night for high-profile cases. Many who stand in these lines and endure all-night waits will be disappointed: space in the magnificent courtroom is very tight.

In a typical session, during which two cases are argued, there are just 250 seats available, many of which are set aside for special guests. Seating is so limited that a separate line forms for those willing to sit for just three minutes, during which the spectators can experience a sternly monitored glimpse into the sanctum before they are hurried along to make room for others. Most Americans, including those who live far from Washington, or who are unwilling or unable to travel to the court building, never try.

"Equal justice under law" is the inscription on the face of the court building. It is time that we the people had equal access to the process by which that justice is meted out.

The benefits of increased access and transparency are many. Democracy's first principles strongly support the people's right to know how their government works. This would seem to be underscored by this court's stubborn insistence on freedom of communication in a democratic society. Recall that earlier this year, the court held that the First Amendment protected the right of protesters to hector a military family during a funeral service for their son, who was killed in Iraq. And the court decided that the same societal interest in free speech outweighed California's interest in protecting minors from extremely violent video games. These are but two of many examples in which the current court has made plain its view that, in extreme cases, the force of First Amendment rights shall outweigh all else.

Year after year, the court issues decisions that profoundly affect the nation. Think of civics classes. The retired Justice Sandra Day O'Connor is one of many who have lately lamented the apparent collapse of civic literacy in public schools. Think of older Americans affected by President Obama's health care program. Think of women or other groups affected by important class-action cases, like the Wal-Mart discrimination case last term. These citizens should have a chance to hear what the justices think about important questions that touch their lives.

The issue of cameras in the courtroom is one of precious few on which conservative Republicans, like Senator John Cornyn of Texas, and liberal Democrats, like Representative Henry A. Waxman of California, agree. The views cherished by the court's old guard are nicely dramatized by the retired justice David H. Souter, who, by his own account, preferred death to the quiet illumination of cameras in the courtroom.

Justice Anthony M. Kennedy's fear is that televising the oral arguments would introduce "the insidious temptation to think that one of my colleagues is trying to get a sound bite for the television." But this fear seems groundless in light of the already available sound recordings from these sessions. Newspapers, radio and television were all once condemned for their demagogic potential, but we have long since accepted these media as vitally important pieces of our national dialogue. The idea that cameras would transform the court into "Judge Judy" is ludicrous.

Happily, the old guard's views are now in decline. Justice Elena Kagan, the newest and youngest member of the court, has spoken fervently for openness and transparency. At an Aspen Institute event in August, she said, "If everybody could see this, it would make people feel so good about this branch of government and how it's operating."

Just so. If the justices won't open the courtroom doors to cameras — proxies for the public eye — of their own accord, then Congress has the capacity and the duty to take action. Today, we seek only the opportunity to enjoy the access the justices and the select 250 visitors enjoy when the clerk of the court lifts his voice, thunders the ritual words "Oyez! Oyez! Oyez!" and then convenes the high court's new term with the ancient entreaty: "God save the United States, and this Honorable Court."

Kenneth W. Starr, the president of Baylor University, was formerly a federal appellate judge, solicitor general and independent counsel

STATEMENT OF THE HONORABLE ANTHONY J. SCIRICA

Circuit Judge
United States Court of Appeals for the Third Circuit

United States Senate

Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary

Hearing On:

Access to the Court: Televising the Supreme Court

PRESENTED ON DECEMBER 6, 2011

Good morning Chairman Klobuchar, Ranking Member Sessions, and distinguished Members of the Subcommittee. Thank you for inviting me to discuss televising the oral arguments of the Supreme Court. I am pleased to offer my perspective. I do not speak for the Court, and offer my own views on the matter, which are shaped by my experience in the judiciary.

I am a federal circuit judge in the United States Court of Appeals for the Third Circuit. For seven years, I served as Chief Judge of the Circuit. Before that, I was a federal district judge for the United States District Court for the Eastern District of Pennsylvania and a trial judge in the Court of Common Pleas in Montgomery County, Pennsylvania. As a chief circuit judge, I served on the Judicial Conference of the United States, the policy-making body for the lower federal courts. In that capacity, I served as the Chair of the Executive Committee of the Judicial Conference and before that as Chair of the Committee on Rules of Practice and Procedure.

At issue is whether televising Supreme Court oral argument will affect the integrity of the judicial process. In ways we may not completely comprehend or cannot always anticipate, communication through different media can affect how an institution functions.

You are likely to hear a broad range of views on this issue. As you well know, judges, attorneys, and legislators are divided on the question. There are thoughtful arguments on both sides, and reasonable people disagree about the best course.

Rather than rehearse these themes, I would like to make three more general points that, from my vantage, merit consideration in this discussion—transparency, accessibility, and the respect among the branches that allows each to govern its own deliberations.

First, transparency: the most important work of the Supreme Court, deciding the difficult cases it hears, is transparent. The Court explains its decisions in detail. Traditionally this was done through the printed word; now it is done through the electronic word as well, with opinions available online as soon as the decision is announced. These opinions constitute the only disposition of the issues taken up by the Court and are binding precedent on questions of federal law. This process of reasoned deliberation confers legitimacy. It allows litigants and members of the public to understand the basis of the decision and to evaluate for themselves the soundness of the Court's judgment. Dissenting and concurring opinions by other Justices highlight for the public precisely, and at times quite forcefully, where the members of the Court disagree. The Court is, in that important sense, a fully accessible and transparent institution.

Second, over time the Supreme Court has become more accessible and more transparent. It has embraced the Internet to enhance access to its work. For example, while lawyers and judges once had to wait a week or more to access Court decisions from paid subscription services, today the Court's decisions appear on its website within moments of their announcement. The Court provides public access

to its case dockets on its website, so that any member of the public can follow a case as it progresses from the filing of the petition for review to final disposition. Where certiorari has been granted, its website links to the lawyers' briefs so the public may read and download them. Of course, all Court sessions have always been open to the public. But the Court now provides same-day transcripts of oral arguments on its website. Audio recordings of oral arguments have been available at the end of term since 1955, but since last year, the Court has released the audio-tapes of arguments on its website at the end of each week. All of these services are provided free of charge.

The Justices have taken significant steps in their individual capacities to educate the public about the Supreme Court. They regularly speak, teach, and conduct moot courts with students of all ages. And all of the Justices recently gave televised interviews as part of an extensive collaboration with C-Span. These outreach activities help inform the public about the role and responsibilities of the Supreme Court in American governance.

Third, each of our three branches of government is responsible for its own deliberations and self-governance. The complexities of televising oral argument and principles of comity counsel deference to the Court's own determination.

I have some experience with this difficult question. As a member of the Executive Committee of the Judicial Conference and as a former Chief Judge, I have considered proposals for televising proceedings at the appellate and district

court level. I appreciate the merits on both sides, as well as the overriding importance of proceeding deliberately to safeguard the effective administration of justice. Recognizing the value of empirical evidence, the Judicial Conference authorized a three-year pilot project in 1990 allowing electronic media coverage of civil proceedings in two appellate and six district courts. Last year it authorized a new pilot project in fourteen district courts that will progress for three years. The results from the earlier pilot project were mixed. Some judges welcomed the new technology, but others did not. A significant minority of judges on the Courts of Appeals (26%) felt that it disrupted courtroom proceedings at least to some extent, while nearly half (47%) believed it made lawyers more theatrical and a third (34%) suggested it may have caused judges to alter their questioning. Many district court judges also expressed concern over cameras' effect on witnesses and jurors, a misgiving that led the Judicial Conference to maintain its ban on broadcasting lower court proceedings. But the Conference voted to allow each Court of Appeals to set its own policy on cameras. To date, of the thirteen circuits, only the Second and Ninth have opted to allow broadcast of oral arguments, primarily on a case-by-case basis.

I too have these concerns. At oral argument, appellate judges try to probe the strength and weakness of the arguments and, just as important, the reach and consequences of a decision for future cases. We explore the boundaries of a proposed legal rule. Sometimes the questions are tough and encompass provocative hypotheticals, all to test the worth of the arguments. In a high profile or especially

sensitive case, some might view a judge's question as revealing bias or a closed mind unreceptive to a party's position, creating the impression that the judge is not neutral, not fair. Because of these concerns, I have sometimes trimmed my sails when asking questions in these high profile cases. Cameras would likely augment this problem.

The complexities of this issue underscore the considerable latitude that should be afforded the Supreme Court in determining its own internal procedures. Determining whether to televise proceedings goes to the heart of how the Court deliberates and conducts its proceedings. Judges, lawyers, legislators, journalists, and citizens all have individual and institutional interests in the decision. But those of us outside the Court do not have the responsibility to decide these difficult cases of national importance. The Justices do. They are the ones most familiar with the operation of the Court. They understand the dynamics and nuances of Supreme Court oral argument, and how that exchange affects their deliberations in reaching the proper outcome of a case. They can best evaluate whether the introduction of cameras might affect the quality and integrity of the dialogue with the attorneys and, just as important, the dialogue among the Justices.

There is a common bond between the Members of the Supreme Court and the Members of Congress — each serves as a trustee of the long-term interests of an essential institution. That the Court has proceeded cautiously in evaluating televising oral argument should give pause when seeking to impose a decision on a

coordinate branch of government. A congressional mandate that the Supreme Court televise its proceedings likely raises a significant constitutional issue. Lawyers and Members of Congress have expressed this concern. But there should be no need to test the constitutional separation of powers. There is a compelling reason for caution apart from avoiding a potential constitutional question. The coequal branches of the federal government have long respected each branch's authority and responsibility to govern its own internal affairs and deliberations. This history is deeply rooted in the American political and constitutional tradition. Congress has honored this legacy by guarding judicial independence and self-governance. These long-standing principles of comity among the coordinate branches of government — that is, mutual respect for each branch's essential functions — counsel moderation and deference.

The Framers constituted the Supreme Court as a judicial body that would exercise substantial independence. They recognized that the Court would decide the most important legal disputes facing the nation based on principles that transcend the concerns of the moment. Justices take an oath to "faithfully and impartially discharge and perform all the duties" of the office. It is not unreasonable to defer to the Court on how it conducts its deliberations and speaks to the American people. A Court that is charged with the duty under our Constitution to "say what the law is," that has merited the confidence of the American people, and that has made its processes ever more accessible, should be

afforded deference in its own governance, including the decision whether, when, or how cameras should be present during its oral arguments.

Thank you, Chairman Klobuchar, for this opportunity to testify on this issue.

TESTIMONY OF ARLEN SPECTER

BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

Since the Supreme Court of the United States decides the most important issues facing America, its open proceedings should be televised to inform the public how its government operates. The Supreme Court has evolved into the dominant branch of the government after the ruling in Marlbury v. Madison in 1803 that the Court is the final arbiter of what the Constitution means.

The Court decides who should live in the abortion cases; who should die in the death penalty cases; the President's power as Commander in Chief; the power of Congress to regulate commerce on issues like healthcare; who should be the President by one vote along party lines in Bush v. Gore; how elections are financed; what newspapers can print and every other issue ingenious lawyers can construct. As de Tocqueville observed more than 150 years ago, in America virtually everything becomes a political issue to be decided in Court.

It is well established that the Constitution guarantees access to judicial proceedings to the public and to the press. In 1980, the Supreme Court recognized that right in Richman Newspapers v. Virginia, when it held that the right to a public trial belongs not just to the accused, but to the public and the press as well. The Court noted that such openness has "long been recognized as an indispensible attribute of an Anglo-American trial." Since most people cannot physically attend trials, the Court specifically addressed the need for access by members of the media:

"Instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim as acting as surrogates for the public (media press) contribute to public understanding of the Rule of Law and the comprehensive of the functioning of the entire criminal justice system."

The Supreme Courts of most states, Great Britain and Canada allow their proceedings to be televised. C-Span began televising proceedings in the U.S. House of Representatives in 1979 and the U.S. Senate in 1986. Congressional Committee hearings, especially U.S. Supreme Court nomination proceedings, draw extensive audiences and provide great insight into the judicial and legislative process. C-Span stands ready, willing and anxious to televise Supreme Court proceedings.

Public opinion polls disclose widespread popular support for televising the Court. Sixty-three percent of those polled responded affirmatively. When the question was modified to add that the Supreme Court chamber accommodates only approximately 300 observers and people are permitted only to stay three minutes, the figure rose to eighty percent of the public in favor of television.

The most outspoken voice from the Court in opposition to television was Justice David Souter who said the television cameras would roll in over his dead body. He is no longer on the Court. Justice Anthony Kennedy voiced his objection in milder tones saying that television would adversely affect the "dynamics" of the Court. In recent Supreme Court nomination hearings, I have routinely asked the question with answers ranging from Chief Justice Roberts and Justice Sotomayer saying they would consider it to Justice Elena Kagen enthusiastically

supporting it. Justice Stevens, no longer on the Court, expressed support for televising the Court.

Then-Senator Joe Biden and I wrote to Chief Justice Rehnquist in advance of the Supreme Court argument in Bush v. Gore in 2000 urging the Court to allow television coverage for that case. The Chief Justice responded negatively, but did permit an audio tape to be released at the conclusion of the argument. Some audio-tapes have since been released on an irregular basis with delays after the arguments. On occasion, C-Span has carried the audio of the argument with still pictures of the justices and lawyers who were speaking.

I have repeatedly introduced legislation to require the Court to permit television coverage of its open sessions unless it decided by a majority vote of the justices that allowing such coverage in a particular case would violate the due process rights of a party in the matter. The Judiciary Committee voted the bills out favorably in 2006, 2008 and 2010, but was never taken up on the floor.

In my judgment, Congress has the authority to mandate television coverage by analogy to Congressional authority to determine other administrative matters for the Court. Congress decides the day the Court will convene, the first Monday in October; the number of justices required for a quorum: 6; the time-table on habeas corpus cases; what cases the Supreme Court is required to hear such as the McCain/Feingold legislation; and the Court's jurisdiction. As usual the Court could exercise the last word if it decided that the doctrine of separation of powers precludes a congressional mandate.

The objectivity of the Supreme Court has been questioned when individual justices participate in what appears to be political events. Justice Scalia spoke to the House of

Representatives Tea Party caucus, a partisan political group. Justice Thomas' impartiality was challenged for "stopping-by" at a political event sponsored by the ultra-conservative Koch brothers. Questions have also been raised about Justice Ginsberg's involvement in the Aspen Institute seminars which are funded by promoters of liberal political causes. Justice Breyer has been a participant at Renaissance Weekend whose programs focus on liberal political causes. When the Court divides along ideological lines, as it did in *Bush v. Gore* and *Citizens United*, public confidence is undermined. Polls show the Court's approval rating has declined with a 62% approval, 25% disapproval in 2001 to 46% to 40% in 2011.

The average man on the street does not understand the intricacies of Supreme Court opinions, but does have the sense that something is amiss when there are so many 5-4 decisions. People think the law is objectively determinable and does not depend upon the individual judges' personal predilections. So the common sense question arises as to whether the Court is really stating the law when there are so many split decisions. When people are told that there are ideological splits, it is even more distressing.

Frequent opinion polls show the public has little understanding of the Constitution or how government works. As we strive for an educated citizenry, especially among the younger generation, television should cover the government as well as sports and soaps. The authority and legitimacy of the Supreme Court depends upon its' acceptance by the public. Television would give the public the opportunity to understand and evaluate the Court's performance and the Court and opportunity to establish its' legitimacy.

The Court has long acknowledged that Constitutional doctrine reflects the values of the people. The equal protection clause was the same when the Court said separate but equal was

satisfactory in *Plessy v. Ferguson* and when integration was required more than 50 years later in *Brown v. Board of Education*.

People need to know what the Court is doing to guarantee that the public can let the Court know when the public's values are not being recognized. In any event, in a free society, the public is entitled to the maximum transparency in its governmental institutions. Justice Louis Brandeis was right when he said sunlight is the best disinfectant.

The Washington Post

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End the ban on cameras in the Supreme Court

By Editorial, Published: November 25

IN MARCH, the Supreme Court is scheduled to hear one of its most important cases in years: a constitutional challenge to President Obama's signature health-care program.

The case should also be its most closely watched — literally. It would be a fitting vehicle for the court's first televised argument.

We have long urged the justices to allow cameras in the court. Supreme Court arguments generally focus on issues of national importance, typically involve the best lawyers in the country and rarely, if ever, raise the kinds of privacy or safety concerns that crop up in lower courts, where the identity of witnesses and jurors may sometimes need to be shielded.

The court has firmly resisted, arguing that allowing televised proceedings could compromise decorum and change the nature of the sedate proceedings because lawyers — and perhaps even justices — might be tempted to ham it up. Some critics worry that broadcasts could encourage outbursts from audience members. Others say that cameras would make justices more recognizable to the public, increasing security concerns and infringing on privacy. Still others worry that media outlets could take sound bites out of context. Finally, some believe that the public would not be able to make sense of the complicated proceedings.

These are not arguments for banning cameras; they are arguments for banning virtually all coverage of the court and the justices. No reasonable person would accept that.

It is hard to imagine the court losing control over its proceedings. Imagine the embarrassment — and the risk to future business — for a grandstanding advocate who

has to be reined in by the justices. Worse yet, such foolishness could in some instances cost lawyers their case if they fail to address and rebut substantive concerns about the matter at hand. And there is a simple cure for that rare lawyer who refuses to stop the antics: loss of argument time or removal from the court.

C-SPAN, which provides an invaluable service by televising congressional hearings and other public affairs programming, has offered to broadcast the health-care proceedings, which have been allotted 5½ hours of argument time. "We believe the public interest is best served by live television coverage of this particular oral argument," C-SPAN Chairman Brian P. Lamb wrote in a Nov. 15 letter to Chief Justice John G. Roberts Jr. "It is a case which will affect every American's life, our economy, and will certainly be an issue in the upcoming presidential campaign."

If a live broadcast is objectionable, the justices should allow the proceedings to be taped for broadcast later. And if that's too much, the justices at least should permit live audio broadcast of the argument or, as they have done with other high-profile cases in recent years, agree to a same-day release of the audio recording of the proceedings. The fortunate few who are able to secure seats in the courtroom should not be the only witnesses to history.

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