STATEMENT OF MAUREEN MAHONEY

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United States Senate

Before the Subcommittee on Administrative Oversight and the Courts of the Senate Committee on the Judiciary

Hearing On:

Access to the Court: Televising the Supreme Court

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Good morning, Chairwoman Klobuchar, Ranking Member Sessions, and Members of the Subcommittee. I thank you for the opportunity to appear today so that I may explain the basis for my strong opposition to any legislation that would seek to strip the Supreme Court of its own authority to decide whether oral arguments should be televised. My views on this issue are informed by my professional experience as an appellate advocate and by my study of the serious constitutional questions such legislation would raise.

My experiences as an advocate and constitutional lawyer have spanned more than thirty years. I am a member of the Supreme Court and Appellate Practice in the Washington, D.C. office of Latham & Watkins, and I previously served as a United States Deputy Solicitor General and as a law clerk to then Associate Justice William H. Rehnquist. I have argued 21 cases in the Supreme Court, including many that presented difficult constitutional questions. By way of example, I successfully defended the constitutionality of the University of Michigan Law School's affirmative action program in the Equal Protection case of *Grutter v. Bollinger*, which was the subject of extensive media interest. I also serve on the Executive Committee of the Supreme Court Historical Society and previously served as the Chair of the Supreme Court Fellows Commission and as a member of the Judicial Conference Advisory Committee on Appellate Rules.

In my view, Congress should not seek to require the Supreme Court to televise its proceedings for two central reasons. First, congressional interference in the Court's conduct of its own proceedings would represent a sharp departure from historical practice that would raise serious constitutional questions. Second, there is no sufficient justification to precipitate the

potential for a constitutional conflict with the judicial branch on this issue. The Court is actively considering requests to televise its proceedings and has good reason to proceed cautiously. Proponents of televised arguments commonly overstate the incremental benefits to public education while underestimating potential risks to the integrity of the Court's decision making process. The Court is in the best position to evaluate and weigh these competing considerations and can be trusted to reach a reasonable decision entitled to respect by the Legislative Branch.

Turning to my first concern, there is substantial reason to doubt that Congress has the authority to overturn the Supreme Court's policy on this issue and legislatively mandate televised proceedings. Although Senator Specter believes that Congress possesses the requisite authority, he has nonetheless acknowledged that "[s]uch a conclusion is not free from doubt."[1] Indeed, a recent article analyzed the issue extensively and concluded that a congressional mandate would "impermissibly undermine[] the role of the judiciary and violate[] the separation of powers" established by the Constitution.[2] Justice Kennedy has also referenced the doctrine of separation of powers as a "sensitive point" in this context,[3] and it is one reason for his "hope" that Congress would "accept [the Court's] judgment" on the issue of televised arguments.[4]

There is nothing in the text of the Constitution that should provide the Subcommittee with any comfort that legislation mandating televised arguments would be a permissible exercise of legislative power. Article III vests "[t]he judicial Power of the United States" in "one Supreme Court," and that power surely includes the power to exclude television cameras from

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[1] 155 CONG. REC. S2335 (daily ed. Feb. 13, 2009) (statement of Sen. Arlen Specter).

[2] Brandon Smith, *The Least Televised Branch: A Separation of Powers Analysis of Legislation to Televise the Supreme Court*, 97 GEO. L.J. 1409, 1433 (2009).

[3] *Hearings before a Subcomm. of the H. Comm. on Appropriations*, 109th Cong. 226 (2006)

[4] *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 12 (2007) ("2007 Senate Hearing").

the Court's chamber as a means of protecting the integrity of its decision making process.[5] As the Supreme Court explained nearly two centuries ago, "courts of justice are universally acknowledged to be vested, by their very creation" with the "power to impose silence, respect and decorum, in their presence" and "to preserve themselves and their officers from the approach and insults of pollution."[6]

Although Congress unquestionably has some power to adopt laws that affect the Court in various ways, the Constitution does not grant Congress any express power to regulate the manner in which the Supreme Court exercises its decision making authority in proceedings properly before the Court.[7] Moreover, it is well settled that Congress cannot exercise whatever powers it does have in a manner that would "impermissibly intrude on the province of the judiciary,"[8] or disregard a "postulate of Article III" that is "deeply rooted" in the law.[9] It would be difficult to describe a statute stripping the Court of its deeply rooted power to control its own courtroom and

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[5] U.S. CONST. art. III, § 2. The judicial power, at its core, is the ability to decide cases and controversies. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995). It is, however, accompanied by ancillary powers that are necessary to execute that core function.

[6] *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 227 (1821).

[7] Some proponents have suggested that an express textual justification for mandating televised proceedings resides in Article III, which provides that the Supreme Court's appellate jurisdiction is subject to "Exceptions" and "Regulations" created by Congress. U.S. CONST. art. III, § 2, cl. 2. The text, however, only refers to the "regulation[]" of "jurisdiction" and not "proceedings." Thus, for example, the Clause gives Congress the authority to enact a "regulation" limiting diversity jurisdiction to cases with more than $75,000 in controversy. 28 U.S.C. § 1332. Even if the text were less clear, it would also be implausible to read the Clause to authorize "regulation" of the Supreme Court's decision making processes because it would only give Congress authority to regulate some, but not all, of the Court's oral arguments. The Clause plainly does not authorize any "regulations" governing cases that fall within the Court's original jurisdiction. As a consequence, Congress would only have authority to mandate television for the appellate cases on the Court's docket, even though original cases are often heard on the same day in the same room.

[8] *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 851-52 (1986).

[9] *Plaut*, 514 U.S. at 218.

decision making processes as a mere administrative regulation—especially when done in the context of a disagreement with the Supreme Court's own evaluation of the impact of cameras.

In considering the scope of congressional power, it is also significant that a mandate of this type would represent a stark departure from Congress's historic refusal to adopt legislation encroaching on the Supreme Court's independence and its authority to conduct its own proceedings. As the Supreme Court explained in *Plaut v. Spendthrift Farm, Inc.*, such "prolonged reticence would be amazing if such interference were not understood to be constitutionally proscribed."[10] Proponents who claim there is no separation of powers problem with legislation requiring the Supreme Court to televise its arguments have pointed to Congress's assertion of control over the number of Justices, the composition of a quorum, the date for the start of each term, standards for recusal, and the scope of the Court's jurisdiction.[11] Even if we assume *arguendo* that all such legislation is constitutional, we know that Congress steadfastly refused to exercise its powers in a manner that would encroach on the Court's decision making authority and undermine the independence of the judiciary. The Senate voted down President Roosevelt's effort to enlarge the size of the Court based on the conclusion that it was "essential . . . that the judiciary be completely independent of both the executive and legislative branches."[12]

But in any event, the imposition of a requirement that the Court televise arguments bears little resemblance to these laws. Unlike the *ex ante* rules establishing the size of the Court (each Justice must be appointed by the President with the consent of the Senate), and the regulation of

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[10] *Id*. at 230

[11] *See* 28 U.S.C. §§ 1, 2, 455, 1251, 153-54, 1257-59, 1292.

[12] S. COMM. ON THE JUDICIARY, REORGANIZATION OF THE FEDERAL JUDICIARY, S. REP. NO. 75-711, at 14 (1937).

the scope of the Court's appellate jurisdiction (which is textually committed to Congress), the law under consideration here would go to the heart of how the Court considers pending cases. Oral argument is a core part of the Court's deliberative process. As Justice Kennedy explained in testimony to Congress, at oral argument "[w]e are talking with each other" and "we are using the attorney to have a conversation with ourselves and with the attorney."[13] While deference to all federal courts on these types of internal deliberative issues is appropriate, special deference is owed to the Supreme Court. Unlike the lower federal courts, which Congress created, the Supreme Court was established by the Constitution itself. Congress has recognized the special status of the Supreme Court in the constitutional structure and declined to assert any supervisory authority over the promulgation of Supreme Court rules.[14] Legislation requiring televised arguments would be an historic departure from Congress's longstanding practice of noninterference with the Court's deliberative process—which has served to fulfill the Founders' view that the "complete independence of the courts of justice is peculiarly essential in a limited Constitution."[15]

Given these serious questions, Congress should not test the boundary between the legislative and judicial powers unless it is truly essential for the protection of the public interest. Even if this Subcommittee believes that television is a good idea, there is certainly no compelling necessity to seize control of the debate and tell the Court that it must televise its proceedings. It is not as if the Judiciary has arbitrarily refused to give any serious consideration to the issues. To the contrary, the Judicial Conference is currently conducting a pilot project in the lower

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[13] 2007 Senate Hearing, 110th Cong. 12 (2007).

[14] The Rules Enabling Act establishes a mechanism for congressional review of rules of practice, but it only governs rules applicable to proceedings in the lower federal courts, which were created by Congress. *See* 28 U.S.C. §§ 2071-75, 2077.

[15] THE FEDERALIST NO. 78, 426 (Alexander Hamilton) (E.H. Scott ed., 1898).

courts that is likely to provide useful empirical information on the effects of cameras in the courtroom.[16]

The Supreme Court has itself also shown a willingness to consider requests respecting media coverage of oral arguments and has made exceptions to its standard policies in response to showings of special public interest. For example, when Senators Grassley and Schumer sought television coverage of the argument in *Bush v. Gore*, Chief Justice Rehnquist advised them that the Court "carefully considered the question of televising these proceedings," that "a majority of the Court remains of the view that we should adhere to our present practice," but that the Court "decided to release a copy of the audiotape of the argument promptly after the conclusion of the argument" in recognition of "the intense public interest" in the case.[17] Press reports indicate that there are pending requests for permission to televise or allow live or promptly released audio of the arguments in the cases addressing the Patient Protection and Affordable Care Act. The petitions for certiorari in the health care cases were granted on November 14, and argument will reportedly be scheduled in March. There is accordingly ample time for the Court to determine how to proceed, and there is every reason to expect that the Court will again give careful consideration to those pending requests.

Moreover, Congress should not preempt the Court's study and deliberation on these issues because there is still a genuine risk that televising the proceedings of this Court would do more harm than good. This is not a one-sided debate. As Justice Stevens put it, this issue is

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[16] REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11-12 (Sept. 14, 2010).

[17] Letter from William H. Rehnquist, Chief Justice, U.S. Supreme Court, to Senators Charles E. Grassley and Charles E. Schumer (Nov. 28, 2000).

"difficult."[18] It is easy to posit that there would be some educational benefits to televised proceedings. But benefits and risks cannot properly be weighed without first assessing the *incremental* benefit of videotape to the public's understanding of the Court's work. Members of the public can already read the Court's opinions, listen to every word of every Supreme Court argument within a few days after it occurs, and read a full transcript within hours. How much more will the public learn about the Court by seeing the faces of the Justices? Video would likely hold public interest better, but it adds little in the way of useful information. Nor would the public's understanding of the Court's work be materially enhanced by the availability of short video clips. Oral arguments cannot properly be understood through sound bites. As Justice Scalia has observed, "[f]or every ten [television viewers] who sat through our proceedings gavel to gavel, there would be 10,000 [viewers] who would see nothing but a 30-second takeout . . . which I guarantee you would not be representative of what we do,"[19] and could ultimately contribute to "the miseducation of the American people."[20]

While many state courts have televised proceedings (which may serve different interests in jurisdictions where judges run for re-election), there is at least some evidence that television has not delivered on its promise of a better informed populace. A New York study concluded that the introduction of televised proceedings "had no impact on public understanding of the

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[18] *John Paul Stevens on Cameras in the Court*, C-Span Q & A Interview (Oct. 3, 2011), *available at* http://www.youtube.com/watch?v=2x_qNe-z_dA.

[19] *Considering the Role of Judges Under the Constitution of the United States, Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (Oct. 5, 2011), *available at* http://www.c-spanvideo.org/program/301909-1.

[20] George Bennett, *Scalia on 2000: 'Get over it,'* The Palm Beach Post, Feb. 3, 2009, *available at* http://www.palmbeachpost.com/hp/content/local_newspaper/2009/02/03/0203scalia.html.

judiciary."[21] And we can surely all agree that there is no public interest in televising arguments for their entertainment value. As Justice O'Connor sees it, televised proceedings simply "wouldn't enhance the knowledge [of the public] that much" due to the availability of other information, and it would not "solve the problem of educating young people" because the arguments are "technical and complicated."[22]

As for the risks, we can be certain that they are not imaginary. In 1996, Justice Souter told Congress that the case against cameras is "so strong" that "[t]he day you see a camera coming into our courtroom it is going to roll over my dead body," and he explained that his opposition was a product of his own "personal experience" with televised proceedings while serving on the New Hampshire Supreme Court.[23] Justice Souter testified unequivocally that the presence of cameras adversely "affected [his] behavior" by altering the way he questioned advocates.[24] He explained that when he had a "15 second question" that could "create a misimpression either about what was going on in the courtroom or about me or about my impartiality or about the appellate process" then "I did not ask that question."[25] He also told his colleagues that "lawyers were acting up for the camera" by "being more dramatic" and that he was "censoring his own questions."[26] Similar concerns were shared by a large number of federal

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[21] Marjorie Cohn & David Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* 54 (1998).

[22] Jess Bravin, *Excerpts: Sandra Day O'Connor*, WALL ST. J., Aug 20, 2009, *available at* http://online.wsj.com/article/SB124994452340020825.html

[23] *Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations for 1997, Hearing before a Subcomm. of the H. Comm. on Appropriations,* 104th Cong. 31 (1996).

[24] *Id.*

[25] *Id.*

[26] *Life in the Federal Judicary,* C-Span coverage of the 10th Cir. Bench and Bar Conference, Aug. 27, 2010, *available at* http://www.c-spanvideo.org/program/id/231797.

appellate judges who had first-hand experience with televised arguments during an experimental program sponsored by the Judicial Conference. More than 40% of the judges reported that television caused attorneys to change the content of their arguments and to be "more theatrical," and a full third of the judges acknowledged that cameras caused them to change their questioning of advocates.[27]

It is accordingly not surprising that a number of Justices have voiced serious concerns that cameras will adversely affect the usefulness of oral argument in the Court's deliberative process. Chief Justice Roberts has observed that "grandstanding" may be expected to increase with the advent of television.[28] Justice Kennedy told Congress that the introduction of television would create an "insidious temptation to think that one of my colleagues is trying to get a sound bite for the television," and that it would "alter the way in which we hear our cases, the way in which we talk to counsel, the way in which we talk to each other, the way in which we use that precious hour."[29] Justice Thomas has concurred, advising Congress that television would have an "effect on the way the cases are actually argued" and could "undermin[e] the manner in which we consider the cases."[30] Justice Alito has also expressed the view that television would "change the nature of the arguments" because the participants' "behavior is changed" when proceedings

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[27] Molly Treadway Johnson & Carol Krafka, FEDERAL JUDICIAL CENTER, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS 17 (1994).

[28] *A Conversation with Chief Justice Roberts*, *Fourth Circuit Judicial Conference*, June 25, 2011, *available at* http://www.c-spanvideo,org/program/FourthCi.

[29] *Judicial Security and Independence: Hearing Before the S. Comm. on the Judiciary*, 110th Cong. 12, 13 (2007).

[30] *Hearings before a Subcomm. of the H. Comm. on Appropriations*, 109th Cong. 225 (2006).

are televised.[31] Justice Breyer sees "good reasons" for television but counsels caution because there are also "good reasons against it."[32] And Justice Stevens recognized potential benefits but "ultimately came down against it," because cameras might negatively affect arguments and the behavior of Justices and lawyers.[33]

This is not to say that the matter has been finally decided or that the Court should not continue to consider changes to its current practices. But Congress should not presume that it knows the best way for these nine Justices to conduct their oral arguments. Justice Kennedy has informed Congress, in no uncertain terms, that "we feel very strongly that this matter should be left to the courts."[34] As he explained, it is the Justices, not Congress, who "have intimate knowledge of the dynamics and the needs" of the Court.[35] And when the shoe was on the other foot, the Supreme Court refused to second guess the Senate's procedures for conducting impeachment trials. It held that Congress had the authority to determine for itself what procedures should govern.[36] Congress should afford the Supreme Court no lesser deference and recognize, in the words of the 75th Congress, that Senators must not be "the judges of the

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[31] Debra Cassens Weiss, *U.S. Supreme Court: Justice Alito cites 'observer effect' in opposing cameras in court*, First Amendment Coalition, Oct. 1, 2010, *available at* http://www.firstamendmentcoalition.org/2010/u-s-supreme-court-justice-alito-cites-observer-effect-in-opposing-cameras-in-court.

[32] *Q & A with Stephen Breyer*, C-Span, Nov. 28. 2005, *available at* http://www.c-spanvideo.org/program/190079-1.

[33] Wayne Grayson, *Former high court justice defends unpopular decision*, TUSCALOOSA NEWS, Nov. 17, 2011, *available at* http://tuscaloosanews.com/article/20111117/NEWS/111119604?p=2&tc=pg.

[34] *Hearing before a Subcomm. of the H. Comm. on Appropriations*, 109th Cong. 226 (2006).

[35] *Id.*

[36] *Nixon v. United States*, 506 U.S. 224 (1993).

judges." [37] With all due respect to the Senators' views on the merits of televised proceedings, I urge you to continue your historic respect for the independence of the judiciary by allowing the Court to structure its own proceedings in the manner that it determines will best serve the public interest.

Thank you, Ms. Chairwoman, for the opportunity to testify on this issue. I look forward to answering the Subcommittee's questions.

[37] S. REP. NO. 75-711 at 14.