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THE RIGHT LEGISLATION FOR THE WRONG REASONS

*Tony Mauro** †

Senator Arlen Specter took a bold and long-overdue step on January 22, 2007, when he introduced legislation that would require the Supreme Court to allow television coverage of its proceedings. But instead of making his case with a straightforward appeal to the public's right to know, Specter has introduced arguments in favor of his bill that seem destined to antagonize the Court, drive it into the shadows, or both. Chances of passage might improve if Specter adjusts his tactics.

Both the Congress and the Supreme Court have tiptoed around the issue of cameras in the Supreme Court for decades. Even after the Court in 1981 ruled in *Chandler v. Florida* that, in light of improved technology, there is no general constitutional bar to the televising of criminal trials, the Justices have clung to a NIMBY (Not in my Back Yard) position when it comes to televising their own proceedings. They have kept cameras out in part because they still can. When asked about the issue, Justice Stephen Breyer has said often that as a steward of a cherished institution, he doesn't want to make any move that might mess things up. In unguarded moments, Justices also acknowledge that personal privacy—the ability to tramp around Washington, D.C. unrecognized—is a major reason for their stance. “It's very selfish, I know,” the late Justice Byron White allowed in a 1993 Judicial Conference discussion.

More recently, security concerns have bolstered the Justices' self-interested arguments. After Justice David Souter was mugged one evening in 2004 as he jogged near his D.C. dwelling, many expressed surprise that Justices are not guarded around the clock. Several Court police officers told me they try to press more security on the Justices, but the Justices don't want it. Their anonymity, they say, is their first line of defense.

Justices also articulate loftier reasons for keeping cameras out. Justice Antonin Scalia has said common law judges are supposed to stay out of the limelight, and besides, the public would not understand much of what the Court does. “That is why the University of Chicago Law Review is not sold at the 7-Eleven,” Scalia said famously in a 1989 speech.

Access advocates initially viewed Souter, who had experienced camera coverage while serving as a justice on the New Hampshire Supreme Court,

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as a potential ally. But he dashed those hopes in 1996 when he told a congressional subcommittee, “The day you see a camera come into our courtroom it’s going to roll over my dead body.” His belief, similar to Breyer’s, is that even the slightest change in the dynamics of Supreme Court oral argument resulting from the presence of cameras would be unacceptable. The fact that Souter made his comment not long after the O.J. Simpson trial, which arguably set back the cause of cameras in the courtroom for decades, is worth noting.

Justice Anthony Kennedy recently added a new, even more abstract argument to the debate. In several recent appearances before congressional committees, he has opposed any legislation imposing cameras on the Court as a matter of inter-branch etiquette. The Court doesn’t tell Congress how to conduct its business, Kennedy argues (though some in Congress would disagree with that statement). In return, Kennedy continues, Congress should not tell the Court how to operate. “[M]andat[ing] direct television in our court in every proceeding is inconsistent with that deference, that etiquette, that should apply between the branches,” Kennedy said before a House subcommittee in April 2006. “[W]e feel very strongly that this matter should be left to the courts.”

Kennedy’s comments serve as a backdrop to Senator Specter’s introduction of S. 344 on January 22, 2007. Specter’s was not the first legislative effort to require cameras in the Supreme Court, and in fact he had introduced identical legislation in September 2005. The Senate Judiciary Committee, which he chaired at the time, approved it by a bipartisan 12-5 vote, but it went no further.

But Specter’s repeat performance in 2007 got more attention. One reason may be the inexorable momentum of the information age, which with every passing month and year makes the Supreme Court appear, because of its no-cameras policy, more and more like a relic of some bygone era.

Another reason is the recent flood of attention given to the Court in light of two vacancies—prompted by Justice Sandra Day O’Connor’s retirement and Chief Justice William Rehnquist’s death—as well as President George W. Bush’s three nominations to fill them: John Roberts, Jr., Harriet Miers, and, finally, Samuel Alito, Jr. (The nomination of Miers, of course, was withdrawn.) The nominees’ confirmation hearings were extensively televised, providing the general public an education about the Court that the public had not received since *Bush v. Gore* in 2000, if then.

The Roberts and Alito nominations were followed by a bout of openness on the part of several Justices, a trend that seemed to hold the promise of greater public access to the Court. Perhaps because of Chief Justice Roberts’ lighter and younger hand on the helm, Justices seemed freer to go forth and mingle with the masses. Roberts himself made several televised appearances, Justice Ruth Bader Ginsburg turned up on the CBS Sunday Morning show, Justice John Paul Stevens spoke on ABC News about the death of President Gerald Ford, and Breyer gamely appeared on an NPR quiz show (failing, ultimately, to give any correct answers).

Senator Specter alluded to the increased visibility of individual Justices in his floor speech in support of S. 344. But his tone was not celebratory. Instead, Specter said, “[T]here has been very extensive participation by Court members [in television appearances], which totally undercuts one of the arguments, that the notoriety would imperil the security of Supreme Court Justices.” By stepping out in front of the public more than before, Specter was suggesting, the Justices are already making themselves more recognizable; therefore, a little more television face time from the bench won’t make them any more vulnerable to attack.

Specter’s point has some validity, but one can only hope that by making it, he does not drive the Justices back behind the curtains for fear that their greater visibility is fueling the call for cameras. Justices should be applauded, not criticized, for increasing their engagement with the public. Hearing Specter’s comment, Justices might be forgiven for shaking their heads and repeating the axiom, “No good deed goes unpunished.”

But that was not the only point in Specter’s floor speech when he seemed to be arguing for cameras in the Supreme Court as a way of punishing the Justices. As he has before, Senator Specter complained about several recent Supreme Court decisions that, he said, have shown less than proper respect for the role of Congress in the constitutional scheme.

One of Senator Specter’s targets is *United States v. Morrison*, a 2000 decision that struck down parts of the federal Violence Against Women Act. The Court invalidated provisions affording victims of domestic violence the right to sue in federal court on the ground that the Commerce Clause did not justify their enactment. But what sticks in Specter’s craw is that the Court questioned Congress’s “method of reasoning.” In his sometimes quaint way of speaking, Specter went on to say in his floor speech that the *Morrison* decision raises “a fundamental question as to where is the superiority of the Court’s method of reasoning over that of the Congress. But that kind of decision, simply stated, is not understood.” Later in the speech, Specter went back to *Morrison* and elaborated: “I wondered what kind of a transformation there was . . . with method of reasoning that there is such superior status when going to the Court.” Plain English translation: What makes the Supreme Court think it is smarter than the Congress?

The senator from Pennsylvania also took aim at two Supreme Court decisions that interpreted parts of the Americans with Disabilities Act: *Tennessee v. Lane* and *Board of Trustees of the University of Alabama v. Garrett*. Both, he said, employed the reasoning from *City of Boerne v. Flores* that there must be “congruence and proportionality” between the problem Congress is trying to solve and the method it uses to solve it. “I defy anyone to say what those words mean in a standard which can be applied in a way which can be predicted by lawyers and understood by state legislators and understood by clients,” Specter said on the floor of the Senate.

Specter seems to raise these same issues whenever the subject of the Supreme Court comes up. He even asked about these cases during the confirmation hearings of Roberts and Alito. Senators often treat Supreme Court confirmation hearings as an occasion for sending a message to the

Court. Specter's message during those hearings, as in his speech on S. 344, was that Congress deserves more respect from the Supreme Court.

But what does this significant complaint from one branch to the other have to do with television access? Specter makes the connection this way: cameras, he hopes, will make it clear to the public the extent to which the Supreme Court is dissing Congress. In his floor speech he said that if cameras are allowed and C-SPAN regularly broadcasts oral arguments at the Court, this new level of exposure will "inform the American people about what is going on so that the American people can participate in a meaningful way as to whether the Court is functioning as a super-legislature—which it ought not to do, that being entrusted to the Congress and state legislatures, with the Court's responsibility being to interpret the law."

When he speaks this way, it is hard not to conclude Specter's objective is not merely to let the sun shine in, but also to train an accusatory spotlight on the Justices. Certainly broadcasting Supreme Court arguments would further accountability in a general "good government" and "open government" sense. As Chief Justice Warren Burger wrote in *Richmond Newspapers, Inc. v. Virginia*, in the context of keeping criminal trials public, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."

But by framing the case for camera access in terms of a complaint about past decisions he does not like, Specter is bound to raise the hackles of Supreme Court Justices and other federal judges who are smarting already from threats to their judicial independence. To be sure, Congress does not need the blessing of the Court to pass Specter's bill. But antagonizing the Justices in this way does not seem to be the best path toward passage. Justice Kennedy's reference to the "etiquette" between branches, quoted *supra*, illuminates a powerful if intangible force that usually makes Congress think twice before passing laws affecting the Supreme Court.

Sure enough, when Specter raised his objections to the *Morrison* decision at a Senate Judiciary Committee hearing attended by Justice Kennedy on February 14, 2007, it became clear that Specter's arguments already had rankled the Court. "I think it's a non sequitur to use that so that you can have cameras in the courtroom," Kennedy told Specter. "We didn't tell Congress how to conduct its proceedings. We said that, in a given statute, we could not find in the evidence that Congress had shown us that interstate commerce was involved. . . . I think that that just doesn't follow [that] therefore we should have cameras in the courtroom. I don't understand that."

Traditionally, the federal judiciary exerts influence over pending legislation in more behind-the-scene ways. But Kennedy's comments, aired by C-SPAN, amounted to an extraordinary public repudiation of a key senator's views. Kennedy was signaling—if such a signal was needed—that Specter's rationale was wanting, and that the judiciary was unpersuaded, to say the least. Whether Kennedy can ever be persuaded is uncertain. But if Senator Specter wants his worthy bill to pass, it seems evident that he should take Kennedy's hint and argue for cameras in the Court as a public good, not as punishment.