Journal of Legislation

Volume 33 | Issue 2 Article 1

5-1-2007

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"SUPREME COURT TV": TELEVISING THE LEAST ACCOUNTABLE BRANCH?

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I. INTRODUCTION: THE SEARCH FOR BIPARTISANSHIP AND THE 110TH CONGRESS

The midterm elections of 2006 ushered in the return of divided government,[1] with different parties in control of the White House and United States Congress. This electoral shift has renewed talk of Congress's central role in national policymaking and prompted pundits and politicians to resume calls for bipartisan lawmaking.[2] As President George Bush claimed during a press conference held in November 2006, "it is now our duty to put the elections behind us and work together with the Democrats and independents" to find "common ground."[3] When the 110th Congress convened in January 2007, its leaders reiterated this pledge of cooperation between the parties. "Guided by the spirit of bipartisanship," said new Senate Majority Leader Harry Reid, we "are ready to take this country in a new direction."[4]

Historically, however, constructing this shared policy agenda has been an elusive and delicate undertaking. And in the immediate future, institutional cooperation may be especially difficult given the electoral competitiveness of the two major parties,[5] and the

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1. Since 1980, the federal government has featured unified party rule infrequently: from 1993–1994, during part of 2001, and from 2003–2006. *See, e.g.*, Office of the Clerk, U.S. House of Representatives, *Party Divisions of the House of Representatives (1789 to Present)*, http://clerk.house.gov/art_history/house_history?partyDiv.html (last visited Mar. 30, 2007) [hereinafter *Party Divisions of the House*]; Senate Historical Office, U.S. Senate, *Party Division in the Senate, 1789-Present*, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Mar. 30, 2007); The White House, *Presidents of the United States—Presidents By Date*, http://www.whitehouse.gov/history/presidents/chronological.html (last visited Mar. 30, 2007).

2. Rick Klein, *President, Pelosi Talk of Bipartisanship, Bush Reoffers Controversial UN Envoy Pick*, BOSTON GLOBE, Nov. 10, 2006, at A2; Eric Pianin, *McConnell Pledges Cooperation, New GOP Leader Vows to Work With Democrats on Legislation*, WASH. POST, Nov. 29, 2006, at A21; Eliott C. McLaughlin, *Pelosi Ready for House Helm, Battle Over Issues*, CNN.com, Nov. 9, 2006, http://www.cnn.com/2006/POLITICS/11/08/pelosi.speaker (Speaker-elect Nancy Pelosi expressing her desire to go in a "new direction," emphasizing bipartisanship).

3. George W. Bush, President of the U.S., President's News Conference, 42 WEEKLY COMP. PRES. DOC. 2023 (Nov. 8, 2006), *available at* http://www.whitehouse.gov/news/releases/2006/11/20061108-2.html.

4. John M. Broder, *Jubilant Democrats Assume Control on Capitol Hill*, N.Y. TIMES, Jan. 5, 2007, at A1 (discussing Democrats' taking control of the new Congress).

5. The relatively close party divide in the House of Representatives (233 Democrats, 202 Republicans in the House of Representatives for the 110th Congress) is somewhat offset by lawmakers' success in drawing congressional districts that tend to be non-competitive. *Party Divisions of the House, supra* note 1. Since most districts are constructed to favor one party decisively over the other, electoral competition tends to be somewhat limited in recent Congresses. *See* Bruce I. Oppenheimer, *Deep Red and Blue Congressional Districts: The Causes and Consequences of Declining Party Competitiveness*, *in* CONGRESS RECONSIDERED (Lawrence C. Dodd & Bruce I. Oppenheimer eds., 2004) (discussing the incidence and effects of partisan

related likelihood that political control of both the White House and Congress will be genuinely contested during 2008. Moreover, scholarship suggests that party divisions are notably deep in the current era.[6] At least in terms of votes in Congress, the past twenty years have seen legislators adhering to their respective party line ever more tightly; that is, they are much more reluctant than in the past to break from their party's preferred policy positions—to "cross the aisle" and vote for a measure supported by the opposition.[7] Additionally, a number of commentators have suggested that leaders in the 110th Congress face the enduring difficulty of trying to bring unity to the disparate ideological, geographic, and issue-oriented groups within the two major parties.[8]

II. TELEVISING THE LEAST ACCOUNTABLE BRANCH?

Given these potentially shearing political forces, what specific issues could bring together partisans and officials who appear to be so opposed? One possibility is that lawmakers might find common ground by training their attention on the Supreme Court—an institution that has, in recent years, been criticized by a wide spectrum of public officials, including representatives from both major parties, as well as Congress and the White House.[9] Since the 1990s, the Court has invalidated (sometimes widely popular) federal legislation at a rate not seen since the advent of the New Deal.[10] The Court's decisions over this period have frequently inflamed both the left and the right—sometimes at the same time.[11]

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gerrymandering in Congress).

6. *See, e.g.*, PIETRO S. NIVOLA & DAVID W. BRADY, RED AND BLUE NATION?: CHARACTERISTICS AND CAUSES OF AMERICA'S POLARIZED PARTIES 1–47 (2006). *See generally* JULIET EILPERIN, FIGHT CLUB POLITICS: HOW PARTISANSHIP IS POISONING THE HOUSE OF REPRESENTATIVES (2006) (discussing political tactics and dynamics in the House of Representatives that have exacerbated partisan divisions within the institution); THOMAS E. MANN & NORMAN J. ORNSTEIN, THE BROKEN BRANCH: HOW CONGRESS IS FAILING AMERICA AND HOW TO GET IT BACK ON TRACK (2006) (identifying partisanship as one of the ills of the contemporary Congress); Tom Balz and Jim VandeHei, *GOP Moderates' Ouster Widens House Divide*, WASH. POST, Nov. 10, 2006 at A10 (discussing the effects of the 2006 congressional midterm elections in "widening the ideological divisions that have contributed to partisanship and gridlock on Capitol Hill"); John W. Dean, *Are Congressional Wars Coming? Since Cheney Has Already Said He'll Ignore the Democratic Congress, It Seems Likely*, FINDLAW, Dec. 01, 2006, http://writ.news.findlaw.com/dean/20061201.html (discussing partisan tensions between the Bush administration and Democrats in Congress).

7. *See, e.g.*, KEITH T. POOLE & HOWARD ROSENTHAL, CONGRESS: A POLITICAL-ECONOMIC HISTORY OF ROLL CALL VOTING 229–32 (Oxford University Press 2000); DAVID H. ROHDE, PARTIES AND LEADERS IN THE POSTREFORM HOUSE 162–92 (Univ. Chicago Press 1991).

8. *See, e.g.*, McLaughlin, *supra* note 2 (quoting scholar Thomas Mann who claims that the challenge for the new speaker "and the other leaders is going to be to find issues that unify the various wings of the [Democratic] party").

9. *See, e.g.*, JOHN YOO, WAR BY OTHER MEANS vii–xi, 162–64, 236–39 (Atlantic Monthly Press 2006) (decrying Supreme Court decisions opposing the Bush Administration); Bruce Peabody, *Congress, the Court, and the "Service Constitution:" Article III Jurisdiction Controls as a Case Study of the Separation of Powers*, 2006 MICH. ST. L. REV. 269 (2006) [hereinafter *Service Constitution*]; Robert Post, *Congress and the Court*, 132 DÆDALUS, Summer 2003, at 5 (2003).

10. *See* Post, *supra* note 9, at 5–6, THOMAS M. KECK, THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 1–2 (Univ. Chi. Press 2004); KEITH E. WHITTINGTON, *Hearing About the Constitution in Congressional Committees*, *in* CONGRESS AND THE CONSTITUTION 87 (Neal Devins & Keith E. Whittington eds., Duke Univ. Press 2005).

11. Mike Allen & Charles Babington, *House Votes to Undercut High Court on Property; Federal Funds Tied to Eminent Domain*, WASH. POST, July 1, 2005, at A1 (quoting former House Majority Leader Tom DeLay's criticisms of the Supreme Court's ruling in *Kelo v. City of New London*); Hillary Rodham Clinton & Goodwin Liu, *Separation Anxiety: Congress, the Courts, and the Constitution*, 91 GEO. L. REV. 439, 449

Congressional leaders have seemed uncertain about how to deal with this perceived institutional "activism."[12] Some lawmakers have proposed initiatives to trim the Court's budget, impeach individual Justices, or employ Congress's authority under Article III of the Constitution to strip the Court of jurisdiction to hear cases involving certain substantive areas, such as abortion.[13] On the whole, these measures have failed to attract sustained popular attention and legislative support.

The new Congress, however, will consider a bill that could succeed where these other "Court curbing" initiatives have failed. On January 22, 2007, Senator Arlen Specter introduced S. 344, a "bill to permit the televising of Supreme Court proceedings."[14] Specter's bill would drag the Supreme Court into the twentieth century, never mind the twenty-first, by requiring television coverage of the Court's open sessions. The measure includes what might be described as a civil liberties "loophole"—permitting a "majority of [J]ustices" to discontinue the broadcasts in a particular case if they believe that televising these proceedings would "constitute a violation of the due process rights of [one] or more of the parties before the Court."[15] In all other cases, however, the presumption is that the cameras will roll.

In recent years, scholars, judges, and commentators have surfaced a number of purported benefits and drawbacks to proposals, like Specter's, that would expand television coverage of federal judicial proceedings.[16] Typically, these debates have focused on policy assessments—on the supposed impact the legislation would have on the operation of our courts or the public's attitudes towards the judiciary.

Opponents have claimed that bills like S. 344 would compromise the anonymity, and, in turn, the security, of Supreme Court Justices. Moreover, they fear that televising

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(2003) (warning about "the imperial tendencies of the current Court"); Press Release, Rep. Ron Lewis, Accountability for Judicial Activism Act Introduced in House (June 30, 2005), http://www.house.gov/apps/list/press/ky02_lewis/SCOTUS.html (introducing a bill enabling Congress to reverse constitutional judgments of the Court); Rich Lowry, *"Mad Max" Stands with the Right, A Left-Right Coalition for Property,* NAT'L REV., Aug. 5, 2005, http://www.nationalreview.com/lowry/lowry200508050737.asp (discussing Democrat Maxine Waters' strong opposition to the *Kelo* decision); Bruce G. Peabody, *Congressional Constitutional Interpretation and the Courts: A Preliminary Inquiry into Legislative Attitudes, 1959-2001,* 29 LAW & SOC. INQ. 127, 151–156 (2004) [hereinafter *Congressional Interpretation*]; Post, *supra* note 9, at 5–6; John Yoo, *The High Court's Hamdan Power Grab,* L.A. TIMES, July 7, 2006, http://www.latimes.com/news/opinion/commentary/la-oe-yoo7jul07,0,3547342.story?coll=la-news-comment-opinions.

12. *See* KECK, *supra* note 10, at 199–253 (delineating features of judicial activism).

13. *See Service Constitution, supra* note 9, at 295–302.

14. 153 CONG. REC. S831–34 (daily ed. Jan. 22, 2007); S. 344, 110th Cong. (2007). The bill is identical to S. 1768, a measure that had been introduced by Senator Arlen Specter in the fall of 2005, favorably reported by the Judiciary Committee, and placed on the Senate's calendar in the spring of 2006. 122 CONG. REC. S2602 (daily ed. Mar. 30, 2006) (showing S. 1768 was reported favorably by the Senate Judiciary Committee and placed on the Senate's calendar). *See also Day to Day: Slate's Jurisprudence: U.S. Supreme Court TV* (NPR radio broadcast Apr. 18, 2006), *available at* http://www.npr.org/templates/story/story.php?storyId=5348842 [hereinafter *Day to Day*] (radio broadcast of interview by NPR's Madeleine Brand of Dahlia Lithwick, discussing how Senator Specter has been sponsoring similar legislation "for years"); Arlen Specter, *Hidden Justice(s),* WASH. POST, Apr. 25, 2006, at A23 (discussing S. 1768 and its necessity). Since S. 1768 and S. 344 are substantively identical, this Article will generally discuss arguments and testimony made about the former measure as being equally pertinent to the more recent bill.

15. *See* 151 CONG. REC. S10426, S10429 (2005) (text of S. 1768 read into the record).

16. *See* LORRAINE H. TONG, CONG. RES. SERVICE, TELEVISING SUPREME COURT AND OTHER FEDERAL COURT PROCEEDINGS: LEGISLATION AND ISSUES 11–17 (Nov. 8 ed. 2006), *available at* http://www.fas.org/sgp/crs/secrecy/RL33706.pdf (reviewing debates about various forms of the proposed television legislation).

the Court would induce lawyers and Justices to "grandstand"[17] before the cameras, compromising the integrity and solemnity of the proceedings of the highest court in the land. Television coverage of the Court would also sew popular confusion and misunderstanding by reporting on the activities of the high bench without context and "depth."[18] Supporters of televising the Court have countered that these broadcasts are essential for keeping the public informed about the most powerful tribunal in the world,[19] for keeping the Justices accountable,[20] and for inducing a more robust popular discussion about the issues facing the judiciary—and how the Court attempts to resolve them.[21]

Vetting these issues is important, and they could certainly stand for more systematic exposition.[22] This Article, however, pursues a different analytic tack. The focus of this piece is whether Specter's legislation, whatever its policy merits, is constitutional—a question that has been largely bypassed in the current debate, and has certainly not generated a thoroughgoing investigation. The remainder of this Article identifies a range of textual provisions, legal arguments, and legislative and judicial precedents relevant to the question of whether the recent proposed legislation, S. 344, is consistent with our supreme law. After briefly sketching the political and legislative context of Specter's bill, this Article examines specific claims regarding whether Specter's bill is either compatible with or impinges upon our Constitution's legal commands and principles. This Article's analysis of the constitutionality of S. 344 attempts to be thorough, in the sense that it sorts through and evaluates constitutional arguments that might be made on both sides of the debate—both by those convinced of the constitutionality of the measure as well as those deeply skeptical.[23] This Article

17. *Id.* at 6, 12.

18. *Id.* at 13 (discussing the "potential for misinterpretation" posed by the proposed television legislation). *See also Cameras in the Courtroom: Hearing Before the Comm. on the Judiciary, United States Senate*, 109th Cong. 12 (2005), *available at* http://judiciary.senate.gov/hearing.cfm?id=1672 [hereinafter *Cameras in the Courtroom*] (statement of Jan E. Dubois, Judge for the District Court for the Eastern District of Pennsylvania) (expressing concerns about how television coverage places the work of the judiciary out of context). *But cf. id* at 24 (testimony of Brian P. Lamb, chairman of C-SPAN) (promising that "if the Supreme Court will ever allow its oral arguments on television, we will carry all of them from start to finish.").

19. *See* 151 CONG. REC. S10426, S10426 (daily ed. Sept. 26, 2005) (statement of Senator Arlen Specter) [hereinafter Specter] (arguing for his proposal on the grounds that "the public gets a substantial portion, if not most, of its information from television and the internet"); *Cameras in the Courtroom, supra* note 18, at 21-23 (testimony of Seth D. Berlin, attorney) (arguing that television coverage will improve the public's understanding of the courts).

20. *See* Specter, *supra* note 19, at S10427 (statement of Mr. Specter) (discussing how the proposed legislation will help to keep the Court more accountable to the public); *Day to Day, supra* note 14 (Court commentator reviewing the accountability argument).

21. TONG, *supra* note 16, at 17 (reviewing civic education arguments).

22. Some of those engaged in policy discussions about "Supreme Court TV" appear to talk past one another. In particular, at least some of the policy arguments against "Supreme Court TV" seem weakened in light of the research provided and claims made by supporters of this venture. For example, a study of federal courts' experimentation with televising judicial proceedings suggested that "the majority of jurors and witnesses who experience electronic media coverage do not report negative consequences or concerns." *Cameras in the Courtroom, supra* note 18, at 21–23 (statement of Seth D. Berlin). *See also* TONG, *supra* note 16, at 18 (discussing how the purported intrusiveness of cameras in the Court could be diminished by existing technology and resources); *Cameras in the Courtroom, supra* note 18, at 23–25 (statement of Brian P. Lamb) (countering the argument that Court proceedings will be televised out of context, by pledging "gavel-to-gavel coverage of the Supreme Court").

23. To a limited degree, this Article will also consider some potential variants of S. 344, conscious that the final measure may well be modified through the lawmaking process.

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.

III. THE LEGAL AND POLITICAL BACKGROUND OF "SUPREME COURT TV"

Televising court proceedings is not an unprecedented or even a particularly new practice, although there is substantial variation in terms of which courts allow what proceedings to be broadcast.[24] Every state judiciary, but not the District of Columbia Courts system, permits some televising of its proceedings, generally in both civil and criminal courts, and at the trial as well as appellate levels.[25]

At the federal level, courts and policymakers have been much more resistant to allowing judicial proceedings to be televised. Rule 53 of the Federal Rules of Criminal Procedure bars both photographing and broadcasting court proceedings in federal criminal trials.[26] More broadly, the Judicial Conference of the United States has issued a policy prohibiting the televising, recording, or broadcasting of the proceedings of both civil and criminal federal trial courts.[27] The Conference has qualified this proscription, permitting courts of appeals to allow television and other forms of coverage.[28] Currently, two circuits have used this authority to televise some of their proceedings.

Since 1955, the Supreme Court has made audio recordings of both oral argument and Justices' reading of opinion summaries and excerpts from the high bench, but for decades, these recordings were handed over to the National Archives and Records Administration and only made available to the public and press through a somewhat onerous and dilatory process.[29] After the 2000 presidential election controversy, and the attendant interest in *Bush v. Gore*,[30] the Court became more accommodating to

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24. *Cameras in the Courtroom*, *supra* note 18, at 21–23 (statement of Seth D. Berlin) (discussing the practices of different courts).

25. TONG, *supra* note 16, at 17; *Cameras in the Courtroom*, *supra* note 18, at 23 (statement of Seth D. Berlin) (discussing state practices).

26. FED. R. CRIM. P. 53. The rule reads:

> Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

Id. *See also infra*, Part IV.B.2.b.(4) (discussing Rule 53).

27. The Judicial Conference of the United States originally adopted a resolution in 1962 opposing the broadcasting of judicial proceedings, and it has affirmed and further specified this opposition in a number of subsequent resolutions. *See* TONG, *supra* note 16, at 3–6 (discussing Conference policy and its effects on federal courts). Between 1991–1994, six district and two appellate courts participated in a pilot program examining the effectiveness and advisability of having television proceedings in federal civil courts. *Id.* at 4. The Conference decided against the subsequent recommendation by the Federal Judicial Center that the program be extended to all district courts and courts of appeals covering civil matters. *Id.* *See also* MARY TREADWAY JOHNSON & CAROL KRAFKA, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS, AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 43–45 (1994), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf.

28. Under the current policy, the judicial council for each circuit determines whether television is permitted within the entire circuit. TONG, *supra* note 16, at 4.

29. Bill Mears, *Supreme Court to Provide Audio Tape of Arguments*, CNN.COM, Mar. 31, 2003, http://www.cnn.com/2003/LAW/03/31/scotus.scotus.audio/index.html (last visited Mar. 16, 2007); *Cameras in the Courtroom*, *supra* note 18, at 20–21 (statement of Peter Irons).

30. Bush v. Gore, 531 U.S. 98 (2000).

public interest in its proceedings, providing direct access to some of its audio recordings. Currently, the Court decides whether to release its audio tapes of oral arguments and opinions on a case-by-case basis. These materials are available on the same day they are recorded in only a handful of cases, although in October 2006, the Court announced it would subsequently post same-day transcripts of oral arguments on its official website.[31]

Beginning with the 105th Congress (1997–1998), and continuing through every subsequent Congress, federal lawmakers have introduced legislation seeking to induce more televised broadcasting of federal court proceedings.[32] While a number of these measures have simply sought to expand the federal courts' options related to televising trial and appellate proceedings, other measures, like the current Specter legislation, have required some courts to open their proceedings to live television broadcasts.[33]

To date, Specter's proposal has assumed only a modest political profile. But the measure possesses a number of qualities that should make it attractive to the current and future Congresses.[34] Prominent leaders of both parties have endorsed the bill.[35] Moreover, the proposed law is the kind of democratic and procedural reform likely to be more broadly popular than measures seeking to alter the Court's policies or powers directly (such as proposals to restrict what kinds of cases the Court can review).[36] For a federal lawmaker, an initiative requiring the Court to be more accessible and transparent is easier to defend and "sell" to a wide range of constituents than, for example, a measure seeking to alter powers of judicial review that the Court has exercised for over 200 years.[37]

Finally, the recent call to televise some of the Supreme Court's proceedings may

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31. Charles Lane, *High Court to Post Same-Day Transcripts*, WASH. POST, Sept. 15, 2006, at A08; Press Release, United States Supreme Court (Sept. 14, 2006) *available at* http://www.supremecourtus.gov/publicinfo/press/pr_09-14-06.html (last visited Jan. 27, 2007) (discussing the Court's new same-day release policy).

32. TONG, *supra* note 16, at 6.

33. *Id.*

34. *Day to Day, supra* note 14 (contending that while Senator Specter has been sponsoring legislation "for years" calling for the Court to televise its sessions, the current initiative seems to have "traction").

35. In addition to Specter himself, who had been Chair of the Senate Judiciary Committee and is now the ranking minority member of the committee, the bill's earliest supporters include Republican Chuck Grassley (ranking member of the Finance Committee) and John Cornyn (who had been a Republican whip and was selected to be Vice Chairman of the Senate Republican Conference in December 2006). Among Democrats, Dick Durbin (Assistant Majority Leader), Charles Schumer (Vice Chair of the Democratic Conference and Chairman of the Democratic Senatorial Campaign Committee) and Russell Feingold (Deputy Whip) were amongst the original cosponsors of S. 344. Patrick Leahy (current Chair of the Judiciary Committee) joined these other lawmakers in supporting S. 1768, Specter's earlier version of the television bill—a measure that had been reported favorably to the full Senate after a 12-6 bipartisan vote from the Senate Judiciary Committee. Cathy J. Potter, *Senate Judiciary Committee Clears Bill to Allow TV Cameras in Supreme Court*, JURIST, Mar. 30, 2006, http://jurist.law.pitt.edu/paperchase/2006_03_30_indexarch.php#11437735472702 5458.

36. *See* JOHN R. HIBBING AND ELIZABETH THEISS-MORSE, WHAT IS IT ABOUT GOVERNMENT THAT AMERICANS DISLIKE? 243 (2001) (discussing Americans' dissatisfaction with American politics and emphasis on procedural reforms as a solution to its purported problems); Meredith McGehee, *How Congress Should Tackle its Institutional Corruption*, THE HILL, Nov. 15, 2006, http://www.hillnews.com/thehill/export/TheHill/Comment/OpEd/111506.html.

37. *See* JOHN R. HIBBING & ELIZABETH THEISS-MORSE, CONGRESS AS PUBLIC ENEMY: PUBLIC ATTITUDES TOWARD AMERICAN POLITICAL INSTITUTIONS 161 (1995) [hereinafter CONGRESS AS PUBLIC ENEMY].

benefit from a leadership change within the Court itself.[38] Chief Justice John Roberts, sworn in as the nation's seventeenth Chief Justice in 2005, signaled that he would at least consider televising Supreme Court sessions.[39] As Roberts stated, "my new best friend, Senator Thompson, assures me that television cameras are nothing to be afraid of. But I don't have a set view on that."[40] While hardly a strong endorsement of allowing cameras in the Court, Roberts' seemingly open-minded approach on this issue contrasts with his predecessor, William Rehnquist, and, at least according to some commentators, presages an inevitable change in the Court's historic reluctance to broadcast its proceedings.[41]

IV. ASSESSING THE CONSTITUTIONALITY OF S. 344

The current political environment looks fairly favorable for Specter's proposal: the bill has supporters across the ideological spectrum and is being introduced in a Congress that appears willing to confront the judiciary.[42] Thus S. 344 may find political daylight in the form of increased debate on and publicity surrounding the measure, if not passage into law.[43] In this context, a question that has been mostly ignored is likely to receive greater scrutiny: Is S. 344 constitutional?

Several sitting Justices of the Supreme Court are not so sure. In the spring of 2006, during a hearing before a House Appropriations Subcommittee, Associate Justice Anthony Kennedy expressed deep reservations about Specter's bill on the grounds that it was "inconsistent with the deference and etiquette that should apply between the branches."[44] At the same proceeding, Associate Justice Clarence Thomas stated that Specter's measure "runs the risk of undermining the manner in which we consider cases."[45] Compelling the Court to televise its proceedings, Thomas chided, would

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38. Dahlia Lithwick, *The Letterman Justice: John Roberts is Too Savvy to Keep Cameras Out of Court Forever*, SLATE, Dec. 8, 2005, http://www.slate.com/id/2131895.

39. *U.S. Senate Judiciary Comm. Holds a Hearing on the Nomination of John Roberts to be Chief Justice of the United States*, 109th Cong., 265–266 (2005) (statement of Judge John G. Roberts).

40. *Id.*

41. Lithwick, *supra* note 38. In a 2006 appearance before the Ninth Circuit Court of Appeals' Judicial Conference, Chief Justice Roberts was asked if television coverage would occur first in a federal civil jury trial or at the Supreme Court. He responded:

> That's a tough question. In either case, there's a concern about the impact of television on the functioning of the institution, both the civil trial and the Supreme Court argument . . . All of the Justices view themselves as trustees of an extremely valuable institution, one that we think by and large functions pretty well. The oral argument is a valuable and important part of that, and we're going to be very careful before we do anything that will have an adverse impact on that, and I think that same perspective applies to the civil trials. I appreciate very much the argument that the public would benefit greatly from seeing how we do things.

TONG, *supra* note 16, at 3.

42. *Congressional Interpretation, supra* note 11, at 127, 132–138 (discussing recent congressional attitudes towards congressional interpretation and the courts).

43. Tony Mauro, *Bill Allowing Cameras in Supreme Court Gains Momentum*, LEGAL TIMES, Nov. 10, 2005, at 13, *available at* http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1131583507730 [hereinafter, Mauro, *Bill Allowing Cameras*] (quoting Senator Charles Schumer and other public officials who indicate that the television legislation may be coming of age).

44. Linda Greenhouse, *2 Justices Indicate Supreme Court Is Unlikely to Televise Sessions*, N.Y. TIMES, Apr. 5, 2006, at A16.

45. *Id.*

precipitate "some conflict between the branches."[46]

But do these rather vague warnings amount to anything? On what grounds, specifically, might one argue that Specter's bill strays beyond, or is consistent with, the Constitution's powers and proscriptions? The remainder of this Article attempts to work through these legal queries in a systematic manner, leaving to others the policy questions concerning whether televising Supreme Court sessions is an advisable course of action. As indicated, this Article is partly impelled by a sense that specific analysis of the constitutional issues posed by S. 344 is largely absent from the current debates about televising the Court.[47] The question of constitutionality could influence whether S. 344 becomes law,[48] and whether it would survive the almost inevitable legal challenges that would arise once it became a part of the United States Code.

While the ensuing analysis includes a consideration of judicial precedent and legal doctrine relevant to assessing the constitutionality of Specter's proposal for "Supreme Court TV," this Article attempts to evaluate constitutional questions from a broader perspective. There is only limited case law directly pertinent to this Article's inquiry; consequently, the courts provide an incomplete bag of analytic tools for assessing Specter's bill. In addition, this Article takes seriously the obligations public officials and members of the public have to engage in their own constitutional analysis.[49] These obligations are heightened in this context—where the courts (and especially the Supreme Court) would assess Specter's bill from a potentially compromised and partial institutional position, as judges involved in their own case.[50] There are good reasons for believing that the struggle over televising the Supreme Court will pit quite different claims from both the legislature and judiciary about the constitutional status and propriety of this initiative. At a minimum, this Article is designed to help sort through these debates.

A. The Separation of Powers Objection

There are several basic arguments that raise doubts about the constitutional status of the proposed television legislation. First, one might object that this bill would threaten the constitutional separation of powers. Justice Kennedy's 2006 remarks before the House Appropriations subcommittee hinted at this concern. In speaking

46. Tony Mauro, *Supreme Court Pushes Back on Televised Proceedings,* LEGAL TIMES, Apr. 5, 2006, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1144154023584.

47. Even one of the more thorough and recent analyses of the debates over televising the judiciary (and the associated legislation) does not offer anything approximating a systematic analysis of the constitutional issues pertinent to Specter's legislative proposals. TONG, *supra* note 16, at 13 (sketching separation of powers arguments relevant to the Specter bill).

48. *See generally,* CONGRESS AND THE CONSTITUTION, *supra* note 10 (outlining the case for Congress's responsibility to engage in independent constitutional analysis, including considering whether proposed bills should become law).

49. *See Cameras in the Courtroom, supra* note 18, at 53–57 (statement of Seth D. Berlin). *See also* LOUIS FISHER, CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS 231–279 (1988) [hereinafter FISHER, CONSTITUTIONAL DIALOGUES]; LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 35–92 (Oxford University Press 2004).

50. *See infra,* Part V. *See also* THE FEDERALIST NO. 10 (James Madison) ("No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity. With equal, nay with greater reason, a body of men are unfit to be both judges and parties at the same time.").

about the Specter legislation, Kennedy warned that the Justices "feel very strongly that we have intimate knowledge of the dynamics and the mood of the [C]ourt."[51] Since the Justices have taken the position that "[i]t's not for the [C]ourt to tell the Congress how to conduct its proceedings," Congress should embrace a reciprocal standard and leave the television matter to be determined by the Court.[52] "We feel very strongly," Justice Kennedy concluded, "that this matter should be left to the courts."[53] While Kennedy's comments were somewhat oblique, they struck at least one commentator as introducing a "new" constitutional argument into the debate about televising the Court that essentially stood as a warning to the legislature: "Go ahead . . . enact your law, we're going to strike it down," presumably on separation of powers grounds.[54]

What are we to make of the suggestion that Specter's proposal would violate our Constitution's separation of powers and institutions? One might initially note that it is by no means obvious what our commitment to the separation of powers includes, either as a descriptive or normative matter. No portion of our constitutional text deals explicitly with the separation of powers, and there is considerable debate by scholars,[55] as well as inconsistency amongst jurists, about how we should conceptualize and protect this constitutional arrangement.[56] While it is beyond the scope of this Article to present a systematic argument and defense of how we should and actually do construe the separation of powers,[57] the following section focuses on what would seem to be the most likely objections raised against the Specter legislation on separation of powers grounds.

1. Inappropriate blending of powers?

A widely held view is that the separation of powers is premised on dividing institutional power as a means of preventing arbitrary exercises of authority and, in the extreme, tyranny.[58] As James Madison warned in *The Federalist,* the "accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny."[59]

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51. Greenhouse, *supra* note 44; Mauro, *supra* note 46.

52. Greenhouse, *supra* note 44.

53. Mauro, *supra* note 46.

54. *Day to Day, supra* note 14 (statement of court commentator Dahlia Lithwick). In this context, one might also consider whether comments like Justice Kennedy's can ever amount to an impermissible advisory opinion (a court judgment made outside of a particular case or controversy. *See, e.g.,* Muskrat v. United States, 219 U.S. 346, 361–63 (1911) (dismissing the case because there was no actual controversy between the supposed adversarial parties).

55. *See generally* Bruce G. Peabody & John D. Nugent, *Towards a Unifying Theory of the Separation of Powers,* 53 AM. U. L. REV. 1 (2004) (discussing different traditions of separation of powers research).

56. *See id.* at 12–17 (discussing jurisprudence).

57. *See id.* at 17–42 (providing a new, "unifying" theory of the separation of powers).

58. *See, e.g.,* Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) ("The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power."); William B. Gwyn, *The Separation of Powers and Modern Forms of Democratic Government, in* SEPARATION OF POWERS—DOES IT STILL WORK? 65–66 (Robert A. Goldwin & Art Kaufman eds., 1986) (stating that the goals of the constitutional order are to protect individual liberty and prevent tyranny).

59. THE FEDERALIST NO. 47, at 322 (James Madison) (Clinton Rossiter ed., 1961).

However, Madison's rather restrictive "definition of tyranny"[60] actually occurs in the context of arguing for the necessity of blending and sharing institutional powers.[61] Even the most rigid readings of the Constitution's separation of powers[62] accede to Madison's observation that in the U.S. the federal departments "are by no means totally separate and distinct from each other."[63] Presidents are famously involved in lawmaking through their power to propose legislation and issue vetoes. Similarly, our constitutional text invites Congress to become rather intimately involved in the work of the judiciary. To take one of the more obvious examples, Article III grants Congress a seemingly sweeping constitutional power to make "exceptions" and "regulations" to the Court's appellate jurisdiction.[64] Moreover, a number of federal statutes provide Congress with control over a substantial portion of the Court's business. Congress, for example, determines the presence of clerks and the role of the Court's marshal, fixes the Court's budget, sets the level of the Justices' salaries, and delineates the particular penalties for those who "parade" in the Supreme Court building or on its grounds.[65] Thus, this particular version of the separation of powers objection to S. 344 seems to be somewhat anomalous—it is based on a more rigid model of political institutions and their governing authority than the one we actually possess.

2. Intimidation and threatened independence?

a. Legislative encroachment

Alternatively, perhaps Specter's legislation poses a separation of powers threat that involves compromising the judiciary's independence.[66] This purported danger might

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60. *Id.*

61. *Id.* at 324. As Madison indicates:

> If we look into the constitutions of the several States, we find that, notwithstanding the emphatical and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.

Id.

62. *See, e.g.*, Humphrey's Ex'r v. United States, 295 U.S. 602, 629 (1935); Bowsher v. Synar, 478 U.S. 714, 722 (1986) (discussing the Constitution's creation of the presidency as "a separate and wholly independent Executive Branch").

63. THE FEDERALIST NO. 47 (James Madison). The authors of *The Federalist*, and many of their contemporaries specifically rejected the strict divisions of governing authority found in state constitutions as mere "parchment barriers." THE FEDERALIST NO. 48 (James Madison).

64. U.S. CONST. art. III, § 2.

65. 40 U.S.C. §§ 6135, 6137 (2000).

66. There are few cases holding Congress impermissibly encroached on the judicial power, and these are not especially helpful in resolving the questions posed by this Article. In *Plaut v. Spendthrift Farm, Inc.*, the Court ruled that the separation of powers barred Congress from requiring federal courts to reopen final judgments in private civil actions. 514 U.S. 211, 240 (1995). In essence, *Plaut* held that Congress's efforts impinged upon the judiciary's authority "to say what the law is." *Id.* at 218. It is not clear how the Specter television legislation would directly threaten this power or involve the *Plaut* precedent. In *United States v. Brainer*, the Fourth Circuit upheld the Speedy Trial Act of 1972, finding that the Act provided "no 'rules of decision,' but only rules of practice and procedure." 691 F.2d 691, 695 (4th Cir. 1982). *See also* United States v. Smith, 899 F.2d 564, 565 (6th Cir. 1990) (stating that executive branch investigations of court personnel pursuant to standard procedures do not violate the separation of powers). These cases reinforce a picture of shared separated powers, and underscore the presumed propriety of Congress imposing

assume several forms. First, legislative intimidation and encroachment could trigger threats to judicial independence; the passage of S. 344 could sanction and invite a more general manipulation of the Court and its proceedings by Congress.

In the context of the numerous and uncontroversial congressional regulations discussed above (involving, for example, the creation and direction of the Court's budget, facilities, personnel, and internal procedures), requiring the Court to televise conversations and debates that it already makes available to the public would hardly seem like a greater threat to its capacity for independent judgment, or a dramatic departure from what presidential scholar Richard Neustadt famously called "separated institutions sharing powers."[67] Absent some other dynamics or threats, it is not entirely obvious how "Supreme Court TV," would compromise the Court's autonomy, more than, for example, the practice of asking the Justices to appear before Congress to justify their annual budget. Indeed, televising the Court seems to be a regulation of the same order as the numerous other controls that the legislature already employs.

One might make the claim that these other regulations, unlike "Supreme Court TV," advance or facilitate the unique work of the Court and thereby promote rather than threaten its independence as well as its powers under Article III of the Constitution. Setting aside the question of whether televising the Court might actually promote its authority, we might note that some of the accepted congressional regulations already in place cannot be readily characterized as solely facilitating the judiciary's work and independence. To return to an example, observers have not always perceived Congress's control of the Court's budget as strictly enhancing judicial authority. Indeed, Chief Justice John Roberts recently lamented that Congress's decision not to increase the salaries of federal judges was threatening judicial independence and "has now reached the level of a constitutional crisis."[68]

b. General political encroachment

There is a second way in which one might conceivably argue that Specter's legislation poses an unconstitutional threat to judicial independence. The introduction of "Supreme Court TV" could arguably impede the Court's autonomy by inviting in, and making the Court more conscious of, various political interests that would now be more responsive to the high bench's day-to-day proceedings. In other words, televising the Supreme Court could place the institution more squarely in the crosshairs of public opinion and organized interest-group politics.

Even if the Court assumed a substantially heightened political profile as a result of television coverage, would this development really intimidate Justices (and the lawyers appearing before them) and somehow diminish their ability to speak freely or otherwise

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administrative rules on the Court, but not regulations that compel the judiciary to reach particular decisions or foreclose its ability to render judgments.

67. RICHARD E. NEUSTADT, PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP 33 (1960).

68. Linda Greenhouse, *Chief Justice Advocates Higher Pay for Judiciary*, N.Y. TIMES, Jan. 1, 2007, at A14. To take another example, Congress has not always adjusted the number of Justices who serve on the Court solely with an eye on enhancing their power. *See generally*, Barry Friedman, *Reconstruction's Political Court: The History of the Countermajoritarian Difficulty, Part Two*, 91 GEO. L. J. 333 (2002) (examining "the political forces that determine the judiciary's independence from majoritarian politics—and, thus, its freedom to engage in judicial review" especially during the era of Reconstruction).

act independently? While some Justices are, for whatever reasons, reluctant to speak during oral argument, and appear less comfortable with publicity than others, it is not evident that this dynamic would change dramatically in the face of "Supreme Court TV." The current Court is actively covered by the press, is the object of impassioned public protests outside its building, and receives a variety of entreaties through the *amicus* process and through less formal means.[69] The Court's personnel are surely not unaware of their importance and would not be surprised to hear that their arguments and decisions are closely followed.[70]

In addition, objecting to greater public exposure to the Court through televised proceedings seems to be anti-democratic—without giving support to any obvious countervailing value. Interest-groups and elites currently have some access to the Court's public proceedings and to individual Justices. Legislation like S. 344 would make exposure to the Court more universally available, arguably diminishing the role and influence of the relatively limited group that now regularly observes and comments upon the Court's proceedings.[71]

Moreover, even some skeptics of televising the Supreme Court have dismissed the "political encroachment" argument by drawing, in part, on the experiences of the state and federal courts, and noting the continued independence of these entities even in the face of greater media coverage.[72] Finally, one might contend that whatever potential intimidation the Court could possibly face through S. 344 is necessarily limited as Specter's bill only televises those proceedings the Court has already chosen to open to the public.[73] Internal hearings, debates, and decisions would remain closed—covering the eyes of the public with a restrictive blinder of the Justices' own making.[74]

3. Compromising distinctive judicial functions?

A variant of these constitutional objections might be based on the assertion that mandating television coverage of the Court would compromise or undermine distinctive judicial functions, perspectives, or powers specified or implied in Article III or other portions of the Constitution. Some scholars and jurists have suggested that besides preventing the tyranny of institutions accumulating too much power or encroaching upon one another, our separation of powers system promotes "positive" traits and

69. *See, e.g.*, Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743 (2000).

70. Indeed, one could make the case that televising the Court would reduce some of the mystery surrounding the institution, and thereby reduce the speculation and intrigue that often surrounds popular and press coverage of the high bench.

71. *See, e.g.*, LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES: A PERSPECTIVE ON JUDICIAL BEHAVIOR 4 (2006) [hereinafter BAUM, JUDGES AND THEIR AUDIENCES] (discussing judges' interest in currying the "regard of salient audiences" including particular "policy groups" and other elites).

72. *See Cameras in the Courtroom*, *supra* note 18, at 10–12 (statement of the Hon. Diarmuid O'Scannlain) (denying that cameras facilitate political influence on the courts); *Day to Day*, *supra* note 14 (stating opinion that "we know that cameras in courtrooms are not a problem; an awful lot of state courts use them all the time without ill effect").

73. 153 CONG. REC. S831–34 (daily ed. Jan. 22, 2007); S. 344, 110th Cong. (2007).

74. There are good reasons for thinking that oral argument is not the most important (or even a decisive) part of the Court's decision-making process. *See, e.g.*, LAWRENCE BAUM, THE SUPREME COURT 111–160 (CQ Press ed., 2004); KEVIN T. MCGUIRE, UNDERSTANDING THE SUPREME COURT: CASES AND CONTROVERSIES 91–137 (McGraw Hill ed., 2001).

features, such as the energy, unity, and secrecy associated with the presidency,[75] and the final judgment and stability sometimes linked to courts.[76] To the extent we accept and value these potential contributions of our separated powers, we ought to take seriously the charge that televising the Court could somehow compromise the unique institutional benefits it confers on our legal and political order. Some critics of the television proposal have made arguments that hint at this objection. As federal district court Judge Jan DuBois commented in hearings before Congress, "the camera is likely to do more than report the proceeding—it is likely to influence the substance of the proceeding."[77]

Many of the objections that have been made along these lines, however, focus on the supposedly disruptive effects of cameras in the context of trial proceedings.[78] For example, when the Judicial Conference rejected recommendations that it should generally allow television cameras throughout the federal courts, it cited concerns about how this coverage might intimidate the parties to a case, along with witnesses and jurors.[79]

The Supreme Court is essentially an appellate court,[80] so many of these concerns about trial coverage would simply not apply. However, we might still worry that live cameras in the Court would change the behavior of the Justices and the lawyers appearing before them in such a way that their inclusion might unconstitutionally diminish the Court's contribution to both our system of laws and politics—impeding, for example, the Court's ability to resolve cases and controversies.[81] This argument seems fairly unconvincing. As noted, the lawyers and Justices who engage in the Court's open proceedings are already aware that they are under sustained and exacting scrutiny by a national audience.[82] It is unclear why the presence of live television

75. *See* THE FEDERALIST NO. 70 (Alexander Hamilton).

76. *See* Frederick Schauer & Larry Alexander, *Defending Judicial Supremacy: A Reply*, 17 CONST. COMM. 455 (2001) (linking the courts with legal stability and authoritative settlement); Peabody & Nugent, *supra* note 55 at 23–24 ("we believe that another signature feature of the constitutional separation of powers is its tendency to foster special qualities associated with good governance, such as deliberation, energy, steady administration, and judgment—qualities linked with individual departments and needed to secure their different governmental objectives").

77. *Cameras in the Courtroom*, *supra* note 18, at 12–14 (statement of Judge Jan E. DuBois).

78. *Id.* (discussing concerns that the presence of cameras during judicial proceedings might be unpredictable, and, therefore, both disruptive and prejudicial).

79. TONG, *supra* note 16, at 11; TREADWAY JOHNSON & KRAFKA, *supra* note 27, at 14 (reporting that 46% of surveyed judges indicated that the presence of television cameras made witnesses less willing to appear, with 41% indicating that the cameras distracted witnesses). *See also Executive Business Meeting: Hearing Before the S. Comm. on the Judiciary*, May 22, 2003, http://judiciary.senate.gov/member_statement.cfm?id=774&wit_id=51 (statement of Senator Orrin Hatch) ("Cameras and electronic media in the courtroom can have an intimidating effect on litigants, witnesses and jurors that negatively impacts the trial process.").

80. In a handful of cases, the Supreme Court has original jurisdiction and can act as a kind of trial court. *See* U.S. CONST. art. III, § 2.

81. Judge Edward R. Becker, former chief judge of the U.S. Court of Appeals for the Third Circuit, has voiced this concern, worrying that judges might alter their approach to questioning when faced with cameras, which, in turn, could somehow alter their decisions. TONG, *supra* note 16, at 12-13, 15. Again, one should note that the claim that Justices and lawyers would alter their behavior before the cameras might take at least two divergent forms—they could be intimidated, or, quite the opposite, they could engage in "grandstanding" or "showboating." *See, e.g., id* at 12.

82. Recent scholarship, for example, has examined the extent to which the Justices contribute to oral argument, the nature of the terms they use, and even the frequency (and effectiveness) of the humor they

cameras would change this dynamic substantially.[83] Moreover, even if the Justices and attorneys did somehow "play to the cameras" or otherwise change their debate and behavior style, it is difficult to conceive how this would amount to an unconstitutional undermining of the Court's specific institutional roles or its contribution to protecting values such as legal stability. Regardless of participants' performance before the cameras, the Court would still be issuing decisions, declaring winners and losers, and helping to establish policy for the judicial system of the United States.

B. The Enumerated Powers Objection

Setting aside the various separation of powers objections still leaves us with another broad challenge to Specter's proposed law. A basic, albeit inconsistently applied, tenet of American constitutionalism is that every federal law is supposed to be traceable to some specific or implied constitutional grant.[84] In the words of the Supreme Court, Congress may only legislate or otherwise act when "authorized by one of the powers delegated . . . in . . . the Constitution."[85] So what exactly, is the constitutional basis for mandating "Supreme Court TV?"

1. The power of the purse

Various provisions in Article I of the United States Constitution have been construed—by the courts as well as the legislature itself—as establishing the power of Congress to exercise wide discretion in how it raises and spends funds, so long as these expenditures are pursuant to valid, constitutional objects.[86] Congressional practices and precedent have largely created the particulars of authorization and appropriations, since the Constitution says nothing about these processes and is short on budgeting details generally.[87]

If one assumes that Congress's general power to authorize and appropriate funds for operating the Supreme Court is not controversial, could the legislature also use its budgeting powers to impose conditions on how the Court operates? In other words, so long as Congress did not interfere with Article III, which guarantees the Justices "a [c]ompensation, which shall not be diminished during their [c]ontinuance in [o]ffice,"[88] could the legislature use its control over the Court's funding as a coercive tool to induce

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employ. *See, e.g.*, Jay Wexler, *Laugh Track*, 9 GREEN BAG 2d 59, 59–61 (2005).

83. *But cf.* Press Release, C-SPAN.org, New C-Span Study: Congressional Scholars Examine House Television After Twenty-Five Years (Apr. 19, 2004), http://www.c-span.org/C-SPAN25/survey_release.asp [hereinafter C-SPAN] (citing the mixed views of scholars about the effects of C-SPAN on congressional behavior).

84. *See* THE FEDERALIST NO. 84 (Alexander Hamilton) (arguing against the necessity of a Bill of Rights on the grounds that the federal government only contained enumerated powers); PAUL BREST & SANFORD LEVINSON, PROCESSES OF CONSTITUTIONAL DECISIONMAKING 5 (Richard A. Epstein, ed., Aspen Law Publishers 1992) (1975) (discussing the debate over enumerated powers).

85. New York v. United States, 505 U.S. 144, 155 (1992). *See also* Gregory v. Ashcroft, 501 U.S. 452, 457 (1991).

86. *See* WALTER J. OLESZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 47 (Congressional Quarterly Press 2007). The Constitution, primarily through Article I, sections 7 and 8, gives Congress wide powers over raising revenue and considerable discretion in spending. *Id.* at 3.

87. *Id.* at 47.

88. U.S. CONST. art III, § 1.

the Court to agree to "Supreme Court TV"?[89]

The Court's prior jurisprudence seems to suggest that the answer to this question would depend upon whether the Specter legislation is otherwise constitutional. In *South Dakota v. Dole*, the Court held that Congress has wide leeway to use its spending powers to attach conditions to entities receiving funding, so long as these controls satisfy a four-part test.[90] According to the Court, conditional exercises of the spending power must be 1) for the "general welfare" of the United States, 2) unambiguous, providing a clear choice about the consequences of accepting the funding, 3) germane to the overall purposes of the funding, and 4) consistent with the Constitution.[91]

In light of *Dole* (and the Constitution's Supremacy Clause), we can safely conclude that Congress could not require the Court to televise its proceedings through its budget powers unless the Constitution otherwise permitted it to do so. Seeking to compel the Supreme Court to televise its proceedings through the power of the purse would, as suggested, also raise questions about whether this approach violated the guarantees of Article III, which precludes diminishing the "compensation" of judges while they are in office.[92]

2. Art. I, Section 8

In addition to authorizing aspects of the congressional spending power, Article I, section 8 includes a list of other sources of legislative power. Is there anything here that authorizes Congress to put cameras in the courtroom? While these constitutional provisions say very little about Congress's powers *vis-a-vis* the Supreme Court, two items on this laundry list of powers are pertinent to this discussion.

a. Authority over the District

Among other powers delegated to Congress, Article I states that the legislature shall:

> exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts,

89. While S. 344 is not based on this budgetary coercion approach, it might still be modified through the legislative process, or it could be reborn in a somewhat different form during a future Congress.

90. South Dakota v. Dole, 483 U.S. 203, 207–208, 211–212 (1987). Arguably, this case is not strictly pertinent, since it involved Congress's efforts to use the spending power to control states as opposed to another, coordinate branch of the federal government. *Id.* at 205.

91. *Id.* at 207. *See also* MCGUIRE *supra* note 74, at 55–90 (discussing the *Dole* case); Todd D. Peterson, *Controlling the Federal Courts Through the Appropriations Process*, 1998 WISC. L. REV. 993, 1014 (1998) (citing 37 Op. Att'y Gen. 56, 61 (1933)) ("Congress may not, by conditions attached to appropriations, provide for a discharge of the functions of Government in a manner not authorized by the Constitution.").

92. U.S. CONST. art. III, § 1.

> Magazines, Arsenals, dock-Yards, and other needful Buildings.[93]

Despite its somewhat sweeping language, this provision does not grant Congress a general authority to provide legislative regulation of anything in the District. Such a reading would give the legislature a rather blanket power over the Court and much of the executive branch—in a way that is in obvious tension with other aspects of the Constitution.

However, Congress has employed this constitutional provision to regulate and protect federal property in the District of Columbia, passing laws that provide for the maintenance, care, operation, and security of the Supreme Court building and its grounds.[94] Could proposals to televise the Supreme Court be constitutionally justified on this basis—claiming that televising the Court was incident to Congress's authority over the District and its grounds and buildings?

Congress is empowered to pass legislation related to the District and its governance, and to regulate other federal buildings and places within the District. But, presumably, Congress's authority over the non-District federal property limits it to governing the property *per se*, rather than using these controls as a more general regulatory power. Specter's legislation does not, for example, seek to install cameras on the Court grounds as a means of promoting security. Instead, it appears to regulate more directly the judicial power itself. Understood in this way, the connection between the legislature's constitutional grant over the District and its property, and the manner in which S. 344 requires television cameras in the Court, is arguably too remote to serve as the legal basis for the proposed law.

b. The Necessary and Proper Clause

Article I, section 8 concludes with the so-called "elastic clause," which gives Congress authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution" powers given to the federal government.[95] Does the "necessary and proper" clause provide Congress with the legal power to mandate televising the Supreme Court? Could one insist, for example, that televising Supreme Court proceedings is "necessary and proper" to furthering the "judicial power," which Article III vests in the Court?

The Court's own jurisprudence certainly gives proponents of "Supreme Court TV" a basis for pursuing this claim. The Court has given Congress considerable leeway to enact legislation pursuant to the "necessary and proper" clause, merely requiring a "rational nexus" between "the content of a specific power in Congress and the action of Congress in carrying that power into execution."[96] In the famous (if somewhat elliptical) words of *McCulloch v. Maryland*, so long as the legislative end is "legitimate" and "within the scope of the Constitution . . . [then] all means which are

93. U.S. CONST. art. I, § 8.

94. *See, e.g.*, 40 U.S.C. § 13 (2000).

95. U.S. CONST. art. I, § 8. To be more precise, the necessary and proper clause allows Congress to advance both the specific legislative powers granted to Congress by Article 1, Section 8, as well as "all other powers vested by th[e] Constitution in the Government of the United States." *Id.*

96. *See, e.g.*, Perez v. Brownell, 356 U.S. 44, 58 (1958).

appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional."[97]

More specifically, the Court has sanctioned, and Congress has energetically utilized, a broad legal authority to fashion rules governing the operations of the federal courts. As the Court indicated in *Wiley v. Coastal Corp.*:

> [f]rom almost the founding days of this country, it has been firmly established that Congress, acting pursuant to its authority to make all laws "necessary and proper" to [the] establishment [of federal courts], also may enact laws regulating the conduct of those courts and the means by which their judgments are enforced.[98]

(1) Legislative enhancements

What, precisely, does this power entail with respect to Congress's supervision of the Supreme Court? There are several ways of understanding the necessary and proper clause—and consequently, its purposes and limits—in the context of this Article. First, the clause could be understood as permitting federal legislation if it somehow "enhances" valid powers of national government.[99] This reading of the clause would presumably justify Specter's bill if it promoted, for example, the operations and effectiveness of the Court, by furthering the administration of justice and the Court's responsibilities as outlined in Article III. A classic example of this sort of "necessary and proper" legislation would be the Act that created the Federal Judicial Center in 1967 "to promote improvements in judicial administration in the courts of the United States."[100]

Justifying S. 344 on the grounds that it is a "necessary" enhancement or extension of the Court's powers is not obvious at first glance.[101] While there is some research suggesting that televising federal and state court proceedings has beneficial effects in terms of conferring legitimacy on the judiciary, the necessity of the technology is certainly debatable.[102] Could providing more coverage of the Court through the

97. McCulloch v. Maryland, 17 U.S. 316, 421 (1819).

98. Wiley v. Coastal Corporation, 503 U.S. 131, 136 (1991). *See also* Burlington Northern R.R. Co. v. Woods, 480 U.S. 1, 5 (1987).

99. See discussion *supra* note 66 and accompanying text (whether the separation of powers permits only legislation that enhances or facilitates judicial power).

100. 28 U.S.C. §§ 620–629 (2000). The Federal Judicial Center is the education and research agency for the federal courts created by Congress to improve judicial administration of the U.S. courts. *See* Federal Judicial Center Home Page, http://www.fjc.gov/public/home.nsf (last visited Mar. 18, 2007).

101. Strictly adhering to only an "enhancement" view of the necessary and proper clause is certainly inconsistent with our constitutional history and past institutional practices. If Congress were to reduce the number of Justices (as it has done previously) or increase the categories of cases the Court must hear on appeal, these changes would not obviously enhance the powers of the Court, even though they seem to be constitutional.

102. *See, e.g.*, RONALD L. GOLDFARB, TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS 96–98 (1998) (reviewing scholarship on the effects of televising different judicial proceedings and contexts); *Cameras in the Courtroom*, *supra* note 18, at 21–23 (statement of Seth D. Berlin) (discussing the federal courts' three-year pilot program and its findings that overall "attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program"); *id.* at 25–27 (statement of Henry S. Schleiff). *But cf.* C-SPAN, *supra* note 83.

medium of television deepen the public's understanding and knowledge of the high bench, in a way that makes it operate more effectively? Could "Supreme Court TV" increase the accountability of the Court, thereby enhancing its connection to the people and, in turn, its capacity to carry out its duties?[103] While it is conceivable that both questions could be answered in the affirmative, these are still somewhat questionable bases for constitutionally grounding Specter's television proposal. It is possible that televising the Court could have no effect, or even a negative effect, upon the Court's legitimacy and effectiveness. Certainly, as already indicated, a number of judges and Justices are themselves skeptical about the positive correlation between televised proceedings and the Court's ability to conduct its business. Presumably their views carry considerable weight in trying to establish whether television would be necessary for enhancing the Court's work. More broadly, arguing that S. 344 is strictly necessary for advancing the Court's functions and operations appears to push the limits of how we normally understand "necessity." After all, the Supreme Court's ability to function does not seem to have been obviously compromised by its historical absence from the nation's television screens.

On the other hand, if we adopt a less rigid conception of congressional authority under the necessary and proper clause, three alternate arguments provide a basis for claiming that S. 344 does indeed constitutionally advance or enhance the judicial power of the Supreme Court, and is therefore a defensible exercise of Congress's powers under Article I, section 8. First, we might note that the Court itself promotes a kind of heuristic function in opening its oral arguments to the public, and in choosing to read summaries and sometimes excerpts from its opinions (including dissents). If one presumes that these initiatives are defensible exercises of the judicial power, it seems entirely plausible that the proposed television bill would enhance their educational value by potentially reaching millions of viewers rather than the small group that currently attends the Court in person. Second, a proposal requiring the Supreme Court to televise its proceedings might facilitate the Court's distinctive institutional role, especially its capacity to contribute to legal and political stability and unity.[104] To the extent the Court can promote this legal "settlement" by communicating with the general public, televised proceedings will surely advance this function. Third, as discussed in the following section, Congress seems to possess implicit rulemaking powers over federal government; this authority may empower Congress to pass specific regulations that do not themselves advance the judicial power, but occur in an area of institutional operations in which it is critical to have some rule established for judicial operations. Thus, while we know that it is not strictly "necessary and proper" for the Court to have a membership of nine (it has operated with fewer and more Justices), it seems plausible to argue that it must have some fixed membership level to perform. The television legislation, then, may be understood as advancing the judicial power by providing specific regulation within a broad area—access to the Court—that is genuinely

103. As discussed *infra* Part V, these arguments are among the central justifications Senator Specter himself has made on behalf of his bill. *See, e.g.*, 153 CONG. REC. S1259 (daily ed. Jan. 29, 2007) (quoting Justice Felix Frankfurter's statement that "[i]f the news media would cover the Supreme Court as thoroughly as it did the World Series, it would be very important since 'public confidence in the judiciary hinges on the public perception of it.'").

104. *See* Schauer & Alexander, *supra* note 76, at 455.

"necessary" for its functioning.

Alternatively, we might argue that S. 344 is necessary and proper for enhancing federal powers and functions found in another branch or, more generally, "in the government of the United States."[105] For example, even if one concludes that "Supreme Court TV" has no effect upon the ability of the Court to fulfill its functions, it might still be defended as promoting Congress's oversight powers or in keeping the public informed about their leaders and institutions.[106] Given the bill's focus on proceedings that the Court has itself chosen to make public, this argument is not entirely straightforward. While we will look at this question in greater detail below, the Specter bill appears to be so closely tethered to existing judicial operations that it may be difficult to justify solely on the grounds that it advances some non-judicial power or prerogative found in the Constitution.[107]

(2) Legislative rulemaking

As indicated, we can also frame the question of whether the legislature retains the "necessary and proper" authority to force cameras into the Supreme Court in a quite different manner. Adopting a "legislative rulemaking" approach to the necessary and proper clause allows us to move beyond understanding the provision as strictly limited to enhancing the powers of the various institutions and entities of national government. We might ask instead, whether Congress can use its necessary and proper power to fill in the details governing aspects of the judicial power, including even the judiciary's ability to govern itself.

As already suggested, Congress has certainly provided this regulation in other contexts. For almost one hundred years, for example, Congress has handed the Court its calendar, compelling it, under the United States Code, to open every new term on the first Monday in October.[108] No one would pretend that it is necessary and proper for the Supreme Court to start its business on this particular date—almost any starting time would do.[109] However, it is arguably essential that the Court's term have some beginning, so that those seeking rulings from the Court know how to prepare their case, and have a sense of when they might anticipate a ruling.

In this, as well as in other aspects of public life, we have a long tradition of allowing Congress, as the federal government's chief policymaking body, to set out particular rules in order to make the work of our national institutions possible. In

105. U.S. CONST. art. I, § 8.

106. While the Constitution does not provide an explicit constitutional grant empowering Congress to promote the public's scrutiny of governmental procedures and products, such authority is arguably implicit in certain constitutional provisions (such as the First Amendment) and in our general conception of republican governance. This implied power would seem to justify other important legislation such as, for example, the Freedom of Information Act. 5 U.S.C.S. § 552 (2007).

107. Moreover, this argument raises other problems. One might note that the "enhancing" interpretation of the necessary and proper clause is necessarily limited because there are situations where promoting one set of government powers or processes arguably comes at the expense of another. In addition, it is not entirely clear how we ought to resolve conflicts between (and within) institutions about the perceived "necessity" of different legislative proposals.

108. 28 U.S.C. § 2 (2000).

109. Similarly, we can't argue that starting the Court's session on this date enhances its work—at least not relative to many other starting dates.

addition to stipulating precisely when the Court's term begins, for example, the United States Code establishes how many Justices sit on the Court and what constitutes a Court quorum for conducting business.[110]

Presumably, Congress's power to pass these regulations does not flow directly from its own legislative responsibilities and functions. Instead, Congress enacts these measures as a function of its constitutional authority to enact laws that are "necessary and proper" for advancing some of the "powers vested by this Constitution [more generally] in the government of the United States" and specifically, the judiciary.[111]

Evaluated against this background of Congress's rather extensive history of "filling in" the details of judicial power, the constitutional grounding of S. 344 looks fairly secure.[112] The Specter television legislation would provide specific guidelines for exercising an implicit Article III power that, on its own, has been free of controversy—the Court's authority to open some of its proceedings to the public, a practice that the Court now follows in permitting private citizens to hear and view oral argument and other aspects of its proceedings.[113]

One might still argue that, unlike other aspects of the judiciary regulated by Congress, the power that the Specter legislation aims to govern is not somehow "obligatory." In other words, we might conclude that the Constitution allows for legislative rulemaking under the "necessary and proper" clause, but only in areas that are strictly "necessary" for the Court's operation. The Court must have some number of Justices, needs to have a quorum to operate, and depends upon a budget of some size to facilitate its work. Existing legislation, such as the Judiciary Act of 1789,[114] fills in the

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110. 28 U.S.C. § 1. As Senator Specter argued in introducing S. 1768:

> While the Constitution specifically creates the Supreme Court, it left it to Congress to determine how the Court would operate. For example, it was Congress that fixed the number of Justices on the Supreme Court at nine. Likewise, it was Congress that decided that any six of these Justices are sufficient to constitute a quorum of the Court. It was Congress that decided that the term of the Court shall commence on the first Monday in October of each year, and it was Congress that determined the procedures to be followed whenever the Chief Justice is unable to perform the duties of his office.

Specter, *supra* note 19, at S10429 (statement of Mr. Specter).

111. U.S. CONST. art. I, § 8.

112. It is worth noting in this context that the Constitution only specifies that each house of Congress will determine its own rules and internal procedures:

> Each House shall be the judge of the elections, returns and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members, in such manner, and under such penalties as each House may provide. Each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two thirds, expel a member.

U.S. CONST. art. I, § 5. There is no comparable language for either the judiciary or executive branch, and, of course, by practice, the structure and operations of both of these branches are largely created and controlled by congressional laws.

113. *See Cameras in the Courtroom, supra* note 18, at 96 (statement of Peter Irons) (discussing the Court's increasing willingness to make itself available to the public, including its occasional release of "audio-tapes . . . on the [same] day of the arguments").

114. Among other regulations, the Judiciary Act of 1789 set down guidelines for the size of the overall Court, for the Court's quorum operations, the location of Court sessions, the minimum number of sessions it could hold each year, and indicated that "precedence" amongst the Justices was to be established by their length of tenure. 1 STAT. 73, § 1. Supporters of S. 1768 might point to the Judiciary Act of 1789 as a widely accepted, longstanding law that allows for rather detailed superintending of the Court's internal functions. Opponents of the Specter bill might claim that unlike S. 344, the Judiciary Act was foundational—setting out

details of essential aspects of the Court's business, supporting vital elements of its basic operations. But S. 344, in this view, is not of such a character. Determining whether to televise the Court's proceedings is not the kind of foundational question that must be decided as a prerequisite for enabling the Court to fulfill its core responsibilities.

But this demanding standard would call into question much of the legislation, and with it many of the practices, that the Court has long depended upon, and the nation has come to accept. To name just a few examples, if the necessary and proper clause were construed as only allowing congressional regulations of measures that must be enacted for the Court to perform, the presence of law clerks, the Public Information Office, and the Federal Judicial Center would all be brought into serious question.[115] Such a reading seems needlessly restrictive.

(3) Procedural vs. substantive regulations

We might add an additional layer to this analysis of the necessary and proper clause and its relevance to assessing the constitutionality of S. 344. Some court decisions have attempted to distinguish procedural regulations of the judiciary made in the name of the necessary and proper clause (permissible) from substantive regulations (impermissible). For example, in *Burlington Northern R. Co. v. Woods*, the Court ruled that "Article III of the Constitution, augmented by the Necessary and Proper Clause . . . empowers Congress to establish a system of federal district and appellate courts and, impliedly, to establish procedural Rules governing litigation in these courts."[116]

While this distinction is difficult to delineate, it is not meaningless. A proposal that sought to bar the Court from reviewing cases related solely to abortion on the grounds that these decisions damaged the Court's legitimacy and effectiveness[117] would seem to aim at a rather specific substantive goal rather than enacting a neutral, procedural rule for the Court to follow; this sort of proposal targets what the Court decides rather than seeking to govern the manner or environment in which it makes its decisions.

Setting aside the question of whether this emphasis on procedure over substance is a sensible construction of the "necessary and proper" clause, should we regard the

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rules strictly "necessary" for the operations of the court—and entirely procedural, not attempting to impact the substantive decisionmaking of the Court. *Cf.* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L. J. 1215, 1223 n.22 (2001) (arguing that the Judiciary Act of 1789 was a "super-statute" or "foundational statute" of a different class than ordinary legislation).

115. Presumably, one might respond to these arguments by claiming that the best interpretation of the necessary and proper clause would only permit legislative regulations of the courts (and presumably other bodies) if they were either 1) strictly necessary for the operation of the judiciary, or 2) if they somehow enhanced that institution. But again, while this would cover much of existing regulative legislation and rulemaking, it would leave other crucial statutes behind. To take just one example, it is not at all obvious that this test would permit the creation of the Freedom of Information Act—at least not through the necessary and proper clause. *See* 5 U.S.C. § 552.

116. Burlington Northern R. Co. v. Woods, 480 U.S. 1, 5 n.3 (1987). *Cf.* Budinich v. Becton Dickinson & Co., 486 U.S. 196, 199 (1988) (quoting Hanna v. Plumer, 380 U.S. 460, 472 (1965)) ("[e]nactments 'rationally capable of classification' as procedural rules are necessary and proper for carrying into execution the power to establish federal courts vested in Congress by Article III, Section 1"). *See also* 28 U.S.C. § 2072 (2000) (The Rules Enabling Act, authorizing the Supreme Court to "prescribe general rules of practice and procedure and rules of evidence" for the federal courts).

117. This specific measure might also be pursued through Congress's Article III power to control the appellate jurisdiction of the Court. *See generally Service Constitution, supra* note 9.

Specter legislation as largely procedural or substantive?[118] On its face, the bill seems to be the former—seeking not to shape or direct the Court to particular outcomes but controlling the medium through which the Court publicizes its work.

(4) Fed. R. Crim. P. 53

Of existing regulations and laws, the one most pertinent to this discussion and analysis of S. 344 is Rule 53 of the Federal Rules of Criminal Procedure.[119] The United States Supreme Court, pursuant to federal law, promulgates and changes the Federal Rules, subject to Congress's approval and amendment.[120] Rule 53 bars both photographing and broadcasting court proceedings in federal criminal trials.[121] Assuming this rule is a valid exercise of congressional power, partly delegated to the Supreme Court,[122] does the rule either cast doubt upon or enhance the constitutional case for S. 344? As indicated, Congress created the Court's authority to fashion federal rules, and that authority is subject to congressional specification and correction. Passing S. 344 would effectively amend Rule 53 with respect to the Court; the old federal Rule would not have trumping power over the newly enacted federal law. Therefore, Rule 53 does not pose an obstacle to Specter's initiative.

Does the Rule somehow authorize the television bill? In other words, can we argue that Congress's delegated power to enact Rule 53—barring television from the federal criminal courts—implies the inverse authority to enact "Supreme Court TV?" In a sense, the question largely reprises the prior "necessary and proper" analysis and is, therefore, of secondary importance to that discussion. If one construes exercises of the "elastic clause" narrowly,[123] as allowing only enhancements of judicial power or operations that directly further the work of the courts, then one might conclude, especially given the federal judiciary's own resistance to televised proceedings, that the

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118. The Court's *Plumer* ruling argued not only that it was, at times, difficult to maintain the substantive-procedural distinction, and that where the question was ambiguous, the Court should err on the side of accepting the regulation:

> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Hanna, 380 U.S. at 472.

119. FED. R. CRIM. P. 53.

120. *See* http://judiciary.house.gov/media/pdfs/printers/109th/crim2005.pdf.

121. Specifically the rule states, "Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom." FED. R. CRIM. P. 53. Although Rule 53 does not explicitly bar television broadcasts, it has been generally interpreted as including this prohibition. *See* United States v. Hastings, 695 F.2d 1278, 1279 n.5 (11th Cir. 1988).

122. To date, courts have generally rejected constitutional challenges to Rule 53. *See, e.g., Hastings*, 695 F.2d at 1279; Conway v. United States, 852 F.2d 187, 188 (6th Cir. 1988); United States v. Moussaoui, 205 F.R.D. 183, 186 (E.D. Va. 2002) (rejecting a constitutional challenge to Rule 53 and rejecting a motion to record and televise the pretrial and trial proceedings of defendant). Interestingly, the court in *Moussaoui* also indicated that the question of televising was ultimately "a question of social and political policy best left to the United States Congress and the Judicial Conference of the United States." *Moussaoui*, 205 F.R.D. at 186.

123. As discussed, a broader construction would view the necessary and proper clause as carving out broad zones of legislative action wherein Congress might enact regulations that are themselves somewhat unrelated or have a neutral relationship to the goal of advancing the work of the courts.

constitutional authority behind Rule 53 goes only "one way,"[124] allowing for the exclusion of cameras but not authorizing their presence. Alternatively, as argued previously, there are grounds for believing that televised proceedings could advance the judicial power, and the history of congressional regulations of the courts suggests that Congress has a general authority to enact laws that fill in the details within fairly broad areas of governance. While, on its own, Rule 53 does not establish the constitutional propriety of "Supreme Court TV," it certainly does not damage the case.

(5) Summary

We might summarize the forgoing analysis of the necessary and proper clause by concluding that the Specter legislation has a secure constitutional foundation through this textual provision. Specifically, the bill arguably advances the Court's judicial power directly in several ways (by, for example, supporting its settlement function and by making the proceedings it has chosen to reveal to the public more widely available). Moreover, S. 344 represents a valid exercise of Congress's authority to enact rules that fill in the details of how the public gains access to and information about the Court—in a manner that does not erode the Court's independence, particularly not relative to other broadly accepted regulations.[125] Finally, we have some initial reasons for thinking that the Specter legislation would validly advance non-judicial powers and general governmental interests—especially the authority of Congress and the general public to monitor the work of the judiciary.

3. Article III congressional controls

Article III specifies a finite number of cases in which the Supreme Court has original jurisdiction and states that in "all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."[126] The Specter legislation under consideration does not limit itself to promoting coverage of cases considered under the Court's appellate authority; it televises all "open sessions" of the Court, although in practice these sessions would overwhelmingly involve appellate matters. Could this seemingly broad grant of power under Article III provide a basis for a variant of the Specter bill, perhaps a measure that sought to televise sessions of the Court involving the cases it reviews through its appellate jurisdiction?

The question is complex and beyond the scope of this study, which is focused on the language and constitutional basis for Specter's original bill, S. 344. The Article III power has been used as the basis for a range of legislation, including bills that set the

124. Some support for this construal of the Rules themselves can perhaps be found in Federal Rule 2, which explains that the rules "are to be interpreted to provide for the just determination of every criminal proceeding, to secure simplicity in procedure and fairness in administration, and to eliminate unjustifiable expense and delay." FED. R. CRIM. P. 2.

125. Not every regulation would meet this test. A bill that sought to increase the size of the Supreme Court significantly might well threaten its institutional responsibility for providing stability and clarity to the law.

126. U.S. CONST. art. III, § 2.

dollar threshold for diversity jurisdiction in civil matters[127] and, more controversially, laws that have "stripped" the Court of authority to hear particular classes of cases.[128] Legislation seeking to use Article III as the basis for controlling the means through which the Court publicizes its actions would seem to be of a different class than these historical exercises of the power, but, again, the issue would require more thorough and systematic analysis.

4. The First Amendment and rights of access

Does the First Amendment include a right of public access that authorizes mandatory television legislation? While the amendment says nothing explicitly about a general right to view judicial proceedings, longstanding practices and more recent court decisions have permitted private citizens to attend many criminal proceedings.[129] Some federal circuits and state courts have extended this guarantee to civil trials.[130] This history, along with the rationale of allowing the public to inspect the operations of courts to help maintain the integrity of the judicial process, creates a "strong presumption of access to judicial proceedings and court records."[131]

However, it is not obvious this right to access includes appellate matters and, more to the point, "courts generally have been hesitant to find that the First Amendment requires camera access."[132] Some proponents of televising judicial proceedings have argued that denying this coverage impermissibly favors one form of news media (print) over another (television)—encroaching upon the First Amendment's press protections.[133] While the First Amendment would seem to require access on the same

127. *See* 28 U.S.C. § 1332 (2000) (codification of the amount in controversy dollar threshold needed for federal diversity jurisdiction).

128. *Service Constitution, supra* note 9, at 289–93, 302–03 (discussing successful efforts by Congress to pass "subject matter jurisdiction" controls of the Court).

129. *See, e.g.*, Craig v. Harney, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property . . . [t]here is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."); Richmond Newspapers, Inc. v. Virginia, 448 U. S. 555, 580 (1980) (First Amendment includes right to attend criminal trials); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 603 (1982) (invalidating automatic closure of courts during testimony of minor victims involved in sexual offense cases); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 505 (1984) (right of access includes *voir dire* hearings); Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 13 (1986) (access to preliminary hearings protected by First Amendment).

130. *See, e.g.*, Publicker Industries, Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984) (First Amendment guarantees public and press access to civil proceedings); NBC Subsidiary (KNBC-TV), Inc. v. Superior Court of Los Angeles Cty., 980 P.2d 337, 361 (Cal. 1999) (holding that "the First Amendment provides a right of access to ordinary civil trials and proceedings").

131. *Cameras in the Courtroom, supra* note 18, at 50 (statement of Seth D. Berlin).

132. *Id.* (emphasis omitted). *See also id.* at 55–56 (discussing federal court rulings that have rejected claims that the First Amendment requires the presence of cameras in court). In general, the furthest that courts have been prepared to go in promoting television in the courtroom is to suggest that this practice is not inherently unconstitutional. *See, e.g.*, Chandler v. Florida, 449 U.S. 560, 573 (1981).

133. *See* Kelli L. Sager & Karen N. Frederiksen, *Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights*, 69 S. CAL. L. REV. 1519, 1539 (1996) (rejecting the notion that "courts can arbitrarily restrict the public's access to judicial proceedings and discriminate against electronic media absent a compelling justification for doing so"). *See also* Specter, *supra* note 19, at S10428 ("a strong argument can be made that forbidding television cameras in the court, while permitting access to print and other media, constitutes an impermissible discrimination against one type of media over another [in contravention of the First Amendment.]").

terms for different members of the press, this constitutional mandate would not obviously also demand government to facilitate the varied technologies associated with different forms of the press. As the Court stated in *Estes v. Texas*, courts cannot

> be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press [or television camera into court].[134]

Interestingly, if cameras were required in the Supreme Court, the impermissible discrimination argument might have renewed relevance as print journalists (and, presumably, bloggers) might complain that they ought to have access to their computers. Presumably, the Court's decision in the fall of 2006 to make the transcripts of oral arguments available on the same day they are conducted blunts this argument.[135] The Specter legislation could be understood as making similar primary materials of the Court's work available, but now, for the medium of television.

In short, while the First Amendment does not obviously pose a barrier to televising the Court and Specter's legislation, it also does not, on its own, provide a compelling argument in favor of the constitutionality of the measure.[136]

5. The Fourteenth Amendment

Could the Fourteenth Amendment, and its so-called "enforcement" provision, serve as a basis for enacting Specter's television legislation? The Fourteenth Amendment stipulates that:

> [n]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[137]

The Court has ruled that these protections apply equally to the federal government

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134. Estes v. Texas, 381 U.S. 532, 539–40 (1965). As the Court announced in *Estes*:

> It is said, however, that the freedoms granted in the First Amendment extend a right to the news media to televise from the courtroom, and that to refuse to honor this privilege is to discriminate between the newspapers and television. This is a misconception of the rights of the press . . . Nor can the courts be said to discriminate where they permit the newspaper reporter access to the courtroom. The television and radio reporter has the same privilege. All are entitled to the same rights as the general public. The news reporter is not permitted to bring his typewriter or printing press. When the advances in these arts permit reporting by printing press or by television without their present hazards to a fair trial we will have another case.

Id.

135. *See* Press Release, United States Supreme Court, *supra* note 31.

136. *See Cameras in the Courtroom, supra* note 18, at 40 (statement of Barbara E. Bergman, President of the National Association of Criminal Defense Lawyers) (arguing that "[t]he question of whether cameras should be permitted in the federal courts cannot be answered merely by invoking the media's or public's 'right of access'").

137. U.S. CONST. amend. XIV, § 1.

through the Fifth Amendment.[138] Section 5 of the Fourteenth Amendment empowers Congress to "enforce, by appropriate legislation, the provisions" of the Fourteenth Amendment. Could one convincingly argue that Section 5 authorizes Congress to pass S. 344, on the grounds that this bill would help the legislature protect and enforce the liberties guaranteed by the Fourteenth Amendment?[139]

This is a difficult case to make. What particular constitutional rights does S. 344 enforce? As the previous analysis makes clear, while televising the Court does not seem obviously barred by the Constitution, there also does not seem to be an obvious constitutional basis for insisting that this coverage is required by our supreme law. As discussed, there is a well-recognized constitutional right of access for the public and press to many criminal proceedings.[140] But courts have not extended this right, in any context, to include legally guaranteed access for television cameras.[141]

Any effort to defend Specter's bill as an "enforcement" of the Fourteenth Amendment, would also have to contend with a recent line of Supreme Court cases that have tamped down on Congress's capacity to legislate pursuant to Section 5. *City of Boerne v. Flores*,[142] for example, held that Section 5 should be viewed as a "remedial" power that could only be invoked after Congress satisfied two conditions.[143] First, Congress had to make a case that the intended legislation addressed genuine abridgements of the Fourteenth Amendment, and, second, Congress was required to demonstrate that its chosen legislative means for rectifying these violations were closely related to this end.[144] In the words of the Court, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end. Lacking such a connection, legislation may become substantive in operation and effect [straying beyond the Fourteenth Amendment]."[145]

In light of *Boerne* and other rulings,[146] advocates of the Specter bill would likely face a dubious reception from courts in trying to make the case that the legislation was an appropriate enforcement of the Fourteenth Amendment. Proponents of S. 344 would need to demonstrate a sufficient record of specific Fourteenth Amendment violations to establish that the Specter measure is an appropriately tailored legal remedy. Given the uncertain connection between televising judicial hearings and protecting individual

138. The Fourteenth Amendment's provisions also apply to the federal government through the Fifth Amendment. *See, e.g.*, Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

139. *See generally* Sager & Frederiksen, *supra* note 133; Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053 (1993).

140. *See supra* note 129.

141. *See Estes*, 381 U.S. at 585–86; *Chandler*, 449 U.S. at 582–83; Nixon v. Warner Communications, 435 U.S. 589, 610 (1977) ("there is no constitutional right to have [live witness] testimony recorded and broadcast . . . The requirement of a public trial is satisfied by the opportunity of members of the public and the press to attend the trial and to report what they have observed."). *See also* Dolores K. Sloviter, *If Courts Are Open, Must Cameras Follow?* 26 HOFSTRA L. REV. 873, 888–89 (1998).

142. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

143. *Id.* at 519.

144. *Id.*

145. *Id.* at 520.

146. For example, in Board of Trustees of the Univ. of Ala. v. Garrett, 531 U.S. 356, 374 (2001), the Court invalidated a portion of the Americans with Disabilities Act as being overbroad, viz., that the statute's broad remedies were out of proportion to the record of Fourteenth Amendment violations Congress was confronting.

liberties, this would, presumably, be an uphill struggle.[147]

C. Other Constitutional Arguments

The foregoing analysis has examined both the separation of powers doctrine and specific powers within the Constitution to determine whether Senator Specter's proposal, S. 344, is permitted under the United States Constitution. Having made the case that the legislation does not run afoul of separation of powers principles and is indeed authorized by several readings of the necessary and proper clause, the following section goes on to consider whether other specific provisions of the Constitution might otherwise prevent the proposal from becoming a valid law.

1. The Fifth Amendment and due process

Could Senator Specter's bill, in requiring the televising of Supreme Court sessions, jeopardize the Fifth Amendment's guarantee that no person "shall be compelled in any criminal case to . . . be deprived of life, liberty, or property, without due process of law?" The immediate answer is no, because S. 344 contains a provision that allows a majority of the Justices to stop the television cameras if the cameras "would violate the due process rights of one or more of the parties" before the Court.[148] But if this provision was not invoked by the Justices,[149] or if it were stripped from the final version of Specter's bill, would "Supreme Court TV" otherwise be in jeopardy on "due process grounds?"

Although the Court, more than forty years ago in *Estes v. Texas*,[150] reversed a criminal conviction partly due to concerns that television coverage of the case was prejudicial, the judiciary has generally not subsequently found that the presence of cameras in courts undermines fair procedure.[151] Indeed, *Estes* itself suggested that the disruption posed by cameras in that case might well disappear in the future:

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147. *But cf.* Akhil Amar, *The Constitution Versus the Court: Some Thoughts on Hills on Amar*, 94 NW. U. L. REV. 205, 210 (1999) (criticizing the Court's "neutering" of Section 5); Michael McConnell, *Institutions and Interpretation: A Critique of City of Boerne v. Flores*, 111 HARV. L. REV. 153, 179 (1997) (arguing that the framers of the Fourteenth Amendment intended Congress not the Court to be primarily responsible for interpreting its scope); Ellen Katz, *Reinforcing Representation: Enforcing the Fourteenth and Fifteenth Amendments in the Rehnquist and Waite Courts*, 101 MICH. L. REV. 2341, 2349–51 (2003) (arguing that the Fourteenth Amendment was designed to prevent violations of rights by individuals and not simply to bar their encroachment by government officials).

148. *See* Specter, *supra* note 19, at S10426 (statement of Mr. Specter).

149. While unlikely, it is not inconceivable that the Justices could change their mind after the initial decision about whether to turn the cameras off. In other words, even if the Justices failed to halt the cameras at the time of an oral argument, presumably they could still rule later that a defendant's due process rights had been violated by this coverage. Among other scenarios, this might occur if a new Justice were added to the Court during the period between oral argument on a case and the issuing of a decision.

150. *Estes*, 381 U.S. at 565.

151. *See Cameras in the Courtroom*, *supra* note 18, at 73 (statement of Barbara Cochran, President, Radio-Television News Directors Association) ("In the hundreds of thousands of judicial proceedings covered electronically across the country since 1981, to the best of RTNDA's knowledge there has not been a single case where the presence of a courtroom camera has resulted in a verdict being overturned, or where a camera was found to have any effect whatsoever on the ultimate result").

> 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. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.[152]

Thus, even setting aside the explicit "due process" provision of S. 344, the bill does not inherently pose a Fifth Amendment problem. While it is conceivable that the presence of television cameras could threaten the rights of an individual in a specific case, a reviewing court could simply invalidate the result in that particular dispute.[153]

2. Sixth Amendment guarantees

The Sixth Amendment states that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[154] Could this guarantee be somehow compromised by the proposed television legislation?[155]

Since S. 344 is limited to televising the Supreme Court of the United States, this concern could only take one of two forms. First, one might claim that the Court's limited exercise of original jurisdiction sometimes amounts to a criminal trial. In practice, the only category of cases under the Court's original jurisdiction in which this is likely to occur is in criminal "cases affecting ambassadors, other public ministers and consuls."[156] However, given both the infrequency with which the Court reviews original jurisdiction claims involving ambassadors and the criminal immunity that attaches to most diplomatic offices and acts,[157] it is unlikely that a defendant could successfully raise such a challenge (even if one could make the case that the Court's review of these cases equated with a trial as delineated in the Sixth Amendment).

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152. *Estes*, 381 U.S. at 595–96 (Harlan, J., concurring).

153. A sign of how unthreatening "cameras in the courtroom" may be at the appellate level is suggested by the statement of the President of the National Association of Criminal Defense Lawyers during Senate hearings on television legislation in 2005. According to Bergman:

> cameras should be permitted to televise criminal proceedings in the United States district courts and interlocutory appeals to the Circuit Courts with the express consent of the parties; cameras should be permitted in the United States Courts of Appeals and the United States Supreme Court in all other criminal proceedings.

Cameras in the Courtroom, supra note 18, at 44 (statement of Barbara R. Bergman, President, National Association of Criminal Defense Lawyers). Here, the head of the principal national organization for defense lawyers seems to foresee no due process concerns posed by cameras in the Supreme Court.

154. U.S. CONST. amend. VI.

155. Alternatively one might ask if the Sixth Amendment gives Congress a constitutional authority for passing S. 344. *See, e.g.*, Waller v. Georgia, 467 U.S. 39, 46 (1984) ("there can be little doubt that the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and public"). But, among other objections to this argument, the overwhelming percentage of the Court's docket is comprised of appellate matters. Even with a capacious imagination, therefore, "Supreme Court TV" could not, therefore, be justified as advancing the Sixth Amendment's guarantee of a public trial.

156. U.S. CONST. art. III, § 2. The Constitution also grants the Court original jurisdiction in those cases "in which a state shall be party." In practice this includes: (1) some cases initiated by a state, (2) disputes between a state and the federal government, and (3) disputes between states. BAUM, THE SUPREME COURT *supra* note 74, at 9.

157. Diplomatic and Consular Immunity: Guidance for Law Enforcement and Judicial Authorities, 1998 DIGEST, at 1–2.

As a second argument against S. 344, one might contend that even if the Supreme Court does not ever serve as a criminal trial court, the Specter proposal might indirectly impinge upon the Sixth Amendment during the appellate process. That is, if the presence of television cameras in the Court effectively damages or hampers a party's right to appeal, this coverage might indirectly threaten their right to enjoy a fair trial.

But this, too, is a strained and unconvincing argument. The federal right to appeal has been created by statute.[158] There is no constitutionally based right to appeal and no right to appeal to the Supreme Court.[159] Whatever the "right to trial" includes, therefore, it would not obviously be hindered by any supposed defects caused by the televising of Court proceedings.

3. Unconstitutional Legislative Motives or Purposes?

Some might dismiss these various claims regarding the constitutionality of the recent television legislation as being beside the point. What's really at stake in this debate is protecting the Court from an ill-tempered and partisan Congress, intent on harassing the judiciary, and even clipping its wings. In this view, the motivation behind Specter's bill is not to provide greater accountability or to educate the public, but to enact a form of punitive revenge for the Court's nullification of various federal laws.[160]

On one level, it's hard to see how this objection amounts to a damning constitutional argument against the proposed television legislation. With good reason, courts have been reluctant to look at congressional motives for enacting legislation.[161] As it announced in *United States v. O'Brien,* the Supreme Court does "not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[162] Making its constitutional judgments turn on the purity of "legislative motives" would compel the Court to provide authoritative pronouncements on the obscure psychology and incentives of legislators, in large part by attaching a great deal of significance to what is often a spotty and even inscrutable legislative record.[163]

However, this response is incomplete. While it is a dubious, if not impossible, enterprise to assess accurately the incentives and motives of individual lawmakers, not to mention an entire Congress,[164] trying to capture the legislative purposes behind a bill is a more manageable, although still difficult, task. It is relatively commonplace for courts to inspect legislative purposes while, for example, attempting to discern whether a particular legislative classification meets a "rational basis" or "rational standard"

158. 18 U.S.C. §§ 3732, 3742 (2000).

159. *See Cameras in the Courtroom, supra* note 18, at 9–10 (statement of Seth D. Berlin) (discussing federal court rulings that have rejected claims that the Sixth Amendment requires the presence of cameras in court).

160. *See Service Constitution, supra* note 9; Post, *supra* note 9.

161. In 1801, Congress altered the length of the term of the Court so that it did not meet for fourteen months, and sixty-five years later it restricted the number of Justices who could serve on the Court in order to limit the powers of President Andrew Johnson. S. DOC. NO. 108-19, at 628–29 (2004). These moves (each seemingly more drastic than Specter's proposal) were surely partly impelled by partisan motivations, but few have questioned their constitutionality.

162. United States v. O'Brien, 391 U.S. 367, 383 (1968).

163. *See* Bruce G. Peabody, *Reversing Time's Arrow: Law's Reordering of Chronology, Causality, and History,* 40 AKRON L. REV. 587, 607–610 (2007) (discussing the problems of construing legislative intent).

164. *Id.*

test.[165] In general, if courts fail to find a valid public purpose behind a piece of legislation, then it tends to be struck down.

Thus, investigating the legislative purposes behind S. 344 might be relevant to ascertaining its constitutionality in at least three ways. First, if the purposes of the bill are somehow themselves unconstitutional, a case could be made that the bill itself is also invalid. For example, if the reasons cited by legislators for supporting S. 344 centered on curbing the "judicial power," or if proponents offered no rationale whatsoever, the bill would be constitutionally suspect.[166]

Second, plumbing legislative purposes could be central if one accepts a reading of the necessary and proper clause that assesses the validity of congressional regulations of the judiciary by determining whether they are primarily "procedural" rather than "substantive."[167] If one adopts this approach, then, presumably, we might designate S. 344 as an unconstitutional, substantive interference with the Court (if, for example, most lawmakers intended that the initiative would impact the content of the Court's decisions in some way).

Third, examining congressional discussions about the rationale for the television bill might support or erode other arguments about how the measure serves as a constitutional application of the necessary and proper clause. Presumably, for example, if there is no record of Congress evincing interest in promoting Court operations, an argument that S. 344 advances the "judicial power" of the Court is somewhat harder to establish.

How can we evaluate the Specter legislation in light of these arguments about legislative purposes? Given the conciseness of the bill and the absence of a developed legislative record on the measure, it is hard to argue decisively about its intended objectives. A thorough analysis of the legislative purposes behind S. 344 could only take place in the future, after Congress has fully considered and debated the bill.

Nevertheless, we might make a few initial comments about the presumed rationale behind the television legislation, and how this relates to our assessments about its constitutionality. Senator Specter himself has declared that:

> [t]he purpose of this legislation is to open the Supreme Court doors so that more Americans can see the process by which the Court reaches critical decisions of law that affect this country and everyday Americans. Because the Supreme Court of the United States holds power to decide cutting-edge questions on public policy, thereby effectively becoming a virtual "super legislature," the public has a right to know what the Supreme Court is doing. And that right would be substantially enhanced by televising the oral arguments of the Court so that the public can see and hear the issues presented to the Court. With this information, the public would have insight into key issues and be better equipped to understand the impact of the Court's

165. *See, e.g.*, Ry. Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) ("cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation").

166. *Cf.* Linda S. Mullinex, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Power*, 77 MINN. L. REV. 1284, 1287 (1993) (asserting that federal courts possess "inherent Article III power to control their internal process and the conduct of civil litigation").

167. *See* discussion *supra* Part IV.B.1.b.3.

decisions.[168]

Specter has also expressed support for his recent television legislation and similar measures on the grounds that these initiatives represent reasonable responses to the Supreme Court's activism and invalidation of federal law. A law requiring televised Court proceedings might place some "legitimate pressure" on the high bench.[169]

If one assumes that the reasons Specter advances for supporting his bill are not idiosyncratic and will reflect the public declarations of other legislators,[170] what can we infer from his remarks? Much of Specter's argument for televising the Supreme Court focuses on two principal goals: first, educating the public by making information about the Court's personnel and work more available, and second, providing the public with a vital instrument for scrutinizing the Justices and ensuring their accountability. Some of Specter's language also intimates that Congress should pass the bill to punish or pressure the Court, so that its decisions will fall in line with the wishes of national majorities.

Are any of these reasons for supporting S. 344 so constitutionally suspect as to render the entire bill invalid?[171] The arguments Specter offers certainly are "rational"—meeting the minimal standards the Court has imposed in scrutinizing legislative purposes. While it would seem difficult to impugn the first two legislative motives as rendering the measure unconstitutional, a case might be made that the last argument possesses a more dubious character.

But this rationale represents only one strand of Specter's public justification for the bill; one he does not emphasize relative to the other stated purposes. Moreover, the proper basis for determining whether Specter's "pressure" remarks implicate the bill's constitutionality would seem to be a direct separation of powers analysis, and not an indirect inspection of whether the bill's purposes violated this doctrine. In other words, if, as argued previously, the bill itself doesn't violate the separation of powers, it is difficult to imagine that it might still be deemed unconstitutional because its supporters somehow intended to encroach upon the Court.

Setting aside these arguments about unconstitutional motives, could a close inspection of the legislature's justification for the television legislation reveal that this is a largely "substantive" rather than "procedural" regulation, and is therefore constitutionally void under one of the tests used by courts in applying the "necessary and proper" clause? Again, a complete evaluation of this argument would require a full

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168. *See* Specter, *supra* note 19, at S10427. Again, while these remarks were made about S. 1768 (the version of the television legislation introduced in the 109th Congress) they are presumably applicable to S. 344 (the identical bill introduced by Specter in January 2007). *Cf.* 153 CONG. REC. S1259 (daily ed. Jan. 29, 2007) (quoting Chief Justice William Howard Taft's statement that "[n]othing 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 subject to the intelligent scrutiny of their fellow men and to candid criticism").

169. Mauro, *Bill Allowing Cameras, supra* note 43, at 13.

170. Specter's arguments were certainly echoed by his colleagues during the Senate's 2005 hearings. *See, e.g., Cameras in the Courtroom, supra* note 18, at 78 (statement of Sen. John Cornyn), 88–89 (statement of Sen. Russ Feingold), 90–91 (statement of Sen. Chuck Grassley).

171. This question also raises additional, complex matters beyond the scope of this Article: what concentration of a dubious motive is required to render a bill constitutionally impermissible—and how is that assessment to be determined? Is it enough if one legislator has an unconstitutional motive? Or is a majority required? And what do we do with lawmakers who have mixed motives?

accounting of the legislative debates on S. 344, a record that is not yet available. If the congressional deliberations established that the primary goal moving the bill's supporters was their interest in shaping the Court's opinions,[172] we would possess some basis for stamping the bill as intending a substantive outcome, rather than providing procedural rules "necessary" for enabling the Court to function. Presumably an even more pertinent analysis would entail addressing whether Congress actually impeded the Court's Article III powers.

In any event, lawmakers' reasons for supporting the bill are certain to be complex and multiple.[173] Moreover, even if one could establish that the purposes of the bill were somehow distinctively "substantive," this contention would run up against the language and nature of S. 344 itself, a bill which alters how the Court presents itself to the public. The proposed law largely expands the means through which the Court performs a portion of its basic operations. This character of S. 344 appears to mark it as a procedural measure on its face, no matter the underlying purposes of its author and supporters.

D. Summary

Even if S. 344 becomes a public law, it is likely to be challenged in the courts on constitutional grounds.[174] This Article contends, however, that there are good reasons for believing that the measure is consonant with the legislative powers enumerated in the Constitution without threatening judicial prerogatives or individual rights. After taking into account the range of constitutional arguments that might be made both for and against the legislation, the Specter proposal would appear to be a reasonable extension of Congress's powers under the necessary and proper clause to specify the means through which the Court makes some of its proceedings available to the public.

Are there any constitutional constraints governing Congress's regulation of the Court's internal proceedings? 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. A bill forcing the Justices to turn over unpublished notes about their preliminary deliberations and votes on cases, for example, would seem to compromise their ability to speak freely and imaginatively while still mulling over their opinions. A proposal mandating that Justices answer questions from the press and public would add institutional duties that do not obviously arise from either our Constitution or our legal traditions. But unlike these hypothetical measures, Specter's proposal, which regulates and expands the mechanisms through which the

172. While some of Specter's remarks indicate an interest in a kind of "payback" for the Court's activism, it is not obvious this is a central focus of his support of S. 344, or that he intends any direct shaping of the Court's judgments with his television legislation.

173. At least one Court opinion has ruled that where it is difficult to classify a bill as being either substantive or procedural, the measure is presumed valid. *Hanna*, 380 U.S. at 472. *See also supra* notes 111, 112 and 115, and accompanying text.

174. *See generally* Richard Pious, *Public Law and the "Executive" Constitution*, *in* EXECUTING THE CONSTITUTION: PUTTING THE PRESIDENT BACK INTO THE CONSTITUTION (Christopher S. Kelley, ed., 2001) (exploring the question of whether "courts are more likely to rule against Presidents or Congress—rather than evade by using the doctrine of political question or other procedural hurdles—when their own prerogatives have been infringed.").

Court publicizes its already open sessions, is a defensible way to keep the nation's highest court open, available, and legitimate.

V. THE PROSPECTS OF A CONSTITUTIONAL STANDOFF AND THE FATE OF S. 344

Despite the strength of the constitutional case for Specter's measure, it could still give rise to a legal and institutional standoff between Congress and the Court. As indicated, a number of sitting Justices have expressed serious misgivings about the potential effects of television coverage upon the Court and its members. In its starkest form, this opposition has included Justice David Souter's warning—a decade old, but never repudiated—that cameras would only enter the Court "over my dead body."[175] Associate Justice Antonin Scalia has, at times, sounded nearly as skeptical. "We don't want to become entertainment," he warned. "I think there's something sick about making entertainment out of real people's legal problems. I don't like it in the lower courts, and I particularly don't like it in the Supreme Court."[176]

But would this opposition actually endanger the proposed television legislation? Clearly, the attitudes of the Justices and other judicial figures would figure prominently in the public debate surrounding S. 344, as well as in the judgments of lawmakers voting on the bill and the President called on to sign or veto the measure. In general, Congress does not have an especially enviable historical record when attempting to curb the powers of the Court directly.[177] But, as indicated, the political context surrounding Specter's bill looks more favorable. In addition to its bipartisan support, especially helpful in a period of divided government, 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.[178] As noted, Specter's initiative is among the most modest of a recent spate of proposals calling for constraints on or reforms of the judiciary.

In the end, as with most legislative battles, the political fate of the television legislation is likely to turn on how the measure is framed by its proponents and political timing. Polling consistently finds that a substantially higher percentage of the public approves of the Supreme Court's institutional performance relative to Congress.[179] With this background in mind, Specter's measure stands the greatest chance of

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175. *On Cameras in Supreme Court, Souter Says, 'Over My Dead Body'*, N.Y. TIMES, Mar. 30, 1996, at A24.

176. TONG, *supra* note 16, at 12. *See generally* C-SPAN, Cameras in the Court, http://www.c-span.org/camerasinthecourt/ (last visited Jan. 27, 2007) (presenting statements by the Justices of the Supreme Court on cameras in the Court).

177. *See, e.g.*, RICHARD PACELLE, THE ROLE OF THE SUPREME COURT IN AMERICAN POLITICS: THE LEAST DANGEROUS BRANCH? 77–103 (2001); JEFFREY A. SEGAL & HAROLD J. SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL 327–29 (1993); *Service Constitution*, *supra* note 9, at 289–93. *See generally* Barry Friedman, *Attacks on Judges: Why They Fail*, 81 JUDICATURE 150, 150-51(1998) (reviewing the history of popular attacks on judges); CHARLES GARDNER GEYH, WHEN COURTS AND CONGRESS COLLIDE: THE STRUGGLE FOR CONTROL OF AMERICA'S JUDICIAL SYSTEM (2006) (discussing the history of congressional efforts to curb the courts).

178. *See* HIBBING & THEISS-MORSE, CONGRESS AS PUBLIC ENEMY, *supra* note 37, at 29–35; Valerie J. Hoekstra, *The Supreme Court and Opinion Change: An Experimental Study of the Court's Ability to Change Opinion*, 23 AM. POL Q. 109, 122 (1995); Jeffery J. Mondak & Shannon Ishiyama Smithey, *The Dynamics of Public Support for the Supreme Court*, 59 J. POL. 1114, 1115–1116 (1997).

179. *See* HIBBING & THEISS-MORSE, CONGRESS AS PUBLIC ENEMY, *supra* note 37, at 31.

becoming law if Congress can depict the measure as an essential element of maintaining government access and accountability—rather than directly exhorting the public to place their faith in the comparative competence, integrity, and sagacity of the legislature.[180] Since the 2000 election controversy, when media and popular interest in the Court's proceedings hit a contemporary peak,[181] commentators and politicians have called for greater access to our highest tribunal. The Specter bill could be packaged as being an effective and relatively unobtrusive tool for satisfying this widespread and enduring curiosity.[182]

The television legislation would also, obviously, benefit from good luck. While Congress could have a decisive impact on the nature and content of any publicity campaign accompanying Specter's bill, it would have less control over another decisive factor: the Court's capacity to produce a "self-inflicted wound."[183] As indicated, the public generally evinces considerable respect for the Court, at least relative to Congress. However, controversial Court decisions can have a short term impact in dampening the public's trust in the high bench.[184] The most notable recent example occurred in 2005, when, on the heels of the Court's contentious "takings" decision, *Kelo v. City of New London,* public approval of the Court dipped below that of Congress.[185] The political fortunes of S. 344 would, therefore, certainly soar if a vote on the measure were scheduled in the aftermath of an unpopular and well-publicized opinion by the Court.

Suppose S. 344 becomes law, generating sufficient political support to pass Congress and either avoiding or overcoming a presidential veto. The obvious next step for the measure would be its challenge in federal court.[186] Even as it has attempted to make a case for the legal validity of the Specter television legislation, this Article has also outlined a number of arguments that might be advanced in challenging its constitutionality.

At least two questions would be raised at this stage of the legal trajectory of S. 344. First, would the Justices of the Supreme Court be authorized to review the constitutional status of the Specter initiative? Justices are purportedly limited by 28 U.S.C. § 455, the

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180. *Id.*

181. Mauro, *Bill Allowing Cameras, supra* note 43, at 13 ("One factor cited by several witnesses is the renewed public interest in the Supreme Court, beginning with *Bush v. Gore* in 2000 and continuing with this year's confirmation hearings for Chief Justice John Roberts Jr.").

182. Even if the central claims in this piece are defensible—and Specter's bill is able to withstand the legal challenges that will surely be raised against it—there is a broader question as to whether the public (and public officials) would countenance a proposal that some will present as disrupting an institutional equilibrium between the Court and Congress. The potential reluctance of the public (and some elites) to support S. 344 might reflect not only concerns that the bill infringes upon the Court as a legal matter, but could also upset a more amorphous constitutional aesthetics or propriety. *See, e.g.*, Stephen L. Carter, *Constitutional Improprieties: Reflections on* Mistretta, Morrison, *and Administrative Government*, 57 U. CHI. L. REV. 357, 358 (1990) (discussing constitutional "improprieties" as legal phenomena that may be deemed constitutional but are still arguably "contrary to the spirit of the Constitution").

183. CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 50 (1928).

184. Moreover, as the Congressional Research Service suggests, public opinion on televising the Supreme Court may be shifting towards greater coverage. TONG, *supra* note 16, at 1 (discussing recent polling that indicates increased public "support for televising Supreme Court proceedings").

185. Jeffrey M. Jones, *Supreme Court Approval Rating Best in Four Years, Six in 10 Approve of the Job the Court is Doing*, GALLUP NEWS SERVICE, Sept. 29, 2006, http://newsblogs.chicagotribune.com/news_theswamp/2006/09/supreme_court_g.html.

186. Among the significant legal issues not considered by this Article is the question of who would have standing to challenge an enacted S. 344.

portion of the United States Code that sets out criteria for when a "justice [sic], judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."[187]

Despite this seemingly broad and encompassing language, it is unclear whether this recusal provision would actually deter the Court from exercising judicial review with respect to an enacted S. 344.[188] Among other considerations, in practice, judges and Justices have always been their own arbiters of this impartiality rule—that is, they have determined for themselves, with almost no formal guidelines, when they should remove themselves from a case.[189]

If the Justices did review a challenge to the Specter legislation, it could pose a second significant legal question: would this litigation spark a renewed struggle between Congress and the Court over who had final authority to resolve the question of the measure's constitutional status?[190] Notwithstanding this Article's claim that a strong case can be made that the Specter bill is consistent with the Constitution, Congress would be unlikely to challenge directly the Court's judgment on this matter, even if the high bench struck down the law. The Court's frequent invocations of "judicial supremacy,"[191] along with the political advantages afforded by this doctrine,[192] have left federal lawmakers reluctant to contest the authority of the Court to serve as the ultimate arbiter of constitutional questions.[193] Even Senator Specter has stated his commitment to recognizing the "final word" of the Supreme Court in

187. 28 U.S.C. § 455(a) (2000). *See also* JOHN LOCKE, SECOND TREATISE ON GOVERNMENT 8–13 (C.B. Macpherson, ed., Hackett Publishing Co. 1980) (1690).

188. The scope of 28 U.S.C. § 455 is unclear, particularly since the specific grounds upon which judges and Justices are required to recuse themselves under 28 U.S.C. § 455(b) are more specific than the general goals set out in 28 U.S.C. § 455(a). 28 U.S.C. § 455. *See also* Jeffrey W. Stempel, *Rehnquist, Recusal and Reform*, 53 BROOK. L. REV. 589, 641 (1987). The Justices' refusal to disqualify themselves in this instance appears unlikely to amount to a due process violation. *Cf.* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 824–25 (1986) (quoting Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972)) (Alabama Supreme Court member's "direct, personal, substantial, and pecuniary interest . . . was sufficient to establish a violation of the due process clause of the Fourteenth Amendment").

189. *See* Emily Yoffe, *When Do Supreme Court Justices Recuse Themselves?*, SLATE, Oct. 2, 2000, http://www.slate.com/id/1006177/. Moreover, even if they failed to recuse themselves, it is unclear who would have standing to challenge this recusal, and whether and on what grounds another court would review this claim. *See generally* Thomas McKevitt, *The Rule of Necessity: Is Judicial Non-Disqualification Really Necessary?*, 24 HOFSTRA L. REV. 817 (1996) (Rule applies "if no judge can be found who possesses the requisite degree of partiality"). Of course, if Congress mandated cameras only in the Supreme Court, all other federal judges would conceivably possess the requisite impartiality.

190. While many still assume this is a straightforward legal question, a burgeoning scholarship suggests otherwise. *See, e.g.*, KRAMER, *supra* note 49, at 106–11; KEITH WHITTINGTON, CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING 1-19 (1999). *See generally* CONGRESS AND THE CONSTITUTION, *supra* note 10 (discussing various ways in which Congress contributes to the formation of constitutional law and the protection of constitutional values); Michael Stokes Paulsen, *The Most Dangerous Branch: Executive Power to Say What the Law Is*, 83 GEO. L. J. 217 (1994) (arguing for the authority of the President, and, by extension, all three branches, to engage in constitutional interpretation).

191. Judicial supremacy is the doctrine that the constitutional interpretation of the Court trumps other readings of the Constitution. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 868 (1992) (stating the people's belief in being a nation ruled by law "is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals").

192. *See* Mark Graber, *The Non-Majoritarian Problem: Legislative Deference to the Judiciary*, 7 STUD. AMER. POL. DEV. 35, 44 (1993) (discussing circumstances in which it is politically beneficial for political figures to hand off decisions to the courts).

193. *Congressional Interpretation*, *supra* note 11, at 164.

evaluating the constitutionality of S. 344, although the Senator has also indicated that "there is clearly no constitutional prohibition against" requiring the Court "to televise its proceedings."[194]

Of course, even an adverse constitutional ruling by the Court would not terminate political efforts to televise its proceedings. As scholars and public officials have frequently pointed out, there are numerous potential controls and levers Congress might employ in attempting to impose its will upon the Justices.[195] To take just one example, Congress might exercise its Article III authority to remove the Court's appellate jurisdiction over cases involving the televising issue, a move that would lead to its own rounds of legal and political challenges and an unknown resolution.[196]

VI. CONCLUSION: LEGISLATIVE "ESCAPE VELOCITY" AND JUDICIAL REFORM

This discussion suggests that even if S. 344 is passed into law, the immediate fate of "Supreme Court TV" is still unclear. However, as a number of commentators have suggested, there are compelling reasons for believing that in the proximate future, televised sessions of the Supreme Court will become a part of the American political landscape.[197]

The broader significance of this development would need to be assessed on at least two levels. First, and most obviously, if some bill like Specter's becomes and remains valid law, it is an open question as to what, if any, effects it would have on the Justices' behavior, the operation of the Court more generally, and how the high bench is regarded by the public. Would, for example, "Supreme Court TV" induce greater concern by the Justices for how they are perceived by the general public, and would this have any effect on how they question attorneys and construct their opinions?[198]

But beyond this issue, Specter's proposal could be meaningful in giving wider play to a set of conversations that have long been coursing through the academy about the relationship between the Court and Congress, and the public's part in supervising both branches.[199] In this way, if the measure survives the gauntlet of legal and political

194. *See* Specter, *supra* note 19, at S10426–S10430.

195. *See, e.g.*, NEAL DEVINS & LOUIS FISHER, THE DEMOCRATIC CONSTITUTION 29–52 (2004); FISHER, CONSTITUTIONAL DIALOGUES, *supra* note 49, at 200–30.

196. *See, e.g., Service Constitution, supra* note 9, at 293–94.

197. Lithwick, *supra* note 38 (claiming that the presence of cameras in the Court is inevitable).

198. *See* BAUM, JUDGES AND THEIR AUDIENCES, *supra* note 71, at 4, 60–72, 118–135 (2006) (discussing judges' "regard of salient audiences" including the "general public" and particular "policy groups"); *Day to Day, supra* note 14 (discussing the supposed threat of Justices "acting up" for the television cameras).

199. *See generally* JEB BARNES, OVERRULED?: LEGISLATIVE OVERRIDES, PLURALISM, AND CONTEMPORARY COURT-CONGRESS RELATIONS (2004) (examining Congress's efforts to overrule the courts' statutory interpretations); RICHARD DAVIS, ELECTING JUSTICE: FIXING THE SUPREME COURT NOMINATION PROCESS (2006) (reviewing and criticizing the current process for selecting and confirming Supreme Court Justices); LEE EPSTEIN & JEFFREY A. SEGAL, ADVICE AND CONSENT: THE POLITICS OF JUDICIAL APPOINTMENTS (2005) (reviewing the play of a variety of political factors in the judicial appointment process); FISHER, CONSTITUTIONAL DIALOGUES, *supra* note 49 (analyzing the respective roles of the Congress, Court, presidency, and various interest groups and popular forces in shaping constitutional law); GEYH, *supra* note 177 (discussing congressional efforts to curb the courts); ROBERT A. KATZMANN, COURTS AND CONGRESS (1997) (examining the relationship between Congress, the federal judiciary, and "good governance"); EDWARD KEYNES & RANDALL K. MILLER, THE COURT VS. CONGRESS: PRAYER, BUSING, AND ABORTION (1989) (analyzing Congress's power to curb the jurisdiction of courts); DONALD MORGAN,

challenges it will inevitably face, S. 344 could stimulate a more general discussion about whether other reforms of the Court might be in order. For example, scholars from the left and right have long circulated proposals for imposing term limits on the Justices or for directly curbing judicial supremacy.[200] Still other commentators have called for taking steps to promote greater judicial independence by, for example, increasing judicial salaries or urging greater deference to the Court's decision making authority.[201]

In numerous ways our constitutional order is designed to slow and deter significant change within and between our governing institutions.[202] However, if S. 344 has the "escape velocity" to pull away from the political forces that normally mitigate against major shifts in the power dynamics of our nation's capital, it could become a case study for reform and give rise to a more wide-ranging and creative rethinking of the role and status of the judiciary—especially given the discontent that has been percolating amongst at least some of our nation's policy leaders and the public they serve.

CONGRESS AND THE CONSTITUTION: A STUDY OF RESPONSIBILITY 269–91 (1966) (historical study of Congress's capacity to contribute to constitutional interpretation); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 285 (1957) (discussing the Court's relationship to governing coalitions and its institutional role in a democracy); Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28 (1997) (examining the degree to which Supreme Court Justices vote their "sincere policy preferences" irrespective of the preferences of Congress).

200. *See, e.g.*, Erwin Chemerinsky, *When do Lawmakers Threaten Judicial Independence?*, 34 TRIAL 62, 63–64 (1998).

201. Larry Alexander & Frederick Schauer, *Of Extrajudicial Constitutional Interpretation*, 110 HARV. L. REV. 1359, 1387 (1997); Chemerinsky, *supra* note 200, at 62, 67–71; Friedman, *supra* note 177, at 150–51; Sandra Day O'Connor, Associate Justice, Supreme Court of the United States, Address at the Arab Judicial Forum: The Importance of Judicial Independence (Sept. 15, 2003), *available at* http://usinfo.state.gov/journals/itdhr/0304/ijde/oconnor.htm.

202. The institutions and rules of our constitutional system generally gravitate against legislative change. In the words of the Federalist, "inconstancy and mutability in the laws . . . form the greatest blemish in the character and genius of our governments." THE FEDERALIST NO. 73 (Alexander Hamilton). Indeed, Hamilton concludes,

> every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they happen to be at any given period, [is] much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.

Id.