Specter Speaks on the Senate Floor Regarding the Televising of Supreme Court Proceedings

Monday, January 29, 2007 -

Mr. President, I have sought recognition to comment about S. 344, which provides for the televising of Supreme Court proceedings. This bill is cosponsored by Senator Grassley, Senator Durbin, Senator Schumer, Senator Feingold, and, with unanimous consent Senator Cornyn--a bipartisan representation. It is identical with legislation introduced in the last Congress after having been voted out of committee, and was voted out of committee on a 12-to-6 vote. It was previously introduced in 2005. It had a hearing on November 9 of 2005 and was reported out of committee on March 30 of 2006.

The essential provision is to require televising proceedings at the Supreme Court of the United States unless the Court determines on an individual basis that there would be an inappropriate occasion and a violation of the due process rights of the parties.

The thrust of this legislation is to bring public attention and understanding of how the Supreme Court of the United States functions, because it is the ultimate decisionmaker on so many--virtually all of the cutting edge questions of our day. The Supreme Court of the United States made the decision in Bush v. Gore, essentially deciding who would be President of the United States. The Supreme Court decides cases on the death penalty, as to who will die.

It decides by 5-to-4 decisions so many vital cases, including partial-birth or late-term abortion, deciding who will live. It decides the question of who will be elected, controlling the constitutional decision on campaign contributions. It decides the constitutionality--again, and all of the cases I mentioned are 5 to 4--on school prayer, on school vouchers, on whether the Ten Commandments may be publicly displayed, on whether affirmative action will be permitted, on whether eminent domain will be allowed--the taking of private property for governmental purposes. The Supreme Court of the United States decides the power of the President as illustrated by Hamdan v. Rumsfeld--that the President does not have a blank check and that the President is not a monarch.

The Supreme Court of the United States, again in a series of 5-to-4 decisions, has decided what is the power of Congress, declaring in U.S. v. Morrison the legislation to protect women against violence unconstitutional because the Court questioned our ``method of reasoning,'' raising 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.

Or the Supreme Court of the United States dealing with the Americans With Disabilities Act, making two decisions which are indistinguishable, upholding the statute on a paraplegic crawling into the courthouse in Tennessee and striking down the constitutionality of the statute when dealing with employment discrimination. They did so on a manufactured test of congruence and proportionality, which is literally picked out of thin air.

Under our Constitution, I respect the standing of the Supreme Court of the United States to be the final arbiter and to make the final decisions. But it is, I think, fundamental that the Court's work, the Court's operation ought to be more broadly understood. That can be achieved by television. Just as these proceedings are televised on C-SPAN, just as the House of Representatives is televised on C-SPAN, so, too, could the Supreme Court be televised on an offer made by C-SPAN to have a separate channel for Supreme Court oral arguments. There are many opportunities for the Court to receive this kind of coverage, to 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.

It should be noted that the individual Justices of the Supreme Court have already been extensively televised. Chief Justice Roberts and Justice Stevens were on ``Prime Time'' on ABC TV. Justice Ruth Bader Ginsburg was on CBS with Mike Wallace. Justice Breyer was on ``FOX News'' Sunday. Justice Scalia and Justice Breyer had an extensive debate last December, which is available for viewing on the Web--and in television archives. So there has been very extensive participation by Court members, which totally undercuts one of the arguments, that the notoriety would imperil the security of Supreme Court Justices.

It is also worth noting that a number of the Justices have stated support for televising the Supreme Court. For example, Justice Stevens, in an article by Henry Weinstein on July 14, 1989, said he supported cameras in the Supreme Court and told the annual Ninth Circuit Judicial Conference at about the same time that, ``In my view, it is worth a try.''

Justice Stevens has been quoted recently stating his favorable disposition to televising the Supreme Court.

Justice Breyer, during his confirmation hearings in 1994, indicated support for televising Supreme Court proceedings. He has since equivocated, but has also noted that it would be a wonderful teaching device.

In a December 13, 2006 article by David Pereira, Justice Scalia said he favored cameras in the Supreme Court to show the public that a majority of the caseload involves dull stuff.

In December of 2000, an article by Marjorie Cohn noted Justice Ruth Bader Ginsburg's support of camera coverage, so long as it is gavel to gavel--which can be arranged.

Justice Alito, in his Senate confirmation hearings last year, said that as a member of the Third Circuit Court of Appeals he voted to admit cameras.

He added that it would be presumptuous of him to state a final position until he had consulted with his colleagues, if confirmed. But at a minimum, he promised to keep an open mind, noting that he had favored television in the Third Circuit Court of Appeals.

Justice Kennedy, according to a September 10, 1990, article by James Rubin, told a group of visiting high school students that cameras in the Court were ``inevitable,'' as he put it. He has since equivocated, stating that if any of his colleagues raise serious objections, he would be reluctant to see the Supreme Court televised. Chief Justice Roberts said in his confirmation hearings that he would keep an open mind. Justice Thomas has opposed cameras. Justice David Souter has opposed televising the Supreme Court. Justice Souter has been the most outspoken opponent of televising the Supreme Court, saying if cameras rolled into the Supreme Court, they would roll over his--as he put it--over his dead body--a rather colorful statement. But there has been, as noted, considerable sentiment by quite a number of the Justices as to their personal views expressing favorable disposition toward televising the Supreme Court.

The question inevitably arises as to whether Congress has the authority to require televising Supreme Court proceedings, and I submit there is ample authority on Congress's generalized control over administrative matters in the Court. For example, it is the Congress which decides how many Justices there will be on the Court. It is remembered that President Roosevelt, in the mid to late 1930s, proposed a so-called ``packing of the Court'' plan to raise the number to 15. But that is a congressional judgment. The Congress decides when the Supreme Court will begin its term: on the first Monday of every October. The Congress decides what number will constitute a quorum of the Supreme Court: six. The Congress of the United States has instituted timelines that are required to be observed by the Supreme Court when determining timeliness in habeas corpus cases. So there is ample authority for the proposition that televising the Supreme Court would be constitutional.

There is an article which is due for publication in May 2007 by Associate Professor Bruce Peabody of the political science department of Fairleigh Dickinson University, and in that article, Professor Peabody makes a strong analysis that congressional action to televise the Supreme Court would be constitutional. Also, in that article Professor Peabody refers at length to the legislation which I introduced in 2005 and says that it would be constitutional and observes that:

A case could be made for reform giving rise to more wide-ranging and creative thinking of the role and status of the judiciary if the Supreme Court was, in fact, televised.

He further notes that:

Televising the Supreme Court could stimulate a more general discussion about whether other reforms of the court might be in order.

He notes that:

The so-called Specter bill would 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 the Congress.

The Supreme Court itself, in the 1980 decision in Richmond Newspapers v. Virginia, implicitly recognized, perhaps even sanctioned, televising the Court because in that case, the Supreme Court noted that a public trial belongs not only to the accused but to the public and the press as well; and that people acquire information on Court proceedings chiefly through the print and electronic media. But we know as a factual matter that the electronic media, television, is the basic way of best informing the public about what the Supreme Court does.

There was enormous public interest in the case of Bush v. Gore argued in the Supreme Court in December of 2000 after the challenge had been made to the calculation of the electoral votes from the State of Florida and whether the so-called chads suggested or showed that Vice President Gore was the rightful claimant for those electoral votes or whether then-Governor Bush was the rightful claimant.

The streets in front of the Supreme Court chambers across the green from the Senate Chamber were filled with television trucks. At that time, Senator Biden and I wrote to Chief Justice Rehnquist urging that the proceedings be televised and got back a prompt reply in the negative.

But at least on that day the Supreme Court did release an audiotape when the proceedings were over, and the Supreme Court has made available virtually contemporaneous audio tapes since. But I suggest the audio tapes do not fill the bill. They do not have the audience. They do not have the impact. They do not convey the forcefulness that televising the Supreme Court would.

There has been considerable commentary lately about the Court's workload and the Court's caseload. Chief Justice Roberts, for example, noted that the Justices:

Hear about half the number of cases they did 25 years ago.

And, he remarked that from his vantage point, outside the Court:

They could contribute more to the clarity and uniformity of the law by taking more cases.

They have a very light backlog. In the 2005 term, only 87 cases were argued and 69 signed opinions were issued, which is a decrease from prior years. They have left many of the splits in the circuits undecided. Former Senator DeWine, when serving on the Judiciary Committee, asked Justice Alito about the unresolved authority at the circuit level. Now Justice Alito characterized that as ``undesirable." But that happens because of the limited number of cases which the Supreme Court takes.

There has also been concern, as noted in an article by Stuart Taylor and Ben Wittes captioned, ``Of Clerks And Perks," that the four clerks per Justice constitute an undesirable allocation of resources, and the Taylor-Wittes article cites the Justice's extensive extracurricular traveling, speaking, and writing, in addition to their summer recesses and the vastly reduced docket as evidence that something needs to be done to spur the Court into taking more cases.

If the Court were to be televised, there would be more focus on what the Court is doing. That focus can be given without television, but once the Supreme Court becomes the center of attraction, the center of attention, articles such as that written by Taylor and Wittes would have much more currency.

The commentators have also raised a question about the pooling of the applications for certiorari. There were, in the 2005 term, some 8,521 filers. Most of those are petitions for certiorari. That is the fancy Latin word for whether the Court will grant process to hear the case from the lower courts. As we see, the Court acts on a very small number of those cases. Only 87 cases were argued that year in a term when more than 8,500 filings were recorded, most of those constituting cases which could have been heard. And, the Supreme Court has adopted a practice of the so-called ``cert pool," a process used by eight of the nine Justices. Only Justice Stevens maintains a practice of reviewing the cert petitions himself on an individual basis, of course, assisted by his clerks. But when the Court is charged with the responsibility of deciding which cases to hear, it is my view that it is very problematic and, in my judgment, inappropriate for the Justices not to be giving individualized attention, at least through their clerks, and not having a cert pool where eight of the Justices have delegated the job of deciding which cases are sufficiently important to hear to a pool.

We do not know the inner workings of the pool, but I believe it is fair and safe to infer that the judgments are made by clerks. Precisely what the level of reference and what the level of consultation with the Justices is we do not know, but when an application is made to the Supreme Court of the United States to hear a case, it is my view that there ought to be individualized consideration.

That also appeared to be the view of now Chief Justice John Roberts, who said in a 1997 speech, according to a September 20, 2000, article in the Legal Times by reporter Tony Mauro where then-private practitioner John Roberts said he ``found the pool disquieting, in that it made clerks a bit too significant in determining the Court's docket."

I would suggest that is an understatement, to give that kind of power to the clerks and, beyond that, to give that kind of power to the clerks in a pool, where the individual Justices do not even make the delegation to their own clerks with whatever review they would then utilize but make that a delegation to a cert pool.

There have been many scholarly statements about the desirability of having greater oversight on what happens in the Supreme Court. Chief Justice William Howard Taft, who was the 10th Supreme Court Chief Justice and the 27th President of the United States, said that review and public scrutiny was the best way to keep the judges on their toes. And Justice Felix Frankfurter said that he longed for the day when the Supreme Court would receive as much attention as the World Series because the status of the Supreme Court depended upon its reputation with the people.

These are the exact words of Chief Justice William Howard Taft:

Nothing 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.

Justice Felix Frankfurter's exact words were:

If 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."

We have a continuing dialogue and a continuing discussion as to the role of the Supreme Court in our society. We have the cutting edge questions consistently coming to the Court. We have them deciding the issues of who will live, who will die, what will be the status of prayer in the schools, what will be the status of our election laws, and through the vagaries of due process of law and equal protection, there are many standards which the Court can adopt.

I was candidly surprised, in reviewing the recent Supreme Court decisions for the confirmation hearings on Chief Justice Roberts and Justice Alito, to find how far the Court had gone in striking down the power of Congress. It was 11 years between the confirmation proceeding on Justice Breyer and the confirmation proceeding on Chief Justice Roberts. With our workload here, it is not possible, even with responsibilities on the Judiciary Committee, even with responsibilities as chairman of the Judiciary Committee, to keep up with the Supreme Court opinions.

When I read United States v. Morrison, where the Supreme Court struck down the legislation protecting women against violence on a 5-to-4 decision because Chief Justice Rehnquist questioned our ``method of reasoning," I wondered what kind of a transformation there was when you leave the Senate Chamber, where our columns are aligned exactly with the Supreme Court columns across the green, what kind of a transformation there was with method of reasoning that there is such superior status when going to the Court. Certainly I have noted no complaint about Senators' method of reasoning when we confirm Supreme Court Justices.

Then we picked up the Americans with Disabilities Act. We had two cases--one involving Alabama which involved employment discrimination and one involving Tennessee which involved access by a paraplegic to the courtroom--dealing with exactly the same records. In the Alabama case, the Supreme Court declared 5 to 4 that the act of Congress was unconstitutional. In the Tennessee case, exactly on the same record, they decided the act was constitutional. What standard did they use? They adopted a standard on a 1997 Supreme Court decision in a case called Boerne. In that case, the Supreme Court decided they would render a constitutional judgment in a context where Congress had legislated under article V of the 14th amendment to preserve due process of law where the challenge was made by the State that the States were immune under the 11th amendment. The Supreme Court decided it would impose a test of whether the statute was ``congruent and proportional.'' This standard had never been heard in jurisprudence before that time, ``congruent and proportional.'' 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.

In a dissenting opinion, Justice Scalia chastised the Court for being, in effect, the taskmaster of the Congress, to see if the Congress had done its homework, whereas in prior cases the adequacy of the record was determined by a substantial record and the Court would defer to the judgment of Congress, which established, through lengthy hearings and proceedings, a very extensive record. In talking to my colleagues, those decisions by the Supreme Court undercutting congressional power were not known.

Then we have the Supreme Court being the final arbiter on what happens on Executive power, what happens at Guantanamo, what is the responsibility of the President of the United States on military commissions, what is the responsibility under the Geneva Conventions. Here again, I respect the Supreme Court's decisions, respect their role as the final arbiter, but say that there ought to be an understanding by the public. It may be that there will never be a case which has more impact on the working of Government than the decision as to whether the Florida electoral votes would be counted for George Bush or for Albert Gore in the famous case of Bush v. Gore.

A prior version of this legislation came out of committee last year on a bipartisan 12-to-6 vote. It has very substantial cosponsorship. I urge my colleagues to consider it carefully. I urge the distinguished majority leader to look for a spot to bring such legislation to the Senate.

There is companion legislation which Senator Grassley is offering which gives the courts--the Supreme Court, courts of appeals, trial courts--the discretion to have television. My legislation, S. 344, is more targeted. It has a requirement as to the Supreme Court televising its proceedings unless there is some due-process violation which is considered on a case-by-case basis.

When the article comes out by Professor Bruce Peabody in the University of Notre Dame Law Journal, I commend it to everyone's attention. I have advance text, have cited some of Professor Peabody's conclusions on his decision that the legislation has very important public policy benefits and, as he analyzes it, is constitutional.

I ask unanimous consent that the full text of the written statement be printed in the Congressional Record as if recited, and I ask that prior to the introduction of that prepared statement, my statement appear, that the comments I have made up until now have been a summary of that more extensive statement, an extemporaneous summary, and the full statement follows. Sometimes people reading the Congressional Record wonder why there is so much repetition, and I think a word of explanation that the initial statement is a summary and the formal statement is added would explain why the repetition exists.

I ask all of this explanation be printed in the RECORD. Finally, I ask that Senator Cornyn be included as a cosponsor.