

Winter 2012

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Recommended Citation

Thornberry, R. Patrick (2012) "Televising the Supreme Court: Why Legislation Fails," *Indiana Law Journal*: Vol. 87: Iss. 1, Article 25.
Available at: <http://www.repository.law.indiana.edu/ilj/vol87/iss1/25>

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Televising the Supreme Court: Why Legislation Fails

R. PATRICK THORNBERRY*

INTRODUCTION

Senator Arlen Specter spent much of his last few years in the Senate trying to pass legislation aimed at forcing the U.S. Supreme Court to allow television cameras to record oral arguments.¹ While he will no longer be the one to champion the proposal into law,² getting cameras in the Supreme Court is not a new issue,³ and future congressmen will presumably pick up the debate where Specter left it.⁴ Specter's bills, identical in form and proposed in every Congress since 2005,⁵ are concise and well suited for analyzing the topic of a congressional mandate on the Court to allow cameras to record the Court's proceedings. Specter's final bill, Senate Bill 446, will be the focus of this Note and reads, in relevant part, as follows:

The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of 1 or more of the parties before the Court.⁶

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1. See Michael C. Dorf, *Arlen Specter's Swan Song: Mandating Cameras in the Supreme Court*, FINDLAW (Sept. 20, 2010), <http://writ.news.findlaw.com/dorf/20100920.html>.

2. Specter's career as a senator ended with the close of the 111th Congress in December 2010. See Carl Hulse, *Arlen Specter's Closing Argument*, THE CAUCUS: THE POLITICS AND GOVERNMENT BLOG OF THE TIMES (Dec. 21, 2010, 1:15 PM), <http://thecaucus.blogs.nytimes.com/2010/12/21/arden-specters-closing-argument/?ref=arden-specter>.

3. LORRAINE H. TONG, CONG. RESEARCH SERV., RL33706, TELEVISIONING SUPREME COURT AND OTHER FEDERAL COURT PROCEEDINGS: LEGISLATION AND ISSUES 1 (2006), available at <http://dodreports.com/pdf/ada458314.pdf> ("Over the years, some in Congress, the public, and the media have expressed interest in televising Supreme Court and other federal court proceedings.").

4. There are several members of Congress, in addition to Specter, who have already expressed an interest in getting cameras in the Supreme Court. For example, the most recent version of Specter's bill (Senate Bill 446) had ten cosponsors. *Senate Bill 446: A Bill to Permit the Televising of Supreme Court Proceedings*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s111-446>.

5. To Permit the Televising of Supreme Court Proceedings, S. 446, 111th Cong. (2009); To Permit the Televising of Supreme Court Proceedings, S. 344, 110th Cong. (2007); To Permit the Televising of Supreme Court Proceedings, S. 1768, 109th Cong. (2005).

6. S. 446.

This short and seemingly simple bill has spurred considerable debate on both Congress's ability to pass the bill from a constitutional standpoint and whether Congress should pass the bill regardless of its power to do so.⁷

This Note attempts to resolve the two issues above by first briefly discussing the arguments concerning the constitutionality of the bill and then using game theory to analyze whether the bill is a good strategic move for Congress. The use of game theory provides a perspective not yet seen in the debate about cameras in the Supreme Court and reaches a somewhat counterintuitive conclusion. Specifically, the analysis suggests that, regardless of the bill's constitutionality, Specter and Congress as a whole should not force the Court to allow cameras, but should instead use the strategies available to influence the Court to act on its own and voluntarily allow television cameras into its proceedings.

Parts I and II of this Note lay out the history of the proposed legislation and develop the background for the arguments surrounding the issue. Part III discusses the bill's constitutionality and how it affects the decisions of both Congress and the Supreme Court regarding the bill's path to becoming, or not becoming, law.⁸ Part IV attempts to explain the course of Senate Bill 446 and its predecessors through the use of game theory—looking at the strategic analysis each branch applies when choosing how to act on the bill. The game is a losing one for Congress, so even discussing the bill is a waste of Congress's time.⁹ Accordingly, neither the constitutionality nor game theory analysis answers the question as to why Senate Bill 446 was proposed in the first place. Thus, the real question is: Why has the legislation on this topic taken such an odd course and what can future members of Congress do to get cameras in the Supreme Court? Part V attempts to answer this question by offering underlying reasons Specter proposed the bill without the intention of it getting passed, and ultimately comes to the conclusion stated above.

I. HISTORY OF SENATE BILL 446 AND ITS PREDECESSORS

Specter did not initiate the debate over cameras in the Supreme Court.¹⁰ Representative Frank J. Guarini Jr. sponsored a House concurrent resolution in the 96th Congress to communicate to the Court that Congress believed television media should be granted access to cover oral arguments.¹¹ Congress did not take action on the resolution, but it provided some of the earliest exposure that the

7. See, e.g., Bruce G. Peabody, "Supreme Court TV": *Televising the Least Accountable Branch*, 33 J. LEGIS. 144 (2006); Brandon Smith, *The Least Televised Branch: A Separation of Powers Analysis of Legislation to Televising the Supreme Court*, 97 GEO. L.J. 1409 (2009). See generally TONG, *supra* note 3.

8. The focus of this Note will remain on Senate Bill 446. The analysis would apply equally to former versions of the bill because they are identical. It would also presumably apply to future versions, assuming there are no substantial changes in substance. Accordingly, throughout this Note, any reference to Senate Bill 446 or "the bill" will be referencing legislation equivalent to Senate Bill 446 in substance, whether it came before or will come after Senate Bill 446.

9. See *infra* Part IV.

10. See TONG, *supra* note 3 and accompanying text.

11. TONG, *supra* note 3, at n.23.

debate over cameras in the Court received.¹² Starting in the 105th Congress, Representative Steve Chabot picked up where Guarini left off by repeatedly proposing bills to mandate cameras in the Supreme Court.¹³ Senator Charles E. Grassley joined Chabot beginning in the 106th Congress and followed a similar, repetitive pattern of proposing legislation.¹⁴ Likewise, Specter joined the formal debate starting in the 106th Congress¹⁵ and repeatedly proposed legislation to mandate cameras in the Supreme Court until his career as a senator ended with the close of the 111th Congress.¹⁶ Specter's bills are discussed in more detail below.

Senate Bill 446 is the most recent of three bills that Specter proposed in the Senate to mandate television coverage of the Supreme Court.¹⁷ All three have been identical in form, but none have made it very far in the legislative process.¹⁸ Specter introduced the first version, Senate Bill 1768, in the Senate in September 2005.¹⁹ This version of the bill had seven cosponsors—four Democrats and three Republicans.²⁰ Both Specter and Senator Leahy spoke on the bill, giving the Senate the opportunity to hear from members of both parties.²¹ In the end, Senate Bill 1768 never got past the report filed by the Senate Committee on the Judiciary.²² Specter introduced the second version of the bill, Senate Bill 344, in January 2007.²³ This version had five cosponsors—three Democrats and two Republicans.²⁴ Specter was the only senator to offer any remarks on behalf of Senate Bill 344.²⁵ Much like the former version noted above, Senate Bill 344 did not make it past a committee report filing, and therefore, was never enacted into law.²⁶

12. Guarini introduced the resolution on October 2, 1980. *Bill Summary & Status of House Concurrent Resolution 444 of the 96th Congress, H.R. Con. Res. 444*, LIBRARY OF CONGRESS, <http://thomas.loc.gov/cgi-bin/bdquery/D?d096:444:/list/bss/d096HC.lst:>. On the same day, it was referred to the House Committee, but Congress never took further action. *Id.*

13. TONG, *supra* note 3, at n.23.

14. *Id.*

15. *Id.*

16. *See infra* text accompanying notes 17–32.

17. *See supra* note 5. *See generally infra* text accompanying notes 18–30.

18. *See* To Permit the Televising of Supreme Court Proceedings, S. 446, 111th Cong. (2010); To Permit the Televising of Supreme Court Proceedings, S. 344, 110th Cong. (2008); To Permit the Televising of Supreme Court Proceedings, S. 1768, 109th Cong. (2005).

19. S. 1768.

20. *Id.*

21. *See* 151 CONG. REC. 21,222–26 (2005).

22. *S. 1768: A Bill to Permit the Televising of Supreme Court Proceedings*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s109-1768>.

23. S. 344.

24. *Id.*

25. *See* 153 CONG. REC. S831–34 (daily ed. Jan. 22, 2007); 153 CONG. REC. S 1257–62 (daily ed. Jan. 29, 2007).

26. *S. 344: A Bill to Permit the Televising of Supreme Court Proceedings*, GOVTRACK.US, <http://www.govtrack.us/congress/bill.xpd?bill=s110-344>.

Specter's final version of the bill was Senate Bill 446.²⁷ He proposed the bill in the Senate in February 2009 and had significantly higher support with a total of ten cosponsors—eight Democrats and two Republicans.²⁸ Like Senate Bill 344, this version only received remarks by Specter, but unlike both prior versions, did not have a written report prepared by the Senate Committee on the Judiciary.²⁹ The last action date on the bill was June 8, 2010, when there was a nonwritten report by committee.³⁰

Now that the 111th Congress and Specter's career as a senator have come to an end, Specter will not see his final version of the bill get passed into law.³¹ However, his farewell speech in the Senate included one last plea for his cause, asking Congress to force the Supreme Court to televise oral arguments.³² Whether a similar or identical bill will be proposed in the 112th Congress is obviously a question that only time can answer; but given that Senate Bill 446 had ten cosponsors, it would not be surprising to see one of those senators, or even a member of the House of Representatives, step into a sponsor role.

II. THE DEBATE SURROUNDING CAMERAS IN THE SUPREME COURT³³

The Supreme Court has never allowed any part of its proceedings to be photographed or video recorded.³⁴ Both the media itself and Congress have pressured the Court to allow live coverage of oral arguments.³⁵ The call for the Court to allow television media in its doors is not a recent development;³⁶ however,

27. *See supra* notes 5–6 and accompanying text.

28. S. 446, 111th Cong. (2010).

29. *See Bill Summary & Status of House Concurrent Resolution 446 of the 111th Congress: All Congressional Actions, S. 446*, <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:SN00446:@@X#>.

30. *Id.*

31. *See Hulse, supra* note 2.

32. "Congress could at least require televising the Court proceedings to provide some transparency to inform the public about what the Court is doing since it has the final word on the cutting issues of the day. Brandeis was right when he said that sunlight is the best disinfectant." 156 CONG. REC. S10,854 (daily ed. Dec. 21, 2010) (statement of Sen. Arlen Specter).

33. This Part is not meant to take a stance on whether either side's arguments in the debate surrounding cameras in the Supreme Court hold more merit. Rather, this is provided solely for a brief summary of background information that will be helpful in determining the elements both Congress and the Supreme Court will take into consideration when determining their respective future actions.

34. *See TONG, supra* note 3, at 2.

35. *See generally*, TONG, *supra* note 3, at 15–17; Bruce D. Collins, *C-SPAN's Long and Winding Road to a Still Un-televised Supreme Court*, 106 MICH. L. REV. FIRST IMPRESSIONS 12 (2007), <http://www.michiganlawreview.org/articles/c-span-s-long-and-winding-road-to-a-still-un-televised-supreme-court>.

36. One of the earliest attempts to get cameras in the Supreme Court was introduced in 1981 in the form of a resolution sponsored by Rep. Frank J. Guarini Jr., but no formal attempts at legislation ensued. *See TONG, supra* note 3, at 6 n.23.

it has gained support in recent years.³⁷ As noted previously, Specter has been a source of such pressure by repeatedly proposing a bill “[t]o permit the televising of Supreme Court proceedings.”³⁸ The bill would require the Court to allow media outlets to install television cameras that would record video during oral arguments.³⁹ The bill would not have a direct effect on any other part of the Court’s day-to-day operations.⁴⁰ Despite the increased pressure, the Court remains steadfast in its resistance to allowing television cameras into its courtroom.⁴¹

A. Arguments in Favor of Televising Supreme Court Oral Arguments

One of the main arguments put forth in favor of television Court coverage is the educational benefits offered to the public by doing so. Proponents point out that allowing the public to view the proceedings will, among other things, enable better understanding of how the Court works.⁴² Additionally, Specter expressly stated that such an argument was a part of the rationale for his bill.⁴³ Even Supreme Court Justices have indicated their appreciation for the educational benefits that television coverage can offer.⁴⁴ However, the education argument on its own has not persuaded the Court to change its stance on the subject.⁴⁵ Chief Justice Roberts even went so far as to point out that oral arguments are not intended for education; rather, they are intended to help the Justices decide the case at hand.⁴⁶

The second main argument relies on the idea that government should be presumptively open. This argument raises constitutional concerns among Justices and academics.⁴⁷ The general idea was summarized by Professor Michael C. Dorf⁴⁸ as follows: “Courts are a vital component of our government, and in a democracy, the work of government should be presumptively open. That principle flows from the First Amendment, which mandates that, absent special security or privacy

37. *Id.* at 1.

38. S. 446, 111th Cong. § 678 (2009); S. 344, 110th Cong. § 678 (2007); S. 1768, 109th Cong. § 678 (2005).

39. *See* S. 446; S. 344; S. 1768.

40. *See* S. 446; S. 344; S. 1768.

41. *See* Dorf, *supra* note 1.

42. TONG, *supra* note 3, at 17.

43. 151 CONG. REC. 21,223 (2005) (statement of Sen. Arlen Specter) (arguing in favor of Senate Bill 1768, a predecessor that was identical in form and substance to his current proposed bill).

44. *See, e.g.,* *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring) (“[T]elevising is capable of performing an educational function by acquainting the public with the judicial process in action.”).

45. *See supra* note 35.

46. Bob Egelko, *Supreme Court: Chief Justice Vetoes Idea of Televised Hearings*, S.F. CHRON., July 14, 2006, at B6 (“We don’t have oral arguments to show the public how we function. We have them to learn about a particular case in a particular way.”).

47. *See infra* Part III.

48. Michael C. Dorf is the Robert S. Stevens Professor of Law at Cornell University Law School and has published more than fifty law review articles on constitutional law and related subjects. His legal writing also includes books, columns, and a blog. *Michael C. Dorf, Professional Biography*, <http://www.lawschool.cornell.edu/faculty/bio.cfm?id=333>.

concerns, court proceedings should be open to the press and public.”⁴⁹ The Supreme Court arguably already fulfills this idea by releasing audio recordings of oral arguments⁵⁰ and allowing certain accommodations for the press.⁵¹ For example, the Court provides the media with work space in a press room, sets aside special seating for reporters covering announcements and oral arguments, and allows entry to sketch artists to sketch courtroom scenes.⁵² On the other hand, the Court’s accommodation to the public has been criticized because seating is quite limited not only in space but also in time.⁵³ A comparison has also been drawn between congressional proceedings, which are open to television media, and Supreme Court oral arguments. The underlying issue stems from a supposed inadequate distinction between the two that should give the Court the right to keep its doors closed to cameras.⁵⁴ Lastly, the general public convincingly favors the idea of cameras in the Supreme Court over the Court’s current ban on video recording during proceedings.⁵⁵

B. Arguments in Opposition of Televising Supreme Court Oral Arguments

Opponents of cameras in the Supreme Court rely on three main arguments: (1) forcing the Court to allow them would be unconstitutional;⁵⁶ (2) even if mandating cameras was constitutional, it would be an “imprudent intrusion into the Court’s decision-making process”;⁵⁷ and (3) it would have a negative effect on the Court by undermining its legitimacy.⁵⁸ The first two are complex issues that will be discussed in detail in Part III.⁵⁹ The third has several aspects to it that are discussed in this subpart.

49. See Dorf, *supra* note 1.

50. See TONG, *supra* note 3, at 2.

51. See generally Stephen J. Wermiel, *News Media Coverage of the United States Supreme Court*, 42 ST. LOUIS U. L.J. 1059, 1069–76 (1998).

52. *Id.* at 1070.

53. The Supreme Court courtroom is only eighty-two feet by ninety-one feet, which provides for limited numbers of seats. Audrey Maness, *Does the First Amendment’s “Right of Access” Require Court Proceedings to be Televised? A Constitutional and Practical Discussion*, 34 PEPP. L. REV. 123, 127 (2006). Additionally, even if a member of the public does make it to the front of one of the two lines to get to see part of the proceedings, they are limited to three minutes of viewing. *Id.*

54. *Id.* at 182.

55. See TONG, *supra* note 3, at 1 (discussing a 2006 public opinion survey showing that 70% of voters think allowing cameras in the Supreme Court is a “good idea”).

56. See, e.g., Smith, *supra* note 7, at 1433–34.

57. Dorf, *supra* note 1.

58. See, e.g., Bruce G. Peabody, *Constitutional Etiquette and the Fate of “Supreme Court TV,”* 106 MICH. L. REV. FIRST IMPRESSIONS 19 (2007), <http://www.michiganlawreview.org/articles/constitutional-etiquette-and-the-fate-of-supreme-court-tv>; Christina B. Whitman, *Televising the Court: A Category Mistake*, 106 MICH. L. REV. FIRST IMPRESSIONS 5 (2007), <http://www.michiganlawreview.org/articles/televising-the-court-a-category-mistake>; Dorf, *supra* note 1.

59. The constitutionality of mandating cameras in the Supreme Court is a topic on which entire papers have been written. See, e.g., Peabody, *supra* note 7; Smith, *supra* note 7.

Both academics and Justices have two key concerns regarding the effects that Senate Bill 446 would have on the Court and its legitimacy. First, they worry about the entertainment aspect of television coverage.⁶⁰ Justice Scalia showed this concern in a broad sense in 2005 when he said, “We don’t want to become entertainment. I think there’s something sick about making entertainment out of real people’s legal problems. I don’t like it in the lower courts, and I particularly don’t like it in the Supreme Court.”⁶¹ Additionally, some argue that the mere presence of cameras would create a tendency in both lawyers and Justices to use theatrics solely for the benefit of television viewers.⁶² But the most noted concern is how the media itself would handle the footage after the proceedings are concluded. While C-SPAN has made clear it would televise the proceedings “gavel-to-gavel,”⁶³ what other news outlets would do with the footage might mislead the public.⁶⁴ Justice Burger elaborated such a concern when he said: “If there were some way of them saying that any part of that, any segment, could not be produced without all the rest of it, conceivably, that might open things up.”⁶⁵ He also made clear his view that selective coverage of Court proceedings “would be ‘bad for the country, bad for the court and bad for the administration of justice’ because networks would use snippets of the arguments that would give the public a ‘distorted conception.’”⁶⁶ Ultimately, these concerns all relate back to their possible impact on the Court’s legitimacy, which is understandably a key concern, especially for the Justices.⁶⁷

Discussing it in this subpart would not allow for enough detail to get the full picture, so it is developed in Part III with admittedly limited detail given the expansiveness of the overall debate on the constitutional issues regarding such legislation.

60. See, e.g., TONG, *supra* note 3, at 12.

61. *Id.*

62. Dorf, *supra* note 1.

63. Collins, *supra* note 35, at 12.

64. Eleanor Randolph & Al Kamen, *Chief Justice Considers Televising Supreme Court: Burger Opposes Selective Coverage of Proceedings*, WASH. POST, Apr. 12, 1986, at A5.

65. *Id.*

66. *Id.* Based on my research to date, I have been unable to find an instance where a Justice has elaborated on how specifically the media would be able to use snippets in ways substantially different than they are already able through the use of audio recordings. While the following is only conjecture, it may be that the Justices are worried about facial expressions being overanalyzed or paired with audio from a noncorresponding snippet of video. The use of editing by television media could, therefore, easily take a statement and pair it with a facial response of a Justice to make a story more interesting or controversial at the expense of the reputation of a Justice or the Court as a whole.

67. See Marjorie Cohn, *Let the Sun Shine on the Supreme Court*, 35 HASTINGS CONST. L.Q. 161, 163 (2008) (“Chief Justice William Rehnquist told a 1992 conference of judges that if the justices didn’t look good on camera, ‘it would lessen to a certain extent some of the mystique and moral authority’ of the Court.”). This, combined with the Court’s express knowledge that it relies solely on its legitimacy, makes clear why the Justices are concerned with actions that may limit their ability to function. See *Planned Parenthood v. Casey*, 505 U.S. 833, 865 (1992) (“The Court’s power lies, rather, in its legitimacy, a product of substance and perception that shows itself in the people’s acceptance of the Judiciary as fit to determine what the Nation’s law means and to declare what it demands.”).

III. THE CONSTITUTIONALITY OF SENATE BILL 446

The proposal of Senate Bill 446, and similar bills before it, has spurred much debate as to whether Congress has the power to enact it as legislation.⁶⁸ While questions regarding specific amendments have arisen,⁶⁹ the main focus of the debate lies in whether Senate Bill 446 violates the doctrine of separation of powers. However, even if the bill passes the test of constitutionality in an abstract sense, issues regarding judicial independence remain.⁷⁰

A. Separation of Powers

In response to a question from Specter in 2007 regarding one of Specter's predecessors to Senate Bill 446, Justice Kennedy warned Specter that his proposed legislation may violate separation of powers: "A majority of my court feels very strongly . . . that televising our proceedings would change our collegial dynamic. We hope that the respect that separation of powers and checks and balances implies would persuade you to accept our judgment in this regard."⁷¹ Kennedy's statement clearly illustrates that, in the Court's view, Senate Bill 446 would either not survive a constitutional challenge, or would otherwise result in a conflict between Congress and the Court. Justice Kennedy's warning, while somewhat cryptic in what would be its practical effect, undoubtedly should concern anyone seeking the passage of Senate Bill 446 and may have deterred congressional action on the issue thus far.⁷² Because separation of powers is not written anywhere in the Constitution but is rather embedded in its structure,⁷³ the question of the proposed bill's constitutionality comes down to whether Congress has an enumerated power that would allow it to control the Court in regard to its policy on television coverage of proceedings.⁷⁴

The Court may not view Senate Bill 446 as constitutional,⁷⁵ but proponents of the bill maintain several arguments that aim to prove otherwise. Most of the arguments focus on the Necessary and Proper Clause in Article I of the Constitution.⁷⁶ Although the Constitution created the Supreme Court, it is long

68. See, e.g., Peabody, *supra* note 7, at 167–72; Smith, *supra* note 7, at 1415–16; Dorf, *supra* note 1.

69. See, e.g., Maness, *supra* note 53; Peabody, *supra* note 7; Smith, *supra* note 7.

70. See Dorf, *supra* note 1 ("There are many constitutionally-valid laws that Congress could pass that would nonetheless threaten judicial independence.").

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

72. See *infra* Part V.

73. Smith, *supra* note 7, at 1419.

74. Scott E. Gant & Bruce G. Peabody, *Debate: Congress's Power to Compel the Televising of Supreme Court Proceedings*, 156 U. PA. L. REV. PENNUMBRA 46, 52 (2007), available at <http://www.pennumbra.com/debates/debate.php?did=9> ("The Court has observed many times what the Constitution itself makes clear: Congress may act only if authorized by one of the powers delegated to it by the Constitution.").

75. See *supra* notes 71–72 and accompanying text.

76. See, e.g., Peabody, *supra* note 7, at 159.

established that Congress was left with the authority to control many aspects of the Court, such as the number of Justices, the attendance required for quorum, and the details of the Court's Term start and end dates.⁷⁷ The Court itself has indicated an acceptance of this premise in *Wiley v. Coastal Corp.*⁷⁸ when Justice Rehnquist wrote that “[f]rom almost the founding days of this country, it has been firmly established that Congress, acting pursuant to its authority to make all laws ‘necessary and proper’ . . . may enact laws regulating the conduct of those [federal] courts and the means by which their judgments are enforced.”⁷⁹ Note, however, that this excerpt, along with others used by proponents of the constitutionality of Senate Bill 446, refers to federal courts generally, and not specifically the Supreme Court.⁸⁰ This distinction may prove significant because the Constitution expressly grants Congress power over federal courts in two places, while it does not expressly give Congress the power to control the Supreme Court. However, to further the argument that Congress has the ability to control the Court's proceedings, at least to some degree, is the fact that Section 5 of Article I expressly gives Congress the right to “determine the rules of [Congress's] proceedings.”⁸¹ Notably, there is not any similar language in Article III, which establishes the judiciary.⁸² The absence of the language can be inferred to mean that the Court does not have the power to determine the rules of its own proceedings, making something like television coverage within the realm of whoever does have the power over procedural rules. Therefore, through both the interpretation of Article III's lack of a clause giving the Court control of its procedural rules and the history of congressional acts—referring specifically to the examples already mentioned where Congress exerted control over aspects of the Court—it is clear that Congress has, and does in fact maintain, some control over the Court and its functions.⁸³

The question then arises as to whether Senate Bill 446 extends beyond the limited control that Congress does have over the Court.⁸⁴ In a debate in 2007 between Scott Gant⁸⁵ and Professor Bruce Peabody,⁸⁶ Gant said that a bill like Senate Bill 446 “can only be supported by a reading of the Necessary and Proper Clause that seemingly places no meaningful limits on Congress's power, and lacks due regard for the separation of powers principles that infuse the Constitution.”⁸⁷

77. See 151 Cong. Rec. 21,225 (2005) (statement of Sen. Arlen Specter).

78. 503 U.S. 131 (1992).

79. *Id.* at 136.

80. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988) (“[E]nactments ‘rationally capable of classification’ as procedural rules are necessary and proper for carrying into execution the power to establish federal courts vested in Congress by Article III, § 1.” (quoting *Hanna v. Plumer*, 380 U.S. 460, 472 (1965))).

81. U.S. CONST. art. I, § 5, cl. 2.

82. U.S. CONST. art. III.

83. U.S. CONST. art. III; Peabody, *supra* note 7, at 163 n.112.

84. *Cf. supra* note 77 and accompanying text.

85. Scott E. Gant is a Partner at Boies, Schiller & Flexner LLP and an author on constitutional law. Gant & Peabody, *supra* note 74, at 52 n.†.

86. Professor Bruce Peabody is an Associate Professor of Political Science at Farleigh Dickinson University. *Id.* at 47 n.†.

87. *Id.* at 55.

Peabody, by looking to *McCulloch v. Maryland*⁸⁸ and its “legitimate” constitutional end test,⁸⁹ concluded that this would be “a defensible exercise of the Necessary and Proper Clause given a variety of legitimate objectives that would . . . enhance governmental accountability, not to mention the judicial power itself.”⁹⁰ Ultimately, this debate is a matter of constitutional interpretation that may or may not have a clear answer, and it is doubtful that one will surface capable of changing either side’s mind. However, the absence of a clear-cut answer makes this topic more prime for political and strategic moves by both Congress and the Court. In this scenario, either branch could presumably take any action with Senate Bill 446 that it wants and still support it with a “legitimate” argument as to the action’s constitutionality. Conversely, if the Constitution spoke directly on the issue, this debate would be a moot point and it would be much more difficult for either branch to act in a way that does not stay within obvious legal constraints.

B. Judicial Independence

As noted above, Justice Kennedy has voiced his opinion in opposition to Specter’s proposal:

We have always taken the position and decided cases that it is not for the Court to tell the Congress how to conduct its proceedings, what its rules ought to be on markups and reporting bills from one House to the other, or how to conduct itself. And we feel very strongly that we have intimate knowledge of the dynamics and the needs of the Court. We think that proposals which would mandate direct television in our Court in every proceeding is inconsistent with that deference, that etiquette, that should apply between the branches.⁹¹

Although this quote has been interpreted as a hint to Congress that the bill would be unconstitutional,⁹² its language has also been interpreted to suggest that if the bill were constitutional, it would nonetheless be an unjustifiable infringement on the Court in light of the respect due the Court as a coordinate branch of government.⁹³

Those who argue it does not infringe tend to focus on the premise that it would not affect the Court’s decision-making process.⁹⁴ Specifically, because it does not literally affect how the Court would function in terms of its procedures, proponents say the Court’s proceedings will look and be no different than before cameras were present.⁹⁵ It is also worth noting that historically the Court had referred to the size

88. 17 U.S. (4 Wheat.) 316 (1819).

89. *Id.* at 421.

90. Gant & Peabody, *supra* note 74, at 58.

91. *Hearings Before a Subcomm. on the Dep’t of Transp., Treasury, HUD, the Judiciary, D.C., & Indep. Agencies of the H. Comm. on Appropriations*, 109th Cong. 226 (2006) (statement of J. Anthony M. Kennedy).

92. Dorf, *supra* note 1.

93. *Id.*

94. *See, e.g.*, Gant & Peabody, *supra* note 74, at 51.

95. *Id.*

and obtrusiveness of cameras as a key concern over televising court proceedings.⁹⁶ Today's technology completely negates such an argument since the proceedings could be videotaped discreetly, presumably in ways that no one would even have to know cameras were present.⁹⁷

On the other side of the debate, even Specter has hinted that his proposed bill may not show the constitutional etiquette to which Justice Kennedy referred.⁹⁸ In a floor speech regarding one of his camera bills, Specter complained about multiple Supreme Court decisions citing a lack of respect for Congress.⁹⁹ Specter showed particular disapproval of the Court's decision in *United States v. Morrison*¹⁰⁰ because he did not agree with the Court questioning Congress's "method of reasoning" while partially striking down the Violence Against Women Act.¹⁰¹ Justice Kennedy responded in a way that may exemplify the typical attitude of the Justices on the matter by noting that in *Morrison*, "[the Court] 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."¹⁰² Justice Kennedy's statements noted above, combined with the sentiments of the other Justices, make it fairly safe to assume that the Court would view the passage of Senate Bill 446 as, at the very least, an unjustified intrusion on judicial independence.¹⁰³ The bill's questionable constitutionality and intrusion into judicial independence raise one more question: Who gets to decide?

*Marbury v. Madison*¹⁰⁴ is considered one of the most important Supreme Court decisions in the nation's history because, through declaring an act of Congress unconstitutional, it established "the authority for the judiciary to review the constitutionality of executive and legislative acts."¹⁰⁵ Although the holding of the case has been questioned as to its breadth,¹⁰⁶ and the Constitution is silent regarding

96. See *Estes v. Texas*, 381 U.S. 532, 536 (1965); Maness, *supra* note 53, at 142.

97. Collins, *supra* note 35, at 15.

98. Tony Mauro, *The Right Legislation for the Wrong Reasons*, 106 MICH. L. REV. FIRST IMPRESSIONS 8, 10 (2007), <http://www.michiganlawreview.org/articles/the-right-legislation-for-the-wrong-reasons> (arguing in reference to one of Specter's floor speeches that "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").

99. *Id.* (noting Specter's disapproval of, among others, *United States v. Morrison*, 529 U.S. 598 (2000); *Tennessee v. Lane*, 541 U.S. 509 (2004); and *Board of Trustees of the University of Alabama v. Garrett*, 531 U.S. 356 (2001)).

100. 529 U.S. 598 (2000).

101. One interpretation of Specter's statements regarding *Morrison* was characterized as essentially asking the question: "What makes the Supreme Court think it is smarter than Congress?" Mauro, *supra* note 98, at 10.

102. *Id.* at 11.

103. The most prominent example of the Court's view on a bill such as Senate Bill 446 is the oft-quoted statement of Justice Souter who said, "The day you see a camera come into our courtroom, it's going to roll over my dead body." TONG, *supra* note 3, at 1.

104. 5 U.S. (1 Cranch) 137 (1803).

105. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 39 (3d ed. 2006).

106. In a 1994 paper, Professor Clinton criticized the prominent view of the *Marbury* holding and came to the conclusion that the holding is narrower than it has been given credit

the Court's ability to review the constitutionality of actions of the other branches, the Court's authority in this regard has been generally accepted since the time of *Marbury*.¹⁰⁷

Presuming this legislation would get challenged in the Court if passed into law, Congress and the public would find out how far the Supreme Court is willing to take its authority for judicial review. Specter acknowledged that although he believes his bill is constitutional, "[s]uch a conclusion is not free from doubt and is highly likely to be tested with the Supreme Court, as usual, having the final word."¹⁰⁸ So it appears that the Court will have the opportunity to strike the bill down as unconstitutional if it so desires, but only if the bill actually gets passed into law. As of yet, Congress has not passed Senate Bill 446 or any other bill like it,¹⁰⁹ and whether or not Congress will pass the bill in the future can be analyzed in the context of game theory.

IV. A GAME THEORY APPROACH TO SENATE BILL 446

While it is useful to first explore whether Senate Bill 446's constitutionality is clear or at least heavily favored one way, the answer to the question remains essentially wide open, so a constitutional analysis alone does not give an adequate explanation of both the history and likely future of cameras in the Supreme Court. However, game theory can explain the previous moves and predict the future moves of Congress and the Court.

Academics have used game theory to discuss and analyze legal situations for many years.¹¹⁰ It is a social science developed around the idea of strategic thinking in decision making.¹¹¹ Generally, game theorists refer to the actors in each game as "players," and each player's optimal move, or "decision," is dependent upon what they expect the other player(s) will do.¹¹² In other words, game theory is a way to analyze how to best act in a given situation by putting one's self in another player's shoes to analyze how each player will react to each set of possible moves.¹¹³ The analysis often uses decision trees to visually display each player's available and most likely moves.¹¹⁴ This type of analysis requires each player to make

for. He argued that the case can be viewed as "justifying at most the Court's power to nullify national laws in cases bearing directly upon the exercise of judicial functions." Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, AM. J. POL. SCI., May 1994, at 285, 296. Whether Clinton's view would matter in a case determining the constitutionality of Senate Bill 446 would depend on whether cameras would affect a "judicial function," which relates to the arguments in Part II above.

107. CHEMERINSKY, *supra* note 105, at 39.

108. 151 CONG. REC. 21,225 (2005) (statement of Sen. Arlen Specter).

109. *See supra* Part I.

110. *See, e.g.*, Clinton, *supra* note 106; William N. Eskridge, Jr., *Reneging on History? Playing the Court/Congress/President Civil Rights Game*, 79 CALIF. L. REV. 613 (1991).

111. AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY 1-2 (1991).

112. *Id.* at 36.

113. *See id.*; Garth Saloner, *Modeling, Game Theory, and Strategic Management*, 12 STRATEGIC MGMT. J., 119, 120 (1991).

114. For examples of decision trees used by game theorists, see DIXIT & NALEBUFF, *supra* note 111, at 34-40.

assumptions about the other player's rationality, his or her own rationality, and the amount of information each player is privy to.¹¹⁵

William N. Eskridge Jr. was one of the early authors to use game theory to explain the interaction between the three branches of the U.S. government as applied to civil rights.¹¹⁶ Eskridge's model analyzed the interplay between all three branches regarding civil rights legislation and litigation based on multiple models of judicial reasoning.¹¹⁷ Fortunately, the model generally applies to the interaction of the branches in regards to Senate Bill 446, with only a few parts of the game needing alteration for this purpose. Eskridge's model places significant emphasis on the political preferences of the players on a sliding scale.¹¹⁸ While his method worked well with civil rights legislation and litigation, the debate surrounding cameras in the Supreme Court has a clearer divide and, unlike civil rights issues, political affiliation does not seem to be a determining factor as to which side of the debate a political player will fall.¹¹⁹ However, Lee Epstein and Jack Knight later adapted Eskridge's model for application to the strategic model of judicial decision making.¹²⁰ This Note will apply the Epstein and Knight version because it focuses not on a spectrum of preferences but rather on the interplay between the branches in what are essentially yes/no scenarios.¹²¹

A. *The Players and Rules of the Game*

Analyzing an interaction using game theory first requires laying out the parameters and any underlying assumptions.¹²² In the "cameras in the Supreme Court" game, the players are similar to the Epstein and Knight model.¹²³ The Supreme Court, Congress, and the states will all interact in determining their own actions and therefore the ultimate outcome. The main differences are (1) the decisions are yes/no as to whether cameras in the Supreme Court should be mandated by statute; (2) Congress is the first mover instead of the Supreme Court; and (3) the states are the third player instead of the President.¹²⁴ This is a sequential game and, more importantly, a repeated game with presumably indefinite repetitions. The importance of a game being repeated is that the players know they

115. Saloner, *supra* note 113, at 120.

116. *See* Eskridge, *supra* note 110.

117. *See generally id.*

118. *Id.*

119. While there may be some correlation, political party affiliation is not determinative in how a politician will view Senate Bill 446 or similar legislation, as evidenced by the mixture of cosponsors in each of Specter's three bills to mandate cameras in the Supreme Court. *See supra* notes 20–28 and accompanying text.

120. LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 14 (1998).

121. *Id.* at 10–17.

122. *See* Eskridge, *supra* note 110, at 643–44.

123. *See* EPSTEIN & KNIGHT, *supra* note 120, at 14.

124. *Id.* The President is replaced with the states because Article V of the Constitution does not require the President to act in order for a constitutional amendment to take effect, but does require ratification by thirty-eight states. U.S. CONST. art. V. The analysis is limited to constitutional amendments because that is the main recourse available to Congress should the game progress past the first three moves. *See infra* Part IV.B.

will have to deal with each other again in the future. This repetition creates a higher incentive to cooperate with one another to maximize long-term benefits. If this were not the case, there would be no fear of future consequences, such as revenge, and the overall strategy of the game would be significantly different.¹²⁵

For this Note's analysis, it is assumed that the players are acting with complete information as to the other players' preferences and available strategies.¹²⁶ The analysis also assumes that each of the players ultimately wants to get to their desired outcome without being overturned by one of the other players.¹²⁷ The assumption that players have a desired outcome requires an additional assumption that the Court follows a strategic model, similar to that set out in Epstein and Knight,¹²⁸ because if the Court *only* interprets law then it would have no basis to make strategic moves towards its desired outcome. Additionally, this analysis assumes that Congress as a group agrees with Specter and wants to mandate cameras in the Court. Lastly, at least for the rules and assumptions of the game, this is a zero-sum game. In other words, Congress wants cameras in the Supreme Court, while the Justices do not.¹²⁹ In this game, one wins and the other loses so there is no real possibility for a win-win situation.¹³⁰ However, as will be shown below, there will be strategies for minimizing losses and maximizing gains.

B. Possible Outcomes and Strategy

There are several levels of the cameras in the Supreme Court game.¹³¹ They are most easily explained through the modified decision tree shown below.¹³² As shown and previously mentioned, Congress is the first mover in this game. If Congress decides not to pass Senate Bill 446 then the game ends and the Supreme Court gets what it wants. The top box is likely a special case because neither party has actually "won" or "lost" in the eyes of the public—neither branch has been overridden and the Court has not been infringed upon—which may make a significant difference in how that outcome is viewed by the players.¹³³

125. Cf. DIXIT & NALEBUFF, *supra* note 111, at 115–18 (discussing the importance of repetition in a prisoner's dilemma between Congress and the Federal Reserve regarding fiscal policy decisions).

126. Cf. Eskridge, *supra* note 110, at 644.

127. *Id.*

128. See EPSTEIN & KNIGHT, *supra* note 120, at 11. Whether or not the Court is actually strategic in its decision making is a debate beyond the scope of this Note, but it will be taken as true for the remainder of the analysis. Otherwise, the game theoretic analysis used by Eskridge and Epstein and Knight would no longer apply. Additionally, there has been considerable research and literature indicating that the Court does not limit itself to the legal model of judicial decision making; but rather takes strategy and personal preferences into account. *Id.*

129. See *supra* Parts I & II.

130. In this context, a win-win situation is referring to a situation where both players gain some amount of utility, however small. Here, one wins while the other loses so someone will have negative utility in the outcome of the game.

131. See Eskridge, *supra* note 110, at 644.

132. See *id.*

133. See *infra* Part V.

As shown in the decision tree in Figure 1, Congress has the ability to override a Supreme Court decision,¹³⁴ and it is also worth noting that Congress has used its power to do so on many occasions.¹³⁵ If the Court were to overturn Senate Bill 446, it would effectively deem the goal of the legislation unconstitutional and therefore a mere statutory adjustment would not trump the Court's decision. So for the purposes of this debate, it appears that a constitutional amendment is Congress's only recourse. However, overriding a decision is not an easy task, especially through a constitutional amendment. Further, the only situations in the decision tree in which Senate Bill 446 would pass and withstand a legal challenge are where either: (1) the Supreme Court cooperates (submits to the will of Congress); or (2) a congressional committee, Congress as a whole, and the states all work against the Court. While the decision tree provides a useful diagram of the possible outcomes, it does not give the full picture by itself because each player's strategy will vary depending on their individual preferences and the likelihood their actions will impact the outcome of the game.

Figure 1: Congress vs. Supreme Court—Full Decision Tree



134. See Eskridge, *supra* note 110, at 644.

135. Russell R. Wheeler & Robert A. Katzmann, *A Primer on Interbranch Relations*, 95 GEO. L.J. 1155, 1163–64 (2007) (“Scholars estimate that in recent years, Congress has overridden about five percent of the Supreme Court’s statutory decisions, and the Court has invited overrides to clarify the law in about eight percent of its cases.”).

C. Likely Future Moves

The likely future moves of the players in this game rely on both the above decision tree and other environmental factors that the players will incorporate into their strategies. Or, as Epstein and Knight put it:

[S]trategic decision making is about *interdependent* choice: an individual's action is, in part, a function of her expectations about the actions of others But strategic considerations do not simply involve calculations over what colleagues will do. Justices must also consider the preferences of other political actors, including Congress, the president, and even the public. The logic here is as follows. As every student of American politics knows, two main concepts undergird our constitutional system. The first is the separation of powers doctrine, under which each of the branches has a distinct function: the legislature makes the laws, the executive implements those laws, and the judiciary interprets them. The second is the notion of checks and balances: each branch of government imposes limits on the primary function of the others.¹³⁶

While this is the logic that will be applied, the discussion in this Note is limited to the strategic concerns of Congress and the Supreme Court.¹³⁷

The majority of the game's decision making will be done in the first few steps because of the assumption that none of the players want their actions overridden. Accordingly, the decision tree simplifies to the version shown in Figure 2, below.

136. EPSTEIN & KNIGHT, *supra* note 120, at 12–13 (emphasis in original).

137. The President is ignored because the analysis focuses on the steps for constitutional amendments, which do not require action from the President, only the Legislature and the states. U.S. CONST. art. V.

Figure 2: Congress vs. Supreme Court—Modified Decision Tree

Game theory generally calls for players to look at end results and work backwards to determine how to either maximize gain or minimize loss.¹³⁸ In the case of Senate Bill 446, Congress would look to the third and fourth tiers of the decision tree, where either the congressional committee or Congress as a whole must choose to override the Court’s ruling through a constitutional amendment. If Congress is at this point in the game, it is no longer really in a gain-maximizing position because the only way it could get to that point is through a Supreme Court decision striking down Senate Bill 446. Therefore, Congress already does not like its position, and the difficulty in overriding the Court’s decision is costly and unlikely (based on historical interactions).¹³⁹ It can then be presumed that although there is the possibility that Congress could overturn the Court’s decision, it is not likely under normal circumstances.¹⁴⁰ Because getting cameras in the Supreme Court is not a topic in which voters have a large concern,¹⁴¹ it is also reasonable to

138. See *supra* notes 112–13 and accompanying text.

139. See Frank B. Cross & Frank J. Nelson, *Strategic Institutional Effects on Supreme Court Decisionmaking*, 95 NW. U. L. REV. 1437, 1452 (2001) (noting a “laundry list of factors that reduce the probability of legislative response,” including the substantial transaction costs of doing so).

140. *Id.* at 1454 (“[T]he risk of any given decision being overridden appears to be quite low and the probabilistic magnitude of that risk difficult for the Court to assess. Yet the risk is not zero, as we know from Eskridge and others that some number of Court opinions are in fact overridden.”).

141. See *infra* notes 166–69 and accompanying text.

say that Senate Bill 446 falls under what would be considered normal circumstances and a Court decision is, therefore, unlikely to be overturned.

The next part of the analysis takes one step back in the process and looks at how the Supreme Court would come to a decision if Senate Bill 446 was passed as legislation.¹⁴² If, as is one of the assumptions of the game, there is perfect information amongst the players, the Court would know that Congress would be unlikely to overturn the Court's decision should it strike down Senate Bill 446. This assumption mimics reality and what many scholars view as the Court's presumption, or at least what should be the Court's presumption.¹⁴³ Frank B. Cross¹⁴⁴ and Frank J. Nelson¹⁴⁵ refer to this concept as the "risk of reversal probability."¹⁴⁶ They argue that the many structural barriers inherent in Congress—such as its bicameral structure and its committee system—make the probability of a congressional override low.¹⁴⁷ They further point out that in such a situation, the Court generally should not take Congress's preferences into account when making its decision because there is not only a small likelihood of a Court decision being overridden, but also the Court should not want to be known to defer to Congress.¹⁴⁸ Accordingly, the Court should strike down Senate Bill 446 if it was passed into law.

To test the strategy above, assume the Court did strike down Senate Bill 446. Only two things could happen. The most likely result is that it would remain stricken and the Court would uphold both of its goals—keeping cameras out of its courtroom and not being overridden by another branch. The other possible (and unlikely) result would include the Court losing on both counts by getting overridden and getting cameras installed in its courtroom. While the second and unlikely option sounds significantly worse, it is not as bad as it may seem. Assume instead that the Court feared a congressional override enough that it upheld Senate Bill 446. In this situation the only difference is that the Court has not technically been overridden. The Court still loses on the fight over cameras in its courtroom,

142. The analysis assumes the Court prefers to keep cameras out of its courtroom. While Justices have, on occasion, expressed the possibility that they would consider allowing cameras in the Court, they nearly unanimously show their skepticism to the idea. See Matt Sundquist, *Cameras and the Supreme Court*, SCOTUSBLOG (Apr. 29, 2010, 8:17AM), <http://www.scotusblog.com/2010/04/cameras-and-the-supreme-court/>. Additionally, television coverage of proceedings is even more likely to receive a negative reaction from the Justices if forced upon them instead of giving them the autonomy to make their own choice.

143. See Cross & Nelson, *supra* note 139, at 1452; Jeffrey A. Segal, *Separation-of-Powers Games in the Positive Theory of Congress and Courts*, 91 AM. POL. SCI. REV. 28, 31 (1997).

144. "Herbert D. Kelleher Centennial Professor of Business Law at the McCombs School, University of Texas, and Professor of Law at the University of Texas Law School." See Cross & Nelson, *supra* note 139, at 1437 n.*.

145. "Assistant Professor of Political Science, Pennsylvania State University, Harrisburg." See *id.* at 1437 n.**.

146. Cross & Nelson, *supra* note 139, at 1452.

147. *Id.*

148. See *id.* at 1453 ("[A] strategic judiciary would not establish a reputation of readily deferring to Congress.").

and how much worse is an overriding than being forced into televised proceedings when the Justices have already been so publicly against them? Even an open proponent of the proposed bill, Professor Dorf, acknowledges that the mere act of proposing the bill “show[s] disrespect for the Court as an institution.”¹⁴⁹ So it appears that even in the unlikely event that Congress did override the decision through a constitutional amendment, the difference in the loss might not be significant. Further, and in the more likely case, the Court would actually benefit from the attempt because it would presumably have precedent that might bar future attempts by Congress to force the Court to allow televised oral arguments. The likely outcomes insinuate a high likelihood that the Court would strike down Senate Bill 446 because by doing so, the Court maximizes its expected benefit and exposes itself to a limited downside.¹⁵⁰

The analysis concludes by coming back to the first move, where Congress decides whether to enact Senate Bill 446 into law. Based on the analysis above, Congress can be fairly certain the bill would get overturned when challenged in the Court. Therefore, Congress has two basic options. It can enact Senate Bill 446 knowing the bill is unlikely to succeed and may even result in adverse precedent, which would make future attempts more difficult.¹⁵¹ Or Congress can choose not to enact the bill. Based on the fact that Senate Bill 446 is the third attempt at such legislation,¹⁵² it would appear that Congress has analyzed the game in a similar fashion and has chosen not to pass the bill. However, if Congress were using such a simplistic approach, it would have been proposed once and never shown up again because it did not make strategic sense. By the same logic, the bill would not have been proposed in the first place unless it was to test the Supreme Court’s preference by making the idea public. Therefore, there likely exists a different reasoning behind Congress’s actions thus far.¹⁵³

D. Possible Alternative Moves and Explanations

Congress can use two other options to achieve its goal of getting cameras into the Court. First, if Congress could change the analysis of the game in the third and fourth stages, it could alter the strategies all the way back to the beginning. Specifically, if it could somehow prove to the Court that it was so serious about the legislation that it would seek a constitutional amendment if the Court struck down Senate Bill 446, it would undoubtedly lessen the likelihood that the Court would strike Senate Bill 446 and Congress may have a chance of successfully getting cameras in the Supreme Court—and more importantly, keeping them there. However, many of the obstacles to congressional action mentioned above are not easily changed and, therefore, Congress is unlikely to actually utilize such a

149. Dorf, *supra* note 1.

150. This decision may not be as clear cut as it seems, because striking Senate Bill 446 may be viewed by the public as self-serving or unconstitutional, and evidence shows that the Court is swayed, at least to a degree, by public opinion. *See infra* notes 184–85 and accompanying text.

151. *See supra* Part IV.B.

152. *See supra* notes 17–30 and accompanying text.

153. *See infra* Part V.

strategy.¹⁵⁴ As a second option, Congress can essentially bully the Court into allowing cameras without legislation forcing the Court to do so. This coercion is accomplished through what Cross and Nelson referred to as “resource punishment.”¹⁵⁵ Using this strategy, Congress could withhold salary increases and cut other budgetary resources until the Court agrees to allow cameras in its courtroom.¹⁵⁶ While such a tactic generally works on the Court,¹⁵⁷ “[t]he effect [is] not an enormous one and not entirely consistent.”¹⁵⁸

Since neither of Congress’s two options seem likely,¹⁵⁹ it is probably impossible to answer the question as to exactly why legislation regarding cameras in the Supreme Court has taken such an odd course over the past several years using game theory alone. Additionally, even assuming the above analysis is complete, it merely shows why the legislation has not been passed; it does not show why Specter would bother proposing it in the first place knowing it would fail.

V. THE REAL EXPLANATION AND THE FUTURE OF CAMERAS IN THE SUPREME COURT

The explanation provided by a game theory analysis, albeit a complete explanation on its face, fails to adequately answer the question as to why the proposed legislation has taken such an odd course. It fails due to both the expected outcome¹⁶⁰ and because one of the key assumptions of the model is that both Congress and the Supreme Court do not want to be overturned.¹⁶¹ Some research supports this assumption and it may be a generally accepted view, but it does not hold true in all circumstances.¹⁶²

154. *See supra* notes 138–40 and accompanying text.

155. Cross & Nelson, *supra* note 139, at 1465.

156. *Id.*

157. *Id.* at 1468 (“There is empirical evidence that Congress pays attention to Supreme Court decisions and punishes undesirable decisions with budget cuts, and that the Justices respond with decisions more amenable to congressional policy goals.”).

158. *Id.*

159. *See supra* notes 154–58 and accompanying text.

160. The fact that the expected outcome is that the legislation would not get passed makes it so the mere act of proposing it does not make sense if we presume that Specter is a rational actor.

161. *See Eskridge, supra* note 110, at 644; text accompanying note 127.

162. Congress regularly passes laws with the expectation or the hope that the Court will clean them up or overturn them. These tactics are used either to “pass the buck” to the Court, because then Congress can blame the Court when a popular but unconstitutional law is overturned; or to speed up the legislation process by getting the Court to pare the legislation down to what is allowable. Dahlia Lithwick & Richard Schragger, *Pass the Buck*, SLATE (Oct. 7, 2006), <http://www.slate.com/id/2151048/>. Additionally, the Supreme Court sometimes invites Congress to reverse a Court decision. *See generally* Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POL. SCI., 1, 162 (1999).

Even though the Supreme Court’s preference in terms of being overturned may matter in its own decision making, its preference does not really matter in the analysis if Congress does not care about being overturned. This difference is because if Congress did

There remains the following plausible explanation: While Specter may legitimately wish to have Supreme Court proceedings televised, he probably knows that he is unlikely to accomplish his goal through normal legislation.¹⁶³ Getting cameras in the Supreme Court is simply not something worth Congress's time and risk because it does not offer any benefit to Congress. First, however inefficient government entities may be, it should be a reasonable assumption that Congress would rather not waste time on matters that offer its members no benefit. The legislative process is not a short or easy one,¹⁶⁴ so Congress members would rather spend their time on issues affecting their chances of re-election.¹⁶⁵ While Specter and others have offered evidence that the majority of Americans would like to see cameras in the Supreme Court,¹⁶⁶ the numbers do not necessarily signify actual public interest. The evidence mentioned is a survey conducted in 2006 that asked, "Do you think it is a good idea or a bad idea to allow television coverage of the U.S. (United States) Supreme Court?"¹⁶⁷ The result was that 70% of the 900 voters surveyed said it was a "good idea."¹⁶⁸ While this survey does say something about public opinion on the matter, it does not necessarily support the conclusion that voters are concerned about whether there are cameras in the Supreme Court. A voter answering affirmatively to a survey question over the phone is quite different from the same voter writing his or her state representative to show his or her support on the issue.¹⁶⁹ So while it may be a voter preference, voters probably do not cast votes based on the stance a candidate takes regarding cameras in the Supreme Court (or even give that factor any meaningful weight). Accordingly, basic political strategy would suggest it is not worth the time of any member of Congress to put more than minimal effort into such a bill.¹⁷⁰ Why Specter chose to do so was probably based on ulterior motives—possibly his disapproval of some of the Court's past decisions.¹⁷¹

not care about being overturned, it would just pass the bill and let the rest of the game play out however the Court wants it to. In other words, Congress would have a dominant strategy because they would have nothing to lose and everything to gain by passing the bill. While an outright aversion to being overturned is not true regarding *both* the Supreme Court and Congress, the discrepancy involving the Supreme Court will be ignored in this discussion because it does not truly affect the outcome as does the failure of the same assumption regarding Congress.

163. Even some of those who view the bill as a good idea and capable of withstanding constitutional scrutiny still think that imposing such a law on the Court is probably not the best strategy. *See, e.g.,* Maness, *supra* note 53, at 184.

164. Cross & Nelson, *supra* note 139, at 1452.

165. *Id.*

166. TONG, *supra* note 3, at 1.

167. *Id.*

168. *Id.*

169. This is not to say that there are no voters who are concerned with getting cameras in the Supreme Court, but other surveys have indicated what little interest voters actually have. For example, a recent PublicMind poll found that only 17% of respondents would watch Supreme Court hearings regularly and 33% would sometimes watch them. FARLEIGH DICKINSON UNIVERSITY'S PUBLICMIND POLL, *Public Says Televising Court Is Good for Democracy* (Mar. 9, 2010), <http://publicmind.fdu.edu/courtstv/>.

170. *See* Cross & Nelson, *supra* note 139, at 1452.

171. *See supra* notes 98–101 and accompanying text; *infra* notes 179–82 and

The second aspect making bills like Senate Bill 446 not worthwhile is the risk involved. Even given that Congress might not care about being overturned,¹⁷² the lack of a real benefit from a political standpoint makes this particular issue not worth upsetting the Court. While Specter thinks that the Court does not give proper deference to Congress,¹⁷³ there are instances where Congress has been able to stretch limits because the Supreme Court has allowed it to do so. One prime example is the Voting Rights Act.¹⁷⁴ Over several decades the Court has allowed Congress to exert power with little substantive reasoning through the Voting Rights Act.¹⁷⁵ There is considerable debate as to why the Court has chosen to do so,¹⁷⁶ but it may just be an example of the Court picking its battles with Congress. The point is that Congress should pick its battles with the Court because both branches depend on each other for some level of deference.¹⁷⁷ Putting cameras in the Supreme Court is not worth the risk of losing the Court's deference elsewhere because Congress gains little, or maybe even nothing, by enacting a law like Senate Bill 446.¹⁷⁸

But why Specter chose to repeatedly propose legislation like Senate Bill 446 remains unsettled. The arguments in the paragraph above make his actions seem irrational, but he appears to have ulterior motives that are directed more at punishing the Supreme Court than advancing his own career as a senator.¹⁷⁹ Not surprisingly then, it has been argued that Specter is simply not arguing his case for cameras correctly.¹⁸⁰ Tony Mauro¹⁸¹ argues that Specter is making personal attacks on the Court through these proposals as a punishment for prior Court decisions that may have impeded on Congress's authority.¹⁸² The combination of Mauro's observations and the conclusions drawn above—showing that Senate Bill 446 is ultimately not worthwhile for a senator—make it seem that while Specter repeatedly proposes the bill, he does not truly expect to get it passed. His lack of follow-through lends a better explanation than game theory as to why these bills

accompanying text.

172. *See supra* note 162.

173. *See* Mauro, *supra* note 98, at 10.

174. *See* Luis Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 760–61 (2009) (arguing that, with regard to an early challenge to the Voting Rights Act, “existing law offered no match for the Court’s willingness to offer Congress what amounted to a free pass”).

175. *See id.* at 760–63.

176. *Id.* at 763.

177. *See, e.g.*, Peabody, *supra* note 58, at 20–21.

178. *See supra* notes 165–69 and accompanying text.

179. *See* Mauro, *supra* note 98, at 11 (interpreting one of Specter’s floor speeches to insinuate that forcing cameras into the Court “will make it clear to the public the extent to which the Supreme Court is dising Congress”).

180. *Id.* at 8 (“[I]nstead 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.”).

181. “Supreme Court Correspondent, *Legal Times*, American Lawyer Media, and law.com; member of the steering committee of the Reporters Committee for Freedom of the Press.” Mauro, *supra* note 98, at 8 n.*.

182. *Id.* at 10.

have repeatedly been proposed but never given any real consideration by Congress. Essentially, since it is not worthwhile for Congress to pass bills like Senate Bill 446 because of the interbranch turmoil it could cause, Congress is better off just keeping the debate alive through congressional discussions and the resulting media coverage. Specter makes his opinion public merely to give the idea of cameras in the Supreme Court some face time in the media.¹⁸³ His strategy may have merit based on fairly recent research tracking public opinion and its effect on the Court.¹⁸⁴ While it is impossible to know for certain, Specter may have been proposing the bill merely to draw attention to his cause. His strategy might hold merit, since evidence shows that the Court is swayed, at least to a degree, by public opinion.¹⁸⁵ If the research holds true that the Supreme Court does take public opinion into consideration in its decision making, the Court may “change its mind” on its own and decide to allow televised coverage of proceedings without being seen as deferring to Congress and without Congress having to push the Court beyond the unwritten boundaries of separation of powers.

Regardless of the reasons why Specter has repeatedly proposed the bill and why Congress as a whole has repeatedly failed to enact it, it seems relatively clear that such a mandate on the Court is unlikely in today’s environment.¹⁸⁶ Still, it is possible to accomplish the ultimate goal eventually.¹⁸⁷ Multiple Justices have acknowledged the possibility of televising oral arguments at some point in their career.¹⁸⁸ So Specter’s plan, or at least what this Note argues was his plan, might work because, if he or a future member of Congress keeps the debate in the public and the Court’s mind, the Court may eventually act on its own. The Court made a similar decision after *Bush v. Gore* when the Court decided to promptly release the audio of the arguments to the public, presumably because of the public pressure involved in the high profile case.¹⁸⁹ Additionally, the environment may change to the point where such a law would survive the gauntlet of legislation so easily that the Court would have no basis to resist it.¹⁹⁰ Professor Peabody argues that if Congress could act quickly at a time when support for the Court was at a low point, then public opinion would be so heavily in Congress’s favor that the Court would

183. See, e.g., *supra* notes 1, 38.

184. See generally Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1018 (2004).

185. *Id.*

186. This presumption is made based on the game theory analysis in Part IV of this Note, the openness of the Court’s opposition to the legislation, and the fact that none of the proposed bills have made it past committee.

187. See generally *Estes v. Texas*, 381 U.S. 532, 595 (1965) (Harlan, J., concurring) (“[T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.”).

188. See Sundquist, *supra* note 142.

189. See Collins, *supra* note 35, at 14.

190. See *supra* Part IV.D.

essentially have no choice but to uphold the law, knowing that Congress would fight any attempt by the Court to deem it unconstitutional.¹⁹¹

CONCLUSION

While the constitutionality of a bill like Senate Bill 446 is questionable, the Constitution is not what is going to get cameras into, or keep them out of, the Supreme Court. First, the Supreme Court gets to decide what is and what is not constitutional;¹⁹² and its Justices have made clear that the likely outcome would be a negative one.¹⁹³ Second, a game theory analysis predicts that Congress should not pass the bill,¹⁹⁴ but it does not help explain why the bill gets proposed in the first place. Third, and the crux of this analysis, the political game that Congress must play puts this particular issue low on its members' radar because the issue is low on the public's radar.¹⁹⁵ Accordingly, members of Congress have no real incentive to act on the matter unless they—like Specter—aim more toward seeking revenge on a Court that has overstepped its boundaries than actually seeking future votes.¹⁹⁶ Therefore, if the public and Congress truly desire cameras in the Court, the best and most likely route to accomplish such a goal is to forego legislating on the topic and to push the Court to make the decision itself through the use of other measures, such as public opinion or political maneuvers. Since Specter is no longer in the Senate, his successors in Congress should continue to propose legislation if they have a legitimate reason for wanting cameras in the Court, but they should not exert any more effort than is needed to get the public's attention. Additionally, while Specter captured public attention, he also made clear his displeasure with the Court. In the future, proposals for similar legislation should emphasize the public's desire to have cameras in the Supreme Court, as well as any other beneficial effects the cameras might have on society. Emphasizing these aspects, and leaving personal vendettas out of the debate, should maximize the chance of cameras making it into

191. There have been two turbulent times when such legislation may have been successful. The first was in the midst of *Gore v. Bush*, when there was tremendous public interest in seeing the proceedings and the Court refused to change its stance on cameras. *See supra* text accompanying note 189. The second was after *Kelo v. City of New London*, when the public opinion of the Supreme Court was at a low—even lower than the public approval rate of Congress. Peabody, *supra* note 7, at 177. President Franklin Roosevelt's Court-packing plan, while debated as to its causation of the actual results, lends credence to the idea that mere threats and publicity can influence the Court's decisions. The Court-packing plan, while it did not actually become enacted, is generally accepted as the impetus behind Justice Roberts changing his voting pattern to establish a 5–4 majority to uphold Roosevelt's New Deal legislation. JESSE H. CHOPER, RICHARD H. FALLON, JR., YALE KAMISAR & STEVEN H. SHIFFRIN, *CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS* 47 (10th ed. 2006).

192. *See supra* notes 104–07 and accompanying text.

193. *See supra* notes 61, 66, 71 and accompanying text.

194. *See supra* Part IV.

195. *See supra* notes 165–69 and accompanying text.

196. Not only did Specter openly discuss how his bill would get back at the Court for its lack of respect for Congress, but his career was also nearing its end throughout the time he proposed the legislation. *See supra* notes 2, 179–82 and accompanying text.

the Court. Eventually, the Supreme Court may choose to open its own doors if it does not look like the Justices are giving in.