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GEE WHIZ, THE SKY IS FALLING!

The Honorable Boyce F. Martin, Jr. †*

I am reminded of Chicken Little’s famous mantra as I listen to some Supreme Court Justices’ reactions to the prospect of televising oral arguments. Their fears—such as Justice Kennedy’s warning that allowing cameras in the courtroom may change the Court’s dynamics—are, in my opinion, overblown. And some comments, most notably Justice Souter’s famous exclamation in a 1996 House subcommittee hearing that “the day you see a camera come into our courtroom, it’s going to roll over my dead body,” make it sound as if the Justices have forgotten that our nation’s court system belongs to the public, not merely the nine Justices who sit atop it. I write this essay in order to give my own perspective. Having served as a judge on the Sixth Circuit Court of Appeals for nearly twenty-eight years, I believe that I am in a unique position to understand the concerns raised by televising oral arguments. I can make this guarantee—televising the Supreme Court’s oral arguments will not produce the disastrous results predicted by some frightened Justices; rather, it will yield positive results. Most notably, it will increase the public’s knowledge of the appellate process.

Recent studies have revealed disturbing data about our country’s understanding of how its government works. A survey of 1213 adults conducted by Zogby International last year showed that only 42% could name the three branches of the federal government. Moreover, while 77% of those surveyed could identify two of Snow White’s seven dwarfs, only 24% could name two current Supreme Court Justices. Recognizing this discrepancy, I am baffled that we have not done more to exploit visual media as a way of educating the public about our system of government. We are a visual society. Americans, and particularly young Americans, turn to television and the Internet as their main sources of news. I believe that the importance of increasing public awareness trumps many of the concerns expressed by the Justices when they consider allowing cameras in the Court.

One of these concerns, as Justice Kennedy has recognized, is the “soundbite” problem. He believes that televising oral arguments will give the Justices the “insidious temptation” to speak in short, catchy soundbites that can be easily relayed to a general audience—perhaps this is because most television channels, save for a few such as C-SPAN, will not devote precious airtime to televising an oral argument in its entirety. While Justice Kennedy’s fear of grandstanding is understandable, I believe it is exaggerated.

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Although the production of soundbites might be an adverse consequence of televising arguments, this problem is not terribly different than the problems that exist under our current practices. Reporters already attend oral arguments, so any Justice who truly wants to create a stir with a catchy soundbite already has the means by which to do so. And can't it be said that appellate judges' *written* opinions yield a soundbite problem of equal magnitude? To speak from personal experience, I do not believe that the press has ever printed a full copy of one of my opinions. Indeed, I am lucky to get an entire paragraph printed. Not surprisingly, the parts of my opinions that do get quoted are never the mundane details. Standards of review and complex procedural postures are not the stuff that keeps the media in business. Quite to the contrary, the press focuses on the most controversial or entertaining parts of my opinions, even if those parts are relatively unimportant to the legal issues in dispute. The advent of blogs has dramatically increased the quantity of these—shall we call them—“wordbites” dispensed to the public. It is true that video broadcasts of Supreme Court oral arguments will make it easier for the media to deliver the most interesting tidbits of legal proceedings to the public, as written opinions and audio recordings clearly have their limitations. However, the remote chance that a Supreme Court Justice will become the appellate version of Judge Judy is significantly outweighed by the very real possibility that even snippets of the Justices in action will help improve public awareness of how the Court operates.

I find it rather bewildering that some of the same Justices who have serious reservations about placing cameras in the courtroom have also thrust themselves into the public spotlight through their lectures, debates, and books. While in some instances the Justices have refused to discuss certain areas of law, generally their views and individual approaches to resolving legal issues are not exactly shrouded in secrecy. We are not usually privy to this information because we have actually read the Justices' books cover-to-cover or attended each of their lectures. Rather, on a nearly daily basis, we read articles and blogs summarizing the Justices' writings or watch video footage of the Justices, so that by the time the Justices' views reach us, they have been reduced to easy-to-swallow bites. Given that we already have so many snippets of the Justices' attitudes and reasonings from these extracurricular activities, I am not persuaded that it is a bad idea to receive so-called soundbites from the Justices while they are performing their duties for the country.

I trust that even with cameras aimed at them, the Justices will maintain the same degree of decorum and decency. I do not deny there is a risk that some lawyers arguing before the Court will use their time to pander to public opinion, perhaps jeopardizing their clients' interests or making a mockery of the Court. But this is quite unlikely to become a big problem. In the Sixth Circuit, without a television camera in sight, my colleagues and I have our fair share of grandstanding lawyers. When lawyers' arguments exceed the bounds of propriety, we simply rein them in. Likewise, the Justices of the Supreme Court (as I am sure they have done many times before) can do the same. Even if cameras do encourage some lawyers to showboat, other

lawyers will surely take advantage of the opportunity to study oral arguments in order to improve their own appellate advocacy, which will in turn serve the interests of their clients.

One upshot of allowing cameras in the Supreme Court, which will perhaps allay some of Justice Kennedy's fears, is the fact that the Internet—not television—will likely be the primary medium over which Supreme Court oral arguments will be broadcast. Unlike television, the Internet will allow viewers to watch entire oral arguments anytime and anywhere, thus minimizing the number of people who receive their "Supreme Court TV" solely in soundbite format.

The most serious concern posed by placing cameras in the Supreme Court is the danger that the due process rights of the parties—particularly criminal defendants—could be undermined. This is easily preventable. In fact, the legislation introduced in January by Senator Arlen Specter contains an explicit exception to televising oral arguments where a majority of the Justices finds that "allowing such coverage in a particular case would constitute a violation of the due process rights of 1 or more of the parties before the Court." Such a provision creates a win-win situation: the public has access to proceedings before the Supreme Court, but consideration of the parties' interests remains paramount.

Of course, judges in most states have the option of allowing trial court proceedings to be televised. The televising of a trial is undeniably far more dangerous to a party's rights than the televising of an appellate argument over discrete issues of law. Such public portrayal can often affect the behavior of the trial's key players, ultimately influencing the verdict. And even if a mistrial was declared due to this influence (or any other trial errors), the damage already may have been done: after all, following a highly publicized trial where the proceedings were on display for a nation to witness, the parties would be hard-pressed to find unbiased jurors in *any* venue. In addition to affecting the substance of the proceedings, televising a highly publicized trial could also threaten the safety of witnesses and jurors. Yet, despite the dangers inherent in televising trials, we have long recognized the importance of transparent trials. Why then are we reluctant to televise those proceedings that adjudicate the issues of law that may ultimately determine the outcome of future trials?

I, like many Americans, have been a spectator to some of the more unfortunate instances of televised trials. Most memorable is the infamous trial of O.J. Simpson, which was nothing short of an embarrassment. And recently we have found ourselves baffled by the carnivalesque antics of Florida Circuit Judge Larry Seidlin, whose handling of the Anna Nicole Smith case was replete with sobbing, jokes, and confessions of his personal feelings about the case. At least we can take comfort in knowing that in states like California and Florida, judges are elected. Considering the fact that people rarely read judicial opinions, I can think of no better way of informing the public than to allow them to observe how their elected jurists run their courtrooms. Of course, federal judges have the benefit of lifetime tenure, which might eliminate some incentive to act with justice and fairness

in the courtroom. But the elected officials who nominate and confirm judges are still accountable to the public, and many voters consider the issue of judicial appointments before casting their ballots. If placing cameras in courtrooms reveals flaws in our system or causes judges to behave differently, then so be it. The costs of televising oral arguments are surely outweighed by the reward of a more well-informed public. Nationwide exposure of these flaws will do more to hasten their elimination than will continuing with the status quo.

Finally, another fear expressed by some is that televising oral arguments will jeopardize the Justices' safety. Such an argument is untenable. A quick Google search of my name yields nearly everything I have ever done in my judicial career, complete with photographs. The same can clearly be said for each of the nine Supreme Court Justices. Thus, while safety is a legitimate concern, the televising of oral arguments presents no new security risks.

In sum, I believe that allowing cameras into the Supreme Court will have an overall positive effect. The public's knowledge of the appellate process and awareness of the most important legal issues facing our nation will surely increase. As I need not remind our Justices, our court system was not created for their benefit. The proceedings over which they preside are intended to resolve the legal disputes of the parties before them and to interpret the law for all of us. Just as the public has a right to know what its Congress and President are up to, it has a right to know what happens at the Supreme Court. As the recent slew of cases involving executive powers and Congress's authority under the Commerce Clause have illustrated, the high Court's business is just as important as that of the other two branches. Televising the Justices' questions and comments on the bench will facilitate the public's understanding and appreciation of how the Supreme Court reaches decisions that are often deemed controversial (but perhaps are simply misunderstood). Our nation's highest court is open to the public, and theoretically anyone can get a firsthand glimpse of oral arguments, so long as he or she arrives in time to get seat. Yet given the technology we have at our disposal, it is disappointing that right now only those who have the honor of arguing before the Court, the privilege of being one of the select members of the press for whom a seat is reserved, or the fortitude to camp out on the courthouse steps in hopes of obtaining a seat not so reserved may view its proceedings.

TELEVISIONING THE COURT: A CATEGORY MISTAKE

Christina B. Whitman* †

The idea of televising Supreme Court oral arguments is undeniably appealing. Consequently, it is not surprising that reporters and politicians have been pressuring the Court to take this step. The other branches have been media-friendly for years, and Supreme Court arguments are already open to the public. Why should those of us who neither reside in Washington, D.C. nor have the time to attend Court proceedings be asked to depend on reporters for descriptions of the event? Even lower courts permit cameras. There is an understandable hunger for anything that will help us understand these nine individuals who have so much power—who can even choose a President, or at least hasten his anointment. Are the Justices refusing to reveal themselves because they prefer mystery, because they do not want the public to realize that the Court is a human institution after all? Whatever the Justices' motives, televising the Court's arguments is a terrible idea. It is both misleading and unnecessary. Misleading because it would only randomly tell us something useful about the Court, and unnecessary because the Court is already more open than the other branches.

Oral arguments and announcements of decisions are the only moments of public performance in the work of the Court, but they are more performance than work. Arguments come in the middle of the Justices' consideration of a case—after considerable reading, discussion, and thought, but before more of the same. Individual Justices use arguments differently. Some Justices simply do not work out their thoughts orally. The Justice with whom I am most familiar, Justice Lewis F. Powell, Jr., preferred to communicate through memoranda—even with his clerks. He was an extremely successful litigator, but also a Southern gentleman. Showing off his intelligence, much less asking a snide question or making a cutting remark, was just not his style. Conversely, other Justices enjoy the give-and-take with each other and with the advocates for the sake of the encounter alone. Their dialogue may or may not focus on what really matters to their decision in a case. They might just be pouncing on a weak argument for the pure pleasure of the kill. Either way, every comment is already overanalyzed for a hint as to what is on the Justices' minds.

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Oral arguments already receive too much of the wrong kind of attention because Court watchers enjoy the game of predicting outcomes, and arguments provide an occasion to justify a story or a comment on a blog. But this attention gives arguments a misleading importance. It is common to say that a lawyer cannot win a case by her oral argument, but that she can lose her case that way. This is as it should be. Ideally, we want effective advocates for both sides, but we should hope that the Justices can rise above a poor argument and reach a result that reflects judgment and justice despite the shortcomings of its advocate. Most arguments are lost not by embarrassing advocacy, but rather because a lawyer is not always able to avoid admitting under direct questioning to a weakness in his case that was concealed in his brief.

I enjoy reading the argument transcripts, which are now available almost immediately, and I use them in my classes. But they are a treat rather than a meal. On television and radio, the availability of transcripts already promotes emphasis on the kinds of insights and ripostes that can be conveyed in soundbites. There are Justices whose performances lend themselves to soundbites, who have a quick and provocative wit, and these Justices inevitably attract the most attention. Although these qualities are not inconsistent with greatness, they are not the qualities that make a Justice great. Despite the fun, focusing on these qualities distracts us from less flashy indications of excellence.

So, the televising of oral arguments is misleading. It is also unnecessary. The Court has always been an open institution on the matters that count. The judiciary, at least at the appellate level, has always been required to expose the reasons underlying its actions more than either of the other branches of government—through the discipline of writing published opinions. That is the process through which judges are publicly accountable, and it has no counterpart in the political branches. It is not easy to spot dishonest reasoning or evaluate quality of judgment as captured in opinions, but it is possible. It requires effort, and it is admittedly undemocratic in that it also requires expertise. But it is exactly the process of struggling with writing that gives the judiciary its unique character and disciplines the tendency to rely on first impressions or subjective reactions. The voices of individual Justices can be traced through their separate opinions and even found in their collegial opinions for a group. But the individual is not obscured just to create an insiders' guessing game. The collegial process is the whole point. A Justice who speaks for the greatest number of her colleagues speaks with the most authority.

Is it naive to take the collegial character of the Court and its written opinions so seriously? Perhaps Justices delegate all this effort to their law clerks and are not really subject to the discipline of forming the written work. Perhaps they are only really engaged while on the bench, if there. To the extent that has happened, it is a betrayal of their obligation as Justices, a rejection of the key justification for judicial review—and certainly not something to be accepted or encouraged by overemphasizing oral argument.

The standard arguments against televising the Court are true, too. Media attention might already be encouraging individual Justices to play to an

audience. It would be unfortunate and inappropriate if the most attractive, or even the fastest wit, were to become the public face of the Court.

Politicians are accustomed to performing in the spotlight. They may not appreciate how invasive the camera can seem to people who have not lived their lives this way. Justice Powell took media access seriously, but he saw it as a duty rather than a pleasure. Even more exposure to public scrutiny might have made his years on the Court deeply uncomfortable. For people like Powell, for whom public service is an obligation and public performance a necessary evil, becoming a media celebrity might be too costly. Yet we need people like Justice Powell in part because they understand the costs of public scrutiny and the value of privacy.

A narrow view of accountability, one that reduces it to public observation, has already turned too much governmental decision-making away from substance. Media attention already focuses on the sharpest tongue on the bench. Let us not give verbal skill more importance than it deserves, lest it change the character of our least democratic but most open branch.

THE RIGHT LEGISLATION FOR THE WRONG REASONS

*Tony Mauro** †

Senator Arlen Specter took a bold and long-overdue step on January 22, 2007, when he introduced legislation that would require the Supreme Court to allow television coverage of its proceedings. But instead of making his case with a straightforward appeal to the public's right to know, Specter has introduced arguments in favor of his bill that seem destined to antagonize the Court, drive it into the shadows, or both. Chances of passage might improve if Specter adjusts his tactics.

Both the Congress and the Supreme Court have tiptoed around the issue of cameras in the Supreme Court for decades. Even after the Court in 1981 ruled in *Chandler v. Florida* that, in light of improved technology, there is no general constitutional bar to the televising of criminal trials, the Justices have clung to a NIMBY (Not in my Back Yard) position when it comes to televising their own proceedings. They have kept cameras out in part because they still can. When asked about the issue, Justice Stephen Breyer has said often that as a steward of a cherished institution, he doesn't want to make any move that might mess things up. In unguarded moments, Justices also acknowledge that personal privacy—the ability to tramp around Washington, D.C. unrecognized—is a major reason for their stance. “It's very selfish, I know,” the late Justice Byron White allowed in a 1993 Judicial Conference discussion.

More recently, security concerns have bolstered the Justices' self-interested arguments. After Justice David Souter was mugged one evening in 2004 as he jogged near his D.C. dwelling, many expressed surprise that Justices are not guarded around the clock. Several Court police officers told me they try to press more security on the Justices, but the Justices don't want it. Their anonymity, they say, is their first line of defense.

Justices also articulate loftier reasons for keeping cameras out. Justice Antonin Scalia has said common law judges are supposed to stay out of the limelight, and besides, the public would not understand much of what the Court does. “That is why the University of Chicago Law Review is not sold at the 7-Eleven,” Scalia said famously in a 1989 speech.

Access advocates initially viewed Souter, who had experienced camera coverage while serving as a justice on the New Hampshire Supreme Court,

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as a potential ally. But he dashed those hopes in 1996 when he told a congressional subcommittee, “The day you see a camera come into our courtroom it’s going to roll over my dead body.” His belief, similar to Breyer’s, is that even the slightest change in the dynamics of Supreme Court oral argument resulting from the presence of cameras would be unacceptable. The fact that Souter made his comment not long after the O.J. Simpson trial, which arguably set back the cause of cameras in the courtroom for decades, is worth noting.

Justice Anthony Kennedy recently added a new, even more abstract argument to the debate. In several recent appearances before congressional committees, he has opposed any legislation imposing cameras on the Court as a matter of inter-branch etiquette. The Court doesn’t tell Congress how to conduct its business, Kennedy argues (though some in Congress would disagree with that statement). In return, Kennedy continues, Congress should not tell the Court how to operate. “[M]andat[ing] direct television in our court in every proceeding is inconsistent with that deference, that etiquette, that should apply between the branches,” Kennedy said before a House subcommittee in April 2006. “[W]e feel very strongly that this matter should be left to the courts.”

Kennedy’s comments serve as a backdrop to Senator Specter’s introduction of S. 344 on January 22, 2007. Specter’s was not the first legislative effort to require cameras in the Supreme Court, and in fact he had introduced identical legislation in September 2005. The Senate Judiciary Committee, which he chaired at the time, approved it by a bipartisan 12-5 vote, but it went no further.

But Specter’s repeat performance in 2007 got more attention. One reason may be the inexorable momentum of the information age, which with every passing month and year makes the Supreme Court appear, because of its no-cameras policy, more and more like a relic of some bygone era.

Another reason is the recent flood of attention given to the Court in light of two vacancies—prompted by Justice Sandra Day O’Connor’s retirement and Chief Justice William Rehnquist’s death—as well as President George W. Bush’s three nominations to fill them: John Roberts, Jr., Harriet Miers, and, finally, Samuel Alito, Jr. (The nomination of Miers, of course, was withdrawn.) The nominees’ confirmation hearings were extensively televised, providing the general public an education about the Court that the public had not received since *Bush v. Gore* in 2000, if then.

The Roberts and Alito nominations were followed by a bout of openness on the part of several Justices, a trend that seemed to hold the promise of greater public access to the Court. Perhaps because of Chief Justice Roberts’ lighter and younger hand on the helm, Justices seemed freer to go forth and mingle with the masses. Roberts himself made several televised appearances, Justice Ruth Bader Ginsburg turned up on the CBS Sunday Morning show, Justice John Paul Stevens spoke on ABC News about the death of President Gerald Ford, and Breyer gamely appeared on an NPR quiz show (failing, ultimately, to give any correct answers).

Senator Specter alluded to the increased visibility of individual Justices in his floor speech in support of S. 344. But his tone was not celebratory. Instead, Specter said, “[T]here has been very extensive participation by Court members [in television appearances], which totally undercuts one of the arguments, that the notoriety would imperil the security of Supreme Court Justices.” By stepping out in front of the public more than before, Specter was suggesting, the Justices are already making themselves more recognizable; therefore, a little more television face time from the bench won’t make them any more vulnerable to attack.

Specter’s point has some validity, but one can only hope that by making it, he does not drive the Justices back behind the curtains for fear that their greater visibility is fueling the call for cameras. Justices should be applauded, not criticized, for increasing their engagement with the public. Hearing Specter’s comment, Justices might be forgiven for shaking their heads and repeating the axiom, “No good deed goes unpunished.”

But that was not the only point in Specter’s floor speech when he seemed to be arguing for cameras in the Supreme Court as a way of punishing the Justices. As he has before, Senator Specter complained about several recent Supreme Court decisions that, he said, have shown less than proper respect for the role of Congress in the constitutional scheme.

One of Senator Specter’s targets is *United States v. Morrison*, a 2000 decision that struck down parts of the federal Violence Against Women Act. The Court invalidated provisions affording victims of domestic violence the right to sue in federal court on the ground that the Commerce Clause did not justify their enactment. But what sticks in Specter’s craw is that the Court questioned Congress’s “method of reasoning.” In his sometimes quaint way of speaking, Specter went on to say in his floor speech that the *Morrison* decision raises “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.” Later in the speech, Specter went back to *Morrison* and elaborated: “I wondered what kind of a transformation there was . . . with method of reasoning that there is such superior status when going to the Court.” Plain English translation: What makes the Supreme Court think it is smarter than the Congress?

The senator from Pennsylvania also took aim at two Supreme Court decisions that interpreted parts of the Americans with Disabilities Act: *Tennessee v. Lane* and *Board of Trustees of the University of Alabama v. Garrett*. Both, he said, employed the reasoning from *City of Boerne v. Flores* that there must be “congruence and proportionality” between the problem Congress is trying to solve and the method it uses to solve it. “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,” Specter said on the floor of the Senate.

Specter seems to raise these same issues whenever the subject of the Supreme Court comes up. He even asked about these cases during the confirmation hearings of Roberts and Alito. Senators often treat Supreme Court confirmation hearings as an occasion for sending a message to the

Court. Specter's message during those hearings, as in his speech on S. 344, was that Congress deserves more respect from the Supreme Court.

But what does this significant complaint from one branch to the other have to do with television access? Specter makes the connection this way: cameras, he hopes, will make it clear to the public the extent to which the Supreme Court is dissing Congress. In his floor speech he said that if cameras are allowed and C-SPAN regularly broadcasts oral arguments at the Court, this new level of exposure will "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."

When he speaks this way, it is hard not to conclude Specter's objective is not merely to let the sun shine in, but also to train an accusatory spotlight on the Justices. Certainly broadcasting Supreme Court arguments would further accountability in a general "good government" and "open government" sense. As Chief Justice Warren Burger wrote in *Richmond Newspapers, Inc. v. Virginia*, in the context of keeping criminal trials public, "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."

But by framing the case for camera access in terms of a complaint about past decisions he does not like, Specter is bound to raise the hackles of Supreme Court Justices and other federal judges who are smarting already from threats to their judicial independence. To be sure, Congress does not need the blessing of the Court to pass Specter's bill. But antagonizing the Justices in this way does not seem to be the best path toward passage. Justice Kennedy's reference to the "etiquette" between branches, quoted *supra*, illuminates a powerful if intangible force that usually makes Congress think twice before passing laws affecting the Supreme Court.

Sure enough, when Specter raised his objections to the *Morrison* decision at a Senate Judiciary Committee hearing attended by Justice Kennedy on February 14, 2007, it became clear that Specter's arguments already had rankled the Court. "I think it's a non sequitur to use that so that you can have cameras in the courtroom," Kennedy told Specter. "We didn't tell Congress how to conduct its proceedings. We said that, in a given statute, we could not find in the evidence that Congress had shown us that interstate commerce was involved. . . . I think that that just doesn't follow [that] therefore we should have cameras in the courtroom. I don't understand that."

Traditionally, the federal judiciary exerts influence over pending legislation in more behind-the-scene ways. But Kennedy's comments, aired by C-SPAN, amounted to an extraordinary public repudiation of a key senator's views. Kennedy was signaling—if such a signal was needed—that Specter's rationale was wanting, and that the judiciary was unpersuaded, to say the least. Whether Kennedy can ever be persuaded is uncertain. But if Senator Specter wants his worthy bill to pass, it seems evident that he should take Kennedy's hint and argue for cameras in the Court as a public good, not as punishment.

C-SPAN'S LONG AND WINDING ROAD TO A STILL UN-TELEVISED SUPREME COURT

*Bruce D. Collins** †

In 2005 when Senator Arlen Specter (R-PA) first proposed legislation requiring the Supreme Court of the United States to televise its oral arguments, he resuscitated a twenty-plus-years long effort by several news organizations to achieve the same goal. For at least that long, C-SPAN has been ready to provide the same kind of video coverage of the federal judiciary as it has been providing of the Congress and the president. If cameras are ever permitted in the high Court's chamber, C-SPAN will televise every minute of every oral argument, frequently on a live basis, and will do so in its trademark format of no interruptions or commentary.

This commitment to so-called "gavel-to-gavel" coverage of the Supreme Court is one we make to our audience, and it has an extensive history. Only a few years after C-SPAN began operations, we produced our first Supreme Court oriented program with our full coverage of Sandra Day O'Connor's 1981 Senate confirmation hearings. Four years later, we launched "America & the Courts," a weekly program (Saturday nights at 7 p.m. Eastern Time) focusing on the judiciary with an emphasis on the high court. A few years later, when it seemed to us and others (erroneously, as it turned out) that the Court was open to the possibility of letting the cameras in, we formed an advisory group of former Supreme Court clerks. These nine, mostly younger lawyers had been on the inside of the less-than-transparent Court and were willing to answer our questions about how we should proceed in dealing with it as we urged the Court to become more open to public view. Each of them was careful not to divulge any confidences from their Court service, but as a group they were valuable to us as we decided *which* proposals we might make to the Court and, almost as important, *how* we would make them.

In 1987, the Court accepted an early proposal that allowed C-SPAN to originate live programs from the press room inside the Court building. This was a breakthrough of sorts, albeit a modest one, in terms of the Court's receptiveness to television cameras on its premises. For the first time, the general public was able to see what it looked like inside the Court building as they used our viewer call-in format to talk to the journalists who work in the press room covering the Court, to the lawyers, and even to the parties involved in the pending cases. We were even able to persuade several mem-

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† Suggested citation: Bruce D. Collins, *C-SPAN's Long and Winding Road to a Still Un-televised Supreme Court*, 106 MICH. L. REV. FIRST IMPRESSIONS 12 (2007), <http://www.michiganlawreview.org/firstimpressions/vol106/collins.pdf>.

bers of the Court staff to appear on television to describe their jobs and to take questions from viewers. We thought we were slowly but surely easing the Court and its staff into the television age. We believed that by originating television programs from inside the building we were showing them that television coverage could be achieved easily; that it did not disrupt Court operations; that the cables, equipment and power requirements did not stress the building's infrastructure; and that the public was getting an accurate view of the Court.

Early in the following year, 1988, C-SPAN CEO Brian Lamb wrote to then-Chief Justice Rehnquist to make a formal offer. He told the Chief Justice that C-SPAN would televise the entirety of every oral argument if the Court would permit cameras in its chamber. Lamb's offer was made partly in response to our awareness of what a few of the Justices regularly referred to as the "snippet" problem. They did not like the idea of their hour-long arguments being reduced to very brief "snippets" when reported on the evening newscasts. They believed such reporting was inherently distorting and the Court would be better off without it. C-SPAN's offer of gavel-to-gavel coverage was intended to highlight our network's unique format and our ability to televise the whole of each oral argument to an audience that would appreciate such coverage. We realized that the appearance of Court arguments on C-SPAN would not eliminate the Justices' "snippet" concerns, but we hoped our offer would at least mitigate them.

The offer was a long shot, but we hoped its comprehensiveness would appeal to enough of the Justices' concerns that it might overcome their hesitation regarding cameras in their courtroom. For example, we knew some of the Justices recognized courtroom video would generate educational benefits, particularly for law schools. With this in mind, we noted that C-SPAN keeps an archive of all its programming and regularly makes videotapes (now, DVDs) available to educators. We also pointed out that we would not televise the arguments only during the daytime on a live basis, but rather at various times of day when a wider audience would be able to watch.

Chief Justice Rehnquist graciously acknowledged Lamb's offer and said he would refer it to the Conference—meaning the rest of his colleagues. He later responded that the Conference preferred not to change its current practice regarding news media coverage.

Our efforts continued. Toward the end of 1988, C-SPAN joined an informal consortium of other news organizations (including still photographers who wanted the right to take photos of oral arguments—thereby putting the sketch artists out of business). The consortium put on a demonstration inside the Court's chamber to show exactly how televised coverage would work. Our group set up two cameras, one off to the side of the bench and a second facing the lectern from which the attorneys addressed the Court. The director and the switching equipment were set up in a hallway outside the chamber. The production relied on the Court's existing audio system and on available lighting—we did not set up bright lights that would be a distraction. After a 25-minute oral presentation during which three Justices attended (while seated at their usual places on the bench) they

watched a playback on tape and asked a few questions. Nothing else came of the demonstration.

C-SPAN's efforts to cover the judicial branch continued. In July 1989 we became the first news organization to televise a federal court argument when the chief judge of the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Forces) permitted our cameras to tape an argument on drug testing. The next year the same court (which is not subject to the federal courts' rules regarding television coverage) permitted us to provide live coverage of an argument challenging the military death penalty.

Up to this point we had thought the Court, as the iconic Highest Court in the Land, could be persuaded on the merits alone that televised oral arguments would be good for the Court and for the public. We began to think that in light of the Court's deep respect for and reliance on precedent, perhaps it would rather be a follower than a leader in opening the federal judiciary to TV coverage. So, in 1991 C-SPAN and other television news organizations proposed a multiyear experiment during which eight federal trial and appellate courts across the country would be open to televised coverage of civil trials and appellate court oral arguments. The four-year experiment was taken up by the Federal Judicial Center, with the Chief Justice's approval. At the end of the experiment, the official assessment concluded that the television coverage of court proceedings did not adversely affect the administration of justice. We took this as a victory and hoped for a loosening of the rules against televising federal courts including, eventually, the Supreme Court. Although a few of the lower federal courts continued to allow some television coverage after the experiment, its results had no discernible effect on the Supreme Court.

There was little activity in this area from the mid-nineties until the disputed presidential election of 2000. As we watched the Florida Supreme Court's televised proceedings on the vote recount, we realized the election, against all earlier expectations, could be decided in Washington. C-SPAN made an emergency appeal to the Chief Justice to permit televised coverage of the Court's oral arguments in the case that became known as *Bush v. Palm Beach County Canvassing Board*. We pointed out that in this case "the public interest in the Court and its role in our government would likely never be higher" and that "televised coverage of that role would be of immense public service and would help the country understand and accept the outcome of the election." The Court did not agree to televised coverage, but it did break with tradition by offering instead to release audiotapes of the oral arguments immediately upon their conclusion. This led to a media frenzy of coverage as every news channel, including us, put the taped arguments on the air the moment they were available.

A few days later when what turned out to be the dispositive case, *Bush v. Gore* was to be argued, we asked for permission to provide live radio coverage, realizing that televised coverage was unlikely to be approved. Again, the Court consented only to prompt release of the audio, prompting a media frenzy similar to the one experienced days before.

Since that time the Court has not altered its stance against televised coverage, but it has loosened up considerably in releasing the audio of many important cases on the day of the arguments. From December 2000 to the date of this writing, the Court has granted just more than half (fifty-six percent) of C-SPAN's requests for same-day release of the taped oral arguments.

Although we continue to provide extensive coverage of the judiciary and of the Supreme Court in particular, we do so without any real expectation that cameras will be allowed in its chamber any time soon. Still, as recently as October 3, 2005, C-SPAN CEO Brian Lamb renewed the offer originally made to Chief Justice Rehnquist in 1988 in a letter to his successor, Chief Justice John Roberts. The letter described again that if given the chance C-SPAN would televise the entirety of every oral argument. In recognition of the dramatic changes in technology since our first such offer to the Court, we also offered our experience and expertise in creating high-quality and discreet video coverage of arguments should camera coverage ever be permitted. Chief Justice Roberts, like his predecessor, graciously received the offer but ultimately passed on the proposal.

Recently, there has been an unprecedented effort to legislate television access to the Supreme Court. The legislation introduced by Senator Specter, first in September 2005 and again in January 2007, has reinvigorated the debate, while raising new issues of comity between the branches on the one hand, and separation of powers on the other.

When asked to testify on these and other issues in 2005, C-SPAN declined. As a news organization we did not think it appropriate to take a position on pending legislation. However, Brian Lamb appeared before the Senate Judiciary Committee at a hearing on Senator Specter's bill in order to answer the committee's questions about how C-SPAN would use televised oral arguments if they became available. In his testimony, Lamb told the senators the same thing he told Chief Justices Rehnquist and Roberts: C-SPAN will televise the entirety of the oral arguments and we will make it available to the public, scholars, lawyers, judges, educators and the public at large as part of our public service mission. All we need is the right to do so. We think it should happen, but we are not entirely sure it will happen.

WILL IT MAKE MY JOB EASIER, OR WHAT'S IN IT FOR ME?

*Kenneth N. Flaxman** †

Putting aside philosophical questions about public access to government proceedings—what we now call “transparency”—and without regard to whether televising Supreme Court arguments is a logical extension of the common law’s “absolute personal right of reasonable access to court files” as described in 1977 by the Seventh Circuit in *Rush v. United States*, my real concern about whether Supreme Court arguments should be televised is somewhat narcissistic. Will it make my job—as a plaintiff’s civil rights lawyer who dabbles in criminal defense and post-conviction matters and who has had five adventures as “arguing counsel” in the Supreme Court—easier? I explain below why I think the answer is a resounding “yes.”

In this age of YouTube, *Media Matters*, and low-cost desktop video editing, televised Supreme Court arguments will not follow the 1950s model of the Army-McCarthy hearings, which the Museum of Broadcast Communications described as “the first nationally televised congressional inquiry and a landmark in the emergent nexus between television and American politics.” In addition to the inevitable C-SPAN-style sterile coverage starting with counsel’s opening words of “May it please the Court” and ending with the Chief Justice’s concluding statement of “The case is submitted,” expect to see on your favorite video blog or fake news program short video bites that capture the essence of a case—or more likely, in my view, excerpts that make someone (most likely a judge) look and sound like an ignorant or prejudiced bumpkin. (This is *not* criticism of the Court or of any of its past or present members, only a reflection on the reality of sound bite and video snippet journalism.)

Based on my experience arguing more than two hundred appeals, including five in the Supreme Court, my guess is that this type of exposure would be a good thing and would make my job easier. A lawyer’s job in a case before the Supreme Court is different than in a case before a trial judge or an intermediate appellate court. Rather than trying to convince a judge (or a panel of judges) why a particular outcome is compelled by precedent, an attorney presenting a case before the Supreme Court has an opportunity to urge the Court to change the law—as it did in the case I argued just this year, *Wallace v. Kato*—and reject the construction that every Court of

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Appeals had afforded to an earlier Supreme Court case, meanwhile announcing a new rule. (The Court can make new law without any request from the parties, as it did on this issue in *Wallace*.) Oral argument before the Supreme Court need not focus on whether prior decisions require a particular result, but rather on the “big picture” justifications for a particular result.

Another salient factor for a lawyer with a case before the Supreme Court is that the Court controls the size of its docket and, at least in the number of cases it decides on the merits, is not a victim of litigation explosion. This means the Supreme Court, unlike the lower federal courts, is not compelled by its workload to decide cases without oral argument, or with oral argument limited to “ten minutes per side” as is common in at least one federal court of appeals.

Oral argument before the Supreme Court is always at least thirty minutes per side. While this may seem long, arguments in the Court’s early days could extend over several days while Justices ate and sometimes slept, as explained by Stephen M. Shapiro in *Oral Argument in the Supreme Court: The Felt Necessities of the Time*. The first formal limitation on oral argument came in 1849, when each side was limited to a mere two hours. The time was reduced to one hour per side in 1925 and then reduced again to its present thirty minutes per side in 1970.

Although ten minutes of oral argument before a trial judge or an intermediate appellate court may be required before the court will understand a party’s position, this should not be true in the Supreme Court, where the written submissions are more thorough, more carefully researched, and better written than briefs filed in lower courts. In my perhaps jaundiced view, the Supreme Court should not need to hear oral argument to understand the positions of the parties.

Other than tradition or public spectacle, is there a reason why the Supreme Court continues to hear oral arguments? I believe that oral argument before the Supreme Court is the prequel to the decision conference. Arguments before a Court comprised of Justices with widely disparate views may very well frame the debate that will presumably take place during the post-argument conference.

Televising arguments should make it easier for arguing counsel to frame the post-argument debate by encouraging better judicial behavior. A Justice who is successful at provoking laughter in the courtroom may find that his or her humor falls flat in a video snippet. Similarly, a Justice who declines to ask questions of counsel at oral argument, but who engages in whispered conversations with other justices, might change his or her behavior in light of its exposure on YouTube. Likewise, a Justice who makes a truly stupid comment may find that life tenure does not provide immunity from public ignominy. And a Justice who is well past his or her prime and no longer in touch with reality (and no, I’m not suggesting this is the case with any member of the Court) would have greater difficulty hiding his or her disability.

I expect that televising arguments, like the recent amendment to Rule 32.1 of the Federal Rules of Appellate Procedure authorizing the citation of unpublished opinions, would enhance the integrity of the decisional process.

Unpublished opinions—which, of course, are actually published on Westlaw and LexisNexis—permit a court to reach a result that it could not justify in an opinion that would be precedential. I was exposed to this almost twenty years ago in *Browder v. Director, Illinois Department of Corrections*, where the Supreme Court reversed the Seventh Circuit’s judgment. In an unpublished opinion, the appellate court had committed the unspeakable sin of stating that it need not resolve the challenge to its appellate jurisdiction. In resolving *Browder*, the Supreme Court did not reach the issue whether the rules authorizing unpublished opinions exceeded the rulemaking authority of the courts of appeals, leaving the question for “another day.” That day arrived more than twenty years later when the Supreme Court adopted the amended Rule 32.1.

In sum, sunlight may or may not be the “best disinfectant,” and I am not suggesting that Supreme Court proceedings are infested with bacteria or germs. Moreover, I do not want to see TV cameras roll over the dead body of any Supreme Court Justice. But television coverage would significantly increase the utility of oral arguments at the Supreme Court. Justice Souter’s hyperbolic bon mot notwithstanding, I anxiously await video podcasts of Supreme Court arguments.

CONSTITUTIONAL ETIQUETTE AND THE FATE OF “SUPREME COURT TV”

Bruce Peabody* †

In traditional media outlets, on the Internet, and throughout the halls of Congress, debate about whether the Supreme Court should be required to televise its public proceedings is becoming more audible and focused. To date, these discussions have included such topics as the potential effects of broadcasting the Court, the constitutionality of Senator Arlen Specter’s current congressional initiative, S. 344, and how the public would use or abuse televised sessions of our highest tribunal.

But almost entirely ignored in these conversations is an issue that may effectively determine the fate of S. 344: Will this initiative unsettle supposedly time-honored relations of respect and civility between the judiciary and Congress—a pattern of institutional courtesy we might label “constitutional etiquette”? In order to answer this question, we need to understand the concept of constitutional etiquette and its application to the contemporary debate about “Supreme Court TV.” The following discussion briefly defines constitutional etiquette, assesses whether Congress would breach that etiquette by enacting the legislation proposed by Senator Specter, and concludes by examining the significance—for the Specter bill and for our public affairs generally—of our branches’ mutual expectations of respect and deference.

A little over a year ago, Justices Anthony Kennedy and Clarence Thomas appeared before a House Appropriations subcommittee. Their testimony included criticism of initiatives that would obligate the Court to televise its proceedings. As Kennedy remarked, the Justices “feel very strongly that we have an intimate knowledge of the dynamics and the needs of the court.” The current proposals, he argued, “which would mandate direct television in [the] court in every [public] proceeding [are] inconsistent with that deference, that etiquette, that should apply between the branches.”

The Court’s reluctance to set foot in the television age is unsurprising. The Justices’ high regard for traditional modes of conducting Court business can be seen in their donning of robes and providing “quill pen” keepsakes to

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the advocates who engage in oral argument. Indeed, the Court has only recently begun making oral argument accessible to the general public in a timely and direct manner. Last year, the Court decided to make transcripts of oral argument available to the public on a same day basis, and since 2000 it has also released a handful of audiotapes of these proceedings on a similar basis.

The Court may also be especially interested in maintaining relationships with the other branches based on “deference” and “etiquette” because the Court noticeably lacks the powers of the sword and the purse. But what, specifically, does Justice Kennedy’s overture to constitutional etiquette actually mean—and how does it apply to S. 344?

The answer to these questions is initially elusive, because neither Justice Kennedy nor others making variations of this basic argument have spelled out what constitutional etiquette comprises. Nevertheless, we might construct a working definition by drawing on general features of etiquette used in social rather than political or legal contexts.

Broadly speaking, etiquette refers to informal rules of behavior, not necessarily written or codified, that apply to a specific group and serve some social and unifying objective, generally by providing perceived benefits to the parties who abide by these norms of cooperation. Etiquette is primarily internally enforced: the adherents of the rules of etiquette, not some external body, establish and maintain its dictates.

Moving from this general conception, we might define constitutional etiquette as referring to norms of behavior that apply to the three branches of federal government and help sustain constitutional governance. The rules of constitutional etiquette, while not legal requirements, help create an environment in which each branch can fulfill its duties with the expectation that the other branches will accede to some extent.

For example, there is no constitutional requirement that the executive and legislative branches recognize Supreme Court decisions as binding beyond the parties to a case. But, as scholars such as Larry Alexander and Frederick Schauer have argued, the traditional willingness of these branches to acknowledge the Court’s authority to establish general precedents and legal norms promotes a system of stable and unifying rules useful to all three branches and the citizenry. The Court justifies its own “political question” doctrine on similar terms. As the Court noted in *United States v. Munoz-Flores*, that doctrine purportedly prevents the judiciary “from inappropriate interference in the business of the other branches.” Justice Souter further explained in his concurrence to *Nixon v. United States* that the judiciary owes considerable deference to legislative acts involving the impeachment or trial of judges or executive officials. Judicial review of an impeachment proceeding would violate the political question doctrine by stepping into the domain of a respected, coordinate branch; even “under the best of circumstances[, it would] entail significant disruption of government.”

We might distill four basic characteristics of constitutional etiquette that are reminiscent of its conventional, social analogue. First, constitutional

etiquette is firmly rooted in historic comity and cooperation between our federal institutions.

Second, each branch's continued acceptance of relevant rules is crucial to the preservation of constitutional etiquette. Constitutional etiquette gains credence from the reciprocal support of all three branches, and, in turn, it generally must provide each branch with some perceived benefits.

Third, and closely related to this last point, constitutional etiquette is not strictly a legal phenomenon. In the United States, legal rules—conventionally established through legislative acts and judicial opinions—are generally formal and written, exhibiting characteristics largely antithetical to the practical, institutional give-and-take embodied by the “softer” norms of constitutional etiquette. In contrast with legal rules, our constitutional manners are maintained by the informal accommodation, compromises, personal appeals, and deal-making of officials in all three branches of government.

Finally, constitutional etiquette enables institutional cooperation by fostering a hospitable and stable environment. In this way, constitutional etiquette mitigates the rough-and-tumble that ordinarily characterizes separation of powers politics. This etiquette represents the inversion of our revered assumption, described in Federalist No. 51, that American politics depends upon “ambition” being made “to counteract ambition.” The District of Columbia Circuit Court of Appeals alluded to a similar point when it stated in *United States v. American Telephone & Telegraph Co.* that our framers believed

that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation . . . the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system.

With this background in mind, let us return to Justice Kennedy's challenge of S. 344. *Is Senator Specter's bill inconsistent with the deference and etiquette that should apply between the branches?* Presumably, Specter's proposal violates an implicit norm giving the judiciary control of its internal operations. But, as a matter of history and practice (not to mention law), there is no such rule. As many commentators have noted, Congress has long controlled (and varied) the size of the Court, created positions that support the work of the Court (among them, law clerks and the Court marshal), and dictated rules for establishing seniority and a quorum within the nation's highest court.

But Justice Kennedy could conceivably have in mind a more general principle of etiquette. Perhaps his objection is to Congress's lack of regard

for the several Justices who publicly have opposed televised Court proceedings. As a historical matter, Congress generally has been reluctant to pass measures deemed to interfere with the independence of the Court and its members.

Senator Specter, interestingly, has addressed this claim directly by turning it on its head. In an April 2006 *Washington Post* op-ed, Specter wrote that Kennedy and Thomas “insisted that Congress should mind its own business and respect the court’s autonomy, just as the court has respected Congress’s autonomy.” But, he asked, “does the Supreme Court respect Congress?” In answering his own question, Specter pointed to a number of recent cases in which the Court invalidated popular federal legislation, concluding that “there is no doubt that congressional procedures and authority have been severely diminished by the court.” In essence, Specter argued that his bill was an appropriate response to the Court’s disruption of longstanding relations of deference and accommodation between the judicial and legislative branches.

So how does greater awareness of constitutional etiquette help us understand the fate of S. 344 and other facets of American political life? To begin with, legislators’ perceptions of whether the television bill breaches established rules of deference and respect between the Court and Congress will inform the congressional debate and the ensuing vote. Congress will play a decisive role in deciding whether the bill is compatible with the informal norms that guide our national politics. Moreover, this debate will influence the response the bill receives from interest groups, the president (who could, of course, veto the measure), and, finally, the courts.

More broadly, the discussion of the television proposal serves as a reminder that these are important times at the Supreme Court—because of the high bench’s role not only in construing our individual liberties and defining the contours of executive and congressional power, but also in shaping increasingly contentious judicial-legislative relations. In recent years, members of Congress from both parties have shown greater willingness to criticize the Court and support various “Court-curbing” initiatives; among these are calls to remove certain topics from the high bench’s jurisdiction and to limit how long individual Justices can serve. While the Court has long enjoyed a great deal of independence and deference from the public and its elected representatives, this could conceivably change if our nation’s lawmakers effectively make the case that the Court has violated the comity that the “people’s branch” is due.

Exploring constitutional etiquette in light of the apparently evolving status of judicial-legislative relations is all the more important given an emerged consensus in legal scholarship and political science that the effectiveness of the Court—and especially its ability to protect individual rights—depends upon the willingness of Congress to promote and secure the Court’s decisions. Without bilateral respect and cooperation, the Justices may find their decision-making powers seriously compromised by legislative indifference or even resistance.

While the notion of constitutional etiquette can inform our understanding of contemporary attacks on the Court by members of Congress, it can also help us comprehend the emergence of an arguably unhealthful form of deference practiced by legislators towards the high bench. Many of today's members of Congress support "judicial supremacy," the doctrine that the Court has a supreme—and, in some formulations, exclusive—duty to interpret the Constitution. At the same time, contemporary constitutional scholars have argued forcefully that there are theoretical, historical, and pragmatic reasons for believing that members of Congress should take seriously their own independent responsibilities to engage in constitutional interpretation. Given these claims, it is somewhat curious that judicial supremacy seems to be so widespread in Congress, both in terms of lawmakers' expressed attitudes and their actual, deferential behavior.

But we can partially account for this apparent disconnect by noting that Congress's support for judicial supremacy may stem from its eagerness to recognize broad norms of constitutional etiquette. Indeed, research suggests that some members of Congress equate the Court's core institutional responsibilities with its possession of a monopoly on constitutional interpretation. As a result, deferential legislators may be ceding their own obligations to engage in constitutional interpretation in the interests of respecting what they (mistakenly) believe is a power exclusively held by the Supreme Court: that tribunal's supposed authority to be the ultimate interpreter of our supreme law.

In sum, we need more careful attention to and systematic study of constitutional etiquette as a part of our investigation into the largely unseen "dark matter" that helps to hold our constitutional system together. Such an examination will help us, in the short run, to understand the political path of S. 344, and, more broadly, will provide us with a critical vantage point for assessing the ongoing health and sustainability of our Constitution.

GRANTING CERTIORARI TO VIDEO RECORDING BUT NOT TO TELEVISIONING

Scott C. Wilcox* †

Cameras are an understandable yet inapt target for Supreme Court Justices apprehensive about televising the high Court's proceedings. Notwithstanding Justice Souter's declaration to a congressional subcommittee in 1996 that cameras will have to roll over his dead body to enter the Court, the Justices' public statements suggest that their objections are to televising—not to cameras. In fact, welcoming cameras to video record Court proceedings for archival purposes will serve the Justices' interests well. Video recording can forestall legislation recently introduced in both houses of Congress that would require the Court to televise its proceedings. The Court's desired result—the legislation disappearing from the congressional agenda—will become more plausible once the Justices have acknowledged legislators' legitimate arguments for improving access to the Court. When initiating video recording, however, the Justices can allay the concerns they have expressed about televising by strictly limiting the distribution of the archival footage.

I propose that the Supreme Court voluntarily begin video recording its proceedings and make the footage available for viewing at the National Archives. The Court could arrange with the Archives to prohibit copying of oral argument video; visitors would be permitted to view the footage and to take notes but not to duplicate the recordings. The College Park, Maryland branch of the Archives, accessible to anyone (but only with photo identification), serves as the federal government's multimedia depository. Traditionally, anyone can copy recordings warehoused there because government materials are generally in the public domain and fall outside the protections of copyright.

But preventing the copying of video recordings of the Court should not demand too much of the Archives. Dubbing and recording equipment is already prohibited within the Motion Picture, Sound, and Video research room's Restricted Media Viewing and Listening Area. Moreover, precedent for placing copying restrictions on government recordings, although rare, definitely exists. According to Susan Cooper, Director of Public Affairs for the U.S. National Archives and Records Administration, visitors interested in the Nixon tapes originally were permitted only to listen to the audio recordings and to make notes; copying the tapes was at first prohibited. (Litigation over the Nixon tapes resulted in the limitations initially being placed on their

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distribution. Since then, most of the collection has become available for copying, but this relaxation of copying restrictions does not foreordain the eventual loosening of access to Court videos; the unique context of the Watergate-inspired criminal proceedings in *United States v. Nixon* is easily distinguished. Instead, sitting Justices would retain control over the disposition of any video recordings made as they currently do with respect to audio recordings.)

Utilizing the National Archives as a depository for Supreme Court recordings is a familiar concept for the Justices. The Court has made audio recordings of its public proceedings since 1955 and began depositing the recordings annually with the Archives in 1969. Recordings are stored in the office of the Marshal of the Supreme Court for the duration of each current term, and the Marshal transfers the term's recordings to the Archives at the beginning of the following term. After the recordings arrive at the Archives, anyone may listen to them or freely copy them. Because the Court relaxed its policy governing the copying of tapes of its proceedings in 1993, the public can now use and copy the recordings even for commercial purposes. Adding to the Justices' familiarity with the Archives, the main Archives facility in Washington, D.C. also stores printed transcripts of Court proceedings.

Because I have tailored my proposal to address the Justices' express concerns about televising, it is best evaluated in the context of the Justices' past statements about televising Court proceedings. Over the past twenty-five years, the current Justices each have reacted, at least briefly, to the concept of televising the Court's proceedings. The four Justices who outright oppose televising—Kennedy, Scalia, Thomas, and (as already noted) Souter—have expressed several concerns: televising may adversely affect the institution, televising would intrude on the Justices' privacy, soundbites shown on the nightly news would mislead the public about the Court's work, and televising could imprudently signal to lower courts that the Justices believe televising all federal court proceedings is advisable. Other Justices, however, have recognized the potential merits of greater public access to the Court. Justice Stevens, for example, expressed concern in a 1985 statement about the fact that, in many high-profile cases, members of the public were being turned away from the Supreme Court after a long wait; he alluded that television might be a solution to the problem yet acknowledged the unforeseeable impact televising might have on the Court. Justice Bader Ginsburg indicated in a 2000 interview that she personally had no objections to televising but that she respected the positions of her colleagues who do.

Bearing these considerations in mind, permitting cameras into the Court in order to record oral arguments for archival purposes is a modest step that will eliminate the express concerns motivating judicial opposition to televising. The Justices' apprehension about providing fodder for television programming too often comprised of truncated soundbites will disappear. (Understandably, the Justices would likely prefer to foreclose the possibility of a clip of oral arguments being featured in the *Daily Show with Jon Stewart's* "A Moment of Zen" or in some other humorous but anti-contextual

frame of reference.) While oral arguments theoretically could be viewed out of context at the Archives, this approach presents no greater danger of distortion than the “three-minute line” at the Court, which provides visitors only the briefest glimpse of the Justices at work.

Additional reasons given for opposing televising also fail to resonate in the different realm of archival recording. In Justice Thomas’s March 2007 testimony before a congressional subcommittee, he vocalized some Justices’ privacy concerns. Their apprehensions, it seems, stem from a belief that regular television coverage of Court proceedings will erode the relative anonymity that a few Justices have managed to preserve. Archival recording, however, avoids widespread media exposure and will impact the Justices’ privacy and security minimally, if at all. Also, because the footage will no longer be released for media distribution, the worry that the Supreme Court might indicate to lower courts that televising is advisable in all cases will also evaporate.

Archival recording should mollify even Justices who have expressed the concern that televising will negatively affect the character of oral arguments. The limited distribution of archival footage should allay most fears that video recording will exacerbate this problem. Even if a few arguing counsel are tempted to overly dramatize their arguments for the cameras, most Supreme Court litigators will exercise self-restraint out of respect for the Court, especially once they recognize the film will not be airing on the 11 p.m. news.

While my proposal will likely address the Justices’ concerns, substituting archival recording for televising may fail to satisfy many advocates of greater media access to the Court. Admittedly, financial and time constraints will prevent some prospective viewers of the archived oral arguments from traveling to the depository at the Archives. This reality is a consequence of our federal system, one in which many government institutions are located in the Washington, D.C. metropolitan area. The John F. Kennedy Center for the Performing Arts and the Smithsonian Institution are merely two examples. But the availability of Court video on demand at the Archives may afford to many other viewers even greater access than if the footage instead were televised on a fixed schedule. Television coverage is most likely to air within the days or weeks after Court proceedings are recorded, whereas archival footage will be accessible for the foreseeable future. Moreover, acknowledging the inadequacy of archival recording for some purposes does not undercut the great benefits that access to the recordings will bring to historians, legal practitioners, law students, and even the media. Video recordings of oral argument will prove invaluable resources as law students and practitioners study Supreme Court advocacy, as legal scholars study the Court’s jurisprudence, and as historians study the Justices and the operation of the Court. This value should not be surprising because oral arguments offer a rare glimpse into the inner workings of a largely private Court and into the inner minds of the nine individuals who guide our nation’s jurisprudence. To be sure, transcripts and audio recordings are valuable. But oral arguments take place in three dimensions, and the next best thing to experi-

encing them live is watching a video. Video can capture the nuances of communication—among the Justices as well as between the Justices and counsel—that tend to be understated in transcripts and even in audio recordings. The Court should not overlook these benefits to society when they easily may be attained without sacrificing the Justices' control over the Court's proceedings.

In light of the value of archival recording, expanding the Archives' Supreme Court collection surely will increase the attractiveness of the depository to scholars, students of the Court, budding advocates, and interested members of the public. The Archives already are popular destinations, drawing over a million visitors each year. Of course, the majority of visitors tour the main Archives in Washington, D.C., which house the original Declaration of Independence, Constitution, and Bill of Rights. Nevertheless the College Park branch housing the multimedia depository, which is conveniently located only ten miles outside of Washington, D.C., also draws significant numbers of visitors.

Notwithstanding the skepticism that this proposal may face from advocates for televising the Court, it is the most viable means of achieving greater access to the Court at present. The current Court seems unwilling to consider televising its proceedings voluntarily, and the political and constitutional viability of the legislation pending in both houses of Congress is uncertain. But video recording should be both judicially acceptable and politically achievable.

The Court may fear that allowing archival cameras would only strengthen the position of those advocating the televising of oral arguments, but this concern is misplaced. Justices have shared their concerns about televising with Congress in no uncertain terms. Congress will likely defer to the Justices once the Court has acknowledged legitimate arguments for improving access to its proceedings, even if the Justices take only this incremental step. Legislators will not lightly provoke a constitutional showdown with the Supreme Court, and most will be unwilling to do so when the Court has supplemented its reasoned defense of continued non-televising with archival recording. Even if a minority of legislators feels that requiring the Court to distribute its video footage would be a more natural exercise of congressional power than would be forcing the Court to permit the installation of cameras, such reasoning is unlikely to carry the day—especially in light of several Justices having made an impassioned appeal to Congress to respect the Court's perspective and purview.

Eventually, the Supreme Court may be ready to air the highest (and most consequential) reality television show in the land. Until such time, however, video recording will allow the Court to document for posterity the most public aspect of its important work without compromising the character and dignity of the Court's proceedings. This simple step will also stave off an undesirable conflict between the Supreme Court and the other branches. Stay tuned for further developments.