

friends on the other side said Republicans hated the bill and decided to kill it. Another said our effort to make the bill better through the amendment process was “one of the worst stunts he had seen in 25 years as a legislator.” What made those observations particularly absurd is that on that same day, the very same day those quotes were made, the bill passed 96 to 2.

Last week, many of our colleagues on the other side were reviving their charges of noncooperation after we took up the minimum wage bill. One said Republicans don't tend to vote for a minimum wage increase. Another said we were putting up obstacles to the bill so we wouldn't have to act on it.

We passed a good ethics and lobby reform bill and we are going to pass a good minimum wage increase bill because of Republican support and because Republicans insisted on a bipartisan package for both ethics and lobbying. That is the reason we saw an overwhelming vote at the end, support on both sides of the aisle. It is only because Republicans insisted on a bipartisan package for the minimum wage bill that I expect at some point in the near future we will see a similar vote on that. We pledged cooperation, and cooperation is exactly what we are offering in these early days of this Congress.

I yield the floor.

RESERVATION OF LEADER TIME

The ACTING PRESIDENT pro tempore. Under the previous order, the leadership time is reserved.

MORNING BUSINESS

The ACTING PRESIDENT pro tempore. Under the previous order, the Senate will now proceed to a period for the transaction for morning business until 3:30 p.m. with Senators permitted to speak therein for up to 10 minutes each, and the Senator from North Dakota, Mr. DORGAN, in control of 45 minutes and the Senator from Pennsylvania, Mr. SPECTER, in control of 30 minutes.

The Senator from Pennsylvania.

Mr. SPECTER. Mr. President, Senator DORGAN and I have arranged to switch times. He graciously consented to that. I ask unanimous consent that I may proceed for the 30-minute special order that was already announced and that Senator DORGAN be recognized for 45 minutes when my time is concluded.

The ACTING PRESIDENT pro tempore. Without objection, it is so ordered.

TELEVISIONING OF SUPREME COURT PROCEEDINGS

Mr. SPECTER. Mr. President, I have sought recognition to comment about S. 344, which provides for the televising of Supreme Court proceedings. This

bill is cosponsored by Senator GRASSLEY, Senator DURBIN, Senator SCHUMER, Senator FEINGOLD, and, with unanimous consent Senator CORNYN—a bipartisan representation. It is identical with legislation introduced in the last Congress after having been voted out of committee, and was voted out of committee on a 12-to-6 vote. It was previously introduced in 2005. It had a hearing on November 9 of 2005 and was reported out of committee on March 30 of 2006.

The essential provision is to require televising proceedings at the Supreme Court of the United States unless the Court determines on an individual basis that there would be an inappropriate occasion and a violation of the due process rights of the parties.

The thrust of this legislation is to bring public attention and understanding of how the Supreme Court of the United States functions, because it is the ultimate decisionmaker on so many—virtually all of the cutting edge questions of our day. The Supreme Court of the United States made the decision in *Bush v. Gore*, essentially deciding who would be President of the United States. The Supreme Court decides cases on the death penalty, as to who will die.

It decides by 5-to-4 decisions so many vital cases, including partial-birth or late-term abortion, deciding who will live. It decides the question of who will be elected, controlling the constitutional decision on campaign contributions. It decides the constitutionality—again, and all of the cases I mentioned are 5 to 4—on school prayer, on school vouchers, on whether the Ten Commandments may be publicly displayed, on whether affirmative action will be permitted, on whether eminent domain will be allowed—the taking of private property for governmental purposes. The Supreme Court of the United States decides the power of the President as illustrated by *Hamdan v. Rumsfeld*—that the President does not have a blank check and that the President is not a monarch.

The Supreme Court of the United States, again in a series of 5-to-4 decisions, has decided what is the power of Congress, declaring in *U.S. v. Morrison* the legislation to protect women against violence unconstitutional because the Court questioned our “method of reasoning,” raising a fundamental question as to where is the superiority of the Court's method of reasoning over that of the Congress. But that kind of decision, simply stated, is not understood.

Or the Supreme Court of the United States dealing with the Americans With Disabilities Act, making two decisions which are indistinguishable, upholding the statute on a paraplegic crawling into the courthouse in Tennessee and striking down the constitutionality of the statute when dealing with employment discrimination. They did so on a manufactured test of congruence and proportionality, which is literally picked out of thin air.

Under our Constitution, I respect the standing of the Supreme Court of the United States to be the final arbiter and to make the final decisions. But it is, I think, fundamental that the Court's work, the Court's operation ought to be more broadly understood. That can be achieved by television. Just as these proceedings are televised on C-SPAN, just as the House of Representatives is televised on C-SPAN, so, too, could the Supreme Court be televised on an offer made by C-SPAN to have a separate channel for Supreme Court oral arguments. There are many opportunities for the Court to receive this kind of coverage, to inform the American people about what is going on so that the American people can participate in a meaningful way as to whether the Court is functioning as a super-legislature—which it ought not to do, that being entrusted to the Congress and State legislatures, with the Court's responsibility being to interpret the law.

It should be noted that the individual Justices of the Supreme Court have already been extensively televised. Chief Justice Roberts and Justice Stevens were on “Prime Time” on ABC TV. Justice Ruth Bader Ginsburg was on CBS with Mike Wallace. Justice Breyer was on “FOX News” Sunday. Justice Scalia and Justice Breyer had an extensive debate last December, which is available for viewing on the Web—and in television archives. So there has been very extensive participation by Court members, which totally undercuts one of the arguments, that the notoriety would imperil the security of Supreme Court Justices.

It is also worth noting that a number of the Justices have stated support for televising the Supreme Court. For example, Justice Stevens, in an article by Henry Weinstein on July 14, 1989, said he supported cameras in the Supreme Court and told the annual Ninth Circuit Judicial Conference at about the same time that, “In my view, it is worth a try.”

Justice Stevens has been quoted recently stating his favorable disposition to televising the Supreme Court.

Justice Breyer, during his confirmation hearings in 1994, indicated support for televising Supreme Court proceedings. He has since equivocated, but has also noted that it would be a wonderful teaching device.

In a December 13, 2006 article by David Pereira, Justice Scalia said he favored cameras in the Supreme Court to show the public that a majority of the caseload involves dull stuff.

In December of 2000, an article by Marjorie Cohn noted Justice Ruth Bader Ginsburg's support of camera coverage, so long as it is gavel to gavel—which can be arranged.

Justice Alito, in his Senate confirmation hearings last year, said that as a member of the Third Circuit Court of Appeals he voted to admit cameras. He added that it would be presumptuous of him to state a final position until he

had consulted with his colleagues, if confirmed. But at a minimum, he promised to keep an open mind, noting that he had favored television in the Third Circuit Court of Appeals.

Justice Kennedy, according to a September 10, 1990, article by James Rubin, told a group of visiting high school students that cameras in the Court were "inevitable," as he put it. He has since equivocated, stating that if any of his colleagues raise serious objections, he would be reluctant to see the Supreme Court televised. Chief Justice Roberts said in his confirmation hearings that he would keep an open mind. Justice Thomas has opposed cameras. Justice David Souter has opposed televising the Supreme Court. Justice Souter has been the most outspoken opponent of televising the Supreme Court, saying if cameras rolled into the Supreme Court, they would roll over his—as he put it—over his dead body—a rather colorful statement. But there has been, as noted, considerable sentiment by quite a number of the Justices as to their personal views expressing favorable disposition toward televising the Supreme Court.

The question inevitably arises as to whether Congress has the authority to require televising Supreme Court proceedings, and I submit there is ample authority on Congress's generalized control over administrative matters in the Court. For example, it is the Congress which decides how many Justices there will be on the Court. It is remembered that President Roosevelt, in the mid to late 1930s, proposed a so-called "packing of the Court" plan to raise the number to 15. But that is a congressional judgment. The Congress decides when the Supreme Court will begin its term: on the first Monday of every October. The Congress decides what number will constitute a quorum of the Supreme Court: six. The Congress of the United States has instituted timelines that are required to be observed by the Supreme Court when determining timeliness in habeas corpus cases. So there is ample authority for the proposition that televising the Supreme Court would be constitutional.

There is an article which is due for publication in May 2007 by Associate Professor Bruce Peabody of the political science department of Fairleigh Dickinson University, and in that article, Professor Peabody makes a strong analysis that congressional action to televise the Supreme Court would be constitutional. Also, in that article Professor Peabody refers at length to the legislation which I introduced in 2005 and says that it would be constitutional and observes that:

A case could be made for reform giving rise to more wide-ranging and creative thinking of the role and status of the judiciary if the Supreme Court was, in fact, televised.

He further notes that:

Televising the Supreme Court could stimulate a more general discussion about whether other reforms of the court might be in order.

He notes that:

The so-called Specter bill would be meaningful in giving wider play to a set of conversations that have long been coursing through the academy about the relationship between the court and the Congress.

The Supreme Court itself, in the 1980 decision in *Richmond Newspapers v. Virginia*, implicitly recognized, perhaps even sanctioned, televising the Court because in that case, the Supreme Court noted that a public trial belongs not only to the accused but to the public and the press as well; and that people acquire information on Court proceedings chiefly through the print and electronic media. But we know as a factual matter that the electronic media, television, is the basic way of best informing the public about what the Supreme Court does.

There was enormous public interest in the case of *Bush v. Gore* argued in the Supreme Court in December of 2000 after the challenge had been made to the calculation of the electoral votes from the State of Florida and whether the so-called chads suggested or showed that Vice President Gore was the rightful claimant for those electoral votes or whether then-Governor Bush was the rightful claimant.

The streets in front of the Supreme Court chambers across the green from the Senate Chamber were filled with television trucks. At that time, Senator BIDEN and I wrote to Chief Justice Rehnquist urging that the proceedings be televised and got back a prompt reply in the negative.

But at least on that day the Supreme Court did release an audiotape when the proceedings were over, and the Supreme Court has made available virtually contemporaneous audio tapes since. But I suggest the audio tapes do not fill the bill. They do not have the audience. They do not have the impact. They do not convey the forcefulness that televising the Supreme Court would.

There has been considerable commentary lately about the Court's workload and the Court's caseload. Chief Justice Roberts, for example, noted that the Justices:

Hear about half the number of cases they did 25 years ago.

And, he remarked that from his vantage point, outside the Court:

They could contribute more to the clarity and uniformity of the law by taking more cases.

They have a very light backlog. In the 2005 term, only 87 cases were argued and 69 signed opinions were issued, which is a decrease from prior years. They have left many of the splits in the circuits undecided. Former Senator DeWine, when serving on the Judiciary Committee, asked Justice Alito about the unresolved authority at the circuit level. Now Justice Alito characterized that as "undesirable." But that happens because of the limited number of cases which the Supreme Court takes.

There has also been concern, as noted in an article by Stuart Taylor and Ben

Wittes captioned, "Of Clerks And Perks," that the four clerks per Justice constitute an undesirable allocation of resources, and the Taylor-Wittes article cites the Justice's extensive extracurricular traveling, speaking, and writing, in addition to their summer recesses and the vastly reduced docket as evidence that something needs to be done to spur the Court into taking more cases.

If the Court were to be televised, there would be more focus on what the Court is doing. That focus can be given without television, but once the Supreme Court becomes the center of attraction, the center of attention, articles such as that written by Taylor and Wittes would have much more currency.

The commentators have also raised a question about the pooling of the applications for certiorari. There were, in the 2005 term, some 8,521 filers. Most of those are petitions for certiorari. That is the fancy Latin word for whether the Court will grant process to hear the case from the lower courts. As we see, the Court acts on a very small number of those cases. Only 87 cases were argued that year in a term when more than 8,500 filings were recorded, most of those constituting cases which could have been heard. And, the Supreme Court has adopted a practice of the so-called "cert pool," a process used by eight of the nine Justices. Only Justice Stevens maintains a practice of reviewing the cert petitions himself on an individual basis, of course, assisted by his clerks. But when the Court is charged with the responsibility of deciding which cases to hear, it is my view that it is very problematic and, in my judgment, inappropriate for the Justices not to be giving individualized attention, at least through their clerks, and not having a cert pool where eight of the Justices have delegated the job of deciding which cases are sufficiently important to hear to a pool.

We do not know the inner workings of the pool, but I believe it is fair and safe to infer that the judgments are made by clerks. Precisely what the level of reference and what the level of consultation with the Justices is we do not know, but when an application is made to the Supreme Court of the United States to hear a case, it is my view that there ought to be individualized consideration.

That also appeared to be the view of now Chief Justice John Roberts, who said in a 1997 speech, according to a September 20, 2000, article in the *Legal Times* by reporter Tony Mauro where then-private practitioner John Roberts said he "found the pool disquieting, in that it made clerks a bit too significant in determining the Court's docket."

I would suggest that is an understatement, to give that kind of power to the clerks and, beyond that, to give that kind of power to the clerks in a pool, where the individual Justices do

not even make the delegation to their own clerks with whatever review they would then utilize but make that a delegation to a cert pool.

There have been many scholarly statements about the desirability of having greater oversight on what happens in the Supreme Court. Chief Justice William Howard Taft, who was the 10th Supreme Court Chief Justice and the 27th President of the United States, said that review and public scrutiny was the best way to keep the judges on their toes. And Justice Felix Frankfurter said that he longed for the day when the Supreme Court would receive as much attention as the World Series because the status of the Supreme Court depended upon its reputation with the people.

These are the exact words of Chief Justice William Howard Taft:

Nothing tends more to render judges careful in their decision and anxiously solicitous to do exact justice than the consciousness that every act of theirs is subject to the intelligent scrutiny of their fellow men and to candid criticism.

Justice Felix Frankfurter's exact words were:

If the news media would cover the Supreme Court as thoroughly as it did the World Series, it would be very important since "public confidence in the judiciary hinges on the public perception of it."

We have a continuing dialogue and a continuing discussion as to the role of the Supreme Court in our society. We have the cutting edge questions consistently coming to the Court. We have them deciding the issues of who will live, who will die, what will be the status of prayer in the schools, what will be the status of our election laws, and through the vagaries of due process of law and equal protection, there are many standards which the Court can adopt.

I was candidly surprised, in reviewing the recent Supreme Court decisions for the confirmation hearings on Chief Justice Roberts and Justice Alito, to find how far the Court had gone in striking down the power of Congress. It was 11 years between the confirmation proceeding on Justice Breyer and the confirmation proceeding on Chief Justice Roberts. With our workload here, it is not possible, even with responsibilities on the Judiciary Committee, even with responsibilities as chairman of the Judiciary Committee, to keep up with the Supreme Court opinions.

When I read *United States v. Morrison*, where the Supreme Court struck down the legislation protecting women against violence on a 5-to-4 decision because Chief Justice Rehnquist questioned our "method of reasoning," I wondered what kind of a transformation there was when you leave the Senate Chamber, where our columns are aligned exactly with the Supreme Court columns across the green, what kind of a transformation there was with method of reasoning that there is such superior status when going to the Court. Certainly I have

noted no complaint about Senators' method of reasoning when we confirm Supreme Court Justices.

Then we picked up the Americans with Disabilities Act. We had two cases—one involving Alabama which involved employment discrimination and one involving Tennessee which involved access by a paraplegic to the courtroom—dealing with exactly the same records. In the Alabama case, the Supreme Court declared 5 to 4 that the act of Congress was unconstitutional. In the Tennessee case, exactly on the same record, they decided the act was constitutional. What standard did they use? They adopted a standard on a 1997 Supreme Court decision in a case called *Boerne*. In that case, the Supreme Court decided they would render a constitutional judgment in a context where Congress had legislated under article V of the 14th amendment to preserve due process of law where the challenge was made by the State that the States were immune under the 11th amendment. The Supreme Court decided it would impose a test of whether the statute was "congruent and proportional." This standard had never been heard in jurisprudence before that time, "congruent and proportional." I defy anyone to say what those words mean in a standard which can be applied in a way which can be predicted by lawyers and understood by State legislators and understood by clients.

In a dissenting opinion, Justice Scalia chastised the Court for being, in effect, the taskmaster of the Congress, to see if the Congress had done its homework, whereas in prior cases the adequacy of the record was determined by a substantial record and the Court would defer to the judgment of Congress, which established, through lengthy hearings and proceedings, a very extensive record. In talking to my colleagues, those decisions by the Supreme Court undercutting congressional power were not known.

Then we have the Supreme Court being the final arbiter on what happens on Executive power, what happens at Guantanamo, what is the responsibility of the President of the United States on military commissions, what is the responsibility under the Geneva Conventions. Here again, I respect the Supreme Court's decisions, respect their role as the final arbiter, but say that there ought to be an understanding by the public. It may be that there will never be a case which has more impact on the working of Government than the decision as to whether the Florida electoral votes would be counted for George Bush or for Albert Gore in the famous case of *Bush v. Gore*.

A prior version of this legislation came out of committee last year on a bipartisan 12-to-6 vote. It has very substantial cosponsorship. I urge my colleagues to consider it carefully. I urge the distinguished majority leader to look for a spot to bring such legislation to the Senate.

There is companion legislation which Senator GRASSLEY is offering which gives the courts—the Supreme Court, courts of appeals, trial courts—the discretion to have television. My legislation, S. 344, is more targeted. It has a requirement as to the Supreme Court televising its proceedings unless there is some due-process violation which is considered on a case-by-case basis.

When the article comes out by Professor Bruce Peabody in the University of Notre Dame Law Journal, I commend it to everyone's attention. I have advance text, have cited some of Professor Peabody's conclusions on his decision that the legislation has very important public policy benefits and, as he analyzes it, is constitutional.

I ask unanimous consent that the full text of the written statement be printed in the CONGRESSIONAL RECORD as if recited, and I ask that prior to the introduction of that prepared statement, my statement appear, that the comments I have made up until now have been a summary of that more extensive statement, an extemporaneous summary, and the full statement follows. Sometimes people reading the CONGRESSIONAL RECORD wonder why there is so much repetition, and I think a word of explanation that the initial statement is a summary and the formal statement is added would explain why the repetition exists.

I ask all of this explanation be printed in the RECORD. Finally, I ask that Senator CORNYN be included as a cosponsor.

The PRESIDING OFFICER (Mr. WEBB). Without objection, it is so ordered.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

SENATOR SPECTER'S TALKING POINTS UPON INTRODUCTION OF S. 344, A BILL TO PERMIT THE TELEVISION OF SUPREME COURT PROCEEDINGS

Mr. SPECTER. Mr. President, once again I seek recognition to introduce legislation that will give the public greater access to our Supreme Court. This bill requires the high Court to permit television coverage of its open sessions unless it decides by a majority vote of the Justices that allowing such coverage in a particular case would violate the due process rights of one or more of the parties involved in the matter.

The purpose of this legislation is to open the Supreme Court doors so that more Americans can see the process by which the Court reaches critical decisions that affect this country and all Americans. The Supreme Court makes pronouncements on Constitutional and Federal law that have a direct impact on the rights and lives of all of us. Televising the Court's oral arguments will enhance the public's understanding of the issues and the impact of, and reasons for, the Court's decisions.

I believe that now is the right time for this legislation. In his 2006 Year-End Report on the Federal Judiciary, Chief Justice Roberts noted that "The total number of cases filed in the Supreme Court increased from 7,496 filings in the 2004 Term to 8,521 filings in the 2005 Term—an increase of 13.7 percent." Despite this increase in petitions, during the 2005 Term, only 87 cases were argued, and 69

signed opinions were issued. These 69 signed opinions compares to 74 opinions in the 2004 Term.

A recent article by law professor Jeffrey Rosen in *The Atlantic Monthly* points out that “Fifty-four percent of the decisions in the first year of the Roberts Court were unanimous” and “the Court issued more consecutive unanimous opinions than at any other time in recent history.” I commend the Supreme Court and Chief Justice Roberts for what appears to be an increase in consensus, as reflected in the unanimity in these cases.

But I am concerned about the steady decline each year in the number of Supreme Court full opinions; the number of cases decided by the slimmest majority of five justices; and the number of opinions that have multiple dissents and concurrences that lead to more confusion than clarity in the law. I believe that permitting cameras into oral arguments is one way to shed light on the nature of the work of the Supreme Court and to improve public awareness of the Court's workload, the Court's institutional prerogatives, and even judicial personalities. The public wants to know: Who are these judges and how do they do what they do?

A January 7, 2007 article by Robert Barnes in the *Washington Post* observes that “After decades of decline in its caseload, the [Supreme] Court is once again on track to take its fewest number of cases in modern history.” The article notes that during his confirmation proceedings, Chief Justice Roberts observed that the justices “hear about half the number of cases they did 25 years ago” and he remarked that from his vantage point outside the court, “they could contribute more to the clarity and uniformity of the law by taking more cases.” Similarly, during his confirmation hearings and in response to questions from Senator DeWine, Justice Alito described unresolved splits of authority at the circuit court level as “undesirable.”

The Barnes article posits six possible reasons for the Court's waning docket: (1) 1988 legislation passed at the Court's request that limits the Court's mandatory review docket (2) the change in justices over the past couple of decades, (3) a decrease in splits among the circuits due to an increasingly homogeneous appellate judiciary appointed by Republican administrations, (4) a decrease in appeals by the Federal government as a result of more government wins in the lower courts, (5) the “cert pool” process used by eight of the nine Justices, which relies upon law clerks to recommend which cases are “cert-worthy;” and (6) the possibility that justices on a closely divided court are hesitant to grant certiorari if they think their view will not prevail in the ultimate outcome of a case. I have no particular view on the merits of these possible explanations but they do make me increasingly curious about the Court and its workload.

In a September 2005 article in *The Atlantic Monthly*, Stuart Taylor, Jr. suggests, “As our Supreme Court justices have become remote from the real world, they've also become more reluctant to do real work—especially the sort of quotidian chores done by prior justices to ensure the smooth functioning of the judicial system. The Court's overall productivity—as measured by the number of full, signed decisions—has fallen by almost half since 1985. Clerks draft almost all the opinions and perform almost all the screening that leads to the dismissal without comment of 99 percent of all petitions for review. Many of the cases dismissed are the sort that could be used to wring clear perversities and inefficiencies out of our litigation system—especially out of commercial and personal-injury litigation.” Mr. Taylor con-

cludes the article by exclaiming, “Quietly our Supreme Court has become a sort of aristocracy—unable or unwilling to clearly see the workings, glitches, and peculiarities of the justice system over which it presides from such great altitude.”

Mr. Taylor's frustration with the Supreme Court may have reached its zenith when, in July of 2006, he coauthored an article with Benn Wittes entitled, “Of Clerks and Perks.” In this piece the authors suggest that “an exasperated Congress” should “fire” the Court's clerks by reducing the budget for clerks from four (4) per justice to one (1). Mr. Taylor and Mr. Wittes cite the justices' extracurricular traveling, speaking and writing, in addition to their summer recesses and vastly reduced docket as evidence that something needs to be done to spur the Court into taking up more cases. According to the authors, terminating ¾ of the clerks would end the justices' “debilitating reliance on twentysomething law-school graduates” and “shorten their tenure by forcing them to do their own work, making their jobs harder and inducing them to retire before power corrupts absolutely or decrepitude sets in.”

I do not necessarily agree with Mr. Taylor or Mr. Wittes about what ails the Supreme Court. I do, however, strongly agree with their observation that “Any competent justice should be able to handle more than the current average of about nine majority opinions a year. And those who don't want to work hard ought to resign in favor of people who do.”

Shortly after Taylor and Wittes issued their acerbic diatribe against the Court for its failure to grant certiorari in more cases, a September 20, 2006 article by *Legal Times* reporter Tony Mauro observed that eight of the nine sitting justices, including the recently confirmed Chief Justice Roberts and Justice Alito, would continue to participate in the Supreme Court's law clerk cert-pool. Mauro describes the cert-pool as an “arrangement, devised in 1972, [that] radically changed what happens when a petition for review or certiorari comes in to the court. Instead of being reviewed separately by nine clerks and/or nine justices, it is scrutinized for the pool, presumably in greater depth, by one clerk, who then writes a memo for all the justices in the pool.” Mr. Mauro goes on to remind us that in a 1997 speech John Roberts gave while in private practice, “he found the pool ‘disquieting’ in that it made clerks ‘a bit too significant’ in determining the court's docket.”

A December 7, 2006 article by Linda Greenhouse observed that “The Court has taken about 40 percent fewer cases so far this term than last. It now faces noticeable gaps in its calendar for late winter and early spring. The December shortfall is the result of a pipeline empty of cases granted last term and carried over to this one.” Looking back at last term, Ms. Greenhouse observed, “The number of cases the court decided with signed opinions last term, 69, was the lowest since 1953 and fewer than half the number the court was deciding as recently as the mid-1980s.” Ms. Greenhouse goes on to note that 16 of the 69 cases—about 23 percent—were decisions with a split of five to four.

On January 11, 2007, in an article by Brooke Masters and Patti Waldmeir, the *Financial Times* tells how “For years, the court declined to hear many cases that most profoundly affected corporate America.” Ms. Masters and Ms. Waldmeir note that 44 percent of the Supreme Court's docket this term includes cases involving business, up from 30 percent in the previous two terms. Nonetheless, they note, “Far too often . . . Supreme Court rulings cast as much ambiguity as they resolve.” The authors go on to quote Steve Bok, general counsel of the

U.S. Chamber of Commerce as saying he'd “rather have a bad decision than that's clear than an OK decision that's not.” According to Bok, “Ninety percent of the time, if you get clarity in a decision with a definitive holding, you at least know what your obligations are, and even if you don't like the opinion you are much less likely to get in trouble with litigation.” Bok said Chief Justice Roberts “gets this” and “understands the importance of clarity” yet Bok notes that “in order to get that unanimity the decisions tend to be more narrow [and] it doesn't give you much advice on what to do going forward.”

I should also note that recent news articles point out the high Court has become more media friendly—even though the same articles deem the prospect of televised proceedings “remote.” A December 25, 2006 article by Mark Sherman observes “Lately . . . some members of the court have been popping up in unusual places—including network television news programs—and talking about more than just the law.” Mr. Sherman notes with some irony that then-Chief Justice “Rehnquist could stroll around the court, unrecognized by tourists. Justice Anthony Kennedy snapped a photograph for visitors who had no idea who he was and Justice John Paul Stevens was once asked to move out of the way by a picture-taking tourist.” The article suggests that despite the Supreme Court's reticence about cameras in oral arguments, Chief Justice “Roberts believes its credibility will be enhanced if the justices appear less remote.”

Frankly, I agree with the view that making the justices less remote adds to the credibility of the Supreme Court. I also believe that public understanding may help heal some of the deep division and even cynicism we have in some segments of our society. This is why I'm introducing legislation to permit cameras into oral arguments. As our 27th President and 10th Chief Justice William Howard Taft teaches, “Nothing tends more to render judges careful in their decision and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep judges alive to the reasonable demands of those they serve.”

For their part, some of the justices have expressed an openness to the idea of allowing a broader audience to see oral arguments.

Chief Justice Roberts, in addition to comments about the court needing to appear less remote, stated at his 2005 confirmation hearing upon being nominated as Chief Justice, “Well, you know my new best friend, [former] Sen. Thompson assures me that television cameras are nothing to be afraid of. But, I don't have a set view on that.”

Justice Alito, at his Senate Confirmation hearings in 2006, said that as a member of the 3rd Circuit Court of Appeals, he voted to admit cameras, but a majority of his colleagues rejected the idea. In response to a question I posed, Justice Alito said, “I argued we should do it” but he went on to qualify his personal belief by saying, “it would be presumptuous for me to talk about it right now” with respect to the Supreme Court. Justice Alito pledged he would “keep an open mind despite the position I took on the circuit court.”

Justice Breyer, during his confirmation hearings in 1994, indicated support for televised Supreme Court proceedings. He has more recently stated, at an event in late

2005, that cameras in the Supreme Court “would be a wonderful teaching device” but might become a symbol for lower federal courts and state courts on the advisability of cameras in courtrooms. Justice Breyer noted that “not one of us wants to take a step that could undermine the court as an institution” and expressed the hope that “eventually the answer will become clear”

Justice Stevens, according to a July 14, 1989 article by Henry Weinstein in the *Times Mirror*, appears to support cameras and he told the annual 9th Circuit Judicial Conference attendees, “In my view, it’s worth a try.”

Justice Kennedy, according to a September 10, 1990 article by James H. Rubin, told a group of visiting high school students that cameras in the Court were “inevitable.” But Justice Kennedy later stated that “a number of people would want to make us part of the national entertainment network.” In testimony before the Commerce, Justice, State and Judiciary Subcommittee of the House Appropriations Committee in March of 1996, Justice Kennedy pledged, “as long as any of my colleagues very seriously objects, I shall join with them.”

Justice Thomas, in an October 27, 2006 article by R. Robin McDonald, is quoted as saying, “I’m not all that enthralled with that idea. I don’t see how it helps us do our job. I think it may distract from us doing our job.” Justice Thomas added that if 80 percent of the appellate process is wrapped up in the briefs, “How many of the people watching will know what the case is about if they haven’t read the briefs?” Justice Thomas went on to suggest the viewing public would have a “very shallow” level of understanding about the case.

On October 10, 2005, Justice Scalia, opposed an earlier version of my bill, stating, “We don’t want to become entertainment I think there’s something sick about making entertainment out of real people’s problems. I don’t like it in the lower courts, and I don’t particularly like it in the Supreme Court.” Yet a recent December 13, 2006, article by David Perara reports that Justice Scalia favors cameras in the Supreme Court to show the public that a majority of the caseload involves, “Internal Revenue code, the [Employee Retirement Income Security Act], the bankruptcy code—really dull stuff.”

Justice Ginsburg made a similar observation: “The problem is the dullness of most [Supreme] Court proceedings.” This comment was in a December 2000 article by Marjorie Cohen who noted Justice Ginsburg’s support of camera coverage so long as it is gavel-to-gavel.

Justice Scalia’s, Justice Thomas’ and Justice Ginsburg’s points are well taken. The public should see that the issues decided by the Court are not simple and not always exciting, but they are, nonetheless, very important.

So I have to disagree with Justice Souter, who appears to be the staunchest opponent of cameras in the Supreme Court and who famously said in 1996, “I can tell you the day you see a camera come into our courtroom, it is going to roll over my dead body.”

Many years ago, Justice Felix Frankfurter may have anticipated the day when Supreme Court arguments would be televised when he said that he longed for a day when: “The news media would cover the Supreme Court as thoroughly as it did the World Series, since the public confidence in the judiciary hinges on the public’s perception of it, and that perception necessarily hinges on the media’s portrayal of the legal system.” It is hard to justify continuing to exclude cameras from the courtroom of the Nation’s highest court. As one legal commentator observes: “An effective and legitimate way to

satisfy America’s curiosity about the Supreme Court’s holdings, Justices, and modus operandi is to permit broadcast coverage of oral arguments and decision announcements from the courtroom itself.”

In recent years watershed Supreme Court precedents, have been joined by important cases like *Hamdi*, *Rasul* and *Roper*—all cases that affect fundamental individual rights. In *Hamdi v. Rumsfeld*, 2004, the Court concluded that although Congress authorized the detention of combatants, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker. The Court reaffirmed the Nation’s commitment to constitutional principles even during times of war and uncertainty.

Similarly, in *Rasul v. Bush*, 2004, the Court held that the Federal habeas statute gave district courts jurisdiction to hear challenges of aliens held at Guantanamo Bay, Cuba in the U.S. War on Terrorism. In *Roper v. Simmons*, a 2005 case, the Court held that executions of individuals who were under 18 years of age at the time of their capital crimes is prohibited by Eighth and Fourteenth Amendments.

Then on June 27, 2005, the high Court issued two rulings regarding the public display of the Ten Commandments. Each opinion was backed by a different coalition of four, with Justice Breyer as the swing vote. The only discernible rule seems to be that the Ten Commandments may be displayed outside a public courthouse (*Van Orden v. Perry*), but not inside (*McCreary County v. American Civil Liberties Union*) and may be displayed with other documents, but not alone. In *Van Orden v. Perry*, the Supreme Court permitted a display of the Ten Commandments to remain on the grounds outside the Texas State Capitol. However, in *McCreary County v. ACLU*, a bare majority of Supreme Court Justices ruled that two Kentucky counties violated the Establishment Clause by erecting displays of the Ten Commandments indoors for the purpose of advancing religion. While the multiple concurring and dissenting opinions in these cases serve to explain some of the confounding differences in outcomes, it would have been extraordinarily fruitful for the American public to watch the Justices as they grappled with these issues during oral arguments that, presumably, reveal much more of their deliberative processes than mere text.

These are important cases, but does the public understand how the Court grappled with the issues? When so many Americans get their news and information from television, how can we keep them in the dark about how the Court works?

When deciding issues of such great national import, the Supreme Court is rarely unanimous. In fact, a large number of seminal Supreme Court decisions have been reached through a vote of 5-4. Such a close margin reveals that these decisions are far from foregone conclusions distilled from the meaning of the Constitution, reason and the application of legal precedents. On the contrary, these major Supreme Court opinions embody critical decisions reached on the basis of the preferences and views of each individual justice. In a case that is decided by a vote of 5-4, an individual justice has the power by his or her vote to change the law of the land.

5-4 SPLIT DECISIONS SINCE THE BEGINNING OF THE OCTOBER 2005 TERM

Since the beginning of its October 2005 Term when Chief Justice Roberts first began hearing cases, the Supreme Court has issued

twelve (12) decisions with a 5-4 split out of a total of 96 decisions—the most recent of which, *Osborn v. Haley*, was issued few days ago (January 22, 2007). The Court has also issued four (4) decisions with votes of 5-3, with one justice recused. Finally, it has issued a rare 5-2 decision in which Chief Justice Roberts and Justice Alito took no part. In sum, since the beginning of its October 2005 Term, the Supreme Court has issued seventeen (17) decisions establishing the law of the land in which only five (5) justices explicitly concurred. Many these narrow majorities occur in decisions involving the Court’s interpretation of our Constitution—a sometimes divisive endeavor on the Court. I will not discuss all 17 of these narrow majority cases, but will describe a few to illustrate my point about the importance of the Court and its decisions in the lives of Americans.

EIGHTH AMENDMENT, DEATH PENALTY & AGGRAVATING FACTORS OR MITIGATING EVIDENCE

The first 5-4 split decision, decided on January 11, 2006, was *Brown v. Sanders*, which involves the death penalty. In that case the Court held that in death penalty cases, an invalidated sentencing factor will render the sentence unconstitutional by reason of its adding an improper element to the aggravation scale unless one of the other sentencing factors enables the sentencer to give aggravating weight to the same facts and circumstances. The majority opinion was authored by Justice Scalia and joined by Chief Justice Roberts and Justices O’Connor, Kennedy and Thomas. Justice Stevens filed a dissenting opinion in which Justice Souter joined. Similarly, Justice Breyer filed a dissenting opinion in which Justice Ginsburg joined.

Last November the Supreme Court decided *Ayers v. Belmontes*, a capital murder case in which the Belmontes contended that California law and the trial court’s instructions precluded the jury from considering his forward looking mitigation evidence suggesting he could lead a constructive life while incarcerated. In *Ayers* the Supreme Court found the Ninth Circuit erred in holding that the jury was precluded by jury instructions from considering mitigation evidence. Justice Kennedy authored the majority opinion while Justice Stevens wrote a dissent joined by three other justices.

Other 5-4 split decisions since October 2005 include *United States v. Gonzalez-Lopez*, concerning whether a defendant’s Sixth Amendment right to counsel was violated when a district court refused to grant his paid lawyer permission to represent him based upon some past ethical violation by the lawyer (June 26, 2006); *LULAC v. Perry*, deciding whether the 2004 Texas redistricting violated provisions of the Voting Rights Act (June 28, 2006); *Kansas v. Marsh*, concerning the Eighth and Fourteenth Amendments in a capital murder case in which the defense argued that a Kansas statute established an unconstitutional presumption in favor of the death sentence when aggravating and mitigating factors were in equipoise (April 25, 2006); *Clark v. Arizona*, a capital murder case involving the constitutionality of an Arizona Supreme Court precedent governing the admissibility of evidence to support an insanity defense (June 29, 2006); and *Garcetti v. Ceballos*, a case holding that when public employees make statements pursuant to their official duties they are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline (May 30, 2006).

THE JUSTICES HAVE SPLIT 5-3 FOUR (4) TIMES
SINCE OCTOBER 2005

FOURTH AMENDMENT WARRANT REQUIREMENT

In *Georgia v. Randolph*, (March 22, 2006), a 5-3 majority of the Supreme Court held that a physically present co-occupant's stated refusal to permit a warrantless entry and search rendered the search unreasonable and invalid as to that occupant. Justice Souter authored the majority opinion. Justice Stevens filed a concurring opinion as did Justice Breyer. The Chief Justice authored a dissent joined by Justice Scalia. Moreover, Justice Scalia issued his own dissent as did Justice Thomas. In *Randolph*, there were six opinions in all from a Court that only has nine justices. One can only imagine the spirited debate and interplay of ideas, facial expressions and gestures that occurred in oral arguments. Audio recordings are simply inadequate to capture all the nuance that only cameras could capture and convey.

ACTUAL INNOCENCE AND HABEAS CORPUS

In *House v. Bell*, a 5-3 opinion authored by Justice Kennedy (June 12, 2006), the Supreme Court held that because House had made the stringent showing required by the actual innocence exception to judicially-established procedural default rules, he could challenge his conviction even after exhausting his regular appeals. Justice Alito took no part in considering or deciding the House case. It bears noting, however, that if one Justice had been on the other side of this decision it would have resulted in a 4-4 tie and, ultimately, led to affirming the lower court's denial of House's post-conviction habeas petitions due to a procedural default.

MILITARY COMMISSIONS, GENEVA CONVENTIONS AND HABEAS CORPUS

In *Hamdan v. Rumsfeld*, a 5-3 decision in which Chief Justice Roberts did not participate, the Supreme Court held that Hamdan could challenge his detention and the jurisdiction of the President's military commissions to try him despite the 2005 enactment of the Detainee Treatment Act. A thin majority of the justices held that, although the DTA states that "no court . . . shall have jurisdiction to hear or consider . . . an application for . . . habeas corpus filed by . . . an alien detained . . . at Guantanamo Bay," the President could not establish a military commission to try Hamdan unless Congress granted him the authority through legislation. This case was of great interest and great importance, and was one of a handful of recent cases in which the Supreme Court released audiotapes or oral arguments almost immediately after they occurred. The prompt release of the audiotapes was good, but it would have been far better to allow the public to watch the parties' advocates and the Justices grapple with the jurisdictional, constitutional and merits-related questions that were addressed in that case. With due respect to Justices Scalia and Ginsberg, watching the advocates respond as the Justices pepper them with questions is something that should be seen and heard.

14TH AMENDMENT DUE PROCESS AND NOTICE CONCERNING TAX LIENS ON HOMES

In another 5-3 case, *Jones v. Flowers*, (April 26, 2006), the Supreme Court considered whether the government must take additional reasonable steps to provide notice before taking the owner's property when notice of a tax sale is mailed to the owner and returned undelivered. The public can readily understand this issue. In an opinion by Chief Justice Roberts, the Court held that where the Arkansas Commissioner of State Lands had mailed Jones a certified letter and it had been returned unclaimed, the Commissioner had to take additional reasonable steps to provide Jones notice. Justices Thomas,

Scalia and Kennedy dissented and Justice Alito took no part in the decision.

Not only lawyers who might listen to the audio tapes and read the full opinions, but all citizens could benefit from knowing how the Court grapples with legal issues related to their rights—in one case something as straightforward as the right to own one's home as it may be affected by unclaimed mail—and in another the right of someone who is in prison to be heard by a court. My legislation creates the opportunity for all interested Americans to watch the Court in action in cases like these.

Regardless of one's views concerning the merits of these decisions, the interplay between the government, on the one hand, and the individual on the other is something many Americans want to understand more fully. So, it is with these watershed decisions in mind that I introduce legislation designed to make the Supreme Court less remote. Millions of Americans recently watched the televised confirmation hearings for our two newest Justices. Americans want information, knowledge, and understanding; in short, they want access.

In a democracy, the workings of the government at all levels should be open to public view. With respect to oral arguments, the more openness and the broader opportunity for public observation—the greater will be the public's understanding and trust. As the Supreme Court observed in *Press-Enterprise Co. v. Superior Court* (1986), "People 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." It was in this spirit that the House of Representatives opened its deliberations to meaningful public observation by allowing C-SPAN to begin televising debates in the House chamber in 1979. The Senate followed the House's lead in 1986 by voting to allow television coverage of the Senate floor.

JUDICIARY COMMITTEE HEARINGS AND ACTION ON CAMERAS IN THE FEDERAL COURTS

On November 9, 2005, the Judiciary Committee held a hearing to address whether Federal court proceedings should be televised generally and to consider S. 1768, my earlier version of this bill, and S. 829, Senator GRASSLEY's "Sunshine in the Courtroom Act of 2005." During the November 9 hearing, most witnesses spoke favorably of cameras in the courts, particularly at the appellate level. Among the witnesses favorably disposed toward the cameras were Peter Irons, author of *May It Please the Court*, Seth Berlin, a First Amendment expert at a local firm, Brian Lamb, founder of C-SPAN, Henry Schleif of Court TV Networks, and Barbara Cochran of the Radio-Television News Directors Association and Foundation.

A different view was expressed by Judge Jan DuBois of the Eastern District of Pennsylvania, who testified on behalf of the Judicial Conference. Judge DuBois warned of concerns, particularly at the trial level, where witnesses may appear uncomfortable because of cameras, and thus might seem less credible to jurors. I note, however, that these would not be issues in appellate courts, where there are no witnesses or jurors.

The Judiciary Committee considered and passed both bills on March 30, 2006. The Committee vote to report S. 1768 was 12-6, and the bill was placed on the Senate Legislative Calendar. Unfortunately, due to the press of other business neither bill was allotted time on the Senate Floor.

CONGRESSIONAL AUTHORITY TO LEGISLATE CAMERAS IN THE COURT

In my judgment, Congress, with the concurrence of the President, or overriding his veto, has the authority to require the Su-

preme Court to televise its proceedings. Such a conclusion is not free from doubt and may be tested in the Supreme Court, which will have the final word. As I see it, there is no constitutional prohibition against this legislation.

Article 3 of the Constitution states that the judicial power of the United States shall be vested "in one Supreme Court and such inferior Courts as the Congress may from time to time ordain and establish." While the Constitution specifically creates the Supreme Court, it left it to Congress to determine how the Court would operate. For example, it was Congress that fixed the number of justices on the Supreme Court at nine. Likewise, it was Congress that decided that any six of these justices are sufficient to constitute a quorum of the Court. It was Congress that decided that the term of the Court shall commence on the first Monday in October of each year, and it was Congress that determined the procedures to be followed whenever the Chief Justice is unable to perform the duties of his office. Congress also controls more substantive aspects of the Supreme Court. Most importantly, it is Congress that in effect determines the appellate jurisdiction of the Supreme Court. Although the Constitution itself sets out the appellate jurisdiction of the Court, it provides that such jurisdiction exists "with such exceptions and under such regulations as the Congress shall make."

The Supreme Court could permit television through its own rule but has decided not to do so. Congress should be circumspect and even hesitant to impose a rule mandating television coverage of oral arguments and should do so only in the face of compelling public policy reasons. The Supreme Court has such a dominant role in key decision-making functions that its proceedings ought to be better known to the public; and, in the absence of a Court rule, public policy would be best served by enacting legislation requiring the televising of Supreme Court proceedings.

My legislation embodies sound policy and will prove valuable to the public. I urge my colleagues to support this bill. Finally, I ask unanimous consent that the text of the bill be printed in the RECORD and I yield the Floor.

Mr. SPECTER. I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. DORGAN. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

Mr. DORGAN. Mr. President, by previous order, I am to be recognized; is that correct?

The PRESIDING OFFICER. That is correct, for 45 minutes.

VA HEALTH CARE

Mr. DORGAN. Mr. President, on Saturday of this past weekend, I was in Minneapolis, MN, for some meetings. In the Minneapolis Star Tribune newspaper, there was on the front page a story that I read with substantial disappointment and concern. I will relate it to my colleagues.

Kevin Giles for the Minneapolis Star Tribune wrote a story:

This Marine's death came after he served in Iraq.