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Hearing On:

Access to the Court: Televising the Supreme Court

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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