SUNSHINE IN THE COURTROOM ACT OF 2013

HEARING

BEFORE THE

SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY,
AND THE INTERNET

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

ON

H.R. 917

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SUNSHINE IN THE COURTROOM ACT OF 2013

WEDNESDAY, DECEMBER 3, 2014

HOUSE OF REPRESENTATIVES

SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY, AND THE INTERNET

COMMITTEE ON THE JUDICIARY

Washington, DC.

The Subcommittee met, pursuant to call, at 10:05 a.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino (Vice-Chairman of the Subcommittee) presiding.

Present: Representatives Coble, Marino, Goodlatte, Chabot, Poe, Farenthold, Collins, DeSantis, Conyers, Deutch, DelBene, Jeffries, Cicilline, Lofgren, and Jackson Lee.

Staff Present: (Majority) David Whitney, Counsel; David Lazar, Clerk; (Minority) Jason Everett, Counsel; Norberto Salinas, Counsel; and Susan Jensen, Counsel.

Mr. MARINO. The Subcommittee on Courts, Intellectual Property, and the Internet will come to order. Without objection, the Chair is authorized to declare recesses of the Subcommittee at any time. We welcome all of our guests today.

Unfortunately, Representative and Chairman Howard Coble and the Ranking Member, Jerry Nadler, will not be able to make the meeting—or the hearing in the beginning. They may be here later on. And at the request of them, I stated that I would explain why they are not here.

For the members of the public who are here today or may otherwise be observing our hearing, I am Representative Tom Marino from Pennsylvania, the Vice-Chairman of the Subcommittee on Courts, Intellectual Property, and the Internet. And I will be chairing today's legislative hearing. I will recognize myself and then Congressman Ted Deutch from Florida, who is sitting in for the Subcommittee Ranking Member, for initial opening statements. I will then recognize the chairman of the full Committee, Representative Bob Goodlatte, and the Ranking Member, Representative John Conyers, of the full Committee, to make their introductory remarks.

With that explanation, today's legislative hearing is on H.R. 917, the "Sunshine in the Courtroom Act of 2013."

The bill was introduced by our distinguished colleague, Representative Steve King in April of 2013 and includes three additional members of the Judiciary Committee, Representatives Chaf-

fetz, Lofgren, and Deutch, as original cosponsors. Subsequent to the introduction, two additional Members of the House signed on in support. Representatives King and Lofgren are present with us this morning, and they will soon be recognized to testify on the reasons they believe the legislation should be enacted.

In addition to Representatives King and Lofgren, we have two additional witnesses who will testify on a second panel. They are the Honorable Julie Robinson, United States Judge for the District of Kansas, who will appear on behalf of the Judicial Conference of the United States, and Mr. Mickey Osterreicher—did I pronounce that right? Thank you—the general counsel of the National Press Photographers Association, NPPA.

The principal authority contained in H.R. 917 is in section 2B, which provides, subject to certain exceptions, the presiding judge, which is defined in the bill, of each Federal appellate court and district or trial level court, is authorized to permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceedings over which that judge presides. Provisions in H.R. 917 would apply this authority to the Supreme Court of the United States, as well as United States Circuit Courts of Appeals and district courts. The purpose of H.R. 917, as with similar bills introduced in prior Congresses, is meant to address the longstanding practice of the Federal courts, which with few exceptions, prohibits the live electronic recording of media coverage or proceedings from inside the courtroom.

In general, proponents for the legislation believe existing prohibitions are a hindrance on transparency, education, and general public awareness of our law and judicial processes due to limited access to the actual proceedings. As one of our witnesses will testify today, the ability to disseminate information via electronic coverage of courts proceedings is a critical component in affording the public the modern equivalent of attending and observing proceedings.

In sum, the opponents think the potential harm outweighs the benefits. Chief among their concerns is the proposition that the legislation has the potential to impair substantially the fundamental right of citizens to a fair trial, while undermining court security and the safety of jurors, witnesses, and other trial participants, including judges. Beyond the general questions of whether cameras should be permitted in Federal court proceedings are a myriad of additional questions that include where and when they should be permitted, whether consent of the parties should be required, whether the courts should control the operation and dissemination of materials, and whether Congress would be required to provide additional funding and resources to the courts. Today's hearing presents an opportunity to discuss in detail the issues implicated by these fundamental questions.

With that, I conclude my opening remarks, and recognize our acting Ranking Member, Congressman Deutch from Florida, who is a cosponsor of the bill that is the subject of today's hearing.

[The bill, H.R. 917, follows:]

I

113TH CONGRESS
1ST SESSION

H. R. 917

To provide for media coverage of Federal court proceedings.

IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 28, 2013

Mr. KING of Iowa (for himself, Mr. CHAFFETZ, Ms. LOFGREN, and Mr. DEUTCH) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide for media coverage of Federal court proceedings.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in the Courtroom Act of 2013".

SEC. 2. FEDERAL APPELLATE AND DISTRICT COURTS.

(a) DEFINITIONS.—In this section:

(1) PRESIDING JUDGE.—The term "presiding judge" means the judge presiding over the court proceeding concerned. In proceedings in which more than 1 judge participates, the presiding judge shall

be the senior active judge so participating or, in the case of a circuit court of appeals, the senior active circuit judge so participating, except that—

(A) in en banc sittings of any United States circuit court of appeals, the presiding judge shall be the chief judge of the circuit whenever the chief judge participates; and

(B) in en banc sittings of the Supreme Court of the United States, the presiding judge shall be the Chief Justice whenever the Chief Justice participates.

(2) APPELLATE COURT OF THE UNITED STATES.—The term ''appellate court of the United States'' means any United States circuit court of appeals and the Supreme Court of the United States.

(b) AUTHORITY OF PRESIDING JUDGE TO ALLOW MEDIA COVERAGE OF COURT PROCEEDINGS.—

(1) AUTHORITY OF APPELLATE COURTS.—

(A) IN GENERAL.—Except as provided under subparagraph (B), the presiding judge of an appellate court of the United States may, at the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides.

(B) EXCEPTION.—The presiding judge shall not permit any action under subparagraph (A), if—

(i) in the case of a proceeding involving only the presiding judge, that judge determines the action would constitute a violation of the due process rights of any party; or

(ii) in the case of a proceeding involving the participation of more than 1 judge, a majority of the judges participating determine that the action would constitute a violation of the due process rights of any party.

(2) AUTHORITY OF DISTRICT COURTS.—

(A) IN GENERAL.—

(i) AUTHORITY.—Notwithstanding any other provision of law, except as provided under clause (iii), the presiding judge of a district court of the United States may, at the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides.

(ii) OBSCURING OF WITNESSES.—Except as provided under clause (iii)—

(I) upon the request of any witness (other than a party) in a trial proceeding, the court shall order the face and voice of the witness to be disguised or otherwise obscured in such manner as to render the witness unrecognizable for purposes of photographing, recording, broadcasting, or televising the witness described in clause (i); and

(II) the presiding judge in a trial proceeding shall inform each witness who is not a party that the witness has the right to request the image and voice of that witness to be obscured during the witness's testimony.

(iii) EXCEPTION.—The presiding judge shall not permit any action under this subparagraph if that judge determines the action would constitute a violation of the due process rights of any party.

(B) NO MEDIA COVERAGE OF JURORS.—The presiding judge shall not permit the

photographing, electronic recording, broadcasting, or televising of any juror in a trial proceeding, or of the jury selection process.

(3) INTERLOCUTORY APPEALS BARRED.—The decision of the presiding judge under this subsection of whether or not to permit, deny, or terminate the photographing, electronic recording, broadcasting, or televising of a court proceeding may not be challenged through an interlocutory appeal.

(4) GUIDELINES.—The Judicial Conference of the United States may promulgate guidelines with respect to the management and administration of photographing, recording, broadcasting, or televising described under paragraphs (1) and (2).

(5) SUNSET OF DISTRICT COURT AUTHORITY.—The authority under paragraph (2) shall terminate upon the expiration of the 3-year period beginning on the date of the enactment of this Act.

(6) PROCEDURES.—In the interests of justice and fairness, the presiding judge of the court in which media use is desired has discretion to promulgate rules and disciplinary measures for the courtroom use of any form of media or media equipment and the acquisition or distribution of any of the images or sounds obtained in the courtroom. The pre-

siding judge shall also have discretion to require written acknowledgment of the rules by anyone individually or on behalf of any entity before being allowed to acquire any images or sounds from the courtroom.

○

Mr. DEUTCH. Thank you, Mr. Chairman.

And thanks to our colleagues for their leadership on this issue. Judicial Conference policy and the Federal Rules of Criminal Procedure prohibit the televising of Supreme Court and Federal court proceedings involving some of the most critical legal issues facing our Nation. These policies impose severe limitations on the public's ability to observe court proceedings interpreting laws that can impact the daily lives of every American. These restrictive broadcasting policies shroud the Supreme Court and Federal court proceedings in secrecy and can raise questions in the minds of the public on the administration of justice. Chief Justice Burger wrote of the importance of public access to courtrooms in *Richmond Newspapers v. Virginia*, writing that, "A trial courtroom is also a public place where the people generally, and representatives of the media, have a right to be present and where their presence historically has been thought to enhance the integrity and quality of what takes place."

And while *Richmond Newspapers* addressed public access to criminal court proceedings, public access has been extended to civil trials as well. You can walk into any State or Federal courtroom in America and see rows of benches or seats to accommodate public audiences interested in watching the legal proceedings. The Supreme Court also has public seating available to accommodate the lucky few. Courtroom proceedings for audiences recognizes and accommodates our Nation's long tradition of public court watching. Public court watchers may not be as prevalent now as they were in the past, however, for cases on important legal issues, finding an available seat in the courtroom can be difficult, if not impossible. Indeed, most people now receive descriptions on important proceedings from press reports in various forms of the media outlets.

And don't get me wrong, I appreciate the work that SCOTUSblog does, but the Supreme Court and Federal courts need to recognize and adapt to the changes to permit the next generation of court watchers access to proceedings on important legal issues. Such changes should include permitting television broadcasting.

The Sunshine in the Courtroom Act would improve U.S. Supreme Court and the Federal Court transparency by increasing public accessibility to legal proceedings. Under the bill, the presiding judge, a majority of the judges participating on the panel, or the Chief Justice of the Supreme Court would have the discretion to permit the photography, the broadcasting, the televising of the proceedings.

The bill also includes numerous protections for the parties involved that would permit the judge or judges to close the court proceedings to being televised. As added protections, the bill would permit the judge or judges to consider if televising the proceedings would violate the due process rights of a party involved in the proceedings. And in addition, a witness in a court proceeding could request to have their face and voice disguised to protect their identity. Moreover, the bill would prevent media coverage of the jurors involved in a judicial proceeding and juror selection. The presiding judge of a court also would have the discretion to create rules and

disciplinary measures that could be enforced against members of the media in the interests of preserving justice and fairness.

The Supreme Court and our Federal courts hear and consider some of the most important issues facing our country. These proceedings, and the decisions issued from the proceedings by the Supreme Court and Federal courts, impact every facet of the lives of Americans. As just one of many examples, a three-judge panel of the D.C. Court of Appeals recently heard oral arguments on the constitutional privacy issues involving the NSA's mass collection of phone data. The U.S. Supreme Court and the Federal courts also have heard and hear cases involving the Affordable Care Act, our Nation's immigration laws, interpretation of the Second Amendment, housing and foreclosure issues, political and campaign cases, and many other pressing issues that face our country. And yet very few people have an opportunity, and most people never have the chance, to observe the proceedings in person.

Public access to critical cases in the Supreme Court or Federal courthouses is limited to the very few who can wait in line for hours and sometimes days or who can hire a person to stand in line for them.

The limited public access to the Supreme Court and Federal court proceedings is inconsistent with the modern world of readily accessible media. Indeed, video recording devices are permitted in State supreme courts. It is time that this U.S. Supreme Court and Federal court practice is changed.

I would like to thank again my colleagues, Congressman King and Congresswoman Lofgren, for their work and strong leadership on this critical issue. Broadcasting of the Supreme Court and Federal court proceedings will ensure that the public has full access to the oral arguments on important legal issues and will, most importantly, help to ensure that justice is carried out for all to see.

Thank you, and I yield back.

Mr. MARINO. Thank you, Congressman Deutch.

I would now like to recognize the full Committee Chairman, the distinguished gentleman from Virginia, Congressman Bob Goodlatte.

Mr. GOODLATTE. Thank you, Mr. Chairman.

Mr. Chairman, today's legislative hearing on H.R. 917, the "Sunshine in the Courtroom Act of 2013," is one that raises substantial and important questions that have been the focus of this Committee's attention before. Indeed, the questions surrounding whether and under what circumstances Federal court proceedings should be televised or otherwise made available via electronic medium is not novel but ones Congress and the Federal Judiciary have considered in various forms for many years. In fact, legislation to authorize broadcast or television coverage of Federal court proceedings has been introduced by Members, typically with bipartisan support, as is true in the present case, in every Congress dating back to at least the 105th.

Most recently, the Committee reported a version of this legislation in 2007, when a bill sponsored by our colleague Representative Steve Chabot and former Representative William Delahunt was reported favorably. H.R. 917, the "Sunshine in the Courtroom Act of 2013" and the 2007 bill are substantially similar. The bill's spon-

sor, Representative Steve King, succinctly stated in his written testimony his motivation and belief in introducing this bill that Congress has both the constitutional authority to act and the duty to use that authority to expand public access to our courts.

Proponents of the bill believe that the values of transparency, accountability, and education will only be enhanced by expanded public access to our Federal courts. However, the principal opponents of cameras in the courtroom legislation are the Supreme Court of the United States and the Judicial Conference of the United States, the latter of which functions as the policymaking body for the lower Federal courts. Each would be impacted by the enactment of H.R. 917, which authorizes the presiding judge of a court to allow cameras and recording devices to be operated in Federal court proceedings, subject to certain exceptions and qualifications.

I appreciate Judge Robinson's appearance today, and I believe it is vitally important that the Judicial Conference and the Supreme Court avail themselves of each opportunity to participate in the Committee's consideration of legislation that impacts our justice system. This is particularly true in matters that relate to the administration and operation of the Federal Judiciary.

Perhaps spurred by this Committee's action in 2007, the Judicial Conference authorized a 3-year pilot project in 2010 to evaluate the effects of cameras being used in district courts and related matters. Fourteen courts volunteered for the project, which is ongoing, limited to civil proceedings, and scheduled to conclude in July 2015. Following the pilot's conclusion, the Federal Judicial Center will prepare a report and provide it to the Judicial Conference's Committee on Court Administration and Case Management. It is then expected that CACM will provide a report to the Judicial Conference regarding the possible future use of cameras in district courts. Notwithstanding the ongoing nature of the pilot, the conference currently maintains the view that this legislation will have the potential to impair substantially the fundamental right of citizens to a fair trial, while undermining court security and the safety of jurors, witnesses, and other trial participants, including judges. It is clear the views of proponents and opponents are strongly and sincerely held and that a discussion of the relative merits will benefit our consideration. I particularly want to thank Mr. King and Mr. Chabot for their work on the Republican side on this issue, and Congresswoman Lofgren and Congressman Deutch for their efforts on the Democratic side. This is truly a bipartisan effort, and deserves careful consideration by the Committee.

With that, I yield back, Mr. Chairman.

Mr. MARINO. Thank you, Mr. Chairman.

I would now like to recognize the full Committee Ranking Member, the distinguished gentleman from Michigan, Congressman Conyers.

Mr. CONYERS. Thank you very much, Mr. Chairman.

I wanted to begin by mentioning that our colleague from New York, Mr. Nadler, wanted to be here today, but he is at the Supreme Court, where there is oral argument going on in a very important case. And I wanted his absence to be noted, and that he is very concerned about the proceedings that are taking place here in the Judiciary Committee.

The Sunshine in the Courtroom Act of course would authorize photography, electronic recording, broadcasting, or televising of any court proceeding held in the Federal district court, and in the Circuit Court of Appeals, and even the Supreme Court of the United States, subject to some exceptions. As many of you may recall, the Committee on the Judiciary previously considered legislation substantially identical to H.R. 917. And although I voted in favor of this prior legislation, I still have, nevertheless, several concerns. Most importantly, I want the proponents of H.R. 917 to address the Judicial Conference's observation that this measure could potentially impair the fundamental right of a citizen to a fair and impartial trial.

For example, Justice Elena Kagan earlier this year said that televised coverage of Federal court proceedings would or might encourage participants to play to the camera. In fact, the Supreme Court in *Estes v. Texas*, a case involving a State criminal trial that was televised, observed that the chief function of our judicial machinery is to ascertain the truth. The use of television, however, cannot be said to contribute materially to this objective. Rather, its use amounts to the injection of an irrelevant factor into the court proceedings.

In addition, experience teaches that there are numerous situations in which it might cause actual unfairness, some so subtle as to defy detection by the accused or controlled by the judge. Accordingly, I want the proponents of H.R. 917 to explain how the bill does not undermine a citizen's right to due process and a fair trial.

Secondly, we should ensure that the bill adequately protects the privacy rights of participants in Federal judicial proceedings. Clearly, we must be cognizant of the fact that electronic media coverage presents the prospect of public disclosure of personal information that may have a material effect on the individual's willingness to testify or place an individual at risk of being a target for retribution or intimidation. I realize the bill authorizes a witness' image and voice to be obscured under certain circumstances. But is this sufficient to protect the witness' privacy?

And finally, we must be mindful of the need to ensure the safety and security of our judges, our law enforcement officers, and other participants in the judicial process. Some believe that cameras in the courtroom could heighten the level of, and potential threats to, Federal judges, particularly those proceedings involving highly controversial matters. The Judicial Conference is currently in the midst of a pilot program expected to conclude next July, that, among other things, is examining the impact of electronic media on the safety and security of the courtroom. Hopefully, that test program will provide some guidance on this issue so that court security is not undermined. That concludes my statement.

I yield back the balance of my time.

Mr. MARINO. Thank you, Congressman Conyers.

Without objection, the Members' opening statements will be made part of the record.

We have two very distinguished panels of witnesses today. Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within the timing,

there is a light on your table. When the light switches from green to yellow, you have 1 minute to conclude your testimony. When the light turns red, it signals the witness' 5 minutes have expired.

Our first witness today is the Honorable Steve King, the Member of Congress who represents the Fourth District of Iowa. Representative King serves as Chairman of the Department Operations, Oversight, and Nutrition Subcommittee on the House Agricultural Committee. He also serves on the Small Business Committee, and here on the Judiciary Committee. Prior to being elected to Congress in 2002, Representative King served in the Iowa State Senate for 6 years as Chairman of the State Government Committee and Vice-Chairman of the Oversight Budget Subcommittee. Representative King studied math and science at Northwest Missouri State University.

Welcome, Mr. King.

Our second witness is the Honorable Zoe Lofgren, the Member of Congress who represents the 19th District of California. She serves as Ranking Member on the Oversight Subcommittee for the House Administration Committee, and is a member of the Science, Space, and Technology Committee. She also serves as Ranking Member of the Immigration and Policy and Enforcement Subcommittee and is a member of this Subcommittee, which has oversight over Federal courts, intellectual property, and the Internet on the Judiciary Committee. Prior to being elected to Congress in 1995, Representative Lofgren served on the Santa Clara County Board of Supervisors for 14 years. She earned her J.D. From the University of Santa Clara School of Law, and her B.A. From Stanford University.

Welcome.

We will start with you, Representative King.

TESTIMONY OF THE HONORABLE STEVE KING, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF IOWA

Mr. KING. Thank you, Mr. Chairman. Mr. Chairman, I thank you and our Ranking Member, both the full and the Subcommittee, for the opportunity to bring this bill, H.R. 917, the "Sunshine in the Courtroom Act of 2013," before this hearing today. I would ask consent to introduce my written testimony into the record and then to testify orally in addition.

Mr. MARINO. Without objection.

Mr. KING. Thank you, Mr. Chairman. To work our way down through this bill, and I also want to thank my colleague, Ms. Lofgren, and a good number of others for their bipartisan cooperation on this bill that is before us. H.R. 917, the "Sunshine in the Courtroom Act of 2013," expands public access to the courts. And when we think about what public access means, it is a different definition for us in this modern era in the 21st Century than it was back when the Constitution was ratified, in that we had small courtrooms, a few people traveled, there wasn't much access just because of logistical difficulties. Today, we turn on the Super Bowl, and millions of people watch it on television. That is what we consider access. And yet something like *Bush v. Gore* can be decided in the United States Supreme Court with a relative handful of people having only exclusive access to get in to hear a case like that. It also was true with Obamacare, the Affordable Care Act. It was

a significant maneuver for even a member of this Judiciary Committee, meaning myself, to be able to get into the courtroom to hear the oral arguments before the court.

I think that the court needs to have the opportunity to make the decision to change that. We don't direct the courts to open up the courtroom to the cameras, but we provide the regulations that allow the courts to do so under their judgment and their discretion. We protect the jurors from any kind of exposure. They cannot be exposed to the media coverage along that. And, again, we don't force the judges to open up their courtrooms. We just provide them the opportunity to do so.

And there may be an argument about where this jurisdiction to provide this statutory authority to open up the courtrooms to cameras comes from. And I would point out that in Article I, Section 8, and in Article III, Section 1, the Congress establishes—it is established that the Congress establishes the courts. And in Article III, Section 2, it is clear that we write the regulations at least for the Supreme Court, and I might expand that definition in another venue. But we need to be expanding the public access and open up the machinery of government. When I hear—I remember during the Bush administration, I heard comments of the "appointed President." Well, there is a bit of I will say suspicion about what went on in a courtroom that very few people had an opportunity to witness. And most of us, if we weren't in the courtroom, then we had to rely on the pundits' analysis or perhaps the legal analysis that informed the pundits' analysis of what the decision really was in the courtroom. It isn't an eye to eye objective view for hardly anybody in today's world, given the access we have at all other public functions that I can think of. So we expand public access and open up the machinery of government. I also would add that the Sixth Amendment demands that we have a right to a speedy and a public trial. And that takes us back to that definition of, what is public? So the Founders knew that opening the government to public served a dual purpose of holding our leaders accountable, and our appointed and elected officials and confirmed officials accountable, and it had a form of education as well.

I would just take you back to an experience that frames this for me. And this was in a State district court. But I had a case, and the name of it was *King v. Gustafson*. And it was an issue where I was collecting on a bill. And we ended up before the district court with a judge, who, after the court hearing—and I thought we had made our case absolutely irrefutably. We caught our opposition in contradictory statements, which I consider to be lies. And yet the judge had 90 days to write the decision. This is the irony of life. On the 89th day, the judge had a brain aneurysm. He did survive that. But out of it came what they said was a 30-day blank spot in his memory. Oh, how nice it would have been if he could have gone back and reviewed the videotape of the hearing before the court. Otherwise, we ended up going to the State Supreme Court, and it was a saga that lasted for 8 years. We could have cut that by about 2 or 3 years if the judge, who I think had his faculties about him, had been able to review the tape rather than review his notes. That is just my personal anecdote on this. But I also think of the benefits that come from an educational standpoint. We are

in a position where you look at our law schools. And I understand Justice Scalia will write his dissenting opinions so that they are interesting and law students will read them and try to learn what goes on in the courtroom. But to be able to study our courts, to be able to go back and review *Bush v. Gore*, or the ACA litigation that took place, or any of the huge landmark cases that take place before our Supreme Courts or those that are litigated before our circuit courts, would be a tremendous boon to all of our law schools, all of our students, and it would improve our educational process in this country.

Thank you for your attention, and I yield back the balance of my time.

[The prepared statement of Mr. King follows:]

Testimony of the Honorable Steve King
Subcommittee on Courts, Intellectual Property, and Internet
Hearing on H.R. 917, the Sunshine in the Courtroom Act of 2013
Wednesday, November 3, 2014

Chairman Coble, Ranking Member Nadler, I would like to thank you for having a hearing on this very important issue. I proposed H.R. 917, the Sunshine in the Courtroom Act, because I believe Congress has both the Constitutional authority to act and the duty to use that authority to expand public access to our courts.

It is true that court proceedings today are open to the public. But this is only in the narrowest of senses. District court proceedings are open if you have time off of work when most proceedings are being held. In the case of appellate courts, they are held often in central locations in large districts. Attendance at the Supreme Court requires travel to Washington D.C. and the time and patience to stand in line for hours and even then you might not be able to actually witness an oral argument. Today, we can do much better than that to expand access and open up our government to the people who pay for and live under it.

Some will say many courts already offer audio recordings of oral arguments. The Supreme Court releases audio recordings of most arguments within days and all courts produce their opinions for public review. However, anyone that reads opinions know they are not the most accessible even to the trained reader. Further, they do not shed light on the procedure of the courts which is as crucial for the public as the outcomes. We can do so much more to inform the public of how our great judicial branch operates.

My bill would allow presiding judges in appellate courts, including the Supreme Court, to permit electronic recording and broadcasting to the public of any court proceeding over which the judge presides. If the presiding judge and a majority of the judges participating in the proceeding determine that recording and broadcasting to the public would constitute a violation of the due process rights of any party, then the recording is not allowed.

District court judges would be allowed to permit recordings and broadcast to the public so long as they order the obscuring of the voice and face of any witness upon the request of that witness. Judges are also not allowed to allow coverage of jurors. Also, the judge, like his appellate judge colleagues, is not allowed to permit broadcasting and recording to the public if doing so would constitute a violation of due process rights of any party.

From the founding of our nation we have opened up the machinery of government to the public. The people pay for the operations of government and their lives are directly affected by the decisions made by their leaders. If you take a tour of the Capitol you see public gallery space available in the old House and Senate. Likewise, the courts have also always been open to the public. The Sixth Amendment explicitly provides defendants in criminal prosecutions the right to a public trial. It is a great aspect of our nation that the government is accountable to the people not only at election time, but in its daily operation.

Accountability provides transparency which in turn decreases the chance of improper behavior while at the same time expanding the public record. Court reporters are human and can make mistakes, but cameras can create an alternate, permanent record for reviewing courts.

Also, expanded public access provides a valuable educational tool to the American people. Simply reading about procedure in the courts or Congress often does not capture the imagination or paint a vivid picture of the life of our democracy. It is easier to understand the rationale behind why certain procedures are in place when you see them work before your eyes. And I'm confident that more knowledge of our system will engender more pride and respect for the institutions that make up the foundation of this country.

Some have raised concerns about the constitutionality of the Congress inserting itself in the affairs of a separate branch of government. The first point I would make about this is that my bill would simply allow the judges to use their discretion to decide if they would like to film proceedings. This is hardly an example of the Congress dictating to the court what their procedures must be.

Regardless, the Constitution makes clear that Congress does have the authority necessary to pass my bill. For example, Article I Section 8 provides the power of Congress to "constitute tribunals inferior to the Supreme Court." If Congress can create the courts, then they surely have the corresponding power to expand public access to those institutions. Article III Section I recognizes the power of the Congress to "ordain and establish" inferior courts as well. Furthermore, Article III Section 2 provides the power of the Congress to make regulations for the Supreme Court. The Constitution thus provides a clear textual basis for the Congress to be involved in the procedures of the courts.

Another concern raised is that recording and broadcasting proceedings to the public will do damage to the work of the court. The argument is that cameras would make lawyers and judges target arguments to the public as opposed to focusing on the legal arguments. I think we would all share those concerns. Certainly, an attorney or judge would be doing a disservice if they played to the cameras as opposed to doing their jobs. However, we have codes of conduct for attorneys and judges to govern any possible misconduct. Overall, I believe we have responsible officers of the court that could function effectively in front of a camera.

Furthermore, I reject the idea that cameras will do any harm. This very hearing is before cameras. We are here to discuss the issue in a reasonable manner. The existence of cameras broadcasting us does not diminish the noble goal of this subcommittee or dampen the conduct of its Members. Instead, the cameras give millions of Americans the chance to see how the committee hearing process works who otherwise might never get to make the trip to Washington D.C. to see a hearing. It also provides them insight into this crucial issue that they may never otherwise get. It seems simple to me to say that providing more information to the American people about the institutions that govern them is not going to cause harm. Instead, it makes for a more open and transparent government along with a more educated public.

I would like to once again thank this subcommittee for taking the time to inform the public on such an important topic. There should be a robust debate to weigh the pros and cons presented by my legislation. No doubt the Members and distinguished witnesses are fully prepared to engage in that debate. Thank you for allowing me the privilege to testify and good luck to my fellow witnesses and Members today.

Mr. MARINO. Thank you, Congressman King.
The Chair now recognizes Congresswoman Lofgren.

TESTIMONY OF THE HONORABLE ZOE LOFGREN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

Ms. LOFGREN. Thank you, Mr. Chairman and Ranking Member, for holding this hearing. I think the legislation is important, and I am happy to be a cosponsor of the Sunshine in the Courtroom Act, not only in this Congress but previous versions in previous Congresses. Over 100 years ago, Louis Brandeis wrote that "Sunlight is said to be the best of disinfectants." These now famous words reflect a belief that openness and transparency are key components of a functioning democracy. This is a Nation founded on the concept of government accountability. And passage of this bill would ensure that our judicial system is better able to uphold that ideal. The Sunshine in the Courtroom Act would allow judges to open their courtrooms to cameras, granting the public greater insight into the judicial process and building confidence in our legal system. As the Supreme Court found in 1948 in In re Oliver, the knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power. Now, as many of you know, the pilot projects have been going on around the country. And one of the pilots is in the Ninth Circuit and in the Northern District of California, which includes my congressional district. The pilot has been extended for a year. But in talking to the judges in the Northern District, there is wide acceptance of the pilot. Most seem to see no reason why modern technology should not be part of the judicial system. Some of the feedback I have gotten from judges is that although our bill allows the establishing of rules by the Judicial Conference, judges feel very strongly that the—it is essential that the identity of jurors continue to remain obscured. They are volunteers, and they should not be subject to being part of the televised proceedings. Another interesting issue raised to me by judges was that, under the pilot, all the parties need to agree, and consequently, there haven't been very many actual televised proceedings. And some of the judges wonder whether we shouldn't revisit that and examine that element of it. This is a big deal. I took seriously the comments made by the Ranking Member, Mr. Conyers. In terms of playing to the cameras, one of the things that judges told me is that if there is a high-profile case, that happens without cameras being in the courtroom.

And, in terms of playing to the camera, you know, one judge said, pretty soon you forget the cameras are even there. And lawyers are focused on winning their case. Therefore, they have got to appeal to the jury or to the judge, not to the camera. And it was not a concern that that was really a disruptive measure.

Still, it is something that we all should discuss. In terms of personal disclosure of information, that objection to me I find difficult to understand because our courtrooms are open. And if you testify to a matter it is a matter of public record. It is not private. So I look forward to hearing further from the Judicial Conference on that point.

Again, I want to thank the Chair and Ranking Member for holding this hearing. I think it is an important issue. And if we can become familiar with the issues that the courts have raised and address them successfully, I think the country will be a better place. One of the judges I talked to in the Northern District said, you know, the real thing that all of us want to see is the Supreme Court being televised because of the important role that they play. And I am hopeful that this hearing and other discussions will ultimately allow that to happen. It would be a tremendous service to our democracy.

And with that, I yield back the balance of my time.

[The prepared statement of Ms. Lofgren follows:]

Prepared Statement of the Honorable Zoe Lofgren, a Representative in Congress from the State of California, and Member, Subcommittee on Courts, Intellectual Property, and the Internet

I want to thank the Chair and the Ranking Member for holding a hearing on this important legislation. I am an original cosponsor of the Sunshine in the Courtroom Act, and have been pleased to cosponsor previous versions of this bill in past Congresses.

Over 100 years ago, Louis Brandeis wrote that "[s]unlight is said to be the best of disinfectants." These now-famous words reflect the belief that openness and transparency are key components of a functioning democracy. This is a nation founded on the concept of government accountability, and passage of this bill would ensure that our judicial system is aiming to uphold these ideals.

The Sunshine in the Courtroom Act would allow judges to open their courtrooms to cameras, granting the public greater insight into the judicial process and building confidence in our legal system. As the Supreme Court found in 1948 (*In re Oliver*), "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."

As I'm sure many are aware, in addition to the Ninth Circuit's use of video streaming, there are currently fourteen federal trial courts participating in a pilot program to evaluate the effect of cameras on courtrooms. The Northern District of California, which includes my Congressional district, is one of the participating courts as selected by the Judicial Conference. The pilot, initially slated to end this summer, has been extended for an additional year. When it concludes next July, the federal judiciary will be facing questions about whether or not the use of cameras in courtrooms should be expanded. Trials have always been considered public, and I see no reason why, with modern technology, the walls of the courtroom should be the limits of this privilege.

This bill largely leaves the establishment of rules governing the use of cameras to the Judicial Conference, but I did want to raise a couple of points that I think are worth considering after hearing from some of the local judges involved in the pilot program. First, with regard to the pilot program rules, not only do individual judges need to approve the recording of proceedings, but all parties must consent. As a result, very few trials have been recorded in Northern California. Whether or not to require or allow all parties to consent may be worth examining further as we consider expanding the usage of cameras on a national level. I would also note that both the pilot program and the bill prohibit the media coverage of jurors. This is important, and some of our local judges have emphasized that this continue to be stressed. Judges that I've spoken with do support the use of cameras in the courtroom both as an educational tool and as a means for increasing transparency. I hope that the experiences and lessons learned from this pilot program will be used to enact meaningful reforms, including expanded access to our judicial system.

Again, I want to thank the Chair and the Ranking Member for organizing this hearing today and for allowing me to testify in support of this legislation. I look forward to hearing from my colleagues as well as the other witnesses, and I hope that we can find a path forward to bring our judiciary into the 21st century, using modern technology to increase access, accountability, and understanding.

Mr. MARINO. Thank you, Congresswoman Lofgren.

Thank both of you for being here today. I appreciate it.

We will now seat our second panel. And before you get comfortable, I am going to ask you to stand anyhow to be sworn in. I will begin by swearing in our second panel of witnesses. Before introducing them, if you would please raise your right hand.

Do you swear that the testimony that you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record reflect that the witnesses answered in the affirmative. And you may be seated. Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. To help you stay within that time, there is a timing light on your table. When the light switches from green to yellow, you will have 1 minute to conclude your testimony. When the light turns red, it signals that the witness' 5 minutes have expired.

Our first witness of the second panel is the Honorable Julie A. Robinson, United States District Judge for the District of Kansas. Judge Robinson was appointed in 2001 by President George W. Bush. She is here today on behalf of the Judicial Conference of the United States. Prior to her position on the Federal bench in Kansas City, she served as a judge on the U.S. Bankruptcy Court for the District of Kansas for 8 years, and assistant United States attorney for 10 years—near and dear to my heart—and a law clerk for U.S. Bankruptcy Judge Benjamin Franklin for 2 years. Judge Robinson earned both her J.D. and B.A. from the University of Kansas.

Welcome, Judge.

Our second witness on the second panel is Mr. Mickey Osterreicher. Am I still doing well there, sir?

Mr. OSTERREICHER. Yes.

Mr. MARINO. General counsel of the National Press Photographers Association. In his position, Mr. Osterreicher has been actively involved on issues, such as cameras in the courtroom, the Federal shield proposal, and media access. In addition, he is an award-winning photojournalist, with almost 40 years of experience in print and broadcast. He also served as an adjunct professor, teaching courses in media and the law at the University of Buffalo Law School.

Mr. Osterreicher earned his J.D. from the University of Buffalo Law School, and his B.S. from State University of New York at Buffalo.

Welcome to both of you. And, Judge, we will start with your opening statement.

Judge ROBINSON. Thank you, Chairman Marino.

Mr. MARINO. Would you please hit the button there so we can hear you a little better?

TESTIMONY OF THE HONORABLE JULIE A. ROBINSON, JUDGE, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Judge ROBINSON. Thank you, Chairman Marino and Ranking Member Deutch, and Members of the Subcommittee as well as the full Committee. I am Julie Robinson. I am a United States District

Judge for the District of Kansas. And I appreciate Chairman Goodlatte's invitation to appear today to discuss the views of the Judicial Conference of the United States regarding the issue of cameras in the courtroom and, specifically, H.R. 917, the "Sunshine in the Courtroom Act of 2013." With your consent, I will submit a written statement into the record, and I will briefly summarize that statement this morning.

I previously served as the chair of the Court Administration and Case Management Committee of the Judicial Conference of the United States. And I am familiar with the conference position regarding cameras in the courtroom. Before I discuss the concerns of the Federal judiciary, I must emphasize, as did Judge Tunheim in his testimony before the House Judiciary Committee in September 2007, that the Judicial Conference does not speak for the Supreme Court. Therefore, I am unable to address the provisions of the bill that would authorize the broadcasting of Supreme Court proceedings. The legislation before us is designated as a bill to provide for the media coverage of Federal court proceedings. For reasons that are explained in more detail in my written statement, the Judicial Conference opposes this legislation, primarily because it allows the use of cameras in Federal trial courts, in the district courts. If enacted, this legislation will have the potential to impair substantially the fundamental right of citizens to a fair trial, while undermining court security and the safety of jurors, witnesses, and other trial participants, including judges.

I would like to emphasize four points this morning regarding our concerns at the trial level. First, the intimidating effect of cameras on litigants, witnesses, and jurors can have a profoundly negative impact on the trial process. Moreover, televising the trial makes certain court orders, for example an order sequestering witnesses, more difficult to enforce, and could lead to tainted testimony from witnesses. Secondly, permitting camera coverage could become a potent negotiating tactic in pretrial settlement negotiations. Third, allowing cameras in Federal courts would create security concerns, and undermine the safety of jurors, witnesses, and other trial participants, and heighten the level and potential of threats to judges. And fourth, cameras can create privacy concerns for countless numbers of persons, many of whom are not even parties to the case, but about whom very personal information may be revealed.

With regard to the issue of cameras in the Federal Courts of Appeal, the conference opposes the bill's provisions permitting each appellate court panel to decide whether to allow cameras rather than allowing that decision to be made by each Court of Appeals as a whole, which is the existing conference policy. The conference did not take these positions because it is against increased publicity for the Federal courts. In many aspects, the Federal judiciary is at the forefront of electronic innovation and transparency. Nearly every filing, every trial, every appellate argument, decision, and opinion is available and open to the public. Over the past decade, the Judicial Conference has dramatically expanded that openness by making its entire filing system electronically available to the public through the Internet. Furthermore, in September of 2010 the Judicial Conference of the United States authorized a pilot project to evaluate the effect of cameras in district court court-

rooms, also the effect of video recordings of these proceedings, and the publication of such video recordings. The results of the pilot program, which ends in July 2015, will help the judiciary review and evaluate our concerns with the use of cameras in the district courts.

In conclusion, Mr. Chairman, this is not a debate about whether judges have personal concerns regarding camera coverage. It is not a debate about whether the Federal courts are afraid of public scrutiny. It is not a debate about increasing the educational opportunities for the public to learn about the Federal courts or the litigation process. In fact, open hearings are a hallmark of the Federal judiciary.

Rather, this is a question about how your constituents, individual Americans, whether they are plaintiffs, defendants, witnesses, jurors, or other participants in court proceedings, are treated by the Federal judicial process. It is the fundamental duty of the Federal judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. And for the reasons discussed in my statement, the Judicial Conference believes that the use of cameras in the trial courtroom would seriously jeopardize that right, and, therefore, we oppose this legislation. I would ask that my written statement be offered and entered into the record. And I am happy to answer any questions you may have. And thank you for the opportunity.

Mr. MARINO. Thank you, Judge. Your full statement will be entered into the record.

[The prepared statement of Judge Robinson follows:]

STATEMENT OF
THE HONORABLE JULIE A. ROBINSON

JUDGE, UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF KANSAS

ON BEHALF OF
THE JUDICIAL CONFERENCE
OF THE UNITED STATES

BEFORE THE SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY AND THE INTERNET
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON CAMERAS IN THE COURTROOM:
THE "SUNSHINE IN THE COURTROOM ACT OF 2013," H.R. 917

December 3, 2014

Administrative Office of the U.S. Courts, Office of Legislative Affairs
Thurgood Marshall Federal Judiciary Building, Washington, DC 20544, 202-502-1700

STATEMENT OF THE HONORABLE JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF KANSAS
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

December 3, 2014

I. Introduction

Chairman Coble, Ranking Member Nadler, and members of the Subcommittee: I am Julie A. Robinson, United States District Judge for the District of Kansas. I appreciate your invitation to appear today to discuss the views of the Judicial Conference of the United States regarding the issue of cameras in the courtroom, specifically H.R. 917, the Sunshine in the Courtroom Act. I hope the testimony provided here is useful to you.

Within the Judicial Conference, the Committee on Court Administration and Case Management (CACM) has jurisdiction over this issue. The responsibility of the CACM Committee is to study and make recommendations on matters affecting case management; the operation of appellate, district and bankruptcy clerks' offices; jury administration; and other court operational matters. While I am no longer a member of the Committee, I previously served as chair and am familiar with the Conference position regarding cameras in the courtroom.

The legislation before you, H.R. 917, the Sunshine in the Courtroom Act, is designated as a bill "to provide for media coverage of Federal Court proceedings." For reasons I will explain in more detail, the Judicial Conference opposes this legislation,

primarily because it allows the use of cameras in federal trial courts. If enacted, this legislation will have the potential to impair substantially the fundamental right of citizens to a fair trial, while undermining court security and the safety of jurors, witnesses, and other trial participants, including judges.

Before I discuss the concerns of the Federal Judiciary, I must emphasize, as did Judge Tunheim in his testimony before the House Judiciary Committee in September 2007, that the Judicial Conference does not speak for the Supreme Court. Therefore, I am unable to address the provisions of the bill that would authorize the broadcasting of Supreme Court proceedings. I would also note that Judge Anthony Scirica, when testifying before a Senate panel on the topic of "Televising the Supreme Court," emphasized that he did not speak for the Court.

With regard to the issue of cameras in the federal courts of appeals, the Conference opposes the bill's provisions allowing the use of cameras at the discretion of every three-judge panel, rather than allowing that decision to be made by each court of appeals as a whole. The Conference, in 1996, "agreed to authorize each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statues, national and local rules, and such guidelines as the Judicial Conference may adopt."

Two of the 13 appellate courts – the Second and Ninth Circuits – have determined to allow camera coverage in appellate proceedings. This circuit-wide approach ensures litigants within a circuit are treated in a consistent and deliberate manner. Leaving the

decision up to the presiding judge of each panel, as the bill proposes, would foster a piecemeal and *ad-hoc* resolution of the issue among the scores of panels convened within each court of appeals.

Let me stress that the Judiciary is not opposed to the stated goals of this and similar legislative proposals. The Federal Judiciary has a long history of acting to foster transparency and accountability of federal courts and to educate the public regarding the judicial process. With certain very limited exceptions, each step of the federal judicial process is open to the public. By conducting their judicial work in public view, judges enhance public confidence in the courts, and they allow citizens to learn first-hand how our judicial system works.

An individual citizen who wishes to observe a court in session may go to the federal courthouse, check the court calendar, and watch a proceeding. Anyone may review the pleadings and other papers in a case by going to the clerk of court's office and asking for the appropriate case file. Court dockets and some case files are available on the Internet. In addition, nearly every federal court maintains a website with information about court rules and procedures. Appellate opinions and most district court opinions are reported and are made available to the public. And, as I will discuss in more detail, the federal courts are presently conducting a carefully structured pilot program to evaluate the effect of cameras in federal district courtrooms. Video recordings of civil proceedings from this pilot project are available to the public on the uscourts.gov website.

Even as the Federal Judiciary takes steps to broaden public awareness and access, there are competing interests to consider. Federal judges must preserve each citizen's right to a fair and impartial trial. The introduction of cameras into the courtroom can affect behavior in court proceedings. The issue of cameras can even affect whether a case goes to trial. In addition to affecting the fairness of a trial, the presence of cameras in a trial courtroom also increases security and safety issues, especially in criminal cases. The Judicial Conference believes that these and other negative effects of cameras in trial court proceedings far outweigh any potential benefit.

The Judiciary strongly endorses educational outreach but believes it could better be achieved through increased and targeted community outreach programs. The Judicial Conference also believes, however, that this increased public education should not interfere with the Judiciary's primary mission to administer fair and impartial justice to individual litigants in individual cases.

II. Background

The Federal Judiciary has reviewed the issue of whether cameras should be permitted in the federal courts for more than six decades, both in case law and through Judicial Conference consideration. The Judicial Conference, in its role as the policy-making body for the Federal Judiciary, has consistently expressed the view that camera coverage can do irreparable harm to a citizen's right to a fair and impartial trial. The Conference believes that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process. In both civil and criminal

cases, cameras can intimidate defendants who, regardless of the merits of the case, might prefer to settle or plead guilty rather than risk damaging accusations in a televised trial. Cameras can also create security and privacy concerns for many individuals, many of whom are not even parties to the case, but about whom very personal information may be revealed at trial.

These concerns are far from hypothetical. Since the infancy of motion pictures, cameras have had the potential to create a spectacle around trial court proceedings. Examples include the media frenzies that surrounded the 1935 Lindbergh baby kidnapping trial; the murder trial in 1954 of Dr. Sam Sheppard; the Menendez brothers, O.J. Simpson, and Scott Peterson trials; the hearings relating to the death of Anna Nicole Smith; and more recently proceedings in the cases of Casey Anthony, George Zimmerman, and Jodi Arias. We have avoided such incidences in the federal courts due to the long-standing restrictions on cameras in the trial courts, which H.R. 917 now proposes to remove.

I want to emphasize that our opposition to this legislation is not based on a knee-jerk reaction against new technologies. In fact, the federal courts have shown strong leadership in the continuing effort to modernize the litigation process. This has been particularly true of the Judiciary's willingness to embrace new technologies, such as electronic case filing and access to court files, videoconferencing, and electronic evidence presentation systems.

Indeed, the Judiciary provides the public with remote electronic access to dockets, case reports, and over 500 million documents filed in federal courts. Every courthouse has public

access terminals in the clerk's office to provide free access to these court records. Approximately 50 district courts and 80 bankruptcy courts are using a common, free internet tool, RSS, to "push" notification of docket activity to users who subscribe to their RSS feeds; much like a Congressional committee might notify its RSS subscribers of press releases, hearings, or markups.

In March 2010, the Judicial Conference approved allowing judges, who use digital audio recording as the official means of taking the record, to provide public access to digital audio recordings of court proceedings via its electronic case management system. The digital audio initiative, also known as CourtSpeak, continues to be successful, both in terms of public and court interest. Twenty-seven bankruptcy courts and two district courts have implemented digital audio recording, and several others have begun implementation.

In September 2012, the Judicial Conference approved national implementation of a program to provide public access to court opinions via the Government Printing Office's Federal Digital System (FDsys) and encouraged all courts, at the discretion of the chief judge, to participate in the program. Ninety-five courts post opinions to FDsys, which now has over one million individual court opinions available. Federal court opinions are one of the most utilized collections on FDsys, which includes the Federal Register and Congressional bills and reports. This has proved to be extremely popular with the public and is available free of charge via the Internet at www.gpo.gov.

Some courts, such as the district court here in the District of Columbia, have also set up special media rooms for high visibility trials, allowing reporters to provide continual and contemporaneous reports on the conduct of a trial to the public. In addition, many of the appellate courts provide recordings of oral arguments on their websites.

Our opposition to this legislation, therefore, is not, as some may suggest, based on a desire to stem technology or access to the courts. Rather, the Judicial Conference opposes the broadcasting of federal trial court proceedings because it believes it to be contrary to the interests of justice, which is our most basic duty to uphold.

Today I will discuss some of the Judicial Conference's specific concerns regarding this legislation, as well as with the issue of cameras in the trial courts more generally. Before addressing those concerns, however, I would like to provide you with a brief history of the Conference's consideration of the cameras issue, which will demonstrate the time and effort it has devoted to understanding this issue over the years.

III. Historical Background on Cameras in the Federal Courts

Whether to allow cameras in the courtroom is far from a novel question for the Federal Judiciary. Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946. That rule states that "the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom." And in 1972, the Judicial Conference adopted a prohibition against "broadcasting, televising, recording or taking photographs in the

courtroom and areas immediately adjacent thereto . . ." The prohibition applied to both criminal and civil cases.

Since then, the Conference has repeatedly studied and considered the issue. In 1988, Chief Justice Rehnquist appointed an Ad Hoc Committee on Cameras in the Courtroom, which recommended that a three-year experiment be established permitting camera coverage of certain proceedings in selected federal courts. In 1990, the Judicial Conference adopted this recommendation and authorized a three-year pilot program allowing electronic media coverage of civil proceedings in six district and two appellate courts, which commenced July 1, 1991.[1]

The Federal Judicial Center (FJC) conducted a study of the pilot project and submitted its results to a committee of the Judicial Conference. After reviewing the FJC's report, the Conference decided in September 1994 that the potential intimidating effect of cameras on some witnesses and jurors was cause for considerable concern in that it could impinge on a citizen's right to a fair and impartial trial. Therefore, the Conference concluded that it was not in the interest of justice to permit cameras in federal trial courts.

Two years later, at its March 1996 session, the Judicial Conference again considered the issue and urged each circuit judicial council to adopt, pursuant to its rulemaking authority set forth in 28 U.S.C. § 332(d)(1), an order reflecting the Conference's September 1994 decision not to permit the taking of photographs or radio

[1] The courts that volunteered to participate in the pilot project were the U.S. Courts of Appeals for the Second and Ninth Circuits, and the U.S. District Courts for the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania, and Western District of New York.

and television coverage of proceedings in U.S. district courts. The Conference also voted strongly to urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1).

Interestingly, however, the Conference distinguished between camera coverage for appellate and district court proceedings. Therefore, the Conference in 1996 "agreed to authorize each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt."

The current policy states:

> A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:
>
> (a) for the presentation of evidence;
> (b) for the perpetuation of the record of the proceedings;
> (c) for security purposes;
> (d) for other purposes of judicial administration;
> (e) for the photographing, recording, or broadcasting of appellate arguments; or
> (f) in accordance with pilot programs approved by the Judicial Conference.

In September 2010, the Judicial Conference of the United States authorized a pilot project to evaluate the effect of cameras in district court courtrooms, video recordings of district court proceedings, and publication of such video recordings. The Conference mandated that the pilot be national in scope, consist of up to 150 judges, and be limited to

civil cases only. The Conference further specified that the parties must consent to participating in the pilot, that courts participating in the pilot would record proceedings (and that recordings by other entities or persons would not be allowed), and that juries, as well as prospective jurors, were not to be recorded at any time. The Judicial Conference also asked the CACM Committee to develop guidelines to implement the pilot, asked the FJC to study the impact of video recording and publication of district court proceedings, and directed that the project include a national survey of all district judges, whether or not they participate in the pilot, to determine their views on cameras in the courtroom.

After the Judicial Conference approved the pilot, the CACM Committee immediately began work on its implementation. The Committee developed guidelines to address a number of important issues, including: establishing procedures for selecting cases for participation in the pilot; advising courts on equipment configuration for recording proceedings; managing the recording of proceedings to protect the rights of the parties and witnesses and to maintain the dignity of the court; addressing potential security concerns; operating the equipment; and storing and accessing recordings. Considerable discretion was given to the courts to design their own procedures for notifying parties of the opportunity to record proceedings and for obtaining consent to record.

In February 2011, the Director of the FJC and I, in my capacity as Chair of the CACM Committee, wrote to all chief district judges seeking participation in the pilot. The letter included an expression of interest form, as well as the final pilot program

guidelines. Fourteen courts submitted applications to participate in the pilot. At its June 2011 meeting, the CACM Committee endorsed the participation of all 14 courts that had applied, and it set July 18, 2011, as the date for the pilot to begin.

Thereafter, the Administrative Office provided each pilot court with encoding devices to record and transmit proceedings, worked with pilot courts with equipment shortcomings to provide alternate devices, and instructed court staff on use of the equipment to resolve technical issues and ensure quality video recordings. In addition, the FJC and the Administrative Office developed additional implementation guidance, a model courtroom statement for the judge's use at the beginning of a recorded trial, and model instructions for jurors regarding cameras. In August 2011, the pilot courts were provided with an extensive memorandum addressing a number of issues raised by judges and court staff, as well as model forms for courts to use in implementing the pilot, and guidance about how to assist the FJC in gathering information for the study.

As of October 31, 2014, 130 proceedings from 13 pilot courts have been posted on uscourts.gov at: http://www.uscourts.gov/Multimedia/cameras.aspx. These 130 proceedings are divided into 675 video recordings; the number of videos per case ranges from one to 43. The following is a breakdown of the number of proceedings recorded per year:

- 2011 (July – Dec) 11 cases;
- 2012 (Jan – Dec) 40 cases;
- 2013 (Jan – Dec) 45 cases; and
- 2014 (Jan – Oct) 34 cases.

The videos can be searched by (1) district, (2) type of proceeding (e.g., jury trial, summary judgment motion), and (3) subject matter (e.g., personal injury, civil rights, habeas corpus, trademark infringement). The number of proceedings recorded varies by pilot court, and I anticipate that the FJC will interview the participating districts at the end of the pilot, and will explore why some courts participated more than others.

The pilot will conclude on July 18, 2015, and we anticipate that the FJC will present its report on the pilot to the CACM Committee at its December 2015 meeting. The results of the pilot program will help the Judiciary review and evaluate concerns with the use of cameras in the district courts. Issues that the FJC may consider in its report include: whether cameras or the posting of videos had any impact on court proceedings or the administration of justice; the influence of cameras on trial participants; privacy concerns; the use of cameras as a bargaining tactic; safety and security concerns for judges and court employees; whether the media, academics, and the public found the videos to be useful or informative; the reasons why attorneys and case participants consented (or chose not to consent) to the recording of a proceeding; and the reasons why some courts recorded more videos than others. The CACM Committee likely will consider the FJC's report at that time, and I anticipate it will then report to the Judicial Conference regarding the future use of cameras in the district courts.

IV. Judicial Conference Concerns Regarding H.R. 917, As Applied to Trial Courts

I would now like to discuss some of the specific concerns the Judicial Conference has with H.R. 917, as well as the more general issue of media coverage in trial courtrooms.

A. Cameras Have the Potential to Negatively Impact the Trial Process

Supporters of cameras in the courtroom assert that modern technology has made cameras and microphones much less obvious, intrusive or disruptive, and that therefore the Judiciary need not be concerned about their presence during proceedings. The Conference respectfully argues that this is not the paramount concern. While covert coverage may reduce the bright lights and tangle of wires that were made famous in the Simpson trial, it does nothing to reduce the significant and measurable negative impact that camera coverage can have on the trial participants themselves.

While judges are accustomed to balancing conflicting interests, weighing any potential "positive" effects of cameras against the degree of harm that this type of coverage could have on a particular proceeding would be very difficult. This assessment must include the impact the camera and its attendant audience would have on the attorneys, jurors, witnesses, and even judges. For example, a witness telling facts to a jury will often act differently if he or she is aware that a television audience is watching and listening. Media coverage could exacerbate any number of human emotions in a witness from bravado and over-dramatization, to self-consciousness and under-reaction. These changes in a witness's demeanor could have a profound impact on a jury's ability to

accurately assess the veracity of that witness. In fact, according to the FJC study of the earlier pilot program (which is discussed in more detail below), 64 percent of the participating judges reported that, at least to some extent, cameras make witnesses more nervous. In addition, 46 percent of the judges believed that, at least to some extent, cameras make witnesses less willing to appear in court, and 41 percent found that, at least to some extent, cameras distract witnesses. Such effects could severely compromise the ability of jurors to assess the veracity of a witness and, in turn, could prevent the court from being able to ensure that the trial is fair and impartial. These concerns, in combination, pose a serious negative risk to the "search for the truth" in a federal trial.

B. H.R. 917 Inadequately Protects the Right to a Fair Trial

The primary goal of this legislation is to allow radio and television coverage of federal court cases. While there are several provisions aimed at limiting coverage (*i.e.,* allowing judges the discretion to allow or decline media coverage, authorizing the Judicial Conference to develop guidelines regarding media coverage, requiring courts to disguise the face and voice of a witness upon his or her request, and barring the televising of jurors), the Conference is convinced that camera coverage could, in certain cases, so indelibly affect the dynamics of the trial process that it would impair a citizen's ability to receive a fair trial.

For example, Sections 2(b)(1) and 2(b)(2) of the bill would allow the presiding judge to decide whether to allow cameras in a particular proceeding before that court. If this legislation were enacted, I am sure that all federal judges would use extreme care and

judgment in making this determination. Nonetheless, we are not clairvoyants. Even the most straightforward, "run of the mill" cases have unforeseen developments. Obviously a judge never knows how a lawyer will proceed or how a witness or party will testify. And these events can have a tremendous impact on the trial participants. Currently, courts have recourse to instruct the jury to disregard certain testimony or, in extreme situations, to declare a mistrial if the trial process is irreparably harmed. If camera coverage is allowed, however, witnesses or litigants may be tempted to speak to the larger television audience, and there is no opportunity to rescind these remarks.

The Judicial Conference is also concerned about the impact of the legislation on witnesses. Although the bill provides witnesses with the right to request that their faces and voices be obscured, anyone who has been in court knows how defensive witnesses can be. Witnesses are summoned into court to be examined in public. Sometimes they are embarrassed or even humiliated. Often, counsel set out to do just that. Providing witnesses the choice of whether to testify in the open or blur their image and voice would be cold comfort given the fact that their name and their testimony will be broadcast to the community. It would not be in the interest of the administration of justice to unnecessarily increase the already existing pressures on witnesses.

These basic concerns regarding witnesses were eloquently described by Justice Clark in *Estes v. Texas,* 381 U.S. 532 (1965).

> The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization. Furthermore, inquisitive strangers and "cranks" might approach witnesses on the street with jibes, advice or demands for explanation of testimony. There is little wonder that the defendant cannot "prove" the existence of such factors. Yet we all know from experience that they exist.

Estes, 381 U.S. at 547. It is exactly these concerns that cause the Judicial Conference of the United States to oppose enactment of H.R. 917.

C. Threat of Camera Coverage Could be Used as a Trial Tactic

Cameras can provide a strong temptation for both attorneys and witnesses to state their cases in the court of public opinion rather than in a court of law. Therefore, allowing camera coverage would almost certainly become a potent negotiating tactic in pretrial settlement negotiations. For example, in a high-stakes case involving millions of dollars, the simple threat that the president of a defendant corporation could be forced to testify and be cross-examined on camera, for the edification of the general public, might well be a real disincentive to the corporation in exercising its right to a public trial.

D. Cameras Can Create Security Concerns

Although the bill includes language allowing a witness to request that his or her image be obscured, the bill does not address security concerns or make similar provisions

regarding other participants in judicial proceedings. The presence of cameras in the trial courtroom is likely to heighten the level and the potential of threats to judges. The number of threats against judges has escalated over the years, and widespread media exposure could exacerbate the problem. Witnesses, jurors, and United States Marshals Service personnel might also be put at risk with this increased exposure and notoriety.

Finally, national and international camera coverage of trials, especially those relating to terrorism, could place federal courthouses and their occupants at greater risk and may require increased personnel and funding to adequately protect participants in such court proceedings. The prospect of camera coverage may invite extreme, potentially threatening behavior simply because of the possibility for greater publicity.

E. Cameras Can Create Serious Privacy Concerns

There is a rising tide of concern among Americans regarding privacy rights and the Internet. Numerous bills have been introduced in both the Congress and state legislatures to protect the rights of individual citizens from the indiscriminate dissemination of personal information that once was, to use a phrase coined by the Supreme Court, hidden by "practical obscurity,"[2] but now is available to anyone at any time because of the advances of technology.

The Judiciary takes these concerns very seriously. In fact, the CACM Committee has worked many years to ensure that the Judiciary's electronic case files system provides adequate privacy safeguards to protect sensitive and personal information, such as Social

[2] *United States Department of Justice v. Reporters Committee for the Freedom of the Press*, 489 U.S. 749, 764 (1989).

Security numbers, financial account numbers, and the names of minor children, from the general public, while at the same time providing the public with access to court files.

Broadcasting of trials presents many of the same concerns about privacy as does the indiscriminate dissemination of information on the Internet that was once only available at the courthouse. Witnesses and counsel frequently discuss very sensitive information during the course of a trial. Often this information relates to individuals who are not even parties to the case but about whom personal information may be revealed.

The reality is that many of the trials the media would be interested in televising are those that involve testimony of an extremely private nature, revealing family relationships and personal facts, including medical and financial information. While this type of information is presented in open court, televising these matters could sensationalize and provide these details to a much larger audience, which again raises significant and legitimate privacy concerns. Moreover, live broadcasting makes taking corrective action to address an error – innocent or otherwise – much more difficult.

Involvement in a federal case can have a deep and long-lasting impact on all its participants – parties to the case as well as witnesses – most of whom have neither asked for nor sought publicity. In this adversarial setting, reputations can be compromised and relationships can be damaged. In fact, according to the FJC study on live courtroom media coverage, 56 percent of the participating judges felt that electronic media coverage violates a witness's privacy. This is not to say that the Conference advocates closed trials; far from it. Nevertheless, there is a common-sense distinction between a public trial in a

public courtroom – typically filled with individuals with a substantive interest in the case – and its elevation to an event that involves the wider television audience and continuing ready access to a broadcast.

The issue of privacy rights is one that has not been adequately considered or addressed by those who advocate the broadcasting of trials. This heightened awareness of and concern for privacy rights is a relatively new and important development that further supports the position of the Judicial Conference to prohibit the use of cameras in district courts.

F. H.R. 917 Does Not Address the Complexities Associated with Camera Coverage in the Trial Courts

Televised coverage of a trial would have a significant impact on the trial process. Major policy implications as well as administrative issues may arise, many of which are not addressed in the proposed legislation. For example, televising a trial makes certain court orders, such as the sequestration of witnesses, more difficult to enforce and could lead to tainted testimony from witnesses. If witness A's testimony were publicly broadcast, then witness B could have full access to it before himself testifying. In addition, more technical issues would have to be addressed, including advance notice to the media and trial participants, limitations on coverage and camera control, coverage of the jury box, and sound and light criteria.

Finally, I should note that H.R. 917 includes no funding authorization for its implementation, and there is no guarantee that such funds would be appropriated. The

costs associated with allowing cameras, however, could be significant, such as retrofitting courtrooms to incorporate cameras while minimizing their actual presence to the trial participants. Also, to ensure that a judge's orders regarding coverage of the trial were followed explicitly (*e.g.,* not filming the jury, obscuring the image and voice of certain witnesses, or blocking certain testimony), a court may need to purchase its own equipment, as well as hire technicians to operate it. Large courts might also feel compelled to create the position of media coordinator or court administrative liaison to administer and oversee an electronic media program on a day-to-day basis. That liaison's duties might include receiving applications from the media and forwarding them to presiding judges, coordinating logistical arrangements with the media, and maintaining administrative records of media coverage. In short, the cost of this legislation could be significant.

G. There is No Constitutional Right to have Cameras in the Courtroom

Some have asserted that there is a constitutional "right" to bring cameras into the courtroom and that the First Amendment requires that court proceedings be open in this manner to the news media. The response is that today, as in the past, federal court proceedings *are* open to the public; however, nothing in the First Amendment *requires* televised trials.

The seminal case on this issue is *Estes v. Texas,* 381 U.S. 532 (1965). In *Estes,* the Supreme Court directly faced the question of whether a defendant was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting

of his trial. The Court held that such broadcasting in that case violated the defendant's right to due process of law. At the same time, a majority of the Court's members addressed the media's right to telecast as relevant to determining whether due process required, in general, excluding cameras from the courtroom. Justice Clark's plurality opinion and Justice Harlan's concurrence indicated that the First Amendment did not provide a right in the news media to televise from the courtroom. Similarly, Chief Justice Warren's concurrence, joined by Justices Douglas and Goldberg, stated:

> [n]or does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. . . . So long as the television industry, like the other communications media, is free to send representatives to trials and to report on those trials to its viewers, there is no abridgement of the freedom of press.

Estes, 381 U.S. at 584-85 (Warren, C.J., concurring).

In the case of *Westmoreland v. Columbia Broadcasting System Inc.*, 752 F.2d 16 (2d Cir. 1984), the Second Circuit was called upon to consider whether a cable news network had a right to televise a federal civil trial and whether the public had a right to view that trial. In that case, both parties had consented to the presence of television cameras in the courtroom under the close supervision of a willing court, but a facially applicable court rule prohibited the presence of such cameras. The Second Circuit denied the attempt to televise that trial, saying that no case has held that the public has a right to televised trials. As stated by the court, "[t]here is a long leap . . . between a public right under the First Amendment to attend trials and a public right under the First Amendment

to see a given trial televised. It is a leap that is not supported by history." *Westmoreland,* 752 F.2d at 23.

Similarly, in *United States v. Edwards,* 785 F.2d 1293 (5th Cir. 1986), the court discussed whether the First Amendment encompasses a right to cameras in the courtroom, stating: "No case suggests that this right of access includes a right to televise, record, or otherwise broadcast trials. To the contrary, the Supreme Court has indicated that the First Amendment does not guarantee a positive right to televise or broadcast criminal trials." *Edwards,* 785 F.2d at 1295. The court went on to explain that while television coverage may not always be constitutionally prohibited, that is a far cry from suggesting that television coverage is ever constitutionally mandated.

These cases forcefully make the point that, while all trials are public, there is no constitutional right for the media to broadcast federal district court or appellate court proceedings.

H. The Lessons of the 1994 FJC Study

Proponents of cameras legislation have previously indicated that legislation is justified in part by the FJC study referred to earlier. The results of that study, however, were part of the basis for the Judicial Conference's opposition to cameras in the courtroom. Given this apparent inconsistency, it may be useful to highlight several important findings and limitations of the study.

First, the study only pertained to civil cases. This legislation, if enacted, would allow camera coverage in both civil and criminal cases. One could expect that most of the

media requests for coverage would be in sensational criminal cases, where the problems for witnesses, including victims of crimes, and jurors are most acute.

Second, the Conference believes that the study's conclusions downplay a large amount of significant negative statistical data. For example, the study reports on attorney ratings of electronic media effects in proceedings in which they were involved. Among these negative statistics were the following:

- 32% of the attorneys who responded felt that, at least to some extent, the cameras distract witnesses;
- 40% felt that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;
- 19% believed that, at least to some extent, the cameras distract jurors;
- 21% believed that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 27% believed that, at least to some extent, the cameras have the effect of distracting the attorneys; and
- 21% believed that, at least to some extent, the cameras disrupt the courtroom proceedings.

When trial judges were asked these same questions, the percentages of negative responses were even higher:

- 46% believed that, at least to some extent, the cameras make witnesses less willing to appear in court;
- 41% found that, at least to some extent, the cameras distract witnesses;
- 64% reported that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;
- 17% responded that, at least to some extent, cameras prompt people who see the coverage to try to influence juror-friends;

- 64% found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;

- 9% reported that, at least to some extent, the cameras cause judges to avoid unpopular decisions or positions; and

- 17% found that, at least to some extent, cameras disrupt courtroom proceedings.

For the appellate courts, an even larger percentage of judges who participated in the study related negative responses:

- 47% of the appellate judges who responded found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;

- 56% found that, at least to some extent, the cameras cause attorneys to change the emphasis or content of their oral arguments;

- 34% reported that, at least to some extent, cameras cause judges to change the emphasis or content of their questions at oral arguments; and

- 26% reported that, at least to some extent, the cameras disrupt courtroom proceedings.

These negative statistical responses from judges and attorneys involved in the pilot project dominated the Judicial Conference debate and were highly influential in the Conference's conclusion that the intimidating effect of cameras on witnesses and jurors was cause for alarm. Since a United States judge's paramount responsibility is to seek to ensure that all citizens enjoy a fair and impartial trial, and since cameras may compromise that right, allowing cameras would not be in the interest of justice. For these reasons, the Judicial Conference rejected the conclusions made by the FJC study with respect to cameras in district courts.

V. Conclusion

When one thinks of cameras in the trial courtroom today, one can easily recall a high profile case that turned into a media frenzy rather than a dignified judicial proceeding. It is not difficult to see how the presence of cameras in those courtrooms impacted the conduct of the attorneys, witnesses, jurors, and the judge. Admittedly, not all cases have the same level of notoriety, but the inherent effects of the presence of cameras in the courtroom are, in some respects, the same, whether or not it is a high-publicity case. Furthermore, there is a legitimate concern that if the federal courts were to allow camera coverage of cases that are not sensational, it would become increasingly difficult to limit coverage in the high-profile and high-publicity cases where such limitations, almost all would agree, would be warranted.

This is not a debate about whether judges have personal concerns regarding camera coverage. Nor is it a debate about whether the federal courts are afraid of public scrutiny or about increasing the educational opportunities for the public to learn about the federal courts or the litigation process. Open hearings are a hallmark of the Federal Judiciary.

Rather, this is a question about how individual Americans – whether they are plaintiffs, defendants, witnesses, jurors, or other participants in court proceedings – are treated by the federal judicial process. It is the fundamental duty of the Federal Judiciary to ensure that every citizen receives his or her constitutionally-guaranteed right to a fair trial. For the reasons discussed in this statement, the Judicial Conference believes that the use of cameras in the trial courtroom would seriously jeopardize that right. It is this

concern that causes the Judicial Conference of the United States to oppose enactment of H.R. 917 as applied to federal trial courts. As the Supreme Court stated in *Estes*, "[w]e have always held that the atmosphere essential to the preservation of a fair trial – the most fundamental of all freedoms – must be maintained at all costs." 381 U.S. at 540.

Mr. Chairman and members of the Subcommittee, thank you again for the opportunity to testify and present these views. I will be pleased to answer any questions you or the other members of the Subcommittee may have and request that my full statement be entered into the record.

Mr. MARINO. And the Chair now recognizes Attorney Osterreicher.

TESTIMONY OF MICKEY H. OSTERREICHER, GENERAL COUNSEL, NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION

Mr. OSTERREICHER. Chairman Goodlatte, Chairman Marino, Ranking Member Deutch, and Members of the Subcommittee, good morning, and thank you for the opportunity to appear before you to support H.R. 917, the "Sunshine in the Courtroom Act of 2013." My name is Mickey Osterreicher. I am of counsel to the law firm of Hiscock & Barclay in its media and First Amendment law practice in Buffalo, New York, and appear here today in my capacity as general counsel for the National Press Photographers Association, an organization which was founded in 1946 and of which I have been a member since 1973.

NPPA is the voice of visual journalists, with approximately 7,000 members, including video and still photographers, editors, and students. During my 40-year career as a photojournalist in both print and broadcast, I have covered hundreds of court cases, from the Attica trials to the murder trial of O.J. Simpson. I was actively involved in the 10-year experiment with electronic coverage of courtroom proceedings from 1987 to 1997 in New York. And by "electronic," I mean audiovisual recording, as well as digital still images. We support H.R. 917 because there is a strong societal interest in public access to the courts. As part of that openness, almost every State allows electronic coverage of criminal, civil, and appellate proceedings.

Unfortunately, that is not the case at the Federal level. In 1991, the Judicial Conference of the United States commenced a 3-year pilot program permitting the broadcasting, televising, electronic recording, or photographing of courtroom proceedings by the media. At the conclusion of that program and despite favorable reports, the conference declined to approve the continuation of such coverage, and the program ended in 1994. In 2010, the Judicial Conference authorized a second pilot project. This time, it would be court personnel and not the media operating the equipment. The guidelines specifically state the media or its representatives will not be permitted to create recordings of courtroom proceedings.

In 2014, electronic media coverage is the unblinking eye of the public, with its unrivaled capacity to convey information instantly and to the widest audience. As Justice Brandeis noted in 1932, to stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. But in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. The Federal judiciary must be mindful of its high power not to erect its own prejudices into judicial rules. Society can ill afford to let the arbitrary and speculative objections of jurists antagonistic to the electronic press substantially undermine a fundamental constitutional right by lens capping the very tools of its profession and eviscerating the very means by which most Americans receive their news. The benefits of allowing such coverage are numerous and significant. It brings transparency to the Federal judicial system, provides increased accountability from liti-

gants, judges, and the press, and educates citizens about the judicial process. Electronic coverage allows the public to ensure that proceedings are conducted fairly, and by extension, that government systems are working properly. In 1965, Justice Harlan predicted that the 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. That day has long since passed.

Justice Stewart was also on point when he wrote, "The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern." "The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I always thought the presumption must lie in the area of First Amendment freedoms." One would only hope that, by 2015, after what will have been a 4-year experiment, the Federal judiciary will finally acknowledge that electronic coverage of our courts, and the fair administration of justice, are not mutually exclusive. We look forward to working with the Subcommittee and the full Judiciary Committee as you move forward with H.R. 917 and other similar legislation. Thank you for the opportunity to testify. I look forward to answering your questions, and request that my full statement be entered into the record.

Mr. MARINO. Thank you, sir. And your full statement will be entered into the record without objection.

[The prepared statement of Mr. Osterreicher follows:]

BEFORE THE
HOUSE OF REPRESENTATIVES COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, IP AND THE INTERNET

WASHINGTON, D.C.

HEARING ON
H.R. 917, THE SUNSHINE IN THE COURTROOM ACT OF 2013

TESTIMONY OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (NPPA)

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December 3, 2014

Subcommittee on Courts, Intellectual Property and the Internet
Committee on the Judiciary
United States House of Representatives
113th Congress, 2nd Session

Hearing On
H.R. 917, The Sunshine in the Courtroom Act of 2013

Testimony of Mickey H. Osterreicher
General Counsel, National Press Photographers Association (NPPA)

December 3, 2014

Chairman Goodlatte, Chairman Coble, Ranking Member Conyers, and other members of the subcommittee, good morning and thank you for the opportunity to appear before you to discuss H.R. 917, the Sunshine in the Courtroom Act of 2013.

Background

My name is Mickey Osterreicher. I am of counsel to the law firm of Hiscock & Barclay LLP in its Media & First Amendment Law Practice Area in Buffalo, NY and appear here today in my capacity as general counsel for the National Press Photographers Association (NPPA), an organization which was founded in 1946 and of which I have been a member since 1973.

As the "Voice of Visual Journalists" the National Press Photographers Association ("NPPA") is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. Our approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding, the NPPA has vigorously promoted and defended the rights of photographers and journalists,

including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

Additionally, the NPPA is one of 19 legal and media organizations that are members of the Coalition for Court Transparency, a national non-partisan alliance that advocates for greater openness and transparency from the federal courts system, including the U.S. Supreme Court.

As way of background I am an award winning visual journalist with almost forty years' experience in print and broadcast. My work has appeared in such publications as the New York Times, Time, Newsweek and USA Today as well as on ABC World News Tonight, Nightline, Good Morning America, NBC Nightly News and ESPN.

During that career I have covered hundreds of court cases from the Attica trials, where I had the opportunity to watch the late William Kunstler and Ramsay Clark defend their clients, to the murder trial of O.J. Simpson. I was actively involved in the 10 year experiment (1987 -1997) under New York Judicial Law § 218, entitled "Electronic Coverage of Judicial Proceedings."[1] And by electronic I mean audio-visual recording as well as still images.

Judicial Conference Pilot Program (1991 – 1993)

Much in the same way, H.R. 917 would provide for media coverage of federal court proceedings. Among other things, the Sixth Amendment guarantees "the right to a speedy and public trial." There is a strong societal interest in public trials. Openness in court proceedings has been shown to improve the quality of testimony, persuade unknown witnesses to come forward with relevant testimony, induce trial participants to perform their duties more conscientiously, and generally give the public, either directly or through press coverage, an opportunity to observe the workings of our judicial

[1] *See*: http://codes.lp.findlaw.com/nycode/JUD/7-A/218

system. As part of that openness almost every state allows electronic coverage of criminal, civil and appellate proceedings.

That is not the case at the federal level. In 1990 following the advice of its Ad Hoc Committee on Cameras in the Courtroom, the Judicial Conference of the United States[2] commenced a three-year (July 1, 1991 to June 30, 1993) pilot program permitting "the broadcasting, televising, electronic recording, or photographing of courtroom proceedings hy the media "in civil cases in six district and two appellate courts .[3] At the conclusion of the experiment in 1994, the Court Administration and Case Management Committee presented a report and recommendation to the Judicial Conference, which included an evaluation of the pilot program by the Federal Judicial Center (FJC) of the pilot covering civil proceedings.[4] The report also included an analysis of studies conducted in state courts regarding electronic coverage.

After reviewing the FJC Report, the "Committee was confident that the experimental media coverage did not create sufficient disruption to civil proceedings to warrant the continuation of the prohibition against such coverage.[5] In a supplemental report the FJC once again stated that "most jurors and witnesses believe electronic media presence has no or minimal detrimental effects on witnesses and jurors, while a minority believe there are detrimental effects on them."[6] Based upon these evaluations, the Committee recommended that the Judicial Conference allow electronic coverage of civil proceedings in accordance with the Conference's policy and standards.

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[2] The Judicial Conference of the United States is the rulemaking body for the entire federal court system, with the exception of the United States Supreme Court. See 28 U.S.C. § 331.
[3] Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals (1994)) http://ftp.resource.org/courts.gov/fjc/elecmediacov.pdf
[4] *See* U.S. JUD. CONF., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 46-47 (1994), *available at* http://www.uscourts.gov/judconf/94-Sep.pdf
[5] U.S. JUD. CONF., COMM. ON CT. ADMIN. & CASE MGMT., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 3 (Sept. 1994).
[6] *Id* at 4.

Unfortunately the Judicial Conference chose to disregard those favorable assessments, data and recommendations, by dismissively stating, "the intimidating effect of cameras on some witnesses and jurors was cause for concern."[7] Based on this reasoning, the Conference declined to approve the Committee's recommendation to continue such coverage of civil proceedings[8] and the initial pilot program ended on December 31, 1994.[9]

Despite that setback a number of progressive district court judges defied what they considered to be only the persuasive position of the Judicial Conference on this issue.[10] In 1996 New York District Court Judge Robert W. Sweet permitted electronic coverage[11] under the "presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to view those proceedings on television."[12] He also took judicial notice that "the equipment [was] no more distracting in appearance than reporters with notebooks or artists with sketch pads."[13]

In that same year Senior District Judge Jack B. Weinstein also allowed coverage while finding that "actually seeing and hearing court proceedings, combined with commentary of informed members of the press and academia, provides a powerful device for monitoring the courts."[14]

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[7] U.S. JUD. CONF. RPT. OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S., 47 (Sept. 1994), *available at* http://www.uscourts.gov/judconf/94-Sep.pdf.
[8] *Id.*
[9] *Id.*
[10] These cases were *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580 (S.D.N.Y. 1996); *Marisol A. v. Giuliani*, 929 F. Supp. 660 (S.D.N.Y. 1996); *Sigmon v. Parker Chapin Flanau & Kimpl*, 937 F. Supp. 335 (S.D.N.Y. 1996); and *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996).
[11] *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 583 (S.D.N.Y. 1996). The rule provided that "No one other than court officials engaged in the conduct of court business shall bring any camera, transmitter, receiver, portable telephone or recording device into any courthouse or its environs without written permission of a judge of that court." *Id.* (quoting S.D.N.Y. Gen.R. 7). Judge Sweet read this language to allow camera coverage, writing that, "Although Rule 7 does not state in the affirmative that court proceedings may be televised, it plainly permits cameras in the courtroom with a judge's written permission." *Id.* at 584.
[12] *Id.* at 589. Judge Sweet also noted that "[t]he equipment [used] is no more distracting in appearance than reporters with notebooks or artists with sketch pads." *Id.* at 582.
[13] *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996).
[14] *Id.*at 138.

Judicial Conference Pilot Program (2011 – 2014)

Since 1996, a number of bills have been introduced in Congress with bipartisan support which would require federal courts – the Supreme Court, the circuit and district courts, or all federal courts, depending on the bill – to allow television broadcasting of their proceedings. In 2000 during the 106th Congress, the Judicial Conference voiced its opposition S. 721, a bill permitting electronic media coverage of federal court proceedings. In twenty-two pages of testimony before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, Chief Judge Edward R. Becker (3rd Cir.) "strongly opposed"[15] the legislation and the concept. Despite the previous positive findings of the Court Administration and Case Management Committee and the Federal Judicial Center he reiterated the Judicial Conference's belief "that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process."[16]

The latest of these is the Sunshine in the Courtroom Act of 2013, which would authorize the presiding judge of a federal appellate district court to "at the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides."[17] It would also allow the Judicial Conference of the United States to "promulgate guidelines with respect to the management and administration of photographing, recording, broadcasting, or televising" of such proceedings.[18]

In 2010 the Judicial Conference authorized a second Cameras in the Courtroom Pilot Project, to last up to three years.[19] Once again the pilot was to "evaluate the effect of cameras in district court

[15] Statement of Chief Judge Edward R. Becker on Behalf of the Judicial Conference of the United States, at 1 (2000)
[16] *Id.*
[17] See: https://www.govtrack.us/congress/bills/113/hr917/text
[18] *Id.*
[19] *See* U.S. JUD. CONF., REPORT OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S. (Sept. 14, 2010), at 11-12, *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/ju

courtrooms, of video recordings of proceedings therein, and of publication of such video recordings,"[20] with the Federal Judicial Center once again studying the effects of the program.[21]

In 2011 the selection of fourteen (14) federal trial courts that had voluntarily agreed to take part in the pilot was announced.[22] The announcement stressed that the judges volunteering for the pilot must follow already adopted guidelines that among other things stated that "pilot recordings will not be simulcast, but will be made available as soon as possible on the US Courts and local participating court websites at the court's discretion."[23] Only those participating courts "may record court proceedings for the purpose of public release,"[24] with the presiding judge making the case selection which also required the consent of all parties "of each proceeding in a case"[25]

This time it would be court personnel and not the media operating the equipment used to record the selected proceedings, with the presiding judge having the ability to instantly stop a recording if necessary. It is entirely up to the judge which cases are recorded, and according to the guidelines "it is not intended that a grant or denial . . . be subject to appellate review."[26] Recordings by any other entities or persons have been prohibited. The guidelines also recommended three to four inconspicuously fix-placed cameras focused "on the judge, the witness, the lawyers' podium, and/or counsel tables,"[27] along with "a feed from the electronic evidence presentation system."[28] Additionally "the recording equipment should transmit the camera inputs to a switcher that incorporates them onto

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dconf/proceedings/2010-09.pdf. *See also* U.S. JUD. CONF., JUDICIARY APPROVES PILOT PROJECT FOR CAMERAS IN DISTRICT COURTS (press release), Sept. 14, 2010, *available at* http://www.uscourts.gov/News/NewsView/10-09-14/Judiciary_Approves_Pilot_Project_for_Cameras_in_District_Courts.aspx.

[20] REPORT OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S. (Sept. 14, 2010), *supra*, at 11.

[21] *Id.* at 12.

[22] *See*: http://www.uscourts.gov/News/NewsView/11-06-08/Courts_Selected_for_Federal_Cameras_in_Court_Pilot_Study.aspx

[23] *Id.*

[24] *See*: http://www.uscourts.gov/uscourts/News/2011/docs/CamerasGuidelines.pdf

[25] *Id.* at 2

[26] *Id.*at 1

[27] *Id.* at 3

[28] *Id.*

one screen."[29] Unfortunately it was also stated at the outset of the pilot that funding for equipment or technical support would be limited and the courts were discouraged "from purchasing new equipment."[30]

Another major limitation to true openness is that live or slightly delayed electronic coverage is not allowed. Not only is the media prohibited from providing electronic coverage they are also precluded from getting a feed of those proceedings from court personnel. The guidelines specifically state, "The media or its representatives will not be permitted to create recordings of courtroom proceedings"[31]. For example, in *EMC Hightower v. City and County of San Francisco*,[32] from the Northern District of California, the judge in the video opens the hearing by mentioning the cameras pilot project, and he lays down the rules, which in effect make the video unavailable to the public (and the press) until after the video has been reviewed by him. Under those rules the public and the press are only able to acquire the video by download from the court's website once the recordings are posted. It is this absolute control of such electronic coverage which limits public access.

For the most part courtroom proceedings, especially in civil cases, do not make for compelling viewing and are more like watching paint dry. Recording in such a way that it appears like one is watching the simultaneous output from four surveillance cameras on one screen rather than a court proceeding does not improve things. After viewing some of the recorded proceedings I observed that often nothing is happening in one or more sectors of the screen while the person speaking in another sector is either out of focus or has his body halfway off the edge of the frame. At the very least this could be easily remedied by having professionally trained personnel operate the equipment rather than

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[29] *Id.*
[30] *Id.*
[31] *Id.* at 5.
[32] *See:* http://www.uscourts.gov/Multimedia/Cameras/NorthernDistrictofCalifornia.aspx

it being fixed with no ability to focus, pan, tilt, zoom or appropriately frame a shot. As recorded many of these cases are unsuitable for broadcast.

Openness and Electronic Coverage of Court Proceedings

Aside from the aesthetics of electronic coverage is the constitutional principle that courts are meant to be "open." I believe it is instructive to remember the words of Justice Stewart in his dissent in *Estes v Texas*[33] (the 1965 Supreme Court case dealing with the televising and broadcasting of a trial) where he admonished that "it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, *I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.*"[34]

Just as the Supreme Court articulated an evolving standard of decency in capital punishment cases, I respectfully suggest that there should also be an evolving standard of openness when it comes to court proceedings. In *Richmond Newspapers, Inc. v. Virginia*[35] the Court held that under the First Amendment the public, including the press, had a right of access to a criminal trial, because such proceedings had traditionally been open to the public. "What is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe,"[36] Chief Justice Burger wrote in the plurality opinion.

In 2014 most such information comes from broadcast television, cable/satellite programming and Internet content, including electronic material on websites provided by once traditional print media. Thus the ability of the press to disseminate information via electronic coverage of court proceedings is a critical component in affording the public the modern equivalent of attending and

[33] *Estes v. Texas*, 381 U.S. 532 (1965).
[34] [34] *Id.* at 603-04 (Stewart, J., dissenting) (emphasis added).
[35] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).
[36] *Id.* at 564 (plurality opinion of Burger, C.J.).

observing. As Chief Justice Burger explained further, "people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[37] Justice Stewart, concurring in the judgment, wrote that "the right to speak implies a freedom to listen," and that "the right to publish implies a freedom to gather information."[38] Similarly, I would offer that the right to broadcast implies a freedom to electronically record images.

In 1983 the lone dissent in *US v. Hastings*[39] (an 11th Circuit case regarding electronic trial coverage) wrote "The institutional interests cited in support of the restriction [on electronic coverage of courtroom proceedings] are, at best, mere commendations for the ideals our judicial system strives to maintain. At worst, they represent pretexts for an abhorrence to change and ignore the advances of modern day technology. When suitably circumscribed by appropriate and detailed standards, the public interests which favor electronic media coverage far outweigh the honestly perceived but unsubstantiated concerns over a possible lessening of courtroom decorum and fairness."[40]

Opening courts to electronic coverage is essential for the public to see that justice is being done, to be assured of the integrity of the process, and to better understand how decisions are made at both the trial and appellate levels, especially those of the Supreme Court.

The Framers envisioned court as being part of the public square, a place in an emerging nation where anyone could stop in to observe the proceedings and be assured of the integrity of our system of justice. Given the complexity of our society and the size of our communities, that's just no longer possible. But the core need for true openness continues, particularly as our courts have become

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[37] *Id.* at 572.
[38] *Id.* at 599 (Stewart, J., concurring in the judgment, *citing Branzburg v. Hayes*, 408 U.S. 665, 681).
[39] *US v. Hastings*, 695 F.2d 1278 (11th Cir. 1983).
[40] *Id.* at 561 (citing *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 775 (Fla. 1979)).

national in scope and central agents of either change or maintaining the status quo in matters as significant as who will be president and whether health-care reform is constitutional.

The true openness foreseen by the Framers is closer in nature to that provided by electronic coverage of court proceedings than by second-hand reporting. The only way that the public at large can have full faith in the decisions of our courts is to be able to see them firsthand, and the only way they can do so is to permit journalists to convey electronic coverage of the courts directly to the public.

Supreme Court

Being admitted to the Supreme Court bar and having submitted amicus briefs in a number of cases I am always both in awe and disbelief that I am only one of about three hundred people while in that austere courtroom who actually get to see and hear the arguments.

This term the Court is hearing landmark cases on health care, voting rights, employment law, business and environmental regulations – and will likely take up same-sex marriage. Right now the Court is hearing the case of *Young v. United Parcel Service*,[41] that issue being: Whether, and in what circumstances, the Pregnancy Discrimination Act, requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are "similar in their ability or inability to work."[42] Given the scope of this case it is very likely that a very sizable segment of the population would want to view and listen to the oral argument.

As the Justices take up issues of great import, it's clear that Americans' interest in the court's work is only increasing. But there's a real problem. Millions of Americans, who do not have the time or money to travel to Washington, D.C., to stand in line for hours to get one of the hundred or so

[41] *See:* http://www.scotusblog.com/case-files/cases/young-v-united-parcel-service/
[42] *Id.*

coveted seats inside the building on argument day, are unable to experience the very openness espoused by the High Court itself – even though modern technology affords the opportunity to do just that.

Every state supreme court in the country has a more open technology policy than that of the U.S. Supreme Court. Former federal judge and solicitor general Ken Starr has said: "There is no reason the public should be denied access to consideration of urgent [legal] questions – from global warming to health care – that affect us all. Cameras in the courtroom of the Supreme Court are long overdue."[43] Ohio Supreme Court Chief Justice Maureen O'Connor agrees, saying: "An absolutely necessary condition of openness and accessibility in this new era [of transparency] is allowing video cameras"[44] in public courts. Former U.S. Attorney General Richard Thornburgh, once a proponent of the ban on electronic coverage, said twenty years ago that he "changed his views and now supports the televising of criminal proceedings."[45] He also stated that he was "amazed at the number of people, not lawyers, picking up on the intricacies of our system and realizing that this Bill of Rights is for everybody."[46]

The Justices claim that cameras will lead to grandstanding during oral arguments. Experience in state supreme courts and other federal courts of appeal suggest otherwise. Advocates before the court are professionals – and they know the only audience they need to convince is the nine justices themselves.

The Justices have also expressed concerns about their personal privacy. This does not conform to their obligations as public figures. Citizens can watch, via electronic coverage, their local town council or Congress in action; the Supreme Court should not conduct itself differently. Justices do not

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[43] *See*: http://www.nytimes.com/2011/10/03/opinion/open-up-high-court-to-cameras.html?_r=0
[44] *See*: http://www.c-span.org/video/?293580-1/supreme-court-
[45] Memorandum of Points and Authorities of Court TV in Opposition to Termination of Film and Electronic Coverage, People v. Simpson, No.BA097211,1994 WL 621389 at *12 (Cal. Super. Ct. Nov. 7, 1994).
[46] *Id.*

hesitate to provide interviews when they have a book to promote and often appear at speaking events across the country in full view of electronic coverage. As a stark divide between the Justices intransigence on this subject and "the people's business"[47] is a recent C-Span poll that showed 95 percent of adults thought the Supreme Court should be more open, while 74 percent indicated that all oral arguments should be televised.[48]

In the last decade, members of both parties have proposed legislation to convince the justices to adopt electronic coverage of the Court. Senators Grassley and Schumer, Cornyn and Durbin, and Congressmen Poe – who sits on this subcommittee – and just a month before the introduction of H.R. 917, Congressman Connelly, along with 8 cosponsors, proposed a bill (H.R. 96) that would permit electronic 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 one or more of the parties before the Court," by amending Chapter 45 of title 28 of the United States Code. 28 U.S.C. § 1 also legislates that "the Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum," a fact which should help blunt any "separation of powers" argument by the judiciary.

A similar bill (S. 1207) was introduced by Senator Durbin, cosponsored by Senator Grassley and 3 others. As you are all aware Senator Grassley, who is expected to become the new Chair of the Senate Judiciary Committee, has been a staunch advocate of "transparency and accountability" in the nation's federal courts by allowing electronic coverage of court proceedings.[49]

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[47] *See*: http://www.nationallawjournal.com/supremecourtbrief/id=1202676220755/As-Judiciary-Chair-Grassley-Likely-to-Push-for-Cameras-in-Supreme-Court?slreturn=20141101072759

[48] *Id.*

[49] *Id.*

Public Proceedings

In that same vein, Justice Holmes took judicial notice of the "vast importance" of the "public trial" phenomenon when he wrote about, "the security which publicity gives for the proper administration of justice." Holmes continued that "[i]t is desirable that the trial of [civil] causes should take place under the *public eye*."[50] This public scrutiny was deemed crucial "because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with *his own eyes* as to the mode in which a public duty is performed."[51] In 2014 electronic coverage *is* the unblinking eye of the public and to deny its unrivaled potential to convey information instantly and to the widest audience is to deny reality.

Federal courts should not be viewed with suspicion and distrust. Instead they should be governed by the words of Chief Justice Burger when delivering the opinion of the Court in *Nebraska Press Association v. Stewart*: "the value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the acceptance of fairness so essential to public confidence in the system."[52]

Such electronic coverage provides modern society with almost all of its current information. In order to be fully informed about decisions made in federal courts, the press must be permitted to provide electronic coverage of those proceedings so that the public may see the administration of justice for itself.

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[50] *Publicker Industry v. Cohen*, 733 F.2d 1059, 1069 (3d Cir. 1984) *citing* 3 W. Blackstone, Commentaries 373) *quoting Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884))(emphasis added).
[51] *Id.* emphasis added.
[52] *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984)

To that end the press must be permitted to do what it does best – inform its viewers by presenting to them the sights and sounds of things, places and people which they would not ordinarily be able to see or hear. The right of a free press is embodied in the First Amendment and predicated on the belief that an informed society will remain just and free. It will take courage and vision for this doctrine to endure and dynamically continue to evolve as one of the fundamental principles upon which this country was founded.

As Justice Brandeis noted in his dissent in a 1932 due process case, "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. But in the exercise of this high power, *we must be ever on our guard, lest we erect our prejudices into legal principles.*"[53]

The federal judiciary must be mindful of its high power not to erect its own prejudices into judicial rules. Society can ill afford to let the arbitrary and speculative objections of jurists antagonistic to the electronic press substantially undermine a fundamental constitutional right by lens-capping the very tools of its profession and eviscerating the very means by which most Americans receive their news.

Justice Holmes also stated "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[54]

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[53] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311(1932)(Brandeis, J., dissenting)(footnote omitted)(emphasis added).
[54] Vol. 3 OLIVER W. HOLMES, *The Path of the Law, in* Collected works of Justice Holmes 391, 399 (Sheldon M. Novick ed., University of Chicago Press 1995) (1897).

In light of current broadband and storage capabilities to present gavel-to-gavel electronic coverage of court proceedings on the Internet, whether through live streaming or archived files, along with the ability to watch such coverage on hand-held devices, makes the quaint notion of citizens gathered around in living rooms to watch live TV on small black & white screens just as passé.

In an age when it is no longer practical for all members of the community to pack into the courthouse and personally take in "court day," the media act as public surrogates, transmitting court proceedings to a vast public audience and enabling the public to satisfy its civic duty in monitoring the government.

Conclusion

The benefits of allowing such coverage are numerous and significant: it will bring transparency to the federal judicial system, provide increased accountability from litigants, judges, and the press, and educate citizens about the judicial process. Electronic coverage will allow the public to ensure that proceedings are conducted fairly, and, by extension, that government systems are working correctly. We expect that the watchful eye of the public will demand increased accountability from all courtroom actors, each of whom may feel an increased responsibility to conduct themselves in a manner appropriate to their role, thereby diminishing the risk of rogue actors and other wayward judicial actions potentially harmful to the interests of justice. The non-electronic press, for its part, will also feel the weight of increased accountability, as it will no longer be the only source of information about the courts, and claims of sensationalistic or inaccurate reporting will be readily verifiable by a public able to view the underlying proceedings for itself.

Although some critics of electronic coverage have asserted that it will likely impede the fair administration of justice or cause irreparable harm, empirical studies of these concerns have proved to

be speculative at best. Critics have argued against electronic coverage on numerous grounds: because they claim that cameras and other hardware are disruptive of trials, that increased public scrutiny frequently leads to grandstanding and lawyers "trying their case in the press," and that the sensationalistic nature of electronic coverage will infringe upon the privacy of participants and create public misperceptions about the judiciary. Each of these concerns, however, has either been specifically refuted by prior experiments with, and studies of, electronic coverage in the courts, or can be expressly addressed by enacting intrinsic safeguards to complement judicial trial court discretion.

The ability of the public to view actual courtroom proceedings should not be trivialized. It touches on an important right, which goes well beyond the mere satisfaction of a viewer's curiosity. That right, advanced by electronic coverage, is the right of the people to monitor the official functions of their government, including that of the judicial system. Nothing is more fundamental to the democratic system of governance than this right of the people to know how their government is functioning on their behalf.

The Internet has enabled gavel-to-gavel electronic coverage of courtroom proceedings because of its intrinsic capacity to permit unlimited content rather than be bound by the time constraints of traditional broadcast and cable media. Additionally, newspaper websites have made it possible for the print media to also provide electronic coverage where they previously were relegated to artist's renderings, still images and written words. Websites carrying news and information have the capacity to convey and archive video of full trial proceedings. A growing trend of many communities to have all-news cable television stations that focus around the clock on local events also would permit extended coverage of federal court proceedings – not just short stories with sound bites.

Finally, modern technology has long since transcended the difficulties that led to bans on such coverage. There are no more whirling, noisy cameras. There are no more glaring lights. Nor does a thundering herd of technicians have to go in and out of the courtroom to set up and tear down their gear. Modern equipment is inaudible, requires no flashes or extra lights, and can be operated by a limited number of trained professionals.

And while courtroom artists have greatly contributed to the coverage of courtroom proceedings in the absence of cameras, for the public to be relegated to viewing something more akin to cave drawings in an age of high-definition television could not be more anachronistic.

In 1996, the Judicial Conference recognized that "technology that permits the reproduction of sound and visual images provides our courts with a valuable resource to assist in their efforts to improve the administration of justice. That resource should be utilized, however, for purposes and in a manner consistent with the nature and objective of the judicial process."[55]

One would hope that by 2015, after what will have been a four year experiment, the federal judiciary will finally acknowledge that those concepts are not mutually exclusive and permit electronic coverage in all courtrooms for all proceedings on a permanent basis. As Chief Justice John Roberts jokingly acknowledged during his confirmation hearings in 2005 "television cameras are nothing to be afraid of."[56]

[55] *See*: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR1993-04.pdf at 284.
[56] Transcript: Day Three of the Roberts Confirmation Hearings. *See*: http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401451.html

Justice Harlan was a bit more eloquent when he predicted that "the 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."[57]

Justice Stewart expanded on that notion with some prognostications of his own by stating, "the suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms."[58]

We look forward to working with this Subcommittee and the full Judiciary Committee as you move forward with H.R. 917 and other similar legislation.

Thank you for the opportunity to testify. I look forward to your questions.

[57] *Estes* at 595-596.
[58] *Id.* at 614-615 (Stewart, J., dissenting).

Mr. MARINO. As is my custom, I wait and ask questions last, because I am here and other Congressmen and women need to get to other areas. So I am going to defer to my good friend from Ohio, Congressman Chabot, who has been a proponent of this legislation for years and years.

Congressman?

Mr. CHABOT. Thank you very much, Mr. Chairman. And maybe just a few thoughts and a little background. This is a topic, as the Chairman mentioned, that I have been interested in for a long time, at least 30 years. I practiced law for 16 years before coming to Congress. And during part of that time I was practicing law, I was first elected to Cincinnati City Council about 30 years ago now and served there for about 5 years. And one of the things that I did when I was there was to have council meetings televised. I don't know how many people actually watched it. It can be a bit boring at times. But, nonetheless, the public had access.

And then moved over to the Hamilton County Commission, where I served for about 5 years, did the same thing there. When I came to Congress, C-SPAN already existed. Congress itself was already on television, despite a lot of the same types of concerns that there are relative to courtrooms, that people would play to the cameras. And some Members of Congress do. But the fact is that we are public folks; that the public pays for the courtrooms, just as it pays for our congressional chambers. And I think they ought to have access to it. And access nowadays, let's face it, people really—it is not practical to think that you can just leave your job or leave your family and go down and see what is happening in the local courtroom. The access is by television should the public choose to tune in. And but they should have that opportunity. Again, they are paying for it.

But, in any event, when I introduced the legislation in the House about 20 years ago, my colleague, the chief cosponsor, was a former Member of the Committee, Rep. Chuck Schumer. And he felt very strongly about it and gave innumerable excellent speeches. I disagreed with him on a few other things, but on this particular topic, we were in agreement. When he left, I think Rep. Bill Delahunt took up on the Democratic side and did a wonderful job over the years. But we have been working on this for a lot of years now. And then I lost my seat back in 2008 and then won it back in 2010. And I want to commend Rep. Steve King for taking it up then. He has done a great job. And I want to also thank Rep. Zoe Lofgren for her leadership on this issue. But the thing that I keep hearing, this business about potentially impairing the right to a fair trial that the Judicial Conference talks about, I could understand that point of view if we didn't have years and years of experience on this, both when the court had its own pilot project back from 1991 to 1994, in which there essentially weren't any significant issues during that 3-year period of time, and then we have the States, all of whom at this point—we used to be able to say, well, they all except for this one or this one—well, now they all have it, and we have had 20 years of experience, 20-plus years of experience, with very few problems. And whatever problems there are I think have been dealt with.

Our colleague, Mr. Nadler, as the Ranking Member Mr. Conyers mentioned, has been involved in this and supported it. And he had a good suggestion. That was to obscure the faces of witnesses in sensitive cases. And we are leaving the oversight of this and the rules up to the judges themselves. So I just still fail to see what the opposition is to this, although I know it is still there, and we haven't been able to accomplish this yet.

But I think, particularly at the Supreme Court level, as Mr. King mentioned, the types of cases that are heard over there, whether it is Bush-Gore, whether it is the Affordable Care Act or Obamacare, whatever your preferred terminology is, or one of the pieces, one of my things I am proudest of that I was the principal sponsor, the ban on partial birth abortion, which we fought for about 8 years before it went all the way to the U.S. Supreme Court, and on a 5-4 vote prevailed. And I remember sitting on that side, because we were in the minority then, Republicans, and hearing that the case had been ruled in our favor, which I was really happy about, but we couldn't see the decision.

So those were some of the frustrations. So I have said a lot. I don't have a lot of time. Either one of you want to respond, especially to the potentially impairment of a fair trial? We have got such a long experience. Shouldn't that be sufficient to show that that shouldn't really be that much of a concern? Your Honor?

Judge ROBINSON. What we know is that the State courts have had cameras in the courtroom, but there is not a uniform approach. Some of them place limits on criminal cases. Some of them treat civil versus criminal cases differently. Some of them have consent requirements. Some of them do not. The Federal judiciary is going to need a uniform national approach. That is how we operate. The Judicial Conference makes policy for the trial courts. And the trial courts asked for the Judicial Conference's guidance and education and policy. And so we are looking at a uniform national approach. We know that the State courts don't have a singular model that suggests that this is the way to do it. Certainly studying their experiences is important. But equally important is studying the experience of Federal trial judges and having the benefit of all of those experiences in formulating a policy.

In terms of the denial of fair trial or the impairment of the fair trial, what I want to I guess stress to you is that the most serious of concerns is not that it is going to change the behavior of lawyers, or even change the behavior of other participants in the trial process. The greatest threat I think to the right to a fair trial is that in a courtroom—and Representative Conyers spoke to this—it is a search for the truth. What happens is rigorous examination of witnesses, both direct and cross-examination. We don't want a situation where the witness' testimony is all affected by the fact that not only are people that are in the courtroom going to hear it but now hundreds of thousands, if not millions of people, are going to hear it, on television or on the Internet. Perhaps their boss or their minister or their next-door neighbor, who would otherwise not hear that testimony. In every case, there are situations where personal information becomes a part of the record. And as you have all talked about, the fact that we have open trials already, anyone can

find that, all of our pleadings are open to the public through the Internet, as are trial transcripts.

But imagine, if you will, in a civil trial, it is an employment case, one of the claims is emotional distress. I think, Mr. Chabot, you will remember this from being a lawyer, but on cross-examination, someone that has made that type of claim is going to be examined extensively about everything about their personality, their mental health issues, et cetera. In a personal injury case, a plaintiff who has made, for example, a claim of loss of consortium is now going to be cross-examined, if not examined as well, about their sexual practices with their spouse or partner. In a criminal case, a confidential informant is going to be rigorously cross-examined in ways that are going to identify who that person is, even if their voice and even if their face is obscured. I say all of that to say that we have legitimate and serious concerns about the impediment to a fair trial.

And this is what we need to study. This is why we have the pilot. And these are the many questions that we are looking at and that we hope will be answered for us in terms of guidance, best practices, whether it is possible for a judge to use their discretion in a way in a given type of case but yet not impede or impair someone's right to a fair trial.

Mr. MARINO. Thank you, Judge.

The gentleman's time has expired.

But, Attorney Osterreicher, would you briefly like to respond?

Mr. OSTERREICHER. I would hope that we wouldn't shoot the messenger. There are no less than four cameras in this courtroom right now. I don't think any of us are paying any attention to them. We are talking to you. You are talking to us. That is what happens in a courtroom. That is what my experience has been throughout all the cases that I have covered.

In New York, during the 10-year experiment, I think there is a telling statistic. Not one of those cases was ever appealed on the grounds that somebody did not receive a fair trial because their trial was televised. I think that speaks volumes.

In terms of what other information we are going to obtain from this new experiment, you know, I look back from '91 to '94. The FJC report talks about their confidence in—they went through the same empirical data, the same anecdotal data.

They, along with the Case Management Committee, both recommended it. And, yet, at the end of the day, even with a supplemental report supporting the continuation of cameras in the courtroom and electronic coverage, the judicial committee decided to not go forward with it.

So I am not really sure, you know, how much more data we need to convince people. I know that the Honorable Judge Robinson put some statistics in her written report. If you will look at them, I believe that there are 17 points that were addressed. And, yet, only three of those were over a 50 percent concern by the people filling out whatever type of questionnaire there was.

So I think, unfortunately, what we see is that it could, it might, it is possible. I think this is all speculative. But the overwhelming amount of evidence shows that it just hasn't happened in the expe-

rience of the courts throughout the States and even during the experimental time that they had.

Mr. MARINO. All right. Thank you, sir.

I am just going to take a moment here to enter something into the record.

Without objection, I request permission to submit for the hearing record materials from CSPAN, the Radio and Television News Directors Association, and Ms. Maureen Mahoney of Latham & Watkins. These materials have been circulated to all the Members of the Subcommittee. Hearing no objection, I will enter these into the record.

[The information referred to follows:]

Before the
U.S. House of Representatives Judiciary Committee
Subcommittee on Courts, Intellectual Property, and the Internet

Hearing on H.R. 917: Sunshine in the Courtroom Act of 2013

December 3, 2014

Statement of C-SPAN[1]

C-SPAN has long been an advocate for greater public access to government proceedings, including access to the federal courts. Although we have urged televised coverage of the courts for nearly 30 years, including the Supreme Court, we have never taken a position on legislation compelling such coverage. H.R. 917, like the several similar bills before it, addresses administrative and policy matters related to televising the federal courts that we believe are subjects more properly addressed by others.

However, C-SPAN believes the Supreme Court's oral arguments should be open to televised coverage.

We have been on record with Chief Justices Rehnquist and Roberts and with other congressional committees that if, by whatever means, TV cameras were allowed in the Supreme Court, then C-SPAN would give the Court the same quality and extent of coverage we now give the daily legislative sessions of the House and Senate. This means we would televise each argument on a gavel-to-gavel basis without interruption, commentary, or analysis. The arguments would not always be televised on a live basis (due to our commitment to televise the House and Senate), but every minute of every argument would be televised on either C-SPAN, C-SPAN2 or C-SPAN3 on a timely basis. We would also be able to broadcast the arguments on our local broadcast radio station, WCSP-FM, which is also distributed nation wide on satellite as C-SPAN Radio. Finally, we would also make each argument available in full, and forever online as part of the C-SPAN Video Library, which would also mean that educators, students, Court observers, and of course the general public would be able to research and get a better understanding of how the judicial branch works.

C-SPAN has already started to honor this promise. Since the Supreme Court began to release audio-only tapes of its oral arguments, we have broadcast many of them on C-SPAN Radio. We have also added pictures of the attorneys and the justices to the audio-only files to create an approximation of televised coverage. Since 2000 when

[1] C-SPAN is the trade name of the National Cable Satellite Corporation, a tax-exempt and non-profit District of Columbia corporation. It was created by America's cable companies in 1979 as a public service and produces three public affairs television networks: C-SPAN, C-SPAN2 and C-SPAN3; C-SPAN Radio, a Washington, D.C. public affairs broadcast radio station that is also distributed nationally by Sirius/XM Satellite Radio; and the C-SPAN Video Library containing over 200,000 hours of searchable video, available at www.c-span.org .

audio-only tapes of the Court first became available to us, C-SPAN has provided 270 hours of such 'television' coverage of the oral arguments. It is far from ideal, but these efforts are also a demonstration of our commitment to providing our audience with more information about the nation's highest court despite the lack of camera coverage.

We have also devoted significant resources to coverage of the Supreme Court nominees and then to their appearances as justices outside of the Court chamber. Since 1981, C-SPAN has produced 1,073 hours of the Senate confirmation hearings of 14 nominees to the Court. Then, to the extent the incumbent justices permit video coverage of their public appearances, we provide it. Our Video Library contains 982 hours of coverage of justices in such settings as interviews, debates, ceremonies, formal speeches, congressional testimony, etc.

Our efforts also include our coverage of several circuit courts of appeals oral arguments that were made possible when the Judicial Conference experimented with allowing cameras in some federal courts starting in 1991. Since then we have covered 101 hours of federal appellate oral arguments that were, in our news judgement, of broad national interest. We have also given attention to the lower federal courts by covering 27 Senate confirmation hearings for their nominees.

C-SPAN invests its resources into coverage of the judiciary because our public affairs mission can not be met by ignoring an entire branch of government. No matter how much video we produce about judges, justices and attorneys, the ban on Supreme Court television leaves a gaping hole in our coverage of the American government. At a time when most Americans get most of their information about their government from television (or, more accurately, video), it is unacceptable for the Supreme Court to shield itself from the public by keeping the cameras out. If the cameras are let in, the public will finally be able to see the judicial branch in the same way C-SPAN now allows them to see the executive and legislative branches of their government.

STATEMENT OF THE
RADIO TELEVISION DIGITAL NEWS ASSOCIATION
IN SUPPORT OF H.R. 917
THE SUNSHINE IN THE COURTROOM ACT OF 2013
UNITED STATES HOUSE COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON COURTS, INTELLECTUAL PROPERTY AND THE INTERNET

December 3, 2014

The Radio Television Digital News Association ("RTDNA"), the world's largest professional organization devoted exclusively to electronic journalism, submits this statement expressing the support of our more than 1,000 members for H.R. 917, the Sunshine in the Courtroom Act of 2013. RTDNA's members are the people who have demonstrated that television and radio coverage works at the state and local level, and they can make it work on the federal level. RTDNA strongly believes that permitting electronic coverage of federal judicial proceedings—from federal district courts to the United States Supreme Court—is the right thing to do as a matter of sound public policy. Moreover, RTDNA believes that the decision to allow cameras in federal courtrooms is a legislative prerogative. Passage of this legislation will send a message to judges that giving the citizens access to courts through the electronic media is the public's right and an opportunity for the federal judiciary, not an inconvenience.

In 1913, Justice Brandeis famously commented that "sunlight is said to be the best of disinfectants." Since 1999, his observation has found use in naming a series of bills that recognize that, in the proper functioning of a democracy, some of the strongest transparency provisions are required for the judiciary. Sadly, for fifteen years now, leaders in both houses of Congress have been unsuccessful in their attempts to pass various forms of the Sunshine in the Courtroom Act. Indeed, because of the federal ban,

American citizens have been deprived of the benefits of first-hand coverage of significant issues that have come before the United States federal district courts, federal appellate courts, and the Supreme Court in recent years. The time has come for Congress to take the bedrock notion that any citizen may be physically present in a courtroom and update it for the 21st Century, where technology can make federal judicial proceedings accessible to *all* citizens.

Passage of this measure has the potential to open our nation's federal courts to electronic media coverage, thus creating greater transparency, increasing citizens' knowledge and understanding of the federal court system, and advancing the public's right to know. Indeed, openness of trials is integral to the legitimacy of the judiciary. Certainly, the proposed legislation represents an important first step. At the same time, the bill respects the judiciary's autonomy, providing for oversight by the Judicial Conference, granting federal judges the ability to limit coverage where due process rights would be violated, and affording protections to jurors and witnesses. At the expiration of a three year period, Congress would have the opportunity to study the results before enacting permanent changes.

Under present law, radio and television coverage of federal criminal and civil proceedings at both the trial and appellate levels is effectively banned. It simply is not right that Americans form their opinions about how our judicial system functions based on what they see and hear on the latest episode of Judge Judy or CSI. Nor does it make sense that the nominees for the Supreme Court are widely seen in televised hearings, only to disappear from public view the moment they are sworn in as justices. In the same way the public's right to know has been significantly enhanced by the presence of cameras in

the House and then the Senate over the past two decades, H.R. 917 has the potential to illuminate our federal courtrooms, demystify an often intimidating legal system, and subject the federal judicial process to an appropriate level of public scrutiny.

RTDNA submits that there is no compelling reason not to support the passage of this legislation. The First Amendment right of the public to attend trials has been upheld by U.S. Supreme Court. The presence of cameras in many state courtrooms is routine and well-accepted. The anachronistic, blanket ban on electronic media coverage of federal proceedings conflicts with the values of open judicial proceedings and disserves the people. A courtroom is, by nature, a public forum where citizens have the right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.

While both print and electronic media fulfill the important role of acting as a surrogate for the public, only electronic coverage has the ability to provide the public with a close visual and aural approximation of actually witnessing events without physical attendance. It cannot seriously be disputed that audiovisual coverage, which would allow for complete and direct observation of the demeanor, tone, credibility, contentiousness, and perhaps even the competency and veracity of the participants, is the best means through which to advance the public's right to know as it pertains to the actions of the federal judiciary. The interests of our citizens are not fully served, in this day and age, by opening federal courtrooms to a limited number of observers, including the press, who can publicize any irregularities they note. Public access to judicial proceedings should not and need not be limited to reading second-hand accounts in newspapers, or hearing them on radio or seeing them on television. By nature, the

electronic media is uniquely suited to ensure that the maximum number of citizens have direct and unmediated access to important events.

In practice, what goes on inside a courtroom can only be effectively reported if the court permits journalists to use the best technology for doing so. There is no principled basis for allowing the print media and not the electronic media to use the tools of their trade inside federal courtrooms. Only the electronic media can serve the function of allowing interested members of the public not privileged to be in the courtroom to see and hear for themselves what occurs. As Judge Nancy Gertner aptly stated in testimony before the Senate Judiciary Committee's Subcommittee on Administrative Oversight and the Courts some years ago, "public proceedings in the twenty-first century necessarily mean televised proceedings."

Technological advances in recent decades have been extraordinary, and the potential for disruption to judicial proceedings has been minimized. Today, audiovisual coverage seems no more than a natural extension of new technologies that have been embraced by state and federal court systems. The cameras available today are small, unobtrusive, and designed to operate without additional light. The electronic media can be required to "pool" their coverage in order to limit the equipment and personnel present in the courtroom, further minimizing disruption.

Moreover, simultaneous audiovisual coverage of judicial proceedings improves the media's overall ability to accurately report on them. Such coverage affords a greater pool of reporters instantaneous access. In-court events, including quotations, can be verified simply by playing back an audio or videotape. As one New York study found,

"reporting on court proceedings, both by newspaper and broadcast reporters, frequently is more accurate and comprehensive when cameras are present."

Admittedly, the electronic media is not a foreign element in the coverage of federal courts. It is almost unfathomable that the finger pointing that began with the O.J. Simpson murder trial *two decades ago*, accusing the camera as the cause of "sensationalism" and public distaste for our legal process, persists. The empirical evidence to the contrary is overwhelming—the camera shows what happens; it is not a cause. The high-profile, celebrated trials obviously test the tolerance of camera access. Firm administration of the trial environment by the judge is essential, with or without cameras in the courtroom. The prohibition on audiovisual coverage of federal judicial proceedings has resulted in viewers witnessing those events that take place on the courthouse steps, not those transpiring where it matters most—inside the courtroom.

In 2011, the Ninth Circuit allowed cameras to witness the debate over one of the premiere social matters of our times: whether banning same-sex marriage is unconstitutional. No parade of horribles. No lurid sensationalism. Just orderly and respectful proceedings, principled and civil debate, prepared and thoughtful participants, non-partisan inquiries. Because they were able to hear, listen, and see the proceedings, the audience came away with an in-depth education and a better comprehension of the constitutional questions presented. The judges hearing the Proposition 8 case, whom many suggested would not rise above politics, likely gained the esteem of those who witnessed how well they acquitted themselves. Broad public access undoubtedly enhanced acceptance of the court's eventual decision about a controversial issue. The Ninth Circuit's example makes a powerfully compelling argument for the camera's

indispensability when the issues at stake are as broadly consequential and as deeply divisive as they are in the struggle over marriage equality.

This comes as no surprise, of course, to RTDNA's members, who have three decades of experience with electronic court coverage. Jurors, prosecutors, lawyers, witnesses and judges on both the state and federal levels have overwhelmingly reported for years that the unobtrusive camera has not had an adverse impact on trials or appellate proceedings. The pilot cameras program conducted by six federal districts and the Second and Ninth Circuit Courts of Appeals between 1991 and 1993 was a resounding success, resulting in a recommendation that cameras be allowed in all federal courts. All 50 states now permit some manner of audiovisual coverage of court proceedings.

Comprehensive studies conducted in 28 states show that television coverage of court proceedings has significant social and educational benefits. Most conclude that a silent, unobtrusive in-court camera provides the public with more and better information about, and insight into, the functioning of the courts. Many have found that the presence of cameras does not impede the fair administration of justice, does not compromise the dignity of the court, and does not impair the orderly conduct of judicial proceedings. In the hundreds of thousands of judicial proceedings covered electronically across the country since 1981, to the best of RTDNA's knowledge there has not been a single case where the presence of a courtroom camera has resulted in a verdict being overturned, or where a camera was found to have any effect whatsoever on the ultimate result. Fourteen federal trial courts are now taking part in the federal Judiciary's digital video pilot, which started July 18, 2011 has been extended through July 2015. The pilot is limited to civil proceedings in which all parties have consented to recording.

The U.S. Supreme Court is the ultimate arbiter of questions that shape our nation. Currently, to attend Supreme Court hearings, individuals must stand in line outside the building and wait to be ushered in. There are roughly 400 seats in the courtroom, only a fraction of which are available to the public. That means countless Americans hoping to view the arguments are unable to, especially in cases that have broad public interest, such as the marriage equality, Obamacare, voting rights, and affirmative action cases in recent terms. Currently the Court's website provides access to audio recordings of all oral arguments before it, which may be downloaded or heard online. But that audio is not available until well after the fact, and there is no video, ever. Yet, the Court's rejection of transparency appears calcified.

The primary argument made by opponents of televised trials — depriving defendants of a fair trial by intimidating witnesses and jurors – has no application in the Supreme Court. Vague assertions about the court's authority and dignity are easily dispelled. Empirical evidence undermines assumptions that televising proceedings changes the behavior of participants or the nature of the arguments. And the fear that television audiences may be misled by "sound bite" coverage is no reason the Supreme Court should claim exemption from the kind of public scrutiny applicable to the President and Congress. While it is understandable that justices are concerned that electronic coverage could result in out-of-context snippets on YouTube or the Colbert Report, RTDNA respectfully submits that, at the very least, the Justices must accept the reality that they exist in a televised world. (In fact, websites and digital channels now offer the electronic media more ability to offer gavel-to-gavel coverage). At the same time, it is incumbent upon them to offer the public a more accurate understanding of what they do.

Electronic coverage would afford the Court the respect it deserves, in the same way it does the highest courts in U.S. states and many other countries, including Britain and Canada, where the camera is routine and well-accepted.

For whatever reasons, federal courts have not, on their own motion, taken steps to permit electronic coverage of their proceedings. Therefore, RTDNA respectfully submits that the time has come for Congress to legislate. As federal district Judge Leonie Brinkema wrote in rejecting requests for televised coverage of the trial of alleged terrorist Zacarias Moussaoui, whether or not to permit cameras in federal courtrooms is a question of social and political policy best left to the United States Congress. The legislation being considered represents a careful approach by giving federal judges at both the trial and appellate levels the discretion to allow cameras in their courts for three years. At its conclusion, Congress and federal judges would be given an opportunity to review the program.

In sum, RTDNA believes H.R. 917 appropriately reflects a fundamental tenet of our democracy - a courtroom is a public forum where citizens have the right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place. As the Supreme Court has stated, people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. The courtroom camera not only gets the story right, it opens a limited space to a broader audience. The public has a right to see how justice is carried out in our nation. As the Supreme Court has stated, people in an open society do not demand infallibility from their institutions, but it will be difficult for them to accept what they are prohibited from observing. Public scrutiny will help reform

our legal system, dispel myth and rumors that spread as a result of ignorance, and strengthen the ties between citizens and their government. The courtroom camera not only gets the story right, it creates a record of the proceedings and opens a limited space to a broader audience. Experience shows that cameras in the courtroom work and that they do not interfere with administration or infringe on the rights of defendants or witnesses. RTDNA members have covered hundreds if not thousands of state proceedings across the country without incident and with complete respect for the integrity of the judicial process. It is time to provide unlimited seating to the workings of justice everywhere in the United States by permitting audiovisual coverage of federal judicial proceedings at all levels, including those before the United States Supreme Court. It is time to let the sunshine in.

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December 1, 2014

Rep. Howard Coble, Chairman
Rep. Jerry Nadler, Ranking Member
United States House of Representatives
Judiciary Subcommittee on Courts, Intellectual Property and the Internet
2138 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Coble and Representative Nadler:

I have reviewed HR 917 and urge the Committee not to adopt it. The legislation would unreasonably interfere with the Judiciary's authority to establish procedures for protecting the integrity of its own proceedings. I have attached testimony that I submitted to the Senate in 2011 concerning legislative initiatives to authorize televised recordings of arguments in the Supreme Court. Many of the observations I made in that testimony are also germane to this legislation's mandate to override the Judiciary's own deliberative processes for evaluating these difficult issues. Thank you for considering my views.

Very truly yours,

Maureen Mahoney /sh

Maureen E. Mahoney
of LATHAM & WATKINS LLP

Enclosure

ATTACHMENT

STATEMENT OF MAUREEN MAHONEY

Latham & Watkins LLP

United States Senate

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

Hearing On:

Access to the Court: Televising the Supreme Court

PRESENTED ON DECEMBER 6, 2011

STATEMENT OF MAUREEN MAHONEY

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[10] *Id.* at 230

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[24] *Id.*

[25] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

[35] *Id.*

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

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

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

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

Mr. MARINO. All right. The Chair now recognizes the distinguished gentleman from Florida, Congressman Deutch.

Mr. DEUTCH. Thank you, Mr. Chairman.

And thanks to the witnesses for being here.

I wanted just to follow up on what you both were talking about, which is the pilot programs, the need for additional investigation into whether this might work over the long-term and, Judge Robinson, ask you to look at some of the cases, the most highly publicized cases, that were televised, the O.J. Trial, William Kennedy Smith, Ted Bundy, Florida—in Florida, in the Florida Supreme Court, where cameras are permitted, *Bush v. Gore*.

In those cases, certainly, the three trials, was there evidence of—of the concerns that you raised that would undermine a fair trial, the intimidating effect of cameras, threats to judges, privacy concerns for nonparties?

I mean, we have a long history at the state level of cases that have been tried in public and on television. Do we—instead of simply waiting to see what we learn from the pilot, from our history, have your concerns been addressed in any of these cases or to what extent did we see those concerns about undermining a fair trial really come into play?

Judge ROBINSON. Well, I have to tell you the high-profile cases that have been televised that you mention, I didn't watch any of them gavel to gavel. But my perception, I think, and the perception of many were those very concerns in those cases. But I think what is far more important is to survey the people that were involved in a particular case, the lawyers, the witnesses.

I mean, the things that our pilot is going to do—their perceptions, I think, are much more compelling and persuasive than the perceptions of somebody who is watching it on TV who doesn't know all the facts, who doesn't know, perhaps, what that witness testified to in a deposition and whether they are shading their testimony now when they are in front of the television cameras.

Mr. DEUTCH. Right. We may not—viewers may not know that. But the parties involved that—on whose behalf you are speaking—the concerns of the parties involved, certainly, we would have—these are issues that would have come up time and time again or would come up time and time again, wouldn't they, as we televise trials all over the country, many of them high profile?

Judge ROBINSON. All I can tell you, sir, is that I think it is important to survey people. And I am not aware that, in the state courts or in those cases that you mention specifically, that those participants were surveyed, that their views were called upon.

We think it is important that the views of the participants are a part of what we consider. Once the trial is over, you know, they move on unless someone asks them—you know, those concerns may never be raised. We want the concerns, if any, raised in the context of the survey. And so that is why we are doing the pilot in the way we are doing it.

Mr. DEUTCH. And I know, Judge Robinson, that you are not—you are not taking a position on the Supreme Court. Is that correct?

Judge ROBINSON. The Judicial Conference——

Mr. DEUTCH. Right.

Judge ROBINSON [continuing]. Does not take a position.

Mr. DEUTCH. Right.

So——

Judge ROBINSON. It does not speak for the Supreme Court.

Mr. DEUTCH. But it seems—and, Mr. Osterreicher, I will ask you this question. It seems that, since—Judge Robinson, as you said, the real concern isn't judges playing to the cameras.

It is all of these other concerns, that at the Supreme Court where—simply appearing before the Supreme Court is intimidating in itself, and these other concerns don't really seem to apply at all.

So, Mr. Osterreicher, what is—what is the argument? Justice Kagan said that she worries about people playing to the cameras. You have been to many Supreme Court oral arguments. For anyone who has been, is that a—is that a valid concern?

Mr. OSTERREICHER. No. Absolutely not. When those red and green lights come on, the only thing you care about is persuading the nine Justices that are sitting up there as to your position. I really think that it really does a disservice to the people, to the lawyers, to the judges, to really say that people become aware and play to the cameras.

I mean, I sat in the courtroom during the O.J. Simpson trial. The lawyers there were going to do whatever they were going to do, regardless of whether there were cameras or not. And, as a matter of fact—and I use this as a comparison—I believe that the public missed a wonderful opportunity to see Judge Matsch, who oversaw the Oklahoma City bombing trial.

There were cameras in the courtroom there. I mean, most people don't think about it. But they were closed-circuit cameras that allowed the broadcast of the proceedings that were occurring in Denver to be seen by the people in a courtroom in Oklahoma City.

Again, had that been allowed to happen, we might have seen what a well-conducted trial looked like compared to what I will admit was a circus during the O.J. Trial. But that had nothing to do with the fact that there were cameras in the courtroom.

Mr. DEUTCH. And at the Supreme Court where—which is a courtroom—our courtrooms have always been public places, always been open to the public.

In the Supreme Court, couldn't the argument equally be made that, if the concern really is playing to the cameras, that with the current system where there are a handful of Supreme Court correspondents from the networks, from the major publications, who have—who are known to the Justices, isn't it just as likely, if that is really the concern, that Justices would play to them, knowing that they are going to be the ones that describe what happens in the courtroom?

Mr. OSTERREICHER. I think, obviously, from my experience there, that sometimes the Justices get playful and they really don't care whether—that there is cameras there or not cameras there. That is what they are doing.

They are either trying to ask insightful questions or just trying to be clever. And, certainly, it is good, if you are arguing a case, if you can come back with a good answer.

I know, in some of the really seminal cases that we have actually—NPPA submitted amicus briefs in, I am always in awe and disbelief that I am sitting in this courtroom, the highest court in

the land, where they will decide how the rest of us will live and there is only this handful of people.

You know, I am fortunate that I am admitted to the Bar. So I get to wait on a shorter line. But even then they cut people off and you have to sit in the overflow room and only get to listen to it over a speaker and don't actually get to see people. I think that is really important, also, in terms of getting to see people.

When people testify in court and it is only before the people in that courtroom, they might testify differently if it was on TV. But I would assert that they might testify more honestly because, if their neighbors who happen to know something about them get to see it, they don't want to not be truthful.

And if we are in search of the truth in a courtroom, then, isn't that much better to have everybody? I mean, that is really what the founders thought about when they were talking about court day, when people could come in and watch.

Mr. DEUTCH. Okay. Thank you very much.

Thanks, Mr. Chairman.

Mr. MARINO. Thank you, Congressman.

The Chair recognizes the gentleman from Florida, Congressman DeSantis.

Mr. DESANTIS. Thank you, Mr. Chairman.

Judge, I know there is a difference in terms of practitioners practicing in Federal, state court. Part of the reason is because of people like you that get through the Article III vetting process that tend to be well-qualified and good judges.

And sometimes that is not always the case in various state systems. And, obviously, there are States where they do allow cameras at the trial level. And you had raised the concern about due process and fairness in those cases.

And so, given that we do have experience with state courts having cameras, does the Conference believe that prejudice and ill effects abound from the use of cameras there? And, if so, what is the basis for that belief?

Judge ROBINSON. The Conference has not taken a position and really doesn't have a basis to make an evaluation of what is going on in the state courts.

As I said before, I would characterize what the state court is doing—what the state courts are doing is experimental in the sense that, even though they—some of them have been having cameras in the courtroom for a long time, there are so many different models.

We are just concerned, obviously, about ensuring that there is due process in the Federal courts. I don't think we are in a position to evaluate what is going on in the individual state courts.

Mr. DESANTIS. So with respect to this bill, it gives the presiding judge the ability to decide whether or not to broadcast proceedings.

So isn't the presiding judge in the best position to differentiate between those cases where it may be appropriate to record or broadcast and those that may be susceptible to undue interference?

Judge ROBINSON. I think it is very important that the presiding judge have the ultimate discretion because the presiding judge knows the case. They know the evidence in the case. They can anticipate oftentimes what will happen in the trial. On the other

hand, there are times that they cannot anticipate things that may happen in the trial.

At the same time, as trial judges, I think we would all benefit from a policy that is shaped around the results of our study of our own colleagues across the country in terms of what happens in certain natures of cases, why—I think the consent requirement, for example, will educate and inform us by nature of the case what some of the specific concerns are in particular cases.

And I just think our pilot is going to show us what are the concerns of lawyers and other participants in the case. We are all going to be informed by that. And, ultimately, whatever policy the Judicial Conference adopts, I think we will be well informed because of the pilot.

We ask that we be allowed to continue the pilot—it goes for another year—and then to look at the results of that pilot in formulating policy.

Mr. DESANTIS. Mr. Osterreicher, is there evidence that you can point to that shows that the state proceedings where you do have cameras have made state officials more accountable and the proceedings less prone to error?

Mr. OSTERREICHER. I don't know that I could address all of—all of those. But at least I would like to just talk a little bit, if I could, about what went on in the first experiment in Federal court.

That—as you recall and as I mentioned, those cases were covered by the media. In this experiment, it is courtroom personnel that are operating the equipment.

So back between '91 and '93, according to the summary from the FJC, there were 257 cases that the media applied to cover and 82 percent of those applications were approved.

Unfortunately, under the new guidelines in this one, not only does everybody—all the parties have to consent to the coverage, but it is not just the coverage of the trial. It is the coverage of each and every proceeding where they can object and then there is no coverage.

I don't know if any of you have had the opportunity to look at some of the recordings that are on file on the court's Web site, but many of them are done with either split screen or quad screen cameras. It is like watching surveil—you know, somebody watching a surveillance camera.

I mean, from my experience being in a courtroom, being in a trial, for the most part, it is not Perry Mason. It is like watching paint dry. It takes forever for things to happen.

When you add to the mix a video that, for the most part, really could not be broadcast anywhere where things are not happening in parts—in quadrants and one person is speaking, I just don't think that what we are going to end up with is something of value when this pilot is over, and that is what concerns me.

Even after the first experiment when we had the media doing it, all of the recommendations were in favor, and we still don't have cameras in the court. That is a big concern for us.

Mr. DESANTIS. My time is expired.

And so I thank the witnesses.

And I yield back.

Mr. MARINO. Thank you, Congressman.

The Chair recognizes the distinguished gentleman who is the Ranking Member of this Committee, Congressman Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

I have enjoyed the testimony of the witnesses. And I would like to begin with Judge Robinson.

With respect to the privacy expectations of a witness under—H.R. 917 authorizes a Federal judge to order the obscuring of his or her image and voice during the court proceeding.

In your mind, does this sufficiently protect the privacy expectation of a witness?

Judge ROBINSON. It is not a sufficient protection in some instances, we believe. Again, I don't want to—I want to wait for the outcome of the study.

But I will give you an example that I think most trial judges believe is an issue: confidential informants, a common type of witness in criminal cases. This is an issue that we are working on, we have worked on for 10 years.

Because when we made our electronic filings open to the public through the Internet, plea agreements of confidential informants are now public documents, and there has been fallout from that.

Confidential informants have been threatened. There are all kinds of—there is all kinds of anecdotal evidence of people being injured, perhaps even killed, in the Bureau of Prisons when they have been identified as a confidential informant. We are trying to figure out a solution to this just in terms of the public records that we push out in written form.

If that confidential informant is testifying in the courtroom and their voice is obscured and their face is obscured, their identity can still be ascertained because they are being cross-examined and examined about who they are, what their name is, you know, what their background is, where they lived, et cetera. And so that is of particular concern to us.

These are people that cooperate. The criminal justice system relies upon their cooperation; yet, they are at risk. They are already at some risk. But with the presence of cameras in the courtroom, we think that there is a heightened risk.

Mr. CONYERS. Thank you so much.

Attorney Osterreicher, addressing the same question to you, do you think the obscuring of images and voices are sufficient protection for the privacy expectation of a witness?

Mr. OSTERREICHER. Well, as has been said before, this is an open courtroom. I am not quite sure that there are privacy expectations. But, certainly, the presiding judge in that case should be the one who is in the best position and has the authority to make that decision, whether to obscure their face, whether to alter their voice, whether to have them testify behind a screen.

In terms of identification, you know, as has been said, all of these records are being made public. They are on the Internet. And if somebody wants to do someone harm, then all they have to do is go get the transcript and they can find out that same information about where they live and what they do and what their habits are.

So I don't think blaming electronic coverage or identifying that as the culprit here is the solution.

Mr. CONYERS. Thank you.

Let me now ask the Judge with the—would your concerns about H.R. 917 be mollified if it was limited to appellate proceedings only?

Judge ROBINSON. Most of our concerns are about what happens at the trial court level.

Mr. CONYERS. Yes.

Judge ROBINSON. Our only opposition to that part of the bill that pertains to the circuit courts of appeal is, by virtue of the way that circuit courts govern themselves, it is a decentralized governance structure, but they make their own rules of practice and case management, you know, as a corporate body. That is our only objection.

The bill, of course, calls for each individual appellate panel, a panel of three, typically, on a case-by-case or argument-by-argument basis to make the decision. That is inconsistent with the way they govern themselves.

Appellate judges don't have the authority to make governance decisions about how oral arguments are going to be conducted. They do that as a corporate body. That is the status quo, and that is what we would like to continue.

Mr. CONYERS. Well, let me ask Attorney Osterreicher about the appellate proceedings issue.

What is your view, sir?

Mr. OSTERREICHER. Well, certainly, I don't think that the Sixth or the 14th Amendment rights of any defendant will be violated by covering an appellate proceeding, especially one in the Supreme Court.

I mean, there is no testimony. We are just making appellate arguments. So it is really even harder for us to understand the objections when we are looking at the appellate courts.

I just want to go back to something for a second.

You know, during—the Supreme Court has found in capital cases this evolving standard of decency, and that was something that Justice Marshall articulated.

And I would suggest here—because most of the courts have pretty much found, "Look, the reporters can come in. You can report all you want. You just can't bring the cameras with you," I would think that there should be this evolving standard of openness and what openness in an open courtroom trial and a public trial means in 2014.

And I think that there is a huge difference even between the case that was mentioned earlier in *Estes* in 1965. There were 12 cameras in that courtroom during that trial. We are not talking about doing something like that here.

Mr. CONYERS. Thank you very much.

Mr. MARINO. Thank you, Congressman.

The Chair recognizes the gentlelady from Washington, Congresswoman DelBene.

Ms. DELBENE. Thank you, Mr. Chair.

And thanks to both of you for being here with us here today. I appreciate it.

I agree with my colleagues who testified earlier and believe that our democracy is much stronger when we leverage technology that

we have available to increase the public's participation in this process.

We need citizens to be engaged and informed, and part of that means making sure that they have access to their Government. So allowing cameras in the courtroom is one way to help educate the public about the workings of our judiciary.

At the same time, making sure we implement it in a way that is responsible is going to be very important. We need to make sure that we don't compromise the safety of victims of violent crimes who may be witnesses before the court, as has been brought up earlier, or violate due process rights of defendants. And striking the right balance is key.

This bill, I believe, takes a thoughtful approach. And I want to commend my colleagues for their work on it. It is important that we look at steps where we do increase transparency in our system across all three branches of Government, and this bill seems to be a step in the right direction.

The Supreme Court provides online audio recordings of oral arguments, and it has been releasing audio during the same week as arguments only since 2010. Before that, audio from one term generally wasn't available until the beginning of the next term.

And so I was wondering, Mr. Osterreicher, what is your view on the impact of having these audio recordings available now publicly within the same week of the argument? And has there been an improvement in public access?

Mr. OSTERREICHER. Well, it is certainly a good first step. But when we are talking about the age of the Internet, when somebody can tweet something and millions of people can see it and read it and share it seconds after it has been sent, especially in news—when you are talking about something, "Well, we will release it that week"—I mean, in the news business, a week later is really yesterday's news.

So for the people that really are interested—and there are a surprising amount of them that—whether they are shut-ins or just people interested in the way that we conduct ourselves in the judiciary, I think at least having simultaneous broadcast of the audio might be a good first start.

I just have a problem, again, with the audio only. Not to disparage courtroom artists. They certainly perform a good function. But, in 2014, to be relegated to something that is more akin to cave drawings than high-definition television just seems to be wrong to me.

Ms. DELBENE. Judge Robinson, do you have a view of the difference between audio and video when—as you have talked earlier.

Judge ROBINSON. Well, I can only speak to that in terms of what is going on in the trial courts and the circuit courts of appeal.

There are circuit courts of appeal that are posting digital—or, rather, audio recordings—digital audio recording of their arguments in short measure. And there are some trial courts, district and bankruptcy courts, that are doing the same.

Those are courts that are recording their proceedings by audio rather than by court reporter, and a number of them are posting—whatever the proceeding might be, they are posting those to the Internet. Obviously, it improves public access. We recognize and

really revere the right of the public to—access to our open courtrooms.

The Federal courts have really evolved over the last 20 years in the right direction in terms of becoming more transparent, unlike state courts, who look to us, I think, with some reverence because of what we have done with our electronic case filings.

And all of that information is now readily available on the Internet. So we are focusing, of course, on proceedings themselves, on the small percentage of civil cases that go to trial and the small percentage of criminal cases that go to trial.

But in those very many cases that don't, the public right now in the Federal system has access to virtually every pleading that is filed, obviously, every judicial decision. And there is a lot of information and a lot of public education that happens in the context of what we are already providing in the public sphere.

Ms. DELBENE. Now, we also know that, you know, access to actually get into the court—and the Supreme Court is probably a good example—very few members of the public can actually get in.

In fact, you can—people pay people to stand in line for them right now, and they are paid up to $50 an hour to secure spots in a long line for people to get in.

So that makes it pretty difficult for people to have the opportunity to have access to live arguments in the courtroom or in the Supreme Court, in particular. So that doesn't seem like that is great public access either.

And, as Mr. Osterreicher pointed out, in many cases, you might be sitting in a room watching it on video anyway. So it seems like we could do a better job there of improving access as well.

Mr. Osterreicher, do you agree with that?

Mr. OSTERREICHER. I would.

As was mentioned earlier, this morning the Supreme Court was hearing arguments in *Young v. United Parcel*, which was a case about the Pregnancy Discrimination Act. I can only imagine how many people would have been very interested in hearing those arguments this morning while we have been sitting talking here.

Hearing them, watching them, seeing how the proponents argue their case, seeing how the justices reacted to those arguments, I think that is all a very important part of this process and people much better understanding how the judicial system works.

I would almost go so far as to make a comparison. We have talked about things in Ferguson. It has been a big discussion. I was there dealing with issues of photographers being arrested and interfered with.

But my point here is that, even though grand jury proceedings are secret—and they should be—I think as an analogy, if those grand jury proceedings had been open and people had been able to see and understand what went on in that proceeding, we might not have had the same reaction as we had after the grand jury handed up a no bill.

Ms. DELBENE. My time has expired. So I yield back, Mr. Chair. Thank you.

Mr. MARINO. Thank you, Congresswoman.

The Chair now recognizes the gentleman from New York, Congressman Jeffries.

Mr. JEFFRIES. Thank you, Mr. Chairman.

And I thank the witnesses for their presence here today.

We have got, of course, three branches of Government, all of which are coequal and all of which are incredibly important to our democracy.

But we also have a fourth estate, as sometimes the media has been colloquially referred to, which I think also plays a very important role in our democracy in projecting that outward and making sure that people are informed about the things that are occurring certainly with the executive branch and with the legislative branch and, hopefully, increasingly as it relates to the judicial branch.

And so, Judge Robinson, I just wanted to ask: Do you think that the role that the media plays in the context of helping to bring our democracy to life is a point worthy of consideration as we determine the best way to proceed?

Judge ROBINSON. Absolutely. I am a Jay school graduate. So that is an easy answer for me to give.

But I think, also, it is important to note that our pilot—this pilot provides for video recordings pushed out on the uscourts.gov Web site, available to everyone, not just those recordings that the media has decided to record that they think are, you know, interesting enough for people to—to their subscribers or to the public to listen to.

We have evolved as a Nation. We have evolved as an institution. 20 years ago, when we did that first pilot, it was based on media recording. We made a very deliberate decision this time to not have recordings based on what the media wanted to record, but to make all recordings that, you know, meet the requirements of the pilot pushed out to the public.

I mean, what we have found is that the media now is much broader in terms of their, you know, public reporters in the sense of people that tweet and people that report and people that, you know, create YouTube videos and all of that that sometimes actually are—find themselves in the hands of the media, and they are used by professional journalists to report on the news.

Mr. JEFFRIES. Now, we have three branches of Government, as I mentioned, all of which, in our founders' wisdom, are separate and coequal.

Does the Judicial Conference take a position on whether it is appropriate for Congress, a different branch, to be making determinations about the best way for a separate and entirely coequal branch to proceed as it relates to cameras in the courtroom?

In other words, is there—is there a separation-of-powers concern that should legitimately be considered in the context of this debate?

Judge ROBINSON. With respect to the trial courts and the circuit courts of appeal, we haven't raised a separation-of-powers argument. But what we have asked is for you to let us study and then formulate policy on the basis of our experience, as further informed by the study itself.

We—case management—while it is clear that Congress promulgates rules that govern what goes on in Federal litigation, at the same time, we also need to be in control of our case management practices and how we can best go about controlling what happens in the courtroom to ensure that the parties receive a fair trial.

And so that is why—it is not so much a separation-of-powers argument, but an argument that you give credence to the fact that we are studying this, that we are experts, if you will, in what happens in the courtroom, and that we want to make sure that whatever policy we formulate is shaped and informed by our experience and our information.

Mr. JEFFRIES. And is there a legitimate distinction that can be drawn between criminal proceedings and civil proceedings, such that perhaps a greater degree of access is allowed on the civil side?

Because some of the concerns that may be implicated that we need to think through in the context of a criminal trial, particularly as it relates to confidentiality and privacy and the adverse implications of unwanted exposure, don't necessarily exist on the civil side.

Judge ROBINSON. We have concerns with respect to the effect on witnesses and particularly the effect on the substance of the witnesses' testimony in civil proceedings.

But we have more concerns on the criminal side, and that is because we have witnesses, as I mentioned before, that are confidential informants and cooperators. We have undercover officers and agents who routinely testify in criminal cases. We are very concerned about their security and safety.

Mr. JEFFRIES. And, Mr. Osterreicher, is it legitimate for the parties who are participating in the actual trials to have an opportunity to object based on their determination that the presence of cameras in a courtroom will complicate the ability for them to receive a fair trial or should we completely dismiss the concerns and simply just allow a judge to be the arbiter?

Mr. OSTERREICHER. Once again, I think that a trial court judge could make that decision. The problems that I see are, if everybody objects, we are not going to have very much of a pilot study for them to have some evaluations from.

So, you know, my experience in state court in New York was many times, when the media made an application to cover it, you could certainly expect out of hand that there would be an objection.

And we would make those arguments to the judge, and the judge would decide with a presumption of coverage whether or not that objection would overcome that presumption. So I think that might be a good way to start.

I just also wanted to go back to one other point in terms of the media deciding which cases to cover. That is true. But what is also true, at least in my understanding of this pilot program, is that none of the video that is recorded in any of these cases gets posted to the Web site until the judge in the case has reviewed the video.

So, in a way, if there is something there that might be problematic, that's something that, you know, he could—he or she could do as well.

Mr. JEFFRIES. Thank you.

My time has expired.

Mr. MARINO. Thank you, Congressman.

The Chair recognizes the gentleman from Rhode Island, Congressman Cicilline.

Mr. CICILLINE. Thank you, Mr. Chairman.

The bill before us today, the Sunshine in the Courtroom Act, promises to provide greater access to the public and to the inner workings of our justice system.

As my colleague, Congressman Lofgren, noted in her testimony, trials have always been open to the public and the enactment of this legislation would expand upon that promise of transparency.

And it is very hard for me to understand the argument that the quality of our system of justice or the fairness of our courts is impaired by—or is improved by limiting public access.

And, Judge Robinson, I am going to start with you.

Because, you know, if you look at the history of the right to a public trial, it is, of course, grounded in the Anglo-Saxon history of the common law in the 17th century, and the idea of it was that the public proceedings would operate as a check against malevolent prosecution, corrupt or malleable judges, or perjurious witnesses, the idea that a public trial would aid the fact-finding mission and make—encourage citizens to come forward and speak truthfully, whether providing inculpatory or exculpatory evidence.

So your testimony that the single greatest threat to underlying media exposure in the courtroom is—to the search for the truth seems to turn the Sixth Amendment right to a public trial on its head. I mean, the whole idea was it would be a check, it would provide assurances that people would be truthful because it would be exposed broadly to the public.

So why do you conclude or why does the Judicial Conference believe that that public—the expansion of that public trial will undermine the search of the truth rather than advance it even more?

Judge ROBINSON. That is—that is a critical question that we are studying. The right to a public trial is sacrosanct. The right to a fair trial is sacrosanct. We are balancing those two. To the extent we have to worry—and we don't know whether—how much we have to worry. But I think, anecdotally, we have all experienced this.

But to the extent we have to worry that a witness hedges or shades the truth, is not forthcoming with information that they would otherwise be forthcoming with when they are testifying in front of a courtroom with, say, 20 people because they know that there may be millions of people that are watching that, including people that are of particular importance to them, like their boss or their pastor or their next-door neighbor who otherwise probably wouldn't go online and get the transcript of the trial and go through that effort, we have to worry.

And I gave some examples earlier in a civil case. I have had a case recently that I thought the parties might agree to record. They did not. I wasn't surprised because it was a case about trade secrets. They come into a public courtroom. They are looking around, seeing who is in there, hoping none of their competitors are in there. If their competitors are in there, they have a right to be in there. But they are going to be more concerned if their competitors are out watching it on the Internet, something that they won't know.

And this comes up in a variety of contexts. It comes up in terms of are witnesses going to be concerned about hedging or shading their testimony when they are being cross-examined about a loss

of consortium claim or an emotional distress claim or, in a criminal case, if they are a confidential informant. I mean, there a number of concerns, depending on the type of case and depending on the nature of the witness.

Mr. CICILLINE. But, as a general rule, do you agree with the proposition that it is more likely that people will testify truthfully when it is broadly exposed?

Because if you don't accept that proposition, then this notion underlying the right to a public trial doesn't make any sense.

I mean, the idea is, if you are going to make an assertion and the whole world is going to hear it and it is not true, then there is someone who might be able to prove it is not true. If it is a truthful statement, then you are less concerned that the whole world hears.

So I just think that your argument—or the argument of the Judicial Conference really undermines a basic notion of the public trial as being a very effective tool.

And I was a criminal defense and civil rights lawyer, did a lot of state and Federal practice. And I think that a public trial, the notion of being subjected to cross-examination and being done broadly and not in sort of a secret way or way that limits public access, actually enhances the truthfulness.

But I want to go to a second question. You also said in your written testimony that the presence of cameras in the trial courtroom is likely to heighten the level and potential of threats to judges.

What is the basis for that conclusion? And have you seen any evidence in the state court practice that the presence of cameras in the courtroom has increased the level or potential for threats to judges?

Judge ROBINSON. Of course, our study is focused on Federal practice in Federal district courts. We haven't studied what has happened in state courts. But there are judges who have had threats—all of us have had threats, some more serious than others.

The fact that your face——

Mr. CICILLINE. But the question is about the presence of cameras as a source of that.

Judge ROBINSON. Well, the fact that your face is broadcast is a concern, if it is the type of case where you have been—you know, the—you have received threats. That is a concern.

There are a number of concerns, and that is one of them. It won't happen in every case. It probably won't happen except in a small number of cases. But, nonetheless, it is a concern.

Mr. CICILLINE. Mr. Osterreicher, you looked like you were about to say something.

Mr. OSTERREICHER. Yeah. I can certainly understand it being a concern. But is it any more of a concern than—Judge Robinson, I have never met you. Last night I went on the Internet. I Googled you. I found a picture of you. I said, "Oh, I know who to look for."

It is not that difficult in this day and age. You don't need to have a proceeding of somebody testifying and having their face on television to find out what they look like.

Mr. CICILLINE. Thank you.

My time has expired. I yield back. Thank you, Mr. Chairman.

Mr. MARINO. Thank you, Congressman.

The Chair recognizes the gentleman from Texas, Congressman and former Judge Poe.

Mr. POE. I thank the Chair.

Thank you all for being here.

A couple of points to begin with, and then I want to get your input.

As the Chair mentioned, I served on the criminal court district bench in Texas for 22 years, tried felonies, everything from stealing to capital murder. Before that, I spent 8 years as the trial prosecutor at the DA's office in Houston.

And when I took the bench a long time ago, the idea of cameras in the courtroom was just, you know, nonexistent. And I actually allowed cameras in the courtroom very early on in my judicial career, and it was based upon the philosophy, the belief, the frustration—and I am going to agree with Mr. Cicilline from Rhode Island. I know that shocks him that I agree with him on this.

The public—the public—the mystery of the courthouse still exists with the public. They pick up the newspaper in the morning and they read that this happened in a courtroom somewhere. And many times they are frustrated. "Why in the world did that happen in the courtroom?"

And it is because all they get is a little blip in the paper about the trial. They don't have access to the public trial. Public trial, I agree, it is public so that the public knows what is taking place. We get away from the Star Chamber of England when they did things in the back room.

And the more the public knows, the better they understand why the outcome turned out the way it did. So, with that, I allowed cameras in the courtroom. We had—we heard all those arguments. You know, we protected victims of crime. They weren't televised. The media always worked with that. Children weren't televised, special cases. The jury wasn't televised. We kept it focused on the importance of the trial. We never had a problem.

We heard these arguments about that lawyers will play to the—would play to the cameras. They don't play to the cameras. They play to the jury, like they have always done throughout centuries. They play to the trier of fact, whether it is the Court or whether it is the jury. And I always thought that, if judges didn't want cameras in the courtroom, why was that? Maybe they would be doing things that the public should be know—they shouldn't be doing things that they are doing.

So I have had experience with cameras. It worked out. We did a capital murder case of a juvenile, and both sides agreed to the trial—filming most of the case. And so I am a big supporter of the public knowing about the greatest judicial system in the world. It is the American judicial system. It is not somebody else's. It is ours.

And blocking and preventing that access when they have the right to sit there and watch it and saying, "But we put a camera and view it on television. You are not allowed to do that," that does not make any sense to me. So I do believe that we ought to allow that in Federal court as well.

You go over to the Supreme Court and you get a 15-minute snippet, if you are a guest, on what is taking place in a very impor-

tant trial with the most important court in the world, because the public is allowed to walk in and then they rush them out to bring in more people who are wanting to see what takes place. Reading the transcript is not the same as watching the trial.

So without elaborating so much on that specific issue, what does the—what does the media, those in the business of filming courtroom trials, think how that would help or hinder the public perception of the judicial system that is taking place? Got an opinion on that? Either one of you.

Mr. OSTERREICHER. Certainly, I think that the more informed the public can be—the fact that—you know, when I first started doing this, as you said, I might be at the courtroom all day and we are going to run a minute-30 story on the trial.

That day has also long since passed because now, with the Internet, if you work at a television station, they can live-stream the trial all day long and it doesn't take away from their broadcast abilities. So if somebody wants to watch gavel to gavel, they get to watch gavel to gavel, if they allow the cameras in, and certainly the more informed you can be.

I mean, I would much rather watch a courtroom proceeding without any of the commentary. I would just like to see, as if I were sitting there, what is being said, what is being asked, what evidence is being introduced.

Now, I realize I am a lawyer, but I think there are a lot of people that have that same interest. And if I can just watch for myself—I believe that happened during the civil trial of O.J. Simpson. And you just—there were really no commentators. You could just turn it on and watch it. It was on every day. And I think Court TV did gavel-to-gavel coverage, and you could form your own opinions or learn things.

And I think that is the real benefit of allowing the cameras in. And I think, unfortunately, far too often the electronic coverage gets confused with the commentators and the pundits and the spin and all the other stuff that comes with, well, what used to be news and is now infotainment.

Mr. POE. I am out of time. I had another question for the Judge. But thank you very much. I appreciate it.

Mr. MARINO. If the Judge wants another 30 seconds, fire away.

Mr. POE. Well, I appreciate the Chairman.

I was just going to—Judge, I was going to ask your personal opinion.

Do you think, if the public had more visibility of what we did in the courtroom, whether it is at the trial bench or whether it is at the appellate bench or the Supreme Court—do you think maybe they would understand and appreciate the judicial system more or not with the—with cameras?

Judge ROBINSON. That would be my hope, Mr. Poe. Maybe I should call you Judge Poe.

I think all judges want the public to be better informed about our branch of Government and recognize that the public is not as well informed as they used to be, perhaps, when we were in school many years ago.

We recognize and embrace the fact that public access to the courts is very important. They are public proceedings. We under-

stand that, you know, cameras may augment that. At the same time, though, we are balancing other interests.

I appreciate that you have had seasoned experience as a trial judge in Texas. And there are a number of judges in the pilot itself that came from state court experience.

We are going to be serving all of the participants in the pilot, including judges. Some of us didn't have that experience before being on the Federal bench. Others did.

It will be interesting, I think, to hear from those judges that have that prior state court experience as well. But that is going to inform how we go about formulating policy forward.

There are concerns. I think there are legitimate concerns. We are balancing the right to fair trial versus the public's very important right to access.

We just ask that you allow us to complete our study and to formulate our policy and our procedures and our guidance going forward.

Mr. POE. All right. Thank you very much.

Thank you for the additional time, Mr. Chairman.

Mr. MARINO. Thank you, Congressman.

The Chair now recognizes the gentlelady from Texas, Congresswoman Jackson Lee.

Ms. JACKSON LEE. Thank you very much, Mr. Chairman.

And I thank the Ranking Member as well for his leadership and the questions of my colleagues, who have expressed vigorously our collective commitment to justice and fairness and the importance of the judiciary.

I would offer to say that I think the issues have been raised here legitimately, Judge Robinson, that give merit to concerns and comments that you have made, along with those of Mr. Osterreicher, who has likewise raised this open transparency.

And so I hope that, as we deliberate as a judiciary committee, that we will act with judiciousness and take all of these issues into consideration.

I want to ask about the pilot. Give me the ending time of the pilot.

Judge ROBINSON. It is July 2015. It was originally a 3-year pilot. We extended a year and now into a fifth year.

Ms. JACKSON LEE. And so, at that point, you will have a collection of data that included cameras in the courtroom of varying levels of the judiciary, state, county, Federal or——

Judge ROBINSON. No. The pilot is focused only on Federal trial courts, the district courts, and the participants are Federal district judges.

So, in July 2015, the recordings will stop and then the Federal Judicial Center will be the one compiling the data, including the very many surveys of practitioners and lawyers and other participants in the process.

We hope at the Court Administration and Case Management Committee's biannual meeting in December of 2015 that report will be ready for the consideration of the Committee.

I am no longer on that Committee. I chaired that Committee until September 30 of this year. But I would anticipate that it is at that meeting that we—this is a horrible government acronym—

CACM is what we call the Committee, C-A-C-M—but at that meeting that that body will consider that——

Ms. JACKSON LEE. So you have had—excuse me for interrupting.

But you have had cameras in the courtroom now for a number of different Federal courts. Do you, by any chance, know how many?

Judge ROBINSON. There are 14 courts participating in the pilot.

Ms. JACKSON LEE. I am going to ask you a series of questions.

Judge ROBINSON. That is fine.

Ms. JACKSON LEE. So let me just——

Judge ROBINSON. There are 14——

Ms. JACKSON LEE. That is all I need, the 14.

And you do what with the video now?

Judge ROBINSON. The video is posted to the uscourts.gov Web site.

Ms. JACKSON LEE. So it is—it is able to be viewed?

Judge ROBINSON. And they are posted fairly quickly.

Ms. JACKSON LEE. Okay.

Judge ROBINSON. The goal is to post them that day or the following morning.

Mr. Osterreicher had talked about the fact that judges review the videos before they are posted. That is not the practice.

The judges may review the video if there is a problem. But if there is not a problem, the video is posted. And you know there is a problem because you are there and contemporaneously you can usually determine that there is a problem and you may need to go back and ask for some——

Ms. JACKSON LEE. Let me ask some—a series of questions. Thank you very much.

So, in essence, this is a judicial CSPAN somewhat? CSPAN is current and present. You don't post it until the next day? I just need a yes or no.

Judge ROBINSON. Yes.

Ms. JACKSON LEE. Okay.

Judge ROBINSON. Correct.

Ms. JACKSON LEE. Mr. Osterreicher, we are getting your name correctly? Maybe we should say Mr. Mickey. But we thank you for your intolerance—your tolerance. Not intolerance, but your tolerance.

In the bill, I note that there is an effort to protect witnesses, for judges to ask the question about witnesses, blurring their particular faces.

Let me ask you this. And I have heard enthusiastic expression by my colleague. Being a lawyer and a champion of the First Amendment, which is what the intentions are here, that wonderful First Amendment and that recognition of the importance of speech not being, if you will, unfettered speech, which in the courtroom there is speech, and then the whole judicial system that gives every party an opportunity to be heard, but then, also, for witnesses to be heard as well, what comes to mind is the unfortunate case of Mr. Zimmerman and Treyvon Martin and the demonizing of a beautiful young lady because she happened to be different.

What is your response to witnesses who may look differently and speak differently and people are across the country watching and,

even though this is just unfettered video, then it becomes in the open sphere and that person—that innocent person, that beautiful young African-American woman, became the—not of her own fault. She was doing her civic duty, and the horror of demonizing her was inexcusable. How do you answer to the potential of those kinds of things happening?

Mr. OSTERREICHER. I certainly believe that that was very unfortunate. I have always been a proponent of the fact that cameras and electronic coverage should be up to the discretion of the trial court judge.

I don't think there should be a per se ban. I don't think there should be a per se "We are coming in whether you like it or not."

I mean, a judge needs to conduct his or her courtroom in the way he or she sees fit and—and make sure that justice is fairly served. So that is really all I am saying here.

You know, it is unfortunate in this day and age, you know, people are often targeted, whether—now on social media. It is not just broadcasts anymore that leads to this kind of mob mentality that is out there.

Ms. JACKSON LEE. I thank the Chairman for his indulgence.

I just want to make one sentence. I appreciate the testimony of both witnesses. I believe it has been very helpful. This is an important legislative initiative. It has some protective measures to it.

Judge Robinson, you have indicated some protective measures through the pilot. I would hope that we could see the report of the pilot.

And, Mr. Chairman, I am hoping that we will have the opportunity to vigorously look at this and the legislation and make an important decision that will be fair to both of the witnesses' testimony.

I yield back.

Mr. MARINO. Thank you, Congresswoman.

I think it is my turn to ask some questions, and I am staying as neutral as possible on this.

I was a prosecutor at the state and at the Federal level as a U.S. attorney, and I tried my own cases. So I know what goes on in the Federal courtroom.

I am going to play a little bit of a devil's advocate here with the two of you and get your reactions.

Do we agree that—and I have tried these cases in Federal court—when a minor is involved in a case, that there is no—nothing divulging who that minor is as far as a TV is concerned? There is an agreement there?

Judge ROBINSON. We agree. In fact, that is consistent with our privacy policy now in terms of written—the trial transcript and pleadings, that minors are identified by initials, not by name.

Mr. OSTERREICHER. I certainly think that is true. And, for the most part, in cases where the media does cover these trials, if that is what is indicated by the judge, then media will follow along with those guidelines.

Mr. MARINO. And I am particularly concerned about a victim, because I prosecuted cases concerning sex trafficking of minors.

Mr. OSTERREICHER. I think, in much the same way as the media often does not report the name of a victim in cases, it certainly would follow that you wouldn't show their identity.

Mr. MARINO. Do either of you have a distinction whether the proceedings concern testimony, demonstrative evidence, or appellate oral argument? Do you draw a distinction between the two of whether one or the other should or should not be televised?

Judge?

Judge ROBINSON. Again, the circuit courts of appeal can make the decision as corporate bodies individually whether to allow for cameras in their courtroom. There are different concerns. But there are many more concerns at the trial court level, as I have articulated today.

Mr. MARINO. This is probably rhetorical, but from what I have seen, there is no money allocated for this. Who is going to pay for it? Taxpayers.

Mr. OSTERREICHER. Well, I would argue that if the media were allowed to cover these cases, it would be their cost, not the courts'.

Mr. MARINO. Who is going to be the, for lack of a better term, and I don't mean to be facetious about this, who is going to be the director? Does just my local news guy come in and take control and film, or is the judge now going to have the responsibility of being the director and calling the shots?

Judge ROBINSON. Well, the concern that the Judicial Conference has, and the reason we structured the pilot the way we had, is we want to be in control of the equipment, to make sure that jurors or witnesses are not inadvertently recorded. If you are talking about a live broadcast, once the toothpaste is out of the tube, it is out of the tube. You can't fix something like that. But you are right: It takes resources. It takes labor. It takes someone monitoring the equipment.

Mr. MARINO. Mr. Osterreicher.

Mr. OSTERREICHER. I think there certainly are ways to make sure that the jury is not recorded. In the O.J. trial, for example, the camera was mounted on the wall above the jurors' heads. There was no way for it to look down at all. So there was no inadvertent. Certainly as a photojournalist, if I was told by the judge, this person doesn't get recorded, that is what that means.

Mr. MARINO. Am I correctly assuming that neither one of you are—I know certainly, Judge, you are not, but Attorney Osterreicher, are you saying that you do not want to have an individual come in the courtroom with his or her own camera and photograph this?

Mr. OSTERREICHER. I certainly think there needs to be rules and decorum. I can't imagine, just as in those trials of the century during the Lindbergh baby, where you had photographers literally running around the courtroom with big Speed Graphics, that is not what we are talking about here. So, in this day and age, where everybody has got a phone, and everybody has got a camera in that phone, I am certainly not suggesting that everybody in the courtroom sit there and record it on their own.

Mr. MARINO. But I do not hear you saying that you agree with what I am purporting here, that the court cameras are the only

cameras in the courtroom and the judge controls them. Do you not agree with that?

Mr. OSTERREICHER. I have a problem with that.

Mr. MARINO. Okay. What do we do about—my time is running out here—but what do we do about the situation where once these digital recordings are released, now what is going to happen when the public gets a hold of it? What is going to happen when the comedians on late night TV get a hold of it? What is going to happen when someone out there who has the ability, and it is very easy today—my kids teach me how to do it—taking that video and altering it and then putting it out on YouTube?

Judge ROBINSON. Obviously, we have no control of any of that. But to suggest that because that is a problem, the public—if there is value in the public having a right to record proceedings or having access, I should say, to record proceedings, that is one of the risks attendant with that.

Mr. OSTERREICHER. I think there is always going to be a parade of horribles, and no matter what we do, no matter how far we try and think this ahead, there is going to be an issue. But I don't think that is a valid one.

Mr. MARINO. But I agree with my friend Judge Poe that we have the best legal system in the world. It is a sanctity that we have to cherish. And I would hate to see it be ridiculed. So, with that, I would thank you very much for your testimony today. It has been very helpful to all of us. This concludes today's hearing. Thanks to all of our witnesses and those attending.

Without objection, all members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record. This hearing is adjourned.

[Whereupon, at 12:05 p.m., the Subcommittee was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

Defending Liberty
Pursuing Justice

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December 9, 2014

Honorable Robert W. Goodlatte
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We are writing to commend you for recently holding a hearing on H.R. 917 and for continuing to focus public attention on the issue of "cameras in the courtroom." We would appreciate your including this letter in the hearing record.

The American Bar Association has had a long and cautious history with respect to broadcast coverage of federal judicial proceedings. In 1937, the ABA formulated its original ban on camera coverage as Canon 35 of the then Canons of Judicial Ethics because of concerns about preserving the dignity and decorum of the courtroom, safeguarding the right to a fair trial in criminal proceedings, and avoiding potential adverse impact on the fact-finding process and the administration of justice.

During the 1970s, state courts started to permit camera coverage of judicial proceedings. As courts became more experienced and technology improved, the vast majority reported favorable results. After observing state initiatives, and following the 1981 unanimous decision in *Chandler v. Florida*, 449 U.S. 560, holding that due process does not require an absolute ban on cameras in the courts, the ABA revised the Model Code of Judicial Conduct to permit judges "to authorize broadcasting, televising, recording, or photographing of judicial proceedings," consistent with the right to a fair trial and in manner that would not interfere with the administration of justice. A year later, despite the ban against coverage of criminal proceedings in the Federal Rules of Criminal Procedure, the ABA made clear that we believed that electronic coverage should be permissible in criminal proceedings as well as civil proceeding by incorporating the language of the revised Code into its Criminal Justice Standards for Fair Trial and Free Press.

By 1990, 45 states permitted some form of electronic media access to judicial proceedings. The states' acceptance of, and extensive experience with, electronic media coverage likely informed the decision of the ABA to delete the provision in its 1990 Model Code of Judicial Ethics and recast the issue as a matter of court administration rather than one with ethical dimensions.

In 1991, the Judicial Conference of the United States began a three-year pilot program to permit electronic coverage of federal civil proceedings in selected trial courts and courts of appeals. The

Association welcomed these developments and recommended that the U.S. Supreme Court participate in the pilot program, a recommendation that was not followed.

Without a satisfactory explanation, the Judicial Conference voted in 1995 to terminate all electronic coverage of federal courtroom proceedings, despite the favorable assessment of the Federal Judicial Center that electronic media coverage had not adversely affected the administration of justice. The ABA, believing that the issue had not been examined fully, strongly objected to the finality of the Judicial Conference's action and urged it to authorize further experimentation with electronic media coverage. In 1996, the Judicial Conference reconsidered its position and compromised by authorizing federal appellate courts to permit coverage in accordance with promulgated guidelines. Many court observers commented at the time that their reluctance to include district courts in the authorization was understandable, given the breakdown in court decorum during the televising of the O.J. Simpson case the year before.

In 2010, the Judicial Conference announced a new three-year pilot project "to evaluate the effect of cameras in district court courtrooms, video recordings of proceedings therein, and publication of such recordings"; the Conference subsequently extended the project for an additional year. Fourteen courts are participating in the pilot, which began in June 2011 and will end in July 2015.

Guidelines issued for the pilot project state that proceedings in civil cases may be video-recorded only with the approval of the presiding judge and consent of the parties. Jurors may never be recorded, and bankruptcy proceedings are not included in the pilot project. Video recordings will be made available to the public unless the presiding judge determines otherwise. As with the first pilot project, the Federal Judicial Center is tasked with evaluating the pilot project and issuing a report with recommendations.

The current pilot, while limited to civil proceedings, is operating under guidelines that closely resemble provisions contained in H.R. 917 and predecessor legislation. In fact, there seems to be substantial agreement between Congress and the Judicial Conference over the structure for implementation of such a program and the safeguards needed to prevent cameras from interfering with the administration of justice. Although progress is slow, the federal judiciary is paying attention to Congress's interest in expanding public access to court proceedings.

Even the Supreme Court, which is not subject to the governance of the Judicial Conference and has never permitted video recording of its proceedings, has taken significant steps over the past decade to increase transparency and to simplify and expedite access to oral arguments.

In 2000, the Supreme Court, for the first time, released same-day audio recordings of oral arguments in the case of *Bush v. Gore*. Since then, it has released same-day audio recordings in 20 additional high-profile cases. In 2006, the Supreme Court instituted another heralded change, making same-day transcripts of its oral arguments available for free on its website. Prior to that, same-day transcripts were available only through transcription services and often cost hundreds of dollars. The last notable public access policy change occurred in 2010, when the Supreme

Court announced that all oral argument recordings would be released on the Friday of the week in which they occurred, rather than after the term ended.

In August 2014, the ABA deleted its endorsement of electronic media coverage in its Fair Trial and Free Press Criminal Justice Standards and replaced it with a best-practice standard advising courts to think proactively and develop plans that address electronic media coverage and other methods for accommodating the public interest in criminal proceedings. This revision reflects the ABA's recognition that individual jurisdictions are best suited to address these issues based on their specific experiences.

The ABA remains committed to the belief that all federal courts, including the Supreme Court, should experiment with and expand electronic media coverage of both civil and criminal proceedings. We, like many congressional supporters of this legislation, believe that courts that conduct their business under public scrutiny protect the integrity of the federal judicial system by advancing accountability and providing an opportunity for the people they serve to learn about the role of the federal courts in civic life.

We suspect that most judges share these views and that the Judicial Conference's reluctance to move quicker stems from outdated experiences and lingering concerns that electronic media coverage will taint proceedings. Its willingness to reexamine the bases for its views, and to reevaluate its policies in light of the results of the current pilot project, is a welcome change.

Once the pilot project concludes, we hope that Congress will engage the Judicial Conference in rigorous discussion over the Federal Judicial Center's analysis of the pilot project and will work to make sure that empirical data inform future decisions with regard to expanding electronic media coverage of federal court proceedings. The ABA supports this objective but prefers to defer to the Judicial Branch in the first instance to effectuate the transition and establish the necessary framework.

Thank you for the opportunity to present the ABA's views on this topic.

Sincerely,

Thomas M. Susman

cc. Members of the Committee

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