

**Floor Statement Of Senator Arlen Specter
On Introduction of Legislation to Permit
Television Cameras in The United States Supreme Court**

Mr. SPECTER. Mr. President, 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 vote of the majority of 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 of law that affect this country and everyday Americans. Because the Supreme Court of the United States holds power to decide cutting-edge questions on public policy, thereby effectively becoming a virtual "super legislature," the public has a right to know what the Supreme Court is doing. And that right would be substantially enhanced by televising the oral arguments of the Court so that the public can see and hear the issues presented to the Court. With this information, the public would have insight into key issues and be better equipped to understand the impact of the Court's decisions.

In a very fundamental sense, televising the Supreme Court has been implicitly recognized--perhaps even sanctioned--in a 1980 decision by the Supreme Court of the United States entitled *Richmond Newspapers v. Virginia*. In this 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 now acquire information on court procedures chiefly through the print and electronic media.

That decision, in referencing the electronic media, appears to anticipate televising court proceedings, although I do not mean to suggest that the Supreme Court is in agreement with this legislation. I should note that the Court could, on its own motion, televise its proceedings but has chosen not to do so, which presents, in my view, the necessity for legislating on this subject.

When I argued the case of the Navy Yard (*Dalton v. Specter*) back in 1994, the Court proceedings were illustrated by an artist's drawings. Now, however, the public gets a substantial portion, if not most, of its information from television and the internet. While many court proceedings are broadcast routinely on television, the public has little access to the most important and highest court in this country. The public must either rely on the print media, or stand in long lines outside the Supreme Court in Washington DC in order to get a brief glimpse of the open session from the public gallery.

Justice Felix Frankfurter perhaps 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.

When I spoke in favor of this legislation in September of 2000, I said, “I do not expect a rush to judgment on this very complex proposition, but I do believe the day will come when the Supreme Court of the United States will be televised. That day will come, and it will be decisively in the public interest so the public will know the magnitude of what the Court is deciding and its role in our democratic process.” Today, Mr. PRESIDENT, I believe the time has come and that this legislation is crucial to the public’s awareness of Supreme Court proceedings and their impact on the daily lives of all Americans.

I pause to note that it was not until 1955 that the Supreme Court, under the leadership of Chief Justice Warren, first began permitting audio recordings of oral arguments. Between 1955 and 1993, there were apparently over 5,000 recorded arguments before the Supreme Court.¹ That roughly translates to an average of about one hundred thirty two (132) arguments annually. But audio recordings are simply ill suited to capture the nuance of oral arguments and the sustained attention of the American citizenry. Nor is it any response that people who wish to see open sessions of the Supreme Court should come to the Capital and attend oral arguments. For, according to one source:

Several million people each year visit Washington, D.C., and many thousands tour the White House and the Capital. But few have the chance to sit in the Supreme Court chamber and witness an entire oral argument. Most tourists are given just three minutes before they are shuttled out and a new group shuttled in. In cases that attract headlines, seats for the public

¹ See PETER IRONS AND STEPHANIE GUITTON, *MAY IT PLEASE THE COURT: Transcripts of 23 Live Recordings of Landmark Cases as Argued Before the Supreme Court*, vii (1993).

are scarce and waiting lines are long. And the Court sits in open session less than two hundred hours each year. Television cameras and radio microphones are still banned from the chamber, and only a few hundred people—at most—can actually witness oral arguments. Protected by a marble wall from public access, the Supreme Court has long been the least understood of the three branches of our federal government.²

In light of the increasing public desire for information, it seems untenable to continue excluding 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.³

Televised court proceedings better enable the public to understand the role of the Supreme Court and its impact on the key decisions of the day. Not only has the Supreme Court invalidated Congressional decisions where there is, in the views of many, simply a difference of opinion to what is preferable public policy, but the Court determines novel issues such as whether AIDS is a disability under the Americans with Disabilities Act, whether Congress can ban obscenity from the Internet, and whether states can impose

² *Id.*

³ Todd Piccus, Note, Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media, 71 Tex. L. Rev. 1053, 1055 (1993)

term limits upon members of Congress. The current Court, like its predecessors, hands down decisions which vitally affect the lives of all Americans. Since the Court's historic 1803 decision, *Marbury v. Madison*, the Supreme Court has the final authority on issues of enormous importance from birth to death. In *Roe v. Wade* (1973), the Court affirmed a Constitutional right to abortion in this country and struck down state statutes banning or severely restricting abortion during the first two trimesters on the grounds that they violated a right to privacy inherent in the Due Process Clause of the Fourteenth Amendment. In the case of *Washington v. Glucksberg* (1997), the court refused to create a similar right to assisted suicide. Here the Court held that the Due Process Clause does not recognize a liberty interest that includes a right to commit suicide with another's assistance.

In the Seventies, the Court first struck down then upheld state statutes imposing the death penalty for certain crimes. In *Furman v. Georgia* (1972), the Court struck down Georgia's death penalty statute under the cruel and unusual punishment clause of the Eighth Amendment and stated that no death penalty law could pass constitutional muster unless it took aggravating and mitigating circumstances into account. This decision led Georgia and many states to amend their death penalty statutes and, four years later, in *Gregg v. Georgia* (1976), the Supreme Court upheld Georgia's amended death penalty statute.

Over the years, the Court has also played a major role in issues of war and peace. In its opinion in *Scott v. Sanford* (1857)--better known as the *Dredd Scott* decision--the Supreme Court held that *Dredd Scott*, a slave who had been taken into "free" territory by

his owner, was nevertheless still a slave. The Court further held that Congress lacked the power to abolish slavery in certain territories, thereby invalidating the careful balance that had been worked out between the North and the South on the issue. Historians have noted that this opinion fanned the flames that led to the Civil War.

The Supreme Court has also ensured adherence to the Constitution during more recent conflicts. Prominent opponents of the Vietnam War repeatedly petitioned the Court to declare the Presidential action unconstitutional on the grounds that Congress had never given the President a declaration of war. The Court decided to leave this conflict in the political arena and repeatedly refused to grant writs of certiorari to hear these cases. This prompted Justice Douglas, sometimes accompanied by Justices Stewart and Harlan, to take the unusual step of writing lengthy dissents to the denials of cert.

In *New York Times Co. v. United States* (1971)--the so called ``Pentagon Papers'' case--the Court refused to grant the government prior restraint to prevent the New York Times from publishing leaked Defense Department documents which revealed damaging information about the Johnson Administration and the war effort. The publication of these documents by the New York Times is believed to have helped move public opinion against the war.

In its landmark civil rights opinions, the Supreme Court took the lead in effecting needed social change, helping us to address fundamental questions about our society in the courts rather than in the streets. In *Brown v. Board of Education*, the Court struck down the principle of ``separate but equal'' education for blacks and whites and integrated public education in this country. This case was then followed by a series of civil rights

cases which enforced the concept of integration and full equality for all citizens of this country, including *Garner v. Louisiana* (1961), *Burton v. Wilmington Parking Authority* (1961), and *Peterson v. City of Greenville* (1963).

In recent years *Marbury*, *Dred Scott*, *Furman*, *New York Times*, and *Roe*, familiar names in the lexicon of lawyerly discussions concerning watershed Supreme Court precedents, have been joined with similarly 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. Earlier this year in *Roper v. Simmons* (2005), 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.⁴

In June of this year, the Supreme Court issued *Kelo v. City of New London* (2005), a highly controversial opinion in which a majority of the justices held that a city's exercise of eminent domain power in furtherance of an economic development plan satisfied the Constitution's Fifth Amendment "public use" requirement despite the

⁴ By doing so, the Court abrogated a contrary holding from a 1989 decision, *Stanford v. Kentucky* (1989).

absence of any blight. Moreover, 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.

Irrespective of ones view concerning the merits of these decisions, it is clear beyond cavil that they have a profound effect on the interplay between the government, on the one hand, and the individual on the other. So, Mr. President, it is with these watershed decisions in mind that I introduce legislation designed to make the Supreme Court less esoteric and more accessible to common men and women who are so clearly affected by its decisions.

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 and 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.

Some would argue that the Court has even played a significant role in deciding political contests as well. Who can forget the Court's dramatic decision in *Bush v. Gore* that enabled the country to move on from a bitterly fought presidential race. That decision, with its enormous repercussions for the nation, cried out for greater public scrutiny of the process by which the Justices heard arguments and all but decided the fate of the 2000 presidential race.

Given the enormous significance of each vote cast by each Justice on the Supreme Court, televising the proceedings of the Supreme Court will allow sunlight to shine brightly on these proceedings and ensure greater public awareness and scrutiny.

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 more real the opportunity for public observation the greater the understanding and trust. As the Supreme Court observed in the 1986 case of *Press-Enterprise Co. v. Superior Court*,

“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.

Beyond this general policy preference for openness, however, there is a strong argument that the Constitution requires that television cameras be permitted in the Supreme Court.

It is well established that the Constitution guarantees access to judicial proceedings to the press and the public. In 1980, the Supreme Court relied on this tradition when it held in *Richmond Newspapers v. Virginia* that the right of a public trial belongs not just to the accused, but to the public and the press as well. The Court noted that such openness has “long been recognized as an indisputable attribute of an Anglo-American trial.”

Recognizing that in modern society most people cannot physically attend trials, the Court specifically addressed the need for access by members of the media:

Instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print *and electronic media*. In a sense, this validates the media claim of acting as surrogates for the public. [Media presence] contributes to public understanding of

the rule of law and to comprehension of the functioning of the entire criminal justice system.

To be sure, a strong argument can be made that forbidding television cameras in the court, while permitting access to print and other media, constitutes an impermissible discrimination against one type of media over another. In recent years, the Supreme Court and lower courts have repeatedly held that differential treatment of different media is impermissible under the First Amendment absent an overriding governmental interest. For example, in 1983 the Court invalidated discriminatory tax schemes imposed only upon certain types of media in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*. In the 1977 case of *ABC v. Cuomo*, the Second Circuit rejected the contention by the two candidates for mayor of New York that they could exclude some members of the media from their campaign headquarters by providing access through invitation only. The Court wrote that:

Once there is a public function, public comment, and participation by some of the media, the First Amendment requires equal access to all of the media or the rights of the First Amendment would no longer be tenable.

In the 1965 case of *Estes v. Texas*, the Supreme Court rejected the argument that the denial of television coverage of trials violates the equal protection clause. In the same opinion, the Court held that the presence of television cameras in the Court had violated a Texas defendant's right to due process. Subsequent opinions have cast serious doubt upon the continuing relevance of both prongs of the *Estes* opinion.

In its 1981 opinion in *Chandler v. Florida*, the court recognized that *Estes* must be read narrowly in light of the state of television technology at that time. The television coverage of *Estes*' 1962 trial required cumbersome equipment, numerous additional microphones, yards of new cables, distracting lighting, and numerous technicians present in the courtroom. In contrast, the court noted, television coverage in 1980 can be achieved through the presence of one or two discreetly placed cameras without making any perceptible change in the atmosphere of the courtroom. Accordingly, the Court held that, despite *Estes*, the presence of television cameras in a Florida trial was not a violation of the rights of the defendants in that case. By the same logic, the holding in *Estes* that exclusion of television cameras from the courts did not violate the equal protection clause must be revisited in light of the dramatically different nature of television coverage today.

Given the strength of these arguments, it is not surprising that over the last two decades there has been a rapidly growing acceptance of cameras in American courtrooms which has reached almost every court except for the Supreme Court itself. Ironically, it was the *Chandler* decision which helped spur the spread of television cameras in the courts. Shortly after *Chandler*, the American Bar Association revised its canons to permit judges to authorize televising civil and criminal proceedings in their courts.

Following the green lights provided by the Supreme Court and the ABA, nearly all the states have decided to permit electronic coverage of at least some portion of their judicial proceedings. In 1990, the federal Judicial Conference authorized a three-year pilot program allowing television coverage of civil proceedings in six federal district courts and two federal circuit courts. The program began in July, 1991, and ran through

December 31, 1994. The Federal Judicial Center monitored the program and issued a positive final evaluation. In particular, the Judicial Center concluded that:

Overall, attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program.

The Judicial Center also concluded that:

Judges and attorneys who had experience with electronic media coverage under the program generally reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum, or the administration of justice.

Despite this positive evaluation, the Judicial Conference voted in September 1994, to end the experiment and not to extend the camera coverage to all courts. This decision was made in the aftermath of the initial burst of television coverage of O.J. Simpson's pretrial hearing. Some have argued that the decision was unduly influenced by this outside event. In March 1996, the Judicial Conference revisited the issue of television cameras in the federal courts and voted to permit each federal court of appeals to "decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments." Since that time, two circuit courts have enacted rules permitting television coverage of their arguments. It is significant to note that these two circuits were the two circuits which participated in the federal experiment with television

cameras a few years earlier. It seems that once judges have an experience with cameras in their courtroom, they no longer oppose the idea.

On September 6, 2000, the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts held a hearing titled "Allowing Cameras and Electronic Media in the Courtroom." The primary focus of the hearing was Senate bill S.721, legislation introduced by Senators **GRASSLEY** and **SCHUMER** that would give federal judges the discretion to allow television coverage of court proceedings. One of the witnesses at the hearing, Judge Edward Becker, Chief Judge U.S. Court of Appeals for the Third Circuit, spoke in opposition to the legislation and the presence of television cameras in the courtroom. The remaining five witnesses, however, including a federal judge, a state judge, a law professor and other legal experts, all testified in favor of the legislation. They argued that cameras in the courts would not disrupt proceedings but would provide the kind of accountability and access that is fundamental to our system of government.

In my judgment, Congress, with the concurrence of the President, or overriding his veto, has the authority to require the Supreme Court to televise its proceedings. Such a conclusion is not free from doubt and is highly likely to be tested with the Supreme Court, as usual, having the final word. As I see it, there is clearly no constitutional prohibition against such 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.

Beyond such basic structural and operational matters, 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 exist “with such exceptions and under such regulations as the Congress shall make.” In the early days of the Supreme Court, Chief Justice Marshall, writing for the Court in *Durousseau v. United States*, recognized that the power to make exceptions to the Court's jurisdiction is the equivalent of the power to grant jurisdiction, since exceptions can be “implied from the intent manifested by the affirmative description [of jurisdiction].”

The Supreme Court recognized the power of Congress to control its appellate jurisdiction in a dramatic way in the famous 1868 case of *Ex Parte McCardle*. In this case, McCardle, a newspaper editor, was being held in custody by the military for trial on charges stemming from the publication of articles alleged to be libelous and incendiary. McCardle petitioned the Supreme Court for a writ of habeas corpus. The Court heard his

case but, before it rendered its opinion, Congress repealed the statute that gave the Supreme Court jurisdiction to hear the habeas appeal. In light of this Congressional action, the Supreme Court felt compelled to dismiss the case for lack of jurisdiction.

Some objections have been raised to televised proceedings of the Supreme Court on the ground that it would subject justices to undue security risks. My own view is such concerns are vastly overstated. Well-known members of Congress, walk on a regular basis in public view in the Capitol complex. Other very well-known personalities, presidents, vice presidents, cabinet officers, all are on public view with even incumbent presidents exposed to risks as they mingle with the public. Such risks are minimal in my view given the relatively minor exposure that Supreme Court justices would undertake through television appearances.

As I explained earlier, the Supreme Court could, of course, 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 the televising of Supreme Court proceedings 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 their proceedings ought to be better known to the public; and, in the absence of Court rule, public policy would be best served by enactment of legislation requiring the televising of Supreme Court proceedings.

Mr. President, this legislation embodies sound policy and will prove valuable to the public. I urge my colleagues to support this bill.