TESTIMONY OF ARLEN SPECTER

BEFORE THE SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT AND THE COURTS

OF THE JUDICIARY COMMITTEE OF THE UNITED STATES SENATE

Since the Supreme Court of the United States decides the most important issues facing America, its open proceedings should be televised to inform the public how its government operates. The Supreme Court has evolved into the dominant branch of the government after the ruling in Marlbury v. Madison in 1803 that the Court is the final arbiter of what the Constitution means.

The Court decides who should live in the abortion cases; who should die in the death penalty cases; the President's power as Commander in Chief; the power of Congress to regulate commerce on issues like healthcare; who should be the President by one vote along party lines in Bush v. Gore; how elections are financed; what newspapers can print and every other issue ingenious lawyers can construct. As de Tocqueville observed more than 150 years ago, in America virtually everything becomes a political issue to be decided in Court.

It is well established that the Constitution guarantees access to judicial proceedings to the public and to the press. In 1980, the Supreme Court recognized that right in Richman Newspapers v. Virginia, when it held that the right to a public trial belongs not just to the accused, but to the public and the press as well. The Court noted that such openness has "long been recognized as an indispensible attribute of an Anglo-American trial." Since most people cannot physically attend trials, the Court specifically addressed the need for access by members of the media:

"Instead of acquiring information about trials by first hand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim as acting as surrogates for the public (media press) contribute to public understanding of the Rule of Law and the comprehensive of the functioning of the entire criminal justice system."

The Supreme Courts of most states, Great Britain and Canada allow their proceedings to be televised. C-Span began televising proceedings in the U.S. House of Representatives in 1979 and the U.S. Senate in 1986. Congressional Committee hearings, especially U.S. Supreme Court nomination proceedings, draw extensive audiences and provide great insight into the judicial and legislative process. C-Span stands ready, willing and anxious to televise Supreme Court proceedings.

Public opinion polls disclose widespread popular support for televising the Court. Sixty-three percent of those polled responded affirmatively. When the question was modified to add that the Supreme Court chamber accommodates only approximately 300 observers and people are permitted only to stay three minutes, the figure rose to eighty percent of the public in favor of television.

The most outspoken voice from the Court in opposition to television was Justice David Souter who said the television cameras would roll in over his dead body. He is no longer on the Court. Justice Anthony Kennedy voiced his objection in milder tones saying that television would adversely affect the "dynamics" of the Court. In recent Supreme Court nomination hearings, I have routinely asked the question with answers ranging from Chief Justice Roberts and Justice Sotomayer saying they would consider it to Justice Elena Kagen enthusiastically

supporting it. Justice Stevens, no longer on the Court, expressed support for televising the Court.

Then-Senator Joe Biden and I wrote to Chief Justice Rehnquist in advance of the Supreme Court argument in Bush v. Gore in 2000 urging the Court to allow television coverage for that case. The Chief Justice responded negatively, but did permit an audio tape to be released at the conclusion of the argument. Some audio-tapes have since been released on an irregular basis with delays after the arguments. On occasion, C-Span has carried the audio of the argument with still pictures of the justices and lawyers who were speaking.

I have repeatedly introduced legislation to require the Court to permit television coverage of its open sessions unless it decided by a majority vote of the justices that allowing such coverage in a particular case would violate the due process rights of a party in the matter. The Judiciary Committee voted the bills out favorably in 2006, 2008 and 2010, but was never taken up on the floor.

In my judgment, Congress has the authority to mandate television coverage by analogy to Congressional authority to determine other administrative matters for the Court. Congress decides the day the Court will convene, the first Monday in October; the number of justices required for a quorum: 6; the time-table on habeas corpus cases; what cases the Supreme Court is required to hear such as the McCain/Feingold legislation; and the Court's jurisdiction. As usual the Court could exercise the last word if it decided that the doctrine of separation of powers precludes a congressional mandate.

The objectivity of the Supreme Court has been questioned when individual justices participate in what appears to be political events. Justice Scalia spoke to the House of

Representatives Tea Party caucus, a partisan political group. Justice Thomas' impartiality was challenged for "stopping-by" at a political event sponsored by the ultra-conservative Koch brothers. Questions have also been raised about Justice Ginsberg's involvement in the Aspen Institute seminars which are funded by promoters of liberal political causes. Justice Breyer has been a participant at Renaissance Weekend whose programs focus on liberal political causes. When the Court divides along ideological lines, as it did in *Bush v. Gore* and *Citizens United*, public confidence is undermined. Polls show the Court's approval rating has declined with a 62% approval, 25% disapproval in 2001 to 46% to 40% in 2011.

The average man on the street does not understand the intricacies of Supreme Court opinions, but does have the sense that something is amiss when there are so many 5-4 decisions. People think the law is objectively determinable and does not depend upon the individual judges' personal predilections. So the common sense question arises as to whether the Court is really stating the law when there are so many split decisions. When people are told that there are ideological splits, it is even more distressing.

Frequent opinion polls show the public has little understanding of the Constitution or how government works. As we strive for an educated citizenry, especially among the younger generation, television should cover the government as well as sports and soaps. The authority and legitimacy of the Supreme Court depends upon its' acceptance by the public. Television would give the public the opportunity to understand and evaluate the Court's performance and the Court and opportunity to establish its' legitimacy.

The Court has long acknowledged that Constitutional doctrine reflects the values of the people. The equal protection clause was the same when the Court said separate but equal was

satisfactory in *Plessy v. Ferguson* and when integration was required more than 50 years later in *Brown v. Board of Education*.

People need to know what the Court is doing to guarantee that the public can let the Court know when the public's values are not being recognized. In any event, in a free society, the public is entitled to the maximum transparency in its governmental institutions. Justice Louis Brandeis was right when he said sunlight is the best disinfectant.