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CONSTITUTIONAL ETIQUETTE AND THE FATE OF “SUPREME COURT TV”

Bruce Peabody* †

In traditional media outlets, on the Internet, and throughout the halls of Congress, debate about whether the Supreme Court should be required to televise its public proceedings is becoming more audible and focused. To date, these discussions have included such topics as the potential effects of broadcasting the Court, the constitutionality of Senator Arlen Specter’s current congressional initiative, S. 344, and how the public would use or abuse televised sessions of our highest tribunal.

But almost entirely ignored in these conversations is an issue that may effectively determine the fate of S. 344: Will this initiative unsettle supposedly time-honored relations of respect and civility between the judiciary and Congress—a pattern of institutional courtesy we might label “constitutional etiquette”? In order to answer this question, we need to understand the concept of constitutional etiquette and its application to the contemporary debate about “Supreme Court TV.” The following discussion briefly defines constitutional etiquette, assesses whether Congress would breach that etiquette by enacting the legislation proposed by Senator Specter, and concludes by examining the significance—for the Specter bill and for our public affairs generally—of our branches’ mutual expectations of respect and deference.

A little over a year ago, Justices Anthony Kennedy and Clarence Thomas appeared before a House Appropriations subcommittee. Their testimony included criticism of initiatives that would obligate the Court to televise its proceedings. As Kennedy remarked, the Justices “feel very strongly that we have an intimate knowledge of the dynamics and the needs of the court.” The current proposals, he argued, “which would mandate direct television in [the] court in every [public] proceeding [are] inconsistent with that deference, that etiquette, that should apply between the branches.”

The Court’s reluctance to set foot in the television age is unsurprising. The Justices’ high regard for traditional modes of conducting Court business can be seen in their donning of robes and providing “quill pen” keepsakes to

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the advocates who engage in oral argument. Indeed, the Court has only recently begun making oral argument accessible to the general public in a timely and direct manner. Last year, the Court decided to make transcripts of oral argument available to the public on a same day basis, and since 2000 it has also released a handful of audiotapes of these proceedings on a similar basis.

The Court may also be especially interested in maintaining relationships with the other branches based on “deference” and “etiquette” because the Court noticeably lacks the powers of the sword and the purse. But what, specifically, does Justice Kennedy’s overture to constitutional etiquette actually mean—and how does it apply to S. 344?

The answer to these questions is initially elusive, because neither Justice Kennedy nor others making variations of this basic argument have spelled out what constitutional etiquette comprises. Nevertheless, we might construct a working definition by drawing on general features of etiquette used in social rather than political or legal contexts.

Broadly speaking, etiquette refers to informal rules of behavior, not necessarily written or codified, that apply to a specific group and serve some social and unifying objective, generally by providing perceived benefits to the parties who abide by these norms of cooperation. Etiquette is primarily internally enforced: the adherents of the rules of etiquette, not some external body, establish and maintain its dictates.

Moving from this general conception, we might define constitutional etiquette as referring to norms of behavior that apply to the three branches of federal government and help sustain constitutional governance. The rules of constitutional etiquette, while not legal requirements, help create an environment in which each branch can fulfill its duties with the expectation that the other branches will accede to some extent.

For example, there is no constitutional requirement that the executive and legislative branches recognize Supreme Court decisions as binding beyond the parties to a case. But, as scholars such as Larry Alexander and Frederick Schauer have argued, the traditional willingness of these branches to acknowledge the Court’s authority to establish general precedents and legal norms promotes a system of stable and unifying rules useful to all three branches and the citizenry. The Court justifies its own “political question” doctrine on similar terms. As the Court noted in *United States v. Munoz-Flores*, that doctrine purportedly prevents the judiciary “from inappropriate interference in the business of the other branches.” Justice Souter further explained in his concurrence to *Nixon v. United States* that the judiciary owes considerable deference to legislative acts involving the impeachment or trial of judges or executive officials. Judicial review of an impeachment proceeding would violate the political question doctrine by stepping into the domain of a respected, coordinate branch; even “under the best of circumstances[, it would] entail significant disruption of government.”

We might distill four basic characteristics of constitutional etiquette that are reminiscent of its conventional, social analogue. First, constitutional

etiquette is firmly rooted in historic comity and cooperation between our federal institutions.

Second, each branch's continued acceptance of relevant rules is crucial to the preservation of constitutional etiquette. Constitutional etiquette gains credence from the reciprocal support of all three branches, and, in turn, it generally must provide each branch with some perceived benefits.

Third, and closely related to this last point, constitutional etiquette is not strictly a legal phenomenon. In the United States, legal rules—conventionally established through legislative acts and judicial opinions—are generally formal and written, exhibiting characteristics largely antithetical to the practical, institutional give-and-take embodied by the “softer” norms of constitutional etiquette. In contrast with legal rules, our constitutional manners are maintained by the informal accommodation, compromises, personal appeals, and deal-making of officials in all three branches of government.

Finally, constitutional etiquette enables institutional cooperation by fostering a hospitable and stable environment. In this way, constitutional etiquette mitigates the rough-and-tumble that ordinarily characterizes separation of powers politics. This etiquette represents the inversion of our revered assumption, described in Federalist No. 51, that American politics depends upon “ambition” being made “to counteract ambition.” The District of Columbia Circuit Court of Appeals alluded to a similar point when it stated in *United States v. American Telephone & Telegraph Co.* that our framers believed

that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system. Under this view, the coordinate branches do not exist in an exclusively adversary relationship to one another when a conflict in authority arises. Rather, each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation . . . the resolution of conflict between the coordinate branches in these situations must be regarded as an opportunity for a constructive *modus vivendi*, which positively promotes the functioning of our system.

With this background in mind, let us return to Justice Kennedy's challenge of S. 344. Is Senator Specter's bill inconsistent with the deference and etiquette that should apply between the branches? Presumably, Specter's proposal violates an implicit norm giving the judiciary control of its internal operations. But, as a matter of history and practice (not to mention law), there is no such rule. As many commentators have noted, Congress has long controlled (and varied) the size of the Court, created positions that support the work of the Court (among them, law clerks and the Court marshal), and dictated rules for establishing seniority and a quorum within the nation's highest court.

But Justice Kennedy could conceivably have in mind a more general principle of etiquette. Perhaps his objection is to Congress's lack of regard

for the several Justices who publicly have opposed televised Court proceedings. As a historical matter, Congress generally has been reluctant to pass measures deemed to interfere with the independence of the Court and its members.

Senator Specter, interestingly, has addressed this claim directly by turning it on its head. In an April 2006 *Washington Post* op-ed, Specter wrote that Kennedy and Thomas “insisted that Congress should mind its own business and respect the court’s autonomy, just as the court has respected Congress’s autonomy.” But, he asked, “does the Supreme Court respect Congress?” In answering his own question, Specter pointed to a number of recent cases in which the Court invalidated popular federal legislation, concluding that “there is no doubt that congressional procedures and authority have been severely diminished by the court.” In essence, Specter argued that his bill was an appropriate response to the Court’s disruption of longstanding relations of deference and accommodation between the judicial and legislative branches.

So how does greater awareness of constitutional etiquette help us understand the fate of S. 344 and other facets of American political life? To begin with, legislators’ perceptions of whether the television bill breaches established rules of deference and respect between the Court and Congress will inform the congressional debate and the ensuing vote. Congress will play a decisive role in deciding whether the bill is compatible with the informal norms that guide our national politics. Moreover, this debate will influence the response the bill receives from interest groups, the president (who could, of course, veto the measure), and, finally, the courts.

More broadly, the discussion of the television proposal serves as a reminder that these are important times at the Supreme Court—because of the high bench’s role not only in construing our individual liberties and defining the contours of executive and congressional power, but also in shaping increasingly contentious judicial-legislative relations. In recent years, members of Congress from both parties have shown greater willingness to criticize the Court and support various “Court-curbing” initiatives; among these are calls to remove certain topics from the high bench’s jurisdiction and to limit how long individual Justices can serve. While the Court has long enjoyed a great deal of independence and deference from the public and its elected representatives, this could conceivably change if our nation’s lawmakers effectively make the case that the Court has violated the comity that the “people’s branch” is due.

Exploring constitutional etiquette in light of the apparently evolving status of judicial-legislative relations is all the more important given an emerged consensus in legal scholarship and political science that the effectiveness of the Court—and especially its ability to protect individual rights—depends upon the willingness of Congress to promote and secure the Court’s decisions. Without bilateral respect and cooperation, the Justices may find their decision-making powers seriously compromised by legislative indifference or even resistance.

While the notion of constitutional etiquette can inform our understanding of contemporary attacks on the Court by members of Congress, it can also help us comprehend the emergence of an arguably unhealthful form of deference practiced by legislators towards the high bench. Many of today's members of Congress support "judicial supremacy," the doctrine that the Court has a supreme—and, in some formulations, exclusive—duty to interpret the Constitution. At the same time, contemporary constitutional scholars have argued forcefully that there are theoretical, historical, and pragmatic reasons for believing that members of Congress should take seriously their own independent responsibilities to engage in constitutional interpretation. Given these claims, it is somewhat curious that judicial supremacy seems to be so widespread in Congress, both in terms of lawmakers' expressed attitudes and their actual, deferential behavior.

But we can partially account for this apparent disconnect by noting that Congress's support for judicial supremacy may stem from its eagerness to recognize broad norms of constitutional etiquette. Indeed, research suggests that some members of Congress equate the Court's core institutional responsibilities with its possession of a monopoly on constitutional interpretation. As a result, deferential legislators may be ceding their own obligations to engage in constitutional interpretation in the interests of respecting what they (mistakenly) believe is a power exclusively held by the Supreme Court: that tribunal's supposed authority to be the ultimate interpreter of our supreme law.

In sum, we need more careful attention to and systematic study of constitutional etiquette as a part of our investigation into the largely unseen "dark matter" that helps to hold our constitutional system together. Such an examination will help us, in the short run, to understand the political path of S. 344, and, more broadly, will provide us with a critical vantage point for assessing the ongoing health and sustainability of our Constitution.