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CAMERAS IN THE COURTROOM

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BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

	Page
Cornyn, Hon. John, a U.S. Senator from the State of Texas, prepared statement	78
Feingold, Hon. Russell D., a U.S. Senator from the State of Wisconsin, prepared statement	88
Grassley, Hon. Charles E., a U.S. Senator from the State of Iowa	2
prepared statement	90
Leahy, Hon. Patrick J., a U.S. Senator from the State of Vermont	6
prepared statement	107
Schumer, Hon. Charles E., a U.S. Senator from the State of New York	4
prepared statement	137
Specter, Hon. Arlen, a U.S. Senator from the State of Pennsylvania	1

WITNESSES

Bergman, Barbara E., President, National Association of Criminal Defense Lawyers, Washington, D.C.	18
Berlin, Seth D., Levina, Sullivan, Koch and Schulz, LLP, Washington, D.C.	21
Cochran, Barbara, President, Radio-Television News Directors Association, Washington, D.C.	27
DuBois, Jan E., Judge, District Court for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania	12
Irons, Peter, Professor of Political Science, Emeritus, University of California at San Diego, San Diego, California	20
Lamb, Brian P., Chairman and Chief Executive Officer, C–SPAN Networks, Washington, D.C.	23
O'Scannlain, Diarmuid F., Judge, Court of Appeals for the Ninth Circuit, Portland, Oregon	10
Schleiff, Henry S., Chairman and Chief Executive Officer, Courtroom Television Network, LLC, New York, New York	25

SUBMISSIONS FOR THE RECORD

Bergman, Barbara E., President, National Association of Criminal Defense Lawyers, Washington, D.C., prepared statement	39
Berlin, Seth D., Levina, Sullivan, Koch and Schulz, LLP, Washington, D.C., prepared statement	47
Cochran, Barbara, President, Radio-Television News Directors Association, Washington, D.C., prepared statement	70
DuBois, Jan E., Judge, District Court for the Eastern District of Pennsylvania, Philadelphia, Pennsylvania, prepared statement	79
Irons, Peter, Professor of Political Science, Emeritus, University of California at San Diego, San Diego, California, prepared statement and attachment	92
Lamb, Brian P., Chairman and Chief Executive Officer, C–SPAN Networks, Washington, D.C., prepared statement and attachment	98
O'Scannlain, Diarmuid F., Judge, Court of Appeals for the Ninth Circuit, Portland, Oregon, prepared statement	110
Schleiff, Henry S., Chairman and Chief Executive Officer, Courtroom Television Network, LLC, New York, New York, prepared statement	119

CAMERAS IN THE COURTROOM

WEDNESDAY, NOVEMBER 9, 2005

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Committee met, pursuant to notice, at 9:33 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Arlen Specter, Chairman of the Committee, presiding.

Present: Senators Specter, Grassley, Sessions, Leahy, and Schumer.

OPENING STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Chairman SPECTER. Good morning, ladies and gentlemen. The Judiciary Committee will now proceed on our hearing on cameras in the courtroom. The Ranking Member will be joining us very shortly.

This is a subject of enormous importance to the American people on the basics of understanding how the Government functions. Senator Grassley, who is our lead witness today, has had legislation pending on cameras in the courtrooms of the circuit courts and the district courts, and I have had legislation pending since 2005, for some 5 years, to open up the Supreme Court of the United States to cameras.

The Supreme Court, as our system of Government has evolved, is deciding the cutting-edge questions of our day, decisions on who will live and who will die, what is the power of the President, what is the relative power of the Congress, whether marijuana may be used for medicinal purposes, where the balance will lie in a woman's right to choose, what DNA evidence may be used to exonerate the innocent. The whole range of cutting-edge questions have been left really to the Supreme Court of the United States.

In the year 2000, the Court in effect decided who would be the President of the United States. There was the largest array of television truck that I have ever seen—and I have seen assemblages of television trucks—in front of the Supreme Court building when that case was decided. And it was, I thought, most unfortunate that the cameras were not allowed inside so that the American people and the people of the world could see precisely what was going on.

At that time, Senator Biden and I had written to the Chief Justice urging that the case be open to television. The Chief Justice declined. They did release an oral transcript shortly after the hear-

ings ended, and that was illuminating, but far from what would have been apparent had cameras been in the courtroom.

The House of Representatives and the Senate have been televised now for decades. And I think at the outset there might have been some grand-standing, so to speak, but it has been an enormously useful tool for public understanding as to how the Congress works.

The hearings of the House and Senate have long been televised. The comments that I hear most frequently about television relate either to the NFL, the World Series or C–SPAN, and late-night viewing is practically captured by C–SPAN.

It is my thinking that the Congress has the authority to legislate on cameras in the courtroom for the Supreme Court. The Congress makes the determination as to how many justices there are on the Court. The Congress makes the determination of what is a quorum for the Court. The Congress makes the determination for when the Court will begin its session on the first Monday in October. The Congress has imposed time limits for the Supreme Court. And by analogy to those lines, I think it is fair for the Congress to legislate in this field.

Obviously, if the Supreme Court decides as a matter of separation of powers that it is not a Congressional prerogative, we will not petition for a rehearing. That will be the judicial decision which we respect since *Marbury* v. *Madison*.

We have a distinguished array of witnesses today. Our lead witness is Senator Charles Grassley, the senior Senator from Iowa. He came to the U.S. Senate in 1980, a banner year for Republicans. Some 16 Republicans were elected that year, and two of them were Charles Grassley and Arlen Specter, and the only two survivors are the two of us.

Senator Grassley was once analogized—I am going to be a little more liberal with the time, since no other Senator is on the panel. I usually stop promptly with the red light. Senator Grassley was analogized or compared to President Harry Truman as being very plain-spoken. The expression was "horse sense," and with Senator Grassley's background as a farmer, he took it as a compliment and it was intended as a compliment. And I can say that with some certainty because it was my statement about Senator Grassley.

Welcome, Senator Grassley. You are a distinguished member of this Committee, you are a distinguished member of the Senate, and we look forward to your testimony.

STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S. SENATOR FROM THE STATE OF IOWA

Senator GRASSLEY. Well, thank you very much for giving us an opportunity to speak about openness in our courts. As you know, I have long championed this, most recently with Senator Schumer, going way back to the 106th Congress when we first introduced the sunshine bill. Over the years, it has enjoyed bipartisan cosponsorship, and we have had the opportunity of getting our bill out of this Committee three times since that 106th Congress.

Just a couple of months ago, the new Chief Justice testified before our Committee about this issue when I and several members asked, and he seemed to have a great deal of open-mindedness on

this subject. Today's hearing, I hope, will help him with facts needed to make decisions to open the Supreme Court, as well as other Federal courts, to cameras. As you know, the House Judiciary Committee just passed out by a vote of 20 to 12 a House companion that was introduced by Congressman Chabot.

The Grassley-Schumer bill will give Federal judges the discretion to allow for photographing, electronic recording, broadcasting and televising in Federal courts. The bill will help the public become better acquainted about the judicial process, produce, I think, a healthier judiciary, increase public scrutiny, bring greater accountability, and I think help judges to do a better job. The sun needs to shine in on the Federal courts.

In this room, we often talk about the intentions of the Founding Fathers. I think allowing cameras in the Federal courtroom is absolutely consistent with their intent that trials be held in front of as many people as choose to attend. I believe the First Amendment requires court proceedings to be open to the public and, by extension, news media.

As the Supreme Court articulated in 1947, in *Craig* v. *Harney*, quote, "A trial is a public event." Another quote: "What transpires in the courtroom is public property." The Supreme Court stated in its 1980 ruling in *Richmond Newspapers*, "People in an open society do not demand infallibility from their institutions, but it's difficult for them to accept what they are prohibited from observing."

Beyond the First Amendment implications, enactment of our bill would assist in the implementation of the Sixth Amendment's guarantee of public trials in criminal cases. In its 1948 *Oliver* opinion, the Supreme Court said, quote, "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." The Court stressed that, quote, "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," end of quote. Louis Brandeis captured it better by saying "Sunshine is the best disinfectant."

During this morning's hearing, we are going to hear from opponents. Much of their opposition is based on speculation and false assumptions. The criticism ignores the findings of at least 15 State studies and a large Federal pilot program.

The widespread use of cameras in State court proceedings shows that still and video cameras can be used without any problems and that procedural discipline is observed. All 50 States allow for some modern audio-visual coverage of court proceedings. My own State of Iowa has done this for almost 30 years.

There are many benefits and no substantial detriment to allowing greater public access to the inner workings of our courts. Fifteen States conducted studies aimed specifically at the educational benefits derived from cameras. They all determined that camera coverage contributed to greater public understanding of the judicial process.

Further, at the Federal level, the Federal Judicial Center conducted a pilot program in 1994 which studied the effects of cameras in selected courts. That study found, quote, "small or no effect of

camera presence on participants in the proceeding, courtroom decorum, or the administration of justice," end of quote.

However, in order to be certain of the safety and integrity of our judicial system, we have included a 3-year sunset. It is also important to note that the bill simply gives judges the discretion to use cameras in the courtroom. It does not require the judges to do that. The bill also protects anonymity of non-party witnesses by giving them the right to have their voices and images obscured.

So this bill doesn't require cameras, but allows judges to exercise their discretion to permit cameras in appropriate cases. I think it guarantees safety for our witnesses and doesn't compromise that safety. So I hope we can pass it out of our Committee once again, Mr. Chairman.

[The prepared statement of Senator Grassley appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Grassley.

We have been joined by Senator Sessions.

Senator Sessions, would you care to make an opening statement?

Senator SESSIONS. No, Mr. Chairman. I just would say that I chair the Administration and Courts Subcommittee and I have given a lot of thought to this. I think we need to go carefully here and I am looking forward to the panel and discussing the issues.

Chairman SPECTER. Thank you very much, Senator Sessions.

We now turn to another distinguished member of this Committee, Senator Charles Schumer, from the State of New York. Senator Schumer went directly from the Harvard Law School to the New York Assembly and then directly to the U.S. House of Representatives, and then in 1998 was elected to the U.S. Senate, much to the dismay of his parents, as he has told the story, right from law school to public service without any intervening big bucks.

Chuck Schumer is dedicated to public service in a big way. He has run into big bucks, however, not for himself personally, but in his prodigious fundraising capabilities. He can give tips to all of his 534 colleagues on television access. May the record show he is nodding in the affirmative.

We find him to be very, very active and a great contributor to this Committee and we welcome him here this morning for his testimony.

STATEMENT OF HON. CHARLES E. SCHUMER, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator SCHUMER. Well, thank you, Mr. Chairman. I appreciate your, I guess, kind introduction and am honored to serve with you. I would note two quick things. I came to the Congress in 1980. You mentioned, I think, 16 new Senators. I was one of seven freshman Congressmen from New York, a Democratic blue State, six Republicans and myself. And I think I am—let's see—yes, I think I am the only one who is still there, too, just as you and Senator Grassley are. The other thing that links Senator Grassley on this bill is we are the only two "Charles Es" in the Senate who are nicknamed "Chuck."

Anyway, thank you, Mr. Chairman. I want to thank you and Senator Leahy for scheduling this hearing. It is an important hearing about people's ability to participate in this great democracy.

Public interest in our court system is higher than ever, and that is a good thing because our democracy is stronger when participation is strong. No branch of our Government has remained a greater mystery to average people than our Federal courts, and that is a shame because the decisions of our courts and the judges who sit on them, judges who get a lifetime appointment, have tremendous consequences for everyday lives.

An example: No case has had a more profound effect on the lives of Americans as much as when the Supreme Court helped decide the Presidential election 5 years ago in *Bush* v. *Gore*. We all remember that case. no matter what side you were on, you were riveted every step of the way. There was lots of concern then and there still is a lot of talk about that case now, but the Court realized that, and this is what is so interesting.

With *Bush* v. *Gore*, the Court also made history in one other way. For the first time in its history, the Court released an audio tape immediately after the proceedings. The tape was broadcast all over television and all over the radio. Millions of Americans listened intently just to get a feel for what was going on inside the hallowed halls of the Supreme Court. And ask any one of them if they would have liked to have the opportunity to watch the proceedings and the answer would have been an overwhelming "yes."

Well, if the Court did that in *Bush* v. *Gore*, a case very important particularly to people who care about politics, when they get a case on disability, there are people who care about that maybe more so. When they get a case on the environment, there are people who care about that. When they get a case on business law, there are business leaders who care about that.

I think the same standard ought to hold, and that is why I am proud to cosponsor a bill with my colleague, Senator Grassley. As he mentioned, we have worked on this a long time together and we have had some success in moving it out of this Committee. I think this is the year to make this law.

The reason for the bill is simple: it is openness. Courts are an important part of our Government. The more people know how government works, the better. But the Federal Government, as has been mentioned, lags far behind the States. I want to give another example in my own home State of how openness worked.

We have allowed televised trials for decades. It has been a great success. The critics say, oh, the cases of strong passion will become circuses and everything else. Well, there was no case New Yorkers felt more strongly about than the case of Amadou Diallo. Four police officers were eventually acquitted, but they were accused of shooting Diallo, a Nigerian immigrant, in cold blood.

Because the case got such wide concern, the venue was moved from the Bronx to Albany, but the judge wisely permitted live TV coverage. It allowed anyone who was interested to watch the entire trial, whether they lived in the Bronx, the neighborhood where it occurred, or elsewhere. The cameras were not disruptive. The lawyers acted professionally. The rights of witnesses were not cur-

tailed. Witnesses and jurors were not in the room, and so it didn't diminish the dignity of the court.

But at the same time, when the public—many people particularly in the African-American community were very upset about this and when they were able to watch the proceedings, most people agreed, whether they agreed with the outcome or not that the jury decided, that it was a fair trial. That wouldn't have happened if we didn't have cameras in the courtroom. For people to just read the newspaper accounts doesn't give the same thing.

So this works. Allowing cameras into our courtrooms will help demystify the courts. Let the public evaluate how well the system works. Only then will the public really be able to decide based on facts and real knowledge what changes need to be made.

Finally, as Senator Grassley mentioned, there are instances where cameras are not appropriate and this bill takes care of that by granting discretion to the judge. We don't really tie the judge's hands on this even though, as you note, Mr. Chairman, we probably could, although the court would have to rule on that ala *Marbury* v. *Madison*.

But if the judge thinks that televising a trial would be harmful—maybe he thinks it is unfair to the defendant, maybe there are privacy concerns—the judge could ban it. It also allows witnesses to request, as was mentioned, that their voices and images be obscured.

So the risk here isn't turning courtrooms into a circus or unduly invading someone's privacy. The risk is the danger we pose to our society and our democracy when we close off our institutions to the people they are supposed to serve.

Thank you, Mr. Chairman.

Chairman SPECTER. Thank you very much, Senator Schumer.

I turn now to our distinguished ranking member, Senator Leahy.

Senator LEAHY. Well, Mr. Chairman, I would just as soon wait for Senator Grassley. Oh, you are done, OK. Well, then, I will speak.

Chairman SPECTER. Do you think we would call on Schumer before Grassley?

[Laughter.]

Senator GRASSLEY. I am sorry you missed it, too.

Senator LEAHY. I know these two are not just two pretty faces; they are here for substance. I didn't realize Senator Grassley had already spoken. I was going to wait for him.

STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Senator LEAHY. I am glad to see this hearing. I am the son of a printer. My parents not only had a printing business, but for a while ran a small newspaper. So I come by my affection for the First Amendment very honestly and directly. My father instilled in me the sense that the freedom of speech in the First Amendment is the foundation of this democracy. But it also assures that we will have access to our Government.

When I was a young man—actually, when I was a young prosecutor in Vermont, Vermont even then had this culture of open government. We could talk to our elected officials and meet with

them on a regular basis. You can have balances for security, but there has to be this transparency. We have to know what is going on. A democracy works best when there is sunshine in government.

I think right now there is this dramatic shift toward secrecy in the government, and that is bad; it hurts the whole country. So we have to expand access to government for all Americans. I have tried to make all three branches of our Government more transparent and accessible. Congress and its committees, except for a rare secret session, are open and carried live on cable television, C–SPAN, and radio. Members and the committees use the Internet and the Web to let us know what is going on. The executive branch is subject to FOIA, the Freedom of Information Act.

We then have the third branch. Now, most judicial proceedings are open to those who can travel to the courthouse and wait in line and they can see what is going on. But emerging technology could invite the rest of the country into that same courtroom. You wouldn't have to travel there. Whether I am sitting in my little farm house in Middlesex, Vermont, or somebody is in their office, anybody could be in that courtroom, with technology.

All 50 States have allowed some form of audio or video coverage of court proceedings, but the Federal courts lag behind. I have cosponsored several bills to address this, including two bills currently pending—the one we have talked about, the Sunshine in the Courtroom Act of 2005, and the Televising Supreme Court Proceedings Act with Senator Specter.

The First Amendment is one of those magnificent bequests to all Americans and we have to protect it for succeeding generations. It is a fragile gift; it needs nurturing and it needs protection by every new generation. Let's use the technology available to this generation to give even greater guarantees to that amendment and the free and open government it facilitates.

It is time to let some sunshine into our Federal courts. The Federal courts are the bulwark for the protection of individual rights and liberties. The Supreme Court is often the final arbiter of constitutional questions having a profound effect on all Americans. Why not allow the public greater access to the public proceedings of the Federal courts? That is going to allow Americans to evaluate for themselves, ourselves, all of us, the quality of justice in this country.

They are there for all 280 million Americans. Let all 280 million Americans know what is going on. It can deepen the understanding of the work of the courts, but it can also deepen our understanding that it is our rights that are there being protected. It is a fascinating subject and it is time for this.

I remember when I first came to the Senate we did not have television. We brought in radio during the Panama Canal debates. People tuned in throughout the country; they got involved. Then we added television. That was an interesting experiment, and sometimes it has been good and sometimes it has been bad. Sometimes there has been posturing and sometimes there have been riveting matters. But the American people could see what they had a right to see if they traveled to Washington, stood in line and went in there. Well, I can see what goes on in my Federal court if I travel

to the court, stand in line and go in there. I want to be able to see from wherever I am.

Thank you, Mr. Chairman.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Senator Leahy.

Just a question or two, Senator Schumer. Do you think that the presence of the cameras in the Senate has any significant effect on promoting grand-standing or hot-dogging among the Senators?

Senator SCHUMER. I really don't. I think that the overall benefit of having C–SPAN, with millions of Americans watching—there are now call-in shows where people respond to what is going on—has been extremely salutary for our democracy. I think it is great.

Chairman SPECTER. That is the next question. What do you hear from your constituents about viewing C–SPAN and watching the Senate proceedings, and how much enlightenment does it give them as to what we are doing?

Senator SCHUMER. Mr. Chairman, I am amazed at how many people actually tune into C–SPAN and how often you hear it. I mean, maybe the average person doesn't, but a large number of people do. And, again, it has demystified the Congress. It is different having an intermediary tell you what happened through their eyes rather than seeing it through your own eyes. And what C–SPAN does and what cameras in the courtroom do is let anyone who wants to, as Patrick Leahy said, view it themselves.

Chairman SPECTER. How about the C–SPAN coverage of hearings? How many of your friendly insomniacs tell you that they saw you at 3 a.m. or at some other ungodly hour?

Senator SCHUMER. I agree. You hear about it all the time for hearings and for everything else. Have there been occasional times, I guess, when people might regret having C–SPAN in the Senate chamber and the hearings? Once in a blue moon, very, very rarely, and the benefit is every day, every minute.

Chairman SPECTER. Senator Leahy.

Senator LEAHY. The Chairman talked about the insomniacs at three o'clock, but they are making that choice to watch it.

Senator SCHUMER. You got it.

Senator LEAHY. And I know the number of e-mails and letters I get even from a little State like Vermont from the number of people who watch. But doesn't it also, though, come down again to if you have an interest in what is going on in that court, you can watch it?

Senator SCHUMER. Exactly.

Senator LEAHY. You have been there for Supreme Court arguments, as I have. I am a member of the Supreme Court bar. Senator Specter has argued cases there. We know that some of the cases can be awfully arcane. Fine, but the case that we may find arcane may have a very, very direct relationship to somebody else's rights or interests. Why not be able to watch it?

Senator SCHUMER. Right.

Senator LEAHY. And I again I come back to the point that if you can spend the money to travel to where the court is and stand in line, you might get in and watch it. It is an open courthouse. Why shouldn't it be open to everybody?

Senator SCHUMER. Exactly.

Senator LEAHY. So, Mr. Chairman, I thank you for having these hearings, and I agree with Senator Schumer and I agree with you and Senator Grassley.

Chairman SPECTER. Senator Sessions.

Senator SESSIONS. I thank the Chairman and, Senator Schumer, for your remarks. I think they are worthy of serious consideration. We serve on the Courts Subcommittee together. During that Democratic spring, you chaired the Subcommittee, and now I chair that Subcommittee.

I believe the courts are somewhat different than Congress. I believe the primary charge of a court is to provide justice in the case before it, not to entertain and to create circumstances that might undermine that. So as a person who spent a lot of time in the courtroom who dealt with witnesses, talked to them, held their hand, seen them cry before going in there, many times I comforted them to say, well, probably all that is going to be there is some of the family and a few other people, and don't worry about that. That was some comfort to them.

Judges and polls show that witnesses would be affected by the fact that what they may say about most intimate, personal, emotional issues, family disputes or love affairs and those kinds of things, personal admissions of errors and wrongdoing, or maybe even criminality that they participate in that they have to testify to—I think it is a basis for concern particularly in the trial court. The ability to get truth and witnesses to cooperate and testify accurately would be undermined. That is what the judges believe and that is where I am, particularly on the trial court.

I am not unhappy with the process that is established now for the circuit courts, and believe the proposed legislation that allows the presiding judge to make the call rather than the judicial council would be less satisfactory. That would be an aberrational process that would be not as justified, in my view, as a uniform council policy.

The Supreme Court obviously has begun to loosen up some. They have allowed their arguments to be taped and produced, but they likewise have given this consideration quite a number of times and have concluded that they do not wish their lawyers and the process to be a television show, and that they would prefer it be focused on the law of the case.

The judges ask awfully technical, legal questions. That is what the American rule of law often is, is standing and procedural matters and statutes of limitations and those kinds of things. There could be a tendency, I think, even for judges to go more away from those issues and to the dramatic issue that may have attracted the attention of the public. So I think the court is wise to consider this.

I think someone asked new Chief Justice Roberts what his views were on this subject, and I am not sure what he said, but he obviously has left it open and the Court has the ability to do that.

So, Mr. Chairman, I know that there is a strong push for this. I know a lot of the TV networks would like to see this occur. I respect what they do and respect the work that they perform, but my feeling at this point is we should be very careful about this. And

particularly by personal experience with Federal district courts, we should not go forward to allow cameras in the courtroom.

Chairman SPECTER. Senator Sessions, when you say you weren't quite sure what Chief Justice Roberts said in response to the question—

Senator SESSIONS. I think you asked it, maybe.

Chairman SPECTER. Oh, I asked him.

Senator SESSIONS. What did he say, Mr. Chairman?

Chairman SPECTER. Well, first, I want to comment where you said you weren't sure about what he said. Many of us weren't sure about what he said in answer to many questions.

[Laughter.]

Chairman SPECTER. His response to that question was that he had an open mind. That was before he was confirmed, however. My view has been that the nominees answer about as many questions as they think they have to and they are as compliant as they can be consistent with their consciences and what they may do later.

Senator SESSIONS. You are a wise and experienced Chairman, Mr. Chairman.

Chairman SPECTER. We will revisit that. There are more people on television. I walked into my office this morning and saw Justice Breyer on television. You see Justice Scalia on television. It is coming.

Senator SESSIONS. Mr. Chairman, I would say this, that in the evaluation of it I think the least detrimental would be the Supreme Court. The next least detrimental consequences perhaps would be the courts of appeals, and the most detrimental from my perspective would be the trial courts. So we will just see how it goes and I look forward to the hearings.

Chairman SPECTER. Thank you for that, Senator Sessions. I am putting you down in my tally sheet as leaning.

[Laughter.]

Chairman SPECTER. We are going to now turn to the judicial panel.

Thank you very much for joining us, Senator Schumer, and you are welcome to stay.

Senator SCHUMER. Thank you.

Chairman SPECTER. Our next witness is Judge Diarmuid O'Scannlain, a Ninth Circuit, having been confirmed in 1986. He has had a distinguished record in public service in a variety of positions. He was on the Advisory Panel for the U.S. Secretary of Energy. He had been the Director of the Oregon Department of Environmental Quality, Deputy State Attorney General for Oregon. He served in the Judge Advocate General Corps. He has a bachelor's from St. John's and a law degree from Harvard, and a J.D. and LL.M. from the University of Virginia.

Thank you for joining us, Judge O'Scannlain, and we look forward to your testimony.

STATEMENT OF DIARMUID F. O'SCANNLAIN, JUDGE, U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT, PORTLAND, OREGON

Judge O'Scannlain. Thank you very much, Mr. Chairman and members of the Committee. My name is Diarmuid O'Scannlain,

United States Circuit Judge for the Ninth Circuit, with chambers in Portland, Oregon. I thank you for inviting me to share my personal experience with televised proceedings of the U.S. Court of Appeals for the Ninth Circuit.

Our court is one of two courts of appeals involved in a pilot program under which audio equipment, still cameras or video cameras can be admitted to the courtroom upon request and with approval from the panel hearing the case. Since 1991, until last week, we have logged 205 requests to allow media into oral arguments. Of these requests, the panels granted 133.

But to give some perspective, the Ninth Circuit has heard oral arguments in approximately 24,000 cases since 1991, meaning that media requests for videotaping or live television have been requested in less than 1 percent of the total cases receiving oral argument.

To gain access to a Ninth Circuit courtroom, a member of the media with cameras need only fill out a simple form requesting very basic information. The clerk of the court then transmits the request to the panel, which can grant or deny the request by majority vote of the judges assigned to that case.

The Ninth Circuit requires media representatives to obey modest guidelines which request proper attire, ban the use of flash photography or other potentially distracting filming, prohibit the broadcast of any audio conversations between clients and attorneys, and limit the total number of cameras that can be present for any single oral argument.

The Committee might also be interested to know that the Ninth Circuit currently makes audio playback of all oral arguments available through its website the day after the hearing, and frequently provides a live audio feed of oral arguments in certain cases. Further—and this may not be generally known—all arguments are recorded on the court's unobtrusive internal videotaping system for the court's own records.

I have personally had 44 requests to allow cameras in oral arguments in which I have been a panel member, of which nearly 80 percent have been granted. In other words, I have personally participated in 35 appellate oral arguments which were videotaped or televised live, which experience is the basis of my testimony today.

These requests range from high-profile, attention-grabbers to the comparatively banal. Among the more controversial three-judge cases were *Brown* v. *Woodland School District* which considered whether certain Sacramento area classroom activities required children to practice witchcraft, in violation of the First Amendment.

Understandably, cases involving elections and the right to vote have generated substantial public interest and press coverage. For example, I sat as a member of a limited en banc panel of 11 judges in a very high-profile, live video coverage of a case evaluating whether the California recall election of Gray Davis, the Governor, should be enjoined as a violation of the 14th Amendment because of the use of punch card balloting machines.

Of course, not every request to bring media into our courtrooms has been allowed. Panels, perhaps motivated by concern for the parties, have occasionally shunned cameras. For example, in *Compassion in Dying* v. *Washington*, the court grappled with whether

a State statute criminalizing the promotion of suicide violated the 14th Amendment.

Some judges will vote to deny video access unless assured that the media will broadcast the tape on a gavel-to-gavel basis. Indeed, just last weekend C–SPAN aired the entire oral argument in *Planned Parenthood* v. *Gonzales*, a partial birth abortion case that was argued several weeks before.

Finally, Mr. Chairman, I appear before you today both in my individual capacity supportive of cameras in appellate courtrooms and on behalf of the Judicial Conference of the United States, which opposes cameras in trial courtrooms. Trial courts and appellate courts differ in important respects, primarily with respect to the presence of victims, witnesses, juries and, of course, the parties themselves.

For this reason, I have serious concerns regarding the placement of cameras in trial courts, and suggest that questions about cameras in trial courts be directed to my district court colleague from Pennsylvania, Judge Jan DuBois.

I thank you again, Mr. Chairman. I will be happy to take any questions that you or the Committee members may have with respect to the use of cameras in the circuit appellate setting.

Thank you.

[The prepared statement of Judge O'Scannlain appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Judge O'Scannlain.

Our next witness is United States District Judge Jan DuBois from the Eastern District of Pennsylvania. He has served there since 1988 and prior to that time had a very extensive trial practice in Philadelphia with the law firm of White and Williams. He had clerked for Circuit Judge Harry Kalodner.

He received his bachelor's degree from the University of Pennsylvania in 1952 and his law degree from Yale in 1957, and in the interest of full disclosure has been a friend of mine for 50 years. I was at Penn with him. I did not make Sphinx, but Buddy DuBois did. He had a distinguished record at the Yale Law School and has been really an outstanding Federal judge.

He has handled major cases involving the prison system and has no peer when it comes to hours in the courtroom, frequently running up the GSA bills on Saturday afternoon for air conditioning in the summer and heating in the winter. He is well worth it and beyond.

Welcome, Judge DuBois. The last time you were here was for your confirmation hearing and we have some tougher questions for you today. Please proceed.

STATEMENT OF JAN E. DUBOIS, JUDGE, U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, PHILADELPHIA, PENNSYLVANIA

Judge DUBOIS. Mr. Chairman, members of the Committee, my name is Jan DuBois. I am presently a judge on the United States District Court for the Eastern District of Pennsylvania. I have served on the district court for 17 years. I am appearing before you today in my personal capacity. I appreciate the invitation to testify and hope my testimony will be useful to you.

As you requested, my statement will cover the pilot program providing for electronic media coverage of civil proceedings in selected Federal trial and appellate courts—two courts of appeals, the Second Circuit and the Ninth Circuit, and six district courts, including my district.

The pilot program authorized coverage only of civil proceedings. Guidelines were adopted by the Judicial Conference, and I have appended a copy to my written testimony. The guidelines set forth the procedures to be followed for using cameras in the courtroom. Significantly, they also prohibited photographing of jurors and they provided that the presiding judge had discretion to refuse, terminate or limit coverage.

To give you some idea of the scope of the program, from July 1, 1991, through June 30, 1993, there were 257 applications for media coverage in all of the pilot courts. Of these, about 72 percent of the applications were approved. Of this total, 257 cases in which applications were made, about 30 percent were submitted in the Eastern District of Pennsylvania.

The Eastern District of Pennsylvania conducted a study at the completion of the pilot program on December 31, 1994. More cases had been the subject of applications and the percentages remained about the same. Significantly, the breakdown of the cases in which applications were filed in the Eastern District disclosed that about 49 percent of them involved civil rights. Next, in terms of percentage of requests were tort cases—21 percent.

The Federal Judicial Center evaluated the program and I have a copy of their report. It is entitled "Electronic Media Coverage of Federal Civil Proceedings" in this program. It was published in 1994 and I understand it is on the Federal Judicial Center website. That report included ratings of effects of cameras in the courtroom by district judges who participated in the program and I have appended a copy of that part of the report to my written testimony.

The ratings by the judges who participated in the program were both favorable and unfavorable. For me, the most disturbing ratings were these: 64 percent of the participating judges reported that, at least to some extent, cameras made witnesses more nervous. Forty-six percent of the judges believed that, at least to some extent, cameras made witnesses less willing to come to court. Forty-one percent of the participating judges found that, at least to some extent, cameras distracted witnesses, and 56 percent of the participating judges found that, at least to some extent, cameras violated witnesses' privacy.

In my experience, I had, I believe, a total of four applications for cameras in the courtroom. I granted three, denied one. Strangely, the media—I think it was Court TV—covered what I considered to be the least dramatic case, a product liability case, and rejected cameras in the prison class action, to which the Chairman referred.

In deciding whether to allow cameras, I conducted a conference. The most commonly advanced objections offered by the attorneys were the adverse effect on the parties and the adverse effect on witnesses. In some cases, plaintiffs were concerned about disclosing matters of an extremely private nature, and Senator Sessions has already mentioned that. And in at least one case, a defense attorney said the threat of a televised trial would cause the defendant

to consider settlement, regardless of the merits of the case. As far as the adverse effect on witnesses, counsel were concerned that cameras would make them less willing to appear. And, in general, the attorneys' objections tracked the comments of the judges who participated in the program.

I will say this about cameras in the courtroom: My personal view is that the disadvantages far outweigh the advantages. I say that mindful of the fact that our courtrooms have to be open, and indeed I think they are open. My concern about cameras in the courtroom stems from the fact that I think the cameras do more than just report proceedings. They affect the substance of the proceedings, and I say that based on my experience as a trial judge and my experience for 30 years as a trial attorney.

I think that the impact, or the potential impact, of cameras on jurors, on witnesses and on parties augurs for not allowing cameras in the district courts. The paramount responsibility of a district judge is to uphold the Constitution, which guarantees citizens the right to a fair and impartial trial. In my opinion, cameras in the district courts could seriously jeopardize that right because of their impact on parties, witnesses and jurors.

[The prepared statement of Judge DuBois appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Judge DuBois.

Judge O'Scannlain, you testified that you have been a party to 35 appellate proceedings and you have come to the conclusion that you think it is desirable to have cameras in the courtroom, correct?

Judge O'SCANNLAIN. At the circuit court of appeals level, yes. I think our experience now over 13 years—and it has continued since 1991 and is still on—has indicated that it seems to work well and the vast majority of us feel that it is perfectly acceptable.

Chairman SPECTER. Any material impact on the lawyers who are presenting the cases or on the judges who are presiding in terms of responses for grand-standing—

Judge O'SCANNLAIN. Well, you always wonder here and there—

Chairman SPECTER. Let me finish the question, Judge.

Judge O'SCANNLAIN. I am sorry, excuse me, I am sorry.

Chairman SPECTER. Let me finish the question—or in any way altering their regular conduct?

Judge O'SCANNLAIN. Well, you always wonder here and there of perhaps some aberrational moments, but by and large I have never been offended by anything that the lawyers or my colleagues have said in a televised oral argument in my court.

Chairman SPECTER. You maintained your same judicial demeanor, notwithstanding the presence of the cameras? That is a leading question.

Judge O'SCANNLAIN. Well, we certainly try to, and hopefully we do.

Chairman SPECTER. Judge DuBois, how many cases were televised in your courtroom?

Judge DUBOIS. In my courtroom, only one. I approved three applications. Only one case, a product liability case which did not involve personal injuries—it involved the recall of a line of bottled water—

Chairman SPECTER. What was the impact of cameras in the courtroom, if any, on you?

Judge DUBOIS. The answer to that question is none on me, and in that case, because of the rather bland nature of the case, the impact was positive. There was no negative impact at all. The parties did not object, the witnesses did not object. Cameras did not focus on the jurors, but I asked the jurors after they were empaneled whether they had any objection to having television cameras there and they replied no.

I should add—

Chairman SPECTER. So why, with your sole experience with cameras in your courtroom being positive, do you come to a different conclusion as a generalization?

Judge DUBOIS. First of all, that case was a case that was tried on the first day of the program, July 1, 1991. As my experience with the program and with attorneys who objected to cameras in the courtroom expanded, I concluded that there was an effect on some witnesses, on some jurors and on some parties.

Chairman SPECTER. But as a result of having cameras in the courtroom?

Judge DUBOIS. Well, I think the effect of having cameras in the courtroom is a telling effect. Let me give you an example. The Federal Judicial Center reported that a large percentage of the judges concluded that there was an impact on witnesses, that witnesses became more nervous. Jurors are told to watch the way a witness responds to a question. If a witness is nervous because of cameras in the courtroom, a juror might very well misinterpret that to mean the witness is nervous because the witness is not telling the truth. That is a dynamic that I never want to see happen in a courtroom in which I am presiding.

Chairman SPECTER. It didn't happen in the case that you presided over where the cameras were present?

Judge DUBOIS. It was a rather bland case involving the recall of bottled water.

Chairman SPECTER. Well, how about cameras for bland cases?

Judge DUBOIS. I don't think the media would go for that, Senator.

Chairman SPECTER. Well, give them the choice. Don't bar them if it is something they might choose to do.

Judge DUBOIS. Senator, may I say this? And I am mindful the lights are going on and I am mindful of your experience in the Supreme Court in the Navy Yard argument, and I was afraid that today would be pay-back time for me and that I would be cutoff in mid-word.

Chairman SPECTER. Time is not up. Give us a chance. Chief Justice Rehnquist, as you know, was looking for an occasion to cutoff a lawyer in the middle of the word "if."

Judge DUBOIS. Well, I thought you might try to do that to me today. Thank you for not doing that, sir.

I am concerned that any compromise of an individual's right to a fair trial, any intrusion on that right is not warranted because I think we have open courtrooms now and the question is do we need courtrooms to be more open. And I think if you can answer that question by saying there would be no trampling of individual

rights in trials, that is fine. But I don't think we can say that based on the information that is presently available and I wouldn't want to sacrifice the right to a fair trial in both civil and criminal cases to make courtrooms more open. And in saying that, I want to add that I certainly favor open courtrooms, but believe our courtrooms are open now.

Chairman SPECTER. Well, my time expired in the middle of your answer, so I am going to yield to Senator Sessions.

Senator SESSIONS. Take more time, Mr. Chairman, if you need it.

Chairman SPECTER. No. I am going to stick to the time and maintain our Committee record on that, but I will comment that we are all devoted to a fair trial and we are not going to do anything that would impede on that. And I think the legislation which Senator Grassley testified about leaves it open to eliminate the cameras where the judge feels there would be an impingement or where participants and parties to the trial object.

Senator Sessions.

Senator SESSIONS. Thank you.

Judge DuBois, the American ideal of justice is to create a climate for the very fairest outcome in every case that comes in a court of law in this country. Wouldn't you agree with that?

Judge DUBOIS. I certainly would.

Senator SESSIONS. We even give you two judges a lifetime appointment. We can't even cut your pay because we want an independent judge to preside over the trial who will take steps to make sure that trial is conducted in a way that guarantees that extraneous emotional forces don't come together in a way that might adversely impact a fair decisionmaking process. Wouldn't you agree with that?

Judge DUBOIS. I would, sir.

Senator SESSIONS. And in your opinion, based on your years on the bench, you have concluded that cameras in the courtroom could be an adverse factor in guaranteeing as fair an outcome as we can possibly achieve?

Judge DUBOIS. That is correct, sir.

Senator SESSIONS. Looking at the polling data that they did in New York to review their television coverage, it says they polled—and I think it is pretty startling, really. Forty-three percent of citizens would be less willing to serve on a jury if there were cameras and 54 percent would be less willing to testify as a witness to a crime if cameras were present. I think that is even more troubling.

A New York survey of voters conducted by Bill Bowers of Northwestern University found that 4 out of 10 potential victims would be less willing to testify in a criminal case if cameras were present. The Federal Judicial Conference study found that 64 percent of participating judges in the pilot program reported at least to some extent, as you noted, cameras make witnesses more nervous.

Do you agree? Are those polling data numbers consistent with your experience as a judge and your own observations?

Judge DUBOIS. I agree with the conclusions. My experience isn't broad enough to reflect specific percentages, but I believe every one of the factors that you mentioned from the New York study and the

Judicial Center study are factors that weigh against a fair trail and should not be compromised to make our courtrooms more open.

Senator SESSIONS. Well, we just have to be careful. Trials are critically important crucibles to ascertain truth. They are not for entertainment; they are there to help decide correctly complex, often emotional disputes between defendants and victims and prosecutors, and between civil litigants and that sort of thing.

Let me ask Judge O'Scannlain, now, if you do coverage of the appellate courts, does the coverage cover the whole hearing and then when it is put on the six o'clock news, do they just excerpt some small part of it, and does that give you a concern that perhaps an incorrect perception might be conveyed to the public?

Judge O'SCANNLAIN. Senator, there have been a variety of experiences. Some of the cases in which I participated were video only, with no audio, and snippets from that were used in the public broadcasting special program about the Ninth Circuit.

In other situations, as I indicated, some of my colleagues will vote not to grant permission unless there is a commitment by C–SPAN or whatever the particular media entity is that they would run it on a gavel-to-gavel basis. So it would be the full 20 minutes and a 10-minute argument, or the full 40, that kind of thing. That is why I thought it was quite telling and quite impressive that—

Senator SESSIONS. Let me just suggest that a local TV station that might have an interest in it would not be obligated to show the whole argument at six o'clock. They could simply show one snippet from it, is that correct?

Judge O'SCANNLAIN. Yes, that is true, and that specifically happened in a case which was argued in San Francisco having to do with a cross on public property. There was a lot of local interest in it, and as a matter of fact the local Bay area television stations did indeed show it on a snippet basis.

Senator SESSIONS. Mr. Chairman, my time is up.

Chairman SPECTER. Thank you very much, Senator Sessions, and thank you very much, Judge O'Scannlain and Judge DuBois. There are many, many more questions we could ask. We have your written statements. We have a very long third panel, so we are going to thank you and we may be following up with some additional questions for the record.

Judge O'SCANNLAIN. It would be our pleasure. Thank you very much, Mr. Chairman.

Judge DUBOIS. Thank you, Mr. Chairman.

Chairman SPECTER. We will now call panel three—Ms. Barbara Bergman, Mr. Peter Irons, Mr. Seth Berlin, Mr. Brian Lamb, Mr. Henry Schleiff and Ms. Barbara Cochran.

Our first witness on this panel is Ms. Barbara Bergman, who is testifying in her capacity as President of the National Association of Criminal Defense Lawyers. She has been a professor of law at the University of New Mexico School of Law. She worked as a staff attorney for the public defender here in Washington, was associate counsel for President Carter. She has a bachelor's degree from Bradley and a law degree from Stanford.

Thank you for joining us, Ms. Bergman, and the floor is yours for 5 minutes.

STATEMENT OF BARBARA E. BERGMAN, PRESIDENT, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, WASHINGTON, D.C.

Ms. BERGMAN. Mr. Chairman and distinguished members of the Committee, as President of the 13,000-member National Association of Criminal Defense Lawyers, NACDL, I am honored to be here today to share the association's views regarding the important issue of cameras in Federal courtrooms.

While current rules do not permit cameras in Federal district courts, NACDL's members have experience with televised proceedings in their State courts. And in discussing this issue recently with our board of directors, it was apparent that there is no consensus within the defense community regarding the overall desirability of cameras in courtrooms in criminal cases. The position of our association reflects that diversity of experience and opinion.

The Supreme Court has held that there is no constitutional right of access for cameras in the courtroom. As a result, in criminal cases the purported value of televised court proceedings must be weighed against the accused's constitutional rights to due process and a fair trial.

The NACDL believes that S. 829 does not strike the right balance. We would like to see the bill amended so as to authorize cameras in district court criminal proceedings and interlocutory appeals only with the express consent of the parties. In all other criminal matters coming before the United States courts of appeals and the Supreme Court, NACDL favors access for cameras, and there are many arguments on both sides.

To the extent that cameras in the courtroom promote greater public understanding of the judicial process and the constitutional protections that apply to that process, we generally support their expanded use. Not unrelated is the notion that televised trials may encourage greater preparation and a higher standard of professionalism.

But in the alternative, the arguments against cameras, there are many that concern us a great deal. First is pressure on jurors. The decision to televise a trial signals to the jury that their verdict is likely to be scrutinized by the viewing public, and defendants are less likely to receive a fair trial when jurors feel the need to reconcile their verdict with strong public sentiments in favor of a particular result.

As a member of Terry Nichols's defense team in the State capital prosecution arising from the Oklahoma City bombing, we were extremely concerned about the possibility of strong community pressures being brought to bear on Oklahoma jurors if the court permitted cameras in the courtroom. We objected to the presence of such cameras under Oklahoma's rule permitting the defendant to object to cameras and ultimately they were excluded.

While it is impossible to measure the precise impact cameras may have had on that trial, the fact that some of the jurors have refused to speak to the media and others did so over a year after the verdict reinforced my belief that excluding cameras reduced at least some of the community pressure on the jury in the small community of McAlester, Oklahoma. Finally, past television coverage

may make it more difficult to select an impartial jury in case there is ever a retrial.

We also share the concern about pressure on witnesses, that it will discourage witnesses from testifying, that it may affect the ability of them to testify in a way that doesn't distort what they have to say. The concern we have is that it will affect the jury's evaluation of their credibility.

We also have concern about pressure on the defendant from cameras that can affect the accused's demeanor and willingness to testify. And more fundamentally, the prospect of extended media coverage may discourage the accused from exercising their right to trial in the first place, and it is of particular concern in cases involving humiliating accusations or corporate defendants unwilling to expose themselves to negative publicity.

It is also of particular concern in capital cases where evidence of childhood sexual and physical abuse is frequently offered in mitigation. The prospect that such evidence may be broadcast across the country may cause a defendant to hide such information even though it could save his life. Finally, even when the accused is acquitted, the stain on their reputation is not easily erased and camera coverage may exacerbate this unwarranted punishment.

Given these concerns, the sponsors of S. 829 have wisely avoided a rule authorizing unrestricted camera access. But rather than placing the ultimate decision in the hands of the presiding judge, we think the consent of the parties—the accused acting with the advice of counsel and the government—should be required before cameras are permitted to televise criminal trials or interlocutory appeals.

The positive or negative effects of cameras depend on the facts and circumstances of each case. The parties who are familiar with the witnesses who will testify, the evidence that will be offered and other facts that might indicate the potential for prejudice are in the best position to determine the appropriateness of cameras. Moreover, permitting the parties to withhold their consent avoids the time-consuming distraction of litigation regarding the judge's decision to permit or forbid that coverage.

While we support efforts to ensure more sunshine on our democratic institutions, that goal should not be allowed to eclipse the fundamental purpose of a criminal trial, which is not education or entertainment, but justice.

[The prepared statement of Ms. Bergman appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Ms. Bergman.

Our next witness is Professor Peter Irons, Professor Emeritus of Political Science and Director of the Earl Warren Bill of Rights Project at the University of California in San Diego. Professor Irons has authored six books on the Supreme Court and served two terms on the national board of the ACLU. He has an undergraduate degree from Antioch, a Ph.D. in political science from Boston University, and a law degree from Harvard.

Thank you very much for coming in today, Professor Irons, and the floor is yours.

STATEMENT OF PETER IRONS, PROFESSOR OF POLITICAL SCIENCE, EMERITUS, UNIVERSITY OF CALIFORNIA AT SAN DIEGO, SAN DIEGO, CALIFORNIA

Mr. IRONS. Senator Specter and Senator Sessions, I am very glad to be here this morning. I am going to limit my comments—and my statement is part of the record—if I might.

Chairman SPECTER. Your full statement will be made a part of the record, as are all of the statements.

Mr. IRONS. I would like to limit my comments to television coverage of the Supreme Court, and I base that on my experience with providing to the public access to the audio arguments, the audiotape arguments before the Supreme Court. Let me just give a little history behind that.

Back in 1955, Chief Justice Earl Warren initiated the audiotaping of Supreme Court oral arguments. I think he did so because he recognized in the past term the historic importance of arguments in *Brown* v. *Board of Education*, both the first and the second cases. He felt that keeping those arguments on tape and making them accessible to the public would serve not only an historic, but a civic benefit particularly for students.

Now, until 1986 there was no restriction on access to those tapes. But in 1986 when Fred Graham of CBS News obtained a copy of the Pentagon Papers oral argument and played excerpts of it on television and radio, Chief Justice Burger imposed restrictions on access to those tapes, limiting it to what were termed private research and teaching.

I decided in 1991, having heard some of these tapes when I was in law school, that it would be a good educational project to make them available to the public, particularly for use in schools. So I obtained copies of 23 historical oral arguments, including *Roe* v. *Wade*; *Miranda* v. *Arizona*; the Watergate tapes case, *United States* v. *Nixon*; and the Pentagon Papers case.

Simply to illustrate, with the Committee's indulgence, I would like to just push a button right here and for less than a minute bring you into the Supreme Court chamber for part of the argument by Thurgood Marshall, then chief counsel for the NAACP Legal Defense and Education Fund, in the historic case of *Cooper* v. *Aaron*, and I hope this will be audible.

[Audiotape played.]

Mr. IRONS. Now, I played that, Mr. Chairman, to—

Chairman SPECTER. Mr. Irons, I don't think we all heard that. I will give you a little extra time. Summarize what was just played on the tape.

Mr. IRONS. All right. It was an argument by Thurgood Marshall about the experiences of the African-American children in Little Rock when they were being escorted into the schools through mobs and how—

Chairman SPECTER. And what case was this in?

Mr. IRONS. This was in *Cooper* v. *Aaron*, in 1958.

Now, my point here is very simple that these tapes have been played in thousands and thousands of school rooms, and I would be glad to enter this into the record, as well, a copy of a set of those tapes. My own experience and the experience of hearing from literally hundreds of teachers and students who have heard these

tapes is that they would very much appreciate the chance not only to hear these arguments, which very few of them have been able to witness in person, but also to see the arguments in the Supreme Court. There is nothing, I think, more educational than that opportunity, making it available to the public, and particularly to students, to do that.

This past Monday, I was talking to a class in judicial process at Missouri State University in Springfield and I asked the class—and they had heard excerpts of these tapes, about 50 students, and I said how many of you would really appreciate the opportunity to be able to witness these arguments in person on video to see the lawyers argue the cases and the judges ask questions. And there was a unanimous show of hands in support of that project.

So I think, in conclusion, Mr. Chairman, Senator Leahy and Senators Sessions, that there would be a great public benefit. I also have available a statement that I received yesterday by e-mail from Chief Judge Mary Schroeder, of the Ninth Circuit, on which Judge O'Scannlain sits, I think backing up his testimony, but also saying that "In my opinion, the Supreme Court and the public would benefit from at least experimenting with televised oral arguments in cases that, like the California case, are of intense public interest and presented by counsel of the highest ability."

I would like to submit that statement as well.

Chairman SPECTER. It will be made part of the record.

[The prepared statement of Mr. Irons appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Professor Irons.

We now turn to Mr. Seth Berlin, a partner in the law firm of Levine Sullivan Koch and Schulz. He has handled a variety of First Amendment, defamation, privacy and reporter's privilege cases. He has been nominated to the governing Committee of the American Bar Association's Forum on Communications Law. He has a magna cum laude degree from Brown University and is a cum laude graduate of the Harvard Law School.

The floor is yours, Mr. Berlin.

STATEMENT OF SETH D. BERLIN, LEVINE SULLIVAN KOCH AND SCHULZ, LLP, WASHINGTON, D.C.

Mr. BERLIN. Thank you, Mr. Chairman and members of the Committee. I really appreciate the opportunity to testify today.

At a fundamental level, ours is a Government in which the people are sovereign and therefore possess the right to observe our Government in operation. As the Supreme Court has explained, and as Senator Grassley alluded to in his testimony this morning, 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. Simply put, our democracy works better when people understand how their Government institutions operate, and our Government institutions work better when their operations are understood and scrutinized by the people.

We have a constitutionally required right of access to court proceedings and it cannot be seriously disputed that camera coverage will materially further most people's exercise of that right. The simple truth, as the Florida Supreme Court put it in authorizing

cameras into that State's courts back in 1979, is that newsworthy trials are newsworthy trials and they will be extensively covered by the media both within and without the courtroom, whether cameras are permitted or not.

It makes a lot more sense to provide the public with a picture of the actual in-court proceedings rather than having the public getting its information about trials solely from second-hand summaries, or worse, potentially prejudicial and inflammatory characterizations by interested third parties.

Next, I would like to point out that there is generally no constitutional bar to camera coverage. Following the Supreme Court's decision in *Chandler* v. *Florida*, courts confronting this issue routinely have concluded that television coverage does not interfere with the due process rights of a criminal defendant or of other parties or participants in a court proceeding.

I would also like to talk about the benefit of at least affording judges discretion in this area. A number of courts that otherwise would have found camera coverage warranted have felt constrained by either Federal Rule of Criminal Procedure 53 or by the Judicial Conference guidelines that prohibit camera coverage in trial courts.

For example, in General Westmoreland's landmark libel trial against CBS, the parties consented to CNN's televising the proceedings. Then-trial Judge Leval also made extensive findings that favored camera coverage. He nonetheless denied CNN's petition based on his conclusion that the rules of the Judicial Conference and of his own court left him no choice—a determination that was then upheld by the Second Circuit.

Earlier this fall, a Federal district court in Pennsylvania reached a similar conclusion, relying on the Judicial Conference guidelines. The court denied a request by Court TV to televise the trial over the Dover, Pennsylvania School Board policy of suggesting the study of intelligent design along with the study of evolution, despite the profound national interest on the subject, the consent of all of the parties and the fact that the trial involved none of the usual potential objections that people raise in authorizing camera coverage.

Legislation granting judges at least discretion to authorize camera coverage in appropriate circumstances may well have yielded a different result in these important matters and many other important controversies of the future.

Finally, I want to talk briefly about the experience of those courts that have authorized camera coverage. Both the Federal Judicial Center study of a Federal court pilot program and similar studies of experimental programs in a large number of States have confirmed that camera coverage does not interfere with the fair and orderly administration of justice.

Moreover, the Federal courts are increasingly using cameras for many purposes other than broadcasting court proceedings to the public. Judge O'Scannlain talked about the Ninth Circuit's internal videotaping system. The trial court in the Moussaoui prosecution authorized an audio-visual feed to a nearby overflow courtroom, and in response to the change of venue in the Oklahoma City bombing trial, Congress authorized closed-circuit televising of trials

to crime victims where the trial is moved more than 350 miles and out of State.

Last, there is the overwhelmingly positive record of camera coverage in the State courts. All 50 States allow at least some camera coverage of judicial proceedings. The best evidence that these rules work is that States have continued to operate under them, in many cases for decades. California continued its practice of televising State court proceedings even after the O.J. Simpson trial left some to question that policy. And just last week, the Florida Supreme Court unanimously rejected efforts to limit its rules allowing camera coverage of court proceedings throughout that State's court system.

To sum up, permitting Federal court proceedings to be televised will dramatically enhance the public's exercise of its right of access to judicial proceedings. Congressional action will open the door's of the Nation's Federal court system to millions of Americans who are otherwise unable as a practical matter to view these proceedings.

[The prepared statement of Mr. Berlin appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Berlin.

Our next witness is the distinguished Chief Executive Officer of C–SPAN, and has been since C–SPAN was founded in 1979. He has had a regular on-air presence with his "Booknotes" up until last year and continues to have an on-air presence, as I can personally testify to, having been interviewed by Mr. Lamb as recently as August of this year.

Prior to being a co-founder of C–SPAN, he worked as a freelance reporter for UPI radio, a Senate press secretary and a White House telecommunications policy staffer. In 1974, Mr. Lamb began publishing a bi-weekly newsletter called "The Media Report" and was Washington bureau chief for Cablevision magazine. A graduate of Purdue University, he majored in speech, where he received his bachelor's degree.

Just a little anticipatory on the testimony, C–SPAN covers Senate hearings with regularity and I, for one, hear an enormous amount of comment about it. People talk about C–SPAN with attentiveness only parallel to professional sports as to what this individual has observed.

The next few minutes are yours, Mr. Lamb.

Senator LEAHY. Mr. Chairman, before he starts, I know how much people watch this and actually watch Mr. Lamb because I was walking through an airport once and somebody came up and said, Mr. Lamb, how long have you been wearing glasses? I said, no, no, he is a lot younger and he doesn't have to wear glasses.

STATEMENT OF BRIAN P. LAMB, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, C–SPAN NETWORKS, WASHINGTON, D.C.

Mr. LAMB. Senator Leahy, they do the same thing to me often in airports—Senator Leahy, can I have your autograph? And, you know, I have to disappoint them and tell them I am not you. I have gotten that, by the way, on Senator McCain and Senator Glenn, and I can go down the list of the number of people that I am thought to be.

I was in a classroom a couple of weeks ago, some 16-year-old juniors, talking about C–SPAN and what we do in government and civics. One of the students put her hand up and asked me—and I don't remember why because it is an odd question—she said where do they put the jury in the Supreme Court room? And it struck me, as Professor Irons was talking about the educational value of all of this being one of the more important reasons why we are even doing this.

We have a commitment to make here this morning, and we have done it before, and that is basically if the Supreme Court will ever allow its oral arguments on television, we will carry all of them from start to finish. We will find a place to put them all.

Judge O'Scannlain was talking about members of the Ninth Circuit often want gavel to gavel. I personally am not in favor of enforcing gavel to gavel. I think the news media plays an enormously important role in interpreting, and I often find it fascinating because you can't really find out what the Supreme Court members think about television. They don't meet the public very often. As the Chief Justice says, they have an open mind and you never can really find out if they have ever voted on it or not.

But I often thought it was odd because they will allow a member of the print press to come in and sit in the press area, or a television reporter to sit in the press area, walk outside, stand in front of a camera and interpret everything that went on in the courtroom. But giving us a chance to see how it really happens seems to be something that they can't agree to.

We are interested in finding a place to carry every argument; there are only 80. If you look at the statistics about the Supreme Court, there are only 50 seats in the Court—there are 300 altogether, but only 50 where just an ordinary citizen who comes to this town who wants to watch an entire oral argument can sit and watch. So you have to get in line and you have to take your chances.

There are 12 seats set aside for people to sit for 3 minutes, and that hardly does much for you other than being able to see what the Court looks like. The rest of the seats are determined by either who is before the Court in an oral argument or where the Justices want to fill those seats with people that they know.

So this is just like it was with the Senate in 1986 and the House in 1979—an extension of the gallery, an opportunity to see something that is usually an hour in length. And that particular event isn't going to determine how they vote. They go behind closed doors for that, and that is fine with us.

I would be glad to answer any questions, and you have our commitment that we will carry all of these oral arguments if we are allowed to.

[The prepared statement of Mr. Lamb appears as a submission for the record.]

Chairman SPECTER. Well, thank you very much, Mr. Lamb. We will have some questions for you in a few minutes after we hear from Mr. Schleiff and Ms. Cochran.

Mr. Henry Schleiff is Chairman and CEO of Court TV Networks. Before taking on that position, he was active in a number of key posts in the television industry, including Executive Vice President

for Studios USA, executive producer at Viacom, Senior Vice President for Viacom, and had been Senior Vice President for HBO.

He began his career as a law clerk to Federal Judge Gurfein of the Southern District of New York. He has a bachelor's degree cum laude from Penn and a doctorate in law from the University of Pennsylvania Law School, where he was an editor of the law review.

Thank you for joining us, Mr. Schleiff, and we look forward to your testimony.

STATEMENT OF HENRY S. SCHLEIFF, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, COURTROOM TELEVISION NETWORK, LLC, NEW YORK, NEW YORK

Mr. SCHLEIFF. Thank you very much, Chairman Specter, Ranking Member Leahy and Senator Sessions. On behalf of our Nation's only television network dedicated to providing a window on the American system of justice, I am delighted and honored to testify before your Committee which is considering legislation that would provide our American citizens, both litigants and viewers, with the benefits of televising the proceedings of our Nation's Federal courts.

This Committee, in particular, is well aware of the fact that our trials and courtroom functions are open to the public, and therefore to the press. Indeed, our Founding Fathers themselves well understood the importance and need for this openness. It is not by accident that they built a system of justice on really four great pillars—an independent judiciary, the right to trial by jury, rights of due process for defendants, and a court system which would be open to the public where, as Justice Oliver Wendell Holmes well said, quote, "Every citizen should be able to satisfy himself with his own eyes."

I do believe that all citizens today, not just the print press or those very few who can fit into a courtroom, should be able to watch their judicial system in action, and therefore that the few lingering concerns about electronic coverage or why it should be denied the equal access accorded print coverage are increasingly specious in this the 21st century.

Indeed, there can be no reasonable argument with the fact that advances in technology such as a smaller and unobtrusive camera merely expand the experience of being in the courtroom to the greater community, thereby making public trials truly public, as was intended by the Founders.

Certainly, our system of jurisprudence, and especially our constitutional history of providing public trials is an essential element of our democracy, and not only of our democracy but of freedom. Just as the United States today represents a beacon of freedom, we should also allow that light to shine on the example that our own courtrooms provide. Our system is not perfect, but it is one of which we can and should be proud, especially in our ongoing efforts to preserve justice and freedom around the world.

The importance to our own citizens of allowing cameras in the courtroom is really three-fold. One, it enhances public scrutiny of the judicial system which helps assure the fairness of court proceedings—a concern of Senator Sessions and one which we all

share. This, in turn, serves to further promote public confidence in our third branch of Government. And, three, it does increase our citizens' knowledge about how this branch actually functions.

Because television is the principal means through which most people get their news, it only follows that the same vehicle be employed as a tool to inform and to educate the electorate in this way. Justice Louis Brandeis said it far more succinctly—sunshine is the best disinfectant. We agree, and we vigorously support the proposed legislation which would open courtrooms to cameras and indeed let the sunshine in.

Certainly, camera coverage of Government proceedings is nothing new in the United States. Both Houses of Congress have already opened their chambers to television cameras. This legislation would then merely provide the third branch of our Federal Government to be given the opportunity to take a similar step.

Of course, in the proposed legislation which Court TV has long supported, trial judges are also to be given the discretion in their courtrooms to determine whether to permit a camera in a particular trial, which is a most important and practical safeguard.

Today, there is certainly growing consensus in the United States that having cameras serves the public interest. Some 43 States permit cameras in their trial courts. Since 1991, Court TV has covered more than 900 U.S. trials and legal proceedings, providing more than 30,000 hours of courtroom coverage. Moreover, in our 15 years of such coverage, no judgment has ever been overturned because a camera was in the courtroom.

On the contrary, a myriad of studies over the past two decades tracking the impact of cameras has indicated that they do not disrupt or otherwise interfere with the proceedings. If anything, cameras can help keep newspaper coverage, or for that matter sound bites, whether we read them in the papers or hear them on the local news, in context and thus provide the least sensational and most unfiltered form of coverage. For this proposition, I will merely cite Senator Schumer's eloquent analysis of the Amadou Diallo trial.

Finally, I should note that some justices of the Supreme Court have over the years claimed that allowing cameras in their courtroom would cause them to lose some degree of their personal anonymity or perhaps even lessen the Court's moral authority. However, I would submit to you that where no witnesses or other parties are involved, just lawyers arguing to other lawyers, albeit lawyers dressed in robes, about issues which may fundamentally affect our daily lives, be it affirmative action, personal choice or the like, the potential loss of anonymity would seem to be a fair price to pay.

Chairman SPECTER. Mr. Schleiff, could you summarize the balance of your testimony, please?

Mr. SCHLEIFF. Yes. I would say only in conclusion that we do think that such testimony to be seen at the Supreme Court level would do nothing but actually further the dignity with which that Court is properly held. I would say, finally, that we do think that the American public deserves truly to see the judicial system in action at all levels and to have Federal courtrooms open to camera coverage.

[The prepared statement of Mr. Schleiff appears as a submission for the record.]

Chairman SPECTER. Thank you very much, Mr. Schleiff.

Our next and final witness on this panel is Ms. Barbara Cochran, President of the Radio-Television News Directors Association. She has a very distinguished career in 28 years significantly in Washington, D.C., Vice President and Bureau Chief for CBS News, executive producer of NBC's "Meet the Press," Vice President of News for National Public Radio, managing editor of the Washington Star. She has a bachelor's degree from Swarthmore and a master's degree from the Columbia University Graduate School of Journalism.

Thank you for joining us, Ms. Cochran, and we look forward to your testimony.

STATEMENT OF BARBARA COCHRAN, PRESIDENT, RADIO–TELEVISION NEWS DIRECTORS ASSOCIATION, WASHINGTON, D.C.

Ms. COCHRAN. Thank you very much, Mr. Chairman, Senator Leahy and Senator Sessions, for inviting me to appear today on behalf of the Radio-Television News Directors Association and the 3,000 television and radio journalists who are its members.

RTNDA supports the Sunshine in the Courtroom Act and we welcome Chairman Specter's legislation to open the Supreme Court to television coverage. We believe both bills serve the important public policy goal of instilling trust in the Federal judiciary by allowing Americans to witness for themselves what transpires within the court system.

It is simply not right that Americans form their opinions about how our judicial system functions based 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 conducted by this Committee, only to disappear from public view the moment they are sworn in as justices.

RTNDA'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. The interests of our citizens are not fully served in this day and age by opening Federal courtrooms to a limited number of observers.

By using today's technology, citizens can see and hear for themselves what occurs inside the courtroom. Technological advances have minimized the potential for disruption to judicial proceedings. Cameras available today are small, unobtrusive and designed to operate without additional light. Moreover, the electronic media can be required to pool their coverage, cutting down on the equipment and personnel in the courtroom.

The presence of cameras in many State courtrooms is routine and well-accepted. All 50 States, as we have heard already, now permit some manner of audio-visual coverage of court proceedings. RTNDA 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. To the best of our knowledge, there has not been a single case since 1981 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.

State studies show that reporting on court proceedings both by broadcast and newspaper outlets is more accurate and comprehensive when cameras are present. Unfortunately, the ban on cameras in Federal proceedings means the public sees what takes place on the courthouse steps, not what transpires where it matters most, inside the courtroom. In fact, because of the Federal ban, American citizens have been deprived of the benefits of firsthand coverage of significant issues such as whether the Government can take possession of a person's private property and transfer it to developers to encourage economic development, whether executing juveniles constitutes cruel and unusual punishment, and whether the term "under God" in the Pledge of Allegiance is unconstitutional.

In contrast, just last month people throughout the world were able to turn on their television sets to witness the opening of the trial of Saddam Hussein. Iraqi officials apparently understood how critically important it is to make this process public to the widest possible audience.

During the 2000 Presidential election dispute, RTNDA fought hard for televised coverage of the arguments before the Supreme Court and we were gratified when Chief Justice Rehnquist made the historic decision to release audio tapes at the conclusion of the argument. We were also very pleased to hear our new Chief Justice express to this Committee his openness to cameras in the Supreme Court. The release of audio tapes by the Supreme Court has educated the public and caused no harm. What is needed now is consistent and complete audio-visual coverage.

Federal courts have not on their own motion taken steps to permit electronic coverage of their proceedings. Therefore, RTNDA respectfully submits that the time has come for Congress to legislate. This proposed legislation has the potential to illuminate our Federal courtrooms, demystify an often intimidating legal system and provide an appropriate level of public scrutiny. It is time to provide unlimited seating to the workings of justice everywhere in the United States.

Thank you, Mr. Chairman, and I ask that some supplementary material be submitted along with my written statement.

[The prepared statement of Ms. Cochran appears as a submission for the record.]

Chairman SPECTER. Thank you, Ms. Cochran. We will be glad to have the supplementary material and put it in the record.

We now go to the five-minute rounds for members.

Professor Irons, do you think it is an appropriate matter for the Congress to act legislatively to open up the Supreme Court to television coverage?

Mr. IRONS. Yes, I do, Senator Specter.

Chairman SPECTER. Do you have any doubt as to the constitutionality of such action?

Mr. IRONS. No. As you pointed out in your opening statement, Congress exercises considerable oversight, direction of the Federal courts, the composition, the procedures, et cetera. I think this falls within their purview.

But one thing I would like to note, since Ms. Cochran just mentioned the audiotaping of the *Bush* v. *Gore* arguments, is the response to Chief Justice Rehnquist to that experience. He was talking with Fred Graham afterwards. They were at a party together and Fred quoted him as saying Rehnquist said he was very pleased with the reception that the playing of the Court's audio tapes had gotten. He said he watched it on television and he thought it worked well, the way they put up the pictures that identified the justices and the lawyers who were speaking. He thought that the coverage communicated to the public what was happening in an extremely important case and he was pleased.

So my point is that the next step beyond that—since the pictures were put up, anonymity, of course, disappears the minute those pictures are up—would be best served—

Chairman SPECTER. I am sorry to interrupt, Professor Irons, but we have a lot of ground to cover.

Mr. IRONS. Yes.

Chairman SPECTER. Let me move to Mr. Lamb. Mr. Lamb, would C–SPAN be in a position to cover the full televising of the Supreme Court? Some of the justices have raised objections about snippets here and there. Would there be anything to lead C–SPAN to do other than total coverage, just as you do now for the Senate and the House of Representatives?

Mr. LAMB. No. It would be exactly as we do—like this hearing today, the whole hearing will be on C–SPAN. It would be the same thing with every oral argument.

Chairman SPECTER. What information do you have as to the ratings for C–SPAN? How many people watch C–SPAN?

Mr. LAMB. We don't take ratings. We do surveys from time to time to find if there is anybody out there watching. And it is really interesting because we are the only network like it and we have no idea on a quarter-hour basis who is watching.

We have been able to identify that out of a country of almost 300 million now, about 10 percent of the society is interested on a daily basis in the kinds of things that you are doing and what we are covering. They come to us all the time to see if there is something there of interest to them. There are another 3 in 10 people who are interested when things get a lot of national attention and they will come to us. Then there are 6 in 10 people that never watch. But it would make sense to you if you just look at the voting numbers that only about half the people vote in a Presidential election. So I suspect that most people that don't vote won't watch what we do.

Chairman SPECTER. You now have C–SPAN3, where you make selections as to what is going to be shown, and some very wise judgments from what I have seen. For example, you covered our hearing yesterday on Saudi Arabia.

Senator LEAHY. A brilliant decision.

Chairman SPECTER. I have an instinct that C–SPAN3 gets more viewing than 1, which has the House, and 2, which has the Senate. Any comment?

Mr. LAMB. I don't know. C–SPAN3 is not in nearly as many homes as 1 and 2, and it is on the digital tier—technical language—which means that people have to go after it and have to find it. But I think as times goes by, as the whole television world

is going to change, people will have the same access to C–SPAN3 as they do to the other two networks.

Chairman SPECTER. I have a question for the other panel members which is a big one based on the testimony of Judge DuBois, who was concerned about how television would impact at a trial and the statistics which Senator Sessions cited about jurors being less willing to serve. I thought Judge DuBois made a very telling point about witnesses being nervous being televised, and that might impact on jury evaluation.

So I would like to ask the four of you, because my time is going to expire in just a few seconds, how you respond to the concerns which Judge DuBois and Senator Sessions raised as to the ability to guarantee a fair trial if it is televised. I will start with you, Ms. Bergman.

Ms. BERGMAN. Yes, Senator Specter. I think our proposal is designed to address that, and that is the consent of both parties, both the defense counsel—and I address only criminal cases—and the Government would be required before televising of the trial would be permitted, because those are the people who know the case the best. They know the witnesses, they know the evidence, they know the issues that may arise. By giving those parties the opportunity to give consent or to not give consent, they are in the best position to guarantee that the trials are fair, and they can take into account those concerns about jurors, the concerns about the witnesses, and the concerns about the impact on the defendant as well.

Chairman SPECTER. Mr. Berlin.

Mr. BERLIN. Thank you, Senator. I think that the experience of the State courts that have trial coverage with cameras which is now a very broad experience, in some cases lasting decades, demonstrates that these concerns are not to be completely overlooked, but can be easily managed.

The bill that is currently before the Committee which affords trial judges discretion to handle this has built into it protections on this issue. In particular, if a judge is exercising discretion, the judge—and I would submit with no disrespect to Ms. Bergman that the judge is actually in the best position to balance all of the interests that are before them in a court; that sometimes parties have a particular interest that may or may not be actually consistent with what is the appropriate to do, and that that overwhelmingly record really demonstrates that this is possible to do without interfering with the fair and impartial administration of justice.

When criminal defendants and other parties have challenged on appeal the presence of cameras, there is a very strong record of courts saying that they have not, in the manner that they have been used, interfered with the operation of the trial court. And based on that experience, I think those concerns may be a bit overstated.

Chairman SPECTER. Mr. Schleiff.

Mr. SCHLEIFF. Yes, I agree. I think the most recent New York study actually spoke to that very point, and I quote, "Witness intimidation is neither borne out by the record nor sufficiently strong to warrant barring cameras from the courtroom across the board." I think it is exactly the judge's discretion which has to be used and I think which is appropriately provided for by this legislation.

Chairman SPECTER. Ms. Cochran.

Ms. COCHRAN. Yes. I agree that the important thing about this bill is that it gives the discretion to the judge, who is in the best position to make the decision about whether cameras should be admitted or not. I also would refer to the State experience. Some States have been allowing cameras into trials for as much as 20 years and there have not been the problems that are feared.

Chairman SPECTER. Thank you.

Professor Irons, my time has expired, so I don't have time to ask you a question now, but I interrupted you. Keep that thought in mind because I am going to come back to you.

Mr. IRONS. OK.

Chairman SPECTER. Senator Leahy.

Senator LEAHY. Thank you, Mr. Chairman.

I just want to make absolutely sure I understand, Professor, your answer to Senator Specter because he was asking a question I was concerned about. You see no problem with the constitutionality?

Mr. IRONS. No, I don't, Senator Leahy.

Senator LEAHY. I don't either, but I just wanted to get that on the record.

Ms. Bergman, am I correct that some in the defense bar are for the idea of the cameras and some are opposed?

Ms. BERGMAN. There is a diversity of opinion depending upon what court we are talking about. Generally, for appellate argument or Supreme Court argument, the defense bar—at least our board of directors didn't have any major opposition to that at all. Our concern is with the impact on jurors, witnesses, defendants at the time of trial.

Senator LEAHY. That also requires some sense on the part of the trial judge not to allow it to turn into a circus. I mean, a trial judge can easily, for example, protect the identity of jurors. I mean, you can easily set it up in such a way that jurors' faces will not be shown, or any reaction of jurors during a trial. Is that not correct?

Ms. BERGMAN. Senator Leahy, there are steps that can be taken to try to provide some safeguards to protect the identity of jurors, but that does not address the concerns about witnesses who will refuse to come forward, who will refuse to testify. It does not address the concern of the impact on witnesses when they testify and how it may affect their demeanor in the courtroom and how they present their testimony.

And it doesn't deal with the issues of the very intimate, private types of information that if people think it is going to be televised nationally they are not going to want to testify. Or in some cases you will have situations with a defendant who will say I don't want that presented because I don't want that broadcast, and so it is going to have an impact that cannot be evaluated merely by protecting identities of jurors.

Senator LEAHY. We could discuss it further. Having defended cases and having prosecuted cases, I still come down on allowing the public to know.

I might ask Mr. Lamb, as far as keeping down the intrusiveness, we were halfway through this hearing before I realized there is a robot camera here in front of me going back and forth. That is relatively easy to do, is it not, just from a technical point of view to

cut down on the intrusiveness of cameras, which doesn't go to Ms. Bergman's question, of course, of having yourself seen when you are testifying? But at least as far as conducting a trial, you can lower the intrusiveness of cameras.

Mr. LAMB. I think Henry Schleiff would be better at—he has done a lot more courtrooms than we have. But when we are talking about the Supreme Court, they undoubtedly, if they ever get to television in the Court, would want to operate their own system just like the Senate and the House do. And you can basically hide the cameras, make it very easy, and people who go before the Court won't even know there are cameras in the room.

Senator LEAHY. Justice Scalia recently noted on C–SPAN that he wasn't concerned about gavel-to-gavel coverage of oral arguments, but was concerned that cameras take these 15-second out-takes that can distort rather than inform the public. Isn't this really a question of whether the press acts in a responsible way?

I remember during the Michael Jackson trial, every night I was so glad to see that genocide in Darfur had obviously ended because the national press didn't bother to cover that anymore. They had this one molestation case out in California.

Isn't that a question for the media and their own responsibility?

Mr. LAMB. As I said earlier, the justices have a different view of the electronic press compared to the writing press. I just don't understand how you can delineate between the two, but they do. Justice Scalia has a very unusual view of what television ought to do. He likes the idea of gavel-to-gavel, doesn't like the snippets, and even when he goes out to speak, he will often say if there are television cameras in the room, I won't speak.

We had a little bit of openness earlier this year for about three sessions, but it has been a tough go. We have had public comments about all this and have great disagreement with him. I just think you can't delineate between the two. The First Amendment applies to everybody.

Senator LEAHY. As Ms. Cochran stated earlier, you get this great view of justices during our hearings, as we will with the latest nominee in January, but then the marble walls close in.

Isn't it true, Ms. Cochran, that there are a lot of examples where coverage has worked very well? For example, I was one of the ones who urged the Attorney General to make coverage available for the families in the Oklahoma City trial because the trial was appropriately moved and a change of venue. But the families who wanted to watch the trial weren't able to pick up and go, too.

Wouldn't that be an example of how all sense of justice for the victims and everybody else was served?

Ms. COCHRAN. Yes. I mean, the easiest way to provide access to the widest number of people is through bringing a camera into court, and that is an excellent example. The families were able to see what was taking place in the courtroom and it didn't appear to have any of the intimidating effects.

Our members work with judges all the time on the ground rules for coverage. They won't show jurors. If there is a witness whose testimony needs to be taken in privacy, that is something that the judge can order, and so on. So all of these things can be worked out. But I think the important thing to remember is that trials

were designed by our Founding Fathers to be public, and so concerns about embarrassment and that kind of thing—these trials are public anyway and the presence of a camera is not going to make a significant difference.

Also, with your indulgence, I would like to address the snippets issue, if I may.

Senator LEAHY. Go ahead.

Ms. COCHRAN. We prefer to call them sound bites or excerpts. The proceedings are going to be covered by the press anyway. Newspaper reporters are going to take selected quotes. Television reporting is going to use selected quotes. And if there are cameras present, then the quotes that are used will be the actual words as they were delivered by the people delivering them rather than having it be a mediated, second-hand account of what was said. So it really enhances the accuracy of the reporting rather than taking away from it.

Senator LEAHY. Thank you, Mr. Chairman. I think these are valuable hearings. I thank the panel.

Chairman SPECTER. Thank you very much, Senator Leahy.

Senator Sessions.

Senator SESSIONS. Ms. Bergman, I think you are alone in this group.

Ms. BERGMAN. I feel alone, sir.

Senator SESSIONS. A good defense counsel is used to that sometimes.

Ms. BERGMAN. I am.

Senator SESSIONS. Under the legislation as you read it, the Grassley bill, do the parties themselves have any ability to object?

Ms. BERGMAN. My understanding is that it is a decision that the judge has the discretion to make, and I would assume the parties would have an opportunity to be heard on it, but ultimately would have no right to object to keep the cameras from actually coming in.

And it raises another concern, Senator, which is that in that whole process, if the parties have grave concerns about the impact this is going to have, it is going to require hearings before the judge to present this evidence, to raise this issue, to potentially disclose defense theories that counsel would prefer not to be disclosing at that stage.

It raises the possibility of increased litigation and taking, quite frankly, time away from the trial lawyers' preparation and work on the trial rather than focusing on this peripheral issue. That was a concern we had in the State capital prosecution of Terry Nichols, and luckily we were able to have a professor from Kansas who came in to litigate that issue for us because it ended up being a writ all the way up to the Oklahoma Supreme Court and it took a lot of time and energy that could have been better spent in other ways.

Senator SESSIONS. And if a defendant in a civil or criminal case, or even a plaintiff is threatened, let's say, that we are going to call witness such-and-such and that witness is going to say horrible things about you if you go to trial and you challenge us and you force us to go to trial, do you think it is a quantitative difference

that that might be videotaped and then might be on the evening news as compared to maybe being reported in the newspaper?

Ms. BERGMAN. Absolutely, I think it makes a tremendous difference when it is broadcast with a camera in the courtroom. Putting it on the evening news is qualitatively different in terms of the nature of the impact of that, and I think it impacts in several ways. One is the fear that a witness will be called to say certain things. The other is the aspect of I don't want to put someone through testifying and being televised and having to talk about those things.

I have been involved in capital cases where there were defendants who did not want very painful information presented by relatives, friends, family members. And it was an extreme effort to get them to agree to do that, and then if they thought it was going to be televised nationally, I know it would have made a tremendous difference.

Senator SESSIONS. And is it your experience, as it has been mine as a prosecutor for quite a number of years and a defense attorney on occasion, that some of the key things you have to do is just spending time holding the witnesses' hands? They are just terrified.

Ms. BERGMAN. Absolutely.

Senator SESSIONS. And if they are told they are going to be on television, maybe national television, do you think it adds to the terror and concern that they face?

Ms. BERGMAN. It would just magnify it astronomically.

Senator SESSIONS. You have said that parties have the right to object. Does that include the prosecutor?

Ms. BERGMAN. Yes, sir.

Senator SESSIONS. That is good.

Thank you, Mr. Chairman. I would just say this has been an excellent panel that has raised some very important issues.

I think there is a remnant, Mr. Lamb, out there that keeps up with America. I call them a patriotic remnant that know more what goes on here than we do. We have got this Committee just down to you and me, Mr. Chairman, and here we are. We are sitting here, but some people are watching every word of this, maybe more than the Senate, and they are forming opinions with less stress and pressure on them than we have and I think it is healthy. I really do believe that.

But as a person who has tried a lot of cases, I am inclined to think that the judges may be correct in their overall perception that justice would not be enhanced in the trial court, but we will continue to discuss it.

Thank you.

Chairman SPECTER. Thank you very much, Senator Sessions.

Professor Irons, you were in the midst of commenting actually beyond the scope of my question, which is why I wanted to move on before, but let's hear what you have to say.

Mr. IRONS. Well, what I was trying to get across, Senator Specter, was simply that we have, and have had for 50 years now access to the words that are spoken in the Supreme Court. And it is a very small, and I think, as pointed out very aptly, now, because of technology, unobtrusive process to add faces to those words.

I remember last year when I was attending the Supreme Court oral arguments in the Pledge of Allegiance case, sitting right behind Dr. Newdow in the bar section of the Court, I couldn't imagine a more educational experience than being able, particularly for students, but for the general public as well, to see those arguments. They were dramatic on both sides. And I don't think it would have detracted from the decorum of the Court or any of its proceedings to be able to witness those kinds of arguments.

So I think that my own experience in talking with students at every level, from fourth grade all the way through high school, playing them excerpts of these arguments, trying to explain what was going on in the Court, would be enhanced immeasurably—and I am simply talking now about the appellate level of argument, but would be enhanced immeasurably by being able to see those proceedings as well as just listen to them.

Chairman SPECTER. You testified in your opening statement that it was Chief Justice Earl Warren who began the practice of recording the Supreme Court arguments?

Mr. IRONS. That is correct.

Chairman SPECTER. Was there any contemporaneous statement made or any statement made later by Chief Justice Warren as to why he did that, what his thinking was?

Mr. IRONS. Yes. As a matter of fact, Mr. Chairman, in the accession file at the National Archives—these arguments have been moved from the Archives building downtown out to Suitland, Maryland, but in the accession file—and I am probably the only person who went through that file after there was an effort by the Supreme Court to limit my access to the tapes.

A statement by Chief Justice Warren was sent to the Archives along with the first batch of the tapes saying that he wanted them open to the public. It wasn't until 1986 that restrictions were put on access by Chief Justice Burger, and those restrictions remained in place for 7 years until these tapes were released and the Court decided, I think, very wisely, particularly in view of the publicity that their effort to restrict them had produced, to lift the restrictions again.

So now, as a matter of fact, you can go into the Supreme Court bookstore just down the block and purchase CD-ROMs called "The Supreme Court's Greatest Hits," which have the arguments in 62 cases, the full arguments. These, of course, are edited and narrated for classroom use. It is hard to keep students' attention during an entire hour of argument.

I think my basic point really is that I can't see any detriment to the Supreme Court or to the U.S. courts of appeals in having the pictures added to the words that are already available to the public.

Chairman SPECTER. Do you think Chief Justice Warren would have been wise to have had audio recordings of the Warren Commission proceedings made available to the public?

Mr. IRONS. I think so. As I said, Chief Justice Warren recognized—and, of course, he came from public office and he was very used to his words being recorded and reported in the press and it didn't intimidate him at all. But I think what he recognized was that having presided over the second round of arguments in *Brown*

v. *Board of Education*—and I searched high and low in the Archives hoping that they would be there somewhere—but that that is an experience that should be recorded and preserved for the public.

Chairman SPECTER. It was difficult to get Chief Justice Warren to agree to print the transcripts of the Warren deliberations covering 26 volumes and 17,000 pages. The staffers had to go to the Congressional members who were used to printing large volumes of materials in the Congressional Record which weren't too salient or pithy, and that was done.

Mr. Schleiff, what about ratings for Court TV? Mr. Lamb doesn't rate C–SPAN. Do you rate Court TV?

Mr. SCHLEIFF. Yes, we do.

Chairman SPECTER. And how are your ratings?

Mr. SCHLEIFF. They are good these days, sir. But in fairness, most of our ratings or focus on our ratings come from the proverbial prime time in the evenings from eight to eleven. While we do have ratings during the day of our hearings and our coverage of proceedings, they are important to the overall brand, if you will, of the network, but it is not where we derive any principal portion of our revenues or anything else. But they are indispensably important to what Court TV obviously, given the name, stands for.

And, yes, it is a core audience that watches it. It is an audience that is very devoted, actually, to the process.

Chairman SPECTER. How many hours a day do you televise?

Mr. SCHLEIFF. The entire day, pretty much nine right through when most of the East Coast courthouses close, until five o'clock.

Chairman SPECTER. And how about overnight?

Mr. SCHLEIFF. We will repeat sometimes a portion, depending upon what the case is, and some of it on the weekends. But overnight we go into something else which is called our more entertaining or seriously entertaining mode.

Chairman SPECTER. Mr. Lamb, you do interview Supreme Court justices from time to time. What has C–SPAN's experience been on that?

Mr. LAMB. Well, the most interesting experience was with Chief Justice Rehnquist, who over a period of about 15 years let us sit down with him four times. And it was always odd to me that he would be so open personally and when he would go out to speak at his circuit or he would give a speech, he would allow our cameras in; he never refused that. But when it came to inside that courtroom, he would just shut it down.

Several years ago, we would take our cameras into the press room and set up and do live programs in there. All of a sudden, 1 day he sent the word down "no more." It is really hard to know what the thinking is inside that conference room when they make some of these decisions and they vote on them.

There is really only one justice out of the nine that are there now that really has not been open, and that is Justice Souter, to anything. We have done lots of programs with these justices and kids live coming out of the East Conference Room in the Supreme Court. We have actually had on the air over since we have been cataloging this, since 1987, 700 different events involving Supreme

Court justices. So, really, the closer you get to that courtroom, the more they want to shut it down and don't want to open it up.

Chairman SPECTER. So on those events, you have televised all members of the Court, except for Justice David Souter?

Mr. LAMB. And Justice Scalia has been very uninterested in television cameras, the two of them. But all the rest of them—you can go into our files and find tape. We have it in our archives. I mean, if you want to see what these justices look like and what they sound like, after we have done all the hearings that you have been involved in, you can go to our archives and still find them to this day.

Chairman SPECTER. Well, you say Justice Scalia has been uninterested in television?

Mr. LAMB. Yes, he has. He opened three events this year and that is the first time since he has been on the Court that he has allowed our cameras in. If he sees a camera in his giving a speech—and he gives a lot of them—he will just say either take the camera out or I am not going to speak.

Chairman SPECTER. Does anybody choose alternative B?

Mr. LAMB. You know, interestingly enough, let me just take a minute to tell you what happens, and it is a disappointment.

Chairman SPECTER. You can take your time. My colleagues have all gone.

Mr. LAMB. The disappointment is this, that the venues where he speaks, often universities, often connected with law schools, frankly will cave. They would rather have him there instead of upholding the principle of openness. One of the best examples of this was the City Club of Cleveland, which a couple of years ago gave him the Citadel of the Freedom of Speech Award. Justice Scalia went to Cleveland to accept the award. We cover the City Club of Cleveland all the time. We were told we could not cover this time the Freedom of Speech Award given to Justice Scalia.

You know, once they have up their mind on the Court, it is hard to change it and we have not been successful.

Chairman SPECTER. Well, perhaps he is modulating a bit. Perhaps he has a little different point of view.

I think that we really need to get a public reaction to televising the Supreme Court of the United States. My instinct is the public reaction is going to be very positive. The public does not know what has happened to Government in the United States. The Court has taken over and rules with very much an iron hand, and very much an inexplicable hand.

When we had the hearings for Chief Justice Roberts, it provided an opportunity to discuss in some detail what the Court has been doing. And when we analyzed a case called *United States* v. *Morrison* which involved the Supreme Court declaring part of the Act unconstitutional protecting women against violence, we were able to publicize that the Court, in a five-to-four decision, found as it did because they disagreed with the Congress's, quote, "method of reasoning," close quote.

Up until that decision, Commerce Clause questions had been decided on whether there was a rational basis for the Congressional judgment based upon the numerous hearings which Congress holds. The four-person dissent said that there was a mountain of

evidence, but Chief Justice Rehnquist disagreed with our method of reasoning, which I found, and said it at the hearings, highly insulting.

Then they upheld parts of the Americans With Disabilities Act on access for a paraplegic five to four and denied coverage of the Americans With Disabilities Act on employment. Justice Scalia denounced the standard as a flabby test, he called it, designed to have the Court be the task master of the Congress to see that we had done our homework. And they made the decision based upon a test called congruence and proportionality which was invented in 1997 in a case called *Boerne* on the Religious Restoration Act. Judge Alito is going to be asked, as Chief Justice Roberts was, to comment about that standard.

But I think Americans would be flabbergasted to hear that the Court devises some test on proportionality and congruence, and expects the Congress of the United States to know what the standards are. And I think it would put some legitimate pressure on the Court to come down with decisions, if not understood by C–SPAN's audience, at least understood by the Judiciary Committee. So we are going to continue to push it and it is a question of when, in my judgment, not a question of it, and the sooner the better.

Senator Feingold could not with us today. Without objection, his statement will be made a part of the record.

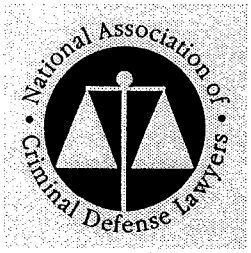
We thank you all very much for coming. That concludes our hearing.

[Whereupon, at 11:44 a.m., the Committee was adjourned.]

[Submissions for the record follow.]

[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD



Written Statement of
Barbara E. Bergman

on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
Senate Committee on the Judiciary

Re: "Cameras in the Courtroom"
November 9, 2005

Mr. Chairman and Distinguished Members of the Committee:

As President of the 13,000-member National Association of Criminal Defense Lawyers (NACDL), I am honored to be here today to share the Association's views regarding the important issue of cameras in the courtroom. We commend the sponsors of S. 829 (the "Sunshine in the Courtroom Act of 2005") and S. 1768 (to permit the televising of Supreme Court proceedings) for their efforts to promote greater public awareness of the judicial system.

While current rules do not permit cameras in federal district courts, the NACDL's members have experience with televised proceedings in their state courts and the two camera-accessible federal appellate courts. Indeed, the NACDL's immediate past president, Barry Scheck, served as defense counsel in the most hotly debated example of extended media coverage. Before explaining the NACDL's position regarding this issue, I am compelled to make two preliminary disclosures. First, in discussing this issue with our Board of Directors recently, it was apparent that there is no consensus within the defense community regarding the overall desirability of cameras in courtrooms. The position of our association reflects that diversity of experience and opinion. Second, in keeping with the NACDL's mission, our position is limited to criminal proceedings, which are subject to both broader constitutional guarantees and, generally speaking, broader public interest.

The question of whether cameras should be permitted in the federal courts cannot be answered merely by invoking the media's or public's "right of access." The Supreme Court has held that there is no constitutional right of access for cameras in the courtroom.[1] The decision to ban cameras is simply a restriction on the manner of the media's access to trials, and it is rationally based. In criminal cases, the purported value of televised court proceedings must be weighed against the accused's constitutional rights to due process and a fair trial. The NACDL believes that S. 829

does not strike the right balance. We would like to see the bill amended so as to authorize cameras in district court criminal proceedings and interlocutory appeals only with the express consent of the parties. In all other criminal matters coming before the United States Courts of Appeals and the Supreme Court, the NACDL favors access for cameras.

I. The arguments in favor of cameras in the courtroom: promoting civic awareness, government accountability, and legal professionalism.

To the extent that cameras in the courtroom promote greater public understanding of the judicial process and the constitutional protections that apply to that process, we generally support their expanded use. A citizenry that understands such fundamental guarantees as the presumption of innocence, the government's burden to prove the offense elements beyond a reasonable doubt, and the accused's Fifth Amendment right to remain silent will more faithfully fulfill the solemn duties of jury service. Beyond this positive effect on potential jurors, extended media coverage of criminal trials may foster respect for outcomes that do not necessarily comport with public sentiment. In some cases, televised trials may dispel the damning stigma of pretrial publicity and help to restore the reputation of a criminal defendant against whom charges are dismissed or a not guilty verdict is returned. Finally, televised trials may provide the public with greater insight regarding the appropriateness of certain laws and the potential need for reform. Court TV must be credited for its considerable contributions in all of these areas.

However, these societal benefits are largely intuitive and difficult to measure. Of greater concern to the NACDL are the values underlying the defendant's Sixth Amendment right to a public trial. The purposes of this guarantee are to protect the accused from the abuses that may attend secret proceedings and to subject courtroom events to public scrutiny. Aside from deterring official

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[1] *Chandler v. Florida*, 449 U.S. 560 (1981).

misconduct, the print and broadcast media make an invaluable contribution to our justice system by shining a light on miscarriages of justice when they do occur. The instances where cameras have helped to prevent or expose injustice are too numerous to mention, and this factor should weigh heavily in any policy decision regarding courtroom access.

Not unrelated is the notion that televised trials encourage greater preparation and a higher standard of professionalism. It stands to reason that some lawyers and judges -- aware that their actions will be televised -- will strive to perform at a higher level and comport themselves with a greater degree of civility and ethics. If true, this may enhance both the quality of our justice system and public perceptions of the legal profession. This factor, therefore, tends to bolster the foregoing arguments in favor of cameras in the courtroom.

II. The arguments against cameras in the courtroom: the adverse effect on participants and the fair administration of justice.

One primary concern regarding cameras in the courtroom is that they will affect the participants' behavior in ways that would undermine the fair administration of justice. That is, the presence of cameras and the attendant glare of publicity may cause lawyers, judges, jurors, defendants and witnesses to act differently and to base their decisions on irrelevant factors. In rare cases, the prejudicial impact may be apparent, providing grounds for relief, but more often the effect will be "so subtle as to defy detection by the accused or control by the judge."[2]

If jurors are filmed and their verdict publicized, concern about how their verdict will be accepted by the mass television audience may invade the deliberations process. The decision to televise a trial signals to the jury that the case is celebrated or notorious and that their verdict is to be scrutinized by the viewing public. Defendants are less likely to receive a fair trial when jurors feel

[2] *Estes v. Texas*, 381 U.S. 532, 544-45 (1965).

the need to reconcile their verdict with strong public sentiments in favor of a particular result. As U.S. District Court Judge Edward F. Harrington said:

> I am disinclined to allow cameras into the courtroom because it lets jurors know this is an unusual, that is, a celebrated case. And when jurors are asked to make a judgment in an ordinary case, that is a heavy responsibility. When they are asked to make a judgment in a celebrated case, I think that puts undue pressure on them. And it might distort the verdict.[3]

There is some evidence that citizens will be less willing to serve on juries if there are cameras in the courtroom. Should a case result in a mistrial, past television coverage may make it more difficult to select an impartial jury for the retrial.

While life-tenured federal judges enjoy a greater degree of insulation from public and political pressure than their elected counterparts, this is still an area of concern. Like other participants, judges may tailor their actions to win the admiration or approval of the viewing public and commentators. Even the appearance of this can undermine confidence in the justice system and the fairness of the proceeding, because "[j]udges as the embodiment of the process, must appear above reproach at all times if the system and the rule of law are to receive respect."[4]

Televised proceedings can adversely affect witness behavior in many ways. The prospect of television coverage may chill witness cooperation and heighten the reluctance of some witnesses to appear and testify. Not just an issue for the prosecution, the effect of cameras in deterring witnesses from testifying may have serious implications for a defendant's right to receive a fair trial. Just as damaging to the truth-seeking process, some witnesses may exaggerate or distort their testimony so

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[3] *Bench Conference*, Massachusetts Lawyers Weekly, July 25, 1994, at 40.

[4] David A. Harris, The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System, 35 Arizona Law Review 785, 792 (1993).

as to gain personal publicity. The effect of television coverage may also impact witness demeanor – for example, making self-conscious witnesses appear agitated or ill-tempered – thus hindering the jury's vital efforts to determine credibility. Provisions in S. 829 that would permit the witness the option of obscuring their face and voice would not fully address such concerns, given that the witness's name and other personal facts would be televised.

In addition to these potential threats to the defendant's right to a fair trial, courtroom cameras may alter the defendant's behavior as well. As with witnesses, cameras in the courtroom may affect the accused's demeanor and willingness to testify. More fundamentally, the prospect of extended media coverage may discourage the accused from exercising their right to trial in the first place. This may be of particular concern in cases involving notorious, repugnant or humiliating accusations or corporate defendants unwilling to expose themselves to negative publicity. Even when the accused is acquitted, the stain on their reputation is not easily erased, and camera coverage may exacerbate this unwarranted punishment. Televised trial also may subject the accused (or other participants) to harassment or physical threats during the course of the trial, necessitating additional security measures at public expense.

III. Striking the right balance: cameras should be permitted to televise criminal proceedings in the United States district courts and interlocutory appeals to the Circuit Courts with the express consent of the parties; cameras should be permitted in the United States Courts of Appeals and the United States Supreme Court in all other criminal proceedings.

The sponsors of S. 829 have wisely avoided a rule authorizing unrestricted camera access. Rather than placing the ultimate decision in the hands of the presiding judge, however, we think the consent of the parties – the accused (acting with the advice of counsel) and the government – should

be required before cameras are permitted to televise criminal trials or interlocutory appeals.[5] The positive or negative effects of cameras depend on the facts and circumstances of each case. The parties, who are familiar with the witnesses who will testify, the evidence that will be offered, and other facts that might indicate the potential for prejudice, are in the best position to determine the appropriateness of cameras.

Moreover, permitting the parties to withhold their consent avoids the time-consuming distraction of litigation regarding the judge's decision to permit or forbid camera coverage. The decision to bring cameras into the courtroom is usually made a few days prior to the start of trial. The defendant, if he opposes camera coverage, would be required to enter into an extended process of brief writing and oral argument to convince the trial judge that cameras will unfairly prejudice his client. Often, you will have a criminal defense attorney who is a solo practitioner or works out of a small firm and a defendant who has severely limited financial resources to pay for his defense; other times, the defendant will be represented by an attorney appointed under the Criminal Justice Act or employed by one of the Federal or Community Public Defenders. Forcing a defense attorney to focus on such matters at a critical moment in a case and requiring a defendant or taxpayers to pay for that representation on an issue that is irrelevant to a determination of guilt or innocence undermines the "proposition that the criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated."[6]

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[5] Subject to certain statutory distinctions, party consent is required in order to televise criminal trial proceedings in Alabama, Arkansas, Minnesota, and Oklahoma. *See* Cameras in the Court: A State-By-State Guide <http://www.rtndf.org/foi/scc.shtml>

[6] *Estes v. Texas*, 381 U.S. 532, 564 (1965) (Warren, C.J., concurring).

This position is supported by the fact that any prejudice as a result of the decision to allow cameras will be difficult to detect and virtually impossible to rectify. "The prejudices of television may be so subtle that it escapes the ordinary methods of proof."[7] Any rule that fails to honor the accused's objection would too easily jeopardize the fundamental right to a fair trial, upon which the accused's life or liberty depends, for the sake of less important societal goals. While we support efforts to ensure more sunshine on our democratic institutions, that goal should not be allowed to eclipse the fundamental purpose of a criminal trial: not education, not entertainment, but justice.

[7] *Id.* at 578 (1965) (Warren, C.J., concurring).

Testimony of Seth D. Berlin
Before the
United States Senate Committee on the Judiciary

November 9, 2005

Introduction

Mr. Chairman, and Members of the Committee. Thank you for inviting me to testify today. At the Committee's request, I will address the issue of cameras in the federal courts, their role in providing the public with meaningful access to the operations of the judiciary, and the historical experience in both federal and state courts on the actual workings of camera access.[1]

The Role of the Media in Furthering the Public's Access to Its Government, Including Its Judicial System

At a fundamental level, ours is a government in which the people are sovereign and therefore possess the concomitant right to observe its functioning.[2] Applying these principles, the Supreme Court has long recognized that the public is entitled to observe and scrutinize the operation of government, including especially the workings of the Nation's judicial system: "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."[3] As the Supreme Court has emphasized in the judicial context: "A trial is a

[1] Any opinions expressed in this testimony are my own and are not necessarily those of my law firm or its clients. My testimony is substantially derived from various briefs our law firm has submitted on behalf of media organizations seeking camera access to courts.

[2] *See, e.g.*, *First National Bank v. Bellotti*, 435 U.S. 765, 791-92 (1978) ("[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. . . [and] if there be any danger that the people cannot evaluate the information and arguments . . . it is a danger contemplated by the Framers of the First Amendment.").

[3] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980).

public event. What transpires in the courtroom is public property."[4] For example, public observation of the operation of our institutions of criminal justice

> in part reflects the widespread acknowledgement, long before there were behavioral scientists, that [such openness] had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.
>
> To work effectively, it is important that society's criminal process 'satisfy the appearance of justice,' and the appearance of justice can best be provided by allowing people to observe it.[5]

The Supreme Court has applied these principles to require access to a variety of phases of the criminal justice process, including trials;[6] testimony of minor victims of sexual abuse;[7] *voir dire* examinations of potential jurors;[8] suppression hearings;[9] and other preliminary hearings.[10] In so doing, the Court has established a strong presumption of public and media access to judicial proceedings that can only be overcome by a showing

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[4] *Craig v. Harney*, 331 U.S. 367, 374 (1947).

[5] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 570-72 (citations omitted). *See also, e.g.*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring) ("free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability").

[6] *See Richmond Newspapers, Inc.*, 448 U.S. at 570-72.

[7] *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

[8] *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*").

[9] *Waller v. Georgia*, 467 U.S. 39, 45 (1984).

[10] *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*").

that closure is essential to preserve higher values and is narrowly tailored to serve that interest, including that reasonable alternatives cannot adequately protect that interest.[11]

For the same reasons, the courts have been equally solicitous of the right of the public, and of the media as the public's representative, to access judicial records.[12] Significantly in this context, the majority of the federal circuits to have addressed the question have concluded that the media, as the representative of the public, has a right to copy such records – including audiotape and videotape evidence that the media seeks to copy for broadcast.[13] In reversing a denial of access to videotaped material, one federal court of appeals held:

> [W]e conclude that the trial court accorded too little weight to the strong common law presumption of access and to the educational and informational benefit which the public would derive from broadcast [of material] which raised significant issues of public interest. Similarly, the court accorded too much weight to concerns which we believe either are irrelevant or capable of resolution in some manner short of denial of the application.[14]

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[11] *Id.* at 13-14.

[12] *See, e.g.*, *Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978); *United States v. Criden (In re National Broad. Co.)*, 648 F.2d 814, 819-20 (3d Cir. 1981) ("The right to inspect and copy, sometimes termed the right to access, antedates the Constitution. It has been justified on the ground of the public's right to know, which encompasses public documents generally, and the public's right to open courts, which has particular applicability to judicial records.") (citations omitted).

[13] *See, e.g.*, *United States v. Myers (In re National Broad. Co.)*, 635 F.2d 945, 952 (2d Cir. 1980) ("When physical evidence is in a form that permits inspection and copying without significant risk of impairing the integrity of the evidence or interfering with the orderly conduct of the trial, only the most compelling circumstances should prevent contemporaneous public access to it.").

[14] *Criden*, 648 F.2d at 829. *See also Valley Broad. Co. v. District Court*, 798 F.2d 1289, 1293 (9th Cir. 1986) (ordering access to copy of audiotapes and videotapes admitted in RICO trial); *United States v. Guzzino*, 766 F.2d 302, 303-304 (7th Cir. 1985) ("The common law right of the public . . . includes the right of the media to copy audio or video tapes."); *United States v. Rosenthal*, 763 F.2d 1291, 1294 (11th Cir. 1985) (public has right of access to audiotapes of Title III wiretaps played in court); *In re National Broad. Co.*, 653 F.2d 609, 613 (D.C. Cir. 1981) (ordering access to audiotapes and videotapes played at trial of Congressman resulting from

The strong presumption of access to judicial proceedings and court records vindicates the democratic principle that observing judges and other participants in the legal system is the best way for our citizenry to obtain a deeper appreciation for these institutions. These principles are based on the recognition that the judicial system, like the other branches of government, will operate more effectively by making its operations transparent, rather than by protecting judges and other participants in the process from public scrutiny. As the Supreme Court long ago admonished:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[15]

The Role of Camera Access in Furthering the Public's Access to Its Court System

While, as discussed below, courts generally have been hesitant to find that the First Amendment *requires* camera access, many courts have trumpeted the role that the electronic media can play in serving the public's right of access through camera coverage. As the Supreme Court recognized in *Richmond Newspapers*, "[i]nstead of acquiring information . . . by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense

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Abscam investigation); *United States v. Vazquez*, 31 F. Supp. 2d 85, 88-91 (D. Conn. 1998) (government could not overcome the "especially strong" presumption of access to videotapes filmed outside a clinic and later used in defendant's trial for allegedly violating the Freedom of Access to Clinic Entrances Act).

[15] *Bridges v. California*, 314 U.S. 252, 270-71 (1941).

this validates the media claim of functioning as surrogates for the public."[16] For more than half a century, television has served the function of informing our Nation's citizenry about the functioning of its Government. Stating the obvious, one federal district court observed almost twenty-five years ago: "it cannot be denied that television news coverage plays an increasingly prominent part in informing the public at large of the workings of government. Many citizens likely rely on television as their sole source of news. Further, visual impressions can and sometimes do add a material dimension to one's impression of particular news events."[17]

Unlike second-hand reporting, which often does not afford the public with the full flavor of courtroom events, a broadcast of those events as they transpire will dramatically enhance the public's understanding of the federal judicial system. There are many aspects of a judicial proceeding – from seeing a witness to evaluate credibility, to fully understanding the interactions between the various participants – that are unlikely to be fully captured by second-hand reports. As Justice Brennan observed in his concurring opinion in *Richmond Newspapers, Inc. v. Virginia*, "the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge

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[16] 448 U.S. at 572-73. *See also Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491 (1975) ("[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations."); *United States v. Antar*, 38 F.3d 1348, 1360 (3d Cir. 1994) ("[F]or what exists of the right of access if it extends only to those who can squeeze through the door?"); *Criden*, 648 F.2d at 822 (public's right of access "can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend . . . in person").

[17] *Cable News Network, Inc. v. American Broad. Cos.*, 518 F. Supp. 1238, 1245 (N.D. Ga. 1981).

can attest, the 'cold' record is a very imperfect reproduction of events that transpire in the courtroom."[18]

Moreover, as the Florida Supreme Court recognized in authorizing camera coverage in that state's courts beginning in the 1970s, "newsworthy trials are newsworthy trials, and . . . they will be extensively covered by the media both within and without the courtroom" whether cameras are permitted or not.[19] Ultimately, therefore, the question is whether public information about trials is to come *solely* from second-hand summaries presented on the news, and/or potentially prejudicial and inflammatory characterizations by interested third parties; or whether the public will be permitted, as well, to observe the entirety of the actual in-court proceedings – dignified, somber and under the control of the Court. The latter is the far preferable state of affairs. As Justice Kennedy stated in testimony to Congress:

> You can make the argument that the most rational, the most dispassionate, the most orderly presentation of the issue is in the courtroom and it is the outside coverage that is really the problem. In a way, it seems somewhat perverse to exclude television from

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[18] 448 U.S. at 597 n.22 (Brennan, J., concurring). Similarly, as Justice Stewart observed in a case considering public and media access to prisons:

> A person touring [the] jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

Houchins v. KQED, Inc., 438 U.S. 1, 17 (1978) (Stewart, J., concurring). *See also United States v. Stewart (In re ABC, Inc.)*, 360 F.3d 90, 99 (2d Cir. 2004) ("one cannot transcribe an anguished look or a nervous tic"); *Antar*, 38 F.3d at 1360 n.13 ("some information, concerning demeanor, non-verbal responses, and the like, is necessarily lost in the translation of a live proceeding to a cold transcript").

[19] *In re Petition of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 764, 776 (Fla. 1979).

> the area in which the most orderly presentation of the evidence takes place.[20]

Does the Constitution Permit and/or Require Cameras in the Courtroom?

Forty years ago, in *Estes v. Texas*,[21] the Supreme Court found, in a 5-4 decision, that the media's presence in the courtroom had infringed on a criminal defendant's right to a fair trial. Specifically, rather than relying on evidence of actual prejudice to the defendant, the Court found that the presence of "at least 12 cameramen," "three microphones on the judge's bench," "others beamed at the jury box and counsel table" and "[c]ables and wires . . . snaked across the courtroom floor" created "such a probability that prejudice will result that it is deemed inherently lacking in due process."[22] Justice Clark's opinion emphasized, however, that "we are not dealing here with future developments in the field of electronics," nor with "the hypothesis of tomorrow," but with "the facts as they are presented today."[23]

Justice Harlan, whose concurrence provided the Court's crucial fifth vote, similarly cautioned that the Court's decision should not be viewed as announcing a *per se* rule that would prevent "the States from pursuing a novel course of procedural experimentation."[24] Indeed, Justice Harlan emphasized that any limitations on televising trials "would of course be subject to re-examination" when "television will have become

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[20] *Hearings Before a Subcomm. of the House Comm. on Appropriations*, 104th Cong., 2d Sess. 30 (1996).

[21] 381 U.S. 532 (1965).

[22] *Id.* at 536, 542-43.

[23] *Id.* at 551-52.

[24] *Id.* at 587 (Harlan, J., concurring).

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."[25]

Picking up on Justice Harlan's suggestion, a number of states began to experiment with cameras in their courtrooms by the mid-1970s. In 1978, the Conference of State Chief Justices voted 44 to 1 to allow the highest court of each state to promulgate standards regulating radio, television and photographic coverage of court proceedings.[26] By October 1980, 19 states permitted televising trials and appellate proceedings, three permitted trial coverage only, and three others allowed telecasts of appellate proceedings.[27]

In *Chandler v. Florida*, the Supreme Court rejected a challenge on due process grounds to camera coverage of a Florida criminal trial, which, pursuant to that state's rules, had been authorized without the defendants' consent.[28] In *Chandler*, the Court found that its earlier decision in *Estes* should not be read "as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change."[29] Indeed, the Court found that, just as the "risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all

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[25] *Id.* at 595-96.

[26] *See Chandler v. Florida*, 449 U.S. 560, 564-65 (1981).

[27] *Id.*

[28] 449 U.S. 560 (1981). Unlike the circumstances at issue in *Estes*, the camera coverage at issue involved only one camera in a fixed location, and one technician. *Id.* at 566-68.

[29] *Id.* at 573-74.

broadcast coverage."[30] Thus, while in an individual case it may be possible to show that televising a trial, or doing so in a manner that is particularly intrusive in the courtroom, would violate a defendant's due process rights, the vast majority of courts to have confronted this issue have found that not to be the case.[31]

Chandler stands for the proposition that it is not *per se* unconstitutional to *permit* cameras into courtrooms. While the line of Supreme Court cases announcing a First Amendment-based presumption of public access to judicial proceedings post-dated the Court's decision in *Chandler*, several federal circuit courts have nevertheless rejected claims that the First and/or Sixth Amendments *require* cameras.[32] In so doing, those courts have upheld the constitutionality of Federal Rule of Criminal Procedure 53, which

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[30] *Id.* at 575.

[31] *See, e.g.*, *Massachusetts v. Clark*, 730 N.E.2d 872 (Mass. 2000) (approving trial judge's decision finding that presence of electronic media in courtroom would not impair defendant's right to fair trial); *Missouri v. Simmons*, 944 S.W.2d 165, 179 (Mo. 1997) (holding that defendant failed to produce evidence that electronic media coverage "'had an adverse impact on the trial participants sufficient to constitute a denial of due process'") (citation omitted); *South Carolina v. Byram*, 485 S.E.2d 360, 366 (S.C. 1997) (holding that, while trial judge erred in deciding that he lacked discretion to exclude television without excluding other media, there was no evidence that defendant was prejudiced by having television cameras in courtroom during sentencing); *Tennessee v. Cooper*, 1998 Tenn. Crim. App. LEXIS 923 (Sept. 9, 1998) (rejecting defendant's claim that, because jury was not sequestered, "trial court erred in allowing television coverage of the trial" where defendant did not show "any prejudice"); *Montoya v. Texas*, 1998 Tex. App. LEXIS 7377 (Nov. 25, 1998) (upholding trial court's refusal to ban cameras, despite parties' joint request, in absence of any evidence that "presence of the cameras . . . affected appellant's substantial rights"); *Vinson v. Virginia*, 258 Va. 459, 471 (1999) (trial court properly permitted broadcast coverage over defendant's objection that coverage would prejudice his right to fair trial). *See also Stroble v. California*, 343 U.S. 181, 194-95 (1952) (refusing to overturn conviction on ground that pretrial news accounts were inflammatory because, *inter alia*, trial court had carefully screened jurors).

[32] *See Conway v. United States*, 852 F.2d 187 (6th Cir. 1988); *United States v. Edwards*, 785 F.2d 1293 (5th Cir. 1986); *United States v. Kerley*, 753 F.2d 617 (7th Cir. 1985); *United States v. Hastings*, 695 F.2d 1278 (11th Cir. 1983); *see also United States v. Yonkers Bd. of Educ.*, 587 F. Supp. 51 (S.D.N.Y.), *aff'd*, 747 F.2d 111 (2d Cir. 1984) (rejecting constitutional challenge to local rule); *Courtroom Television Network LLC v. New York*, 833 N.E.2d 1197 (N.Y. 2005).

expressly prohibits cameras in federal criminal proceedings.[33] While these courts concluded that television camera access is not constitutionally required, they have expressly left the door open for the rules to be revisited legislatively. For example, in rejecting constitutional challenges to Rule 53 and a corresponding local rule, the Eleventh Circuit observed that "[p]romulgation of the current rules in a legislative-type manner is more appropriate than a case-by-case approach."[34]

More recently, in *United States v. Moussaoui*, the court denied intervenor television networks' motion for leave to record and telecast the pretrial and trial proceedings of a defendant alleged to be a member of the al Queda conspiracy that resulted in the September 11 attacks.[35] Even though the Court authorized an audio-visual feed to a nearby "overflow" courtroom, the court rejected a constitutional challenge to Rule 53 and denied the networks' motion. At bottom, the Court concluded, "this is a question of social and political policy best left to the United States Congress and the Judicial Conference of the United States."[36]

Some courts that have rejected a First Amendment right of camera access have characterized prohibitions on cameras as reasonable "time, place and manner" restrictions. Even putting aside the question of whether it is constitutionally permissible

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[33] Rule 53 provides that "taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court." Although Rule 53 does not expressly prohibit television broadcasting, it is generally understood to include the electronic media. *See United States v. Hastings*, 695 F.2d at 1279 n.5.

[34] *Id.* at 1284.

[35] 205 F.R.D. 183 (E.D. Va. 2002).

[36] *Id.* at 186.

to discriminate between different forms of media,[37] this analysis fails to recognize that, unlike other "time, place and manner" restrictions where the content remains the same despite the restriction, camera coverage provides decidedly *different* content to the public about judicial proceedings than does second-hand reporting.

The Judicial Conference Guidelines

In 1972, the Judicial Conference adopted a prohibition against "broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto," applicable to both criminal and civil proceedings.[38] Following *Chandler*, a group of media organizations and other interested parties petitioned the Judicial Conference to adopt rules permitting electronic media coverage of federal court proceedings. The Conference appointed an ad hoc committee, which issued a report in 1984 recommending against allowing broadcast coverage of federal court proceedings, a recommendation adopted by the Conference shortly thereafter.[39]

In 1988, the Judicial Conference appointed a second Ad Hoc Committee on Cameras in the Courtroom. In 1990, following the recommendations of its committee, the Judicial Conference implemented a three-year pilot program permitting electronic

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[37] There can be no legal basis for distinguishing, as a matter of constitutional right, between the recording devices such as cameras and those such as pencils and paper. *See, e.g.*, *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 591-92 (1983) (striking down state tax statute singling out small group within the press because it "presents such a potential for abuse that no interest suggested by [the state] can justify the scheme"); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (same); *see also Cosmos Broad. Corp. v. Brown*, 471 N.E.2d 874, 883 (Ohio Ct. App. 1984) ("[I]f the print media, with its pens, pencils and note pads, have a right to access to a criminal trial, then the electronic media, with its cameras, must be given *equal* access too.").

[38] CODE OF JUDICIAL CONDUCT FOR UNITED STATES COURTS, Canon 3A(7) (1972).

[39] Federal Judicial Center, ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEAL (1994) ("Federal Judicial Center Report"), at 3.

media coverage of civil proceedings in six federal district courts and two federal courts of appeals, subject to certain guidelines.[40] During the pilot program, camera access was sought and approved in 186 civil cases, most commonly of trials. The Federal Judicial Center issued a detailed 50-page report on the experiment, concluding that, "[o]verall, attitudes of judges toward electronic media coverage of civil proceedings were initially neutral and became more favorable after experience under the pilot program." Judges and attorneys participating in the pilot program "generally reported observing small or no effects of camera presence on participants in the proceedings, courtroom decorum or the administration of justice."[41] According to the staff's survey of those participants, "[n]early all judges thought that educating the public about how the federal courts work was the greatest potential benefit of coverage, and most thought that this benefit could be more fully realized with electronic media rather than traditional media."[42] The report concluded with the project staff's recommendation that "the Judicial Conference authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms, subject to Conference guidelines."[43]

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[40] The Courts were the United States Courts of Appeal for the Second and Ninth Circuits, as well as the United States District Courts for the Southern District of Indiana, the District of Massachusetts, the Eastern District of Michigan, the Southern District of New York, the Eastern District of Pennsylvania, and Western District of Washington. Federal Judicial Center Report at 4.

[41] *Id.* at 7. The Report also noted that "[r]esults from state court evaluations of the effects of electronic media on jurors and witnesses indicate that most participants believe electronic media presence has minimal or no detrimental effects on jurors or witnesses." *Id.*

[42] *Id.* at 24.

[43] *Id.* at 43.

Despite the findings and recommendations of this three-year study, the Judicial Conference voted, by a 2-1 margin, to reject these recommendations. In 1996, the Conference again considered the issue, voting to urge each circuit judicial council to adopt an order prohibiting broadcast coverage of proceedings in district courts. The Conference left it up to the appellate courts whether or not they would adopt similar rules, and all but two courts of appeals subsequently adopted prohibitions.[44]

A few judges, in jurisdictions where the local rules leave some discretion to individual judges, have concluded that they are not bound by the Judicial Conference's guidelines,[45] and have expressly relied on the positive results of experiments with camera access to allow proceedings to be televised.[46] Other judges, however, have concluded that the Judicial Conference's blanket prohibition on cameras leaves them little discretion

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[44] The rules of the United States Courts of Appeals for the Second and Ninth Circuits, both of which participated in the three-year pilot program, allow for camera coverage.

[45] *Marisol A. v. Giuliani*, 929 F. Supp. 660, 660-61 (S.D.N.Y. 1996) (under 28 U.S.C. §§ 331, 2071(c), the policy of the Judicial Conference does not overrule or supplant local court rules, which "empower[ ] the court to grant written permission to televise a civil proceeding" and under which "the court should consider the Conference policy only as a persuasive factor in the exercise of that power"); *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 584 (S.D.N.Y. 1996) (allowing Court TV to televise proceedings because, "[w]hile the recent action of the Judicial Conference [rejecting televising] is persuasive, this Court is not required to defer to it"); *Hamilton v. Accu-Tek*, 942 F. Supp. 136, 137-38 (E.D.N.Y. 1996) (applying local rule to permit television broadcast of motions hearing because "in general, the public should be permitted and encouraged to observe the operation of its courts in the most convenient manner possible, so long as there is no interference with the due process, the dignity of litigants, jurors and witnesses, or with other appropriate aspects of the administration of justice"); *Sigmon v. Parker Chapin Flattau & Klimpl*, 937 F. Supp. 335, 336-37 (S.D.N.Y. 1996) (granting motion for camera access because, "although the position of the Judicial Conference is persuasive, it is not controlling").

[46] *See, e.g.*, *Katzman*, 923 F. Supp. at 586 (noting, in allowing camera coverage, that the experiments conducted between 1979 and 1994 had established that "a silent, unobtrusive in-court camera can increase public access to the courtroom without interfering with the fair administration of justice").

to allow cameras in their courts.[47] For example, in the landmark libel trial in *Westmoreland v. CBS Inc.*, the parties consented to CNN's televising the proceedings, and then-trial judge Leval concluded that, but for the Judicial Conference policy and the local rules based on that policy, CNN's petition seeking camera access "should be granted."[48] Specifically, Judge Leval found, the experience by that time of 41 states had shown "that under appropriate rules preserving the court's control over the use of cameras, live filming and telecasting need not interfere in any degree with fair and orderly administration of justice."[49] Moreover, the judge emphasized that "people should have the opportunity to see how the courts function," which would be greatly facilitated through televised proceedings, and opined that "it is very much in the interest of the federal judiciary to admit the camera into its proceedings," a practice he concluded was "inevitable."[50] "[I]n spite of its merit," however, the judge denied CNN's petition based on his conclusion that the rules of the Judicial Conference and of his own court left him no choice.[51] That determination was subsequently upheld by the Second Circuit, which

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[47] *See, e.g.*, *Lac Courte Oreilles Band v. Wisconsin*, 17 MEDIA L. REP. (BNA) 1381-83 (W.D. Wis. 1990) ("however strongly [the court] may disagree with the Judicial Conference's position on this question," the court was "not free to disregard it," even though "televising the proceedings . . . would be beneficial for the public and the judicial system" and "would not interfere with the court proceedings").

[48] 596 F. Supp. 1166, 1170 (S.D.N.Y.), *aff'd*, 752 F.2d 16 (2d Cir. 1984).

[49] 596 F. Supp. at 1168-69; see *id.* at 1167 ("It appears that filming can be done without the slightest obstruction of dignified, orderly court procedure.").

[50] *Id.* at 1168-69.

[51] *Id.* at 1170.

concluded that "television coverage of federal trials is a right created by the consent of the judiciary, which has always had control over the courtrooms."[52]

Earlier this fall, the United States District Court for the Middle District of Pennsylvania started a trial in a case challenging the constitutionality of the Dover, Pennsylvania School Board's policy concerning "intelligent design" – namely, suggesting to students, at the outset of the study of evolution in biology classes, that they also consider the study of intelligent design and offering to provide them with an intelligent design text that had been donated to the school system.[53] Given that the "Dover School Board" litigation presented perhaps the paradigm case for allowing camera access to the trial, Court TV moved for leave to televise it. The case itself involves the collision of three issues that are of profound national interest: the regulation of public education of children by local government, the appropriate role of religion in public education, and conflicting beliefs about the origins of life. And, there are none of the generally asserted countervailing concerns that often cause courts to hesitate in allowing camera coverage: privacy interests of witnesses or parties, prurient interest in salacious material, constitutional rights of criminal defendants, or protection of a jury. Finally, none of the parties opposed Court TV's motion.

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[52] *Westmoreland v. CBS Inc.*, 752 F.2d 16, 22, 24 (2d Cir. 1984), *cert. denied*, 472 U.S. 1017 (1985); see *id.* at 23 ("[T]hese [access] cases articulate a right to attend trials, not a right to view them on a television screen."). In a concurring opinion, Judge Winter refused to require trial courts to make determinations based on the circumstances of individual cases and instead credited the Judicial Conference's "reasonable belief that the potentially undesirable effects of television cannot be detected, or detected in a timely fashion, on a case-by-case basis." *Id.* at 26 (Winter, J., concurring).

[53] *Kitzmiller v. Dover Area School Board*, No. 04cv2688 (M.D. Pa.).

The court nevertheless denied Court TV's motion to intervene for the limited purpose of televising the proceedings. Under the "well-settled policy of the Federal Judicial Conference" and the Court's local rules, the court concluded it could not "allow telecasts in the fashion sought by Court TV, even if we were philosophically inclined to allow cameras within our courtroom."[54] The Court also noted that it "will leave the discussion as to whether" the Federal Judiciary's practice "is a prudent course to others."[55]

While some judges will continue to be either opposed to or extremely reluctant to authorize televised proceedings, legislation that allows judges who are differently inclined to permit camera coverage would serve as a worthwhile first step in this area, and would likely have yielded a different result in such important matters as *Westmoreland* and the "Dover School Board" case. Indeed, under both of the bills currently before this Committee courts would, at a minimum, no longer be tethered to the Judicial Conference policy if, after evaluating the particular circumstances before them, they concluded that camera coverage of the proceedings was appropriate.

Other Recent Experience in the Federal Courts of Appeals

In a few recent cases considering significant public issues, federal appeals courts have opened their proceedings to public telecasts in some fashion. Although still reasonably rare, these experiences further confirm that legislation in this area is warranted. For example, when the Ninth Circuit heard oral argument in the Napster file-

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[54] Memorandum and Order, *Kitzmiller v. Dover Area School Board*, No. 04cv2688 (M.D. Pa. Sept. 7, 2005), Slip op. at 5-8. *See also id.* (it is the court's "considered view" that it should not "derogate from the clear policy mandate of the Federal Judicial Conference").

[55] *Id.* at 8 n.3.

sharing case, it allowed C-SPAN to cover the argument with cameras in the courtroom.[56] Likewise, the D.C. Circuit permitted the press to disseminate live audio coverage of the oral arguments in *United States v. Microsoft Corporation*.[57]

And, of course, in 2000, the eyes and ears of the Nation were keenly focused on the litigation that would determine the outcome of that year's presidential election. As the litigation wound its way through the judiciary, Americans were able to watch and listen live as the Florida courts – including the Florida Supreme Court – considered the candidate's arguments.[58] Then, breaking with tradition, the United States Supreme Court released to the public the audiotape of the oral argument in its chambers promptly following the conclusion of the argument.[59] The Supreme Court argument was immediately broadcast in its entirety on radio and television stations throughout the United States.

Each of these cases provided Americans with the opportunity to observe directly its judicial system as it wrestled with some of the most significant legal issues of our time. By opening up their courtrooms, these courts gave citizens the means to participate

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[56] *See A&M Records, Inc. v. Napster, Inc.*, No. 00-16401 (9th Cir. Sept. 25, 2000) (order granting applications to audio or video record).

[57] *See, e.g.*, *Appeals Hearing to Be Live on Radio, Internet*, SEATTLE TIMES, Feb. 13, 2001, at C1.

[58] *See, e.g.*, David Bianculli, *Air Fair to Fla. & U.S.: State is Right to Allow TV*, DAILY NEWS (N.Y.), Dec. 8, 2000, at 146.

[59] *See* Letter from Chief Justice Rehnquist to Barbara Cochran, Radio-Television News Directors Association (Nov. 28, 2000) ("[T]he Court recognizes the intense public interest in the case and for that reason today has decided to release a copy of the audiotape of the argument promptly after the conclusion of the oral argument.").

in the judicial process and the satisfaction of observing justice in action.[60] In each instance, the country was treated to a civics lesson – it learned not only about the particular issues presented to the court, but also about the judicial process itself.[61]

Courts' Own Use of Cameras

In addition to allowing audiotaped and videotaped evidence to be copied for broadcast, as discussed above, the federal courts are increasingly using cameras for many purposes – other than broadcasting court proceedings to the public. The courts' own cameras are often similar in size and operation to those proposed by broadcasters – namely, they are small and unobtrusive, and operate without any additional lighting. As mentioned above, for example, the *Moussaoui* court authorized an audio-visual feed to a nearby courtroom.

In addition, in response to the change of venue of the Oklahoma City bombing trial, Congress authorized closed circuit televising of trials to crime victims where the trial is moved more than 350 miles and out-of-state.[62] Similarly, a federal statute

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[60] *See, e.g.*, *Publicker Indus. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) (recognizing that the right of access "'permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government'") (citation omitted).

[61] *See Globe Newspaper Co.*, 457 U.S. at 606 (emphasizing that access to court proceedings heightens "public respect for the judicial process"); *Katzman*, 923 F. Supp. at 586 (explaining that televising court proceedings "'exposes greater numbers of citizens to our justice system'" and "'engenders a deeper understanding of legal principles and processes'") (citation omitted).

[62] *See* 42 U.S.C. § 10608(a) ("[I]n order to permit victims of crime to watch criminal trial proceedings . . . the court shall order closed circuit televising of the proceeding . . . for viewing by such persons the court determines have a compelling interest in doing so and are otherwise unable to do so by reason of the inconvenience and expense caused by the change of venue."); *see also United States v. McVeigh*, 931 F. Supp. 753, 755 (D. Colo. 1996).

required the court in *Moussaoui* to order closed circuit televising of trial proceedings for viewing by the families of September 11 victims.[63]

These actions recognize that persons interested in the proceedings may not be able to attend them because they are too far away, or because of space limitations in the courtroom, and that access beyond second-hand media coverage is important. That legitimate interest in judicial proceedings is not, however, limited solely to direct victims, but extends to others throughout the nation who are interested and affected by the outcomes of important cases.

Experience with Cameras in the State Courts

All 50 states allow at least some camera coverage of judicial proceedings, including 37 states in which criminal proceedings may be televised in at least some circumstances.[64] Only the District of Columbia bans camera coverage of all judicial proceedings.[65] Most states allow coverage of both trial and appellate proceedings, but in six states, only appellate courts admit cameras (one of those six allows still photography of trial proceedings and another allows audio recording of trial proceedings).[66] The state statutes or rules vary in their other provisions, including some, for example, which

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[63] Pub. L. No. 107-206, 116 Stat. 820, § 203 (Aug. 2, 2002). Procedures for notifying such persons are set forth in *United States v. Moussaoui*. *See* 2003 WL 1877701 (E.D. Va. Mar. 11, 2003).

[64] The Radio-Television News Directors Association provides an online state-by-state discussion of the guidelines governing television, broadcasting, recording, and still photography coverage of judicial proceedings. *See* RADIO-TELEVISION NEWS DIRECTORS ASS'N, CAMERAS IN THE COURT: A STATE-BY-STATE GUIDE, *at* http://www.rtnda.org/foi/scc.shtml (last visited Nov. 7, 2005).

[65] *Id.*

[66] *Id.*

prohibit the filming of jurors and/or specified witnesses.[67] In all jurisdictions, the trial judge retains broad discretion to limit coverage in particular cases.[68]

Many of the state statutes or rules authorizing camera coverage of judicial proceedings were adopted after a period of study or experimentation. When the Federal Judicial Center issued its report on the federal court pilot program, it surveyed studies that had been undertaken in twelve states.[69] That survey concluded that "the majority of jurors and witnesses who experience electronic media coverage do not report negative consequences or concerns."[70] The survey of state court studies further concluded that there was little if any distraction of jurors and witnesses or effect on witness testimony or juror deliberations.[71]

For example, following a one-year experiment, the Florida Supreme Court determined that the claims of opponents to camera coverage were "unsupported by any evidence."[72] After a four-year experiment, the Iowa Supreme Court determined that jurors thought camera coverage had little effect on trial participants, and no effect on the performance of judges or witnesses. And, the Alaska Judicial Council, following a three-

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[67] *Id.*

[68] *Id.*

[69] *See* Federal Judicial Center Report at 38-42. The twelve states were Arizona, California, Florida, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, New York, Ohio and Virginia. *Id.* at 38.

[70] *Id.*

[71] *Id.* at 39-42.

[72] *In re Petition of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d at 775.

year experiment, concluded that "[t]elevision cameras in the courtroom have had virtually no effect on courtroom behavior on participants."[73]

Twenty-five years ago, California was one of the first states to conduct a statewide experiment of electronic media coverage which, after a detailed evaluation by an independent consulting firm, was declared a success.[74] Ninety percent of the judges and attorneys surveyed agreed that there was little or no interference with courtroom decorum, and most said that the presence of cameras did not alter the behavior of participants. For their part, participants advised that they experienced little distraction by, and little awareness of, the cameras. Following this experiment, California enacted a court rule authorizing camera coverage of both civil and criminal trials.[75]

California revisited this rule in the wake of the O.J. Simpson trial. In 1996, the California Supreme Court's Chief Justice appointed a Task Force on Photographing, Recording, and Broadcasting in the Courtroom. That Task Force found that judges who had actually had permitted camera coverage of proceedings strongly favored the continuation of that practice. Ninety-six percent of such judges advised that the presence of camera equipment did not affect the outcome of a trial or hearing in any way.[76] In addition, the vast majority of them agreed that camera coverage did not interfere with

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[73] Alaska Judicial Council, *News Cameras in the Alaska Courts: Assessing the Impact* (1988).

[74] *See* Ernest H. Short and Assoc., EVALUATION OF CALIFORNIA'S EXPERIMENT WITH EXTENDED MEDIA COVERAGE OF COURTS (1981).

[75] *See* California Rule of Court 980.

[76] *See* REPORT OF THE TASK FORCE ON PHOTOGRAPHING, RECORDING, AND BROADCASTING IN THE COURTROOM, Feb. 16, 1996; REPORT OF THE TASK FORCE ON PHOTOGRAPHING, RECORDING, AND BROADCASTING IN THE COURTROOM, May 10, 1996.

maintaining courtroom order, controlling proceedings, or with potential jurors' willingness to serve.[77] Based on this study, California continued to authorize camera access.

State courts who have had occasion to consider this issue more recently have reached similar conclusions. For example, in 2002, the New Hampshire Supreme Court implemented new guidelines for lower courts to follow in permitting cameras into the state's courts.[78] The Court recognized that the original rationale underlying its prior rule restricting camera access was the product of a bygone era in which camera technology was bulky and distracting: "the increasingly sophisticated technology available to the broadcast and print media today allows court proceedings to be photographed and recorded in a dignified, unobtrusive manner."[79] The court concluded that the beneficial effects of cameras outweighed their negative effects[80] and that cameras should be allowed in all courtroom proceedings otherwise open to the public, with trial judges able to limit television coverage in cases only where there was a "substantial likelihood of harm to any person or other harmful consequence."[81]

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[77] *Id.*

[78] *See Petition of WMUR Channel 9*, 813 A.2d 455 (N.H. 2002).

[79] *Id.* at 460 (citing studies "finding minimal, if any, physical disturbance to the trial process").

[80] See *id.* at 460 ("[T]he advent of cameras in the courtroom improves public perceptions of the judiciary and its processes, improves the trial process for all participants, and educates the public about the judicial branch of government." The trial judge could "maintain the decorum" and "guarantee a defendant's right to a fair trial by working with the media to place guidelines on their coverage, instructing the jury . . . and maintaining control of the courtroom.").

[81] *Id.* at 461. Complete closure is authorized only where four requirements were met: "(1) closure advances an overriding interest that is likely to be prejudiced; (2) the closure order is no broader than necessary to protect that interest; (3) the judge considers reasonable alternatives

Indeed, just last week, the Florida Supreme Court unanimously rejected a rule change that would have significantly limited camera coverage of Florida's courts to protect claimed privacy rights and confidential material.[82] The Court's Order also rejected provisions that would have allowed courts to ban videotaping and photographing without a hearing to give the media an opportunity to object.[83]

Conclusion

Permitting federal court proceedings to be televised will dramatically enhance the public's exercise of its right of access to judicial proceedings. The rich experience of the states, coupled with the positive experience of those federal courts to have authorized camera access, convincingly demonstrate that the presence of cameras does not impair the fair and impartial administration of justice. The federal courts are already familiar with making available audiotaped and videotaped evidence, and have had occasion to use cameras to transmit proceedings for their own purposes, even if not to the general public.

Moreover, a number of federal courts have felt constrained by the Judicial Conference guidelines, local rules based on them, or Federal Rule of Criminal Procedure 53 not to allow camera coverage when they otherwise would have viewed such coverage as beneficial, and have, in essence, invited legislative action on the subject. Congressional action will therefore open the doors of the Nation's federal court system to millions of Americans who are otherwise unable as a practical matter to view its judicial proceedings.

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to closing the proceeding; and (4) the judge makes particularized findings to support the closure of the record." *Id.* The court also set out procedures for trial courts to follow when restricting the use of electronic media in the courtroom. *Id.*

[82] *In re Amendments to the Rules of Judicial Administration*, No. SC05-173 (Fla. Nov. 3, 2005).

[83] *Id.*

TESTIMONY OF BARBARA COCHRAN
PRESIDENT,
RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION,
BEFORE THE
UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

NOVEMBER 9, 2005

Mr. Chairman and Members of the Committee, I am Barbara Cochran, President of the Radio-Television News Directors Association. Thank you for inviting me to appear today on behalf of the 3,000 electronic journalists, educators, students and executives who comprise RTNDA, the world's largest professional organization devoted exclusively to electronic journalism.

At the Committee's request, I will address proposed legislation to allow media coverage of federal court proceedings. As you know, under present law, radio and television coverage of federal criminal and civil proceedings at both the trial and appellate levels is effectively banned. The Sunshine in the Courtroom Act of 2005 represents an important step toward removing the cloak of secrecy surrounding our judicial system by giving all federal judges the discretion to allow cameras in their courts under a three-year pilot program. Similarly, legislation introduced by Chairman Specter would open our nation's highest court to audiovisual coverage and would instill a sense of public trust in our judicial process by allowing Americans to witness for themselves what transpires within the United States Supreme Court, thus gaining insight into decisions that affect their daily lives.

It is simply 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, entertaining as those television programs may be. Nor does it make sense that the

nominees for the Supreme Court are widely seen in televised hearings conducted by this Committee, only to disappear from public view the moment they are sworn in as justices.

RTNDA'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. RTNDA 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, RTNDA 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 public access to courts through televised proceedings is a right and an opportunity, not an inconvenience.

RTNDA respectfully 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.

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. 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 this body's Subcommittee on Administrative Oversight and the Courts some five 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. The cameras available today are small, unobtrusive, and designed to operate without additional light. Moreover, 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.

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. 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.

Admittedly, the electronic media is not a foreign element in the coverage of federal courts. Since the O.J. Simpson murder trial, many have been quick to point the finger at the camera as the cause of "sensationalism" and public distaste for our legal process. The empirical evidence to the contrary is overwhelming—the camera shows

what happens; it is not a cause. Moreover, 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.

Jurors, prosecutors, lawyers, witnesses and judges on both the state and federal levels have overwhelmingly reported for the last decade or so 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. The District of Columbia is the only jurisdiction that prohibits trial and appellate coverage entirely. 43 states allow electronic coverage at the trial level.

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 RTNDA'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.

It is also worth noting that 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."

One compelling illustration of the public benefits resulting from audiovisual coverage of judicial proceedings involves the presidential election dispute in the fall of 2000. Given Florida state rules that permit cameras in the courtroom, the nation was able to watch and listen live as the Florida courts, including the state's Supreme Court, heard arguments in President Bush's bid to throw out hand-counted ballots that former Vice President Al Gore hoped would win him the presidency.

In response to requests from numerous media organizations, including RTNDA, to allow television coverage of the subsequent oral arguments before the United States Supreme Court, Chief Justice Rehnquist wrote, "the Court recognizes the intense public interest in the case and for that reason today has decided to release a copy of the audiotape of the argument promptly after the conclusion of the argument." Radio stations played the tapes in their entirety; their television counterparts played long excerpts, supplemented with photos and the familiar artists' sketches. Later, Chief Justice Rehnquist told a CNN reporter that he was very pleased with the reception that the playing of the court's audiotapes had gotten. People who before the election couldn't have named one justice now could name all nine. As divisive as the 2000 electoral

contest was, the openness of the courtrooms produced the common understanding and acceptance necessary for political closure.

The Supreme Court has released audiotapes of other high profile cases in recent years, thus permitting the public to hear oral argument concerning such serious issues as United States courts' jurisdiction over claims by foreign citizens held at the Guantanamo Naval Base and whether the government may withhold constitutional protections from a U.S. citizen detained as an "enemy combatant." While the electronic media has welcomed release of these select recordings, they are no substitute for consistent, complete audiovisual coverage. Significantly, in response to questions posed by members of this Committee during his confirmation hearings, our new Chief Justice, John Roberts, stated that he is open to the idea of televising Supreme Court proceedings.

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. For example:

- Whether the government can take possession of a person's private property and transfer it to developers to encourage economic development;
- Whether executing juveniles constitutes cruel and unusual punishment;
- Whether the term "Under God" in the Pledge of Allegiance is unconstitutional;
- Whether a state university may consider race and ethnicity in its admissions process;
- Whether parents have a constitutionally protected right to prevent schools from providing information on sexual topics to their children.

In contrast, on October 19 of this year, people throughout the world were able to turn on their television sets (or their computers) to witness for themselves opening

proceedings in the trial of Saddam Hussein and seven of his associates accused of crimes against humanity. The judges involved and the Iraqi people apparently understood how critically important it was to make this process truly public. Ironically, if the United States had successfully argued to have the case come before one of our federal courts, our laws would have prohibited broadcast of the trial.

For whatever reasons, federal courts have not, on their own motion, taken steps to permit electronic coverage of their proceedings. Therefore, RTNDA 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 proposed by Senators Grassley and Schumer represents a careful approach by giving federal judges at both the trial and appellate levels the discretion to allow cameras in their courts under a three-year pilot program. At its conclusion, Congress and federal judges would be given an opportunity to review the program. Similarly, Chairman Specter's bill would afford a majority of the justices the discretion to disallow coverage where they believe the due process rights of a party would be violated.

I should mention here that RTNDA believes that federal law governing television coverage of the judicial branch should be grounded in a presumption that such coverage will be allowed unless it can be demonstrated that it would have a unique, adverse effect on the pursuit of justice or prejudice the rights of the parties in any particular case. Placing decisions as to whether or not to "pull the plug" on electronic coverage in the hands of the parties would render the legislation ineffective.

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. RTNDA 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.

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, the proposed legislation that is the subject of today's hearing 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. While both print and electronic media fulfill the important role of acting as a surrogate for the public, only television has the ability to provide the public with a close visual and aural approximation of actually witnessing events without physical attendance. 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.

Thank you, Mr. Chairman, for the opportunity to testify on behalf of RTNDA before your committee today.

STATEMENT OF SENATOR JOHN CORNYN
Before the United States Senate Committee on Judiciary
On Cameras in the Courtroom
November 9, 2005

Thank you, Mr. Chairman, for holding today's hearing. As a strong proponent of open government, I am likewise supportive of cameras in the courtroom, and am an original co-sponsor of both S. 829, the Sunshine in the Courtroom Act and S. 1768, the Televising Supreme Court Proceedings Act. I believe that cameras should be allowed in both district and appellate courts -- and furthermore, that the Supreme Court should also televise its proceedings. Both of these bills would permit everyday citizens from across the country observe what goes on in the Judicial System. This will help our constitutions to be better informed, and in turn will better serve our government.

I believe it is important that the people of the United States know what happens in all branches of government. C-Span currently televises the debates on the floors of both branches of Congress. Daily, Executive Branch press conferences are televised. These broadcasts allow the public to see the give-and-take between public officials, which provides the public a better understanding of governmental policies. Opening the courts to this type of comprehensive coverage will certainly better serve our public, and will keep them informed as they perform their citizen duties.

In fact, C-Span currently replays audio tapes of Supreme Court arguments from its archives on Saturday nights. These broadcasts are very interesting and provide an opportunity to hear how the Supreme Court addresses issues they are called on to decide. I was pleased to hear that throughout the month of August, C-Span replayed archived Supreme Court arguments made by John Roberts and has recently begun to replay past arguments made by Judge Samuel Alito. For those who listen to these broadcasts, they undoubtedly come away from them knowing that both individuals are highly qualified and skilled Supreme Court advocates.

Allowing cameras into the courtroom would allow many people to learn more about the government and more about our judicial system. This would increase the confidence of the general public that we have dedicated public servants who serve in our judiciary, and who, on a day-in and day-out basis, conduct themselves in a dignified, distinguished, and professional manner.

I recognize that it is important that any telecast be conducted in an unobtrusive way that does not interfere or disrupt the proceedings or prejudice the rights of the litigants. This is done, with great success, every day. Court TV and other outlets have refined the process over time such that they blend in with the courtroom surroundings and the trial carries on as if they were not there.

Fundamentally, open government is one of the most basic requirements of any healthy democracy. It allows taxpayers to see where their money is going; it permits the honest exchange of information that ensures government accountability; and it upholds the ideal that government never rules without the consent of the governed.

Our government's default position must be one of openness. Whether it be documents, information, or court proceedings, if it can safely be open and broadcasted to the public, then it indeed should be. I look forward to hearing from our witnesses to day. Thank you Mr. Chairman.

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United States Senate
Committee on the Judiciary

Hearing on:
"Cameras in the Courtroom"
Wednesday, November 9, 2005, 9:30 a.m.
Dirksen Senate Office Building Room 226
Washington, D.C.

Written Testimony of
JAN E. DUBOIS
United States District Court Judge
United States District Court for the
Eastern District of Pennsylvania
United States Courthouse
601 Market Street
Philadelphia, PA 19106

MR. CHAIRMAN, AND MEMBERS OF THE COMMITTEE, MY NAME IS JAN E. DUBOIS. I AM PRESENTLY A JUDGE ON THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, HAVING SERVED ON THAT COURT FOR OVER 17 YEARS. I AM APPEARING BEFORE YOU TODAY IN MY PERSONAL CAPACITY. I APPRECIATE THE INVITATION TO TESTIFY AND HOPE MY TESTIMONY WILL BE USEFUL TO YOU.

AS YOU REQUESTED, MY STATEMENT WILL COVER THE PILOT PROGRAM PROVIDING FOR ELECTRONIC MEDIA COVERAGE OF CIVIL PROCEEDINGS IN SELECTED FEDERAL TRIAL AND APPELLATE COURTS, INCLUDING MY TRIAL COURT, FROM JULY 1, 1991, TO DECEMBER 31, 1994. THE PILOT COURTS FOR THAT PROGRAM WERE, IN ADDITION TO MY COURT, THE U.S. DISTRICT COURTS FOR THE SOUTHERN DISTRICT OF INDIANA, DISTRICT OF MASSACHUSETTS, EASTERN DISTRICT OF MICHIGAN, SOUTHERN DISTRICT OF NEW YORK, WESTERN DISTRICT OF WASHINGTON; AND THE U.S. COURTS OF APPEALS FOR THE SECOND AND NINTH CIRCUITS. THOSE PILOT COURTS WERE SELECTED FROM COURTS THAT HAD VOLUNTEERED TO PARTICIPATE IN THE EXPERIMENT. SELECTION CRITERIA INCLUDED SIZE, CIVIL CASE LOAD, PROXIMITY TO MAJOR METROPOLITAN MARKETS, AND REGIONAL AND CIRCUIT REPRESENTATION.

THE PILOT PROGRAM AUTHORIZED COVERAGE ONLY OF CIVIL PROCEEDINGS. GUIDELINES WERE ADOPTED BY THE JUDICIAL CONFERENCE AND I HAVE APPENDED A COPY TO MY WRITTEN TESTIMONY. THE GUIDELINES REQUIRED REASONABLE ADVANCE NOTICE OF A REQUEST TO COVER A

PROCEEDING; PROHIBITED PHOTOGRAPHING OF JURORS IN THE COURTROOM, IN THE JURY DELIBERATION ROOM, OR DURING RECESSES; ALLOWED ONLY ONE TELEVISION CAMERA AND ONE STILL CAMERA IN TRIAL COURTS AND TWO TELEVISION CAMERAS AND ONE STILL CAMERA IN APPELLATE COURTS; AND REQUIRED THE MEDIA TO ESTABLISH "POOLING" ARRANGEMENTS WHEN MORE THAN ONE MEDIA ORGANIZATION WANTED TO COVER A PROCEEDING. THE GUIDELINES ALSO PROVIDED THAT THE PRESIDING JUDGE HAD DISCRETION TO REFUSE, TERMINATE OR LIMIT MEDIA COVERAGE.

FROM JULY 1, 1991, THROUGH JUNE 30,1993, MEDIA ORGANIZATIONS APPLIED TO COVER A TOTAL OF 257 CASES IN ALL OF THE PILOT COURTS.[1] OF THESE, 186 OR 72% OF THE APPLICATIONS WERE APPROVED, 42 OR 16% WERE DISAPPROVED AND THE REMAINDER WERE NOT ACTED ON. OF THE TOTAL OF 257 CASES IN WHICH APPLICATIONS WERE MADE, 78 WERE SUBMITTED IN THE EASTERN DISTRICT OF PENNSYLVANIA. OF THE 78, 54 OR 69%WERE APPROVED, AND THE REMAINDER WERE DISAPPROVED OR NOT RULED ON.

THE EASTERN DISTRICT OF PENNSYLVANIA HAD THE GREATEST

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[1]ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS; FEDERAL JUDICIAL CENTER, 1994 ("FEDERAL JUDICIAL CENTER REPORT"), TABLE 1. A COPY OF TABLE 1 IS APPENDED TO MY WRITTEN TESTIMONY.

APPLICATION AND COVERAGE ACTIVITY. THE FEDERAL JUDICIAL CENTER REPORT ON THE PROGRAM ATTRIBUTED THAT RESULT, AT LEAST IN PART, TO THE FACT THAT IT WAS THE SECOND LARGEST DISTRICT COURT IN THE PILOT PROGRAM AND HAD A VERY ACTIVE MEDIA COORDINATOR.

OF THE 186 CASES APPROVED FOR COVERAGE, 147 WERE ACTUALLY RECORDED OR PHOTOGRAPHED. NINETEEN OF THE REMAINING 39 APPROVED CASES WERE EITHER SETTLED OR OTHERWISE TERMINATED, AND NINE APPLICATIONS WERE WITHDRAWN. IN 11 CASES, THE MEDIA FAILED TO APPEAR.

THE EASTERN DISTRICT OF PENNSYLVANIA, IN A STUDY UNDERTAKEN AT THE COMPLETION OF THE PILOT PROGRAM ON DECEMBER 31, 1994, REPORTED A TOTAL OF 117 BROADCASTING REQUESTS FROM THE MEDIA, 86 OR 74% OF WHICH WERE APPROVED, 16 OR 14% OF WHICH WERE DISAPPROVED, AND 15 OF WHICH WERE IN CASES THAT WERE SETTLED. THE BREAKDOWN OF THE 117 CASES IN WHICH APPLICATIONS WERE APPROVED DISCLOSES THAT ALMOST HALF, 57 OR 49%, WERE IN CIVIL RIGHTS CASES. OF THE 57 CIVIL RIGHTS CASES IN WHICH APPLICATIONS WERE MADE, 42 OR 74% WERE APPROVED, AND 15 OR 12% WERE DISAPPROVED. NEXT IN TERMS OF PERCENTAGE OF REQUESTS WERE TORT CASES, 21 OR 18%.

THE FEDERAL JUDICIAL CENTER EVALUATED THE PILOT PROGRAM AND IN 1994 PUBLISHED A REPORT ENTITLED *ELECTRONIC MEDIA COVERAGE OF FEDERAL CIVIL PROCEEDINGS: AN EVALUATION OF THE PILOT PROGRAM IN SIX DISTRICT COURTS AND TWO COURTS OF APPEALS*; FEDERAL JUDICIAL CENTER, 1994 ("FEDERAL JUDICIAL CENTER REPORT"). THAT REPORT INCLUDED RATINGS OF

EFFECTS OF CAMERAS IN THE COURTROOM BY DISTRICT JUDGES WHO PARTICIPATED IN THE PROGRAM. A COPY OF THAT PART OF THE REPORT - TABLE 2 - IS APPENDED TO THIS WRITTEN TESTIMONY AND IS SUMMARIZED IN THE WRITTEN TESTIMONY SUBMITTED ON BEHALF OF THE JUDICIAL CONFERENCE.

THE RATINGS BY THE JUDGES WHO PARTICIPATED IN THE PROGRAM WERE BOTH FAVORABLE AND UNFAVORABLE. FOR ME, THE MOST DISTURBING RATINGS ARE THESE:

- 64% OF THE PARTICIPATING JUDGES REPORTED THAT, AT LEAST TO SOME EXTENT, CAMERAS MADE WITNESSES MORE NERVOUS.
- 46% OF THE JUDGES BELIEVED THAT, AT LEAST TO SOME EXTENT, CAMERAS MADE WITNESSES LESS WILLING TO APPEAR IN COURT.
- 41% OF THE PARTICIPATING JUDGES FOUND THAT, AT LEAST TO SOME EXTENT, CAMERAS DISTRACTED WITNESSES.
- 56% OF THE PARTICIPATING JUDGES FOUND THAT, AT LEAST TO SOME EXTENT, CAMERAS VIOLATED WITNESSES' PRIVACY.

THE FEDERAL JUDICIAL CENTER REPORT RECOMMENDED THAT THE JUDICIAL CONFERENCE "AUTHORIZE FEDERAL COURTS OF APPEALS AND DISTRICT COURTS NATIONWIDE TO PROVIDE CAMERA ACCESS TO CIVIL PROCEEDINGS IN THEIR COURTROOMS . . . ." THOSE RECOMMENDATIONS WERE REVIEWED AND APPROVED BY THE JUDICIAL CENTER STAFF, BUT WERE NOT REVIEWED BY ITS BOARD. AS YOU KNOW, THE JUDICIAL CONFERENCE DISAGREED WITH THE CONCLUSIONS DRAWN BY THE FEDERAL JUDICIAL

CENTER REPORT AND BARRED CAMERAS IN DISTRICT COURTS BECAUSE OF THE POTENTIALLY INTIMIDATING EFFECT OF CAMERAS ON PARTIES, WITNESSES AND JURORS.

BEFORE GRANTING OR DENYING AN APPLICATION FOR TELEVISION COVERAGE IN CASES BEFORE ME IN THE PILOT PROGRAM, IT WAS MY PRACTICE TO CONVENE A CONFERENCE OR TO ADDRESS THE MATTER AT THE FINAL PRETRIAL CONFERENCE. THE MOST COMMONLY ADVANCED OBJECTIONS DURING SUCH CONFERENCES WERE THESE:

1. ADVERSE EFFECT ON PARTIES. IN SOME CASES PLAINTIFFS WERE CONCERNED ABOUT DISCLOSING MATTERS OF AN EXTREMELY PRIVATE NATURE SUCH AS FAMILY RELATIONSHIPS, MEDICAL INFORMATION, AND FINANCIAL INFORMATION. DEFENDANTS EXPRESSED CONCERN ABOUT THE RISKS OF DAMAGING ACCUSATIONS MADE IN A TELEVISED TRIAL. IN AT LEAST ONE CASE, A DEFENSE ATTORNEY SAID THE THREAT OF A TELEVISED TRIAL WOULD CAUSE THE DEFENDANT TO CONSIDER SETTLEMENT REGARDLESS OF THE MERITS OF THE CASE FOR THE SOLE PURPOSE OF AVOIDING THE TELEVISION COVERAGE.

2. ADVERSE EFFECT ON WITNESSES. COUNSEL WERE CONCERNED THAT CAMERAS WOULD MAKE WITNESSES LESS WILLING TO APPEAR AND, WHEN IN COURT, WOULD MAKE WITNESSES MORE NERVOUS. THAT PRESENTS A REAL CONCERN FOR A TRIAL JUDGE. AS A RESULT, I WAS PREPARED TO DIRECT THAT THE TELEVISION CAMERA EITHER BE REMOVED FROM THE COURTROOM OR NOT BE OPERATIONAL DURING THE TESTIMONY OF ANY WITNESS WHO

OBJECTED TO THE CAMERA.

I APPROVED REQUESTS FOR TELEVISION COVERAGE IN 3 CASES - A PRODUCT LIABILITY CASE ON THE FIRST DAY OF THE PROGRAM, JULY 1, 1991, A CLASS ACTION ON BEHALF OF ALL STATE PRISONERS IN PENNSYLVANIA IN WHICH PRISON CONDITIONS WERE CHALLENGED AS UNCONSTITUTIONAL, AND A CASE FILED BY A REPUBLICAN CONGRESSMAN AGAINST A DEMOCRATIC LIEUTENANT GOVERNOR OVER THE FAILURE TO CALL A SPECIAL ELECTION AT AN EARLY DATE FOR THE CONGRESSMAN'S VACATED STATE SENATE SEAT. THERE WERE CAMERAS IN THE COURTROOM FOR ONE DAY OF THE PRODUCT LIABILITY CASE. THERE IS NO RECORD OF CAMERAS IN THE COURTROOM IN THE TWO OTHER CASES.

IN THE ONE CASE IN WHICH CAMERAS WERE PRESENT IN MY COURTROOM, THE PRODUCT LIABILITY CASE, THERE WERE NO OBJECTIONS TO THE TELEVISION COVERAGE EITHER FROM THE PARTIES OR FROM WITNESSES. I DID NOT ALLOW CAMERAS IN THE COURTROOM DURING JURY SELECTION. AFTER THE JURY WAS CONVENED, I ASKED WHETHER ANY JURORS HAD ANY OBJECTION TO CAMERAS IN THE COURTROOM WITH THE *PROVISO* THAT THE CAMERAS WOULD NOT FOCUS ON THEM. THEY HAD NO OBJECTIONS.

I WAS ALSO CONCERNED DURING THE PRODUCT LIABILITY TRIAL THE CAMERA WOULD BE IN THE COURTROOM ON ONE DAY AND THEN BE REMOVED, AND THAT IS EXACTLY WHAT HAPPENED - THE CAMERA WAS IN THE COURTROOM ONLY ONE DAY. ANTICIPATING THAT POTENTIAL PROBLEM, I TOLD THE JURORS THAT THERE WAS NO GUARANTEE THAT THE MEDIA WOULD

TELEVISE THE ENTIRE TRIAL AND THAT IT MIGHT BE "HERE TODAY AND GONE TOMORROW." I ALSO INSTRUCTED THEM THAT THEY WERE NOT TO CONCLUDE THAT EVIDENCE OR ARGUMENT PRESENTED DURING A TIME WHEN A CAMERA WAS IN THE COURTROOM WAS ANY MORE OR LESS IMPORTANT THAN ANY OTHER PART OF THE TRIAL.

OVERALL, THE VIEWS OF MY COLLEAGUES WHO PARTICIPATED IN THE CAMERAS IN THE COURTROOM PILOT PROGRAM WERE NOT UNFAVORABLE. HOWEVER, MOST OF THE JUDGES WHO COMMENTED WERE CONCERNED ABOUT THE ADVERSE IMPACT OF CAMERAS IN THE COURTROOM ON PARTIES, WITNESSES AND JURORS AND DEEMED IT OF CRITICAL IMPORTANCE TO RETAIN THE AUTHORITY TO DISAPPROVE OF USE OF CAMERAS, PARTICULARLY IN HIGH PROFILE CASES, AND TO LIMIT THE USE OF CAMERAS IN CASES SUCH AS BY NOT TELEVISING THE TESTIMONY OF A WITNESS WHO OBJECTED AND NOT FOCUSING ON JURORS. SOME JUDGES WHO PARTICIPATED IN THE PROGRAM WERE ALSO CONCERNED THAT THE MEDIA WOULD NOT BE INTERESTED IN TELEVISING AN ENTIRE PROCEEDING, AND WOULD USE ONLY SHORT SEGMENTS OF A PROCEEDING WITH VOICE-OVERS. I AM NOT GOING TO COMMENT ON THE EDUCATIONAL BENEFIT OF TELEVISING A SMALL PORTION OF A TRIAL EXCEPT TO SAY THAT IT WOULD BE VERY DIFFICULT TO PROVIDE MUCH VALUABLE INFORMATION ABOUT THE JUDICIAL SYSTEM IN THAT TYPE OF PRESENTATION.

MY PERSONAL VIEW IS THAT, AT THE TRIAL LEVEL, THE DISADVANTAGES OF CAMERAS IN THE COURTROOM FAR OUTWEIGH THE ADVANTAGES. IN SUCH A SETTING, THE CAMERA IS LIKELY TO DO MORE THAN REPORT THE

PROCEEDING - IT IS LIKELY TO INFLUENCE THE SUBSTANCE OF THE PROCEEDING. I SAY THAT BECAUSE OF THE CONCERNS I HAVE EXPRESSED REGARDING OBJECTIONS OF PARTIES TO TELEVISED PROCEEDINGS AND THE POTENTIAL IMPACT OF A TELEVISION CAMERA ON WITNESSES AND JURORS.

THE PARAMOUNT RESPONSIBILITY OF A DISTRICT JUDGE IS TO UPHOLD THE CONSTITUTION WHICH GUARANTEES CITIZENS THE RIGHT TO A FAIR AND IMPARTIAL TRIAL. IN MY OPINION, CAMERAS IN THE DISTRICT COURT COULD SERIOUSLY JEOPARDIZE THAT RIGHT.

News From:

U.S. Senator
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Statement of U.S. Senator Russ Feingold
At the Judiciary Committee Hearing
On Cameras in the Courtroom

November 9, 2005

Mr. Chairman, thank you for holding this hearing. I have supported allowing cameras in the courtroom for many years. I take this position for one simple reason - court proceedings are public hearings, and the American people have the right to actively observe the operations of all branches of our government.

Television plays an enormous role in providing information and bringing the country together. For decades, Americans have been able to watch virtually every significant event of national importance on television, except for proceedings of the judicial branch. Recently, through television, the eyes of America turned to this Committee for now-Chief Justice Roberts' confirmation hearings, and in just two months, they will see another such hearing. But once those hearings are over, the curtain comes down on the new Justices. The Committee hearings present the only opportunity for most Americans to see these important judges at work. Once confirmed, they essentially disappear from public view.

I think it is fair to say that interest in court proceedings has increased in the past decade, although there have been notorious trials and prominent Supreme Court arguments throughout our history. Now that the technology is readily available, the American people deserve the opportunity to see for themselves what goes on in our courts of law. It is no longer sufficient to offer the public second-hand accounts in the morning paper or evening news broadcasts. Through televised court proceedings, the American people can learn so much more about the operation of our judicial system.

Cameras in the courtroom will also increase transparency in government. When the workings of government are transparent, the governed can understand them more thoroughly and constructively, and more readily hold their elected leaders and other public officials accountable. These are tangible benefits that will flow from allowing cameras in courtrooms across our country. Except in the most rare and unusual circumstances, the public is entitled to see what happens in those proceedings.

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The possibility of televising trials raises some complicated issues, including the safety of witnesses and jurors and the rights of criminal defendants, witnesses, and jurors. Experience in the state courts – the majority of states now allow trials to be televised – has shown that it is possible to permit the public to see trials on television without compromising the defendant's right to a fair trial or the safety or privacy interests of witnesses and jurors. There is no question in my mind that the highly trained judges and lawyers who sit on and argue before our nation's federal courts would continue to conduct themselves with dignity and professionalism if cameras were recording their work.

There is no good argument, in my view, for keeping cameras out of appellate proceedings. And I am proud to cosponsor your bill, Mr. Chairman, S. 1768, relating to the Supreme Court in particular.

Cameras in the courtroom, including the Supreme Court, are long overdue. I hope this hearing will bring us closer to taking legislative action to accomplish this important goal.

UNITED STATES SENATOR • IOWA
CHUCK GRASSLEY

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Prepared Statement of Senator Chuck Grassley of Iowa
Senate Committee on the Judiciary
Hearing on Cameras in the Courtroom
Wednesday, November 9, 2005

Mr. Chairman, Senator Leahy, thank you for giving me this opportunity to testify on the need for greater openness in the federal courts. As the members of this Committee know, I've long championed legislation to open the federal courts to television cameras and other broadcast formats. Senator Schumer and I introduced the first Sunshine in the Courtroom Act in the 106th Congress. Over the years, the bill has enjoyed bi-partisan co-sponsorship. In fact, the Judiciary Committee passed the Grassley/Schumer bill three times since the 106th Congress.

Just a couple of months ago, Chief Justice Roberts, in his confirmation hearings, testified that he is open-minded about allowing cameras in the courtroom. Today's hearing should help supply him with the facts needed to make the decision to open the Supreme Court, as well as other federal courts, to cameras.

In fact, the House Judiciary Committee just passed out, by a vote of 20 to 12, the House companion bill introduced by Congressman Chabot.

The Grassley/Schumer Sunshine in the Courtroom Act will give federal judges the discretion to allow for the photographing, electronic recording, broadcasting, and televising of federal court proceedings. The bill will help the public become better informed about the judiciary process and produce a healthier judiciary. Increased public scrutiny will bring about greater accountability and help judges to do a better job. The sun needs to shine in on the federal courts.

In this room we often talk of the intentions of the Founding Fathers. Well, allowing cameras in federal courtrooms is absolutely consistent with our Founding Fathers' intent that trials be held in front of as many people as choose to attend. I believe that the First Amendment requires that court proceedings be open to the public and, by extension, the news media.

As the United States Supreme Court articulated in its 1947 decision in *Craig v. Harney*, "A trial is a public event." "What transpires in the court room," said the Court, "is public property." And as the Supreme Court stated in its 1980 ruling in *Richmond Newspapers, Inc., v. Commonwealth of Virginia*, "People in an open society do not demand infallibility from their institutions, but it's difficult for them to accept what they are prohibited from observing."

Beyond the First Amendment implications, enactment of our bill would assist in the implementation of the Sixth Amendment's guarantee of public trials in criminal cases. As the Supreme Court said in its 1948 *In re Oliver* opinion, "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon society, the guarantee has always

been recognized as a safeguard against any attempt to employ our courts as instruments of persecution." The Court stressed that "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."

Justice Louis Brandeis perfectly captured the essence of our bill when he wrote that, "Sunshine is the best disinfectant."

During this morning's hearing, we'll hear from opponents of cameras in the courtroom. Much of their opposition is based on speculation and faulty assumptions. That criticism ignores the findings of at least 15 state studies and a large federal pilot program.

The widespread use of cameras in state court proceedings shows that still and video cameras can be used without any problems, and that procedural discipline is preserved. According to the National Center for State Courts, all 50 states allow for some modern audio-visual coverage of court proceedings under a variety of rules and conditions. My own State of Iowa has operated successfully in this open manner for more than 20 years.

There are many benefits and no substantial detrimental effects to allowing greater public access to the inner workings of our federal courts. Fifteen states conducted studies aimed specifically at the educational benefits derived from camera access to courtrooms. They all determined that camera coverage contributed to greater public understanding of the judicial system.

Further, at the federal level, the Federal Judicial Center conducted a pilot program in 1994 which studied the effect of cameras in a select number of federal courts. That study found "small or no effects of camera presence on participants in the proceeding, courtroom decorum, or the administration of justice."

However, in order to be certain of the safety and integrity of our judicial system, we have included a 3-year sunset provision allowing a reasonable amount of time to determine how the process is working before making the provisions of the bill permanent.

It is also important to note that the bill simply gives judges the discretion to use cameras in the courtroom. It does not require judges to have cameras in their courtroom if they do not want them. The bill also protects the anonymity of non-party witnesses by giving them the right to have their voices and images obscured during testimony.

So, the bill doesn't require cameras, but allows judges to exercise their discretion to permit cameras in appropriate cases. The bill protects witnesses and does not compromise safety. The bill preserves the integrity of the judicial system. The bill is based on the experience of the states and the federal courts. And the bill's net result will be greater openness and accountability of the nation's federal courts. The best way to maintain confidence in our judicial system is to let the sun shine in by opening up the federal courtrooms to public view through broadcasting. And allowing cameras in the courtroom will bring the judiciary into the 21st century.

Mr. Chairman, thank you for affording me this opportunity to testify about the need for cameras in our federal courtrooms. I know that you share my goal of opening the federal courts to the public. Through the years, I have appreciated your support and co-sponsorship of the Sunshine in the Courtroom Act. Working together I hope we will see our goal accomplished.

-30-

United States Senate
Committee on the Judiciary
Hearing on "Cameras in the Courtroom"
November 9, 2005, 9:30 A.M.
Room 226, Dirksen Senate Office Building

Statement of Peter Irons, Ph.D., J.D.
Professor of Political Science, Emeritus
University of California, San Diego

Mr. Chairman, and Members of the Committee:

My name is Peter Irons, and I am a professor of political science at the University of California in San Diego, now emeritus. My field is constitutional law, and I specialize in the Supreme Court and constitutional litigation. I am also an attorney, and a member of the United Supreme Court bar. I thank the Committee for inviting me to speak in support of Senate Bill 1768.

My invitation to appear this morning, I understand, stems from my role—or perhaps, my notoriety—as the person who first released to the public, back in 1993, audio-tapes of Supreme Court oral arguments in 23 historic cases, including *Roe v. Wade, Miranda v. Arizona*, the *Pentagon Papers* case, and the *Watergate Tapes* case.

Let me first briefly explain the history of those tapes. Chief Justice Earl Warren initiated the audio-taping of Supreme Court oral arguments in 1955, recognizing their historic importance. The tapes were stored in the National Archives, with no restrictions on their use until 1986, when Fred Graham of CBS News obtained a tape of the arguments in the *Pentagon Papers* case and played excerpts on both television and radio, on the fifteenth anniversary of the Court's decision in that case. Chief Justice Warren Burger was displeased with Graham's actions, to say the least; he even asked the FBI to find out how Graham had obtained the tapes, which the agency declined to do. Burger then instructed the Archives staff to require any further requesters of the tapes to sign an agreement limiting their use to "private research and teaching," and prohibiting any duplication or distribution of the tapes.

Hardly anyone at that time even knew the oral argument tapes existed, or how to gain access to them, which was a time-consuming and expensive process. Back in 1978,

in an appellate advocacy class at Harvard Law School, our instructor played the tape of arguments in a 1958 case, *Kent v. Dulles*, which challenged the denial of a passport to an alleged Communist sympathizer. The arguments were fascinating, but I didn't think more about the tapes until 1991, when I directed the Earl Warren Bill of Rights Project at UCSD, designed to create innovative teaching materials for high-school and college classes on the Bill of Rights. I decided that providing students with edited and narrated versions of oral arguments in landmark Supreme Court cases would be a valuable educational project, so I visited the Archives and requested copies of tapes in cases I had selected for their importance and interest. When I arrived, I was asked to sign a document, headed "Exhibit A," containing the restrictions imposed by Chief Justice Burger. I had not known of these restrictions, but I considered them unenforceable and a violation of the First Amendment. These were public records, not classified or subject to the Privacy Act. The Archives staff, in fact, had objected to imposing these restrictions, bowing to Burger's threat to withhold tapes in the future.

At that point, I faced two choices: I could refuse to sign, and perhaps sue the Archives on First Amendment grounds, which might take years and be costly. Or I could sign "Exhibit A" and face any consequences for violating its terms. I chose the latter course, although I also informed the Court, in a letter to Chief Justice Rehnquist, about my plans for providing the edited and narrated tapes to schools and the public, through a non-profit publisher, The New Press. The Chief Justice raised no objection to my plans; in fact, I received a letter from his administrative assistant, telling me he endorsed this "educational" project.

Let me recount two little stories about what happened later. In August of 1993, just before my publisher released the oral argument tapes, I was being interviewed by Tim O'Brien of ABC television. During the interview, the telephone rang, with a call to Mr. O'Brien from the Court's public information officer. She read to him a statement that the Court was contemplating "legal remedies" against me for releasing these tapes. The statement said I had violated the terms of the document I had signed at the Archives, which the Court's statement said was a contract I had breached. I explained to Mr. O'Brien why I felt the document violated the First Amendment. Needless to say, that statement was news, and it was not only on national television that night but also in

newspaper headlines the next morning. The *Washington Post* headline said "Imminent Release of Court Material Rankles Court." The *Post* quoted Professor Laurence Tribe of Harvard Law School as saying, "These are clearly public documents. Why access should be limited to the few who are lucky enough to sit in the courtroom is beyond me." On the other hand, Professor Charles Fried of Harvard dismissed the tapes as "pure entertainment" and said their release might encourage "grandstanding" by lawyers who argued before the Court. However, the media reaction to this flap was overwhelmingly critical of the Court's response, including columns supporting me by William Safire and James J. Kilpatrick. Four months later, the Court backed down and removed all restrictions on distribution of the oral argument tapes, except for one person. The Court's clerk, General William Suter, sent a letter to the Archives saying that I could only copy more tapes with the Court's prior approval. This letter prompted another round of media criticism, and the Court promptly lifted that judicial bill of attainder. The Warren Project has subsequently produced three additional sets of edited and narrated oral arguments, on cases dealing with abortion, the First Amendment, and the rights of students and teachers.

My second brief story is also revealing, I think. In March of last year, I was standing in the bar members' line at the Court, waiting for admission to the chamber for oral arguments in the Pledge of Allegiance case, in which I had written an *amicus* brief. The Court's clerk, General William Suter, came over to introduce himself, and said, "You're the guy who released the tapes." To which I replied, "And you're the guy who threatened to sue me." But he then said, "You know, there are a several justices who have listened to these tapes and think this was a very educational project."

I mention these stories to illustrate the fact that, over time, resistance to public access to the Court's proceedings has not only diminished, but has been replaced with understanding that allowing the American people to hear the arguments in its chambers has not damaged the Court in any way. The audio-tapes that I produced for the *May It Please the Court* series have been played in thousands of classrooms, from middle schools through law schools. I have received hundreds of letters, phone calls, and e-mails from students and teachers who have shared their excitement at hearing these historic arguments. Let me quote a message from one teacher: "These tapes are fascinating! Regardless of how you feel about the issues involved, to hear the arguments

made on both sides, and the questions of the justices, is truly riveting. They make the Supreme Court come alive."

If the Committee will indulge me, I would like to use one minute of my time to let you hear a brief excerpt of Thurgood Marshall's argument in the Little Rock case in 1958, *Cooper v. Aaron.* (Excerpt of *Cooper v. Aaron* argument: "I think we have to think about these children and their parents, these Negro children that went through this every day, and their parents that stayed at home wondering what was happening to their children, listening to the radio about the bomb threats and all of that business. I don't see how anybody under the sun could say, that after those children and those families went through that for a year to tell them: 'All you have done is gone. You fought for what you considered to be democracy and you lost. And you go back to the segregated school from which you came.' I just don't believe it. And I don't believe you can balance those rights."

A few years ago, while I was working on a book about the *Brown v. Board of Education* cases, I visited all the schools involved in those cases, from Summerton, South Carolina, to Topeka, Kansas, meeting with social studies and American government classes. I played for these students excerpts from the Little Rock arguments. The students were enthralled, and some even cried when they heard Marshall's impassioned words. At Topeka High School, from which Linda Brown graduated, one student said, "I never thought I would hear anything like this."

My point here is very simple. If public access to audio-tapes of oral arguments has given us what William Safire called "a fascinating you-are-there experience and an ear to history in the making," I perceive no reason why the American people should not be able to see these arguments as well. As the Committee knows, television cameras are allowed in the courts of all fifty states, under varying guidelines, and the highest courts of states from Alaska to Florida provide television coverage of all their sessions. There is no evidence that televising these public proceedings has turned them into "entertainment" or prompted "grandstanding," as Professor Fried predicted. On the contrary, the experience of courts that allow television coverage of appellate arguments is that lawyers and judges alike are not distracted by the cameras, or even pay attention to them. And there is no evidence that releasing the audio-tapes of Supreme Court sessions has affected

the arguments of lawyers or questioning from the bench in any way. The public can even purchase DVD's in the Court's bookstore, entitled *The Supreme Court's Greatest Hits,* that contain sixty-two oral arguments, along with pictures and text.

In the past five years, the Court itself has released audio-tapes in six cases on the day of the arguments, including *Bush v. Gore* in 2000, the University of Michigan affirmative action cases in 2003, and the "enemy combatant" cases this past April. Television and radio stations have played excerpts of those arguments, along with pictures of the lawyers and justices, with no damage to the Court's reputation. Shortly after the *Bush v. Gore* arguments, Fred Graham, now of Court TV, talked with Chief Justice Rehnquist. According to Graham, "Rehnquist said he was very pleased with the reception that the playing of the Court's audio tapes had gotten. He said he watched it on television, and he thought it worked well—the way they put up the pictures that identified the justices and the lawyers who were speaking. He thought that the coverage communicated to the public what was happening in an extremely important case, and he was pleased."

If those arguments had been televised, I doubt that anything that was said in the Court's chamber would have been affected in any way by the cameras. I'm not an authority on video technology, and I won't advise this Committee or the Court on how television coverage might be arranged. But I do know, from my experience with the Court's audio-tapes, that students, teachers, and the American public have benefited from hearing them. One final word: this past Monday, I met with students in a judicial process class at Missouri State University in Springfield, who had listened to audio-tapes in the *May It Please the Court* series. I asked them if they would have preferred watching those arguments on video or television, and every student raised their hand. That's an unscientific, but I think very revealing, expression of opinion on this topic.

Contact information:

Peter Irons

Telephone: 530-284-6727

E-Mail: pirons@ucsd.edu

Subject: Re: query for chief judge schroeder
From: Chief_Judge_Schroeder@ca9.uscourts.gov
Date: Mon, November 7, 2005 11:36 am
To: pirons@weber.ucsd.edu
Priority: Normal
Options: View Full Header | View Printable Version

Peter,

Please forgive my delay in contacting you. I have been testifying myself lately.

We have had a policy for many years permitting television coverage of oral argument in civil cases, provided there is a timely request, there is no objection from the affected judges and there is only one camera. Most of our judges cooperate and many arguments have appeared on C-span at 4:00 a.m. on Sunday morning.

The most significant televised argument during my tenure as Chief was the California recall case. It was nationally televised, live and we received many, many favorable comments from both the public and the press that it helped open to the sunlight proceedings that are usually conducted with few members of the public able to attend. I insisted that all of the judges on the en banc court agree to the camera, and they all did, on very short notice, as the time constraints were severe. We issued our opinion the morning after argument, and I believe the entire experience was beneficial to the court and the public.

In my opinion the Supreme Court and the public would similarly benefit from at least experimenting with televised oral arguments in cases that, like the California case, are of intense public interest and are presented by counsel of the highest quality.

Sincerely,

Mary M. Schroeder
Chief Judge

David Madden/CE09/09/USCOURTS
10/25/2005 02:39 PM

To
Chief Judge Schroeder/CA09/09/USCOURTS@USCOURTS
cc

Subject
Fw: query for chief judge schroeder

C-SPAN
CREATED BY CABLE
OFFERED AS A PUBLIC SERVICE

Testimony of

Brian P. Lamb,

**Chairman and CEO
of the
C-SPAN Networks**

before the

U.S. Senate Committee on the Judiciary

November 9, 2005

For more than twenty-five years the C-SPAN Networks have used television to give the American people a front row seat to the official proceedings of their national government. We have applied our gavel-to-gavel style of coverage to countless hours of events featuring the Congress and the presidency, including Senate and House committee hearings, Senate and House floor proceedings, White House press briefings, presidential addresses, and many other events.

But in all that time we have *never* been able to show our audience the U.S. Supreme Court at work. Despite the significance of the Court's oral arguments and the high level of the public's interest in them, the courtroom door remains closed to television cameras. An unfortunate result is that the judiciary has become the invisible branch of our national government as far as television news coverage is concerned, and increasingly, as far as the public is concerned.

We believe the Supreme Court's oral arguments should be open to televised coverage.

400 North Capitol St. NW
Suite 650
Washington, DC 20001
202. 737. 3220

Testimony of Brian P. Lamb
Senate Committee on the Judiciary
November 9, 2005

As you know, Mr. Chairman, despite our view that the nation's highest court should be opened to television cameras, C-SPAN has not taken a position on the pending legislation that would compel the Supreme Court or the lower federal courts to permit cameras into their courtrooms. Whether the Congress should take such a step is not our decision. Instead, we are here today at your invitation to tell the Committee how the C-SPAN Networks would televise the Supreme Court if, by whatever means, that became possible.

If television cameras are allowed into the Supreme Court's chamber, *the C-SPAN Networks will give the Court the same quality and extent of coverage we now give to the daily legislative sessions of the Congress.*

In other words, we will televise all of the Court's oral arguments in their entirety on a gavel-to-gavel basis and without any interruptions, commentary or analysis. As a practical matter, we are not likely to provide live coverage of the oral arguments on a regular basis given the frequently overlapping schedules of the Court's sessions with the legislative sessions of the Senate and the House. But we will televise every minute of every argument on C-SPAN, C-SPAN2 or C-SPAN3 on a timely basis. And, we will be able to provide audio coverage on our local Washington, DC radio station WCSP-FM which is also available nationwide by means of the two satellite radio services.

This commitment to gavel-to-gavel coverage of the Supreme Court is one we make to our audience, and it is one with which we have some history. In 1988 when it seemed to us

(and others) the Court was open to the possibility of letting the cameras in, C-SPAN wrote to then-Chief Justice Rehnquist to say that we would televise every oral argument if given the opportunity. Seventeen years later we repeated that offer to Chief Justice Roberts in a letter delivered to him on October 3 of this year, the first day of the Court's current Term. [A copy of the letter is attached to this testimony.]

The C-SPAN Networks are comfortable in making this commitment to our audience because it advances our public service mission, and because our producers and crews have experience in covering oral arguments in federal courts. Between 1991 and 1994 when the Federal Judicial Conference experimented with allowing televised coverage of selected trial and appeals courts, we covered many arguments before the 2nd and 9th Circuit Courts of Appeals. Both circuits have continued to permit camera coverage since the conclusion of the experiment, and C-SPAN has continued to televise their arguments on an occasional basis. We also hold the distinction of being the first news organization to televise a federal court argument. In July 1989 the chief of the U.S. Court of Military Appeals (now the U.S. Court of Appeals for the Armed Services) permitted our cameras in to tape an argument on drug testing. Later, the same court (which is not subject to the federal courts' rules regarding television coverage) permitted our crew to provide live coverage of an argument challenging the military death penalty.

Moreover, in 1988 C-SPAN was part of a news media consortium that conducted a

demonstration in the Court's chamber of how an oral argument could be televised unobtrusively using two cameras, the Court's existing sound system and available light. In our recent letter to Chief Justice Roberts, we offered to organize a similar demonstration using the latest digital equipment. Included in that letter was our offer of the experience and expertise of our technical staff and producers in creating high-quality and discreet video coverage of arguments should camera coverage ever be permitted.

There is an additional and very important aspect of our coverage of the Supreme Court, were it ever to happen. If our cameras are let in to the Court's chamber, we would not only deliver the oral arguments to our national television and radio audiences, we would also be creating a permanent video and audio record that will be part of our archives and available to scholars of all kinds, and to the public, forever.

Finally, Mr. Chairman, there are many good arguments for televising the Supreme Court's public sessions, and the C-SPAN Networks have made them over the last twenty years in a variety of settings. But it seems to me the fundamental argument in favor of a televised Supreme Court is simply that an open government such as ours requires it. The justices of our highest court are public employees paid with public tax money who are conducting the public's business in a public building. They let the print press and a few members of the public who are in Washington, DC watch them at work. They should let the rest of the country do the same. At a time when most Americans get most of their

information about their government from television, it is simply unacceptable for the Supreme Court to shield itself from the public by keeping the cameras out. If the cameras are let in, the C-SPAN Networks will do our part. We will finally be able to complete the tripod of our comprehensive television coverage of the Federal government with the addition of the Judiciary.

C-SPAN
A PUBLIC SERVICE CREATED
BY AMERICA'S CABLE
TELEVISION COMPANIES

Brian P. Lamb
Chairman and Chief Executive Officer

October 3, 2005

BY HAND

The Honorable John G. Roberts
Chief Justice of the United States
The Supreme Court
1 First Street, N.E.
Washington, D.C. 20543

Dear Mr. Chief Justice:

Senator Arlen Specter's legislation and the several questions raised by other Senators during your confirmation hearings are indications of the great interest and raised expectations many people have regarding television access to the Court as you begin your tenure.

Knowing that you are well familiar with C-SPAN and our longstanding interest in this topic, I am writing to detail C-SPAN's commitment to coverage of the Court and to offer our technical expertise to you and the Court to help facilitate any exploration you may undertake of televised Court proceedings.

In 1988, C-SPAN committed to Chief Justice Rehnquist that if the Court would allow camera access, C-SPAN would televise every oral argument *in its entirety*, without editing and without commentary. Our commitment still stands.

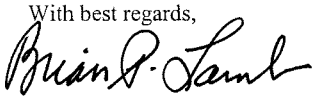
In 1988, we also participated in the first and only demonstration of television equipment in the Chamber. We would be pleased to organize a new demonstration using the latest digital equipment and would offer C-SPAN technical staff and producers to the Court for any consultation it may request regarding the equipment, logistics, and cost of televising arguments in the Chamber.

Our network's 26 years of experience in producing long-form television, combined with the quality and small size of today's digital television equipment virtually guarantee the Court a high-quality and discreet technical system.

400 North Capitol St. NW
Suite 650
Washington, DC 20001
202. 737. 3220

I have enclosed a description of C-SPAN's coverage of the federal judiciary and of our relationship with the Court over the past twenty years that demonstrates our commitment to complete and fair coverage of the Court. That commitment extends to assisting you in any way we can, should you wish to explore televised coverage of oral arguments.

With best regards,



Brian P. Lamb

Enclosure

CC: Kathy Arberg
Public Information Officer

The Supreme Court of the United States
and
The C-SPAN Networks

C-SPAN's Programming:

- Televise all major public speaking appearances of justices of the Supreme Court (that are open to camera coverage) on a gavel-to-gavel basis.

- At C-SPAN's request, the Court provided same-day audio coverage of the oral argument in Bush v. Palm Beach County Canvassing Board and in Bush v. Gore -- the 2000 presidential election cases. C-SPAN provided complete coverage of both oral arguments as they were released and again later in the day.

- C-SPAN provided complete audio-only coverage (with repeats) of the seven subsequent oral arguments the Chief Justice described as of such "heightened public interest" that the audio record was released on a same-day basis. These cases included the University of Michigan affirmative action case, and the campaign finance reform case.

- When cases of national interest are argued before the 2nd and 9th Circuit Courts of Appeal (the two federal courts that regularly permit camera coverage of oral arguments), C-SPAN provides gavel-to-gavel coverage.

- Produced and televised the historic and well-received public discussion featuring Associate Justices O'Conner, Scalia, and Breyer. The April 2005 event was sponsored by the National Archives and the Constitution Center (Philadelphia).

- Televise all Supreme Court nominee Senate confirmation hearings on a gavel-to-gavel basis, beginning in 1981 with the nomination of Sandra Day O'Connor.

- "America and the Courts," a weekly program since 1985, focuses on the judiciary with an emphasis on the Supreme Court. The series is an attempt to give C-SPAN's television audience as much information about the judicial branch despite infrequent camera access to courts in general, especially as compared with the legislative and executive branches of government.

C-SPAN's Relationship With the Court:

- In 1988 C-SPAN made a commitment to then-Chief Justice Rehnquist that if the Court were to allow camera access C-SPAN would televise the entirety of every oral argument scheduled by the Court. That commitment still stands.

- Also in 1988, C-SPAN joined other news organizations to organize a demonstration for the justices in the Court's chamber of the equipment and personnel required to provide good quality televised coverage of oral arguments.

- In 1991 C-SPAN was instrumental in advocating and then implementing a 4-year experiment authorized by the Judicial Conference to test television coverage of civil cases before two federal Courts of Appeal and six District Courts.

- For the last 20 years C-SPAN has regularly donated to the Court's archives videotape copies of its Supreme Court coverage. To date several hundred hours of coverage have been donated.

- In 1987 the Court permitted C-SPAN to originate live interview and call-in programs from its Press Room. The programs featured journalists, attorneys and Court staff discussing the work of the Court and its operations.

U.S. SENATOR PATRICK LEAHY

CONTACT: David Carle, 202-224-3693 VERMONT

Statement Of Senator Patrick Leahy,
Ranking Member, Senate Judiciary Committee
Hearing On Cameras In The Courtroom
November 9, 2005

As the son of a printer I come by my affection for the First Amendment honestly, and directly. As we hear the testimony from this distinguished panel on whether to allow the televising of federal court proceedings, I reflect upon my father, who instilled in me a profound respect for the freedom of speech which is at the foundation of our great democracy. I was lucky enough to grow up in Vermont, a place where the culture nourishes the love of liberty and press freedom. After all, Vermont held out in joining the Union until 1791, after the Bill of Rights was ratified and just a few years later, the citizens of Vermont vigorously supported Matthew Lyon in his fight against the Alien and Sedition Acts which was instrumental in the eventual overturning of the that act.

The freedoms guaranteed by the First Amendment are served not only by the press and speech, but also by ensuring that our citizens have access to the government. When I was a young man and a prosecutor, Vermont had a culture of open government in which we had the opportunity to speak with our elected officials and other leaders on a regular basis. While the values of transparency must always be balanced against security needs and the protection of personal privacy, the public will always have a right to know what their government is doing. I think we can all agree that our democracy works best when there is sunshine in government.

Yet, too often in recent years this balance has been skewed. Freedom and security are always in tension in our society, and especially so after the attacks of September 11. We all understand that protecting our national security requires that certain information be kept out of the public eye. But even before that terrible attack, we saw the Bush Administration drape a cloak of secrecy around all kinds of information. In 2001, President Bush signed a new Executive Order limiting the release of presidential records, despite the clearly stated intent of Congress that such records should become public 12 years after a president leaves office. Since this Administration took office, classification has greatly increased. More records are being classified and roped away from public and press access, at enormous cost to taxpayers, and fewer old records are being routinely declassified.

With the current Administration's dramatic shift towards secrecy, these have been tough times for the public's right to know. It is more important now than ever that we take steps not only to secure, but also to expand, access to government for all Americans. That is why I have continually supported efforts to make all three branches of our federal

government more transparent and accessible. Except for rare closed sessions, the proceedings of Congress and its Committees are open to the public and carried live on cable television and radio. Members and Committees also are using the Internet and Web sites to make their work available to their constituencies and the general public.

The work of Executive Branch agencies is subject to public scrutiny through the Freedom of Information Act, among other mechanisms. We must demand transparency from any government, but this Administration, with its penchant for secrecy, requires vigilant attention. This Administration's default position unfortunately has been secrecy and non-transparency, and at a great cost in accountability to the public and damage to the Freedom of Information Act, one of the cornerstones of our democracy. It establishes the right of Americans to know what their government is doing – or not doing. As President Johnson said in 1966, when he signed the Freedom of Information Act into law:

> "This legislation springs from one of our most essential principles: A democracy works best when the people have all the information that the security of the Nation permits."

Sadly, the Administration has tried to undermine the Act and, in so doing, has done harm not only the Act itself, but to the democratic principles it serves. In 2001, Attorney General Ashcroft reversed his predecessor's policy on FOIA. Janet Reno told the government, "When in doubt, disclose." John Ashcroft flipped this policy on its head, sending the message that government agencies should err on the side on non-disclosure and promising that the Department of Justice would defend those decisions to withhold information in the courts. In nearly every piece of legislation that touches on FOIA, we can count on government agencies or powerful special interests to work overtime to tack on statutory exemptions from FOIA.

The Bush Administration has tried to control the flow of information through the news media. It tried to limit or in some cases even prevent the press from documenting the death and destruction and deadly delay in the shameful aftermath of Hurricane Katrina. It blocked the publication of respectful photos of coffins holding the remains of American soldiers killed in Iraq. The Administration broadcast ads featuring Armstrong Williams, a conservative commentator, supporting the No Child Left Behind Act, without disclosing that it paid for Williams' endorsement. The Government Accountability Office found that the government engaged in illegal propaganda. And just days ago, a high-level White House official was indicted for lying to federal prosecutors in the CIA leak investigation. This last episode, which remains under investigation, is an incredible example of the government seeking to manipulate press coverage of a highly sensitive issue -- namely, why this Nation went to war in Iraq.

A vital democracy cannot afford to be spoon-fed information by the government that belongs to the people themselves. More can and must be done to increase access to government, such as the work I am doing with Senator Cornyn to improve the implementation of FOIA. Certainly, more can be done in the Third Branch. Although most judicial proceedings are open to those who can travel to the courthouse and wait in

line, emerging technology could invite the rest of the country into the courtroom. All 50 states have allowed some form of audio or video coverage of court proceedings, but the federal courts lag behind. I have cosponsored several bills to address this, including two bills currently pending, the Sunshine in the Courtroom Act of 2005 with Senator Grassley, and the Televising Supreme Court Proceedings Act, with Senator Specter. These bills extend the tradition of openness to the Nation's federal courts and can help Americans be better informed about the important decisions that are made there and how they are made.

In 1994, the Judicial Conference concluded that the time was not ripe to permit cameras in the federal courts, and it rejected a recommendation of the Court Administration and Case Management Committee to authorize the photographing, recording, and broadcasting of civil proceedings in federal trial and appellate courts. Today, the time is ripe. The First Amendment is one of the magnificent bequests of earlier Americans to all the generations that follow. These rights are a fragile gift, needing nurturing and protection by each new generation. We should use the technology available to this generation to give even greater effect to the guarantees of that Amendment and the free and open government it facilitates. It is time to let the sunshine into our federal courts.

I thank all of the witnesses who have exercised their First Amendment rights by sharing their thoughts with us today. The federal courts serve as a bulwark for the protection of individual rights and liberties and the Supreme Court is often the final arbiter of Constitutional questions which have a profound effect on all Americans. Allowing the public greater access to the public proceedings of the federal courts will allow Americans to evaluate for themselves the quality of justice in this country, and deepen their understanding of the work that goes on in the courts.

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United States Senate
Committee on the Judiciary

Hearing on:
"Cameras in the Courtroom"
Wednesday, November 9, 2005, 9:30 a.m.
Dirksen Senate Office Building Room 226
Washington, D.C.

Written Testimony of
DIARMUID F. O'SCANNLAIN
United States Circuit Judge
United States Court of Appeals for the Ninth Circuit
The Pioneer Courthouse
Portland, OR 97204

Chairman Specter and members of the Committee on the Judiciary. My name is Diarmuid O'Scannlain, United States Circuit Judge for the Ninth Circuit with chambers in Portland, Oregon. I have been invited to share my individual experiences with televised proceedings of the U.S. Court of Appeals for the Ninth Circuit and thus speak only for myself, except where I indicate that I am authorized to speak for the Judicial Conference of the United States.

I

Our court is one of two courts of appeals involved in a pilot program, under which audio equipment, still cameras, or video cameras, can be admitted to the courtroom upon request and with approval from the panel hearing the case. Since 1991 until last week we have logged 205 requests to allow media into oral arguments. Of these requests, the panels granted 133. A copy of this log is attached as an appendix to my written testimony. Video coverage has originated in at least four of our circuit courthouses: Seattle, Washington, Portland, Oregon, and San Francisco and Pasadena, California. Just to give some perspective, the Ninth Circuit has heard oral arguments in approximately 24,000 cases since 1991 – meaning that media requests for videotaping have been received in less than one percent of the total cases receiving oral argument!

To gain access to a Ninth Circuit courtroom, a member of the media with

cameras need only fill out a simple form requesting very basic information, a copy of which is also in the appendix. The Clerk of the Court then transmits the request to the panel, which can grant or deny the request by majority vote of the judges assigned to the case. The Ninth Circuit requires media representatives to obey modest guidelines which request proper attire, ban the use of flash photography or other potentially distracting filming, prohibit the broadcast of any audio conversations between clients and attorneys, and limit the total number of cameras that can be present for any single oral argument. These guidelines are also in the appendix.

The Committee might also be interested to know that the Ninth Circuit currently makes audio playback of all oral arguments available through its website the day after the hearing, and frequently provides a live audio feed of oral arguments in certain cases. Further, and this may not be generally known, all oral arguments (except in Anchorage, Alaska and Honolulu, Hawaii) are recorded on the court's internal videotaping system for the court's own records. In most of our courtrooms, the cameras are so tiny and unobtrusive as not to be noticeable. In our Portland, Oregon courtroom, the camera is hidden behind a grate.

II

I have personally had 44 requests to allow cameras in oral arguments in which I have been a panel member, of which nearly 80% have been granted. In other words, I have personally participated in 35 of appellate oral arguments which were videotaped in whole or in part or televised live, which experience is the basis of my testimony today. These requests range from high-profile attention-grabbers to the comparatively banal. Among the more "controversial" cases were Brown v. Woodland Joint Unified School District, which considered whether certain Sacramento area classroom activities required children to practice witchcraft, in violation of the First Amendment. Another First Amendment case was Separation of Church & State v. City of Eugene, where the panel had to consider whether a cross constructed in a public park violated the Establishment Clause.

Understandably, cases involving elections and the right to vote have generated substantial public interest and press coverage. For example, I sat as part of a limited en banc panel of 11 judges in a very high-profile live video coverage of a case evaluating whether the California recall election of Gray Davis should be enjoined as a violation of the Fourteenth Amendment because of the use of "punch-card" balloting machines. Similarly, the limited en banc panel in the case

of Bates v. Jones, also televised live, considered whether California's term limits violated the First and Fourteenth Amendments.

While our court does not allow media access to oral arguments in direct criminal appeals, criminal cases – even those dealing with the technical minutiae of the law – sometimes grab the public interest as well. In Dyer v. Calderon, videotaped, not live, another limited en banc panel on which I sat, considered whether in a habeas corpus case, a convicted murderer received a fair trial when one of his jurors lied during voir dire. Similarly, Tolbert v. Gomez, a videotaped limited en banc argument, considered the effect of peremptory challenges of African-American jurors.

You may be interested to know that not all cases where the media requested camera coverage were so flashy. The en banc panel in Bins v. Exxon considered whether an employee benefits plan administrator has a duty to inform participants that it is considering a mere proposal for more generous retirement benefits under the Employee Retirement Income Security Act (ERISA). Dry as it may sound, C-Span requested permission to videotape, and did so.

On two occasions, I have voted to grant blanket requests to tape court proceedings as well. For example, in December, 2004, the San Francisco Bureau of the News Hour with Jim Lehrer requested and received permission to film all

cases in Courtrooms 1 and 3 of the San Francisco courthouse on a certain day. As with individual cases where permission was granted to allow media coverage, the whole affair created no inconvenience and snippets were used as part of a special Public Broadcasting program on the Ninth Circuit.

Of course, not every request to bring media into the courtroom has been allowed. Panels, perhaps motivated by concern for the parties, have occasionally shunned cameras. For example, in Compassion in Dying v. Washington, the panel grappled with whether a state statute criminalizing the promotion of suicide violated the Fourteenth Amendment and refused to allow Court TV camera coverage. Similarly, in Planned Parenthood v. Miller, dealing with the infamous "WANTED" posters picturing doctors employed at abortion clinics, the en banc court denied C-Span's request to videotape. Some judges will vote to deny video access unless assured that the media will broadcast the tape on a gavel-to-gavel basis. Indeed, just last weekend C-Span aired the entire oral argument in Planned Parenthood v. Gonzales, a partial birth abortion case argued several weeks ago.

III

Let me address briefly some concerns expressed with regard to cameras in appellate courts. To the public at large, most oral arguments must be awfully boring. Hearing judges pepper attorneys about obscure bits of legislative history

and the construction of mysterious language in bureaucratic regulations does, one must admit, lack the excitement of the popular courtroom television dramas or even a live trial.

The concern has also been expressed that attorneys or (dare I say it) judges might grandstand before the cameras. My experience, fortunately, has been that as a general rule my colleagues and practitioners have acted with the civility and decorum appropriate to a federal appellate courtroom, by and large resisting the temptation to play to the television audience.

Similarly, I believe that concerns over politicization and the effects of public pressure are overstated. Federal judges, of course, have life appointments, greatly insulating them from political pressures and public disapproval – a fact the Ninth Circuit's steady stream of controversial opinions makes clear! Further, unlike television dramas, oral arguments in federal appellate courts are typically followed by several months of deliberation and opinion-writing before any final disposition is reached. Even if the public is riveted by oral arguments, unlikely in itself, the measured pace of the appellate decision-making process alleviates public pressure even further. I should add that, some of my federal judge colleagues are concerned about the increased security risk that camera exposure might invite in highly emotional cases.

Contrary to the politicization concern expressed by camera opponents, I believe that greater media access might *depoliticize* appellate proceedings and the public's perception of the appellate legal process, not the other way around. When barred from the courtroom, the news media is able only to report on court *holdings*, rather than *process*. This propagates the unfortunate view that appellate courts are results-oriented bodies, rather than thoughtful, deliberative error-correcting panels engaged in technical analysis and the application of legal reasoning. In my personal experience, selective television coverage of appellate oral arguments is perfectly compatible with the federal judicial function. To this end, I endorse the conclusions reached in the Federal Judicial Center's study of media coverage of federal civil proceedings: judges should be free to allow camera access to proceedings.

I believe the Ninth Circuit's pilot program has reflected well on the work performed by courts in general, and ours in particular, and I express my sincere hope that your committee will allow appellate courts to share their work with the public along the lines of the Ninth Circuit experiment. While some of my appellate colleagues are occasionally – and perhaps properly – circumspect in allowing cameras into the courtrooms, my general experience has been overwhelmingly positive.

IV

I appear before you today both in my individual capacity, supportive of cameras in appellate courtrooms, and on behalf of the Judicial Conference of the United States which generally opposes cameras in trial courtrooms. My personal testimony relates solely to the use of cameras in federal appellate courtrooms. I have never served as a trial court judge except on limited occasions, and I cannot confidently testify as to the impact of the media in trial settings. Trial courts and appellate courts differ in important respects, primarily the presence of victims, witnesses, and juries. For this reason, I have serious concerns regarding the placement of cameras in trial courts and suggest that questions about cameras in trial courts be directed to my district court colleague from Pennsylvania, Judge Jan DuBois.

On behalf of the Judicial Conference I have been asked to present written testimony to the committee specifically with respect to S.829 which also appears in the appendix at pages 40-65.

Thank you Mr. Chairman. I will be happy to take any questions that you may have on the use of cameras in the Circuit appellate setting.

TESTIMONY OF HENRY S. SCHLEIFF, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, COURTROOM TELEVISION NETWORK LLC

BEFORE THE SENATE JUDICIARY COMMITTEE – WEDNESDAY, NOVEMBER 9, 2005

Chairman Specter, Ranking Member Leahy and Members of the Committee – my name is Henry Schleiff and I am Chairman and Chief Executive Officer of Court TV – our nation's only television network dedicated to providing a window on the American system of justice – and, in such capacity, I am both delighted and honored to testify before your committee, which is considering legislation that would permit the proceedings of our Federal Courts and perhaps, those of the United States Supreme Court, to be televised.

This committee – the Senate Judiciary Committee – need not, of course, be reminded that our trials and courtroom functions are open to the public, and, therefore, to the press. A long and unbroken line of decisions from the United States Supreme Court, have well established the doctrine – that victims, jurors and parties all have rights to privacy – but, except in extraordinary circumstances, that these rights cannot supersede public and media access to our courtrooms. Indeed, our Founding Fathers were, themselves, well aware of the importance and need for this openness: it is not by accident that they built a system of justice on four great pillars – an independent judiciary; the right to trial by jury (both established in Article III of the Constitution); rights of due process for defendants (established by the Fifth Amendment); and, an open court system scrutinized by a free press (recognized in the First Amendment), where as Justice Oliver Wendell Holmes well said, "every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed." *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884).

In holding that the First Amendment requires that all criminal trials be open to the press and public, absent compelling and clearly articulated reasons for closing such proceedings, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 & n.17 (1980), the Supreme Court relied on historical precedent, taking great pains to rest its conclusion upon historical tradition, dating back to the "days before the Norman Conquest." 448 U.S. at 565. Throughout the middle ages and during the American colonial period, the Court noted, "part of the very nature of a criminal trial was its openness to those who wished to attend." *Id.* at 568. Members of the community always possessed the "right to observe the conduct of trials." *Id.* at 572. But, as the Court in *Richmond Newspapers* realized, in the twentieth century "access to observe" only goes so far. Space constraints and changing times simply preclude the vast majority of Americans from physically attending trials and, therefore, from observing them. Thus, "[i]nstead of acquiring information about trials by first-hand observation or word of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense this validates the media claim of functioning as surrogates for the public." 448 U.S. at 572-73.

I believe that all citizens – not just the print press or those few who can fit into a courtroom – should be able to watch their judicial system in action. To suggest otherwise would be to penalize citizens for having had the misfortune to have been born in an age of greater population, and densely-packed urban areas, where courtrooms cannot accommodate that change. In that respect, the age-old arguments against cameras in courtrooms seem increasingly specious in the 21st century. Indeed, there can be no reasonable argument that advances in technology, such as smaller and unobtrusive cameras, merely expand the experience of being in the courtroom to the greater community, thereby allowing it to observe

the functioning of the judicial branch, making "public trials" truly public, as was intended by the Founders.

Certainly, our system of jurisprudence and, especially, our constitutional history of providing public trials, is an essential element not only of our democracy but, of freedom, itself. And, just as the United States, today, represents a beacon of freedom, we should also allow that light to shine on the example that our own courtrooms provide. Our system is not perfect but, certainly, it is one of which we can – and, should – be proud, especially, in our on-going efforts to preserve justice and freedom, around the world: indeed, it seems only appropriate that, as citizens of this great nation, we should have the benefit of being able to see this process, in our own homes, as it unfolds in our own nation's courtrooms.

The importance to our citizens of allowing cameras in the courtroom is, really, two-fold: it enhances public scrutiny of the judicial system which, in turn, helps assure fairness of court proceedings, thereby promoting public confidence in the government itself; Justice Louis Brandeis said it this way, "sunshine is the best disinfectant." Secondly, it increases our citizen's knowledge about how the third branch of the government functions: because television is the principal vehicle through which most people get their news, it only follows, that this same vehicle be employed as a tool to inform the electorate about this branch. Our democratic society is based upon the rule of law, and if citizens are given the opportunity to see lawyers, judges and juries – firsthand – working at the business of doing justice, much of the mystery will be removed…and, replaced with the confidence, it deserves. Because of

these reasons, we vigorously support the proposed legislation[1] which would open the courthouse doors to cameras and let the sun shine in.

Certainly, camera coverage of government proceedings is nothing new in the United States. Both houses of this Congress have already opened up their own chambers to television cameras. This legislation would, accordingly, provide that the third branch of our federal government, the judiciary, be given the opportunity to take a similar step. Of course, as proposed in the draft legislation (at Section 3(a) on page 2 of S. 829) – and, as long supported by Court TV – trial judges should be given the discretion in their courtrooms to determine whether to permit a camera in a particular trial. That is an important and practical

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[1] The comparable legislation in the House, H.R. 2422, which was introduced by Representatives Steve Chabot and William Delahunt on May 18, 2005, itself rests upon the fundamental principles of the Bill of Rights, and is supported by these findings:

(1) The right of the people of the United States to freedom of speech, particularly as it relates to comment on governmental activities, as protected by the first amendment to the Constitution, cannot be meaningfully exercised without the ability of the public to obtain facts and information about the Government upon which to base their judgments regarding important issues and events. As the United States Supreme Court articulated in Craig v. Harney (1947), "A trial is a public event. What transpires in the court room is public property."

(2) The right of the people of the United States to a free press, with the ability to report on all aspects of the conduct of the business of government, as protected by the first amendment to the Constitution, cannot be meaningfully exercised without the ability of the news media to gather facts and information freely for dissemination to the public.

(3) The right of the people of the United States to petition the Government to redress grievances, particularly as it relates to the manner in which the Government exercises its legislative, executive, and judicial powers, as protected by the first amendment to the Constitution, cannot be meaningfully exercised without the availability to the public of information about how the affairs of government are being conducted. As the Supreme Court noted in Richmond Newspapers, Inc. v. Commonwealth of Virginia (1980), "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."

(4) In the twenty-first century, the people of the United States obtain information regarding judicial matters involving the Constitution, civil rights, and other important legal subjects principally through the print and electronic media. Television, in particular, provides a degree of public access to courtroom proceedings that more closely approximates the ideal of actual physical presence than newspaper coverage or still photography.

(5) Providing statutory authority for the courts of the United States to exercise their discretion in permitting televised coverage of courtroom proceedings would enhance significantly the access of the people to the Federal judiciary.

(6) Inasmuch as the first amendment to the Constitution prevents Congress from abridging the ability of the people to exercise their inherent rights to freedom of speech, to freedom of the press, and to petition the Government for a redress of grievances, it is good public policy for the Congress affirmatively to facilitate the ability of the people to exercise those rights.

(7) The granting of such authority would assist in the implementation of the constitutional guarantee of public trials in criminal cases, as provided by the sixth amendment to the Constitution. As the Supreme Court stated in In re Oliver (1948), "Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution. 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.".

safeguard, given the sensitive nature of some trials – and, it further ensures that the appropriateness of the camera is considered by the court, on a case-by-case basis. The bill also provides robust safeguards to protect witnesses, similar to those found in the bill passed just last month, on October 27, by the House Judiciary Committee. On the request of any witness at a trial other than a party to the case, the District Judge involved must order the face and voice of the witness to be disguised or obscured in a manner that renders the witness unrecognizable to the television audience (see Section 3(b)(2)(A) on page 3 of S. 829). While I believe that there is little evidence, as I discuss below, that witnesses are intimidated by the presence of a camera, this precaution ensures that no party will lose necessary evidence from a witness reluctant to face the camera.

The acceptance of cameras in court has now come full circle, as the limitations were virtually non-existent at the beginning of the 20th century. Until 1935, cameras and newsreel photographic equipment were widely permitted in trial court proceedings. For example, cameras and newsreel photography and radio microphones were permitted at the historic 1924 trial of Leopold and Loeb, argued by the now legendary Clarence Darrow, and the 1925 trial of John T. Scopes, the so-called "monkey trial," in which Darrow and William Jennings Bryan served as opposing counsel.

In the mid-1930s, attitudes toward in-court coverage of judicial proceedings changed dramatically, when Bruno Richard Hauptmann was accused, convicted and subsequently executed for the kidnapping and slaying of the 18-month-old son of Charles Lindbergh. The Hauptmann trial generated immense public interest, and immense photographic and radio coverage, both in-court and out-of-court.

In response to what one observer called the "Roman Holiday" surrounding both the in-court and out-of-court media coverage of the Hauptmann trial, a national backlash emerged against the use of photographic equipment in, and the radio broadcasting and photographic publishing of, court proceedings. As part of that backlash, in 1937, the House of Delegates of the American Bar Association adopted Canon 35, which admonished judges to prohibit the taking of photographs in courtrooms and the broadcasting of court proceedings. According to Canon 35, such activities "degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted." In 1952, the House of Delegates of the American Bar Association amended Canon 35 to proscribe televised court proceedings. In the mid 1960s, 49 states barred television trial coverage by statute, court rule and/or adoption, in sum and substance, of Canon 35.

But, during the last several decades, as television news grew and technology advanced, states began to authorize, by statutes and/or rules, the audio-visual recording and televising of in-court proceedings, including trial court proceedings. The substance of the statutes and/or rules varied by state. Some authorized coverage on an experimental basis; others on a permanent basis. All included a variety of procedural protections for trial court participants, restrictions on the kind and scope of coverage, and restrictions on type of equipment to be used. By the late 1990s, 48 states had adopted rules and/or statutes allowing cameras into courtrooms, 37 of them permitting the televising of criminal trials.

Now, as we move into the 21st century, in the United States today, all 50 states now allow cameras in some courts, generally at the appellate level – 43 states permit cameras in their civil trial courts – and, of those, 39 states permit cameras in their criminal trial courts: as you can see, there is, clearly, a growing consensus that having cameras in courtrooms serves the

public interest. Since 1991, Court TV has covered more than 900 U.S. trials and legal proceedings, providing more than 30,000 hours of courtroom coverage. We have always made a special effort to televise trials that involve issues of great importance and interest to the American people, and we believe that many of the people who have watched these trials have gained an enhanced respect for the justice system and an improved understanding of American society and law.

The judicial proceedings Court TV has covered have raised serious social, political, cultural and economic questions. Some of the trials have been widely covered in the press; others reported on Court TV have been far less covered elsewhere. The underlying thought in all cases is the same, to capture the public workings of the justice system as accurately as possible, thereby seeking to vindicate the Supreme Court's teaching that "[a] trial is a public event. What happens in the courtroom is public property." Craig v. Harney, 331 U.S. 367, 374 (1947).

While a listing of over 900 cases covered by Court TV would take far too much space and time, that coverage has included the following:

(a) **Libya v. Great Britain and United States** (The International Court of Justice, the Hague, 1992). Court TV aired live coverage of a hearing in a case brought by Libya against Britain and the US related to the 1988 bombing of Pan Am Flight 103 which killed 270 over Lockerbie, Scotland.

(b) **Michigan v. Kevorkian** (Michigan State Court). Court TV aired coverage of the criminal trials of Dr. Jack Kevorkian, who was accused of violating state laws criminalizing assisted suicide and euthanasia. The defendant was acquitted on several occasions, and convicted on one. Subsequently, Court TV aired live coverage of the oral arguments before the Michigan appellate courts on the question of the constitutional right to commit suicide.

(c) **Massachusetts v. LeFave** (Massachusetts State Court 1998). Coverage of evidentiary hearing at which defendant, convicted of child abuse in 1987 on testimony of minor, successfully set aside conviction based upon body of scientific evidence demonstrating that children's memories more susceptible to suggestion than previously believed.

(d) **Paramount Communications, Inc., Viacom, Inc., et al. v. QVC Network, Inc.** (Delaware Supreme Court, 1993). Court TV aired live coverage of oral arguments in an appeal from a lower court ruling that had invalidated parts of a merger agreement between Paramount Communications and Viacom, Inc. The Delaware Supreme Court affirmed.

(e) **Gregory K v. Ralph K, et al.** (Florida State Court 1992). Court TV aired live coverage of a suit brought by an 11-year old who sought to "divorce" his parents so he could be adopted by his foster parents.

(f) **Michigan v. Abraham** (Michigan State Court 1999). Live coverage of murder trial of 13-year old, the youngest person in American history tried as an adult for murder. Defendant was convicted of lesser charge.

(g) **Carter v. Brown & Williamson** (Florida State Court 1996). Coverage of civil suit brought by ex-smoker seeking damages for product liability against tobacco company. Jury found for plaintiff.

(h) **Jeffries v. Harrelston et al.** (Federal District Court, N.Y., 1993). Court TV aired live coverage of the trial of Leonard Jeffries, a professor dismissed from an administrative post by the City University of New York for having given a speech in which he made racist and anti-Semitic remarks. The Plaintiff recovered damages and reinstatement. A federal appeals court decision affirming in part and reversing in part was subsequently vacated by the Supreme Court.

(i) **Dipaolo v. New York Blood Center** (New York State 1995). Live coverage of civil trial in which plaintiffs sued blood center for allegedly providing HIV-infected blood transfusions; defendant asserted that standard test to determine infection had not been developed until after plaintiff's transfusions. The jury found for plaintiff against the blood center, but determined attending physician (also a defendant) not to be liable.

(j) **Goetz v. William Kunstler and Carol Communications** (New York State 1995). Taped coverage of libel action brought by Bernhard Goetz against William Kunstler and the publisher of Kunstler's 1994 autobiography. Action was dismissed by the Court.

(k) **Kaplan v. Chamberlain** (New York State 1993). Coverage of a dispute arising out of a surrogate motherhood contract.

(l) **Lajoie v. Coleco** (1991). Coverage of a suit alleging that defendants had negligently manufactured a swimming pool, causing a permanent spinal injury. The jury found defendants 10% at fault and awarded plaintiff damages accordingly.

(m) **New York v. Cotton** (1996). Taped coverage of criminal trial in which economics teacher was accused of demanding payments from students in exchange for higher grades. Defendant was convicted.

(n) **New York v. Cox** (1994). Coverage of the trial of a defendant accused of murder, who claimed temporary incapacity due to his alcoholism. The judge declared a mistrial after one juror refused to convict.

(o) **New York v. Ferguson** (New York State 1995). Live coverage of the criminal trial of Colin Ferguson, who had opened fire with a handgun on a crowded Long Island Railroad commuter train . Defendant was convicted.

(p) **New York v. Hampton** (New York State 1992). Coverage of the trial of a defendant accused of harassing the playwright John Guare. The defendant claimed that Guare had stolen his life story for Guare's award-winning play "Six Degrees of Separation." Defendant was acquitted of one charge and there was a hung jury on the other.

(q) **New York v. King** (New York State 1991). Coverage of criminal proceedings brought against several defendants, who had conducted an AIDS protest in front of St. Patrick's Cathedral. The defendants were convicted.

(r) **New York v. Mercer** (New York State 1994). Coverage of the trial of a championship boxer who was accused of attempting to bribe an opponent into losing a fight between the two. The defendant was acquitted.

(s) **New York v. Miller, Rucco, Lewis** (New York State 1996). Taped coverage of trial of three nuns accused of trespass as they protested practice of electronic fingerprinting of welfare recipients. The defendants were acquitted.

(t) **New York v. Pulinario** (New York State 1997). Live and taped coverage of murder trial of rape victim, who asserted, for the first time in New York, "rape trauma syndrome" defense. Defendant was convicted.

(u) **New York v. Reza** (New York State 1992). Coverage of the trial of a prominent physician, who was accused of murdering his wife. The defendant invoked a "psychiatric defense," claiming that professional and community responsibilities had led him to commit the crime as a way of punishing himself. He was found guilty of second-degree murder.

(v) **Pacheco v. City of New York** (New York State 1992). Coverage of a suit brought by parents of a student shot by a classmate. Plaintiffs alleged that the Board of Education had negligently allowed students to carry handguns in public schools. The jury found for the plaintiff.

(w) **Random House v. Gemini Star Productions** (New York Sate 1996). Live coverage of suit brought by publishing company against actress Joan Collins, alleging breach of contract. The jury returned a partial verdict for plaintiff and ordered certain payment to defendant.

(x) **Zichemrman v. Korean Airlines** (New York Federal Court 1992). Coverage of a suit brought by relatives and the estate of a victim killed when the Soviet Union shot down one of the defendant's airplanes. The plaintiffs prevailed.

(y) **Zion v. New York Hospital** (1994). Live coverage of trial in civil suit brought by writer Sidney Zion against New York Hospital alleging wrongful death of his 18-year-old daughter. The jury found decedent to be 50% responsible for her own death; the hospital was found to be negligent with respect to the workload assigned to one of its physicians but that the negligence was not a proximate cause of decedent's death. The court subsequently set aside a portion of verdict.

(z) **New York v. Boss, Mcmellon, Carroll And Murphy** (2000) – Live from Albany. Four New York City police officers were accused of shooting and killing West African immigrant Amadou Diallo. The officers, members of the elite Street Crime Unit, were each charged with two counts of second-degree murder and one count of reckless endangerment and faced 25 years to life if convicted. Prosecutors claimed the officers, who were looking for a rape suspect at the time, fired 41 shots at the unarmed Diallo. The defendants believed Diallo was reaching for a gun when they shot him. The four defendants were acquitted.

(aa) **Nevada v. Murphy And Tabish** (2000) – Live from Las Vegas. Authorities said Sandy Murphy, a former topless dancer, and her beau, Rick Tabish, forced heroin down former casino owner Ted Binion's throat and then watched him die. Two days later, Tabish was caught digging up $4 million in silver that Binion had buried in an underground vault. Defense attorneys argued the evidence was circumstantial; there were no witnesses. They also claimed that Binion asked Tabish, a business associate, to remove the silver as a favor. Both were convicted of all charges and were sentenced to life in prison with the possibility of parole in 20 years.

(bb) **Georgia v. Lewis, et al.** (2000) – Live from Atlanta. NFL Pro Bowl linebacker Ray Lewis was charged with murder in the fatal stabbing of 2 young men outside an Atlanta nightclub. Lewis and his entourage were seen speeding away from the club in a stretch limousine around 3am on January 31, following a Super Bowl bash. Two of his friends who were in the limousine were also charged. Lewis pleaded guilty to obstruction of justice, a misdemeanor, and was sentenced to 12 months probation. As part of the plea, Lewis testified against his co-defendants, Joseph Sweeting and Reginald Oakley, who were acquitted.

(cc) **North Carolina v. Carruth** (2001) - Former Carolina Panthers wide receiver Rae Carruth, 26, faced the death penalty for allegedly plotting to kill his pregnant girlfriend in November 1999l allegedly because he did not want the baby. Carruth's son Chancellor was delivered via Cesarean section the night his mother, Cherica Adams, 24, was gunned down in her car. Carruth was acquitted of murder charges, but found guilty of conspiracy to commit murder, shooting into an occupied vehicle and using an instrument to destroy an unborn child. Carruth was sentenced to more than 18 years in prison.

(dd) **Massachussets v. Greineder** (2001) – Prosecutors alleged that world-renowned physician Dirk Greineder was so obsessed with Internet porn and prostitutes that he fatally beat and stabbed his wife during an early morning walk after she learned of his alternative lifestyle. Greineder maintained that Mable was attacked by an unknown assailant. Greineder, a prominent allergist and asthma specialist, who was on the advisory board at Harvard Medical School was convicted and given a mandatory sentence of life in prison.

(ee) **Massachusetts v. Junta** (2002) - Live from East Cambridge. In a case that focused the nation's attention on the behavior of parents at their children's sporting events, Thomas Junta was convicted of involuntary manslaughter for brutally killing his son's hockey referee in July 2000. He was sentenced to 6-10 years in prison.

(ff) **California v. Westerfield** (2002) - Live from San Diego - David Westerfield faces kidnapping and murder charges in the death of 7-year-old Danielle van Dam. The second-grader disappeared from her room in the middle of the night Feb. 1. Her body was found more than three weeks later off the side of a road. Westerfield, 50, lived two doors from the van Dams and police found the girl's blood in Westerfield's recreational vehicle and on his jacket. Police also found child pornography in his home and suspect a sexual motive. Prosecutors are seeking the death penalty.

(gg) **North Carolina v. Peterson** (2003) – Live from Durham. Novelist Michael Peterson was accused of beating his wife, Kathleen Peterson, to death on December 9, 2001. He claimed that his wife of five years fell down the steep rear stairwell of their Durham home following a night of celebrating a movie deal that he had signed. Prosecutors told jurors that Peterson concocted a "fictional plot" to make it look like his wife fell down the stairwell. Prosecutors also alleged that

Peterson also was responsible for the death of his then-neighbor, Elizabeth Ratliff. After her death, which also occurred at the bottom of a staircase, Peterson became guardian of her daughters, Martha and Margaret, who supported him throughout the trial. Peterson was convicted of murder and sentenced to life.

(hh) **New Jersey v. Williams** (2004) - Live from Somerville. Former basketball player Jayson Williams was charged with aggravated manslaughter for killing a limousine driver and then covering up the crime to make it look like a suicide. The defense contended the shooting was an accident, that the shotgun may have malfunctioned. Williams shot Costas "Gus" Christofi on Feb. 14, 2002, while giving houseguests a midnight tour of his sprawling Hunterdon County estate after a night out. Williams was acquitted of aggravated manslaughter but found guilty of hindering apprehension or prosecution, tampering with evidence, tampering with a witness, and fabricating evidence.

(ii) **South Carolina v. Pittman** (2005) – Live from Charleston. Christopher Pittman, 15, claimed the antidepressant Zoloft drove him to kill his grandparents in 2001. The trial was among the first cases involving a youngster who says an antidepressant caused him to kill. The trial also came at a time of heightened scrutiny over the use of antidepressants among children. But prosecutors called the Zoloft defense a smokescreen, saying the then-12-year-old Pittman knew exactly what he was doing when he shot his grandparents, torched their house and then drove off in their car. Prosecutors said the motive for the crime was the boy's anger at his grandparents for disciplining him for choking a younger student on a school bus. Prosecutors pointed to Pittman's statement to police in which he said his grandparents "deserved it." Pittman was found guilty of murder and sentenced to 30 years in prison.

(jj) **Ohio v. McCoy** (2005) – Live from Columbus. Charles McCoy admitted committing a string of highway shootings -- one of which killed a woman -- but claimed he was innocence by reason of insanity. McCoy was charged with 12 shootings that terrified Columbus-area commuters over five months in 2003 and 2004. The defense admitted McCoy was behind the shootings, as well as about 200 acts of vandalism involving dropping lumber and bags of concrete mix off of overpasses. But his attorneys insisted he did not understand his actions were wrong because he suffered from untreated paranoid schizophrenia. The case focused on two psychiatrists who disagreed whether McCoy met the legal definition of insanity: that a severe mental illness prevented him from knowing right from wrong. The jury deadlocked and a mistrial was declared.

(kk) **Mississippi v. Killen** (2005) – Live from Philadelphia. Four decades after three civil rights workers were murdered for registering black voters in rural Mississippi, 80-year-old Edgar Ray Killen stood trial for triple homicide. Federal authorities pursued conspiracy charges against Killen and 18 others in 1967, but only seven were convicted. Killen's trial ended in a hung jury. Killen continues to stand by his alibi that he was at a wake at the time of the murders. In addition, he denies ever being a member of the Ku Klux Klan, which the 1967 trial proved carried out the murders. But state authorities argue that a transcript from the federal trial shows Killen coordinated the killings. The transcript includes testimony from now deceased witnesses, which will be read at the trial. He was found guilty of manslaughter.[2]

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[2] Without the ability to televise federal cases, the American public was unable to view, among other trials: Martha Stewart's trial for making false statements to a federal agent; the trial just concluded in Harrisburg, PA challenging the teaching of "Intelligent Design" in the schools; the so-called Whitewater trial of Susan MacDougal for fraud and conspiracy, and her subsequent trials for contempt, embezzlement, and obstruction of justice; and the Arthur Anderson accounting/fraud trial.

Moreover, in the fifteen years that Court TV has been televising trials, no judgment in the United States has been overturned because a television camera was in the courtroom. One has to look back over forty years, when television was in its infancy and cameras were still generally prohibited, to find a case to the contrary, and that case predicted the future of cameras in court. In 1965, the United States Supreme Court, by a mere 5-4 margin, reversed a criminal conviction based in part on a determination that the televising of the pre-trial hearing and portions of the trial had prejudiced the defendant. *Estes v. Texas*, 381 U.S. 532 (1965). Four members of the Court, responding to the argument that television technology and the public's reliance on television news would continue to advance, stated that "we are not dealing here with future developments", nor with "the hypothesis of tomorrow", but with "the facts as they are presented today." *Id.* at 551-52. Justice Harlan's dispositive concurring opinion struck a similar note: Limiting his agreement with the majority to the facts of the case, he observed that:

> "the day may come when television will have become so commonplace an affair" as to "dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives," he concluded, "the constitutional judgment called for now would of course be subject to re-examination." 381 U.S. at 595-96.

When *Estes* was decided, audio-visual technology was crude, and cameras and other recording devices frequently intruded upon the dignity and conduct of courtroom proceedings with noisy cameras, bright klieg lights, snaking cables, and numerous technicians scurrying about the courtroom. In 1965, judges, juries, witnesses, counsel and parties to a proceeding could rightly claim to feel self-conscious, intimidated or distracted by the presence of the crude technology, and by the knowledge that they were being filmed and would be seen by a television audience.

By contrast, Court TV and other broadcasters today employ a single, stationary camera, which produces no noise and requires no lighting other than existing courtroom lighting. The camera is placed away from the proceedings and, if necessary, it can be operated by remote control. Wiring is unobtrusive. Microphones are small and are never operated in such a way as to record conversations between attorneys and clients; they are turned off during all parts of the proceedings that are not part of the public record. Thus, the electronic media routinely record trial court proceedings without disturbing in the slightest the serenity of those proceedings. The fact is that cameras may well be less intrusive than the sketch artist's drawing pad or even the print reporter's pen and paper, and cameras provide *all* of the public with the opportunity observe trial proceedings first hand. Not only is there no "reasonable likelihood" that the simple presence of a modern in-court camera will "disparage the judicial process," but also there can be no question that television has "become so commonplace an affair," that the day foreseen by Justice Harlan has arrived.

As part of the movement during the past two decades to allow in-court coverage of trial court proceedings, more than half the states and the Federal Judicial Council itself have formally studied and evaluated the effects of the televising of such proceedings, some jurisdictions having conducted more than one such evaluation. These studies have examined the impact of audio-visual coverage on the dignity of the proceedings, the administration of justice, and on the effect of in-court cameras upon trial participants, including witnesses, jurors, attorneys, judges and other interested parties. The evidence assembled by all of these studies demonstrates that television coverage does not disrupt trial court proceedings or impair the administration of justice. Moreover, these studies demonstrate that televised coverage of trials provides substantial benefits to the public.

Copies of the four studies conducted in the State of New York, two studies conducted in the State of California (one of which was concluded in 1997 – *after* the OJ Simpson trial), and studies conducted by several other states, as well as the study conducted by the Federal Judicial Counsel itself, have all been submitted to this Committee.

The conclusions of the 1997 New York study are worth noting here. That study found, among other things, that:

(i) *Research has not revealed any appellate decision "overturning a judgment, verdict, or conviction based on the presence of cameras at trial."* (emphasis added)

(ii) "Our review . . . did not find that the presence of cameras in New York interferes with the fair administration of justice."

(iii) "The record developed by this Committee does not show that the fears regarding the impact of cameras on trial participants have been realized in New York during the experimental period."

(iv) "[W]itness intimidation is neither borne out by the record in New York nor sufficiently strong to warrant barring cameras from the courtroom across-the-board..."

(v) Claims that jurors will watch televised coverage of their case and will be influenced either by commentary about the case or by evidence ruled inadmissible and not presented to the jury were unsupported.

(vi) "[W]e have no basis from our review to conclude that lawyers in camera-covered cases in New York State have failed to serve their clients and the public responsibly. The evidence from the record before this Committee is that they have met their professional obligations."

(vii) "In the end, we are left with a record heavily weighted with opinions which suggest that judicial conduct may improve rather than worsen in the presence of cameras. There is no basis in this record to conclude that judges will not faithfully discharge their responsibilities if courtrooms are open to cameras. The evidence before this Committee is that they have met their obligations with a high degree of competence."

(viii) "[W]e believe that openness and the public access to information about trials afforded by television works is a safeguard, not a threat, to the defendant's rights."

Of additional significance is the fact that cameras in the courtroom can keep "sound bites" in context and thus provide the least sensational and most unfiltered form of coverage. Why? – because, the camera permits the public to follow a trial, moment by moment, enabling them to better understand the verdict. Indeed, in Court TV's experience, coverage of high profile cases been no different than other cases. We have found that regardless of the publicity generated by the case, virtually every case proceeds in the appropriate manner regardless of the presence of television cameras. Where there is a "media circus" it is occurs outside he courtroom, whereas the camera consistently reveals the proceedings themselves going forward in a solemn, decorous manner. As the Florida Supreme Court has noted,

"newsworthy trials are newsworthy trials, and . . . they will be extensively covered by the media both within and without the courtroom whether [cameras are permitted in the courtroom] or not." *In re Petition of Post-Newsweek Stations*, 370 So.2d 764, 776 (Fla. 1979).[3]

One of the best known examples of this happened in a case that attracted national attention: the trial, only five years ago, of four New York City police officers charged in the shooting death of an unarmed man, whose name was Amadou Diallo.

Judge Joseph Teresi, the trial judge assigned to that case, understood the importance and value of having the public in New York City witness the trial, after it was moved to Albany. When the televised trial resulted in the acquittal of the police officers, the public's acceptance of the verdict was widely attributed to the fact that the public had been able to watch and listen to the proceedings unfold with their own eyes and ears. The *Diallo* judge rightly concluded that televising the trial would be the best way to show that all parties were given a fair trial – and, as such, his decision helped defuse a potentially dangerously charged situation. After the verdict, then New York City Mayor Rudolph Giuliani commended the trial

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3 Sensational trials are not even creatures of the television era. The twentieth century was not yet eight years old when it hosted its first "trial of the century": that of Harry K. Thaw, who murdered famed architect Stanford White on the rooftop of the original Madison Square Garden. *See New York Times*, Jan. 23, 1907, *quoted in* Paul R. Baker, *Stanny: The Gilded Life of Stanford White* 340, 385-97 (1989). Television had not yet been invented; yet "the nation hung on every word of [Thaw's] trial[], a trial that hinged on the arcane testimony of experts and seemed to go on forever." Frank Whelan, *Hanging on Every Word: Trial in 1907 for Architect's Slayer Was as Sensational as the O.J. Simpson Case Today*, Morn. Call, June 26, 1995, at D1, 1995 WL 9494748. Testimony recounting sexual relationships of the two men, including of a purported rape, led Congress and President Theodore Roosevelt to seek to ban as obscene the press' coverage and transcripts of her testimony. Baker, 387-88.

It is a regrettable fact that prejudicial publicity has accompanied trials. But the solution to its potential problems is not to curb reporting, whether good or bad, print or video, sensational or rational. As every trial lawyer knows, the solution lies with the power and judgment of the trial judge, who may invoke a variety of "curative devices" to lessen the risk of prejudice, including, for example, the most probing *voir dire* of prospective jurors to ensure that they are able to discharge their responsibilities free from the effect of prejudicial publicity; sequestering or partially sequestering the jury, or, where it does not do so, admonishing the jury and witnesses, as often as necessary and on pain of contempt, not to read, watch or listen to any press reports

judge for opening the courtroom to cameras, stating: "I commend the judge for opening the courtroom to cameras, because people can make their own judgment about this case. They don't have to listen to my views of it, they don't have to listen to opposing views of it, or anyone else's. They had the opportunity to listen and to see and to observe all of the witnesses; to observe the judge and the way in which he conducted the case; to sit by and listen to all the analysis the jury went through; and, they can draw their own judgment. And I believe that fact alone – the camera and the television coverage of it – has changed the minds of a lot of people about what happened."

Finally, I should note that some Justices of the Supreme Court have, over the years, claimed that allowing cameras in the courtroom would cause them to lose their personal anonymity and, perhaps, lessen the Court's aura or moral authority. However, I would submit that where no witnesses or other parties are involved, just lawyers arguing to other lawyers – albeit, lawyers dressed in robes – about issue which may fundamentally affect our daily lives, such as affirmative action, personal choice, religious freedom or our civil rights - the potential loss of anonymity would seem to be a fair price to pay. Moreover, I believe the Court's moral authority, itself, would, in fat, not be diminished but, rather, enhanced by observing the intelligent and dignified manner in which oral arguments are presented and addressed in our complete, gavel to gavel, coverage of such proceedings.

Indeed, a glance back at the disputed presidential election of 2000 is sufficient. By allowing delayed audio broadcast of the historic oral arguments before the Supreme Court in the case that ended the 2000 presidential election dispute, Chief Justice Rehnquist recognized the great public interest in access to notable judicial proceedings. While that case was unique in many ways, it demonstrated unequivocally the need for the American public to hear the

arguments before the Supreme Court in other significant cases involving issues potentially as wide ranging as abortion, terrorism, human rights - including gay rights, and the separation of church and state, among others.

After all, the Supreme Court is not, only, our highest court – it is America's Court. We have the right to see and hear – our Court – decide issues of importance to all Americans. I do hope this is, exactly, what now Chief Justice John Roberts had in mind in his favorable response to Senator Grassley, during his confirmation hearings, regarding his willingness to be open minded on this very issue. In fact, I believe Americans should not just be allowed, but actively encouraged, to watch the workings of the most powerful court in the world.

In closing I would say this to the Committee: The American people deserve to see their judicial system in action, at all levels. The American people deserve to see this window on its system of justice now opened – and, for the sun to shine in, upon it. Indeed, the American people deserve to have cameras permitted in our nation's federal courtrooms.

Statement of
The Honorable Charles E. Schumer
United States Senator
New York

November 9, 2005

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STATEMENT OF SENATOR CHARLES E. SCHUMER
HEARING ON CAMERAS IN THE COURTROOM
November 9, 2005

Chairman Specter, Ranking Member Leahy, thank you for scheduling this hearing on an issue that is of tremendous importance to the American people and their ability to meaningfully participate in our great democracy. Public interest in our court system is higher than ever, and that is a good thing because our democracy is stronger when public participation is strong.

Yet no branch of our government has remained as great a mystery to everyday Americans as our federal courts. That is a shame, because the decisions of our courts and the judges who sit on them – judges who have lifetime appointments – have tremendous consequences for our lives.

No case has had as profound an effect on the lives of Americans as when the Supreme Court helped decide the Presidential election five years ago in Bush v. Gore. We all remember that case, and no matter which side you were on, you were riveted every step along the way. With the Bush v. Gore case, the Court also made history in another way. For the first time in its history, the Court released an audiotape immediately after the proceedings. That tape was broadcast all over television and all over the radio. Millions of Americans listened intently, just to get a feel for what was going on inside the hallowed halls of the Supreme Court.

Ask any one of them if they would have liked to have the opportunity to watch the proceedings, and the answer would have been an overwhelming "yes."

That is why I am proud to co-sponsor this bill with my colleague, Senator Grassley, that could lift the veil of mystery from our federal courts. This legislation would permit federal trials and appellate proceedings to be televised, at the discretion of the presiding judge. As Justice Louis Brandeis said, "Sunlight is the best disinfectant." That's what this bill is all about.

The reason for this bill is openness. Courts are an important part of our government, and the more people know about how government works, the better. But the federal government lags far behind the states when it comes to televising court proceedings. My own home state of New York has allowed certain trials to

be televised for over a decade, and it has been a great success.

It has been successful even in cases that have aroused strong passions. Cameras were allowed in the courtroom for the trial of four New York police officers in the death of Amadou Diallo. That trial was moved from the Bronx to Albany, but the judge in that case permitted live TV coverage, which allowed anyone who was interested to watch the entire trial, whether they lived in the Bronx or anywhere else.

The camera in that courtroom was not disruptive. The lawyers acted professionally and the rights of the witnesses were not curtailed. Witnesses and jurors were not intimidated by the single camera in the room.

Those who oppose letting cameras in the courtroom have argued that televising trial proceedings will somehow diminish the dignity of the courtroom. I think this fear is misplaced.
In fact, in a democracy such as ours, the more our government institutions are shown to the public, the more dignified they become, and the more the public comes to understand them.

Allowing cameras into our courtrooms will help demystify them and let the public evaluate how well the system works. Only then can the public decide, based on facts and real knowledge, what changes need to be made.

Finally, I agree that there are some instances in which cameras are not appropriate. This bill takes care of that by granting discretion to the judge. If for any reason the judge thinks that televising a trial would be harmful, whether because it might be unfair to the defendant, or because there are privacy issues for certain witnesses, the bill gives the judge power to ban cameras from the courtroom. It also allows witnesses to request that their voices and images be obscured during testimony.

The risk here isn't turning courtrooms into a circus or unduly invading someone's privacy. The risk is the danger we pose to our society and our democracy when we close off our institutions to the people they are supposed to serve.

- TOP OF THIS PAGE
- RETURN TO HOME

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