

The Least Televised Branch: A Separation of Powers Analysis of Legislation to Televisify the Supreme Court

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“The day you see a camera come into our courtroom it’s going to roll over my dead body.”

—Justice David Souter¹

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1. *Souter Won’t Allow Cameras in High Court*, L.A. TIMES, Apr. 9, 1996, at A6.

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INTRODUCTION

On February 14, 2007, Justice Anthony Kennedy appeared before the Senate Committee on the Judiciary to testify about judicial salaries.² Appreciating the unique opportunity for questioning, Senator Arlen Specter raised the topic of televising Supreme Court proceedings,³ which a bill he had recently introduced would require.⁴ Justice Kennedy made his opposition to the proposed legislation plain, and he warned the senator, “A majority of my court feels very strongly . . . that televising our proceedings would change our collegial dynamic. We hope that the respect that separation of powers and checks and balances implies would persuade you to accept our judgment in this regard.”⁵

The popular press has taken note of exchanges like this, with a *Washington Post* editorial writer, for example, alluding to Justice Kennedy’s “[oblique suggestions] that separation-of-powers concerns could be triggered if Congress tried to require cameras in the court.”⁶ But the question remains to be forth-

2. *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 73–80 (2007) [hereinafter *Judicial Security and Independence*].

3. *Id.* at 12.

4. *See* S. 344, 110th Cong. (2007).

5. *Judicial Security and Independence*, *supra* note 2, at 12.

6. Editorial, *Time for Cameras*, WASH. POST, Dec. 6, 2007, at A28.

The topic of camera legislation is perhaps a hotter one among internet commentators. Consider, for instance, a blog maintained by Ann Althouse, a law professor at the University of Wisconsin. In response to Senator Specter’s first attempt at a camera bill in 2005, Althouse asserted, “I should think there is a decent argument that [camera legislation] would be unconstitutional.” Althouse, Can

rightly asked and answered: would this sort of legislation violate the separation of powers?

This Note asserts that legislation requiring the Supreme Court to televise its proceedings would indeed violate the separation of powers because it would impermissibly undermine the Judiciary in the performance of its constitutional role. The central judicial role is deciding cases and controversies. The separation of powers violation arises because camera legislation would deprive the Court of its ability to protect the functioning of its decisionmaking processes.

In light of assuredly more pressing matters calling for congressional attention,⁷ a serious consideration of Congress's constitutional authority to enact Supreme Court video camera legislation perhaps seems a bit trivial. But the constitutionality of court-televising statutes is one of a cluster of issues that has generated significant academic debate about the nature of the "judicial power,"⁸ as well as about the other constitutionally-conferred governmental powers more broadly.⁹

Congress Force Television Cameras on the Supreme Court?, <http://althouse.blogspot.com/2005/11/can-congress-force-television-cameras.html> (Nov. 10, 2005, 15:01 EDT). Viewers of her posting had other suggestions. *See, e.g.*, Comment of PD Shaw to Althouse, <http://althouse.blogspot.com/2005/11/can-congress-force-television-cameras.html> (Nov. 10, 2005, 16:27 EST) ("To improve access to the courts, Congress should order the SCOTUS to dress casual. Its [sic] less intimidating.").

By 2006, Althouse recanted: "[When] a reporter called me and asked me to explain why [I had said I thought there was a 'decent argument' for unconstitutionality] . . . I had to admit I couldn't see why the argument was any good." Althouse, Justice Kennedy's Opposition to Cameras in the Supreme Court, <http://althouse.blogspot.com/2006/04/justice-kennedys-opposition-to-cameras.html> (Apr. 5, 2006, 7:06 EDT). The reasoning behind Prof. Althouse's reconsidered opinion is somewhat troubling: "[C]ameras would expose the Justices who cling to their seats despite declining ability. . . . [T]he regular gaze of the television cameras would create a permanent but subtle pressure on the Justices to think realistically about whether they still belong on the Court." *Id.*; *cf. infra* notes 84–87 and accompanying text (describing the Founders' concern about encroachments on judicial independence).

7. *See, e.g.*, David M. Herszenhorn, *Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. TIMES, Oct. 4, 2008, at A1 ("After the House reversed course and gave final approval to the \$700 billion economic bailout package, President Bush quickly signed it into law on Friday, authorizing the Treasury to undertake what could become the most expensive government intervention in history.").

8. *See* David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 728 n.114 ("There has been considerable recent debate about the possibility of . . . preclusive Article III powers that are indefeasible by statute, such as whether Congress could require that oral arguments be televised; limit the Court's resort to *stare decisis*; prohibit unpublished or non-precedential opinion; or require that courts decide cases on certain deadlines. . . . The Court has yet to directly address these questions." (citations omitted)). Barron and Lederman cite several recent articles exploring these topics, but notably, no in-depth analysis of the camera question has yet emerged. *See id.* (citing Richard H. Fallon, Jr., *Stare Decisis and the Constitution: An Essay on Constitutional Methodology*, 76 N.Y.U. L. REV. 570 (2001); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of Roe and Casey?*, 109 YALE L.J. 1535 (2000); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761 (1997); Amy E. Sloan, *A Government of Laws and Not Men: Prohibiting Non-Precedential Opinions by Statute or Procedural Rule*, 79 IND. L.J. 711 (2004)).

9. *See* Barron & Lederman, *supra* note 8, at 727 (asserting that "a core/periphery distinction is commonly accepted as a prominent feature of many textually enumerated powers, even though the constitutional clauses that establish those powers do not expressly prescribe such an approach").

Part I of this Note will provide some background on the history of the video camera debate, the major arguments composing it, and the recent legislative efforts to introduce cameras over judicial resistance. It will conclude by narrowing the focus to Senator Specter's bill to televise the Supreme Court. Part II will characterize the separation of powers issue, develop a test for determining constitutional violations, and apply that test to the Specter bill. Part III will examine the implications of the foregoing analysis by considering whether similar separation of powers violations would result from legislation targeting the lower federal courts. Although some considerations vary at the federal court system's different levels, this Note's conclusion—that it is for the courts, not Congress, to decide whether to televise judicial proceedings—remains constant.

I. AN OVERVIEW OF THE CAMERA DEBATE

The separation of powers concerns that this Note analyzes are just part of a broader debate surrounding cameras in the courtroom. Courts have long been wary of the effects that cameras might have on judicial proceedings. The potential for television to educate and increase access to the workings and decisions of the judicial branch is counterbalanced by the harm that could result to parties' fair trial rights in particular cases. Concerns about misrepresentation, security, and privacy also factor into the debate. With the federal judiciary largely entrenched in opposition to cameras—with only limited openings in the lower federal courts and none at the Supreme Court—members of Congress have begun to take up the issue as a legislative matter. Though no legislation has yet been enacted, a proposal like Senator Specter's appears increasingly likely to pass into law.

A. TRADITIONAL HOSTILITY AND MODERN ADVANCES

1. Origins of the Judiciary's Hostility to Video Cameras

Judicial opposition to the presence of cameras in the courtroom can be traced back to at least 1937 when the American Bar Association adopted a Judicial Canon stating categorically, "The taking of photographs in the court room . . . and the broadcasting or televising of court proceedings *are calculated* to detract from the essential dignity of the proceedings . . . [and] degrade the court . . . and should not be permitted."¹⁰ A similar view found expression in *Federal Rule of Criminal Procedure* 53, which implemented a general ban on photography and video recording in criminal trials.¹¹ The advisory committee note to the 1944 adoption of the Rule alludes to a broadly emerging judicial consensus favoring such exclusion.¹²

10. CANONS OF JUDICIAL ETHICS Canon 35 (1937) (amended 1952) (emphasis added).

11. FED. R. CRIM. P. 53.

12. *Id.* advisory committee's note ("While the matter to which the rule refers has not been a problem in the Federal courts as it has been in some State tribunals, the rule was nevertheless included with a view to giving expression to a standard which should govern the conduct of judicial proceedings.").

These anti-camera rules were in part a reaction to perceived abuses of lenient courtroom control in trials of the day.¹³ By one account, in many 1930s cases “the media . . . paid the fees of defense attorneys, the press had unlimited access to the courtroom, [and] the judge and attorneys talked to the press during the trial.”¹⁴ The most famous example from the period was the 1935 trial of Bruno Richard Hauptmann, who was executed for kidnapping and murdering the infant child of aviator Charles Lindbergh.¹⁵ The trial, which generated immense public interest, is still viewed by many as one of America’s most infamous miscarriages of justice.¹⁶ As one contemporary observer put it, “It is difficult to conceive the possibility of having dignified judicial proceedings when one reads . . . that there were, among others in Justice Trenchard’s court, 141 newspaper reporters and photographers, 125 telegraph operators and 40 messengers.”¹⁷

2. The Supreme Court on Cameras

The Supreme Court first addressed the effects of televising court proceedings in the 1965 case *Estes v. Texas*.¹⁸ At the criminal defendant’s initial hearings, twelve cameramen recorded the proceedings, “wires were snaked across the courtroom floor,” and on the whole there was “considerable disruption.”¹⁹ A highly fragmented Court reversed the state court conviction,²⁰ with four Justices concluding that “the televising of criminal trials is inherently a denial of due process.”²¹ Even the dissenting Justices admitted serious doubts about the propriety of televised proceedings.²² Justice Harlan opined in concurrence, however, that “the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.”²³

Though Justice Harlan’s prediction has not yet become a reality, nearly twenty years after *Estes* the Court did evince a greater willingness to accept a role for video technology in judicial proceedings. In *Chandler v. Florida*, it upheld a program that allowed full electronic media coverage of *all* state

13. For example, an ABA publication critiquing the Hauptmann trial was cited in conjunction with the adoption of *Federal Rule of Criminal Procedure* 53. See FED. R. CRIM. P. 53 advisory committee’s note (citing Albert H. Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure*, 21 A.B.A. J. 301 (1935)).

14. JANICE SCHUETZ, COMMUNICATING THE LAW: LESSONS FROM LANDMARK LEGAL CASES 132 (2007).

15. Alan M. Dershowitz, *Introduction to SIDNEY B. WHIPPLE, THE TRIAL OF BRUNO RICHARD HAUPTMANN* (Notable Trials Library 1989) (1937).

16. *Id.*

17. Robbins, *supra* note 13, at 304.

18. *Estes v. Texas*, 381 U.S. 532 (1965).

19. *Id.* at 536.

20. *Id.* at 552.

21. *Id.* (Warren, J., concurring).

22. See, e.g., *id.* at 601 (Stewart, J., dissenting) (“I think that the introduction of television into the courtroom is . . . an extremely unwise policy. It . . . detracts from the inherent dignity of a courtroom.”).

23. *Id.* at 595 (Harlan, J., concurring).

judicial proceedings.²⁴ In addition to the lack of proven constitutional prejudice to the petitioner,²⁵ the Court seemed influenced by improvements in technology and the increased prevalence of television since the time of *Estes*.²⁶ *Chandler* made clear that the states were free to allow video cameras during court proceedings—subject to parties’ constitutional rights²⁷—and today all fifty states allow some type of video or audio recording of court proceedings.²⁸

3. Current Rules in the Federal Courts

The federal courts have only engaged in limited experimentation with video cameras. Since 1972, rules of the Judicial Conference of the United States, the judiciary’s administrative policymaking body,²⁹ had barred cameras from federal courtrooms.³⁰ But in September 1990, the Judicial Conference authorized a three-year program that allowed video and photographic coverage of civil cases in six designated district courts and two courts of appeal.³¹ At the close of the program, the body charged with studying it recommended discretionary camera access in all civil suits in the district and appellate courts.³² In fact, nineteen of the twenty judges most involved in the program concluded that the presence of cameras “had *no effect* on the administration of justice.”³³ Yet when the time came to vote on the recommendation, the traditional status quo prevailed: the federal ban on camera coverage of both criminal and civil suits was maintained.³⁴ Chief among the Judicial Conference’s concerns was the feeling that there might be an “intimidating effect of cameras on some witnesses and jurors.”³⁵

The only break from the outright federal camera ban came in 1996 when the Judicial Conference decided to allow each federal court of appeals to decide for itself whether to allow electronic coverage of particular court proceedings.³⁶ Currently, the Second and the Ninth Circuits—the two that had voluntarily

24. *Chandler v. Florida*, 449 U.S. 560, 565–66, 581–82 (1981).

25. *Id.* at 581–82.

26. *See id.* at 576; *see also* MARJORIE COHN & DAVID DOW, *CAMERAS IN THE COURTROOM: TELEVISION AND THE PURSUIT OF JUSTICE* 24–25 (1998).

27. COHN & DOW, *supra* note 26, at 23.

28. LORRAINE H. TONG, CONGRESSIONAL RESEARCH SERVICE, *TELEVISIONING SUPREME COURT AND OTHER FEDERAL COURT PROCEEDINGS: LEGISLATION AND ISSUES* 17 (2006).

29. *See* 28 U.S.C. § 331 (2000).

30. COHN & DOW, *supra* note 26, at 112.

31. *REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES* 103–04 (1990); *see also* HEDIEH NASHERI, *CRIME AND JUSTICE IN THE AGE OF COURT TV* 22–24 (2002).

32. COHN & DOW, *supra* note 26, at 114.

33. *Id.* (emphasis added).

34. *Id.* at 115.

35. TONG, *supra* note 28, at 4.

36. *Id.* Apparently, there is ambiguity as to whether the 1996 Judicial Conference policy allows the courts of appeal discretion to allow cameras in both civil and criminal cases, notwithstanding *Federal Rule of Criminal Procedure* 53. *Id.* at 4 n.15. However, that ambiguity is not particularly relevant to this Note.

participated in the experimental camera program³⁷—are the only ones that have chosen to allow cameras.³⁸

The Supreme Court has remained aloof from the cautious loosening below. The Court has never allowed its proceedings to be televised or photographed, though opinions, transcripts, and audio recordings of oral arguments are available on the Court's website.³⁹

B. THE LEGAL AND POLICY DEBATE

The issue of televising court proceedings raises a number of concerns—some constitutional, some not even necessarily “legal”—independent from the separation of powers question more recently raised by Congress's attempts to force televised proceedings.

1. The Basic Constitutional Tensions

At the heart of the camera debate is a perceived tension between the right to a fair trial and a right of public access.⁴⁰ The right to a fair trial is constitutionally based, with roots in both the Due Process Clause and the Sixth Amendment. The Sixth Amendment guarantees, for example, that an accused shall “have compulsory process for obtaining witnesses in his favor.”⁴¹ Because honest, unhindered testimony may be essential for criminal defendants to exonerate themselves, it is not difficult to understand why courts are leery of introducing cameras into the potentially delicate courtroom dynamic.⁴² And though the stakes might be lower in civil litigation than in a criminal trial, it is equally the case in both circumstances that no person may “be deprived of life, liberty, or property, without due process of law.”⁴³ As the Court in *Estes* put it, “We have always held that the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs.”⁴⁴

Potentially at odds with the right to a fair trial is the right to a public trial, which actually cuts two different ways. In one sense, the right to a public trial is a right for the benefit of defendants⁴⁵—it is an aspect of the right to a fair trial. The somewhat different right to a public trial relied on by camera proponents is

37. NASHERI, *supra* note 31, at 23.

38. TONG, *supra* note 28, at 4.

39. *Id.* at 2; *see also* Supreme Court of the United States, <http://www.supremecourtus.gov/> (last visited Mar. 28, 2008).

40. COHN & DOW, *supra* note 26, at 11.

41. U.S. CONST. amend. VI.

42. *See supra* note 35 and accompanying text; *see also* *Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 15 (2005) [hereinafter *Cameras in the Courtroom*] (“Jurors are told to watch the way a witness responds to a question. If a witness is nervous because of cameras in the courtroom, a juror might very well interpret that to mean the witness is nervous because the witness is not telling the truth.”).

43. *See* U.S. CONST. amend. V.

44. *Estes v. Texas*, 381 U.S. 532, 540 (1965).

45. *See* U.S. CONST. amend. VI; COHN & DOW, *supra* note 26, at 40.

that recognized by the Supreme Court in *Richmond Papers, Inc. v. Virginia*.⁴⁶ There the Court held that “the right to attend criminal trials is implicit in the guarantees of the First Amendment,”⁴⁷ and the case is also viewed as supporting a right of public access to civil trials.⁴⁸ Thus, there is a gap between *Richmond Papers* and *Chandler*, where the Court made clear that court proceedings *can be* televised, but it made no suggestion of any *right* to televised court proceedings, for either the defendant or the public.⁴⁹ Only one federal court has gone so far as to identify a presumptive “right of the press to televise as well as publish court proceedings, and of the public to view those proceedings on television.”⁵⁰ The Supreme Court has never addressed the issue.

2. Other Considerations

A number of other arguments figure prominently in the camera debate, though they are not clearly anchored to specific legal bases. First, members of the judiciary often cite the potential for misrepresentation—the possibility that video clips “would misinform, rather than inform, the public”—as a reason not to televise court proceedings.⁵¹ In the appellate context, an additional concern is that oral argument is just a part of a court’s decisionmaking process, and televising it would artificially inflate the process’s importance in the public mind.⁵² Even judges tentatively in favor of televising tend to want “gavel-to-gavel coverage” and would seek to prohibit the excerpting of sound bites.⁵³

Camera proponents respond by pointing to the educational value of televised proceedings and to principles of government transparency.⁵⁴ As one congressman put it, “When the Supreme Court is in session, you can walk by and see hundreds of people waiting for their opportunity to observe the judicial process. Why should our constituents not be allowed to observe this process . . . ?”⁵⁵ And C-SPAN, to assuage judicial fears of misrepresentation, has offered to televise Supreme Court arguments in full, without interruption or commentary.⁵⁶

46. *Richmond Papers, Inc. v. Virginia*, 448 U.S. 555 (1980).

47. *Id.* at 580.

48. See COHN & DOW, *supra* note 26, at 40 n.13; TONG, *supra* note 28, at 15.

49. See COHN & DOW, *supra* note 26, at 43; *supra* text accompanying notes 24–28.

50. *Katzman v. Victoria’s Secret Catalogue*, 923 F. Supp. 580, 589 (S.D.N.Y. 1996).

51. See TONG, *supra* note 28, at 13.

52. See *id.*

53. See COHN & DOW, *supra* note 26, at 121 (quoting Justice Ginsburg).

54. See TONG, *supra* note 28, at 15–17.

55. *Id.* at 16. The Supreme Court’s decision not to allow the broadcasting of oral arguments in *Bush v. Gore* seems to be a particularly sore spot for congressional proponents of camera legislation. See *Cameras in the Courtroom*, *supra* note 42, at 1 (“In the year 2000, the Court in effect decided who would be the President of the United States. There was the largest array of television trucks that I have ever seen And it was, I thought, most unfortunate that the cameras were not allowed inside so that the American people and the people of the world could see precisely what was going on.”).

56. See *Cameras in the Courtroom*, *supra* note 42, at 24 (“We have a commitment to make here this morning, and we have done it before, and that is basically if the Supreme Court will ever allow its oral

A second line of argument is related to the sound bite concern: some fear that cameras would affect the behavior of lawyers and judges, not just witnesses and jurors. There is at least anecdotal evidence suggesting that lawyers “posture and preen” more than they otherwise would when they perceive a camera to be their primary audience.⁵⁷ Even Supreme Court Justices do not imagine themselves above the influence of cameras. At the aforementioned hearing,⁵⁸ Justice Kennedy implored Senator Specter, “Please, Senator, do not introduce into the dynamic that I have with my colleagues the temptation, the insidious temptation, to think that one of my colleagues is trying to get a sound bite for television.”⁵⁹ However, this concern is not universally shared by judges.⁶⁰

Third, there are security concerns about the safety of judges, court personnel, and other participants.⁶¹ The Judicial Conference asserts that televising judges would make them more identifiable and vulnerable to threats, and recent death threats against Supreme Court Justices and attacks on other judges only highlight the issue.⁶²

Finally, judges opposed to televising proceedings are sometimes motivated by desires to preserve their personal privacy, apart from safety concerns, and to maintain an aura of mystique about the courts.⁶³ As Justice Byron White once put it, “I am very pleased to be able to walk around, and very, very seldom am I recognized. It’s very selfish, I know.”⁶⁴ With regard to the Supreme Court in particular, there is some sentiment that keeping cameras out underscores the Court’s uniqueness and heightens its authority.⁶⁵ Camera proponents, however, would likely respond that such a judicial “mystique” is undesirable and that the public would benefit more from access to and education about the third branch of government.⁶⁶

arguments on television, we will carry all of them from start to finish. We will find a place to put them all.”).

57. See COHN & DOW, *supra* note 26, at 86–87.

58. See *supra* text accompanying note 2.

59. *Judicial Security and Independence*, *supra* note 2, at 12.

60. See *Cameras in the Courtroom*, *supra* note 42, at 14 (“[B]y and large I have never been offended by anything that the lawyers or my colleagues have said in a televised oral argument in my court.”).

61. See TONG, *supra* note 28, at 14.

62. *Id.*; see also LORRAINE H. TONG, CONGRESSIONAL RESEARCH SERVICE, JUDICIAL SECURITY: RESPONSIBILITIES AND CURRENT ISSUES 1 (2008) (describing the murders of U.S. District Court Judge Joan Lefkow’s husband and mother, the mailing of poison-laced cookies to all nine Supreme Court Justices, and other acts of violence and threats).

63. See COHN & DOW, *supra* note 26, at 119.

64. *Id.* at 120.

65. See *id.*

66. With regard to the decision some years ago to televise congressional proceedings, Senator Patrick Leahy once asserted in a hearing, “Mr. Chairman, I am amazed at how many people actually tune into C-SPAN and how often you hear it. I mean, maybe the average person doesn’t, but a large number of people do. And, again, it has demystified the Congress.” *Cameras in the Courtroom*, *supra* note 42, at 8. Presumably, televising court proceedings would have a similar “demystifying” effect.

C. LEGISLATIVE EFFORTS

In the face of judicial disinclination to allow television cameras, members of Congress have increasingly sought to play a role in forcing the issue.

1. Growing Momentum

Nearly thirty years ago, members of Congress were already beginning to consider whether they might be able to prompt the courts to open up their proceedings to television cameras. In 1981, a resolution expressing congressional sentiment that the Supreme Court should televise its proceedings was introduced, but no further action was taken.⁶⁷

Recent years have seen a more determined groundswell of legislative effort. In 1999, “Sunshine in the Courtroom” bills were introduced in both houses of Congress that would have allowed individual judges to determine for themselves whether to permit cameras into their courtrooms.⁶⁸ At the conclusion of the 109th Congress, in 2007, five bills were pending that called for various degrees of camera access to the federal courts.⁶⁹ All of those bills were repeat efforts by their sponsors,⁷⁰ suggesting that there are at least a handful of congresspersons determined to put the video camera issue on the legislative agenda.

2. A Bill To Permit the Televising of Supreme Court Proceedings

Of the legislation proposed in recent years, Senator Specter’s Supreme Court bill may have the greatest potential for being enacted into law. As introduced in the 109th, 110th, and 111th Congresses, the bill is a marvel of legislative concision, reading simply that:

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.⁷¹

In 2007, one observer wrote that “the political context surrounding Specter’s bill looks . . . favorable. In addition to its bipartisan support . . . the bill allows Congress to give vent to its simmering frustration with the Court, but in a manner that is likely to be better received by a public that is generally deferential to the judiciary.”⁷² Though perhaps Congress has grown more

67. TONG, *supra* note 28, at 6 n.23.

68. NASHERI, *supra* note 31, at 27.

69. TONG, *supra* note 28, at 6–10.

70. *Id.* at 6.

71. S. 446, 111th Cong. (2009); S. 344, 110th Cong. (2007); S. 1768, 109th Cong. (2005).

72. Bruce G. Peabody, “*Supreme Court TV*”: *Televising the Least Accountable Branch?*, 33 J. LEGIS. 144, 176 (2007).

preoccupied in the months between then and now,⁷³ Specter's bill was reported favorably by committee before dying with the close of the 110th Congress,⁷⁴ and he reintroduced it as a live bill in February 2009.⁷⁵ Given some Justices' comments,⁷⁶ it appears that the Supreme Court is taking seriously the threat to its desired policy that the Specter bill poses.

If Senator Specter's bill is enacted into law, the camera debate may take center stage in the form of a justiciable case. A central component of the debate would not really be implicated, however. The bill is largely insulated from the right to a fair trial versus right to a public trial dichotomy;⁷⁷ at the Supreme Court, jurors and witnesses are not typically present, and the bill has its own safety valve to disallow cameras when fair trial rights would be jeopardized.⁷⁸ Furthermore, concerns about misrepresentation, grandstanding, security, and privacy may all be valid, but it does not seem that the Court could appropriately disregard legislation embodying policy judgments on those issues if Congress in fact has the constitutional authority to pass such legislation. The primary issue presented by the Specter bill is thus a separation of powers question: Could Congress permissibly enact legislation requiring the Supreme Court to televise its proceedings in light of the constitutional division of powers among the branches?

II. CAMERA LEGISLATION AND THE JUDICIAL POWER

Legislation violates the separation of powers if it impermissibly undermines the role of the judicial branch. That constitutional role is to decide cases and controversies, but asserting merely that legislation affects judicial decisionmaking is not sufficient to state a separation of powers violation. This Note proposes that the elimination of a court's power to protect the integrity and functioning of its decisionmaking processes impermissibly undermines the judiciary's constitutional role. Under that test, a proposal like Senator Specter's Supreme Court camera bill would violate the separation of powers if enacted into law.

A. THE SEPARATION OF POWERS ISSUE

The "separation of powers" is implicit in the Constitution's structure; the phrase itself does not actually appear. Article III vests the "judicial power" in

73. See, e.g., Naftali Bendavid, *Congress Turns to Budget Bill*, WALL ST. J., Feb. 20, 2009, at A4 ("Two weeks after passing a \$787 billion economic stimulus plan, Congress returns next week to take up another spending bill, this one with a price tag of \$410 billion.").

74. See GovTrack.us, S. 344: A Bill To Permit the Televising of Supreme Court Proceedings, <http://www.govtrack.us/congress/bill.xpd?bill=s110-344> (last visited Feb. 20, 2009).

75. See GovTrack.us, S. 446: A Bill To Permit the Televising of Supreme Court Proceedings, <http://www.govtrack.us/congress/bill.xpd?bill=s111-446> (last visited Feb. 20, 2009).

76. See, e.g., *supra* text accompanying note 5.

77. See *supra* text accompanying notes 40–50.

78. See S. 446, 111th Cong. (2009) (permitting television coverage of the Court's open sessions "unless the Court decides . . . that allowing such coverage in a particular case would constitute a violation of . . . due process rights").

“one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.”⁷⁹ Articles I and II have similar vesting clauses—the “legislative power” is vested in Congress, and the “executive power” is vested in the president.⁸⁰ This separation reflects the Framers’ fear of the accumulation of too much power in a single government branch’s hands.⁸¹ And because of this conscious separation, it can be unconstitutional for one branch to interfere too much with the powers of another.

The ways that Congress might unconstitutionally infringe upon the power of the judicial branch can perhaps be reduced to a few conceptual categories. One category, for example, would involve the “aggrandizement of congressional power” at the expense of the judiciary.⁸² But there is no meaningful argument that Congress, in requiring the Supreme Court to televise its proceedings, would be taking something away from the judiciary *and adding it to* the legislative power.

Instead, camera legislation presents the threat of a second type of infringement, whereby Congress “impermissibly undermine[s], without appreciable expansion of its own power, the role of the Judicial Branch.”⁸³ Thus, the question is whether legislation imposing cameras on the Supreme Court impermissibly undermines the judiciary’s constitutional role.

The issue so-characterized suggests a two-part inquiry. First, what is the federal judiciary’s constitutional “role”? Unless camera legislation affects the performance of that role, it cannot offend the separation of powers under this analysis. Second, when is that judicial role “impermissibly undermined”? If camera legislation effects such an undermining, it violates the separation of powers.

The background principle animating the separation of powers analysis here is judicial independence.⁸⁴ The Framers were wary of the “danger of improper [judicial] complaisance” toward the legislative and executive branches,⁸⁵ and

79. U.S. CONST. art. III, § 1.

80. See U.S. CONST. arts. I, § 1, II, § 1.

81. See, e.g., THE FEDERALIST NO. 47 (James Madison).

82. See *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833, 856 (1986). The *Schor* Court refers to *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (overturning statute that gave Congress a direct role in execution of the laws), as illustrative of the “aggrandizement of power” category of constitutional violation. *Schor*, 478 U.S. at 856. See also *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) (“The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”).

83. *Schor*, 478 U.S. at 856–57. This “impermissible undermining” category of constitutional violation captures issues such as that in *Schor*. See *id.* at 851 (characterizing issue as whether statute authorizing “adjudication of Article III business in non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch”).

84. See, e.g., *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 221 (1995) (“The Convention made the critical decision to establish a judicial department independent of the Legislative Branch”); *Schor*, 478 U.S. at 848 (“Article III, § 1, serves . . . to protect ‘the role of the independent judiciary within the constitutional scheme of tripartite government’” (citation omitted)).

85. THE FEDERALIST NO. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

their desires to ensure the “complete independence of the courts” is manifest in the good behavior and salary clauses of Article III.⁸⁶ Any separation of powers-based conclusion about camera legislation should comport with the constitutional scheme that places such a premium on the “independent spirit” of judges.⁸⁷

B. AN IMPERMISSIBLE UNDERMINING OF THE JUDICIAL ROLE

This Note proposes that the role of the judicial branch is impermissibly undermined when a court’s power to protect its decisionmaking processes is eliminated. Such a test incorporates the conclusion—too broad alone to be workable—that a separation of powers violation *may* arise if legislation affects the judiciary in the performance of its constitutional role of deciding cases and controversies. That the power to protect decisionmaking processes is essential to that role derives from viewing the judicial power as entailing a number of powers and from identifying one power among those as infeasible.

1. The Judicial Decisionmaking Role

If the separation of powers issue is whether legislation impermissibly undermines the judicial role, the necessary starting point is determining what that judicial role is. The judiciary’s constitutional role might be thought of as that which involves the exercise of its constitutionally granted power. By itself, that assertion—the judicial role is to exercise the judicial power—is question-begging. But fortunately, there is widespread acknowledgment that the Article III “judicial power” is primarily a power of decisionmaking to be exercised in the context of cases and controversies.⁸⁸ As the Supreme Court itself has put it: “Article III establishes a ‘judicial department’ with the ‘province and duty . . . to say what the law is’ in particular cases and controversies . . . [and] it gives the Federal Judiciary *the power*, not merely to rule on cases, but *to decide* them”⁸⁹

86. See U.S. CONST. art. III, § 1 (“The judges . . . shall hold their offices during good behavior, and shall, at stated times, receive for their services, a compensation, which shall not be diminished during their continuance in office.”); THE FEDERALIST NO. 78, *supra* note 85, at 524.

87. See THE FEDERALIST NO. 78, *supra* note 85, at 527.

88. See, e.g., William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1809 (2008) (“[T]he judicial power is the power to issue binding judgments”); John Harrison, *Addition by Subtraction*, 92 VA. L. REV. 1853, 1855 (2006) (referring to “the adjudication of cases and controversies” as “the heart of the judicial power”); Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 842 (2007) (The most “‘essential [attribute]’ [of the judicial power] is the Marbury-based judicial duty ‘to say what the law is.’” (citation omitted)); William F. Ryan, *Rush to Judgment: A Constitutional Analysis of Time Limits on Judicial Decisions*, 77 B.U. L. REV. 761, 790 (1997) (asserting that “if the judiciary is to remain a co-equal branch, its decisionmaking function must remain unimpaired”).

89. *Plaut*, 514 U.S. at 218–19 (emphasis added); see also *Adleman v. Booth*, 62 U.S. (21 How.) 506, 525 (1859) (“[N]o power is more clearly conferred by the Constitution and the laws of the United States, than the *power* of this court *to decide*, ultimately and finally, all cases under such Constitution and laws” (emphasis added)).

There is reason to be skeptical about attempts to categorically define a particular power as “judicial,” or “legislative,” or “executive.” For a time, the Supreme Court seemed more inclined toward applying those labels in resolving certain separation of powers questions,⁹⁰ but more contemporary precedent acknowledges the problems with such an approach.⁹¹ Because at the margins it may be quite difficult to discern “judicial” acts from “legislative,” “legislative” from “executive,” and so on, the definition of “judicial power” set forth here is a narrow one. Whatever else it may be, the judicial power is, at its core, the power to decide cases and controversies.

The centrality of the judicial decisionmaking role is well illustrated by cases protecting the finality of judgments,⁹² and a reasonable corollary to those cases is that if the Constitution limits the degree to which another branch can interfere with the *results* of judicial decisionmaking, then there must also be limits on the degree to which Congress can interfere with the decisionmaking *processes* that lead to those results. However, there is a conspicuous paucity of case law to support that seemingly innocuous corollary. One exhaustive separation of powers text, for example, only comes so close as to say, “*Presumably* there is a judicial privilege (paralleling executive privilege) that shields the deliberation of collegial courts, but the federal courts have never had to articulate it against

90. See, e.g., *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628 (1935) (examining the propriety of the President's firing of the FTC commissioner in light of fact that FTC “acts in part quasi legislatively and in part quasi judicially” and is not purely “executive”).

91. See *Morrison v. Olson*, 487 U.S. 654, 690 n.28 (1988) (citing discrepancies among *Humphrey's Executor*, *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), and *Bowsher v. Synar*, 478 U.S. 714 (1986), as illustrative of the “difficulty of defining such categories of ‘executive’ or ‘quasi-legislative’ officials”). The Court in *Morrison v. Olson* acknowledged that “it is hard to dispute that the powers of the FTC at the time of *Humphrey's Executor* would at the present time be considered ‘executive,’ at least to some degree.” *Morrison*, 487 U.S. at 690 n.28.

92. The leading case is *Plaut v. Spendthrift Farm, Inc.*, in which the Court struck down a portion of a newly enacted Securities Exchange Act provision that gave certain plaintiffs sixty days to reinstate suits dismissed under recent decisional law. *Plaut*, 514 U.S. at 213–15, 240. The separation of powers violation arose because some of those plaintiffs' dismissals had become final. *Id.* at 214, 240. The Court explained that “[h]aving achieved finality . . . a judicial decision becomes the last word of the judicial department . . . and Congress may not declare by retroactive legislation that the law applicable was something other than what the court said it was.” *Id.* at 227.

The almost arbitrary-seeming formality of the result for the *Plaut* plaintiffs underscores the Court's focus on protecting structural principles. The plaintiffs in *Plaut* would have been able to reinstate their suit had they filed an appeal such that their suit was not “final” at the time of the corrective legislation. And further, the finality of judgments is determined by statute. *Id.* The lesson of *Plaut* is thus not about finality per se; rather, it is that because the constitutional role of the judiciary is to decide cases, once a case is decided—with “finality”—Congress may not alter the decision without transgressing the separation of powers.

For a related type of separation of powers violation, see *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792) (“[N]o decision of any court of the United States can, under any circumstances . . . agreeable to the constitution, be liable to revision, or even suspension, by the legislature itself, in whom no judicial power of any kind appears to be vested.”).

legislative onslaughts.”⁹³

Establishing that a court is performing the fundamental judicial role when it engages in the processes that will lead to the decision of a case or controversy is clearly only part of the required analysis. The question of when interference with that role is impermissible remains unanswered. Many parameters undoubtedly affecting judicial decisionmaking are set and may be altered by Congress.⁹⁴ For instance, Chief Justice Rehnquist once explained that “the very fact that we are nine, and not three, or five, or seven, sets limits on our procedure”⁹⁵—that is, it sets limits on the Court’s decisionmaking procedures. That a congressional action *affects* the judiciary in the performance of its constitutional role can at most be a necessary condition for a separation of powers violation.

2. The Power to Protect Decisionmaking Processes

A sufficient condition derives from viewing the judicial power, although primarily about decisionmaking, as comprising a number of powers. One such subsidiary power, which cannot be eliminated, is a court’s authority to deal with threats to the orderly functioning of its decisionmaking processes.

a. From “Judicial Power” to Judicial Powers

The analyses of the Article III “judicial power” most helpful here are those found in cases considering the extent to which adjudicatory power may constitutionally be vested in entities outside the judicial branch.⁹⁶ Those cases clearly support the proposition that there are certain “attributes” or powers concomitant to the constitutional paradigm of judges exercising judicial power with the tenure and salary protections of Article III. To discern that principle, though, a close examination of the case law is required.

A subdividing of the “judicial power” is implicit in the balancing test adopted by *Commodity Futures Trading Commission v. Schor*.⁹⁷ The question in the case—whether an agency could constitutionally decide a state-law-based counterclaim between two private parties⁹⁸—forced the Court to return to an issue

93. PETER M. SHANE & HAROLD H. BRUFF, *SEPARATION OF POWERS LAW* 291 (1996) (emphasis added). Shane and Bruff go on to assert that “[a] branch that still feels free to bar news cameras from its open sessions is not unable to protect the confidentiality of its most sensitive functions.” *Id.*

94. See JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 32 (6th ed. 2000) (“In a very real sense judicial review exists with the continual consent of the people, because the ‘political branches’ control the high Court’s membership, its size, the funds that Congress appropriates to it, its staff, the rules of procedure that govern it, and the agencies that enforce its will.”).

95. William H. Rehnquist, *The Supreme Court: How It Was, How It Is*, in SUSAN LOW BLOCH & THOMAS G. KRATTENMAKER, *SUPREME COURT POLITICS: THE INSTITUTION AND ITS PROCEDURES* 383, 387 (1994).

96. *E.g.*, *Commodity Futures Trading Comm’n v. Schor*, 478 U.S. 833 (1986); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Crowell v. Benson*, 285 U.S. 22 (1932).

97. *Schor*, 478 U.S. 833.

98. The genesis of the Supreme Court case was a repatriations suit by Schor against a commodity futures broker, brought before the Commodity Futures Trading Commission (CFTC). *Id.* at 837. Roughly contemporaneous with Schor’s suit, the broker had itself filed suit in federal district court. *Id.*

left significantly unsettled by the recent *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.* decision.⁹⁹ Justice O'Connor, writing for the majority, set forth a balancing test for "determining the extent to which a given congressional decision to authorize the adjudication of Article III business in a non-Article III tribunal impermissibly threatens the institutional integrity of the Judicial Branch."¹⁰⁰ Of the factors that test considers—"the extent to which the 'essential attributes of judicial power' are reserved to Article III courts," "the origins and importance of the right to be adjudicated," and "the concerns that drove Congress to depart from the requirements of Article III"¹⁰¹—the first stands out as particularly relevant to this Note's inquiry. The "judicial power" is not monolithic, it suggests. It might be viewed as comprising various attributes, some of which are even "essential" or inviolable.

Though it did not originate the phrase,¹⁰² *Northern Pipeline* sheds greater light on what some "essential attributes of the judicial power" are. Justice Brennan, writing for four Justices, concluded that portions of the Bankruptcy Act of 1978 were unconstitutional because they "impermissibly removed most, if not all, of the 'essential attributes of the judicial power' from the Art. III district court, and . . . vested those attributes in a non-Art. III adjunct."¹⁰³ Those "attributes," according to the plurality, include a broad subject matter jurisdiction, the ability to decide points of law (as opposed to just finding facts), and the power to issue immediately enforceable judgments.¹⁰⁴ Most pertinently, they also include the ability to "exercise all *ordinary powers of district courts*, including the power to preside over jury trials, the power to issue declaratory judgments, the power to issue writs of habeas corpus, and the power to issue an order, process, or judgment."¹⁰⁵

What emerges is a multilayered construct: the judicial power has essential attributes; one essential attribute is the ability to exercise the ordinary powers of

The broker eventually dismissed its federal court action and agreed to bring its claim as a counterclaim against Schor in the proceeding he had initiated before the CFTC. *Id.* at 838. The CFTC's jurisdictional statute clearly authorized the agency's jurisdiction over the state law counterclaim, so the Supreme Court, by the time the case came before it, was "squarely faced with the question of whether the CFTC's assumption of jurisdiction over the common law counterclaims violates Article III of the Constitution." *Id.* at 847.

99. *Northern Pipeline*, 458 U.S. 50. *Northern Pipeline*, which struck down portions of the Bankruptcy Act of 1978, *id.* at 87, was the first case in years to find a statutory encroachment on Article III.

100. *Schor*, 478 U.S. at 851.

101. *Id.*

102. The phrase was first used by the Court in *Crowell v. Benson*, 285 U.S. 22, 51 (1932) ("The present case . . . is one of private right . . . [I]n cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges.")

103. *Northern Pipeline*, 458 U.S. at 87. Justices Rehnquist and O'Connor wrote more narrowly, concurring in the judgment. *See id.* at 91 (Rehnquist, J., concurring) ("I would . . . hold so much of the Bankruptcy Act of 1978 as enables a Bankruptcy Court to entertain and decide Northern's lawsuit over Marathon's objection to be violative of Art. III of the United States Constitution.")

104. *Id.* at 84–86 (plurality opinion).

105. *Id.* at 85 (citation omitted) (emphasis added).

district courts. *Schor* bears out the validity of this conception, as the Court—a majority, no longer a plurality as in *Northern Pipeline*—notes, among its other considerations in the application of the Article III balancing test, that “the CFTC, unlike the bankruptcy courts under the 1978 Act, does not exercise ‘all ordinary powers of the district courts.’”¹⁰⁶ As with any multi-factor balancing test though, there remains a question of weight. That is, how much does removal of a court’s ordinary powers count towards finding a piece of legislation unconstitutional? Could the impairment of a court’s ordinary powers so impermissibly undermine the judicial power as to itself trigger a separation of powers violation?

b. A Power that May Not Be Eliminated

The power that this Note argues Congress may not dispossess a court of—a power to protect decisionmaking processes—was not expressly mentioned in *Northern Pipeline*’s enumeration of courts’ “ordinary powers.”¹⁰⁷ In fact, the plurality deliberately excluded what might be thought of as an analog, a contempt power, from the illustrative list.¹⁰⁸ The United States’ brief in the case had highlighted statutory limitations on bankruptcy judges’ abilities to punish criminal contempt, arguing that those sorts of limits were adopted precisely so that the Bankruptcy Act would not be viewed as removing an impermissible quantum of judicial attributes from Article III courts.¹⁰⁹ The plurality disagreed, asserting in a footnote that statutes sometimes limit the contempt power of Article III courts as well.¹¹⁰ However, none of the contempt statutes cited in support of that assertion purport to restrict a court’s ability to punish “contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice.”¹¹¹ No statute attempts to restrain courts in their ability to deal with behavior that impairs their functioning as courts or that “poses an imminent threat to the order and decorum required for fair adjudication.”¹¹² Such legislative forbearance suggests that a separation of powers principle is at work.¹¹³

“Inherent power” is a rubric under which the Supreme Court has often

106. *Schor*, 478 U.S. at 853.

107. *See Northern Pipeline*, 458 U.S. at 85.

108. *See id.* at 86 n.37.

109. Brief for the United States at 38–39, *Northern Pipeline*, 458 U.S. 50 (No. 81-150).

110. *See Northern Pipeline*, 458 U.S. at 86 n.37.

111. 18 U.S.C. §§ 402, 3691 (2000); *see also id.* § 401 (“A court . . . shall have the power to punish . . . such contempt as . . . [m]isbehavior of any person in its presence or so near thereto as to obstruct the administration of justice . . .”).

112. H.R. REP. NO. 95-595, at 84 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6045.

113. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 230 (1995) (asserting, with regard to the unprecedented nature of the statute at issue in the case, that such “prolonged [congressional] reticence would be amazing if such interference were not understood to be constitutionally proscribed”).

discussed courts' contempt powers,¹¹⁴ and it is necessary to distinguish the power this Note identifies as something narrower. Inherent powers, such as the power to punish for contempts, are said to be those "necessary to the exercise of all others."¹¹⁵ They are significant in the discretion they allow courts. The Supreme Court, for example, has upheld a court's barring of a disruptive criminal defendant from the courtroom during his own trial.¹¹⁶ At the same time, inherent powers are also generally acknowledged to be mutable; they might be thought of as "procedural gap filling [powers] . . . a weak version of . . . power, given that Congress can, to a great degree, trump its exercise."¹¹⁷ However, the inherent contempt power cannot be completely eliminated.¹¹⁸ As the Supreme Court has put it, "the attributes which inhere in that power and are inseparable from it can neither be abrogated nor rendered practically inoperative."¹¹⁹ This Note's proposed test trains on that irreducible core, which ensures that courts will be able to fulfill their constitutional decisionmaking function.

Justice Scalia is perhaps the Court's staunchest opponent of the notion of "inherent powers," but even he acknowledges the foregoing principle as vital. In *Young v. United States ex rel. Vuitton et Fils*,¹²⁰ where the Court recognized an inherent judicial power to initiate contempt proceedings and appoint a private attorney to prosecute,¹²¹ Scalia wrote a concurrence setting forth his (largely unfavorable) views on inherent powers.¹²² But notwithstanding his desire to eschew deciding cases on the basis of inherent powers, he did acknowledge that:

114. See, e.g., *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991) ("[I]t is firmly established that '[t]he power to punish for contempts is inherent in all courts.'" (quoting *Ex parte Robinson*, 86 U.S. (19 Wall.) 505, 510 (1874))).

115. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812). Inherent powers besides the contempt power include the power to control admission to the bar and discipline attorneys, the power to vacate a judgment upon proof of fraud, and the power to act *sua sponte* to dismiss a suit for failure to prosecute. *Chambers*, 501 U.S. at 43–44.

116. See *Illinois v. Allen*, 397 U.S. 337, 347 (1970) (upholding removal from courtroom of disruptive criminal defendant, notwithstanding Sixth Amendment Confrontation Clause).

117. Ryan, *supra* note 88, at 779. Inherent powers cases tend to distinguish Congress's ability to limit the lower federal courts' exercise of inherent powers from its abilities vis-à-vis the Supreme Court. See, e.g., *Chambers*, 501 U.S. at 47 ("[T]he exercise of the inherent power of lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'" (emphasis added)). For discussion of this distinction, see *infra* section III.A.

118. See *Michaelson v. United States ex rel. Chicago, St. P., M. & O. Ry. Co.*, 266 U.S. 42, 66 (1942).

119. *Id.*

120. *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787 (1987).

121. *Id.* at 800–01 (majority opinion).

122. *Id.* at 815–16 (Scalia, J., concurring in judgment). Scalia argues that the only power constitutionally vested in federal judges is the "judicial power," which is distinct, for the most part, from the powers that the Court has over the years claimed to be "inherent." See *id.* This Note's analysis in no way contradicts that premise. There is indeed a distinction between the "judicial power," even when conceived of as composed of numerous powers, and so-called "inherent powers." There may also, however, be some overlap.

[T]he narrow principle of necessity . . . that the Legislative, Executive, and Judicial Branches must each possess those powers necessary to protect the functioning of its own processes . . . does have logical application to the federal courts' contempt powers. But that principle would at most require that courts be empowered to prosecute for contempt those who interfere with orderly conduct of their business or disobey orders necessary to the conduct of that business.¹²³

This concession recognizes precisely the principle that the statutes cited in the *Northern Pipeline* footnote carefully avoid impairing.¹²⁴ It also suggests an additional reason for the power this Note identifies: interbranch comity.¹²⁵

The separation of powers test is thus fully formed. If camera legislation eliminates the power of a court to protect the functioning of its decisionmaking processes, it impermissibly undermines the judicial role and violates the separation of powers. This test is centered on the constitutional decisionmaking function of the judiciary, and it guards against the deprivation of a power rarely fleshed out, but tacitly and consistently acknowledged as unassailable.

C. THE ANALYSIS APPLIED TO SUPREME COURT CAMERA LEGISLATION

Supreme Court camera legislation would impermissibly undermine the judicial role because it would eliminate the Court's ability to protect the functioning of its decisionmaking processes with respect to a specific type of intrusion—video cameras.

1. Camera Legislation Would Affect Decisionmaking Processes

The Specter bill essentially requires the Supreme Court to televise oral argument, which is undoubtedly a step in the Court's decisionmaking process. That process begins with the Justices familiarizing themselves with the parties' briefs and the lower court records.¹²⁶ Then, prior to any formal discussion amongst themselves,¹²⁷ the Justices hear oral argument—once unlimited in length, but today typically restricted to thirty minutes per side.¹²⁸ A few days after oral argument, the Justices—with no one else present—conference together, explaining one-by-one their respective views.¹²⁹ From that conference, a majority view generally emerges, and the opinion or opinions are assigned,

123. *Id.* at 821.

124. *See supra* notes 110–11 and accompanying text.

125. That is to say, the power to protect core processes is not something for the legislature or executive to begrudge the judiciary. It is a necessary incident of each branch's exercise of its constitutionally granted power, and all three branches likely possess analogous powers in this regard. *See infra* notes 163–65 and accompanying text.

126. Rehnquist, *supra* note 95, at 513.

127. *Judicial Security and Independence*, *supra* note 2, at 12.

128. BLOCH & KRATTENMAKER, *supra* note 95, at 512.

129. Rehnquist, *supra* note 95, at 383–84.

drafted, and circulated.¹³⁰ It is clear that, at least formally,¹³¹ oral argument is a stage in the process leading to the decision in a case.

The Justices themselves offer deeper insights about the role oral argument plays in their decisionmaking processes. Chief Justice Rehnquist, for instance, explained that oral argument is beneficial because it gives the Justices a chance to hear from “lawyers who generally know far more about the particular case than the justices do.”¹³² Oral argument is in part an opportunity for each Justice to learn more about a case, and it may be the last time that he or she will glean anything new to factor into the decisionmaking process.¹³³ In addition, because there is no prior discussion, oral argument can be a critical opportunity for the Justices to get a sense of each other’s positions. As Justice Kennedy recently put it, “We are talking with each other, and sometimes the dynamic works and sometimes it does not, but we are using the attorney to have a conversation with ourselves and with the attorney.”¹³⁴

Some might question whether a mere thirty minute conversation among attorney and Justices can have much effect on the decision ultimately reached in a case, but both history and the Justices themselves make clear that oral argument can and does affect judicial decisionmaking. One famous “conversion” was Justice Owen Roberts’ decision to provide the fifth vote in *West Coast Hotel v. Parrish*, a move that signaled the end of substantive due process scrutiny of economic legislation.¹³⁵ Roberts’ change in position was apparently a surprising switch from what it had been prior to oral argument in the case.¹³⁶ Chief Justice Rehnquist expressly stated the effect oral arguments had on him:

[S]peaking for myself, it does make a difference: I think that in a significant minority of the cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the bench [I]f an oral advocate is effective, how he presents his position during oral argument *will* have something to do with how the case comes out.¹³⁷

So the effect of oral argument on judicial decisionmaking can be, at least in particular cases, crucial.

Given the sensitive decisionmaking that goes on during oral argument, it is unsurprising that most Justices have expressed hostility to the presence of cameras. Justice Souter has claimed that cameras affected his behavior when he served on the New Hampshire Supreme Court.¹³⁸ According to his own testi-

130. Rehnquist, *supra* note 95, at 381.

131. And form matters in separation of powers analyses. *See supra* note 92.

132. Rehnquist, *supra* note 95, at 383–84.

133. *See id.* at 383.

134. *Judicial Security and Independence*, *supra* note 2, at 12.

135. *See* NOWAK & ROTUNDA, *supra* note 94, at 33–34, 34 n.16.

136. *Id.* at 34 n.16.

137. Rehnquist, *supra* note 95, at 515–16.

138. *See* COHN & DOW, *supra* note 26, at 111.

mony, “He’d felt inclined to pull punches in asking questions . . . and worried he would see ‘the excerpts, the sound bites, totally out of context on the 6 o’clock news.’”¹³⁹ Camera legislation would impose an unwanted presence upon the Court, and if it is allowed that the legislation would have any effect at all, such effect takes place on and during decisionmaking processes. The necessary condition for a separation of powers violation—effect on judicial decisionmaking—is thus satisfied.

2. Camera Legislation Would Impermissibly Undermine the Judiciary

Camera legislation would not only affect judicial decisionmaking; it would impermissibly undermine it. Controlling the courtroom is a fundamental power of a court. When it engages in decisionmaking pursuant to its constitutionally-granted power, a court has authority over order, decorum, its ability to function, and, to a large degree, over whom or what may be present.¹⁴⁰ There can be little doubt that, in the absence of camera legislation, the Supreme Court could order the removal of a video camera brought into its courtroom, as well as the removal of anyone brazen enough to attempt to operate one during oral argument. Because it would take away this power to protect the functioning and integrity of a decisionmaking process, camera legislation would violate the separation of powers. Even assuming that it might be permissible for Congress to shape the contours of the Court’s ability to control the courtroom,¹⁴¹ camera legislation is clearly impermissible because it completely eliminates control,¹⁴² albeit with respect to just one category of intrusion.

One might ask, how would a single, discreetly-positioned video device really hurt judicial decisionmaking? What would be the harm? A response might be that a video camera is itself something of an entity or presence,¹⁴³ notwithstanding the fact that the state of video technology has advanced significantly since the time of *Estes*, when the Court was concerned about obtrusive, noisy equipment and crews of cameramen arrayed throughout the courtroom.¹⁴⁴ But making such a response misses the point; the question of harm is one that the Court—as a repository of the judicial power—is most appropriately situated to answer. A bill like Senator Specter’s would deprive the Court of any ability—absent a due process violation—to deem the mandated video camera distracting or detrimental to judicial processes, but that directly contradicts the judiciary’s long experience with cameras in the courtroom. Judicial hostility to the use of video cameras from the beginning has been about protecting the integrity of decisionmaking processes.¹⁴⁵ In light of the numerous occasions the Court has

139. *Id.*

140. *See supra* notes 110–12, 115 and accompanying text.

141. This may be an overly charitable assumption. *See supra* note 117 and accompanying text.

142. *See supra* notes 118–19 and accompanying text.

143. *See supra* notes 57–60, 138–39 and accompanying text.

144. *See supra* notes 18–23 and accompanying text.

145. *See supra* note 10 and accompanying text.

considered—and rejected—the use of video cameras,¹⁴⁶ it is not appropriate for Congress to substitute its judgment for the judiciary's in this regard. Necessity suggests that in at least some instances, each branch must be the final arbiter regarding the exercise of its constitutional power.¹⁴⁷ If the Court thinks that video cameras will have a negative impact on their proceedings, it is a matter of its ordinary control to bar them from the courtroom during decisionmaking processes.

3. Judicial Independence

Another author who has considered the separation of powers implications of the Specter bill concludes:

Some legislative measures would seemingly go too far in managing the way the Court conducts its business, encroaching on the judiciary's independence and primary functions. . . . Specter's proposal, which regulates and expands the mechanisms through which the Court publicizes its already open sessions, is a defensible way to keep the nation's highest court open, available, and legitimate.¹⁴⁸

Not only does that fail to appreciate that oral argument is a decisionmaking process,¹⁴⁹ the author also reaches the wrong conclusion on judicial independence. He acknowledges that “the passage of [the Specter bill] could sanction and invite a more general manipulation of the Court and its proceedings by Congress,” but he concludes that “televising the Court seems to be a regulation of the same order as the numerous other controls that the legislature already employs.”¹⁵⁰ This Note concludes the opposite, and to the extent that the Specter bill is an attempt by Congress to bully or retaliate against the Court,¹⁵¹ perhaps it is desirable for the Court to push back given the constitutional importance of the independent judiciary not being overborne by the political branches.¹⁵²

III. EXTENDING THE ANALYSIS—THE LOWER FEDERAL COURTS

If legislation requiring the Supreme Court to televise its proceedings is unconstitutional because it would impermissibly eliminate an essential power of

146. See *supra* notes 31–38 and accompanying text.

147. See *supra* note 123 and accompanying text.

148. Peabody, *supra* note 72, at 175–76.

149. See *supra* section II.C.1.

150. Peabody, *supra* note 72, at 154.

151. Consider Justice Kennedy's comments to Senator Specter at the 2007 Senate hearing: “You mentioned, we told the Congress about its reasoning in, what was it *Morrison v. Roncella*? . . . It's a non sequitur to use that, to say that you can have cameras in the courtroom. We did not tell Congress how to conduct its proceedings.” *Judicial Security and Independence*, *supra* note 2, at 13. There seems to be a clear subtext of congressional desire to curb the Court with bills like Specter's.

152. See *supra* text accompanying notes 84–87.

courtroom control, the question naturally arises: what about the lower federal courts? Fortunately, there is no difference between the Supreme Court and the lower courts for the purposes of this Note's test, or with regard to its conclusion. That is, legislation requiring the district or circuit courts to televise proceedings would be unconstitutional as a separation of powers matter, just as the Specter bill would be if enacted into law. Adding concerns apart from the separation of powers back into the analysis only makes for a more compelling case against camera legislation as applied to the lower federal courts. As an initial matter, however, it is necessary to dispatch an oft-cited distinction.

A. A RELEVANT DISTINCTION?

A distinction is sometimes drawn between the Supreme Court and the lower federal courts based on the text of the Constitution, which *requires* a "supreme court," but leaves to Congress the decision to create lower courts.¹⁵³ The accompanying notion is that "the power to ordain and establish . . . carries with it the power to prescribe and regulate."¹⁵⁴ In the camera context, such a rule would suggest that even if Congress could not permissibly require the Supreme Court to televise its proceedings, perhaps it could so impose upon the lower courts.

Inherent powers cases frequently pay lip service to this constitutional distinction between the Supreme Court and the lower courts. For instance, the Supreme Court in a case addressing a district court's inherent-powers-based assessment of sanctions on an attorney for bad-faith conduct pronounced, "It is true that the exercise of the inherent power of the lower federal courts can be limited by statute and rule, for '[t]hese courts were created by act of Congress.'"¹⁵⁵ The power to protect judicial decisionmaking that this Note isolates, however, is anchored in the Article III "judicial power." The inherent powers cases never go quite so far as to elevate those powers to constitutional status, and as previously discussed, Justice Scalia in particular has gone to great lengths to make clear that any such elevation would be improper.¹⁵⁶ The Supreme Court's ability to keep cameras out of the courtroom has nothing to do with its being a constitutionally "required" court with potentially greater powers than other courts. The power to protect their decisionmaking processes is one that Article III courts possess because they are vested with the Article III "judicial power." If all other considerations were equal, the fact that a statute

153. See U.S. CONST. art. III, § 1.

154. See *Livingston v. Story*, 34 U.S. (9 Pet.) 632, 656 (1835).

155. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 47 (1991) (citation omitted). There is, however, some tension between the Court's pronouncement in *Chambers* and its holding in that very case. The Court went on to say that it would not "lightly assume [Congressional intent] to depart from established principles such as the scope of a court's inherent power." *Id.* at 48. It then concluded that, notwithstanding the existence of legislation providing for the imposition of sanctions, the lower court was within its discretion to impose them by virtue of its inherent power and free from statutory constraints. *Id.* at 50.

156. See *supra* notes 122–23 and accompanying text.

requiring televised proceedings might be aimed at a district or circuit court would not in any way alter this Note's conclusion. But of course, in the context of the lower courts, all other considerations are not equal.

B. THE SEPARATION OF POWERS AND THE BROADER CAMERA DEBATE

Moving down through the federal court hierarchy in the first instance strengthens this Note's separation of powers-based conclusion because oral argument in the circuit courts of appeal and trial in the district courts, respectively, are arguably more important judicial decisionmaking processes than oral argument in the Supreme Court. The courts of appeal, in contrast to Supreme Court practice, frequently deny parties the opportunity to present oral argument. Because the *Federal Rules of Appellate Procedure* allow a court to deny oral argument if "the decisional process would not be significantly aided,"¹⁵⁷ as a practical matter, argument will not occur unless a court thinks that it will be important to its decision of a case.¹⁵⁸ To the extent that oral argument is more influential upon judicial decisionmaking at the intermediate appellate level than at the Supreme Court, that strengthens the proposition that a court is engaging in its core constitutional duty of deciding cases and controversies when it hears oral argument. Moving down further to the district court level, the import of a trial to judicial decisionmaking states a stronger separation of powers case still. In a trial court, because jurors, witnesses, and, in general, a broad range of individuals are typically present, there are the greatest number of potential avenues for a video camera to adversely affect the decision of a case. The line here between a "pure" separation of powers issue and the broader camera debate unavoidably blurs, however.

Because the Specter camera bill largely fails to implicate the issues that have long dominated the cameras in the courtroom debate,¹⁵⁹ fair trial, public access, misrepresentation, security, and other concerns have all effectively been put to the side throughout the analysis thus far. A consideration of the prospects for legislation aimed at the district courts or courts of appeal cannot remain so insulated. Obviously fair trial concerns are the most pronounced at the trial court level. As a federal district court judge—who claimed to have experienced "no negative impact at all" during his one experience holding trial before television cameras—put it to a Senate committee:

I am concerned that any compromise of an individual's right to a fair trial, any intrusion on that right is not warranted because I think we have open courtrooms now and the question is do we need courtrooms to be more

157. FED. R. APP. P. 34(a).

158. See *United States v. Smith*, 484 F.2d 8, 11 (10th Cir. 1976) ("Oral argument serves only as an aid to the court and is not premised upon a statutory or constitutional right of the parties." (emphasis added)).

159. See *supra* section I.C.2.

open . . . I certainly favor open courtrooms, but believe our courtrooms are open now.¹⁶⁰

Thus, not only would it be impermissible for Congress to *force* any level of the federal judiciary to televise its proceedings as a separation of powers matter, in addition the broader set of arguments against camera legislation increasingly militate against the wisdom—or indeed, perhaps propriety on constitutional grounds apart from separation of powers—of enacting such camera-forcing statutes moving from the top of the judicial system down.

In contrast to legislation requiring televised proceedings, the decision of an individual court to televise proceedings *would* be permissible if litigants' constitutional rights were not jeopardized. Interestingly enough, that reality is basically reflected in current federal court policies. The courts of appeal, and presumably the Supreme Court, have the discretion to allow cameras if they so desire, and a few courts have already done so.¹⁶¹ With regard to the district courts, perhaps it is just a matter of time.¹⁶²

CONCLUSION

Courts vested with the “judicial power” must always retain the power to protect the functioning of their decisionmaking processes. If Congress attempts to eliminate that power, as in the case of Supreme Court camera legislation, it impermissibly undermines the role of the judiciary and violates the separation of powers.

The Court has asserted that “A paramount—indeed, an indispensable—ingredient of the concept of powers delegated to coequal branches is that each branch must recognize and respect the limits on its own authority and the boundaries of the authority delegated to the other branches.”¹⁶³ In the end, this softer version of separated powers may carry the day in this debate. Congress would be wise to take seriously the Court's clearly expressed resistance to cameras and hold off on legislation. As Justice Harlan mused in *Estes*,¹⁶⁴ cameras are likely to find their way into all courts eventually, with the courts' acquiescence. Forcing the issue legislatively risks a court decision that could slow the momentum in the camera debate that presently seems to favor increased access.

160. *Cameras in the Courtroom*, *supra* note 42, at 15–16.

161. *See supra* text accompanying note 38.

162. Recall, fair trial concerns have contributed to the current judiciary policy against allowing district court proceedings to be televised. *See supra* notes 34–35 and accompanying text. But much as the Supreme Court's views evolved from *Estes* to *Chambers*, *see supra* notes 18–28 and accompanying text, time seems likely to bring change in this area too.

163. *United States v. Will*, 449 U.S. 200, 228 (1980).

164. *See supra* note 23 and accompanying text.

Perhaps this sort of comity is what Justice Kennedy most wished to emphasize to Senator Specter in saying the Court “hope[s] that the *respect* that separation of powers and checks and balances implies would persuade [Congress] to accept [the Court’s] judgment in this regard.”¹⁶⁵

165. *Judicial Security and Independence*, *supra* note 2, at 12 (emphasis added); *see also supra* notes 123–25 and accompanying text.