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### A BILL TO PERMIT THE TELEVISIONING OF SUPREME COURT PROCEEDINGS

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SEPTEMBER 8, 2008.—Ordered to be printed

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Mr. LEAHY, from the Committee on the Judiciary,  
submitted the following

### R E P O R T

[To accompany S. 344]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to which was referred the bill (S. 344), to permit the televising of Supreme Court proceedings, having considered the same, reports favorably thereon, without amendment, and recommends that the bill do pass.

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#### I. BACKGROUND AND PURPOSE OF THE BILL TO PERMIT THE TELEVISIONING OF SUPREME COURT PROCEEDINGS

The Supreme Court of the United States is the highest Court in the Nation. Thousands of Americans ascend its grand marble steps each year to watch oral arguments before the Court and to see the Justices hand down decisions in cases of great import to our democracy. Several previous Chief Justices and Associate Justices of the Supreme Court have opined on the importance of transparency in our judicial system because it promotes accountability. Former Chief Justice Taft noted:

Nothing tends more to render judges careful in their decision and anxiously solicitous to do exact justice than the consciousness that every act of theirs is to be subject to the intelligent scrutiny of their fellow men, and to their candid criticism \* \* \*. In the case of judges having a life tenure, indeed, their very independence makes the right freely to comment on their decisions of greater importance, because it is the only practical and available instrument in the hands of a free people to keep judges alive to the reasonable demands of those they serve.<sup>1</sup>

Chief Justice Taft was in good company. Eighty years later Justice Brennan wrote:

[F]ree and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and accountability.<sup>2</sup>

Every year, the Supreme Court hears oral arguments in fewer than one hundred cases. Some cases garner significant public interest because they involve individual rights and freedoms or substantial business interests. The Court's public galleries permit a limited number of people to watch oral arguments on a two-tiered basis: a small number of members of the general public can obtain seats for an entire oral argument, while other members of the general public view three minutes of argument until the next group from the three-minute line is ushered into the courtroom.<sup>3</sup>

According to one source:

Several million people each year visit Washington, D.C., and many thousands tour the White House and the Capitol. 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 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.<sup>4</sup>

Though the Supreme Court has a press gallery, it has never in its history permitted live television or radio coverage of its open proceedings. Print media who attend can take notes during oral ar-

<sup>1</sup>William H. Taft, *Criticisms of the Federal Judiciary*, 29 AM. Law Rev. 642-643 (1895), quoted in Alpheus Thomas Mason, *William Howard Taft: Chief Justice* 92 (1965).

<sup>2</sup>*Nebraska Press Ass'n. v. Stuart*, 427 U.S. 539, 587 (1976)(Brennan, J., concurring).

<sup>3</sup>See *Visitor's Guide to Oral Argument at the Supreme Court of the United States*, <http://www.supremecourtus.gov/visiting/visitorsguidetooralargument.pdf> at 2 (last visited Feb. 7, 2008).

<sup>4</sup>Stephanie Guitton & Peter H. Irons, *May It Please the Court: 23 Live Recordings of Landmark Cases as Argued Before the Supreme Court, Including the Actual Voices of the Attorneys and Judges*, vii (1993)[hereinafter Guitton & Irons].

guments as Seth Berlin testified to the Committee on November 9, 2005: “There can be no legal basis for distinguishing, as a matter of constitutional right, between the recording devices such as cameras and those such as pencils and paper.”<sup>5</sup>

The Supreme Court did not begin recording oral arguments on audiotape until 1955, one year after the Court’s landmark decision in *Brown v. Board of Education* that held unconstitutional State-sanctioned segregation in public schools.<sup>6</sup> In testimony before the Judiciary Committee, Professor Peter Irons explained that the tapes were kept at the National Archives and were accessible to the public until 1986, when Chief Justice Warren Burger created a rule prohibiting duplication of the tapes and limiting their use to research and teaching.<sup>7</sup> Professor Irons obtained copies of the tapes from the National Archives for use in a project to provide edited and narrated tapes to schools and the public. In 1993, just before the tapes were published, Professor Irons was informed that “the Court was contemplating ‘legal remedies’”<sup>8</sup> against him for releasing the tapes but, ultimately, Professor Irons was able to publish the tapes along with rough transcripts he generated with the help of his coauthor Stephanie Guitton.<sup>9</sup>

Between 1955 and 1993, there were over 5,000 recorded arguments before the Supreme Court,<sup>10</sup> an average of about 131 arguments annually. The current practice is to release oral argument transcripts the day of the argument.<sup>11</sup> Audiotapes of oral arguments are released after the conclusion of the Court’s term.<sup>12</sup> Recently, the Chief Justice has granted media requests for the prompt release of audiotapes in a handful of high-profile cases. This practice, however, has been inconsistent and discretionary.<sup>13</sup>

Despite the Supreme Court’s continued reluctance to admit cameras or broadcast radio or television coverage of its public proceedings, many in Congress believe it is time for the Supreme Court to join the other branches of Government in allowing tele-

<sup>5</sup> Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary, 109th Cong., S. Hrg. 109–331, at 57, N.37 (2005) [hereinafter *Cameras in the Courtroom*] (written testimony of Seth Berlin) (citing *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 591–92 (1983) (striking down state tax statute singling out small group within the press because it “presents such a potential for abuse that no interest suggested by [the State] can justify the scheme”); *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (same); *Cosmos Broad. Corp. v. Brown*, 471 N.E.2d 874, 883 (Ohio Ct. App. 1984) (“[I]f the print media, with its pens, pencils and note pads, have a right to access to a criminal trial, then the electronic media, with its cameras, must be given equal access too.”)).

<sup>6</sup> 347 U.S. 483 (1954).

<sup>7</sup> *Cameras in the Courtroom*, supra note 5, at 92.

<sup>8</sup> *Id.* at 93.

<sup>9</sup> Guitton & Irons, supra note 4.

<sup>10</sup> See *id.* at vii.

<sup>11</sup> See *Transcripts and Records of Oral Arguments* (Oct. 2006), [http://www.supremecourtus.gov/oral\\_arguments/availabilityoforalargumenttranscripts.pdf](http://www.supremecourtus.gov/oral_arguments/availabilityoforalargumenttranscripts.pdf) (last visited Feb. 7, 2008) (“The Court’s contracted reporting service, Alderson Reporting Company, with the aid of a court reporter in the Courtroom and high-speed technology, will transcribe the oral arguments more quickly, therefore, providing the transcripts to the Court for same day posting on our Web site.” (footnote omitted)).

<sup>12</sup> See *id.* (“At the beginning of the next Term, the recordings are transmitted from the Marshal to the Motion Picture, Sound, and Video Branch of the National Archives. The Archives’ collection contains audio recordings of Supreme Court oral arguments from 1955 through the immediately preceding October Term. Members of the public can listen to or make their own copies of oral argument recordings using their own tape recorders, blank tapes, and patch cords at the Motion Picture, Sound, and Video Branch. Copies of recordings can also be purchased from the Archives.”).

<sup>13</sup> See e.g., Editorial, *The Supreme Court Club*, N.Y. Times, Jan. 16, 2008, at A22 (complaining that “Chief Justice John Roberts even declined a news media request that he release an audio recording of [of arguments in an Indiana voter identification case] as soon as the argument ended, much as the Court has done in a small number of high-interest cases since Bush v. Gore in 2000.”).

vision coverage of its public proceedings. Since 2003, over 30 newspaper editorial boards and letters to the editor across the United States have endorsed the idea of camera coverage of Supreme Court arguments.<sup>14</sup> Legal scholarship published in journals and law reviews also support camera coverage of Supreme Court proceedings.<sup>15</sup>

On November 9, 2007, Senator Specter and Senator Leahy wrote to Chief Justice Roberts requesting that he permit broadcast radio and television recording of all proceedings in which the Court announces its opinions from the bench. Chief Justice Roberts replied on December 3, 2007, agreeing to give serious thought to the request.

Chief Justice Roberts repeatedly stated during his confirmation hearing that he has no set view on the issue and would defer to his colleagues on the Court:

<sup>14</sup> See, e.g., Bruce Peabody, *Televise Supreme Court*, Daily Record, Jan. 18, 2008, available at <http://www.dailyrecord.com/apps/pbcs.dll/article?AID=/20080118/OPINION03/801180309/1096/OPINION> (last visited Jan. 22, 2008); Editorial, *Lights, Camera . . . Court's In Session*, Republican, Dec. 15, 2007, at A06; Peter G. Verniero, *Supreme Court TV*, Wall St. J., Oct. 31, 2007, at A20; Lisa Scottoline, *Chick Wit, The Supremes: Just What are Top Justices Really Afraid of?*, Philadelphia Inquirer, Apr. 15, 2007, available at <http://scottoline.com/Site/Column/chickwit5.html>, (last visited Jan. 22, 2008); Mark Trachtenberg, *Webcasts Open a Window to Texas Supreme Court*, Houston Chron., Mar. 29, 2007; Editorial, *Televise Court*, Erie Times News, Feb. 28, 2007; Editorial, *Cameras, Please: Congress Should Push Federal Courts Into 21st Century*, Rocky Mountain News, Feb. 26, 2007, at 34; Editorial, *Restoring the People's Court*, San Gabriel Valley Tribune, Feb. 24, 2007; Tom Teepen, *Time May Be Ripe for TV Coverage of Supreme Court*, Ventura County Star, Feb. 20, 2007; Editorial, *Supreme Court is Sturdy Enough to Absorb Modernizing Eye of Television Camera*, Morning Call, Feb. 19, 2007, at A8; Editorial, *Time to Open Up High Court to TV*, Boston Herald, Feb. 18, 2007, at 22; Editorial, *Televising Supreme Court Proceedings*, Lancaster New Era, Feb. 16, 2007, at 8; Editorial, *Candid Camera: Specter is Right to Want to Televise the High Court*, Pittsburgh Post-Gazette, Feb. 16, 2007; Editorial, *Justices on Camera: Sen. Specter Makes a Strong Case for Allowing Cameras Into Supreme Court*, Albany Times Union, Feb. 15, 2007, at A10; Editorial, *Actions in High Court Ready For Prime Time*, Republican, Feb. 14, 2007, at A10; Editorial, *Now Starring: The Supreme Court*, Las Vegas Rev. J., Feb. 13, 2007, at 8B; David Draschler, *Do it on a Trial Basis*, Nat'l L. J., Vol. 29, No. 9, at 27 (Oct. 30, 2006); Henry Schleiff, *Shine TV Lights on the Supreme Court*, Miami Herald, May, 1, 2006, at A20; Arlen Specter, *Hidden Justice(s)*, Wash. Post, Apr. 25, 2006, at A23; Editorial, *American Justices?*, L.A. Times, Apr. 30, 2006, at 4; Henry Schleiff, *Letter: Unveil the Justices: Cameras at the Supreme Court Decades Overdue*, Dayton News J., Apr. 22, 2006, at 04A; Editorial, *Justice Kennedy Goes Too Far: Misreading the Constitution in a Self-Serving Cause*, Wash. Post, Apr. 18, 2006; Editorial, *Unveil the Justices: Cameras at the Supreme Court Decades Overdue*, Daytona News J., Apr. 13, 2006, at 04A; Mickey H. Osterreicher, *Let Cameras in the Supreme Court*, Oklahoman, Aug. 12, 2006, at 13A; Bruce Williamson, *High Court is Out of Touch With TV Coverage*, Times Union, Apr. 13, 2006, at A12; Editorial, *Cameras in Court*, Las Vegas Rev. J., Apr. 3, 2006, at 6B; Marsha Mercer, *Camera Shy Justices?*, Fort Wayne J. Gazette, Jan. 1, 2006, at 7A; Henry Schleiff, *Letter: 'Sunshine' in Courts*, Chi. Trib., Dec. 10, 2005, at 25; Editorial, *Cameras in the Supreme Court Shine Light on Justice System*, Pensacola News J., Oct. 5, 2005, at 8A; Editorial, *TV Brings "Sunshine" Into Our Courts: Court TV Wanted St. Louisans to see Leonard Little's Trial as it Unfolds*, St. Louis Post-Dispatch, Mar. 31, 2005, at D11; Howard Rosenburg, *Let TV Go to the Circus*, Broadcasting & Cable, Mar. 7, 2005, at 50; Nat Hentoff, *The Invisible Supreme Court*, Wash. Times, Dec. 1, 2003, at A21; but see Fred Grimm, *Court Decorum Falls Victim to TV Cameras*, Miami Herald, Feb. 25, 2007, at State and Regional News; Linda P. Cambell, *Lights, Camera . . . Distraction?*, Augusta Chron., Feb. 24, 2007, at A05; and Ali F. Sevin, *Letter, Supreme Court is Too Serious For TV*, Wash. Times, Apr. 30, 2007, at B02.

<sup>15</sup> See, e.g., Marjorie Cohn, *Let the Sun Shine on the Supreme Court*, 36 Hastings Const. L. Q. 161, 168 (2008) ("When the Court argues about how the next President is selected, whether a woman can choose to have an abortion, whether a detainee may be held in custody for the rest of his life, or whether the government will take the threat of global warming seriously, the public has a right to be there. There is no cogent reason to deny the public a window into the high court."); Bruce G. Peabody, "Supreme Court TV: Televising the Least Accountable Branch?" 33 J. Legis. 144, 147-148 (2007) ("This article concludes that there are compelling reasons for believing that S. 344 is indeed constitutional, and consequently, it briefly considers the political prospects of the bill and some of the impact the enacted measure could have on how we think about judicial reform."); Audrey Maness, *Does the First Amendment's "Right of Access" Require Court Proceedings to be Televised? A Constitutional and Practical Discussion*, 34 Pepp. L. Rev. 123, 183 (2006) ("[T]here are far fewer critiques of [televising] appellate proceedings, and the current Senate bill appears to have the most viable approach for this segment of court proceedings.").

Senator, it's not something that I have a settled view on and I do think it's something that I would benefit from the views of my colleagues, and I know that some of them have particular views and some may not. I noticed the last time there was a formal response by the Court to a request to televise a particular argument, the Chief Justice referred the matter to the whole Court and then reported back on it.

I'm also aware that there are—I'm not sure if the right word is experimental or trial efforts going on in some of the courts of appeals, the Federal courts of appeals, to televise arguments there, and I know I've watched them so I appreciate that opportunity. And I don't know yet if there's been an evaluation of how that experiment proceeded, whether the judges thought it went fine, the lawyers or whatever. I just don't know.

At the Supreme Court level, I do know they've experimented recently in a few cases with releasing the audio tapes immediately after the conclusion of the argument. Again, I've listened to those on occasion, not every case, but selected cases of particular interest. I know that on our court, my court, I'm sorry, on the Court of Appeals for the D.C. Circuit, we broadcast, at least within the courthouse, simultaneously, the oral arguments, so I know the technology is there to do that and I certainly understand the interest and I understand how—I know it was very well received to have the audio tapes immediately available in some of those cases.<sup>16</sup>

Justice Stevens has indicated that he is willing to allow cameras into the Supreme Court, stating: "In my view, it's worth a try."<sup>17</sup>

Justice Scalia is concerned about how cameras in the Supreme Court could misinform the public:

If I thought that cameras in the Supreme Court would really educate the people, I would be all for it. But I think it would miseducate and misinform. Most of the time the Court is dealing with bankruptcy code, the internal revenue code, [the labor law] ERISA—stuff only a lawyer would love. Nobody's going to be watching that gavel-to-gavel except a few C-SPAN junkies. For every one of them, there will be 100,000 people who will see maybe 15-second take-out on the network news, which I guarantee you will be uncharacteristic of what the Supreme Court does.<sup>18</sup>

[I]f you send it out on C-SPAN, what will happen is for every one person who sees it on C-SPAN gavel-to-gavel so they can really understand what the court is about, what the whole process is, 10,000 will see 15-second take-outs on the network news, which, I guarantee you, will be

<sup>16</sup>Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong., 239–240 (2005) (statement of John G. Roberts, Jr.).

<sup>17</sup>Henry Weinstein, *Televised High Court Hearings Backed; Public Understanding Would Be Enhanced, Stevens Believes*, L.A. Times I.3, Jul. 14, 1989.

<sup>18</sup>Supreme Court Justice Scalia Gives Civics Lesson, Georgetown University Blue and Gray, Oct. 21, 2006, <http://explore.georgetown.edu/news/?ID=19322>, (last visited Feb. 7, 2008).

uncharacteristic of what the court does. So I have come to the conclusion that it will misinform the public rather than inform the public to have our proceedings televised.<sup>19</sup>

During his confirmation hearing, Justice Kennedy stated that he was concerned that the press could cause a distraction:

My initial reaction is that I think it might make me and my colleagues behave differently than they would otherwise \* \* \* Perhaps they would be accustomed to it after awhile. The press is a part of our environment. We cannot really excise it from the environment \* \* \*. But in the courtroom, I think that the tradition has been that we not have that outside distraction, and I am inclined to say that I would not want them in appellate court chambers.<sup>20</sup>

Justice Kennedy recently cautioned that cameras would work against the Supreme Court's dynamic:

But I don't think it's in the best interest of our institution \* \* \*. Our dynamic works. The discussions that the Justices have with the attorneys during oral arguments are a splendid dynamic. If you introduce cameras, it is human nature for me to suspect that one of my colleagues is saying something for a soundbite. Please don't introduce that insidious dynamic into what is now a collegial Court. Our Court works \* \* \*. We teach, by having no cameras, that we are different. We are judged by what we write. We are judged over a much longer term. We're not judged by what we say. But, all in all, I think it would destroy a dynamic that is now really quite a splendid one and I don't think we should take that chance.<sup>21</sup>

We feel very strongly that we have intimate knowledge of the dynamics and the mood of the Court, and we think that proposals mandating and directing television in our courts is inconsistent with the deference and etiquette that should apply between the branches \* \* \*. We've always taken the position and decided cases that it's not for the Court to tell the Congress how to conduct its proceedings. We feel very strongly that this matter should be left to the courts \* \* \*. We have a dynamic that's different than yours: not better, not worse, but different.<sup>22</sup>

Despite his reservations, Justice Kennedy has stated that he thinks televising the Supreme Court's proceedings is "inevitable."<sup>23</sup>

<sup>19</sup>Charles Lane, From Justices, Static on Televising Proceedings, Wash Post (May 2, 2005).

<sup>20</sup>Confirmation Hearing on the Nomination of Anthony M. Kennedy to be an Associate Justice of the Supreme Court of the United States: Hearings Before the S. Comm. on the Judiciary, 100th Cong., 218-19 (1987) (statement of Anthony M. Kennedy).

<sup>21</sup>Hearing of H. Appropriations Subcomm. on Financial Services and General Government Fiscal 2008 Appropriations: Supreme Court, 110th Cong. (Mar. 8, 2007), available at <http://www.cq.com/display.do?dokey=/cqonline/prod/data/docs/html/transcripts/congressional/110/congressionaltranscripts110-000002467922.html@committees> &metapub=CQ-Congtranscripts&searchIndex=5&seqNum=108 (last visited Feb. 7, 2008) [hereinafter 2008 Supreme Court Appropriations Hearing] (statement of Justice Anthony Kennedy).

<sup>22</sup>Departments of Transportation, Treasury, HUD, the Judiciary, District of Columbia, and Independent Agencies Appropriations for 2007: Hearing before a Subcomm. of the H. Comm. on Appropriations, 109th Cong. 225 (2006) [hereinafter 2007 Independent Agencies Appropriations Hearing] (statement of Justice Anthony Kennedy).

<sup>23</sup>James Rubin, Panel Would Admit Cameras, Mikes to Federal Courtrooms Cautiously, The Associated Press, Sept. 10, 1990.

Justice Souter explained in his confirmation hearing that cameras on the Supreme Court pose certain risks, particularly if they are distracting:

If the cameras are unobtrusive and are not making sound that is distracting, that's one thing. There is still a risk \* \* \* Cameras which are obtrusive to oral argument so that they really do distract your attention. That is something that has to be avoided \* \* \*. [However,] [t]here is no question that there is a value there.<sup>24</sup>

At his confirmation hearing, Justice Thomas explained that he did not have objections to televising Court proceedings in a non-disruptive manner:

Of course, Senator, at our court, we are an appellate court, and there isn't much activity, other than fairly intricate and detailed oral arguments. But I would have no personal objection—of course, I can't speak for the other judges or for the courts—to cameras being in courts, as long as they were unobtrusive and did not disrupt the proceedings.<sup>25</sup>

With respect to the court systems, the only reservation that I would have is that it not be disruptive of the exchange between the court and the individuals who appear before the court. It is a different environment, particularly at the appellate level than perhaps at the trial court level, but I have no objection beyond a concern that the cameras in the court room be unobtrusive or as unobtrusive as possible. Of course, that is just my own reaction. I have not looked at that in detail.<sup>26</sup>

I think it would be good for the American public to see what is going on there. I do not know how long they would be interested in what goes on in appellate argument. It tends to be not so—it does not rivet your attention, except maybe perhaps in the cases that have garnered a tremendous amount of publicity, but I see no reason why, beyond that concern, the American people should not have access to the courts.<sup>27</sup>

Justice Thomas has explained since being on the Supreme Court that he worries about the privacy and distortion effects cameras in the Supreme Court could have:

The primary point for me has been that regular appearances on TV would mean significant changes in the way my colleagues conduct their lives. My anonymity is already gone. It's already affected the way I conduct my own life.

<sup>24</sup>Confirmation Hearing on the Nomination of David H. Souter to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 101st Cong., (1990) (statement of David H. Souter). Some years later, Justice Souter explained that even the slightest change in the dynamics of the Supreme Court's oral arguments resulting from the presence of cameras would be unacceptable. He stated, "The day you see a camera come into our courtroom it's going to roll over my dead body." Associated Press, *On Cameras in Supreme Court, Souter Says "Over My Dead Body,"* (quoting statement to House Appropriations Subcommittee, (Mar. 30, 1996).

<sup>25</sup>Confirmation Hearing on the Nomination of Clarence Thomas to be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 102d Cong., Pt. 1, at 284 (1991) (statement of Clarence Thomas).

<sup>26</sup>*Id.* at 385.

<sup>27</sup>*Id.* at 385–86.

But for some of my colleagues, they've not yet lost that anonymity. I think security is on the foremost of all of our minds now since 9/11. I think they'll certainly become even more significant with more exposure.<sup>28</sup>

Justice Thomas also stated, "It runs the risk of undermining the manner in which we consider the cases. Certainly it will change our proceedings. And I don't think for the better."<sup>29</sup>

Justice Ginsburg has stated that she believes televising proceedings would benefit the public:

I don't see any problem with having appellate proceedings fully televised. I think it would be good for the public \* \* \*. We have open hearings. If coverage is gavel-to-gavel, I see no problem at all televising proceedings in an appellate court \* \* \* televised appellate proceedings can convey at once a picture not easily drawn in words spoken outside the courtroom. One can also view television proceedings as an extension of the U.S. tradition of open proceedings.<sup>30</sup>

Justice Breyer sees both pros and cons to televising Supreme Court proceedings:

I think there are good reasons for it and good reasons against it \* \* \*. The best reason against it \* \* \* is the problem that we could become a symbol since we are the Supreme Court, and if it was in our Court, it would be in every court in the country, criminal cases included.<sup>31</sup>

Justice Samuel Alito previously supported televising proceedings in the Third Circuit:

I had the opportunity to deal with this issue actually in relation to my own court a number of years ago. All the courts of appeals were given the authority to allow their oral arguments to be televised if they wanted and we had a debate within our court about whether we would, or whether we should allow television cameras in our courtroom and I argued that we should do it \* \* \*. I will keep an open mind despite the decision I took in the Third Circuit.<sup>32</sup>

However, Justice Alito expressed concern that cameras in the Supreme Court would change how Justices and lawyers interact in the courtroom:

Television coverage of the Supreme Court would not simply let the public see what goes on before that important institution, but would also in some ways change what

<sup>28</sup>2008 Supreme Court Appropriations Hearing, supra note 21 (statement of Clarence Thomas).

<sup>29</sup>2007 Independent Agencies Appropriations Hearing, supra note 22, at 225 (statement of Clarence Thomas).

<sup>30</sup>Confirmation Hearing on the Nomination of Ruth Bader Ginsburg to be Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 103d Cong., S. Hrg. 103-482, at 262 and 576 (1993) (statement of Ruth Bader Ginsburg).

<sup>31</sup>Interview by Brian Lamb, C-SPAN, with Stephen Breyer, Associate Justice, Supreme Court of the United States (Dec. 4, 2005) (transcript available at <http://www.q-and-a.org/Transcript/?ProgramID=1052> (last visited Feb. 7, 2008)).

<sup>32</sup>Confirmation Hearing on the Nomination of Samuel A. Alito, Jr. To Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong., at 480-481 (2006) (statement of Samuel A. Alito, Jr.).

now goes on \* \* \*. Some lawyers arguing before the court in televised cases would use the occasion to address the television audience for political or other purposes \* \* \*. [T]elevison might well affect the Justices' questions.<sup>33</sup>

This bill to permit the televising of Supreme Court proceedings would require the Supreme Court of the United States to permit television coverage of all open sessions of the Court. Proceedings would be televised unless the Justices decide by majority vote that allowing such coverage in a particular case would violate the due process rights of any of the parties involved. Allowing broadcast coverage of open Supreme Court proceedings will substantially improve public awareness and understanding of Court decisions and the law.

Our democracy works best when our citizens have access to their Government. The judiciary lags behind the other branches of our Federal Government when it comes to open access to public proceedings. Except for rare closed sessions, the proceedings of Congress and its committees are open to the public and carried live on cable television, radio and webcast. The work of executive branch agencies is subject to public scrutiny through the Freedom of Information Act, among other mechanisms. Since not all Americans can travel and wait in line to witness these public proceedings, emerging technology could allow the rest of the country to observe the Supreme Court at work. This bill extends the tradition of openness to the Nation's highest court in order to help all Americans be better informed about the important decisions that are made there.

## II. HISTORY OF THE BILL AND COMMITTEE CONSIDERATION

On November 9, 2005, the committee held a hearing to consider whether Federal court proceedings should be televised and, in particular, to consider S. 1768, Senator Specter's earlier version of this legislation, and S. 829, the Grassley-Schumer "Sunshine in the Courtroom Act of 2005." Among the witnesses favorably disposed toward broadcasting Supreme Court proceedings were Peter Irons, coauthor of *May It Please the Court*;<sup>34</sup> Seth Berlin; Brian Lamb, founder of C-SPAN; Henry Schleif of Court TV Networks; and Barbara Cochran of the Radio-Television News Directors Association and Foundation. Judge Jan DuBois of the Eastern District of Pennsylvania, testifying on behalf of the Judicial Conference, warned of concerns primarily at the trial level, where witnesses may appear uncomfortable because of cameras and, thus, might seem less credible to jurors.

In the 109th Congress the Judiciary Committee considered and reported both S. 1768 and S. 829 on March 30, 2006. The Committee voted to report S. 1768 by a tally of 12 yes and 6 no, and the bill was placed on the Senate Legislative Calendar.<sup>35</sup>

<sup>33</sup> Samuel A. Alito, Jr., Address before the Association of the Federal Bar of New Jersey (Apr. 11, 1996), available at <http://www.law.com/pdf/dc/alito-amtrak.pdf> (last visited Feb. 7, 2008).

<sup>34</sup> Guittion & Irons, *supra* note 4, at 95 ("If public access to audio-tapes of oral arguments has given us what William Safire called 'a fascinating you-are-there experience and an ear to history in the making,' I perceive no reason why the American people should not be able to see these arguments as well."); *id.* at 96 ("I do know, from my experience with the Court's audio-tapes, that students, teachers, and the American public have benefited from hearing them.").

<sup>35</sup> See 152 Cong. Rec. S2602-01.

At the beginning of the 110th Congress, Senator Specter reintroduced his bill (S. 344) to permit television coverage of the Supreme Court.<sup>36</sup> This bill is cosponsored by Senators Feingold, Schumer, Durbin, Grassley, and Cornyn.

On February 14, 2007, Associate Justice Anthony M. Kennedy testified before the Committee concerning several issues important to the Federal courts, including cameras in the courtroom. He stated that:

The majority on my Court feel very strongly however, that televising our proceedings would change our collegial dynamic and we hope that this respect that separation of powers and balance of checks and balances implies would persuade you to accept our judgment in this regard. We do not discuss a case before going on the bench. It's a fascinating dynamic \* \* \* This is a dynamic that works. Please don't introduce into the dynamic that I have with my colleagues, the insidious temptation to think that one of my colleagues is trying to get a soundbite for the television. We don't want that \* \* \*. We are judged by what we write \* \* \*. We think it would change our dynamic. We feel it would be unhelpful to us \* \* \*. We have come to the conclusion that it will alter the way in which we hear our cases, the way in which we talk to each other, the way in which we use that precious hour, and we hope that the Senate would defer to us as a coordinate branch of the Government.<sup>37</sup>

The bill (S. 344) was considered by the Committee on the Judiciary on December 6, 2007. The Committee voted to report the bill To Permit the Televising of Supreme Court Proceedings, without amendment, favorably to the Senate. The Committee proceeded by rollcall vote as follows:

Tally: 11 Yes, 8 No

Yeas (11): Biden (D-DE), Cardin (D-MD), Cornyn (R-TX), Durbin (D-IL), Feingold (D-WI), Grassley (R-IA), Kohl (D-WI), Leahy (D-VT), Schumer (D-NY), Specter (R-PA), Whitehouse (D-RI).

Nays (8): Brownback (R-KS), Coburn (R-OK), Feinstein (D-CA), Graham (R-SC), Hatch (R-UT), Kennedy (D-MA), Kyl (R-AZ), Sessions (R-AL).

### III. SECTION-BY-SECTION SUMMARY OF THE BILL

The legislation consists in its entirety of a single section that would require the Supreme Court for the first time to allow "television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of Justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of one or more of the parties before the Court."

<sup>36</sup> See 153 Cong. Rec. S1257-03.

<sup>37</sup> Hearing of the S. Judiciary Comm. on Judicial Security and Independence, 110th Cong. (2007), available at <http://www.cq.com/display.do?dockkey=cqonline/prod/data/docs/html/transcripts/congressional/110/congressionaltranscripts110-000002454456.html@committees&metapub=CQ-CONGTRANSCRIPTS&searchIndex=0&seqNum=42, Feb. 14, 2007> (last visited Feb. 13, 2008) (statement of Justice Anthony Kennedy).

## IV. CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

The Committee sets forth, with respect to the bill, S. 344, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

DECEMBER 18, 2007.

Hon. PATRICK J. LEAHY,  
*Chairman, Committee on the Judiciary,*  
*U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 344, a bill to permit the televising of Supreme Court proceedings.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Leigh Angres.

Sincerely,

ROBERT A. SUNSHINE  
(For Peter R. Orszag, Director).

Enclosure.

*S. 344—A Bill to Permit the Televising of Supreme Court Proceedings*

S. 344 would require the U.S. Supreme Court to permit television coverage of all open sessions, unless a majority of justices vote to bar such recordings. The Supreme Court currently prohibits recording devices in the courtroom. CBO estimates that enacting S. 344 would have no significant impact on the federal budget.

S. 344 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Leigh Angres. This estimate was approved by Theresa Gullo, Deputy Assistant Director for Budget Analysis.

## V. REGULATORY IMPACT EVALUATION

In compliance with rule XXVI of the Standing Rules of the Senate, the Committee finds that no significant regulatory impact will result from the enactment of S. 344.

## VI. CONCLUSION

Increasing public access to open Supreme Court proceedings is in the public interest. The Supreme Court has repeatedly observed in other contexts that “[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”<sup>38</sup> Permitting people to see the Supreme Court in action through the use of television cameras will advance public understanding of Supreme Court processes and rulings.

<sup>38</sup>*Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13 (1986) (quoting *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980)).

## VII. CHANGES TO EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 344, as reported, are shown as follows (existing law proposed to be omitted is shown in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman type):

\* \* \* \* \*

**SECTION 1. AMENDMENT TO TITLE 28**

(a) IN GENERAL.—Chapter 45 of title 28, United States Code, is amended by inserting at the end the following:

**SEC. 678. TELEVISION SUPREME COURT PROCEEDINGS**

*The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, 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.*

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