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SUNSHINE IN THE COURTROOM ACT OF 2007

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

H.R. 2128

SEPTEMBER 27, 2007

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SUNSHINE IN THE COURTROOM ACT OF 2007

THURSDAY, SEPTEMBER 27, 2007

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
WASHINGTON, DC.

The Committee met, pursuant to notice, at 1:13 p.m., in room 2141, Rayburn House Office Building, the Honorable William D. Delahunt (acting Chair) presiding.

Present: Representatives Delahunt, Sutton, Davis, Smith, Coble, Gallegly, Chabot, Keller, Issa, Forbes, King, Franks, Gohmert, and Jordan.

Staff present: Diana Oo, Majority Counsel; Michael Volkov, Minority Counsel; and Matt Morgan, Majority Staff Assistant.

Mr. DELAHUNT. [Presiding.] The Committee will come to order.

And without objection, the Chair is authorized to declare a recess.

Since 1946, photographing and broadcasting of Federal District Court criminal and civil proceedings have been prohibited by a directive of the Judicial Conference. Federal appellate courts, in contrast, have been authorized by the conference to use their discretion in determining whether to allow electronic media coverage of appellate arguments.

Currently, only the 2nd and 9th Circuit Courts of Appeals permit cameras in their courtroom. In recent years, however, there has been growing public interest in having all Federal judicial proceedings televised, which may reflect a greater general desire for transparency as well as heightened interest in certain well-publicized cases.

Today's hearing provides an opportunity for us to consider H.R. 2128, the "Sunshine in the Courtroom Act of 2007," which would allow the presiding Federal District Court or appellate court judge to permit electronic media coverage of court proceedings.

I would like to acknowledge my friend, Steve Chabot, for his leadership on this issue—and he has joined us on the dais—and for closely working with myself and others to get us to this point.

It is my hope that this hearing will shed some sunlight on the following issues.

First, would this measure help promote greater understanding of the judicial process by the public by making it more transparent? It is vital to our democracy that the public understand the critical role that our Federal judicial system plays in our system of open Government with respect to protecting the rights of all citizens. Greater transparency also helps enhance the public's trust and con-

fidence in the judicial process. As Judge Louis Brandeis once said, "Sunshine is the best disinfectant."

Second, would the measure grant access to Federal judicial proceedings in a way that promotes fairness? Many believe that the constitutional right to a fair trial requires that all court proceedings be open to the public, including the press. They cite, for example, the Supreme Court's ruling in *Richmond Newspapers v. Virginia,* which held, "The right to attend criminal trials is implicit in the guarantees of the First Amendment." Similar statements could be made with respect to civil trials.

Third, would the measure undermine due process and privacy rights of participants in Federal judicial proceedings by opening them to intrusive electronic media? We should be appropriately careful that media coverage of these proceedings not impair the fundamental right of a citizen to a fair and impartial trial.

The prospect of public disclosure of all personal information may have a material effect on our individual's willingness to testify or place an individual at risk of being a target for retribution or intimidation. Likewise, the safety and security of our judges, law-enforcement officers, and other participants in the judicial process should not be jeopardized. Accordingly, we should take all proper precautions to ensure that the privacy of all participants in the judicial process is appropriately protected.

I look forward to having an informative and illuminating discussion on the advantages and disadvantages of electronic media coverage of our court proceedings.

[The bill, H.R. 2128, follows:]

I

110TH CONGRESS
1ST SESSION

H. R. 2128

To provide for media coverage of Federal court proceedings.

IN THE HOUSE OF REPRESENTATIVES

MAY 3, 2007

Mr. CHABOT (for himself and Mr. DELAHUNT) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To provide for media coverage of Federal court proceedings.

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

SECTION 1. SHORT TITLE.

This Act may be cited as the "Sunshine in the Courtroom Act of 2007".

SEC. 2. FEDERAL APPELLATE AND DISTRICT COURTS.

(a) DEFINITIONS.—In this section:

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

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

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

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

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

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

(1) AUTHORITY OF APPELLATE COURTS.—

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

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

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

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

(2) AUTHORITY OF DISTRICT COURTS.—

(A) IN GENERAL.—

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

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

(I) upon the request of any witness (other than a party) in a trial proceeding, the court shall order the face and voice of the witness to be disguised or otherwise obscured in such manner as to render the witness unrecognizable to the broadcast audience of the trial proceeding; and

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

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

(B) NO TELEVISING OF JURORS.—The presiding judge shall not permit the televising of any juror in a trial proceeding.

1 (3) ADVISORY GUIDELINES.—The Judicial Con-
2 ference of the United States may promulgate advi-
3 sory guidelines to which a presiding judge, at the
4 discretion of that judge, may refer in making deci-
5 sions with respect to the management and adminis-
6 tration of photographing, recording, broadcasting, or
7 televising described under paragraphs (1) and (2).
8 (4) SUNSET OF DISTRICT COURT AUTHORITY.—
9 The authority under paragraph (2) shall terminate
10 3 years after the date of the enactment of this Act.

○

Mr. DELAHUNT. I would now recognize the Ranking minority Member of the full Committee for his opening statement, Mr. Lamar Smith.

Before I do, and for those of you who are frequently in attendance at these hearings, I am not Chairman John Conyers.

With that, Mr. Smith?

Mr. SMITH. All right. Thank you, Mr. Chairman.

First of all, it is nice to have my friend from Massachusetts serving as Chairman of the hearing today, and I ought to point out he is serving as Chairman of a hearing in which we have had the largest number of witnesses that we have had all year long, I believe. So you all are setting some kind of a record here today.

I also, Mr. Chairman, want to thank all my colleagues on this side of the podium for their conscientious attendance today, and, Mr. Chairman, we will do our best to restrain ourselves from offering any motions that would in any way delay the hearing today. But I do appreciate the good attendance on this side.

Mr. Chairman, I appreciate having today's hearing to examine the issue that you have mentioned. Legislation to authorize television cameras in the Supreme Court, Appellate Courts and District Courts do raise many questions. For example, does placing cameras in Federal courtrooms trivialize and commercialize what is a serious and often personally stressful time?

The Judicial Conference cites the potential harm to the judicial system after studying this subject for years in a variety of contexts. By and large, they feel cameras in the courtroom are incompatible with the administration of justice.

Some judges are concerned about protecting each citizen's right in a fair and impartial legal setting. They do not want to sacrifice this duty on the altar of media curiosity. They argue that the right to justice in a courtroom, especially at trial, distinguishes the use of cameras in a judicial setting from their use in legislative, administrative and ceremonial proceedings.

So how could a television camera compromise a fair trial? Some lawyers and judges are no less likely to play to the cameras than some Members of Congress. Of course, I do not have anybody specifically in mind. Others, like witnesses, might be intimidated by the camera. Either outcome—grandstanding or intimidation—could diminish the ability of a court to seek the truth and administer justice.

There are also significant safety concerns. Judges, prosecutors, court reporters, courtroom deputies, jurors, witnesses and even law clerks could be identified during televised broadcasts. These men and women could easily become targets for attempts to influence the outcome of the trial or the object of retribution for an unpopular ruling.

The public has a right to know what is said and what happens in courtrooms, and, for more than 200 years, the media has provided the public with in-depth coverage of judicial events. A zone of privacy should be considered out of respect not only for the plaintiffs and defendants, but also for the dignity and decorum of the courtroom itself.

I know the intent of the supporters of this legislation is to create greater transparency in the Federal judiciary. Their motives are

worthy, particularly the motives of my colleague, Steve Chabot, on the Committee here and my colleague from Texas, Ted Poe. Nevertheless, this legislation, in my judgment, does have the potential to weaken our court system by denying litigants and the public fair trials and just outcomes.

Mr. Chairman, I look forward to hearing from all of today's witnesses, and I will yield back the balance of my time.

Mr. DELAHUNT. I thank the gentleman for yielding.

And I would call upon my colleague, the primary sponsor of this legislation with whom I have worked for several years now, the gentleman from Ohio, Mr. Chabot.

Mr. CHABOT. Thank you very much, Mr. Chairman, and I want to commend you for the wisdom contained in your opening statement. I thought it was well thought out, well reasoned, well delivered and agreed with you in toto.

Mr. DELAHUNT. I thought it was pretty good myself, Steve. [Laughter.]

Mr. CHABOT. And I would like to thank the distinguished Chairman and the Ranking Member for agreeing to hold this hearing, and this is one of the very few things that I think the Ranking Member of this Committee and I just do not see eye to eye on, but most things we do. This is just one we differ on.

I would also like to thank Mr. Delahunt, as I said, for his support and leadership on this bill. We have worked together on this for more years than I would like to admit at this point in time, but, eventually, we will get there. Whether it will be this Congress or not remains to be seen, but there is no question in my mind that ultimately cameras will be permitted within the Federal courts all the way up to the U.S. Supreme Court, as far as I am concerned, and should be, and I know Congressman Poe, former Judge Poe, will be speaking about that here shortly.

During the markup of H.R. 660, the Court Security Improvement Act of 2007, concern was expressed about the lack of process that this particular bill, the Sunshine in the Courtroom Act of 2007, had received during this particular Congress. Although this bill has either been introduced or offered as an amendment at least since the 105th Congress, which is, you know, 10, 11 years ago, I think holding this hearing today is important, and I will make my remarks relatively brief here.

As I have said on each of the other occasions, hardworking, taxpaying citizens have the right to see their Government at work. The bill that we are examining today, H.R. 2128, would extend this policy to the Federal courts by giving Federal appellate and district court judges the discretion—and let me repeat that—the discretion—to allow media coverage of courtroom proceedings.

It does not make the judges do it. It says they have the discretion, if they deem it to be appropriate. And some, obviously, still oppose that, but I want to emphasize this does not force the cameras in the courtroom. The judge has discretion over that.

At the same time, this bill incorporates the necessary safeguards to ensure that due process rights are preserved. That request by nonparty witnesses to disguise their features and voices are granted—I believe that was Mr. Nadler that suggested that, and we

agreed with him and complied with that—and that televising of any juror is prohibited.

In addition, the discretion provided to Federal judges under this amendment expires at the end of 3 years—and I do not recall the Member that suggested that. It might have been Mr. Coble, but it was somebody that suggested 3 years, so we incorporated that as well—allowing us to revisit, to make any changes, if necessary.

So, if any of the horrors that some folks think could occur if we put cameras in the Federal courtrooms occur, we can always go back and undo the damage that we have done. Now I do not think there is going to be a bit of damage, but, nonetheless, there is that safeguard in case of the slight chance that something goes wrong.

And, again, let's remember in the House and the Senate, none of us was on television, and we are just as pompous on TV or off TV. I do not think it has made a bit of difference. I think my colleague here mentioned the Senate, but I have to say the House Members are——

Mr. ISSA. That is an——

Mr. CHABOT. I guess they do.

But there is no doubt that trials are public events. In *Craig v. Harney,* the Supreme Court held that, "A trial is a public event. What transpires in the courtroom is public property."

Although the Judicial Conference guidelines currently prohibit cameras in Federal district courts, every State allows for some form of cameras in the courtroom. They do not in the District of Columbia, but every State, all 50, do.

I believe that it is good public policy for Congress to facilitate through media access to the courts the ability of citizens to exercise their freedom of speech, freedom of press and their right to petition the Government for redress of grievances, the very rights acknowledged by the Supreme Court in Harney.

Lifetime tenure for unelected officials conveys a tremendous amount of power. Why shouldn't our constituents be allowed to observe the conduct of Federal judges and their proceedings from their homes or from work? Why should citizens be forced to rely on the news media to interpret and filter the proceedings when cameras would allow citizens to watch and interpret for themselves?

As a co-equal branch of the Federal Government, the Federal judiciary has a responsibility to those who appear before it and to the public. The judiciary is not above the other two branches, nor should it be treated that way. The citizens of this Nation have the right to see how our Federal courts conduct business.

I look forward to hearing from our witnesses today, and I, again, want to thank both the Chairman and the Ranking Members for giving us the opportunity.

And I yield back the balance of my time.

Mr. DELAHUNT. Thank you, Mr. Chabot.

And without objection, other Members' opening statements will be included in the record.

We have a distinguished group of witnesses before us today.

Our first witness is Congressman Ted Poe who is a second-term Republican from Southeast Texas, Second Congressional District. As an Assistant District Attorney for 8 years, he tried hundreds of cases, including capital cases, and never lost a jury trial.

Well done, Congressman Poe.

Later as a judge, he garnered national media attention for his "poetic justice" in sentencing criminals. His innovative punishments included ordering thieves to carry signs in front of the stores from which they stole.

I understand that the congressman has a busy schedule today. For those of you that are unaware, he also is a congressional delegate to the United Nations, which is a very demanding responsibility and task. So what I am going to do is to recognize Congressman Poe now to make his statement, and it is my understanding that after he concludes his statement, he will ask to be excused.

Congressman Poe?

TESTIMONY OF THE HONORABLE TED POE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Mr. POE. Thank you, Mr. Chairman.

And as the other United Nations delegate from Congress, I appreciate the opportunity to address this panel.

Americans have the right to a public trial. The right dates back to the founding of this Nation, and it is based on our values of fairness and impartiality.

The more open and public a trial is, the more likely justice will occur. I believe this theory. That is why we do not have the secret Star Chamber in the United States. The right to a public trial is reserved for a defendant, but the public sees it as their right to be informed as well. Cameras enhance the concept of fairness and openness in a courtroom.

Any American can walk into a courtroom to observe the proceeding, but if the person does not physically fit inside the courtroom, that person is denied the ability to see and observe the same proceeding. That does not make sense. Placing a camera in the courtroom would allow the trial to be more public just like a trial is supposed to be.

While Federal court hearings are open to the public, not everyone can attend a court hearing. This is certainly true of appellate and Supreme Court hearings. Because of the impact of the United States Supreme Court's rulings on all Americans, those proceedings especially should be filmed.

Probably of all court proceedings, the Supreme Court proceedings are the most misunderstood by the public, and the Supreme Court should make that decision whether to be filmed or not in their discretion. It is time to allow cameras in our Federal courts, of course, at the discretion of those Federal judges.

I personally know how important it is to make a courtroom and the proceedings and trials accessible by camera to the public because I did it. For 22 years, I served as a State felony court judge in Houston, Texas.

I heard over 25,000 felony cases and presided over a thousand jury trials. I was one of the first judges in Texas to allow cameras in the courtroom. I tried violent cases, murder cases, corruption cases, undercover drug cases and numerous gang cases.

I had certain rules in place when the camera filmed in my courtroom, and the media followed the rules, including Court TV, who is here today. Court TV successfully aired an entire capital murder

trial in my courtroom. My rules were simple: No filming of sexual assault victims or children, never the jury or certain other witnesses, such as informants. The unobtrusive camera filmed what the jury saw and what the jury heard.

After the trial, jurors even commented and liked the camera inside the courtroom because they wanted the public to know what they heard instead of waiting to hear a 30-second sound bite from a newscaster who may or may not have the facts correct.

Those who oppose cameras in the courtroom argue that lawyers play to the camera. No, lawyers do not play to the camera. Lawyers play to the jury, and they always have done so, with or without a camera in the courtroom. I know I played to the jury for 8 years as a prosecutor.

I am not an academic, but I have spent 30 years in the courtroom as a trial prosecutor and a trial judge, and I tried and heard the most serious of all crime. Sometimes those who oppose cameras in the courtroom argue that it infringes on the defendant's right.

When I was Assistant District Attorney, I spent my career trying criminal cases, and based on my experiences, I actually feel the cameras in the courtroom benefit a defendant. A public trial ensures fairness. That is the purpose of a public trial. It ensures professionalism by the lawyers and the judge, and a camera in the courtroom protects the defendant's right to a public trial.

Some members of the bar and judges may not want the public to see what is going on inside the courtroom because they do not want the public to know what they do in the courtroom. Candidly, maybe those people should not be doing what they are doing if they do not want the public to see it.

A camera reveals the action of all participants, and if a judge feels that filming a terrorist prosecution or some other prosecution involving classified information that assists our enemies or terrorists, the judge can always prohibit the filming of that trial.

If the judge fears that any trial participant's safety is at jeopardy or the identity of an undercover agent or security personnel will be revealed by filming a proceeding, the judge can act to disguise that testimony or refuse filming for that trial. I had the same situation when I had undercover agents, such as the DEA, and informants testify in my courtroom. It is discretionary on how the judges handle filming in the courtroom.

The public has a right to watch courtroom proceedings and trials in person. Americans should not be deprived of this right to know just because they cannot physically sit inside the courtroom and hear those proceedings.

Mr. Chairman, I think we have the best justice system in the world. We should not hide it. Many times citizens wonder why certain things happen in courts and why the results turned out like they did. Openness, transparency and cameras will help educate and inform the public that still continues to be enthralled with the American court system.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Poe follows:]

PREPARED STATEMENT OF THE HONORABLE TED POE, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF TEXAS

Americans have a right to a public trial. This right dates back to the founding of this nation and it is based on our values of fairness and impartiality. The more open and public a trial is, the more likely justice will occur. That's why we don't have the secret STAR Chamber in America. Cameras enhance this concept of fairness and openness. This is a right reserved for defendants, but the public sees it as their right to be informed.

Any American can walk into a courtroom and observe the proceeding. But if a person does not physically sit inside the courtroom, that person is denied the ability to see and observe the proceeding. This does not make sense.

Placing a camera in the courtroom would allow a trial to be public, just like a trial is supposed to be, for those who cannot actually sit inside of the courtroom to witness the proceedings. Because of the impact that the United States Supreme Court's rulings have on all Americans, those proceedings especially should be filmed. While federal court hearings are open to the public, not everyone can actually attend a court hearing. This is certainly true of appellate and Supreme Court hearings. It is time to allow cameras in our federal courts, at the discretion of the federal judges.

I personally know how important it is to make courtroom proceedings and trials accessible by camera to the public because I did it. For 22 years, I served as a Harris County Felony Court Judge in Texas. I heard over 25,000 cases and presided over 1,000 jury trials. I was one of the first judges in Texas to allow cameras in my courtroom. We generally used one camera—out of view to the jury—and it was a shared feed for all other news sources, including documentaries and law schools.

The camera that I had in my courtroom was just like the one inside this room. No one here notices the camera—the cameras today are small and unobtrusive. It does not interfere with this Committee's proceedings. It does not make the Members pander to the camera. But the camera allows the public to witness the proceedings when they are not able to sit inside the room.

I had certain rules in place when a camera filmed my courtroom. The media always followed the rules that I ordered, including Court TV, who is here today. Court TV successfully aired an entire capital murder trial in my courtroom. My rules were simple—no filming of sexual assault victims, children, the jury, or certain other witnesses. The camera filmed what the jury saw and heard.

After trials were completed, the jurors and criminal parties were asked their thoughts on the camera inside the courtroom. There was almost total universal approval of the camera. It made the trial fair. Juries especially liked the camera inside the courtroom because they wanted the public to know what they heard instead of waiting to hear a 30 second sound-byte from a newscaster, who may or may not have gotten the facts straight.

Those who oppose cameras in the courtroom argue that lawyers will play to a camera. No, lawyers don't play to a camera. Lawyers play to the jury and they have always done so with or without a camera in the courtroom. I know I played to the jury in my 8 years as a prosecutor.

Those who oppose cameras in the courtroom may also argue that it will infringe on a defendant's rights. Before my 22 years on the bench, I was an assistant district attorney. I spent my career in criminal law. Based on my experiences, I know that cameras in the courtroom benefit a defendant. A public trial ensures fairness. It ensures professionalism by the attorneys and by the judge. A camera in a courtroom protects a defendant's right to a public trial.

Some members of the bar and judges may not want the public to see what is going on inside the courtroom because they don't want the public to know what they do in the courtroom. Candidly, maybe these people shouldn't be doing what they are doing if they don't want the public to know. A camera reveals the action of all participants in a trial.

The public has a right to watch courtroom proceedings and trials in-person. Americans should not be deprived of this right just because they cannot physically sit inside of the courtroom during the proceedings.

We have the best justice system in the world. We should not hide it. Many times citizens wonder why certain things happen in courts and why the results turned out the way they did. Openness, transparency, and cameras will help educate and inform a public that still continues to be enthralled with the American court system. And that's just the way it is.

Mr. DELAHUNT. Thank you, Congressman Poe.

And let me acknowledge that your testimony was compelling, and I am sure it will go a long way to influence Members of this Committee, particularly your fellow Texans. [Laughter.]

I presume that you have other business to attend to, so——

Mr. POE. That is correct, Mr. Chairman.

Mr. DELAHUNT. If you wish to depart, now would be an appropriate time.

Mr. POE. Thank you.

Mr. DELAHUNT. Speaking on behalf of the Judicial Conference of the United States is Judge John Tunheim. He has been on the District Court for the District of Minnesota since 1995.

He is also the chair of the Judicial Conference Committee on Court Administration and Case Management. He previously served as Chief Deputy Attorney General of Minnesota and, prior to that, as the State's Solicitor General. Previously, he worked in private practice.

Welcome, Judge Tunheim.

Next, we have Judge Nancy Gertner who serves on the U.S. District Court for the District of Massachusetts following a 20-year career as a criminal defense lawyer and civil rights activist. The Massachusetts Lawyers Weekly has listed her as one of the most influential lawyers in the past 25 years, and I can corroborate that ranking.

She has been a star during her practice as a prominent criminal defense lawyer as well as a judge on the Federal District Court. She commands respect from every member of the bar in Massachusetts. She has written widely on a number of legal issues, including constitutional law, criminal law and reproductive rights. Her book, "The Law of Juries," was published in 1997. She has taught sentencing at Yale Law School since 1998.

Welcome, Judge Gertner.

Next, speaking on behalf of the U.S. Department of Justice, we have John Richter, the U.S. Attorney for the Western District of Oklahoma. Mr. Richter leads a team of nearly 40 in civil and criminal cases in areas ranging from narcotics trafficking to child pornography.

Previously, he served as the Acting Assistant Attorney General for the Criminal Division of the Department of Justice and, prior to that, as a commissioner on the U.S. Sentencing Commission.

Welcome, Mr. Richter.

Next is Susan Swain, president and co-chief operating officer of C-SPAN, the Nation's eighth largest cable television network. Along with helping to run the network, she has been an on-air interviewer for C-SPAN for 20 years.

It is nice to see you in person, Ms. Swain.

She is also a regular moderator of Washington Journal, the Nation's famous morning call-in and interview program and one is that is avidly watched by all Members of Congress to find out what is happening. She has also been involved in the creation of C-SPAN's history series, helped launch Book TV in the Washington Journal and overseas content on C-SPAN Radio.

Welcome, Ms. Swain.

Our next witness is Barbara Cochran, president of the Radio-Television News Directors Association and Foundation. Previously, she

was the Washington bureau chief to CBS News and, prior to that, executive producer of NBC's Meet the Press.

She is a leading advocate for issues facing electronic journalists, fighting for cameras and microphones in State and Federal courtrooms, protecting journalists' access in post-9/11 America in opposing Government secrecy. She is a frequent speaker on topics such as first amendment rights, the Freedom of Information Act, and cameras and microphones in the courtroom.

Welcome, Ms. Cochran.

Finally, but certainly not last, we have Fred Graham, an anchor at Court TV since it was launched in 1991. He served as chief anchor and managing editor as well as the head of its editorial board. He has received numerous awards for his reporting, including the George Foster Peabody Award.

Over the past 45 years, he has been a practicing attorney, legal writer for The New York Times, and law correspondent for CBS News. He also served as special assistant to Secretary of Labor Willard Wirtz and, prior to that, was chief counsel of the Senate Judiciary Subcommittee on Constitutional Amendments.

Welcome, Mr. Graham.

Without objection, your written statements will be made a part of the record in their entirety. We would ask each of you to summarize your testimony in 5 minutes or less. To help you keep time, there is a timing light at your table. When 1 minute remains, the light will switch from green to yellow, and then to red when 5 minutes are up.

We will begin with you, Judge Tunheim.

TESTIMONY OF THE HONORABLE JOHN R. TUNHEIM, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF MINNESOTA, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

Judge TUNHEIM. Thank you, Mr. Chairman, Ranking Minority Member Smith, and Members of the Committee.

My name is John Tunheim. I am a United States District Court judge in Minneapolis in the District of Minnesota, and for the past 2 years, I have served as chair of the Judicial Conference Committee on Court Administration and Case Management. I have been a Member of the committee since 2001. The committee has one of the broadest jurisdictions of any Conference Committee and includes making recommendations to the conference on topics involving court administration.

I am very grateful to have the opportunity to appear before you today to present the position of the United States Judicial Conference on the issue of cameras in the courtrooms and specifically its position on the Sunshine in the Courtroom Act of 2007.

I should also stress that the Judicial Conference does not speak for the Supreme Court and, therefore, I will have no comment on the bill's application to that court.

The Judicial Conference strongly opposes H.R. 2128 because it would permit the use of cameras in the Federal trial courts in all cases civil, and criminal. The Conference also opposes the bill's provisions permitting each appellate court panel to decide whether to allow cameras, believing instead that the existing conference policy

which requires the decision to be made by the whole court of appeals to be appropriate.

The Conference does not take this position because it is against increased publicity for the Federal courts. In fact, the Federal judiciary is probably the most publicly accessible Government institution. Nearly every filing, trial, appellate argument, decision and opinion is available and open to the public, and, over the past decade, the Judicial Conference has dramatically expanded that openness by making its entire filing system electronically available to the public through the Internet. This major initiative has put the Federal judiciary at the forefront of electronic innovation.

In addition, the Federal trial courts effectively utilize videoconferencing, modern electronic evidence presentation systems, and, recently, we have embarked on a pilot study making digital audio recordings of hearings available on the Internet. Many of the courts of appeals make available audio recordings of all oral arguments.

A good example is the arrangements that were made earlier this year in the criminal case against Scooter Libby in the District Court for the District of Columbia. A separate media room was created in which reporters and bloggers had access to both real-time video from the courtroom and the Internet.

The Conference's position regarding cameras in the district courts is based on thoughtful and real concerns regarding the impact that the camera's presence could have on trial proceedings, and, more specifically, the Conference is very concerned that this legislation has the potential to substantially undermine the fundamental right of citizens to a fair trial.

Appearing on television could lead some trial participants to act more dramatically, to pontificate about their personal views, to promote commercial interests to a national audience, or to increase their courtroom actions so as to lengthen their appearance on camera. The use of cameras in the trial courts could also raise privacy concerns and produce intimidating effects on litigants, witnesses and jurors, many of whom have no direct connection to the proceeding.

The concern about the impact on witnesses is at the heart of the Judicial Conference's opposition to the bill. Despite the fact that the bill gives the trial court judge discretion over permitting cameras, an inclusion which the Conference appreciates, it is impossible to determine in advance how witnesses will react to the presence of cameras.

Testifying in Federal court is difficult. It can be embarrassing and tough. Adding television to the burden of testifying could have a profound effect on a witness. Indeed, in the 1994 Federal Judicial Center study, a majority of judges reported that witnesses were more nervous in the presence of cameras. Many reported witnesses being intimidated or distracted by the cameras.

Will witnesses act differently if they know a television audience is listening and watching? Will witnesses say things differently? Even changes in the demeanor of a witness can severely impact their credibility with the jury.

Our concern is that cameras in the courtroom will interfere with the judiciary's primary mission, which is to administer fair and im-

partial justice to individual litigants in individual cases. Also, the Conference is very concerned that possible camera coverage could become a negotiating tactic in pretrial settlement discussions or cause a party to choose not to exercise their right to have a trial.

I also want to differentiate between the televising of trial court proceedings and televising congressional hearings or sessions. The Federal trial takes place to determine individual's rights and to administer justice. Livelihoods, property and even personal liberty are among the crucial matters at stake, and the right to have those matters decided in a fair and impartial trial is the basis of the distinction from the use of cameras in legislative, administrative or ceremonial proceedings.

The paramount question in determining whether cameras should be used in Federal courts should not be whether more openness would be enjoyed by the public and media. Virtually all court proceedings are public and open today with the limited exception of juvenile and some national security-related matters. The better question is whether the presence of the camera has the potential to deprive citizens of their ability to have a claim or right fairly resolved in a United States District Court.

Although the legislation gives the presiding judge discretion to deny the use of cameras, the potential for compromising a citizen's right to a fair trial may not be evident until a televised trial is underway. The court would likely never know the extent to which the potential or actual use of cameras had chilled the search for truth.

Mr. DELAHUNT. Judge, could you wrap up, please?

Judge TUNHEIM. Okay. In closing, I would like to quote from Mr. Justice Clark in the case of *Estes v. Texas* who I think said it very well, "The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable."

Because cameras in the trial courts could profoundly and negatively impact the dynamics of the trial process, the Judicial Conference strongly opposes any legislation that would allow the use of cameras in the United States District Courts.

Thank you.

[The prepared statement of Judge Tunheim follows:]

STATEMENT OF JUDGE JOHN R. TUNHEIM
ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES
September 27, 2007

Mr. Chairman and Members of the Committee, my name is John R. Tunheim. I am a United States District Judge in the District of Minnesota and Chair of the Court Administration and Case Management Committee of the Judicial Conference. I have been asked to testify today on behalf of the Judicial Conference regarding the issue of cameras in the courtroom and the pending legislation, H.R. 2128, the "Sunshine in the Courtroom Act of 2007." As a preliminary point, I want to emphasize that the Judicial Conference does not speak for the Supreme Court regarding the bill's application to that Court.

The Judicial Conference strongly opposes H.R. 2128 to the extent that it allows the use of cameras in the federal trial courts. The Conference also opposes the bill's provisions allowing the use of cameras by any panel in all courts of appeals, rather than allowing that decision to be made by each court of appeals as a whole, which is the present practice.

I. Background

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

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

These concerns are far from hypothetical. Since the infancy of motion pictures, cameras have had the potential to create a spectacle around trial court proceedings. Examples include the media frenzies that surrounded the 1935 Lindbergh baby kidnaping trial, the murder trial in 1954 of Dr. Sam Sheppard, the Menendez brothers and O.J. Simpson trials, as well as the more recent hearings relating to the death of Anna Nicole Smith. We have avoided such incidences in the federal courts due to the long-standing bar of cameras in the trial courts, which H.R. 2128 now proposes to overturn.

I want to emphasize that our opposition to this legislation is not based on a knee-jerk reaction against new technologies. In fact, the federal courts have shown strong leadership in the continuing effort to modernize the litigation process. This has been particularly true of the Judiciary's willingness to embrace new technologies, such as electronic case filing and access to court files, videoconferencing, and electronic evidence presentation systems. Indeed, some courts, such as the district court here in the District of Columbia, have set up special media rooms for high visibility trials, allowing reporters to provide continual and contemporaneous reports on the conduct of a trial to the public. In

addition, many of the appellate courts provide recordings of oral arguments on their web sites. And this policy to promote openness in the courtroom continues. For example, earlier this year, on the recommendation of the Committee that I chair, the Judicial Conference approved a pilot program to make digital audio recordings of proceedings in district and bankruptcy courts in which the official record is taken using digital recording devices available on the Internet. Our opposition to this legislation, therefore, is not, as some may suggest, based on a desire to stem technology or access to the courts. Rather, the Judicial Conference opposes the broadcasting of federal trial court proceedings because it believes it to be contrary to the interests of justice, which it is our most basic duty to uphold.

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

II. Background on Cameras in the Federal Courts

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

judicial proceedings from the courtroom." And, in 1972, the Judicial Conference adopted a prohibition against "broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto. . . ." The prohibition applied to both criminal and civil cases.

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

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

Two years later, at its March 1996 session, the Judicial Conference again considered the issue and urged each circuit judicial council to adopt, pursuant to its

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

rulemaking authority set forth in 28 U.S.C. § 332(d)(1), an order reflecting the Conference's September 1994 decision not to permit the taking of photographs or radio and television coverage of proceedings in U.S. district courts. The Conference also voted strongly to urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1).

Interestingly, however, the Conference distinguished between camera coverage for appellate and district court proceedings. Because an appellate proceeding does not involve witnesses and juries, the concerns of the Conference regarding the impact of camera coverage on the litigation process were reduced. Therefore, the Conference in 1996 "agreed to authorize each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt."

The current policy, as published by the Administrative Office of the U.S. Courts in the *Guide to Judiciary Policies and Procedures,* states:

> A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:
>
> (a) for the presentation of evidence;
> (b) for the perpetuation of the record of the proceedings;
> (c) for security purposes;
> (d) for other purposes of judicial administration; or

> (e) for the photographing, recording, or broadcasting of appellate arguments.
>
> When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will be consistent with the rights of the parties, will not unduly distract participants in the proceeding, and will not otherwise interfere with the administration of justice.

Guide, Vol. 1, Ch. 3, Part E. 3.

Presently, two of the 13 appellate courts, the Second and Ninth Circuits, have decided to permit camera coverage in appellate proceedings. This decision was made by the judges of each court. As for cameras in district courts, most circuit councils have either adopted resolutions prohibiting cameras in the district courts or have acknowledged that the district courts in that circuit already have such a prohibition.

Finally, it may be helpful to describe the state rules regarding cameras in the courtroom. While it is true that most states permit some use of cameras in their courts, such access by the media is not unlimited. The majority of states have imposed restrictions on the use of cameras in the court or have banned cameras altogether in certain proceedings. Although it is somewhat difficult to obtain current information, it appears that approximately 31 states that permit cameras have restrictions of some kind written into their authorizing statutes, such as allowing coverage only in certain courts, prohibiting coverage of certain types of proceedings or of certain witnesses, and/or requiring the consent of the parties, victims of sex offenses, and witnesses. Thirteen states, including the District of Columbia, do not allow coverage of criminal trials. In

nine states, cameras are allowed only in appellate courts. The District of Columbia prohibits cameras altogether. Utah allows only still photography at civil trials. In fact, only 19 states appear to provide the presiding judge with the type of broad discretion over the use of cameras contained in this legislation. It is clear from the widely varying approaches to the use of cameras that the state courts are far from being of one mind in the approach to, or on the propriety and extent of, the use of cameras in the courtroom.

III. Judicial Conference Concerns Regarding H.R. 2128, As Applied to Trial Courts

I would now like to discuss some of the specific concerns the Judicial Conference has with H.R. 2128, as well as the more general issue of media coverage in trial courtrooms.

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

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

Proponents of cameras in the courtroom also argue that media coverage would benefit society because it would enable people to become more educated about the legal system and particular trials. The Judiciary strongly endorses educational outreach but

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

While judges are accustomed to balancing conflicting interests, weighing any potential "positive" effects of cameras against the degree of harm that this type of coverage could have on a particular proceeding would be difficult, if not impossible. This includes the impact the camera and its attendant audience would have on the attorneys, jurors, witnesses, and even judges. For example, a witness telling facts to a jury will often act differently if he or she is aware that a television audience is watching and listening. Media coverage could exacerbate any number of human emotions in a witness from bravado and over-dramatization, to self-consciousness and under-reaction. These changes in a witness's demeanor could have a profound impact on a jury's ability to accurately assess the veracity of that witness. In fact, according to the FJC study (which is discussed in more detail later in this statement), 64 percent of the participating judges reported that, at least to some extent, cameras make witnesses more nervous. In addition, 46 percent of the judges believed that, at least to some extent, cameras make witnesses less willing to appear in court, and 41 percent found that, at least to some extent, cameras distract witnesses. Such effects could severely compromise the ability of jurors to assess the veracity of a witness and, in turn, could prevent the court from being able to ensure that the trial is fair and impartial.

B. H.R. 2128 Inadequately Protects the Right to a Fair Trial

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

For example, Section 2(b)(1) and 2(b)(2) of the bill would allow the presiding judge to decide whether to allow cameras in a particular proceeding before that court. If this legislation were enacted, I am sure that all federal judges would use extreme care and judgment in making this determination. Nonetheless, we are not clairvoyants. Even the most straightforward, "run of the mill" cases have unforseen developments. Obviously a judge never knows how a lawyer will proceed or how a witness or party will testify. And these events can have a tremendous impact on the trial participants. Currently, courts have recourse to instruct the jury to disregard certain testimony or, in extreme situations, to declare a mistrial if the trial process is irreparably harmed. If camera coverage is allowed, however, witnesses or litigants may be tempted to speak to the larger television audience, and there is no opportunity to rescind these remarks. This concern is of such importance to the Conference that it opposes legislation that would give a judge

discretion to evaluate in advance whether television cameras should be permitted in particular cases.

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

These basic concerns regarding witnesses were eloquently described by Justice Clark in *Estes v. Texas,* 381 U.S. 532 (which I discuss more fully at the end of my statement):

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

Estes, 381 U.S. at 547. It is exactly these concerns that cause the Judicial Conference of

the United States to oppose enactment of H.R. 2128.

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

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

D. Cameras Can Create Security Concerns

Although the bill includes language allowing a witness to request that his or her image be obscured, the bill does not address security concerns or make similar provision regarding other participants in judicial proceedings. The presence of cameras in the trial courtroom is likely to heighten the level and the potential of threats to judges. The number of threats against judges has escalated over the years, and widespread media exposure could exacerbate the problem. Witnesses, jurors, and United States Marshals Service personnel might also be put at risk with this increased exposure and notoriety.

Finally, national and international camera coverage of trials, especially those relating to terrorism, could place federal courthouses and their occupants at greater risk and may require increased personnel and funding to adequately protect participants in such court proceedings.

E. Cameras Can Create Serious Privacy Concerns

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

The Judiciary takes these concerns very seriously. In fact, the Committee that I chair, the Court Administration and Case Management Committee, has spent the last eight years ensuring that the Judiciary's electronic case files system provides adequate privacy safeguards to protect sensitive and personal information, such as Social Security numbers, financial account numbers, and the names of minor children from the general public, while at the same time providing the public with access to court files.

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

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

that involve testimony of an extremely private nature, revealing family relationships and personal facts, including medical and financial information. While this type of information is presented in open court, televising these matters could sensationalize and provide these details to a much larger audience, which again raises significant and legitimate privacy concerns.

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

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

F. H.R. 2128 Does Not Address the Complexities Associated with Camera Coverage in the Trial Courts

Televised coverage of a trial would have a significant impact on that trial process. Major policy implications as well as administration issues may arise, many of which are not addressed in the proposed legislation. For example, televising a trial makes certain court orders, such as the sequestration of witnesses, more difficult to enforce and could lead to tainted testimony from witnesses. In addition, more technical issues would have to be addressed, including advance notice to the media and trial participants, limitations on coverage and camera control, coverage of the jury box, and sound and light criteria.

Finally, I should note that H.R. 2128 includes no funding authorization for its implementation, and there is no guarantee that such funds would be appropriated. The costs associated with allowing cameras, however, could be significant, such as retrofitting courtrooms to incorporate cameras while minimizing their actual presence to the trial participants. Also, to ensure that a judge's orders regarding coverage of the trial were followed explicitly (*e.g.*, not filming the jury, obscuring the image and voice of certain witnesses, or blocking certain testimony), a court may need to purchase its own equipment, as well as hire technicians to operate it. Large courts might also feel compelled to create the position of media coordinator or court administrative liaison to administer and oversee an electronic media program on a day-to-day basis. Such liaison's duties might include receiving applications from the media and forwarding them to presiding judges, coordinating logistical arrangements with the media, and maintaining

administrative records of media coverage. Thus, the cost of this legislation could be significant.

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

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

The seminal case on this issue is *Estes v. Texas,* 381 U.S. 532 (1965). In *Estes,* the Supreme Court directly faced the question of whether a defendant was deprived of his right under the Fourteenth Amendment to due process by the televising and broadcasting of his trial. The Court held that such broadcasting in that case violated the defendant's right to due process of law. At the same time, a majority of the Court's members addressed the media's right to telecast as relevant to determining whether due process required, in general, excluding cameras from the courtroom. Justice Clark's plurality opinion and Justice Harlan's concurrence indicated that the First Amendment did not extend the right to the news media to televise from the courtroom. Similarly, Chief Justice Warren's concurrence, joined by Justices Douglas and Goldberg, stated:

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

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

In the case of *Westmoreland v. Columbia Broadcasting System Inc.,* 752 F.2d 16 (2d Cir. 1984), the Second Circuit was called upon to consider whether a cable news network had a right to televise a federal civil trial and whether the public had a right to view that trial. In that case, both parties had consented to the presence of television cameras in the courtroom under the close supervision of a willing court, but a facially applicable court rule prohibited the presence of such cameras. The Second Circuit denied the attempt to televise that trial, saying that no case has held that the public has a right to televised trials. As stated by the court, "[t]here is a long leap. . . between a public right under the First Amendment to attend trials and a public right under the First Amendment to see a given trial televised. It is a leap that is not supported by history." *Westmoreland,* 752 F.2d at 23.

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

These cases forcefully make the point that, while all trials are public, there is no

constitutional right of media to broadcast federal district court or appellate court proceedings.

H. The Teachings of the FJC Study

Proponents of cameras legislation have previously indicated that the legislation is justified in part by the FJC study referred to earlier. The results of that study, however, were part of the basis for the Judicial Conference's opposition to cameras in the courtroom. Given this apparent inconsistency, it may be useful to highlight several important findings and limitations of the study. (I should also note that the recommendations included in the FJC report were proposed by its research project staff, but were not reviewed by its Board.)

First, the study only pertained to civil cases. This legislation, if enacted, would allow camera coverage in both civil and criminal cases. One could expect that most of the media requests for coverage would be in sensational criminal cases, where the problems for witnesses, including victims of crimes, and jurors are most acute.

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

- 32% of the attorneys who responded felt that, at least to some extent, the cameras distract witnesses;

- 40% felt that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;

• 19% believed that, at least to some extent, the cameras distract jurors;

• 21% believed that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;

• 27% believed that, at least to some extent, the cameras have the effect of distracting the attorneys; and

• 21% believed that, at least to some extent, the cameras disrupt the courtroom proceedings.

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

• 46% believed that, at least to some extent, the cameras make witnesses less willing to appear in court;

• 41% found that, at least to some extent, the cameras distract witnesses;

• 64% reported that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;

• 17% responded that, at least to some extent, cameras prompt people who see the coverage to try to influence juror-friends;

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

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

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

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

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

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

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

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

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

IV. Conclusion

When one thinks of cameras in the trial courtroom today, the O.J. Simpson case inevitably comes to mind and how the presence of cameras in that courtroom impacted the conduct of the attorneys, witnesses, jurors, and the judge. Admittedly, few cases will have this notoriety, but the inherent effects of the presence of cameras in the courtroom are, in some respects, the same, whether or not it is a high-publicity case. Furthermore, there is a legitimate concern that if the federal courts were to allow camera coverage of cases that are not sensational, it would become increasingly difficult to limit coverage in

the high-profile and high-publicity cases where such limitation, almost all would agree, would be warranted.

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

Rather, this is a question about how individual Americans – whether they are plaintiffs, defendants, witnesses, or jurors – are treated by the federal judicial process. It is the fundamental duty of the Federal Judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. For the reasons discussed in this statement, the Judicial Conference believes that the use of cameras in the trial courtroom would seriously jeopardize that right. It is this concern that causes the Judicial Conference of the United States to oppose enactment of H.R. 2128 as applied to federal trial courts. As the Supreme Court stated in *Estes,* "[w]e have always held that the atmosphere essential to the preservation of a fair trial – the most fundamental of all freedoms – must be maintained at all costs." 381 U.S. at 540.

Mr. DELAHUNT. Thank you, Judge Tunheim.
Judge Gertner?

TESTIMONY OF THE HONORABLE NANCY GERTNER, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Judge GERTNER. Thank you very much, Mr. Delahunt, and thank you, Ranking Member Smith and Members of the Committee. I want to thank you for giving me an opportunity to speak before you. I am in favor of this bill, and I am a lone judicial voice in favor of the bill.

As I describe in my testimony, which I would like to supplement after this is over, I think that the issue is not whether there should be cameras in the courtroom, but how they should implemented. In other words, I think we are past the discussion of whether, and we are now into a discussion of how.

I come to this issue both as a judge and, as Representative Delahunt said, as a former litigator. I was a trial lawyer for 22 years and participated in State court trials which were televised.

I have been a judge for 13 years and, during that period of time, I have presided over numerous trials which have attracted enormous publicity, most recently *Limone v. United States,* which involved serious accusations of FBI misconduct and, when I announced my decision in open court, the room was filled with spectators. We provided an overflow courtroom with a video feed, and I wish that we had been able to provide a larger audience.

My testimony is based on two prongs. The first is almost conceptual, what "public" means in the 21st century, which I think is a different thing than it meant at the time of the Supreme Court decisions on this issue, and also the experience in the State courts which has proved that in a setting which is far more difficult than the setting of the Federal courts, cameras have not had the predicted impact.

Let me start with what "public" means. "Public" today means television, Internet, means information through screens, means 24/7 coverage of proceedings, and we are essentially there, all but with cameras. That is to say we have 24/7 coverage of proceedings. We have transcripts which the press has ready access to, and, in fact, I have frequently seen the judge with a streaming transcript on the screen.

In my courtroom, it is an electronic courtroom. The lawyers can e-mail one another from the courtroom to their offices. There is, in fact, work going on now about a private video feed from the lawyers to their own offices. In other words, we have equipped our courtrooms to deal with the technological age.

The portrait of cameras that, again, is implicit in this discussion is of an obtrusive device, and I think that that is no longer the case.

In addition, "public" today to those of a certain age group means getting information through screens. There is a huge response, substantial information suggesting that young people do not read newspapers. They only get their information through screens, and when we do not provide our information in that way, it makes a substantial difference.

Again, the debate has been characterized by the awful cases, by O.J. Simpson, by Lorena Bobbitt. There have been certainly times I have been watching the television and grimaced. It is not clear to me that I would not have been grimacing if I were in that courtroom as well in a high-profile case.

I think that the antidote to those cases is to be in the courtroom of Judge Young when he sentenced Richard Reid, the shoe bomber, or the courtroom of Judge Wolf, when he uncovered misconduct in the FBI, or Judge Mazzoni during the course of the proceedings on the cleanup of Boston Harbor.

In the second prong of my testimony is the State courts. The State courts deal with murder and rape and child molestation, and they have managed to have coverage for nearly 20 years without any of the anticipated concerns. I deeply appreciate the concerns of the other witnesses, but I think again that is a question of how and not whether.

The concern, for example, about witnesses who are sequestered, going home and watching television and seeing the testimony of their predecessors—well, we actually trust the public when we tell them not to read about the case that they will not read about the case.

But, again, we know how to control this technology. We could delay the broadcast of proceedings, could obscure faces. There are a number of techniques one can use, and that is what we should examine because it is a new age.

Finally, I want to say just I think it is a new age in another respect. Twenty-four/seven news coverage of proceedings and the anti-judge tirades one frequently sees in late-night programs, I think, requires cameras in the courtroom now as an antidote to that.

I believe that we are at a point where judges in one sense have to prove their legitimacy, have to demonstrate their legitimacy. It is no longer assumed by the public, and I would rather prove that legitimacy in my own voice with my own face and my own words than have my words described by a late-night TV anchor.

Finally, the strength of this bill is that it does not mandate cameras. It does not insist on them. It does not even encourage them. It allows judges to exercise their discretion to permit cameras in appropriate cases, subject to fair limitations. I for one would like to try.

Thank you.

[The prepared statement of Judge Gertner follows:]

PREPARED STATEMENT OF THE HONORABLE NANCY GERTNER

TESTIMONY OF THE HONORABLE NANCY GERTNER, OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Re: H.R/ 2128 the "Sunshine in the Courtroom Act of 2007"
September 27, 2007

I want to thank you for giving me this opportunity to speak before you. I am in favor of this bill. I spoke in favor of an earlier version in 2000. My opinions have not changed in the intervening seven years.

Let me say at the outset, that I speak only for myself, and surely not for the other judges of my Court, or judges around the country or the Judicial Conference. Other judges have raised important and sound concerns which need to be addressed. But as I describe in this testimony, those concerns about cameras in the courtroom involve "how" to implement televised proceedings, not whether.

I come to this issue both as a judge and as a former litigator. I was a trial lawyer for twenty-two years, representing clients in both civil and criminal cases, in federal and state courts. Because Massachusetts has had cameras in the courtroom for a considerable period of time, I have had the privilege of participating in a number of televised trials and other proceedings. I can speak from personal experience.

I have been a judge for thirteen years. During that period of time I have presided over a number of cases which attracted media attention and would have been televised had that option been available. The most recent case was Limone v. United States, which involved accusations of FBI misconduct -- malicious prosecution under the Federal Tort Claims Act -- in connection with the imprisonment of four men. When I announced my decision in open court, the court was filled with spectators. There was on overflow from the courtroom into which a record of the proceedings was streamed.

My testimony is based on two prongs -- first conceptual -- the idea that "public" means something different in the 21st century than it has ever meant before, and second -- anecdotal -- the actual experience of state courts with cameras.

Public proceedings in the 21st century necessarily mean televised proceedings. "Public access" means something different today than it meant years ago, and all of the institutions of government have to adjust to it. "Public" means more than simply opening up our courtrooms to the public. It means television, video, now internet. In deference to this new view of "public" for example, the federal courts do more than simply make our files physically available in courtrooms around the country. We have created electronic access to court papers, accessible to all of our citizens with a computer and internet access.

The vast majority of the American public get information about courts through screens -- television or the internet. Moreover, at a time when polls suggest that the public is woefully

misinformed about the justice system, more information, and relatively unmediated information, is better than less information. Let me draw an analogy here. I have visited courts in many other countries throughout the world. Trial proceedings were open, my hosts would tell me, but the courtrooms were small and had only a single bench for the "public." It was formally open to everyone, but practically speaking, public access was extremely limited. In this country, we understand that to make something public requires affirmative efforts on our part -- courtrooms big enough to include the people who will be interested in the proceedings, handicapped access, provision for the media, etc. In Limone, it meant overflow courtrooms with monitors. Today, that effort necessarily means cameras. Indeed, in deference to the public's new way of learning and their new expectations, we have modernized our courtrooms with technology capable of presenting all information on screens.

The concerns raised by the opponents of this bill are not insignificant but, in my judgment, point to *how* to go about televising proceedings, not *whether*. There is concern that the participants in televised trials somehow skew their presentation because of the gaze of the cameras. I believe that if such behavior occurs at all, it is a function of two things: The fact that most of the televised trials are high-profile cases, where the participants are already acutely aware of the publicity surrounding them, and the fact that televised trials, particularly in federal courts, were still a relative novelty.

In high profile cases, with the sketch artist present, the courtroom filled to the rafters with people, the question is whether the presence of cameras materially changes the atmosphere, and in my experience, it does not. This is particularly the case with the change in technology; cameras are less physically obtrusive. Lawyers may grandstand, judges may pontificate under the public's gaze, whether it is through the print media or cameras. And the reverse is just as likely -- the public will see why our judicial system is one of the most respected in the world.

Moreover, many of the problems concerning cameras derived from the fact that they were novelties -- neither judges nor lawyers were used to them. Whatever impact derived from their presence would surely be lessened as time passes, as everyone becomes more and more used to their presence. This is so even though the state court's docket is more vulnerable to distortion than the federal court. The state court is where we try most murders, child molestation charges, and the like.

That has been the experience of the Massachusetts court system and court systems across the country. There are cameras in the courtrooms of forty-seven states. Numerous studies have been conducted by these jurisdictions to test the impact of the cameras on the proceedings. The results have been favorable -- that televised coverage does not impede the fair administration of justice, does not compromise the dignity of the court, and does not impair the orderly conduct of proceedings. Indeed, the opposite is the case -- that public education about the system is greatly enhanced.

To be sure, there are concerns about the impact of televised trials on the public, that televising the proceedings in fact undermines their legitimacy with the public. I would be remiss

if I did not admit that this problem gives me pause as well. The public watches a televised trial and believes that it is sitting in the shoes of the juror when it plainly is not. The citizen will answer the phone, take a bathroom break, make popcorn, and miss critical testimony. He or she is watching the proceeding in their home, on their couch, relaxed, and without the obligation to make any decisions about the case. The jurors sit in a formal courtroom, the American flag at the front, and they are sworn to be attentive, to be fair. They are instructed about their awesome responsibilities; ideally, they have no other distractions. When the jury's decision is different from the viewing public's decision, the public may well become cynical about the system.

There is a wonderful moment in the movie, "Twelve Angry Men" that illustrates the point. A juror is recounting the testimony of a witness. The witness reported that he heard the sound of a body hitting the ground on the floor above him. He then ran to the door, opened it, and saw the defendant running down the stairs. The juror remembered that the witness, an elderly man, walked with a limp to the witness stand. The juror concluded that the witness' testimony about "running to the door" was less than credible. The point was that there is a difference between experiencing a trial within the four walls of a courtroom and experiencing it through a television screen.

On balance, however, I believe that given the strength of our system, seeing it in operation can only bolster the public's confidence. I believe that these concerns can be addressed by judges, by commentators, by educators, and that, in any event, they do not outweigh the advantages.

Let me be clear: I am not suggesting that televising court proceedings necessarily means accurate, unedited, undistorted coverage. Obviously, television reporters can edit the proceedings, take snippets out of context, sprinkle it with inappropriate commentary. As one judge described:

> When I sat on the bench I always wondered about any reporter I saw in my courtroom. Often I knew that the reporter had no idea what I was doing, what the judicial system was about, what the language being used in the courtroom meant, and what rights were being protected and advanced through the legal system. Rarely do reporters have any expertise in the law; the vast majority come from journalism or liberal arts schools, no law schools. Covering 'cops and courts' is usually an entry level position at newspapers and is subject to general assignment reporting at television stations. Trained court reporters are a dying breed. Turnover is high.

But that is endemic to the print coverage as well.

Attorneys and judges must work with the media to make it clear to the public that their experience of trials is not the same as the participants. More "real time" court coverage should

be encouraged, not just of the high-profile cases but of the ordinary cases. We can promulgate rules and protocols to insure the dignity of the proceedings.

Finally, the strength of this bill is that it does not require cameras, insist on them, encourage them. Rather it allows judges to exercise their discretion to permit cameras in appropriate cases, subject to fair limitations. I, for one, would like to try.

At a time when judges are under attack, when judicial institutions are the fodder of late night talk shows, we need to work harder than ever before to show the public just what we do.

Mr. DELAHUNT. Thank you, Judge Gertner.

Mr. Richter?

TESTIMONY OF JOHN C. RICHTER, U.S. ATTORNEY, WESTERN DISTRICT OF OKLAHOMA

Mr. RICHTER. Thank you, Mr. Chairman, Ranking Member Smith, Members of the Committee.

Again, my name is John Richter. I presently serve as the United States Attorney for the Western District of Oklahoma.

It is my privilege today to speak to you on behalf of the Department of Justice to express our strong opposition to and deep concerns about H.R. 2128.

In pursuing cases, it is the duty of each and every United States Attorney to see that justice is done. In examining the implications of this bill, therefore, I look at whether it will add to or detract from the cause of justice.

The Department of Justice joins with the Judicial Conference, many Federal judges and many defenders in expressing our concerns about this bill.

In my prepared remarks, I have identified the many potential harms that will flow from placing cameras in Federal courtrooms. As the Supreme Court has indicated, giving the media a degree of access beyond that available to the public will adversely impact witnesses, victims, jurors, judges and other trial participants and, in so doing, negatively affect our ability to maximize the truth-seeking function of our justice system.

Likewise, because of the exponential increase in the dissemination of images that will necessarily flow from placing cameras in the courtroom, the risk of harm to judges and other trial participants will increase. Judges, defendants and witnesses face increased risks as it is. We do not need to add to that risk.

In exchange for these harms, proponents of cameras in Federal courtrooms assert that there will be two benefits. First, they argue that by broadcasting the proceedings, the media, as a surrogate for the public, can act as a check by shining the sun on the judicial branch.

Second, they argue that expanding the manner in which the press can cover court proceedings will be educationally valuable to Americans. However, when actually examined, neither of these arguments carries much weight when compared to ensuring that justice is done.

First, it is hard to see how the media really needs a greater means of coverage in order to monitor and check the judiciary. After all, the sun is already shining brightly. Without this bill, the print and broadcast media still have the exact same degree of access to Federal court proceedings as the general public.

These trials are not secret. The bright lights of the camera are on the steps of the courthouse every day, and journalists are already in the courtroom ferrying information immediately to cameras and from there to the viewing public.

Second, the idea that cameras and broadcasts will increase the educational aspects of reporting while carrying superficial appeal, in fact, breaks down upon examination. In comparing television and newspaper coverage, a Harvard academic study showed that

media coverage without the presence of cameras in the court covered more facts about the case, the actual judicial process, the substance of the defense and the larger societal impact of the case than the coverage with the cameras.

The coverage with cameras in court raised few larger societal issues. Instead, the cameras' coverage focused primarily on the dramatic and the graphic aspects of the trial, the emotions of the witnesses and the trials as a strategic game between two sides, rather than a proceeding for the purpose of ascertaining the truth and seeking justice.

And why is that? Because if past is prologue, some in the media will see trials as a soap opera, as just another opportunity to sensationalize, and gain ratings. Of course, many media outlets covering trials may behave responsibly. We must remember, however, that once we allow the feed from the courtroom, no one will be able to control its use or dissemination to only the most responsible.

For some, the Federal court proceedings will not be about education. Instead, the coverage will be focused on sensationalization and entertainment, but, Mr. Chairman, justice is not about entertainment. It is not about making money on programming.

It is about seeking the truth. It is our Nation's best attempt at justice in a dignified process, a process that will not be improved, but only potentially hurt by cameras and broadcasts from inside the courtroom. It is for these and the reasons set forth in my prepared remarks that we conclude as follows:

The potential harms this legislation will have on the cause of justice greatly outweigh the benefits, if any, to be gained by the measure. The Department of Justice, therefore, strongly opposes H.R. 2128.

I would be pleased to answer any questions you or your fellow Committee Members may have.

Thank you.

[The prepared statement of Mr. Richter follows:]

PREPARED STATEMENT OF JOHN C. RICHTER

TESTIMONY OF
THE HONORABLE JOHN C. RICHTER
UNITED STATES ATTORNEY
WESTERN DISTRICT OF OKLAHOMA
ON BEHALF OF THE DEPARTMENT OF JUSTICE
REGARDING
H.R. 2128, THE "SUNSHINE IN THE COURTROOM ACT OF 2007"
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES
SEPTEMBER 27, 2007

MR. CHAIRMAN, RANKING MEMBER SMITH, MEMBERS OF THE COMMITTEE, MY NAME IS JOHN RICHTER. I PRESENTLY SERVE AS THE UNITED STATES ATTORNEY FOR THE WESTERN DISTRICT OF OKLAHOMA. IT IS MY PRIVILEGE TO SPEAK TO YOU TODAY ON BEHALF OF THE DEPARTMENT OF JUSTICE TO EXPRESS THE DEEP CONCERNS WE HAVE ABOUT H.R. 2128, THE "SUNSHINE IN THE COURTROOM ACT OF 2007." AS THIS COMMITTEE KNOWS, H.R. 2128 WOULD AUTHORIZE THE CHIEF JUSTICE OF THE UNITED STATES SUPREME COURT, ANY PRESIDING JUDGE IN THE 13 COURTS OF APPEALS, OR A JUDGE IN ANY DISTRICT COURT AT HIS OR HER DISCRETION TO PERMIT THE PHOTOGRAPHING, BROADCASTING, OR TELEVISING OF COURT PROCEEDINGS OVER WHICH THAT JUDGE WOULD BE PRESIDING. THE BILL ALSO WOULD DIRECT THE JUDICIAL CONFERENCE OF THE UNITED STATES TO PROMULGATE

GUIDELINES WITH RESPECT TO THE MANAGEMENT AND ADMINISTRATION OF SUCH LIVE COVERAGE.

IN PURSUING CASES, IT IS THE DUTY OF THE UNITED STATES TO SEE THAT JUSTICE IS DONE.[1] IN EXAMINING THE IMPLICATIONS OF THIS BILL, THEREFORE, THE DEPARTMENT OF JUSTICE LOOKS AT THIS BILL WITH AN EYE TOWARD WHETHER IT WILL CONTRIBUTE OR DETRACT FROM THE CAUSE OF JUSTICE. TO BEGIN, COURT PROCEEDINGS ARE HELD FOR THE SOLEMN PURPOSE OF SEEKING TO ASCERTAIN THE TRUTH, WHICH IS THE FUNDAMENTAL BASIS FOR A FAIR TRIAL. OVER MANY YEARS, BASED ON THE FOUNDATION LAID BY OUR FOUNDING FATHERS, AMERICAN COURTS HAVE DEVISED CAREFUL SAFEGUARDS BY RULE AND OTHERWISE TO PROTECT AND FACILITATE THE PERFORMANCE OF THAT HIGH FUNCTION. THE FEDERAL JUDICIARY HAS ALWAYS HELD THAT THE ATMOSPHERE ESSENTIAL TO THE PRESERVATION OF A FAIR TRIAL MUST BE MAINTAINED AT ALL COSTS.[2]

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[1] *See Berger v. United States*, 295 U.S. 88 (1935).

[2] *See Estes v. Texas*, 381 U.S. 532, 540 (1965).

WHEN CONSIDERING NEW LAWS, WE GENERALLY LOOK AT WHETHER THE POTENTIAL BENEFIT TO BE GAINED BY THE LEGISLATION OUTWEIGHS THE POTENTIAL HARM IT WILL CAUSE. WITH APOLOGIES TO JUDGE LEARNED HAND, THE FATHER OF COST-BENEFIT ANALYSIS[3], IN CONSIDERING THE EFFICACY OF H.R. 2128 AND THE BROADCAST OF COURT PROCEEDINGS, WE MUST WEIGH THREE VARIABLES: (1) THE LIKELIHOOD OR PROBABILITY OF HARM TO THE CAUSE OF JUSTICE AS A RESULT OF THE MEASURE; (2) THE SEVERITY OF SUCH HARM; AND (3) THE ABILITY TO OR BURDEN OF AVOIDING THAT HARM THROUGH DENIAL OF THE PROPOSED MEASURE.

SEEN IN THIS LIGHT, MY TESTIMONY TODAY ON BEHALF OF THE DEPARTMENT OF JUSTICE WILL FOCUS ON THE THREE PERTINENT FACTORS THAT SHOULD BE WEIGHED IN CONSIDERING

[3] *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Learned Hand, J. (the seminal case in which Judge Hand described the utilitarian instrumentalist standard as applied to tort liability).

H.R. 2128 AND THE LIVE COVERAGE OF FEDERAL COURT PROCEEDINGS. I WILL SET FORTH THE POTENTIAL HARMS TO OUR FEDERAL JUSTICE SYSTEM THAT THE DEPARTMENT OF JUSTICE BELIEVES H.R. 2128 MAY HAVE. I WILL ALSO DESCRIBE THE LIKELIHOOD AND SEVERITY OF THOSE HARMS, AS WELL AS EXAMINE SOME ASSERTED BENEFITS TO THE BROADCAST OF CASES. I CONCLUDE THAT THE HARMS THIS LEGISLATION COULD CAUSE TO THE JUSTICE SYSTEM GREATLY OUTWEIGH ANY PURPORTED BENEFIT TO BE GAINED BY THE MEASURE.

AS ATTORNEYS FOR THE UNITED STATES, WE, IN THE DEPARTMENT OF JUSTICE, HAVE GRAVE CONCERNS ABOUT THE POTENTIAL HARM THAT THIS BILL AND LIVE COVERAGE OF FEDERAL COURT PROCEEDINGS MAY HAVE ON KEY PARTICIPANTS IN THE TRUTH-SEEKING PROCESS. WE SHARE THE CONCERN OF THE JUDICIAL CONFERENCE, MANY FEDERAL JUDGES, AND MANY DEFENDERS THAT CAMERA COVERAGE MAY NEGATIVELY IMPACT JUDICIAL DECISION-MAKING. THE LATE CHIEF JUSTICE REHNQUIST AND OTHERS HAVE ARGUED THAT THE INVASIVE PRESENCE OF

CAMERAS MAY CREATE A "CHILLING EFFECT ON JUDGES AND CAUSE THEM TO FEEL RESTRAINED FROM ASKING POINTED QUESTIONS FOR FEAR OF PUBLIC MISPERCEPTION ON THEIR STANCE ON A PARTICULAR ISSUE."[4] SIMILARLY, AT THE TRIAL LEVEL, THERE IS A RISK THAT JUDGES COULD, EVEN UNINTENTIONALLY, SHAPE THEIR BEHAVIOR OR RULINGS UNDER THE HOT GLARE OF THE CAMERAS.

LIKEWISE, THE PRESENCE OF THE CAMERA, NO MATTER HOW UNOBTRUSIVE, MAY AFFECT THE BEHAVIOR OF THE LAWYERS, THE WITNESSES, AND THE JURORS. ONE FEDERAL JUDGE HAS OBSERVED: "[CAMERAS] AFFECT PEOPLES' PERFORMANCE AND MANNER OF BEHAVING – AND IT'S NOT ALWAYS FOR THE GOOD."[5] AFTER ALL, YOU DO NOT HAVE TO GO FAR BACK IN HISTORY TO FIND CRIMINAL

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[4] *See* Charlie Rose Interview with Chief Justice William Rehnquist (PBS television broadcast Feb. 16, 2001).

[5] *See* Dan Horn, *U.S. Judges Camera-Shy in Courtroom*, Cincinnati Enquirer, Jan. 29, 2006 at 1B (quoting Federal District Court Chief Judge Sandra Beckwith of the Southern District of Ohio).

TRIALS THAT WERE TELEVISED WHERE GRANDSTANDING AND THE GLARE OF LIGHTS CREATED A "CIRCUS ATMOSPHERE."[6]

JUST AS THE CAMERA'S INCRIMINATING EYE AFFECTS THE JUDGES AND PARTIES, IT ALSO AFFECTS JURORS. EVEN IF THE JURORS THEMSELVES ARE NOT DEPICTED, AS THIS BILL WOULD REQUIRE, THE PRESENCE OF CAMERAS IN THE COURTROOM ESCALATES THE SENSATIONAL ASPECTS OF THE TRIAL AND THE COVERAGE MAY AFFECT JURORS'S PERCEPTIONS OF THEIR ROLE.[7] OTHERWISE QUALIFIED JURORS MAY NOT WANT TO SERVE UNDER THE GLARING SCRUTINY OF LIVE COVERAGE. MOST TROUBLING, THE MORE SENSATIONALIZED COVERAGE AS A RESULT OF THE CAMERAS MAY PRESSURE JURORS, UNCONSCIOUSLY OR

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[6] *See, e.g.*, John Broder, *Clinton Says Televising Simpson Trial Led To "Circus Atmosphere."* L.A. Times, Sept. 22, 1995 (discussing President Clinton's criticism); *see also*, George Will, *Circus of the Century*, Washington Post, Oct. 4, 1995 at A25.

[7] *See, e.g.*, Joseph F. Flynn, *Prejudicial Publicity In Criminal Trials: Bring Shepard v. Maxwell Into The Nineties*, 27 New Eng. L. Rev. 857, 866 (1993); Kenneth B. Nunn, *When Juries Meet The Press: Rethinking The Jury's Representative Function In Highly Publicized Cases*, 22 Hastings Const. L.Q. 405, 430 (1995).

CONSCIOUSLY, TO BASE THEIR DECISION ON COMMUNITY DESIRES INSTEAD OF THE FACTS OF THE CASE.[8]

WE ALSO SHARE THE CONCERNS MANY IN THE DEFENSE BAR HAVE ABOUT TELEVISION'S EFFECT ON A WITNESS'S WILLINGNESS TO TESTIFY, OR EVEN THAT THE SUBSTANCE OF HIS TESTIMONY WILL BE ALTERED AND HARM THE FAIRNESS OF THE JUDICIAL PROCESS. EVEN WITNESSES WHO PARTICIPATE VOLUNTARILY MAY GIVE ALTERED TESTIMONY, EITHER BECAUSE THEY HAVE LISTENED TO OTHER TESTIMONY ON TELEVISION AGAINST A JUDGE'S ORDER, OR MERELY BECAUSE THE IDEA OF THEIR WORDS BEING BROADCAST TO AN AUDIENCE OF THOUSANDS OR MILLIONS IS FRIGHTENING OR UNNERVING.

AS AN ASSISTANT DISTRICT ATTORNEY, AN ASSISTANT U.S. ATTORNEY, AND NOW AS A UNITED STATES ATTORNEY, I HAVE CALLED ON MANY COOPERATING WITNESSES TO TESTIFY AS TO

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[8] *See Sheppard v. Maxwell*, 384 U.S. 333, 353 (1966); *see also*, *Estes*, 381 U.S. at 545-46.

INCIDENTS AND CONDUCT THAT IS HUMILIATING, EMBARRASSING, AND ILLEGAL. I CAN TELL YOU FROM FIRST-HAND EXPERIENCE THAT IT IS HARD ENOUGH TO GAIN THAT COOPERATION AND CRITICAL TESTIMONY WITHOUT HAVING TO BATTLE THE SPECTER WEIGHING ON THE WITNESS'S MIND THAT HER TESTIMONY WILL BE BROADCAST TO A WIDER AUDIENCE THAN JUST THE PERSONS WHO ARE PRESENT IN THE COURTROOM.

CONSIDER ALSO THE INCREASED LIKELIHOOD AND POTENTIAL FOR HARM TO THE ABILITY OF OUR FEDERAL COURTS TO EXERCISE CONTROL OVER THE WITNESSES OUTSIDE OF THE COURTROOM DURING A TRIAL. IT IS THE NORM FOR A COURT TO ORDER THE SEQUESTRATION OF WITNESSES OR TO ENTER AN ORDER EXCLUDING WITNESSES FROM HEARING OTHER EVIDENCE DURING A TRIAL THAT MAY AFFECT THEIR TESTIMONY.[9] UNDER THE PRESENT RULES IN FEDERAL COURT, THE ONLY WAY A WITNESS OUTSIDE THE COURTROOM CAN HEAR THE TESTIMONY IS THROUGH A THIRD

[9] *See* Fed. R. Evid. 615.

PARTY WHO WAS IN THE COURTROOM TELLING HIM. WITH A LIVE BROADCAST, HOWEVER, THE RISK NECESSARILY IS INCREASED THAT, NOTWITHSTANDING THE ORDER, THE WITNESS NONETHELESS MAY HEAR THE ACTUAL LIVE TESTIMONY, WHICH UNDOUBTEDLY CARRIES A HIGHER ABILITY TO INFLUENCE WHAT THE WITNESS WILL SAY LATER IN THE TRIAL.

THIS CAN BE ALL THE MORE SERIOUS IF THE TESTIMONY TO WHICH THE WITNESS IS EXPOSED WAS IMMUNIZED TESTIMONY. COMPARE, FOR EXAMPLE, THE EFFECT IMMUNIZED CONGRESSIONAL TESTIMONY THAT WAS BROADCAST NATIONWIDE ULTIMATELY HAD ON THE CRIMINAL TRIAL OF LIEUTENANT COLONEL OLIVER NORTH IN THE IRAN-CONTRA CASE.[10] PRIOR TO HIS PROSECUTION BY THE INDEPENDENT COUNSEL, CONGRESS, IN FULL ANTICIPATION OF NORTH'S FUTURE PROSECUTION, GRANTED NORTH "DERIVED USE" IMMUNITY TO TESTIFY REGARDING HIS ROLE IN THE IRAN-CONTRA

[10] *See United States v. North*, 910 F.2d 843 (D.C. Cir. 1990), *opinion withdrawn and superseded in part on rehearing by United States v. North*, 920 F.2d 940 (D.C. Cir. 1990) (per curiam).

MATTER.[11] NETWORK TELEVISION AND RADIO CARRIED THE TESTIMONY LIVE TO A RIVETED NATIONAL AUDIENCE. THE INDEPENDENT COUNSEL, WHO BROUGHT THE CASE, TRIED TO AVOID THE EXPOSURE TO THE TESTIMONY AND DID NOT USE THE IMMUNIZED TESTIMONY AT TRIAL. MANY OF THE WITNESSES CALLED BY THE INDEPENDENT COUNSEL, HOWEVER, HAD SEEN THE TESTIMONY ON THEIR OWN.

UPON CONVICTION, NORTH APPEALED ARGUING THAT THE INDEPENDENT COUNSEL VIOLATED NORTH'S GRANT OF "DERIVED USE" IMMUNITY WHEN HE RELIED ON A WITNESS WHOSE TESTIMONY WAS SHAPED, DIRECTLY OR INDIRECTLY, BY COMPELLED TESTIMONY, REGARDLESS OF HOW OR BY WHOM HE WAS EXPOSED TO THAT COMPELLED TESTIMONY. THE COURT OF APPEALS AGREED. IN OVERTURNING NORTH'S CONVICTION, THE COURT EXPRESSED ITS CONCERN THAT THE MEMORY OF THE WITNESS WOULD BE

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[11] *See Kastigar v. United States*, 406 U.S. 441 (1972) (in which the Court held that "derived use immunity" was sufficient in scope to exempt a witness from harm flowing from court-ordered testimony in violation of his Fifth Amendment right against compelled self-incrimination).

IMPERMISSIBLY REFRESHED BY HIS EXPOSURE TO IMMUNIZED TESTIMONY, WHICH MIGHT SERVE TO ENHANCE THE CREDIBILITY OF THAT TESTIMONY AT TRIAL.[12]

SIMILAR TO THE SPILL-OVER EFFECTS SEEN IN THE NORTH CASE, WITNESS EXPOSURE TO TELEVISED EVIDENCE OF OTHER WITNESSES CARRIES THE SAME SORT OF RISK OF "DERIVED INFLUENCE" CORRUPTION ON THE TRUTH-SEEKING FUNCTION OF A TRIAL. WITNESSES WHO ARE EXPOSED TO THE TESTIMONY OF OTHERS MAY BE ABLE TO ENHANCE THEIR TESTIMONY BY TESTIFYING IN CONFORMITY WITH WHAT THEY HAVE HEARD ELSEWHERE OR IN CONTRADICTING PREVIOUS TESTIMONY, GIVEN THAT THEY MAY HAVE THE BENEFIT OF A PREVIEW FROM A BROADCAST IN STYLING THEIR REMARKS.

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[12] *See North*, 920 F.2d at 944& 994 n.4 (D.C. Cir. 1990) (per curiam); *see also, North*, 910 F.2d at 866-867.

WE ARE ALSO CONCERNED ABOUT THE SPILL-OVER EFFECTS IN CASES WHERE CO-CONSPIRATORS ARE TRIED SEPARATELY AND THE BROADCAST OF THE TRIAL OF ONE CO-CONSPIRATOR THREATENS TO CORRUPT THE POTENTIAL JURY POOL FOR THE TRIAL OF THE OTHER CO-CONSPIRATOR.[13]

IN WEIGHING THE HARM OF CAMERAS IN THE COURTROOM, IT IS IMPORTANT TO RECOGNIZE THAT THE POTENTIAL FOR HARM DOES NOT STOP WHEN THE TRIAL ENDS. BROADCAST TESTIMONY LIVES ON LONG AFTER A TRIAL HAS ENDED. PABLO FENJVES, WHO TESTIFIED IN THE O.J. SIMPSON MURDER TRIAL, REPORTED THAT AFTERWARDS HE HAD STRANGERS APPROACH HIM IN THE SUPERMARKET AND RECEIVED DEATH THREATS.[14]

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[13] *See, e.g., WALB-TV, Inc. v. Gibson*, 501 S.E.2d 821, 822-23 (Ga. 1998).

[14] Jill Smolowe, *TV Cameras On Trial: The Unseemly Simpson Spectacle Provokes A Backlash Against Televised Court Proceedings*, Time, July 24, 1995, at 38.

THIS RAISES ANOTHER SUBSTANTIAL CONCERN: THE SAFETY AND PRIVACY OF THE TRIAL PARTICIPANTS. MOST TRIAL PARTICIPANTS REALIZE THAT THEY MUST SACRIFICE SOME LEVEL OF PRIVACY BY TESTIFYING AT A PUBLIC TRIAL. THEIR SACRIFICE, HOWEVER, IS UNNECESSARILY MAGNIFIED WHEN CAMERAS PROVIDE EXPOSURE TO THE NATIONAL, RATHER THAN JUST THE LOCAL COMMUNITY. FURTHERMORE, THAT UNNECESSARY SACRIFICE IS INCREASED EXPONENTIALLY TODAY BECAUSE THE ADVANCES IN BROADCAST TECHNOLOGY MAKE THE BROADCASTS AVAILABLE NOT JUST WHEN THEY ARE FIRST AIRED BUT POTENTIALLY FOREVER ON THE WORLD-WIDE WEB.

UNITED STATES DISTRICT COURT JUDGE LEONIE BRINKEMA DESCRIBED THIS EXPONENTIAL LOSS OF PRIVACY AND INCREASED SECURITY RISK POSED TO WITNESSES IN AN ORDER SHE ISSUED IN THE ZACARIAS MOUSSAOUI CASE IN THE EASTERN DISTRICT OF VIRGINIA:

> ADVANCES IN BROADCAST TECHNOLOGY,..., HAVE...CREATED NEW THREATS TO THE INTEGRITY OF THE FACT

> FINDING PROCESS. THE TRADITIONAL PUBLIC SPECTATOR OR MEDIA REPRESENTATIVE WHO ATTENDS A FEDERAL CRIMINAL TRIAL LEAVES THE COURTROOM WITH HIS OR HER MEMORY OF THE PROCEEDINGS AND ANY NOTES HE OR SHE MAY HAVE TAKEN. THESE SPECTATORS DO NOT LEAVE WITH A PERMANENT PHOTOGRAPH. HOWEVER, ONCE A WITNESS'S TESTIMONY HAS BEEN TELEVISED, THE WITNESS'S FACE HAS NOT JUST BEEN PUBLICLY OBSERVED, IT HAS ALSO BECOME ELIGIBLE FOR PRESERVATION BY VCR OR DVD RECORDING, DIGITIZING BY THE NEW GENERATION OF CAMERAS OR PERMANENT PLACEMENT ON INTERNET WEB SITE AND CHAT ROOMS. TODAY, IT IS NOT SO MUCH THE SMALL, DISCRETE CAMERAS OR MICROPHONES IN THE COURTROOM THAT ARE LIKELY TO INTIMIDATE WITNESSES, RATHER, IT IS THE WITNESS'S KNOWLEDGE THAT HIS OR HER FACE OR VOICE MAY BE FOREVER PUBLICLY KNOWN AND AVAILABLE TO ANYONE IN THE WORLD.[15]

H.R. 2128 FAILS TO ENSURE THAT ATTORNEY-CLIENT CONVERSATIONS AND CONFIDENCES ARE PROTECTED. THE BILL ALSO FAILS TO PRECLUDE EVEN "THE AUDIO PICKUP OR

[15] *See United States v. Moussaoui*, 205 F.R.D. 183, 186-87 (E.D. Va. 2002).

BROADCAST" OF CONFERENCES IN A COURT PROCEEDING BETWEEN ATTORNEYS AND DEFENDANTS AND BETWEEN CO-COUNSEL."[16]

THE DEPARTMENT'S CONCERNS REGARDING THE EFFECT OF H.R. 2128 EXTEND BEYOND THE CONFINES OF THE TRIAL PROCESS OR THE COURTROOM. FOR EXAMPLE, THE BILL CONTAINS NO SAFEGUARDS TO PROTECT WITNESSES WHO PARTICIPATE IN THE DEPARTMENT'S WITNESS SECURITY PROGRAM FROM THE UNNECESSARY EXPOSURE CAUSED BY A BROADCAST.

IT IS CRITICAL WE ENSURE THAT WITNESSES UNDER THE PROTECTION OF THE U.S. GOVERNMENT NOT FACE GREATER RISK OF HARM BY THE BROADCASTING AND POTENTIAL RECORDING FOR ALL POSTERITY THEIR CURRENT APPEARANCE OR VOICE. PROPONENTS CONTEND THAT THIS CONCERN CAN BE ADDRESSED BY OBSCURING A WITNESS'S IMAGE AND VOICE DURING THE

[16] *See, e.g.,* S.C. App. Ct. R. 605(f)(2)(ii).

BROADCAST. SUCH PRECAUTIONS, HOWEVER, MAY STILL NOT BE ENOUGH. THE DEPARTMENT IS AWARE OF DEVICES AND TECHNOLOGY THAT MAY BE ABLE TO "UNOBSCURE" SUCH IMAGES AND VOICES.

OUR CONCERN ALSO EXTENDS BEYOND ISSUES ABOUT IMAGE AND VOICE. OFTEN, THE FACTUAL INFORMATION ALONE PROVIDED BY A WITNESS CAN GIVE AWAY IDENTITY. THE INCREASED POTENTIAL FOR PLACING FACTUAL INFORMATION RELAYED BY A WITNESS IN THE WITSEC PROGRAM ON THE INTERNET RAISES EVEN GREATER DIFFICULTIES FOR THE DEPARTMENT IN PROTECTING THAT INDIVIDUAL.

ON THE SECURITY FRONT, WE ALSO ARE CONCERNED THAT CAMERAS IN THE COURTROOM COULD HINDER THE ABILITY OF THE UNITED STATES MARSHALS SERVICE TO PROTECT TRIAL PARTICIPANTS. AS THIS COMMITTEE IS WELL AWARE, THREATS TO FEDERAL JUDGES AND THEIR FAMILIES ARE EVER PRESENT. ANY PROPOSAL THAT WOULD RESULT IN MAKING JUDGES MORE READILY

IDENTIFIABLE HOLDS THE POTENTIAL FOR INCREASING THEIR VULNERABILITY.

LIKEWISE, THE INTERESTS OF JUSTICE WOULD NOT BE ADVANCED BY THE WIDE DISSEMINATION OF THE IDENTITY OF WITNESS SECURITY PERSONNEL OR UNDERCOVER AGENTS WHO MAY HAVE TO RETURN TO SUCH DUTIES IN ANOTHER CITY OR STATE TO HAVE THEIR IMAGE FOREVER IMPRINTED ON THE INTERNET.

THE DEPARTMENT IS ALSO VERY CONCERNED ABOUT A RANGE OF OTHER POTENTIAL HARMS THAT ARE LEFT COMPLETELY UNADDRESSED BY H.R. 2128. FOR EXAMPLE, H.R. 2128 DOES NOT PROTECT AGAINST THE TELEVISING OF EVIDENCE THAT SHOULD NOT BE DISSEMINATED EXCEPT TO THE LIMITED DEGREE NECESSARY TO ENSURE DUE PROCESS AND A FAIR TRIAL. AT A TIME WHEN WE ARE FIGHTING TERRORISM, WE SHOULD BE CAREFUL ABOUT INTRODUCING RULES THAT WOULD EXPAND THE DISSEMINATION OF INFORMATION THAT WOULD BE PRESENTED AT TRIAL, PARTICULARLY IF THAT INFORMATION IS DECLASSIFIED

INFORMATION. AFTER ALL, EVEN IF WE HAVE TO DECLASSIFY NATIONAL SECURITY INFORMATION IN ORDER TO SUCCESSFULLY PROSECUTE A TERRORIST OR TERRORIST SUPPORTER, WE STILL SHOULD DO ALL WE CAN TO KEEP THE INFORMATION FROM BEING BROADCAST INTO EVERY DARK CORNER OF THE WORLD WITH INTERNET CAPABILITY.

THE SERIOUS SHORTCOMINGS OF H.R. 2128 ARE APPARENT IN OTHER AREAS OF CRITICAL IMPORTANCE TO THE PUBLIC. THE BILL DOES NOT ACCOUNT FOR THE INCREASED HARM CAUSED BY WIDER-THAN-NECESSARY DISSEMINATION OF SENSITIVE LAW ENFORCEMENT TECHNIQUES WHEN DISCLOSED IN OPEN COURT.

FOR EXAMPLE, LAST YEAR IN MY DISTRICT, WE BEGAN INVESTIGATING THE WALNUT GANGSTER CRIPS, A CRIMINAL GANG DEDICATED TO DRUG TRAFFICKING AND VIOLENCE. THE DEFENDANTS WE INVESTIGATED WERE SOPHISTICATED CRIMINALS, REGULARLY SWITCHING THEIR TELEPHONES AND OTHER MEANS OF COMMUNICATION IN ORDER TO AVOID LAW ENFORCEMENT

DETECTION. THERE WERE SOME MEANS OF COMMUNICATION, HOWEVER, THAT THEY THOUGHT WE WERE STILL UNABLE TECHNICALLY TO INTERCEPT AND SO THEY RELIED PARTICULARLY ON THOSE METHODS OF COMMUNICATION. AS PART OF THE INVESTIGATION, WE SOUGHT AND OBTAINED COURT-AUTHORIZED WIRETAPS NOT ONLY ON THEIR TELEPHONES, BUT ON THEIR OTHER METHODS OF COMMUNICATION IN ORDER THAT WE COULD INTERCEPT THESE GANGSTERS'S PLANS TO DELIVER DRUGS AND KILL RIVAL GANG MEMBERS. I AM PLEASED TO REPORT THAT IN LARGE PART BECAUSE OF OUR USE OF THESE COURT-AUTHORIZED WIRETAPS, WHICH ARE VERY SENSITIVE LAW ENFORCEMENT TECHNIQUES, WE WERE SUCCESSFUL IN GATHERING THE NECESSARY EVIDENCE TO DISMANTLE THIS VIOLENT CRIMINAL GANG. OF COURSE, AS PART OF THE DISCOVERY PROCESS IN THE CASES THAT FLOWED FROM THAT INVESTIGATION, WE NECESSARILY HAD TO REVEAL TO DEFENSE COUNSEL AND THE DEFENDANTS THAT WE WERE ABLE TO INTERCEPT NOT ONLY THEIR TELEPHONE CALLS BUT THEIR OTHER COMMUNICATIONS ON THE DEVICES THEY THOUGHT WE COULD NOT INTERCEPT. BUT, AS PART OF DISCOVERY

AND THE JUDICIAL PROCESS WE ONLY HAD TO TELL THESE DEFENDANTS AND THOSE PERSONS PRESENT IN OPEN COURT WHEN THE TECHNIQUES WERE DISCUSSED. WE DID NOT HAVE TO TELL EVERYONE ANYWHERE. IT IS HARD ENOUGH TO STAY AHEAD OF THE BAD GUYS FROM A TECHNOLOGICAL STANDPOINT WITHOUT EVERY TECHNIQUE BEING POTENTIALLY BROADCAST NOT JUST TO THE MEMBERS OF THE PUBLIC AND TRIAL PARTICIPANTS IN THE COURTROOM BUT ALSO ACROSS THE WORLD.

H.R. 2128 ALSO FAILS TO ADDRESS THE UNNECESSARY HARM TO VICTIMS WHO MUST TESTIFY. AS A PROSECUTOR WHO HAS WORKED FIRST-HAND WITH VICTIMS OF VIOLENCE, I KNOW THAT REQUIRING VICTIMS OF DOMESTIC VIOLENCE AND CHILD SEXUAL EXPLOITATION TO RELIVE THEIR EXPERIENCES BY TESTIFYING IN OPEN COURT IS DIFFICULT ENOUGH UNDER THE CURRENT RULES. LIVE BROADCAST OF THAT TESTIMONY WOULD ONLY ADD TO THEIR TRAUMA AND INVASION OF PRIVACY.

FURTHERMORE, THE FAILURE OF THE BILL TO ADDRESS THE HARMS RESULTING FROM INCREASED INVASIONS OF PRIVACY IS NOT LIMITED TO JUST VICTIMS IN CRIMINAL CASES. IN MEDICAL MALPRACTICE AND TORT CASES, FOR EXAMPLE, A PLAINTIFF'S MEDICAL HISTORY, PSYCHOLOGICAL HISTORY, FAMILY HISTORY, AND PHYSICAL AND EMOTIONAL DISTRESS ARE OFTEN AT ISSUE. UNDER THIS BILL, PLAINTIFFS, WHO MAY ALREADY HAVE BEEN HARMED THROUGH NEGLIGENCE, MAY FIND THAT THEY WILL INCUR ADDITIONAL HARM FROM A WIDESPREAD DISSEMINATION OF DEEPLY PERSONAL TESTIMONY AND EVIDENCE BECAUSE OF THE SENSATION SUCH INFORMATION WILL HAVE IN TODAY'S REALITY TV WORLD.

FURTHER, THE BILL DOES NOT ACCOUNT FOR THE IMPLICATIONS THAT TELEVISING JUDICIAL PROCEEDINGS WOULD HAVE ON THE GOVERNMENT'S ABILITY TO USE INFORMATION THAT IS PROTECTED BY THE PRIVACY ACT.[17] AT PRESENT, THE BALANCE

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[17] *See* 5 U.S.C. § 552a (Privacy Act of 1974).

STRUCK BY CONGRESS ALLOWS THE UNITED STATES TO USE INFORMATION OTHERWISE PROTECTED BY THE PRIVACY ACT IN COURT. THE POTENTIAL FOR DISSEMINATION OF SUCH INFORMATION VIA FULL-SCALE MEDIA COVERAGE, HOWEVER, CHANGES THE BALANCE THAT HAS BEEN STRUCK BETWEEN PRIVACY PROTECTION AND THE GOVERNMENT'S ABILITY TO USE THAT INFORMATION TO ENSURE THAT JUSTICE IS DONE IN A COURT OF LAW. THE PRIVACY CONSIDERATIONS THAT ROUTINELY ARISE IN LITIGATION WOULD BECOME MORE SERIOUS AND THE BALANCE MIGHT BE STRUCK MORE OFTEN ON THE SIDE OF THE GOVERNMENT NOT BEING ABLE TO USE THE INFORMATION IF THAT USE RESULTED IN WIDE-SPREAD MEDIA EXPOSURE WITH NO CONTROL OVER ITS FUTURE USE. THIS WOULD BE OF PARTICULAR CONSEQUENCE TO OUR CIVIL LITIGATION IN CRITICAL AREAS LIKE EMPLOYMENT LITIGATION AND DISCRIMINATION CASES.

THE LENGTHY LIST OF HARMS I HAVE IDENTIFIED TODAY ARE NOT JUST EPHEMERAL. THESE HARMS ARE LIKELY TO OCCUR. EVEN ASSUMING THE BEST, COURT PROCEEDINGS ARE THE PRODUCT OF

HUMAN BEINGS, JUDGES, LAWYERS, PARTIES, WITNESSES, AND JURORS, WHO ARE ALL FALLIBLE. WE DO NOT JUST HAVE TO RELY ON THE EDUCATED SURMISE THAT THESE HARMS ARE LIKELY TO OCCUR UNDER THE GLARE OF THE CAMERA.

ACCORDING TO THE ADMINISTRATIVE OFFICE OF THE U.S. COURTS, THE FEDERAL JUDICIARY HAS REPEATEDLY LOOKED AT THIS ISSUE OVER MORE THAN SIX DECADES WITHOUT FINDING A BASIS FOR THE KIND OF SWEEPING CHANGE THAT IS PROPOSED IN H.R. 2128. IN THE 1990'S, A PILOT PROGRAM IN CIVIL CASES WAS ESTABLISHED IN SIX UNITED STATES DISTRICT COURTS AND ALSO IN A NUMBER OF THE COURTS OF APPEALS. THE RESULTS OF INTRODUCING CAMERAS INTO THE FEDERAL COURTS WERE DOCUMENTED AND ANALYZED. THESE JUDGES REPORTED THAT EVEN IN CIVIL CASES CAMERAS LED TO WITNESSES WHO WERE NERVOUS, DISTRACTED, AND LESS WILLING TO APPEAR IN COURT.[18]

[18] Cameras in the Courtroom: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 83 (statement of Judge Jan E. Dubois of the Eastern District of Pennsylvania) (expressing concern that 64% of the participating judges found that cameras made witnesses more nervous; 41% of the judges found that cameras led to witnesses who were distracted; 46% of judges thought the cameras made witnesses less willing to appear; and 56% of judges found that

AS ONE OF THE JUDGES WHO PARTICIPATED IN THE PILOT PROGRAM STATED, "THE CAMERA IS LIKELY TO DO MORE THAN REPORT THE PROCEEDING – IT IS LIKELY TO *INFLUENCE* THE PROCEEDING.[19] THE NEGATIVE REPERCUSSIONS TO JUSTICE CAUSED BY CAMERAS IN CRIMINAL CASES, WHERE LIBERTY IS AT STAKE, WOULD BE EVEN MORE SEVERE. AT THE END OF THE DAY, THEREFORE, THE FEDERAL JUDICIARY DETERMINED THAT IN THE INTERESTS OF JUSTICE, THE BETTER COURSE WAS TO ALLOW THE EXPERIMENT TO END WITHOUT MAKING ANY CHANGES TO FEDERAL PROCEDURE THAT HAS STOOD IN PLACE SINCE 1946 REGARDING CAMERAS IN TRIALS.[20]

IF THESE HARMS MATERIALIZE, AS THIS PILOT PROGRAM SHOWED, THEY ARE SEVERE. INFLUENCING A JUDGE'S RULING, A WITNESS'S TESTIMONY, AND A JURY'S VERDICT REPRESENT HARM TO OUR PROCESS OF THE MOST SEVERE KIND, PARTICULARLY WHEN

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cameras violated witnesses's privacy).

[19] *See id.* at 86-87 (emphasis added).

[20] *See* Fed. R. Crim. P. 53 (prohibiting courtroom photographing and broadcasting).

THE HARMS ARE NOT ALWAYS EASILY MEASURED, DETECTED, OR REMEDIED.

PROPONENTS OF CAMERAS IN THE COURTROOM DISCOUNT THESE HARMS OR THEIR LIKELIHOOD. THEY ALSO CONTEND THAT JUDICIAL PROCEDURES CAN BE PUT IN PLACE TO PROVIDE ADEQUATE SAFEGUARDS. PROPONENTS ASSERT THAT STATE RULES ALLOWING FOR BROADCASTING IN CASES HAVE BEEN IN USE FOR MANY YEARS, AND ONLY IN RARE INSTANCES HAS IT BEEN SUCCESSFULLY SHOWN THAT BROADCASTING AFFECTED THE OUTCOME OF THE CASE.

THE DEPARTMENT BELIEVES SUCH ASSERTIONS MISS THE POINT. FIRST, GIVEN THE LIKELIHOOD AND SEVERITY OF THE HARMS TO THE JUDICIAL PROCESS, AS EVIDENCED RATHER NOTORIOUSLY IN NUMEROUS SENSATIONAL TRIALS OVER THE YEARS AND THE JUDICIARY'S PILOT PROJECT, THE ALLEGED AMELIORATIVE EFFECTS OF THESE SAFEGUARDS ARE SIMPLY

INADEQUATE TO MAKE THIS BILL WORTH THE POTENTIAL HARM IT MAY HAVE TO THE CAUSE OF JUSTICE AT THE FEDERAL LEVEL.

SECOND, *ANY* RISK TO JUDICIAL DECISION-MAKING, FAIRNESS OF JURY DELIBERATIONS, AND ACESS TO AND ACCURACY OF WITNESS TESTIMONY THAT CAN BE SO EASILY AVOIDED SIMPLY IS NOT A RISK WORTH TAKING. ALTERING OUTCOMES TO SATISFY THE APPETITE AND HUNGER FOR INCREASED ENTERTAINMENT, SENSATIONAL FOOTAGE, AND REALITY TELEVISION SIMPLY IS NOT GOOD PUBLIC POLICY.

LASTLY, MANY OF THE MOST INSIDIOUS HARMS CAUSED BY CAMERAS IN THE COURTROOM CANNOT BE MITIGATED OR REMEDIED BY ANY REGULATIONS THAT MIGHT BE PROMULGATED BY THE JUDICIAL CONFERENCE. IN THE FIRST INSTANCE, IT IS IMPORTANT TO UNDERSTAND THAT THE HARMS TO JUSTICE CANNOT BE MEASURED SIMPLY BY LOOKING TO REVERSALS OF JUDGMENTS AND CONVICTIONS. FOR EXAMPLE, EVEN IF JURORS ARE NOT DEPICTED, WE WOULD NEVER KNOW HOW EVEN THE SIMPLE

PRESENCE OF THE BROADCASTS INFLUENCED A JUROR'S THINKING OR AFFECTED THE JURY'S SECRET DELIBERATIONS. EVEN IF ONLY THE JUDGE'S VOICE COULD BE HEARD DURING THE PROCEEDING, WE WOULD NEVER KNOW HOW THE POTENTIAL FACT THAT HIS WORDS MIGHT END UP LINKED ON BLOGS INFLUENCED THE JUDGE'S THINKING. SINCE NO REGULATION COULD EVER FULLY MITIGATE ALL EFFECTS OF THE CAMERA, IF THAT COVERAGE INFLUENCED JUDGES, WITNESSES, OR JURORS TO THE EXTENT THAT IT LED TO AN ACQUITTAL IN A CRIMINAL CASE THERE WOULD BE NO RIGHT FOR THE UNITED STATES TO APPEAL. LIKEWISE, IF THE COVERAGE INFLUENCED A COURT TO MAKE EVIDENTIARY RULINGS AGAINST THE GOVERNMENT, WHICH ARE RARELY APPEALABLE, THE NEGATIVE EFFECT OF SUCH INFLUENCE WOULD NEVER BE MEASURABLE OR REMEDIED.

MOREOVER, IT IS NOT JUST THE GOVERNMENT THAT FACES THE POTENTIAL FOR UNQUANTIFIABLE HARM, NOTWITHSTANDING ANY GOOD FAITH ATTEMPT TO MITIGATE HARM THROUGH JUDICIAL REGULATION. AS THE LAW PRESENTLY STANDS, A DEFENDANT

CARRIES A HIGH BURDEN OF SHOWING THAT THE COVERAGE RENDERED HIS TRIAL UNFAIR.[21] HE CARRIES THE BURDEN ON APPEAL OF SHOWING THE PREJUDICE AFTER THE RULINGS HAVE BEEN MADE, AFTER THE WITNESSES DEMEANOR AND EXPRESSION HAVE BEEN WITNESSED BY THE JURY, AFTER THE LAWYERS HAVE ALREADY MADE THEIR ARGUMENTS TO THE JURY, AND AFTER THE JURORS HAVE FOUND HIM GUILTY AND BEEN DISMISSED.[22] BECAUSE, AS DESCRIBED ABOVE, THE INFLUENCE AND EFFECT SUCH COVERAGE WOULD HAVE ON THE PROCESS WOULD SO OFTEN BE IMPOSSIBLE TO MEASURE OR DETECT AND, THEREFORE, NOT POSSIBLE TO REGULATE, THIS WOULD BE A VERY HIGH BURDEN FOR A DEFENDANT TO OVERCOME ON APPEAL.

WHAT PRICE DO WE PAY AS A SOCIETY TO AVOID ALL OF THESE HARMS TO OUR JUSTICE SYSTEM? WHAT DO WE GIVE UP?

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[21] *See Chandler v. Florida*, 449 U.S. 560, 575 (1981) .

[22] *See, e.g., State v. Hauptman*, 115 N.J.L. 412, 180 A. 809 (N.J. 1935), *cert. denied* 296 U.S. 649 (1935).

PROPONENTS OF CAMERAS IN THE COURTROOM MAKE TWO MAJOR ARGUMENTS. FIRST, THEY ARGUE THAT BY BROADCASTING THE PROCEEDINGS, THE MEDIA, AS A SURROGATE FOR THE PUBLIC, CAN ACT AS A CHECK BY "SHINING" THE "SUN" ON THE JUDICIAL BRANCH. SECOND, THEY ARGUE THAT THE EXPANSION OF THE ABILITY TO BROADCAST COURTROOM PROCEEDINGS WOULD PROVIDE A VALUABLE EDUCATIONAL OPPORTUNITY TO ALL AMERICAN CITIZENS.

THE FIRST ARGUMENT WAS PROBABLY STRONGEST IN THE FIRST CENTURY OF OUR REPUBLIC, AS FEAR OF THE ENGLISH STAR CHAMBER WAS STILL IN CITIZENS'S MINDS. IN THE PRESENT DAY, HOWEVER, IT IS HARD TO SEE HOW THE MEDIA REALLY NEEDS A GREATER PRESENCE IN ORDER TO ADEQUATELY MONITOR AND CHECK THE JUDICIARY. AFTER ALL, THE SUN IS ALREADY SHINING BRIGHTLY. DESPITE THE PRESENT RULES PROHIBITING BROADCASTS IN FEDERAL COURTS, COURTROOM DRAMA STILL DOMINATES MUCH OUR NEWS COVERAGE TODAY. AND, AS THE RULES AT THE FEDERAL LEVEL OPERATE TODAY, THE PRINT AND BROADCAST MEDIA STILL

HAVE THE EXACT SAME DEGREE OF ACCESS TO COURT PROCEEDINGS AS THE GENERAL PUBLIC. THE BRIGHT LIGHTS OF THE CAMERA ARE ON THE STEPS OF THE COURTHOUSE. JOURNALISTS ARE ALREADY IN THE COURTROOM FERRYING INFORMATION IMMEDIATELY TO CAMERAS AND FROM THERE TO THE PUBLIC. AS IT IS, THE LISTENING AND VIEWING PUBLIC IS GIVEN ALMOST INSTANT ACCESS TO INFORMATION ABOUT THE PROCEEDINGS. IN SHORT, WE GIVE UP VIRTUALLY NOTHING.

THE SECOND ARGUMENT, WHILE CARRYING SUPERFICIAL APPEAL, IS NOT PARTICULARLY WELL-SUPPORTED FROM AN EMPIRICAL PERSPECTIVE. IN A 2002 ARTICLE IN THE *HARVARD JOURNAL OF INTERNATIONAL PRESS/POLITICS*, PROFESSORS C. DANIELLE VINSON AND JOHN S. ERTTER REVIEWED TELEVISED COVERAGE OF CASES, INCLUDING BOTH CASES IN WHICH CAMERAS HAD BEEN PERMITTED AND THOSE IN WHICH THEY HAD NOT. THEY

ALSO REVIEWED TELEVISION AND NEWSPAPER COVERAGE OF THE SAME CASES.[23]

ONE OF THE MOST INTERESTING COMPARISONS WAS BETWEEN THE CASES OF JOHN BOBBITT AND LORENA BOBBITT. YOU MAY RECALL THAT MR. BOBBITT WAS CHARGED WITH ALLEGEDLY RAPING HIS WIFE. MRS. BOBBITT WAS CHARGED WITH MULTILATING HER HUSBAND FOLLOWING THE ALLEGED RAPE. THE UNDERLYING FACTS IN THE CASES WERE THE SAME. UNDER VIRGINIA LAW, MR. BOBBITT'S CASE WAS CONSIDERED A SEXUAL ASSAULT CASE AND, THEREFORE, CAMERAS WERE NOT PERMITTED IN THE COURTROOM. IN CONTRAST, MRS. BOBBITT'S CASE WAS NOT CONSIDERED A SEXUAL ASSAULT AND SO CAMERAS IN THE COURTROOM WERE PERMITTED.

THE PROFESSORS FOUND THAT THE IMPACT OF THE CAMERAS DRAMATICALLY AFFECTED THE SUBSTANCE OF THE REPORTING ON

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[23] C. Danielle Vinson and John S. Ertter, *Entertainment or Education: How Do Media Cover The Courts?*, The Harvard International Journal of Press/Politics (2002) at 80.

THE TWO CASES. IN MR. BOBBITT'S TRIAL, WHERE CAMERAS WERE NOT PERMITTED, THE COVERAGE CONTAINED RATHER CLINICAL DESCRIPTIONS OF THE EVENTS AS DESCRIBED BY THE WITNESSES AND THEN FOCUSED ON THE LARGER IMPLICATIONS OF THE TRIAL – DOMESTIC ABUSE AND THE CALLS FOR THE NEED TO CHANGE MARITAL RAPE LAWS. THE EDUCATIONAL VALUE OF THE REPORTS FROM THE MEDIA WHO MERELY OBSERVED THE PROCEEDINGS WAS ARGUABLY GREATER THAN THE SENSATIONAL DRAMA OF THE CAMERA COVERAGE.

NOT SURPRISING, THE DRAMA PRESENTED IN BROADCASTS FROM THE CAPTURED LIVE TESTIMONY IN THE CASE AGAINST MRS. BOBBIT FOCUSED NARROWLY AND GRAPHICALLY ON THE BRUTAL MUTILATION, THE EMOTIONS OF THE WITNESSES, AND THE "STRATEGIC GAME BETWEEN THE TWO SIDES." NONE OF THE STORIES ON MRS. BOBBITT'S CASE RAISED THE LARGER QUESTIONS OF DOMESTIC ABUSE OR THE POLICY ISSUES RELATING TO MARITAL RAPE.

THESE PROFESSORS ALSO COMPARED TELEVISION AND NEWSPAPER COVERAGE OF A DIFFERENT CASE IN WHICH CAMERAS WERE PERMITTED IN THE COURTROOM.[24] THEY CONCLUDED THAT THE NEWSPAPER COVERAGE COVERED MORE DETAILS OF THE INCIDENT, THE ACTUAL JUDICIAL PROCESS, THE SUBSTANCE OF THE DEFENSE, AND THE LARGER SOCIETAL IMPACT OF THE CASE THAN THE TELEVISION COVERAGE, WHICH FOCUSED PRIMARILY ON THE MORE DRAMATIC ASPECTS OF THE EVENTS IN THE COURTROOM. ALTHOUGH THESE PROFESSORS DID NOT GENERALIZE THESE CASES TO ALL COVERAGE, AND NEITHER DOESTHE DEPARTMENT OF JUSTICE, THEIR FINDINGS CLEARLY RAISE LEGITIMATE QUESTIONS ABOUT WHETHER ARGUMENTS SUGGESTING CAMERAS WOULD AID EDUCATION ARE REALLY ACCURATE. THEIR STUDY MAY SUGGEST THAT CAMERAS IN THE COURTROOM ACTUALLY MAY UNDERMINE THE PUBLIC EDUCATION ABOUT THE JUDICIAL PROCESS AND DEGRADE SUPPORT FOR AND TRUST IN OUR COURTS. REGARDLESS, THIS STUDY'S FINDINGS AND SUGGESTIONS SHOULD NOT BE

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[24] *See id.* at 92.

LIGHTLY DISREGARDED, PARTICULARLY WHEN THE INTEREST OF JUSTICE IS AT STAKE.

MR. CHAIRMAN, I WANT TO THANK THIS COMMITTEE FOR INVITING ME TO TESTIFY AND ALLOWING ME TO PRESENT THE DEPARTMENT'S VIEWS ON H.R. 2128. AS I HAVE BRIEFLY SET FORTH TODAY, THE POTENTIAL HARMS TO FAIR TRIALS AND THE CAUSE OF JUSTICE ARE MANY, ARE LIKELY, AND WOULD BE SEVERE. IN CONTRAST, THE BENEFITS, IF ANY, WOULD BE SMALL. I WILL END, THEREFORE, AS I BEGAN: THE POTENTIAL HARMS OF THIS LEGISLATION TO THE CAUSE OF JUSTICE GREATLY OUTWEIGH ANY PURPORTED BENEFIT TO BE GAINED BY THE MEASURE. THEREFORE, THE DEPARTMENT OF JUSTICE STRONGLY OPPOSES H.R. 2128. I WOULD BE PLEASED TO ANSWER ANY QUESTION YOU AND YOUR FELLOW COMMITTEE MEMBERS MAY HAVE.

THANK YOU.

Mr. DELAHUNT. Thank you, Mr. Richter.
Ms. Swain?

TESTIMONY OF SUSAN M. SWAIN, PRESIDENT AND CO-CHIEF OPERATING OFFICER, C-SPAN

Ms. SWAIN. Thank you, Mr. Chairman, Mr. Smith and Members of the Committee, for inviting C-SPAN here today to testify about an issue that is very near and dear to our network, cameras in the Federal courts.

C-SPAN actually welcomes very strongly the bill's intention of making the courts more accessible to television coverage. As the Members of this Committee are very aware, our network has a long history of advocating greater openness in Federal Government, and we believe that the Federal courts should be as open to cameras as are the House and the Senate.

I travel the country a great deal for my job, and it is interesting how often the question is asked, "When will cameras be allowed in the Federal courts?" It is very disappointing to explain to people that 16 years after the Judicial Conference first began experimenting with television coverage, no additional circuits beyond the two in that first test, the 2nd in New York and the 9th in San Francisco, have moved to allow camera coverage of their proceedings.

Two things have happened during those 16 years: As the judge has indicated, video has come to dominate the communications flow in our society; and the 2nd and 9th Circuits now have long histories of successful interaction with C-SPAN and other television news organizations.

Let me tell you a little bit about what the experience is like being a news organization trying to operate in what has become, we think, a patchwork quilt of policies regarding media access in the 13 Federal courts.

While the 2nd and 9th consider requests for cameras, most other circuits make audiotapes of their proceedings, and even then, access to those audiotapes ranges from no public release—in other words, the tapes are for the judge's use only—to circuits, which, as noted, post them on their Web site. And there is one circuit, the 5th in New Orleans, which still relies on written transcripts.

The status quo is really hard for someone outside the system to understand, and let me give you an example from the past year to explain why.

In the past 9 months, two circuits, the 2nd and the 3rd in Philadelphia, both heard cases about broadcast indecency standards. Because of the current public debate over television decency, C-SPAN petitioned both courts for permission to televise the sessions: the second, which has the camera policy; the third, which does not.

The 2nd Circuit not only permitted us to bring in cameras, but further agreed to our request to televise last December's argument in Fox vs. FCC live. By contrast, the 3rd Circuit court case, *CBS v. FCC,* is probably much better known to the public because it stems from the 2004 Super Bowl telecast, Janet Jackson's so-called "wardrobe malfunction incident."

We asked the 3rd Circuit to consider an exception to its no TV policy and permit us to televise this argument. In the end, we re-

ceived a letter from the clerk denying our request on the grounds that the 3rd Circuit has no television policy, and there we are.

The 3rd Circuit is one of those courts which audiotapes proceedings, so we asked for permission for same-day access to the audiotapes, which the court granted. We figured that our best resource was to televise the audio of the oral argument by adding graphics and pictures of the judges and attorneys. So this is where we end up, same-day televised audio with pictures bringing us far enough down the road that one has to ask, "Why not simply permit the cameras?"

Audio with pictures is exactly where we are with the Supreme Court oral arguments. And, although we are very pleased with Chief Justice Roberts, who has continued Chief Rehnquist's practice of considering requests for expedited release of the audio of high-court arguments, our batting average in the Supreme Court is good, but we wish it were better. So far, we have asked the Roberts court for audio in 12 different cases, and the chief justice has agreed to seven of our requests.

Mr. Chairman and Members of this Committee, it has now been 30 years since C-SPAN argued, and the Congress agreed, that in this very vast country, television cameras are a practical extension of the press and public galleries in the Capitol building, and we believe that the same basic argument holds true for the Federal court.

An open judicial system is fundamental to our democracy. Federal judges, after all, are public employees doing the public's business in public buildings. We believe, as the authors of this legislation do, that the public has a right to witness the work of their Federal courts and that considering the great size of this country and the reliance on television as the means of communication, it is really the only viable way for this to happen.

Mr. Chairman, let me close by reiterating C-SPAN's interest in and commitment to greater coverage of the Federal courts on our networks, our plan to do it entirely gavel to gavel, and complete coverage of the Supreme Court should television access be expanded there as well.

Thank you for letting us present our opinion today.

[The prepared statement of Ms. Swain follows:]

PREPARED STATEMENT OF SUSAN M. SWAIN

Mr. Chairman and members of the committee, thank you for inviting C-SPAN to testify before you today on the issue of camera coverage of federal court proceedings.

C-SPAN is not here today to offer the committee its specific position on H.R. 2128. We don't believe it is our role as journalists to advise the Congress on pending legislation. Instead, we are here to reiterate our longstanding position that it is in the best interests of the American public for the federal courts to be more fully open to audio and video coverage.

We'd like to give you two examples that demonstrate the challenge of providing broadcast coverage of our federal courts today and how the varying guidelines among the courts have created what amounts to a 'patchwork quilt' of policies.[1] Only two circuits, the Second and Ninth, consider requests for television coverage, other courts release audiotapes, and others still have no broadcast access whatsoever.

Just two weeks ago, on September 11th, 2007, the Third Circuit Court of Appeals heard a broadcast indecency case stemming from an incident that is familiar to almost everyone in the United States.[2] *CBS v FCC* involves the 2004 CBS Super Bowl half-time performance of entertainer Janet Jackson for which the FCC fined CBS a half-million dollars for televising what became known as Ms. Jackson's "wardrobe malfunction."

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[1] See attachment 1
[2] See attachment 2

Because of the enormous public awareness of this incident and the implications this case has for the national debate over television broadcasting standards, C-SPAN petitioned the Third Circuit's Chief Judge Anthony Scirica in March for special permission to televise this argument. In July, we received a letter from the Clerk of the Court denying our request because the Third Circuit does not permit camera coverage of its proceedings.[3] Later, the court agreed to same-day release of the audiotape of its argument, but we will explain more about that later.

Nine months earlier, another federal court—in this instance, the Second Circuit—heard another television decency case -- *Fox v FCC,* often referred to as the "fleeting expletives case." Just as it had with the CBS case, C-SPAN petitioned the Second Circuit Court for permission to televise the oral argument….and we further requested permission to telecast it *live*. The Second Circuit, which does have an expressed broadcast policy, approved C-SPAN's request.

Interestingly, our live telecast actually became part of the court's opinion in the case. In their ruling, the judges offered a hypothetical about whether the FCC would, in fact, impose a fine upon a news organization for its live telecast of an oral argument as the attorneys and judges repeated the very expletives that were at the heart of the case.

We wish we had better news to report on camera access to the federal courts. After all, as the members of this committee are well aware it's been 16 years since the Federal Judicial Conference first conducted a test of television and radio coverage of

[3] See attachment 3

selected trial and appeals courts. The Second and Ninth Circuit Courts were the testing grounds for this 1991-1994 experiment and C-SPAN was an active participant during that period, covering many arguments before them.

At the conclusion of this trial, the Federal Judicial Center released a summary evaluation that reported "small or no effects of camera presence on participants in the proceedings, courtroom decorum, or administration of Justice." The Judicial Center further found that "attitudes of the judges toward electronic media coverage…were initially neutral and became more favorable after experience under the pilot program."

Despite this favorable analysis, once the experiment concluded only the two circuits that had participated in the trial, the Second and Ninth, adopted guidelines for ongoing television and audio coverage of their proceedings.

From time to time over the ensuing 13 years, C-SPAN has petitioned the Second and Ninth Circuits for camera access to specific oral arguments. And in most, but not in every case, the courts in these two Circuits have agreed to our requests. Our resulting telecasts have allowed the interested public to witness the courts' deliberations on important Constitutional issues related to NSA warrantless wiretapping, late-term abortion, school integration and free speech.[4]

Once permission has been given to us, or any other requesting news organization, to bring cameras into the courtroom, the feed is then generally available to other

[4] See attachment 4

accredited news organizations for their use. Our practice at C-SPAN is to televise oral arguments in their entirety on one of the C-SPAN television networks, generally accompanied by contextual interviews with experts who explain the workings of the court and the issues surrounding the specific cases. Typically, these productions also air on our radio station and are simulcast, then archived on C-SPAN's website. In addition, as with all of our programming content, these televised oral arguments are digitally preserved at C-SPAN's Archives in West Lafayette, Indiana, where they will remain available to generations of students, scholars, reporters and others who are interested in workings of the federal courts.

This "gavel-to-gavel" style of coverage of federal court cases is similar to countless thousands of hours of public events concerning the Congress and the Executive Branch including House and Senate floor debate, Congressional hearings such as this one, Presidential addresses and press briefings, and many other such events that C-SPAN has televised over the past 28 years.

Throughout these years, America has increasingly become a video-oriented society; yet the judicial branch of our government remains mostly off-limits to television coverage. Today, despite the enormous significance of the federal courts in American life – a significance made all the more apparent to the nation as the federal courts deliberate high-profile issues that have arisen following the September 11th attacks and the wars in Iraq and Afghanistan—this lack of television coverage has caused the

Judiciary to become a nearly invisible branch of our national government for the public-at-large and the news media that serves them.

Some federal courts, including the Supreme Court itself, have taken what seems like small steps into the digital age by creating audio recordings of their proceedings and allowing them to become publicly available over time. And from time-to-time, C-SPAN -- along with or on behalf of other media organizations—has petitioned the courts for expedited access to these audiotapes, as we did in the Third Circuit's *CBS* case.

If such permission is granted, C-SPAN then 'televises the audio' by adding photos and graphics to illustrate the audio. As 'television productions' these telecasts are not particularly satisfying, but they do provide the important service of making these oral arguments more widely available to the public.

The Supreme Court's practice is to make audio recordings of every oral argument. At the end of the term, these tapes are turned over to the National Archives, which delays their public release until the start of the next term. In 2000, C-SPAN petitioned Chief Justice William Rehnquist for permission to televise the oral arguments in *Bush v Palm Beach County Canvassing Board*, its consideration of the 2000 presidential election results. The Chief Justice denied our television request but did respond by assenting to same-day release of the audiotape. Apparently satisfied with the resulting broadcast coverage of this case, Chief Justice Rehnquist further agreed to expedited audiotape

releases for nine other arguments during the remainder of his tenure, using his standard of 'heightened public interest.'

I'm pleased to report that Chief Justice Roberts has continued this tradition. While we wish our track record were better, the Chief Justice has agreed to immediate audiotape release for seven of the twelve arguments that C-SPAN has requested thus far.

Hoping to facilitate the Supreme Court's familiarity with the latest television technology, C-SPAN sent Chief Justice Roberts a letter shortly after his swearing-in, offering to set up a TV demonstration in the court's chamber. We explained that the latest digital television equipment combined with the experience and expertise of our technical staff and producers in creating long-form television would allow discreet, high-quality telecasts of the court's oral arguments. In that letter, C-SPAN also reiterated its commitment to televise every one of the court's arguments, should such coverage be permitted. Thus far, the Chief Justice has not accepted our offer for this demonstration.

The Federal Judiciary's reluctance to move beyond these nascent experiences with audio and video coverage is perplexing: Why are print reporters permitted to cover the federal courts, but broadcast journalists generally excluded? When two federal courts have 16 years of successful experience with television cameras, why have no other federal courts moved to join them in allowing cameras? Why do some courts facilitate audiotape release of proceedings, facilitating radio reporting, but not permit cameras in the courtroom?

Mr. Chairman, there are many good arguments for televising the public sessions of our federal courts and C-SPAN has made them in a variety of settings over the past 28 years.[5] But it seems to us that the fundamental argument in favor of a televised federal judiciary is simply that an open government such as our demands it.

The judges of our federal courts are public employees paid with public tax money who are conducting public business in a public building. The courts generally permit the print press and the few members of the public who can be accommodated in the courtrooms to observe their workings. In this digital age, why not allow the rest of the country to do the same via television? Video dominates our society's communications flow. Because of this, we believe it is simply not acceptable that the majority of our federal courts effectively shield themselves from public view by disallowing cameras.

Thank you again, for soliciting C-SPAN's input on this important question. We appreciate the committee's interest in a more open federal judiciary. And, if the federal courts agree to allow more television coverage of their proceedings, C-SPAN stands ready to provide much more coverage to the public.

[5] See attachment 5

ATTACHMENTS

DATA ACCOMPANYING C-SPAN TESTIMONY #1

Summary of TV/Radio Rules for Federal Courts

	Cameras	Audio	Notes
Supreme Court	No	Yes	Request made to Chief Justice. Granted on case by case basis.
First	No	Yes	Must send letter requesting audio tape. $26.00 per argument.
Second	**Yes**	Yes	Case by case basis.
Third	No	Yes	Must send letter requesting audio tape. $26.00 per argument.
Fourth	No	Yes	Must send letter requesting audio tape. $26.00 per argument.
Fifth	No	No	Petition court prior to argument for transcript: both counsels and panel members must agree. Petitioner must incur costs.
Sixth	No	Yes	Must send letter requesting audio tape. $26.00 per argument.
Seventh	No	Yes	Audio is provided through court's website.
Eighth	No	Yes	Can send letter or listen through website. $26.00 per argument.
Ninth	**Yes**	Yes	Case by case basis.
Tenth	No	No	Audio for judges only.
Eleventh	No	No	Audio for judges only.
DC	No	Yes	Audio is available after a case has completely closed. Fee of $26.00.
Federal	No	Yes	Available by request for $26.00 fee. Call admin office.

Source: Clerk of Court contacted for each circuit, July 2007

DATA ACCOMPANYING C-SPAN TESTIMONY #2

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No TV for Jackson Case

By John Eggerton – Broadcasting & Cable, 9/3/2007

It's unlikely any cable viewers will be offended by visual evidence in arguments in Janet Jackson's breast-baring case being heard later this month.

The Third Circuit U.S. Court of Appeals in Philadelphia will not allow C-SPAN to televise the Sept. 11 oral arguments in CBS' challenge of the FCC's $550,000 indecency fine against the Janet Jackson/Justin Timberlake Super Bowl stunt.

The stunt, which lasted all of a second or so, led to time delays on live programming, editing of scripted fare and increased FCC fines.

The cable public affairs network televised the Dec. 20, 2006, oral argument in the challenge to the FCC's profanity finding against Fox in the Second Circuit. C-SPAN had hoped to do the same for the even more high-profile Jackson trial.

"We took a shot in the dark and sent them a letter," said Terry Murphy, VP of programming, for C-SPAN, "and they said no."

While the Second Circuit Court of Appeals has opened its court to TV cameras, the Third has not and won't start with the Jackson case, which is being argued on the afternoon of Sept. 11. C-SPAN will get access to audio from the arguments, however, and has been working with the court to try to get it as quickly as possible.

Unlike the Supreme Court, which releases the audio "right away," the Third Circuit is not as quick, but Murphy says the court has told C-SPAN it will try to release it to the press by the end of the day. If so, the recording will air on C-SPAN-2 that night, as well as be streamed online and carried on C-SPAN Radio.

(Murphy says it will air on C-SPAN-2 because C-SPAN will likely be devoted to the report from Gen. David Petraeus on the war in Iraq, scheduled to be released the same day.)

While C-SPAN's coverage of the profanity arguments contained numerous four-letter words which C-SPAN did not expurgate, the Jackson hearing is unlikely to need viewer warnings, though Murphy says it will add them if necessary.

CBS has already told the court in its brief that it is not pushing to get FCC out of the indecency enforcement business, but back to a policy of restraint that characterized the commission for decades, a policy it "abandoned" after it "failed to turn up even a shred of evidence" that CBS participated in or knew about the "Jackson/Timberlake" stunt.

The Second Circuit Court of Appeals, in rejecting the FCC's explanation for its crackdown on cursing, signaled the FCC's entire indecency enforcement regime could be suspect. CBS may not be looking to take down the indecency enforcement regime, but a win the Third Circuit might pave the way, ultimately for a Supreme Court challenge of the commission's content enforcement powers.

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Advertisement

DATA ACCOMPANYING C-SPAN TESTIMONY #3a

March 7, 2007

The Honorable Anthony Scirica
Chief Judge
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Dear Chief Judge Scirica:

C-SPAN is asking the Court to make an exception to its rule of barring cameras from taping oral argument in the case of CBS v. FCC # 06-3575, because of its heightened public interest to a national audience.

Beginning in 2000, Chief Justice William Rehnquist allowed same day oral argument release of audio in cases using the criteria of "a heightened public interest." We understand that the Third Circuit Court currently releases audio, but we're asking the Court to move one step further following the lead set by the Second and Ninth Circuit Courts' practice of allowing cameras on a case-by-case basis.

If granted, C-SPAN will air this case in its entirety on our networks including C-SPAN Radio, C-SPAN.org and our America and the Courts program.

We understand the apprehension of allowing cameras into the courtroom and will work with Yullie Robbins, the Court's Public Information Clerk, to assure our presence does not disrupt the Court.

C-SPAN is a private, non-profit public service provided by the cable television industry founded in 1979 and dedicated to covering the United States House, Senate and the Judiciary gavel-to-gavel and without commentary. We believe that in airing this oral argument, we will provide our viewers with a better understanding of the federal judiciary and its impact on the lives of Americans.

Thank you for your consideration of this request. Our Courts Producer, Tanya Chattman will be in touch with Yullie Robbins to follow up on your response.

Sincerely,

Terence Murphy

Terence Murphy
C-SPAN Vice President & Executive Producer

00 North Capitol St. NW
Ulte 650
Ashington, DC 20001
02. 737. 3220

DATA ACCOMPANYING C-SPAN TESTIMONY #3b

OFFICE OF THE CLERK

MARCIA M. WALDRON
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
2100 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, 19106-1790

TELEPHONE
215-597-2995

July 24, 2007

Mr. Terence Murphy
C-SPAN Vice President & Executive Producer
400 North Capitol St. NW
Suite 650
Washington, D.C. 20001

Dear Mr. Murphy:

Your letter to Chief Judge Scirica dated March 7, 2007 was referred to me for response. Your request to televise the oral argument, if scheduled, in CBS v. FCC, C.A. No. 06-3675, must be denied. You mention that the Second and Ninth Circuits permit televising oral argument. The Third Circuit Court of Appeals policy regarding cameras in the courtroom is more restrictive than those of the Second and Ninth Circuit's and does not permit live broadcasts of oral argument. I carefully considered your request, but have determined that it does not come within the court's policy.

Very Truly Yours,

Marcia Waldron
Clerk

DATA ACCOMPANYING C-SPAN TESTIMONY #4

Cumulative C-SPAN Coverage of Lower Federal Courts, Since 1985

US Court of Appeals	39.5 hours
US District Court	13
US Court of Military Appeals	11
US Court of Military Commission Review	1.5

Total: 65 hours

C-SPAN Coverage of Lower Federal Courts, since January 2006

US Court of Appeals, 2nd Circuit	2 hours
US Court of Appeals, 3rd Circuit	1 – Audio only
US Court of Appeals, 6th Circuit	2 – Audio only
US Court of Appeals, 7th Circuit	1 – Audio only
US Court of Appeals, 9th Circuit	8.5 hours

Total: 14.5 hours

Cases Include
Voting Rights, Same Sex Marriage, Free Speech, Broadcast Indecency Regulations, Slave Reparations, NSA Warrentless Wiretapping

C-SPAN Coverage of 'Early Release' Supreme Court Oral Arguments, since 2000

Chief Justice	*Requested*	*Approved*
Rehnquist	11	9
Roberts	14	7

Cases Include
2000 Election results, Campaign Finance Reform, Affirmative Action, Military Tribunals "Don't ask, Don't tell" Military policy, Abortion, Energy Task Force, Securities Fraud & Presidential Powers.

C-SPAN Radio Coverage of Supreme Court Oral Arguments, since 1998

Archival cases	465 hours
Same-day release	16

Total: 481 hours

Source: C-SPAN Archives September 2007

DATA ACCOMPANYING C-SPAN TESTIMONY #5

C-SPAN has sought to provide its audience with coverage of the Judiciary, just as it has covered the Legislative and Executive branches of government. The prohibition of televised coverage of the Supreme Court's oral arguments has been an obstacle to fulfilling that goal. The following web page chronicles C-SPAN's efforts to make the Court more accessible to the public:

http://www.c-span.org/camerasinthecourt/timeline.asp

Mr. DELAHUNT. Thank you, Ms Swain.
Ms. Cochran?

TESTIMONY OF BARBARA COCHRAN, PRESIDENT, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

Ms. COCHRAN. Mr. Chairman, Ranking Member Smith and Members of the Committee, thank you for inviting me to appear today on behalf of the 3,000 electronic journalists who are members of RTNDA.

The Sunshine in the Courtroom Act of 2007 is an important step toward removing the cloak of secrecy surrounding our judicial system. In our view, the time has come to enact this legislation as speedily as possible. Cameras are now routinely present in State courtrooms and have been for more than a quarter of a century. Indeed, all 50 States permit television and radio coverage at some level and 43 States allow such coverage of trials. If cameras can work at the State level, they can work at the Federal level, too.

The U.S. Supreme Court has upheld the first amendment right of the public to attend trials. The news media are present as surrogates for the public. In the 21st century, there is no compelling reason to continue to exclude electronic media from Federal courts. Such a discriminatory ban is inconsistent with an open judicial process and is a disservice to the public.

A courtroom is a public forum where the presence of citizens or the news media as their surrogates historically has enhanced the integrity and quality of the judiciary. Only the electronic media can truly convey with accuracy what goes on inside a Federal courtroom by enabling the public to observe the demeanor, tone, credibility and even the competency and veracity of the participants in a proceeding.

Electronic coverage of Federal court proceedings would serve an important purpose for this body as well. The actions of the executive branch and the legislature are extensively portrayed in the electronic media, but under our current system, neither the legislature nor the executive branch has ready access to the daily workings of the Federal judiciary. Without regular audio visual coverage of court proceedings, two co-equal branches' oversight of the judiciary is limited to fleeting glimpses offered in confirmation hearings.

Americans are left knowing more about the jurisprudence of Judge Judy than of Justices Roberts and Alito. Jurors, prosecutors, lawyers, witnesses and judges at the State and Federal levels have overwhelmingly reported that the unobtrusive camera has not adversely impacted trials or appellate proceedings. The pilot program in the early 1990's was a resounding success and resulted in a recommendation that cameras be allowed in all Federal courts.

Comprehensive studies conducted in 28 States show the significant social and educational benefits of televised coverage of courts. Most conclude that a silent, unobtrusive courtroom camera provides the public with more and better information about the functioning of courts. RTNDA knows of no case in which the presence of a courtroom camera was found to have any affect whatsoever on the ultimate result.

Simultaneous audiovisual coverage of judicial proceedings also improves the accuracy of reporting by all media. Such coverage af-

fords instant access and verification of quotes to reporters who work in print as well as electronic media. In contrast to the Harvard study we just heard about, a New York study found, "Reporting on court proceedings, both by newspaper and broadcast reporters, frequently is more accurate and comprehensive when cameras are present."

The 2000 presidential election case illustrates the public benefits of audiovisual coverage of judicial proceedings. When the case reached the Supreme Court, the court set historic precedent by quickly releasing an audio recording of the oral arguments. Both television and radio stations broadcast the tapes in their entirety. By acting with more transparency, the high court laid the groundwork for a common understanding and acceptance necessary for closure to the electoral contest of 2000.

Federal courts have not taken the initiative to permit electronic coverage of their proceedings. Therefore, RTNDA respectfully submits that the time has come for Congress to legislate.

RTNDA's members have covered court proceedings in every State, and their experience has demonstrated that cameras do not interfere with the administration of justice or infringe the rights of defendants or witnesses. Cameras in the courtrooms work. They create a public record. They get the story right.

In permitting audiovisual coverage in Federal courts at every level, including the Supreme Court, you will provide the world with unlimited seating to observe the workings of justice in the United States.

Thank you, Mr. Chairman, for the opportunity to testify on behalf of the Radio-Television News Directors Association before your Committee today.

[The prepared statement of Ms. Cochran:]

PREPARED STATEMENT OF BARBARA COCHRAN

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 2007 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.

Americans base their opinions and perceptions of our judicial system on a variety of sources. We are influenced by popular culture: the four major broadcast networks currently air at least ten different hour-long prime-time programs dealing with courts or the criminal justice system. Three of the eight shows are regularly set in or around courtrooms. In addition, local broadcasters' daytime offerings frequently include confrontational programs, such as Judge Judy, that purport to approximate atmosphere of a civil courtroom.

Within this context, does it make sense that judicial nominees are closely scrutinized in the Senate Judiciary Committee's confirmation "hot seat," only to be obscured from view after they ascend to the bench? RTNDA's members think not.

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 pre-

rogative. 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 to stall 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.

Allowing electronic coverage of federal court proceedings serves an important purpose for this body, as well. It allows the legislature to criticize actions taken by the executive, and it affords the executive an opportunity to prod reluctant lawmakers. But under our current system, neither the legislature nor the executive have ready access to the day-to-day workings of the federal judiciary. Without regular audiovisual coverage of court proceedings, two co-equal branches' oversight of the judiciary is constrained to fleeting glimpses offered in confirmation hearings.

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 only 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 print media and not 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, who will testify before you today, aptly stated in testimony before the Senate Judiciary Committees' Subcommittee on Administrative Oversight and the Courts some seven 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.

The Committee should not be swayed by those who are quick to point the finger at a few extreme examples of courtroom spectacles. Even though television coverage of a handful of court proceedings has been criticized as mere "sensationalism," the Committee should remember that the camera shows what happens; it is not a cause. 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. This past summer, five federal district courts entered a new pilot program to make digital audio recordings of proceedings available online. Although audio recordings are no substitute for live audiovisual broadcasts, RTNDA is encouraged and sees this program as a step in the right direction.

All 50 states now permit some manner of audiovisual coverage of court proceedings. 43 states allow electronic coverage at the trial level. The District of Columbia is the only jurisdiction that prohibits trial and appellate coverage entirely, but even it has not remained immune from technological advances and demands for greater transparency. Last year, the District of Columbia Court of Appeals opened

its doors, virtually, and began offering live audio webcasts of appellate oral arguments.

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, the late 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 a student may be disciplined for carrying a vaguely pro-drug banner at a public event near his school.
- Whether parents have a constitutionally protected right to prevent schools from providing information on sexual topics to their children.
- Whether an employee may be awarded back-pay for twenty years difference between her salary and those of her male counterparts.

In contrast, 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 Representatives Chabot, Delahunt, McCotter and Poe 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.

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 observe 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.

Mr. DELAHUNT. Thank you, Ms. Cochran.

And now our last witness, Mr. Fred Graham.

TESTIMONY OF FRED GRAHAM, SENIOR EDITOR, COURT TV

Mr. GRAHAM. Thank you, Mr. Chairman.

My name is Fred Graham. I am the Senior Editor of Court TV.

I want to start by commending the Chairman, Congressman Delahunt, and Congressman Chabot—they were the original sponsors of the precursor to this legislation, and they have been very faithful in supporting us through this proposed legislation ever since—and also the other Members of the Committee.

After all, this Committee has twice approved earlier versions of this testimony, and it is clear to you all that Court TV does support

the legislation. We hope the third time will be a charm, that it will go through, again, this Committee, but this time it will turn out to be in the end a statute.

I filed my statement. I want to make two points, and the first one is fortuitous because, as you know, lawyers love to quote Oliver Wendell Holmes, and Oliver Wendell Holmes had a principle that goes to the core of what we are talking about today. He said, "The life of the law is not logic. It has been experience."

And what he meant by that in this context is to go to the heart of the bona fides of this issue, it is not helpful to have a lawyer go through in his mind and lay out a parade of horribles, of things that might happen or theoretically could happen, because we have so much experience in what has happened through cameras in courts.

Now we at Court TV have had a unique, I think in the world, opportunity to obtain experience on this issue. Since we went on the air 16 years ago, we have covered more than 900 trials and judicial proceedings. Thirty thousand hours we have put on the air of real trials being covered by cameras, and you cannot imagine how frustrating it is when we have seen through the course of 30,000 hours while we put on the air these trials that the camera coverage does not have a harmful effect.

You can tell the psychology which is behind that lack of harmful effect, and that is it is so clear when you see a trial begin that is being televised that after the first 3 or 4 minutes, the participants just tune out the fact that there is a camera there. They do not pay any attention to it. These trials typically go 3 weeks, 6 weeks, and, after the first few minutes, the camera means nothing.

So what we see is that the camera does not prevent the trial that is being covered by the camera from being as ordinary and as dignified as the trial next door where there is no camera in effect.

Now my second point has to do with really befuddlement on our part because we are, frankly, confused and uncertain as to why it is that the Judicial Conference is so extreme in its opposition to this bill.

As Judge Gertner pointed out, this does not require the presence of cameras in any court. This only permits the judge to exercise his or her discretion to decide if it should be covered.

Now here is a group of judges who have the power to make decisions over life or death. They can enjoin the President of the United States. They can declare unconstitutional acts that you, Members of Congress, have put into effect. And yet basically the Judicial Conference seems to be saying they cannot be trusted to have discretion to rule on this one point.

I must say that it is a matter of confusion to us. I would be interested to hear some explanation of it. We feel that this statute should become law. We hope that it will, and I will be happy to try to answer any questions you may have.

[The prepared statement of Mr. Graham follows:]

PREPARED STATEMENT OF FRED GRAHAM

Chairman Conyers, Ranking Member Smith and Members of the Committee, my name is Fred Graham. I joined Court TV as an anchor when it first was launched in 1991. I served as the Chief Anchor and Managing Editor of Court TV. In that capacity, I hosted Court TV's morning trial coverage program Open Court. Recently,

I assumed the new role of Senior Editor and serve as the Chair of Court TV's editorial board. I also continue to report on key legal news events from here in Washington, D.C. Prior to joining Court TV, I was a legal writer for The New York Times and law correspondent for CBS News. Very early in my career, I was the Chief Counsel of the Senate Judiciary Subcommittee on Constitutional Amendments under Chairman Estes Kefauver of Tennessee. I earned my law degree at Vanderbilt University, where I was the Managing Editor of the *Vanderbilt Law Review* and was elected to the Order of the Coif.

Mr. Chairman, Court TV strongly supports H.R. 2128, the Sunshine in the Courtroom Act of 2007. We believe that the First Amendment right of the people of the United States to the freedom of speech, particularly as it relates to their right to present their opinions on the affairs of the Government, cannot be exercised meaningfully without the ability of the public to obtain facts and information upon which to base their judgments about important issues and events. As the United States Supreme Court stated in Craig v. Harney (1974), "A trial is a public event." "What transpires in the court room," the Court continued, "is public property."

Further, Mr. Chairman, Court TV believes that the First Amendment 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 under the Constitution, cannot be exercised meaningfully without the availability to the public of information about how the affairs of the 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."

H.R. 2128 would provide statutory authority for United States District Judges to allow, at their discretion, televised coverage of public trials. 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," the Court continued, "is an effective restraint on possible abuse of judicial power."

Mr. Chairman, by allowing delayed audio broadcasts of the oral arguments before the Supreme Court in last fall's partial-birth abortion and affirmative action cases, Chief Justice John Roberts has recognized the great public interest in nationwide access to important judicial proceedings. Building on that principle, Representatives Chabot and Delahunt have introduced H.R. 2128, their bipartisan legislation to give Federal judges the discretion to allow the televising of proceedings in their courtrooms. Senators Schumer and Grassley have introduced companion legislation in the Senate. An earlier version of H.R. 2128 passed the House Judiciary Committee as part of H.R. 1751, the Secure Access to Justice and Court Protection Act of 2005, in the 109th Congress.

H.R. 2128 would codify Chief Justice Roberts's inherent discretionary authority to allow the televising of Supreme Court proceedings. Presiding judges of panels of the Courts of Appeals and District Court Judges would be given statutory authority to exercise discretion in allowing televised coverage of proceedings in their courtrooms. The bill gives the Judicial Conference the authority to formulate and issue guidelines to which judges may refer in deciding whether to allow the televising of particular cases. H.R. 2128 also includes a three-year sunset provision.

Recognizing special concerns about televising trials in the District Courts, H.R. 2128 provides strong safeguards. On the request of any trial witness other than a party, a District Judge 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. The bill also prohibits the televising of jurors.

H.R. 2128 is fully consistent with the trend in the states. All 50 states allow cameras at some level of their judiciaries. Based on our most recent review, 43 states permit cameras in their civil trial courts. Of those, 39 states allow cameras in criminal trials. Thus, at the state level, there is a growing consensus that cameras in the courtrooms serve the public interest.

Mr. Chairman, Justice Oliver Wendell Holmes said, "The life of the law has not been logic, it's been experience." Since 1991, Court TV has covered more than 900 trials and other judicial proceedings, providing more than 30,000 hours of courtroom coverage. We have seen over the years how the participants in these trials "tune out" the camera and how the televised proceedings are conducted in the normal, orderly way. We have always made a special effort to cover trials that involve issues of great public interest and importance. We believe that through our coverage of

these trials, the members of the public who have watched them have gained an enhanced respect for our judicial system and a greater understanding of our laws.

The trials that Court TV has covered have involved many of the most serious social, political, cultural and economic issues of our time. In 1992, for example, Court TV provided live coverage of a hearing before the International Court of Justice in a case involving the 1988 terrorist bombing of Pan Am Flight 103, which killed 270 people, over Lockerbie, Scotland. We also covered the criminal trials of Dr. Jack Kevorkian, who was accused of violating state laws against assisted suicide and euthanasia. In 2005, we covered the trial of the notorious Columbus, Ohio, highway shooter Charles McCoy, who admitted to a string of shootings, one of which killed a woman, but claimed innocence by reason of insanity. Also in 2005, we covered the case of *Mississippi v. Killen,* in which 80-year-old Edgar Killen stood trial for murder in the deaths of three civil rights workers who were killed while registering black voters in rural Mississippi.

We at Court TV believe that our trial coverage serves very important public interests. At times, in fact, our trial coverage can help diffuse highly charged, volatile situations in very controversial cases. One of the best examples of this occurred in a case that attracted considerable national attention, the 2000 trial of four New York City police officers who were charged in the shooting death of an unarmed man, Amadou Diallo.

Judge Joseph Teresi, the trial judge who was assigned to the case, understood the importance and value of having the New York City public watch the trial after venue was relocated to Albany. When the televised trial resulted in the acquittal of the police officers, public acceptance of the verdict was widely attributed to the fact that the people of New York had been able to watch and listen to the proceedings with their own eyes and ears. After the trial, then-New York City Mayor Rudolph Giuliani commended the trial judge for opening the courtrooms to cameras. As a result of televised coverage of the Diallo trial, Mayor Giuliani commented, the public "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," the Mayor continued, "—has changed the minds of a lot of people about what happened."

Mr. Chairman, in the sixteen years that Court TV has been televising more than 900 trials, no judgment in the United States has been reversed because a television camera was in the courtroom. One has to look back more than four decades, to a time when television was in its infancy and cameras were still generally prohibited, to find a case to the contrary. In *Estes v. Texas* (1965), by a bare 5–4 majority, the Supreme Court reversed a criminal conviction based in part on a determination that the televising of a pre-trial hearing and parts of the trial had prejudiced the defendant. 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." Justice Harlan's concurring opinion struck a similar note. Limiting his agreement with the majority to the facts of the case, Justice Harlan 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 reexamination."

Mr. Chairman, in this first decade of the 21st Century enters its final years, the day of which Justice Harlan spoke surely has arrived. When Estes was decided, audio visual technology was crude 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.

Today, by contrast, broadcasters typically employ a single, stationary camera, which produces no noise and requires no additional lighting. The camera is placed away from the proceedings and, if necessary, can be operated by remote control. Wiring is unobtrusive. Microphones are small and are never operated in such a way as to record private conversations between attorneys and clients. Those microphones, in fact, 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 their orderly, serene conduct. Not only, to use Justice Harlan's words, 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 that Justice Harlan foresaw has, in fact, now arrived.

In fact, in today's world many Americans receive most of their news and information from television—so that if the judicial system is to be known and understood by the great mass of American citizens, it must communicate with them by way of television. Since years of experience have demonstrated that television coverage of judicial proceedings does no harm, it is in the public interest to open the judicial system to television coverage to the greatest feasible extent.

Finally, Mr. Chairman, I want to comment on the continuing opposition to this legislation by the Judicial Conference of the United States. I find it ironic indeed that the Judicial Conference opposes this bill. After all, H.R. 2128 does not require cameras in our Nation's Federal courts. Rather, it merely grants discretion to District Judges to decide, on a case-by-case basis, whether, and to what extent, to allow televised coverage of judicial proceedings in their courtrooms. Moreover, as I noted earlier, the bill explicitly grants the authority to the Judicial Conference to "promulgate advisory guidelines to which a presiding judge, at the discretion of that judge, may refer in making decisions with respect to . . . televising [judicial proceedings]." Thus, by opposing this bill, the members of the Judicial Conference seem to be questioning their judicial brethrens' ability exercise their discretion wisely and to follow the advisory guidelines that the Conference itself would issue.

No one would dispute that U.S. District Judges in our Nation have tremendous power. They may declare acts of the Congress unconstitutional. They may issue injunctions against the President's exercise of his executive power if they find that it is contrary to the Constitution. They may sentence defendants convicted of capital crimes to death or send convicted defendants to prison for the rest of their lives. The notion that we can trust our Nation's Federal judges with these awesome powers, but cannot trust them to exercise their discretion wisely in deciding whether to allow televised coverage of trials in their courtrooms is, to say the least, a strange one indeed.

Specifically, in his testimony on behalf of the Judicial Conference before the Senate Judiciary Committee on nearly identical legislation in 2005, Judge Diarmuid O'Scannlain asserted that "camera coverage would . . . have a notably adverse impact on trial court proceedings." "This, he continued, "includes the impact the camera and its attendant audience would have on the attorneys, jurors, witnesses, and judges." Once again, Mr. Chairman, all that H.R. 2128 does is to grant District Judges the discretion to decide, on a case-by-case basis, whether to allow cameras. In doing so, Judges necessarily will take into account whether cameras in any particular case would, in fact, have an "adverse impact" on "attorneys, jurors, witnesses and judges." In fact, the discretion that is granted by the bill is so broad that some Judges could decide that they do not believe that cameras are ever appropriate and make such determinations in each and every case before them.

Beyond that, as I noted earlier, H.R. 2128 provides that non-party witnesses have an absolute right to have their faces and voices obscured if they make that request of the Judge. In addition, as I also pointed out, H.R. 2128 specifically prohibits the televising of members of jurors. Thus, H.R. 2128 has built-in safeguards that address any legitimate concerns about the effects of cameras on witnesses and jurors. As for the Judicial Conference's concerns about the effects of cameras on attorneys and judges, H.R. 2128 leaves it to the Judge to evaluate any such effects and make the determination whether to allow cameras in light of them.

Thank you, Mr. Chairman, for this opportunity to testify. I would be happy to respond to any questions that you or the other members of the Committee may have for me.

Mr. DELAHUNT. Well, thank you, Mr. Graham.

And I do share that befuddlement that you alluded to.

And I am going to go to the Ranking Member, Mr. Smith, at this point in time, and I will save my own questions for somewhere along the track.

Mr. Smith?

Mr. SMITH. Thank you, Mr. Chairman.

Judge Tunheim and Mr. Richter, let's try to dispel some of that befuddlement, if we can.

It seems to me inherently difficult to try to quantify the adverse impact of cameras in the courtroom, particularly on witnesses.

Judge Tunheim, I know the Judicial Conference has over the course of several decades conducted any number of studies. Is there any evidence in those studies of that adverse impact of the cameras in the courtroom, particularly on witnesses?

And, Mr. Richter, going not to logic, but to experience, do you have any experience in the courtroom that you would be able to point to that would be examples of real life adverse impact on courtroom activities?

And we will start with the judge the first.

Judge TUNHEIM. Thank you, Congressman Smith.

There is evidence in the most recent study done by the Federal Judicial Center of this strong concern that cameras may impact the testimony of witnesses. The study reported the views of judges who had presided over trials which were televised, and the results were that about 64 percent of participating judges felt that at least to some extent cameras made witnesses more nervous, 46 percent of the judges believed that at least to some extent cameras made witnesses less willing to appear in court, and we often have some difficulty getting witnesses to testify, particularly if they are outside a judge's subpoena power.

Mr. SMITH. So you are going actually to the administration of justice in America when you talk about those kinds of examples.

Judge TUNHEIM. Absolutely. It is a difficult thing to testify in Federal court, and anything which discourages people from participating in trials as a witness is a cause for concern.

And there is one other figure coming out of the FJC study, and that was 41 percent of the judges felt that cameras distracted witnesses.

So there clearly is evidence from the study that this concern about witnesses is a legitimate one.

Mr. SMITH. Okay. Thank you, Judge Tunheim.

Mr. Richter?

Mr. RICHTER. Thank you, Mr. Smith.

From a prosecutor's perspective, working with victims and witnesses is a critical part of the truth-seeking function of a case, both from the prosecutor and from defense counsel's perspective, and it is their testimony during the course of a trial that, of course, is some of the key facts that come into evidence that make or break a case.

And so to follow on what Judge Tunheim has just stated, for example, particularly in cases involving victims of violent crime, domestic violence, for example, these are victims who, obviously, are being called into court through no choice of their own. They were victims of a very serious crime. They do not want to be there. The circumstances are deeply personal, they are deeply humiliating. It is tough, in most of these cases, to bring the case in to begin with and to get them there and to gain their cooperation to begin with.

For those who have worked with victims of domestic violence, many of them recant. Many of them reconcile. It is very difficult to come back and get them into the courtroom. And so for those types of victims, it is incredibly difficult to begin with, and adding on top of that then the pressure that comes from knowing that your remarks are not only going to be heard by the people in that courtroom, but they are going to be heard and stamped indelibly

on the Worldwide Web, we believe is a significant factor that will weigh in a victim or in that witness's testimony.

And to follow on the pilot project, the fact that judges have observed the change in demeanor, the nervousness, what juries have to judge is the credibility of a witness or victim's testimony, and if they appear more nervous than, in fact, they should have as a result of that camera, then justice is not being done.

Mr. SMITH. Okay. Thank you, Mr. Richter.

Maybe I can squeeze in one more question here. And you have both given the statistical evidence as well as the real life case examples, and I think that that is helpful to all this. Why not allow district judges discretion to determine whether or not they want cameras in the courtroom like we do sometimes on the appellate level?

You will have to give a brief answer, if you will, Judge.

Judge TUNHEIM. Well, the Conference has studied this issue carefully and believes that the concern about witnesses, primarily the concern about security, the kind of pressure that would be brought to bear on televising proceedings is counterproductive, and it is just best that these proceedings go forward without the television cameras present.

They are open proceedings. Anyone can come. The media is present at most of our proceedings and can be present at any one, and there is really no need to add to the concern that presents for witnesses.

Mr. SMITH. Thank you, Judge Tunheim.

Mr. Chairman, thank you.

Mr. DELAHUNT. Mr. Davis of Alabama, a former Federal prosecutor himself, distinguished Member?

Mr. DAVIS. Thank you, Mr. Chairman, and thank you for recognizing me.

I welcome the panel here today. I am a young man, so I have not spent a lot of my time doing anything in life, but I spent a little bit of time as a Federal prosecutor and as a law clerk for a Federal judge, and I am certainly honored to see the judges and U.S. Attorney here today.

Let me make some observations and perhaps invite response from the panel today.

And, Judge Tunheim, let me start with your observations and Mr. Richter's observations.

I certainly respect the observations that you make about the possibility that witnesses could be made nervous or could be constrained or affected in some way, but I wonder if the question were asked of witnesses, "Does the presence of the defendant make you nervous?" I bet a substantial number would say it does.

I will bet if you asked witnesses, "Does the presence of an audience full of live people make you nervous?" I will bet they would say it does. I will bet if you asked witnesses who were testifying pursuant to a plea agreement, "Does the fact that there is a plea agreement hanging over your head and a prosecutor has to evaluate your performance make you nervous?" I bet they would say it does.

I am willing to bet there are a number of factors that witnesses would say constrain and deter their testimony, but, you know

what, we tolerate it because there are powerful countervailing interests on the other side. We decide that courtrooms should be made open to the public, so, therefore, the fact that a live audience could make someone nervous, that concern, is trumped by the desire to have open courtrooms, and I can go on down the line. There is always a countervailing public interest, and I wonder if this is not that kind of an example.

Now I have no desire to see round-the-clock live coverage of Federal court. It would put most people to sleep, as all of us know who practice there, and that is not what we are talking about, as Mr. Graham pointed out. We are talking about giving the discretion to judges. And I have gotten to know a number of Federal judges over the years. Frankly, most of the ones I know would almost never grant it.

The only times they would grant it would be an unusual case. I will give you an example: the Oklahoma City bombing trial. I suspect that that judge would have allowed his courtroom to be open and, frankly, I think the public would have gained from seeing that very serious event transpire and for us to have a living memory of it.

I do not think it is enough for that kind of an event to simply be preserved by newspaper accounts or eyewitness accounts. That is the kind of seminal event that I think our country would benefit from seeing, and there will be other events like that. I want to hear some response from the panel on that point.

But the second point that I would make, though, before that, is that it strikes me that the one branch of Government, ladies and gentlemen, that the public knows the least about is the judicial branch. They probably know all too much about us, the legislative branch, because they see us arguing repetitively at midnight. They see us making speeches to empty chambers and going on and on as if somebody somewhere cared. They get to hear us pontificate all the time.

The executive branch they know a fair amount because even though there is a closed element to the executive branch—some of us are not happy about that—there is still a very active press out there that tries to tear those walls down, and newspapers tell us a lot about what the executive branch, the presidency do in this country.

It has always struck me that the most mysterious branch is the judicial branch.

Mr. Graham, you know this probably from your many years.

For a lot of people, their image of what happens in a courtroom is "Law and Order," the TV show. A lot of people's image of what happens in a courtroom, when I was growing up, was "L.A. Law," and when I first started trying cases as a young assistant U.S. Attorney, juries would wonder why I could not do a closing statement in 1 minute like they do on TV, and they would wonder why my witnesses would not always break down the way the ones on TV would.

And I wonder if we do not have a powerful interest in this society in opening up the judiciary, giving more people a chance to see it, not all of it, not all the time, but the seminal events, the unique events: the Pentagon papers trial in 1971, Supreme Court argu-

ments. I think there is a powerful interest in our demystifying this enormously important branch of Government, and I wonder if this bill would not take us a step in that direction.

But I would like to hear some reaction to what I have said from the panel.

Mr. RICHTER. Well, Mr. Davis, speaking on behalf of the Department briefly to your first point, I think you do frame the issue correctly that this is a question of whether it adds to justice or detracts from justice. Your points as far as other things that may make witnesses nervous are certainly valid ones, but those all flow from things with which we have no choice in the matter.

The difference here is we have a choice as to whether cameras go in a courtroom or not, and so from the Department's perspective, really the question is as to whether that will add to the cause of justice or detract from the cause of justice. We believe, in weighing the equities of this case, that it will detract from the cause of justice.

Mr. DAVIS. Any different perspective, Judge Gertner?

Judge GERTNER. Yes. I think you make a great point. I think the question is: Are witnesses more nervous in high-profile cases because of the presence of the camera or because the cases are a high-profile case?

And I am not sure that one can disentangle one from the other, whether having a courtroom sort of filled to the rafters and with a courtroom sketch artist makes a particle of difference from having the inconspicuous camera behind you on the bench. I do not think that it makes a difference.

The studies that people are pointing to are studies from 1994. Between 1994 and now, there has been an explosion of information, as I said, through screens, and I am not sure that the public makes a difference, makes a distinction.

Also, with respect to the cases that Mr. Richter cited, we care very much about child witnesses. We care very much about domestic abuse victims. That is what is going on in State court, not in Federal court, and it is in State court which accommodations have been made without problems. When you think about what we do in Federal court, we have the ability to control the proceedings even more.

Mr. DAVIS. Mr. Chairman, would you allow some witness to comment on my demystification point, if anybody wants to pick that up?

Mr. DELAHUNT. Without objection.

Hearing none, we——

Mr. GRAHAM. I do, Mr. Davis. I say bravo to everything you said there.

But it does seem that many of the objections that we have heard here and that you hear on this issue would be cured by the structure of this bill. The bill gives discretion to these judges, and these judges are used to making very complicated decisions and they can make proper decisions on complicated issues.

So, if there is a problem perhaps that because of the nature of the case, these questions would come up, the judge just says, "Well, we will not televise this trial." You hinted that you do not think a lot of judges will take you up on taking advantage of the discre-

tion. Well, we will have to see, but it does mean that when these problems perhaps arise, the answer is the judge would just say, "We will not televise this case."

Judge TUNHEIM. Mr. Davis, if I might. Mr. Chairman, Congressman Davis, very good points that you raise. One thing that we are quite concerned about is the inability to determine in advance where you are going to have problems with witnesses testifying with cameras. As you know from your career as a prosecutor, things do not go always as planned during a trial.

Mr. DAVIS. I thought that was just me that happened to.

Judge TUNHEIM. I think that happens to all of us on a regular basis.

And trying to discern ahead of time what type of case would be appropriate for television coverage and what would not be is a very difficult chore.

Mr. DELAHUNT. The gentleman from North Carolina, Mr. Coble?

Mr. COBLE. Mr. Chairman, by your own admission, you are not Chairman Conyers, but I will stipulate that you have presided very adeptly.

Mr. DELAHUNT. Well, I appreciate that particular kudo. Coming from you——

Mr. COBLE. For what that is worth.

Mr. DELAHUNT [continuing]. That is of real consequence.

Mr. COBLE. Good to have you——

Mr. DELAHUNT. And I welcome the new Ranking Member to my left, Mr. Chabot.

Mr. COBLE. Good to have you all with us, and I will probably be brief.

Your Honor, Judge Gertner, do you have any concern about courtroom security if proceedings in your courtroom were regularly televised?

Judge GERTNER. I would have some concerns, but I am not sure, again, that with the Internet that this makes a difference. In other words, my picture and my words are on the Internet. Every time I issue a decision, they, you know, trot out the last picture of me, which is actually not bad if they keep on going back in time. So I am not concerned in that regard.

I think that my point is that we are already there in a world in which information is on the Internet. We have to account for and accommodate for that even in a closed courtroom. I do not think this will materially add to those concerns. That is all that my point was.

Mr. COBLE. Judge Tunheim and Mr. Richter, I was going to ask you all if your opposition would be assuaged if parties were allowed to move the court to prohibit television, but with the judge's discretion finally ultimately prevailing, I take it that your opposition would not be assuaged from your response.

Judge TUNHEIM. Mr. Chairman, Representative Coble, you are correct. An interesting experience here is in my home state of Minnesota in which the State court does permit cameras in the courtroom, but any party can veto that so that any side can decide that they do not want to have cameras in and judges do not have the discretion then.

Mr. COBLE. Then that would prevail.

Judge TUNHEIM. And then that would prevail, which has resulted in cameras never being in the courtroom because, typically, if one side feels that they want cameras, the other side would probably be suspicious and not want it.

Mr. COBLE. Ms. Cochran, do you see any avenue whereby the Federal courts could use this procedure to generate revenue?

Ms. COCHRAN. Well, I think the tradition has been that the actions of Government are free to coverage by the news media, so I am afraid I do not see any opportunity for that.

Mr. COBLE. Ms. Swain, have photographs, recordings or televised proceedings from the courtroom been litigated and what has been the result if you know?

Ms. SWAIN. I actually do not know.

Mr. COBLE. Does any of the panelists know?

Mr. Richter?

Mr. RICHTER. Let me see if I can address your question as I understand it. The issue, of course, of exposure through publicity is periodically litigated around the country, and this is one of the issues that, I guess, concerns us and should be of concern from the defense bar's perspective, and that is that in order to show that publicity during the course of a trial has prejudiced a defendant's rights, a defendant carries a very high burden on appeal of showing that prejudice and, oftentimes, many of the things that go along that may have, in fact, prejudiced the outcome against the defendant are not easily measurable.

So, ultimately, very few of those cases are ever overturned on appeal as a result of publicity, and that is part of the concern that I think many in the defense bar have voiced in the past about legislation of this type.

Mr. COBLE. Mr. Graham, I think I have time for one more question. What would be, in your mind or your opinion, the greatest challenge for Court TV to cover Federal court proceedings?

Mr. GRAHAM. Well, we have covered Federal court proceedings, back during the experimental period, 1991 and the 3 years following that. We covered about two dozen. And would you believe, Congressman, we covered a Federal antitrust case, and people's eyeballs were clouding up all across the country. Antitrust——

Mr. COBLE. That does tend to induce sleep.

Mr. GRAHAM. Antitrust lawyers practice being dull, and let me tell you that this was a dull process, and we did not have a lot of people that stuck with us for the several weeks that that trial lasted.

So, yes, we have covered Federal cases. The experiment did not permit us to cover criminal cases. Under this bill, we could, and I think that is where the most interest would be.

Mr. COBLE. Thank you all for being with us.

Thank you, Mr. Chairman.

Mr. DELAHUNT. Before I go to Mr. Gallegly, I am going to claim my own 5 minutes at this point.

And I noted in response to a question by Mr. Davis—I think it was you, Mr. Richter, that responded—that it is the position of the Department of Justice that cameras detract from the cause of justice. Now it is my understanding that every single State has some

rule, some like Massachusetts which I would describe as an expansive rule, one that I am familiar with.

Why don't I ask the entire panel is it your position that justice has been demeaned in the States since the advent of cameras in the courts of general jurisdiction and appellate courts in the various States?

Judge Gertner?

Judge GERTNER. Well, you know, the last time I spoke in favor of this bill, also on the panel was Judge Hiller Zobel, who had just come off handling the case of *Commonwealth v. Louise Woodward,* which was the Newton Nanny case in which he had international press, national press, and he had cameras.

He talked about—this goes to Representative Davis' point also—how good it was to present this case, to be able to show the wheels of justice on television and to demystify the State judiciary in that case.

Massachusetts has a very expansive rule, as you noted. We do not hear of any problems.

Mr. DELAHUNT. Judge, is there a crisis in the State courts now of detracting, to use Mr. Richter's word, from justice? Has there been a clamor among the various State bars that you are aware of?

Judge GERTNER. I think at this point what has happened as that as cameras have gotten more and more, as I said, inconspicuous, as people got more comfortable with them, the grandstanding problem, if it existed at all, did not exist, and courts and judges learned how to deal with it.

Some of the problems that Mr. Richter raises also are endemic to 24/7 cable news coverage. The problem with pretrial publicity is not necessarily going to be enhanced with cameras. In fact, one argument is that having the real deal in television is better than having the caricature.

Mr. DELAHUNT. Well, I would note also that I think it was Mr. Richter that noted that one of the solutions is press conferences on the steps of the courthouse. You know, some might describe that as the ultimate spin zone, and I would suggest that, you know, getting this information unfiltered to the American public gives them a much more realistic understanding of the process that is embraced in having an independent judiciary as opposed to simply lawyers standing out, putting the facts as they often do in a very favorable light to their client, whomever that client may be.

Judge Tunheim?

Judge TUNHEIM. You raise a very good question, Mr. Chairman, and——

Mr. DELAHUNT. Is there a problem in the States now? Are you concerned about those State courts going out there detracting from justice?

Judge TUNHEIM. Generally no. I think that there have been trials that have not reflected well on the State courts systems. The O.J. Simpson trial comes to mind. And, secondly, I think there is a concern about the 30-second sound bite from inside the courtroom not reflecting well on the entire proceedings.

Mr. DELAHUNT. The 30-second sound bite? I am unfamiliar with it within a courtroom. I am very familiar with it on, you know, the

cable networks, particularly in the aftermath of the trial as lawyers trot out with their clients and give press conferences.

Judge Tunheim, in your written testimony, you make reference to the current policy of the Administrative Office of the U.S. Courts with regard to appellate courts permitting broadcasts of their proceedings. Now the Circuits as a whole already have the ability to permit the televising of proceedings, to set policy, to decide how those proceedings are televised, and yet you have a problem with individual appellate judges making those same decisions. Are the judges better when they are operating collectively as opposed to individually?

Judge TUNHEIM. Well, Mr. Chairman——

Mr. DELAHUNT. Do we have more confidence when they are together as opposed to when they are making those individual——

Judge TUNHEIM. The Judicial Conference policy makes it an issue for the entire court to determine. If the court, pursuant to guidelines established by that court, wishes to open up appellate court hearings to cameras, they can do that, and two circuits, as you have noted, have done that, but it is pursuant to guidelines established by the entire court, and that is the rationale for that position.

Mr. DELAHUNT. Do you feel that you have the capacity and the discretion to circumscribe appropriate rules——

Judge TUNHEIM. Well——

Mr. DELAHUNT [continuing]. You know, in the capacity of an appellate judge?

Judge TUNHEIM. I may have the capacity, but perhaps not the discretion.

Mr. DELAHUNT. Well, that is what this bill would do. It would provide you the discretion, and I, for one, have full confidence in the discretion that you would exercise.

And with that, let me turn to my friend and colleague, Mr. Gallegly of California.

Mr. GALLEGLY. Thank you, Mr. Chairman.

I appreciate your testimony today, and I think you might find it a little unique because I happen to be the first nonlawyer in history to serve on the Judiciary Committee. So I have a little different perspective, and unique to most hearings, as a Member of Congress, I have more questions than answers, okay. So I hope you can understand and respect that.

And listening to Ms. Swain, Ms. Cochran and Mr. Graham, I understand and completely understand your advocacy, and I know that Judge Gartner comes from a little different perspective with her advocacy than you do, and I respect that.

Mr. Graham, I have watched Court TV as a consumer and as a viewer for many years, enjoy it. I find it not only entertaining, but extremely educational. I genuinely say that as a consumer.

I do not have the benefit that my colleagues have in seeing firsthand in the trenches what happens in the courtroom and understanding the depth of whether this is competitive. It appears to me, though, that our principal objective as Members of this Committee is not to be an advocate for education in this arena. We certainly have an opportunity to be an advocate for education in other areas.

But our principal objective here, I would think, is making sure that we do not do anything that compromises the administration of justice, and I do not know that this would. I do not know if anyone could give me an example—perhaps Judge Gertner could—as to whether or not it could contribute to the administration of justice.

I keep going back to as a consumer and as a viewer—I think probably most Americans that are not lawyers and there are more not lawyers—it hard to believe that when you live in this town—than there are just the rank-and-file people across the country—the O.J. trial. Perhaps this is not a classic example.

And, Ms. Cochran, you know, in your testimony, you said that you believed that there would not be able infringement on the process of justice.

Mr. Graham, you said that you are sure that this would not have a harmful effect on the administration of justice.

First of all, Ms. Cochran, I am sure you followed the O.J. trial. I do not know anyone that did not in some degree or another. Do you feel that that was a good example of the effect that cameras could have on the proceedings?

Ms. COCHRAN. I believe that the O.J. trial, whatever happened and whatever one thinks about how that process was carried out, that the most objective observer of what was taking place was the very small camera in the courtroom, that all of the other things that happened either happened because of the way the judge acted or the way the lawyers acted or it happened because of what happened outside of the courtroom on the courthouse steps.

And so even though the O.J. trial is given as an example and the camera is blamed, the camera in the courtroom actually gave the public the most accurate picture of what was transpiring, and the public could make up their own mind, and members of the public made up their minds in vastly different ways about how justice was served.

A few years later, there was a case in New York involving an immigrant named Diallo, and the New York police officers were on trial, and New York is not a State where cameras are readily available. But the Supreme Court said that cameras would be allowed in that court, and there are those who believe that because cameras were present that the verdict, when it came down, was more readily accepted because people could see for themselves in a very controversial and inflammatory case that justice had been done.

Mr. GALLEGLY. I know I am about to run out of time, but I would hope that perhaps, Ms. Swain, you could join in—or Ms. Cochran or Mr. Graham—and just give me a very honest assessment as to whether, in your opinion, your objective opinion—and perhaps Judge Gertner as well—do you believe that the cameras in the courtroom had any effect on the way Judge Ito presided over the case or either Johnny Cochran or Mr. Shapiro? Do you think the cameras had any effect on the way the case was presented and, more importantly, the way it was presided over?

Mr. GRAHAM. Well, I was there, Congressman, and I saw this firsthand. It is impossible to know what was going on in the minds of the participants that you discuss there, but I agree with Ms. Cochran that what we saw basically was a judge who did not con-

trol his courtroom. Some very feisty high-paid lawyers, defense lawyers, some racial overtones of the case that the judge should never have permitted to come out in this case. It was not a race case——

Mr. GALLEGLY. Did he have a tougher job because of the cameras or not?

Mr. GRAHAM. I do not know. You know, I ran into Judge Ito recently out there in California. I was at a judicial meeting, and I said, "How are things going with you?" and he said, "You know, I still allow cameras in my courtroom," and he says, "If you want to bring your cameras back out, you can televise a trial in that courtroom."

Very briefly, as you well know, after the O.J. case, the judiciary in California did a thorough study on just these topics we are talking about, and they concluded that cameras in the courtrooms of California were a beneficial thing and that it should stay.

And in that same regard, Mr. Delahunt, part of your question, in the States that have cameras in courts, are they perceived as being harmful, what we have seen in Court TV is when we launched Court TV in 1991, about half the States permitted cameras in the trial courts, and now that figure is two-thirds. It has gone from a half to two-thirds in 16 years. What has happened is that the word has gone out from the States where they have cameras that it is a good thing, and others have copied that.

Mr. GALLEGLY. Mr. Chairman, I know the red light is on, but it is not often that we have Ms. Swain on the other end of the microphone. [Laughter.]

So I wonder if the Committee would indulge me in asking her to give us a response to the same question about the way the——

Mr. DELAHUNT. Without objection, the gentleman will have another 30 seconds.

Mr. GALLEGLY [continuing]. Trial was presided over.

Ms. SWAIN. You know, Mr. Gallegly, like you, I am, I think, the only nonlawyer on this panel. So I feel as though my comments would only be as an observer, rather than as a professional observer of this, as a citizen. So I think I will defer on being able to answer anything that is of use to you.

I might say for the few members of the panel that have been around Washington as long as I have, when the early debates were happening over whether or not the Congress should be televised and, 7 years later, that the Senate should be televised, the arguments sound very similar to me today. Technology of any sort, if you look through social scientists' eyes, is always disruptive, but then the institution adapts, and we believe the same thing would happen in this case.

Mr. DELAHUNT. Mr. Chabot?

Mr. GALLEGLY. Thank you, Mr. Chairman. Thank you for your indulgence.

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

First of all, let me apologize to the panel. There are two bills that are on the floor today. One of them has to do with flood insurance, the other one has to do with the Small Business Investment Act, and I am the Ranking Member of the Small Business Committee,

so I had to go back and deal with a whole bunch of things relative to that.

So I heard the first four witnesses here personally. I agreed with two of them. I disagreed with two of them, although I think they all make wonderful points. But I did not hear these three witnesses here. So this may be unfair, but could I ask each one of you just in a sentence or two give me your most persuasive argument or your most persuasive point for your point of view, whatever that might be?

And I have a pretty good idea what that point is, or at least not what the point is, but what the point of view is.

So, Ms. Swain, if we could start with you.

Ms. SWAIN. Certainly. Briefly, I think actually Judge Gertner made the point well on our behalf, is that we are so far down the road really with so many Federal courts allowing audiotapes, where they do not allow cameras, and on same-day release of the audiotapes, we are putting them on television in their entirety with photographs and with graphics. So we are this far along, and the republic has stood as we have done this, and we think it will continue to if cameras are added.

Mr. CHABOT. Okay. Thank you. It has even stood under Democratic control with the House and Senate for the first time in 12 years. So I do not know how long it will stand, but——

Ms. Cochran?

Ms. COCHRAN. Yes. Our position is that our members are the people who are making cameras work in courts at the State level and that the objections that we hear could just as easily apply to what transpires in a State procedure as in a Federal procedure, that we have made them work, we know of no instance in which the outcome has been reversed because of the presence of a camera, and we believe we can make it work at the Federal level as well.

Mr. CHABOT. Thank you very much.

And Mr. Graham?

Mr. GRAHAM. What has happened here is that in the States where cameras are permitted in the trials, this is a no-brainer, this is a nonissue because everyone knows that the system works, and it is not harmful.

As I mentioned in my earlier testimony, no one in no case that we know of, certainly no case that has been before Court TV, but in no other case in the last 16 years has a case been overturned or has a trial judge held that anyone's rights were violated because of the presence of the camera, and our feeling is that if it is working, then it should be in the Federal courts which are so much more important in general than the State courts are.

Mr. CHABOT. Thank you very much, Mr. Graham.

Judge Gertner, if I could go to you. Our colleague, Elton Gallegly, was talking about the administration of justice in his questions and made the point about detracting. Could you give an example of it contributing to the administration of justice?

You made a strong point about trials, in the Supreme Court's own words, being a public event, and it seemed to me that that might be a pretty good argument where they are contributing to the administration of justice, cameras would be. Would you want to comment on that?

Judge GERTNER. First is the O.J. Simpson paradigm, which I think would not happen again today and was idiosyncratic to the judge and the lawyers in that case. But even in the O.J. Simpson case, there was a huge number of people who distinguished between "I think he is probably guilty, but not beyond a reasonable doubt." That was stunning to me as a defense lawyer because that was a distinction, in fact, that you have spent your life trying to identify, and it was terribly important that people identified that.

The case in which it contributed to the administration of justice, I think, was the Woodward case, the Newton Nanny case, which had gavel-to-gavel coverage. The judge would actually talk to the foreign press at the end of every day explaining what the proceedings were. He understood he had a public event, and when the verdict came down, the public understood how that had happened.

I have seen so many times that I would be presiding over a trial as a judge and the press would be there for one case, one party's side and not the other, and then the verdict would come down reflecting the defendant's side or the side that they had simply not been a participant of, and there would be this extraordinary outcry about how did it happen. Well, if you had seen the proceedings, you would have understood how it happened, and it seems to me that that is where we want to put the public.

Mr. CHABOT. Mr. Chairman, I am almost out of time. Just let me make a couple of real quick points in the time I have. Can I ask unanimous consent for 1 minute to finish?

Mr. DELAHUNT. Thirty seconds. I am sensing a revolt among——

Mr. CHABOT. Okay.

Mr. DELAHUNT [continuing]. The other Members.

Mr. CHABOT. Real quick. Thank you. Just a couple of quick points.

First of all, I think the point has been made very, very strongly that, you know, the Federal courts would basically just be keeping up with what has happened already in the experience of the States, and if we had seen it been a disaster at the States, I would not have proposed this, Mr. Delahunt would not be for it. But, clearly, we have 50 States out there that are doing some form of cameras in the courtroom, and as was mentioned, the republic still stands.

Judge, with all due respect, I would just make the point that if we were telling you you had to do it, you know, we are separate branches of Government, co-equals, et cetera, "You have to do it. You have to do it," I could understand the objection, you know, even though I really do think they ought to be open. But we are giving judges the discretion to do it. A judge, if he does not want to do it in his courtroom, does not have to, she does not have to, and so that is why I am just surprised at the level of anxiety on the part of the judges, but I know it is there.

And then finally just on the point of the witnesses being afraid of cameras and things, I might have even thought that maybe 20 years ago. But there are many houses in America now where the video cameras are so common. You know, people are always getting videotaped. They are on camera all the time. It has become almost second nature, and I just do not think it is as scary or hostile an experience as it once was. So those are the points I wanted to make.

Mr. DELAHUNT. Let me go to a Member who is not afraid of a camera, and that is the former Attorney General of the State of California, my good friend——

Mr. LUNGREN. If we threw out the cameras, we would not be asking for extra time. [Laughter.]

Since everybody is talking about the O.J. Simpson case, do you remember what they said there? "If it does not fit, you must acquit."

I have not heard a single argument from those who oppose this that is relevant to not allowing cameras in appellate courts or the United States Supreme Court. Everything you have said is the impact on witnesses, impact on parties, and that, for the life of me, underscores the silliness of the argument that somehow the American people do not have a right to see Government in action at the highest level.

And while I disagree with Mr. Graham that somehow the Federal courts are the most important court, which you just said—I disagree with that very strongly—the fact of the matter is the Supreme Court does have a greater affect because of its ability to finally determine interpretations of the Constitution. But I can see nothing that has been said here that in any way would suggest that somehow the presence of a camera in the courtroom would unduly influence those who are on the Supreme Court or those who are on the appellate courts.

But now getting to the question of the trial courts, man, the only image I have in my mind when I hear the testimony of those who oppose this is we are talking about the Federal Wizard of Oz. We sort of know what is being said, but we cannot dare see the wizard because somehow that is going to unduly influence us, and I almost wonder if you want us to say that jurors should have to close their eyes when they are sitting in the jury box because as long as they hear it, it is okay, but if they see it, they are unduly influenced.

One member of the Supreme Court many years ago talked about the States of the union being the crucibles of experimentation, and so, Judge Tunheim, we have had the crucibles of experimentation now for how many years with the courts being televised in the most gut-wrenching cases because that is the ones the States have. Most of the violent crime cases are at the State level, not the Federal level. Most of those cases dealing with children's rights and domestic relationships are State, not Federal.

I would just ask you very directly something that was only hinted at a moment ago. Are you telling us that we have had a substantial diminution of the rights of defendants and parties in our courts at the State level since cameras have been allowed?

Judge TUNHEIM. Mr. Chairman, Congressman Lungren, of course not. I am not saying that. I think what I am saying is it is very difficult to quantify and very hard to say what the impact of cameras has been in courts. Defendants have raised these issues on appeal. As it has been properly stated, it is rare that a case has been overturned. But how do you measure and how do you demonstrate that your rights have been impacted by the presence of cameras in a particular——

Mr. LUNGREN. But I was asking for your opinion——

Judge TUNHEIM. It is very difficult.

Mr. LUNGREN [continuing]. As to whether you think there has been a diminution of the protection of rights of individuals in the courtrooms that have been exposed to cameras because your premise is that that is necessarily what will follow if this bill becomes law.

Judge TUNHEIM. Well, I think what I am saying, Congressman Lungren, is that there is a significant risk of it, and I do not know how we can quantify what has happened in the State courts over the past 20 years when cameras have been there. It is very difficult to determine how many rights have been impacted by the cameras. It is a concern.

Mr. LUNGREN. Well, I will just give you an analogy of your argument. When I was Attorney General of California, I helped author Megan's Law. The same arguments I am hearing from you are what I heard then, because under the law for a long period of time, people who registered as sex offenders was public information, except that the public could not get to it. They were shielded from it. It was difficult to even try and find it.

And when I first came forward with the idea, it was I was going to deprive these folks, even though they had been convicted, of their other constitutional rights and we could not allow the public to handle this information, which is the same argument I hear here.

And you say to us, look, these are public trials because people are allowed to be in here. And maybe I am just a little irritated about this, but as I grew up as a kid, I knew I did not have a chance to come to Washington, D.C., and I could not get in the galleries. One of the great things about C-SPAN is it opened it up to the entire United States.

What is the craziness that says, yes, the Supreme Court is public so long as you can be one of the few people that can get into the few seats that are there, and so long as you can stand in line and so long as you can get here? I mean, what does public mean to you that says that only those selected people that are able to get there can do it, number one.

And, number two, we talk about demeanor of witnesses. I like to eyeball witnesses. I like to see what they say. What is the matter with the public eyeballing the witnesses through the TV cameras?

Judge TUNHEIM. Mr. Chairman, Congressman Lungren, I think what we are trying to say is that it is the potential impact on the testimony of the witness of having a camera staring them in the face.

Mr. LUNGREN. So you have the discretion of the judge to make that determination——

Judge TUNHEIM. You do——

Mr. LUNGREN [continuing]. Under this bill.

Judge TUNHEIM. But your discretion is at the beginning of the trial whether or not to have the proceedings open or not, and, as I indicated earlier, things change during the course of the trial.

I have to also remind the Members that transcripts are fully available. The courtroom doors are open. The briefs, every filing in court is available through the Internet. We have made these proceedings open.

The concern is about how the cameras affect the testimony of the witnesses, their demeanor as reviewed by the jury, and the impact on the truth-finding function of the trial court.

Mr. LUNGREN. I appreciate that. The only point I would make is we have tested that in all the other States in the union. The crucibles of democracy's experimentation has taken place. With all due respect to Mr. Graham, perhaps the Federal courts could learn from the State courts even though some may think the Federal courts are most important.

Mr. DELAHUNT. I would associate myself with the final conclusion and remarks of the gentleman from California.

I understand, Judge Tunheim, that you have to leave at 3. Is that correct?

Judge TUNHEIM. Mr. Chairman, I should leave. I need to get to a family funeral tomorrow morning——

Mr. DELAHUNT. Sure. Then this would be an appropriate——

Judge TUNHEIM [continuing]. In Congressman Lungren's home State.

Mr. DELAHUNT. So this would be an appropriate time for you before I call on the gentleman from Florida.

Mr. Keller?

Judge TUNHEIM. Thank you very much, Mr. Chair.

Mr. KELLER. Thank you, Mr. Chairman.

And as I listen to the witnesses, I am very impressed with all of you on both sides. To me, this turns on two central issues. First, we have to weigh the first amendment right of the public to view public trials versus the concerns of the Judicial Conference that a witness on TV might pontificate his personal views or promote his commercial interests.

Are we really worried about a witness saying, "I will tell you whether the traffic light was red or green, but, first, let me just say that we should stop global warming and shop at Joe's Hardware Store?" I think if that is the true analysis, you have to come down on the side of the first amendment here.

Now the second issue then becomes: Are Federal judges wise enough to exercise their discretion about saying yes or no to having cameras in the courtroom? I have to think they are smart enough.

Let me give you an example. Let us take a Federal judge sitting in the Southern District of New York. Osama bin Laden has already been criminally indicted by a Federal grand jury in New York for terrorism-related activity.

If he is captured somewhere in the hills of Pakistan and brought to New York City, in light of the high-profile nature of his crime and its impact on thousands of people, don't you think that it would be best to have a public trial where all of us can see it on TV, especially in light of all the kooky conspiracy theories relating to 9/11, and we can see ourselves what the evidence is with his various activities?

On the other hand, if I am that same Federal judge sitting in the Southern District of New York, and I am presiding over the prosecution of a mid-level Mafia thug who has been charged with extortion, and I see that the witnesses include many undercover FBI agents, as well as lots of paid informants and fearful shopkeepers who are going to be witnesses for the prosecution, I can tell you

I would probably exercise my discretion to say "no cameras" in that circumstance. So I have to believe that the judges are smart enough to make that call.

Mr. Graham, let me start with you. As a fellow Vanderbilt Law School graduate, you have great credibility with me here. Let me have you address some of the concerns. You have been covering State courts and Federal courts for a long time raised by the Judicial Conference. In all your years, have you seen a big problem in these televised State court trials about witnesses getting up there and promoting their own commercial interests?

Mr. GRAHAM. No, I have never seen that happen. You know, when he mentioned that, I thought, well, we really are wandering far afield here on our objection because I do not think that would ever really happen in the real world.

Mr. KELLER. Have you ever seen a big problem at these televised State court proceedings about witnesses getting up there and pontificating their personal views about various political issues or other things?

Mr. GRAHAM. Well, I have seen them try, but I have seen them put down very quickly by the presiding judge.

Mr. KELLER. And, next, let me talk to you about the issue of witnesses being nervous. Obviously, many State court trials are right there on national TV. O.J. is a good example. Is there any evidence that somehow a witness would be more extra nervous in a Federal court televised trial than in a State court nationally televised trial?

Mr. GRAHAM. I cannot see what the difference would be.

Mr. KELLER. Now isn't it true that right now 43 States already allow television for civil court proceedings in State court?

Mr. GRAHAM. State. Some of them criminal as well.

Mr. KELLER. And I believe 39 States allow TV coverage in criminal cases, 43 in civil cases. Is that about right?

Mr. GRAHAM. I have seen those figures, yes. I believe they are accurate.

Mr. KELLER. Okay. Now one of the things Mr. Tunheim said before he left was that, "Well, in a Federal court, we are dealing with people's livelihoods and money, and liberty is at stake." In a State court action in a criminal prosecution, isn't someone's liberty at stake?

Mr. GRAHAM. Certainly.

Mr. KELLER. And in a State court suit when you have a civil action, isn't money often at stake?

Mr. GRAHAM. Yes, it is.

Mr. KELLER. Okay. Let me get my remaining person against the—our prosecutor here. Sorry about that.

Mr. Richter, let me get your side of this. Do you believe that Federal judges are wise enough to exercise their discretion about whether to say yes or no in terms of having cameras in the courtroom?

Mr. RICHTER. Thank you, Congressman.

I would direct you to a decision in which this issue was taken up before the 11th Circuit Court of Appeals a number of years back and the 11th Circuit Court of Appeals itself addressed really that question, and what it said is that it came down on the side of a per se rule, one blanket rule, for the following reason, as opposed

to a case-by-case approach as presumably would occur with this legislation, and that is because of the difficulty that a judge has—and this is the court noting this—will have on detecting all the potential adverse impacts that flow from a camera. And let me just identify a few of those that it is likely a judge would be unable to really identify.

Mr. KELLER. Let me just have you be brief, and I will tell you why. I would be happy to hear it, but we are going to have votes here in a second, and I want to get to our other judge and ask her some questions. So, if you could wrap that up kind of in a summary form.

Mr. RICHTER. Well, secondly, I think what we are dealing with here is a balancing between the benefits and the potential harms that are out there. I think all the panelists agree that there are potential harms out there. Where we disagree, I think, is how heavily we weigh the potential benefits here.

Now what the 11th Circuit said in that is because the public and media already have full access at some point to a degree, the down sides did not outweigh the up sides of doing that, and I think that is where the department comes down on that.

Mr. KELLER. Thank you.

Mr. Chairman, I will yield back my time.

Mr. DELAHUNT. Thank you.

And let me now go to a former jurist, an eminent Member of the Committee, Mr. Gohmert from Texas.

Mr. GOHMERT. Thank you, Mr. Chairman.

And thank you, members of the panel. I really appreciate your being here.

Fred, you do not remember me, but in the early days of Court TV, you had commentary on a case of mine.

But let me comment very briefly, and I would ask if in my questions I not be restricted by a 5-minute rule, but by the rule of the number of words that the gentleman from Massachusetts used. I think we will come closer to being equal. I cannot talk that fast.

Mr. DELAHUNT. So ordered. [Laughter.]

Mr. GOHMERT. And I realize Judge Tunheim had to leave, but let me address a couple of things, and I am talking from personal experience here.

He said that it could change the activity or conduct in the courtroom. I can tell you this. It could make them better because you do not have lawyers and even judges that want to come face that television camera unprepared, and if there is anything that frustrates judges, it is having lawyers coming in the courtroom unprepared.

They know they are going to be on TV, they would come in ready, and then it is up to the judge to control the conduct in the courtroom.

One other case, our chairman of the Judicial Conference had referenced the *Estes* case and a quote from Judge Clark. He was referencing Billy Sol Estes, tried in the early 1960's in the 7th District Courtroom in Tyler, Texas. That is the courtroom where I presided 30 years after the trial.

As it happens, just this week, the local prosecutor passed away, a fine man, Democrat, good friend of mine, Weldon Holcomb.

Weldon told me that during the course of that trial, the judge had no rules as to the conduct of the media. They were everywhere. He said at times, there were cameramen that would walk up behind the judge, photographing, taking pictures around, that they just had free reign.

I can tell you I allowed a camera in the courtroom, and I never had a problem because it was very clear that in order to bring a camera in the courtroom or to get footage from that camera, as a member of the media, you had to sign a motion seeking permission to have a camera in the courtroom or to get footage in the courtroom.

Now the case I tried on Court TV that you all came in at the last minute and wanted to cover, actually, I asked, "Why are you interested in this case? It is going to be a long case. It has been tried once. We know it is going to be a long case." And I was told by the Court TV personnel, "Well, initially, we were not interested in televising it, but O.J.'s case just got moved to the spring, so you will be a great filler."

But anyway, with the order allowing camera in the courtroom or footage, it allowed me to reach my control outside the courtroom. I was able to control the sanctity of the proceedings like a judge cannot do if they do not have that leverage because, let's face it, whether you are in Congress or you are in the courtroom, it is all about leverage.

And so we had the most interesting case, from what they tell me, in Smith County history. The county was evenly divided. We had three TV stations that wanted to cover it. They all had to sign the motion. Court TV had to sign the motion. It allowed me to control who was interviewed that was involved in the case.

It allowed me to prevent, not just in the courtroom, but outside the courtroom until that case was over, any photography of any juror or any witness that I did not allow because if anyone violated that motion that they signed and my order that followed, they were subject to contempt, and they were subject to sanctions. I controlled the media coverage for my trial.

Now Judge Ito seemed like a great guy, seemed like a really smart kind of guy I would love to hang around with, but he did not control the courtroom, and when I saw him putting hourglasses that he was getting through the mail or from people up on his bench, I knew he was concerned and the cameras were a distraction to him. That was none of his business.

And as I recall, he said, "Now the jurors and all the parties have heard this tape of Mark Fuhrman, but since the public has a right to know, we are going to sit here and we are going to listen to it on camera," then I knew he had lost his way. That was none of his business. His business was conducting the trial and making sure they had a fair verdict. He could have handed that out. So we know we had a judge lose his way a little bit in that.

But the judge can ensure that the truth comes out, and when it comes to the allegation that a witness may be more nervous, maybe they are, maybe they are not. I can tell you I think nervousness is a good thing in a witness. It makes potential inaccuracies come to the light and easier to observe. Perhaps you have seen that.

Also, the judge has said it may make it more difficult for getting witnesses to testify, and I have experienced that. I am sure we all have. There is a thing called a subpoena and officers with handcuffs, and just like I found if people cannot shut their mouth in the courtroom, duct tape is very helpful, I also found that if people are not willing to come to court and they are reluctant to testify, officers with handcuffs and guns are very helpful. So I do not see that as being all that helpful as an assertion.

The Federal judges may say that they are not paid adequately to deal with the media, and I would submit they are not paid adequately to do the job they are doing. When you can have first year law students or people come out of the first year of law school making more than judges, then it is time that we gave them a raise, and I was hopeful we were going to get that filed this week, as I understand, maybe next week to give them a raise, and then they will feel better about dealing with this.

But I would submit to the Chairman and to other Members seeking input after the hearing from our witnesses, I would like to tweak this bill a little bit to make sure that judges have that power to require a motion and that they have the power to fashion sanctions. But that is the one thing I have never heard anybody on Court TV or anyone else say. It gives the judge so much more control.

When my predecessor tried that case that ended up on Court TV for 10 weeks, he did not allow a camera in the courtroom. They chased witnesses. They chased jurors. He had no control outside his courtroom. When I did it, I had total control.

And I would also add, it has advantages, too. We had a witness in a hearing outside the presence of the jury that was supposed to turn over all of his materials that he had used in formulating his opinion, his expert opinion, and the judge from Minnesota, as I recall, after we broke for lunch, gave the defense time to review what had been provided. After lunch, we came back and the prosecutor and the defense attorney said, "Judge, we need to see you in chambers."

The defense attorney's office had gotten a call, as I recall, from somebody from Minnesota who said they believed as the witness was turning over this big stack of documents and a computer disc that he may have palmed a computer disc and put it in his pocket, and they got that information to his office in Tyler. They passed it on to him.

They approached me. We got with the Court TV editing room, watched an instant replay of the witness, and saw that—nobody had seen it—he palmed a disc, took it and stuck it in his pocket, and it changed a little bit of the outcome of how that played.

But there are all kinds of advantages, but the judge must control what they do.

Mr. DELAHUNT. Thank you, Detective Gohmert.

Mr. GOHMERT. Well—— [Laughter.]

Mr. DELAHUNT. Appreciate that.

Mr. GOHMERT. Well, I would ask the Chairman would you be open to some little tweaking to allow——

Mr. DELAHUNT. I mean, I think, you know, Mr. Chabot has indicated that accommodations have been made in the past, and as

long as the core purpose of the proposal remains intact, I think we would welcome that discussion among Members of the Committee.

Mr. GOHMERT. Thank you.

And thank you, witnesses.

I know I did not ask any questions, but I had a lot to testify about. So I appreciate it.

Mr. DELAHUNT. Well, we are glad you were able to get it off your chest. [Laughter.]

You know, we are at the end of this round, and I would ask if any of the Members wish to make further inquiry. I would be pleased to grant them as much time as they may consume and as much time as the panel is willing to indulge us.

Mr. LUNGREN. Mr. Chairman?

Mr. DELAHUNT. Mr. Lungren?

Mr. LUNGREN. If I could just ask Mr. Richter a couple of questions.

In your testimony, you outlined some serious concerns, and so I would just like to ask you if the way the bill is written, which allows the discretion of the judge, would not take care of that. You are saying, "We are concerned with the spillover effects from cases where co-conspirators are tried separately." Wouldn't that be a case in which the prosecutor would ask that perhaps that not be televised for that very purpose?

Mr. RICHTER. It certainly could be, yes.

Mr. LUNGREN. I mean, wouldn't you think the judges would be sensitive to that as they are to other requests to be made when you have those kinds of considerations?

Mr. RICHTER. Sure. That is clearly something that if the issue was flagged and put before the judge, that we would hope a judge would come down and take that in consideration. The problem we see, Congressman, is that there are many other harms in addition to that that are not necessarily so easily quantified.

Mr. LUNGREN. Well, let me ask you about a couple others. You say that, "The bill fails to ensure that the attorney-client conversations and confidences are protected." Talking about what former Judge Gohmert said, wouldn't that be something that could be controlled by the judge?

Mr. RICHTER. It could be.

Mr. LUNGREN. And let me ask those that have actually done this in State cases, have you run into a problem where there has been a complaint that attorney-client conversations and confidences have been picked up and broadcast?

Mr. GRAHAM. At Court TV, we take steps on the front end to prevent that so that it does not happen. In the wiring of the courtroom and the placement of the microphones, we have in mind the fact that we do not want to pick up any privileged conversation, and, to my knowledge, it has not happened.

Mr. LUNGREN. What about conversations between the judge and the lawyers, sidebar?

Mr. GRAHAM. Well, the same thing occurs, and judges are very, very vigilant about sidebar conversations, as I am sure you know, and, generally speaking, the judges see to it—they really do not have to with Court TV because we see to it—in case the broad-

caster does not have experience in it, that they just do not pick up sidebar conversations.

Mr. LUNGREN. Mr. Richter——

Mr. GRAHAM. Some——

Mr. DELAHUNT. If the gentleman would yield for a moment?

Mr. LUNGREN. Yes.

Mr. DELAHUNT. You know, let me opine, put forth a premise. I think what we are discussing here is whether we have confidence in both the judgment and the integrity of the individual participants in the judicial process. Mr. Richter indicated that it was an 11th Circuit case where—and maybe I am mischaracterizing his words—it was almost as if the court—and I did not get the name of the decision—wanted to alleviate the burden of discretion from individual judges.

I mean, you know, if that is the premise of our jurisprudence, why don't we just, you know, mandate everything, you know, from sentencing on? Let's really start to restrict judicial discretion. Do we have confidence in our prosecutors that they are going to protect in some aspects the rights of the defendant as well as the administration of justice in a larger sense? I mean——

Mr. RICHTER. If I might respond, the case called *United States v. Hastings*—I do not believe the court was opining with regarding to a lack of confidence in judges to identify the kinds of points that Congressman Lungren credibly is identifying, and, obviously, we would hope, of course, that the parties to a case would do their utmost to identify pitfalls and risks and problems.

What the court in Hastings identified, however, and what I think is of deep concern from the Department's perspective is that there are things that cannot be identified and cannot be accounted for. So, for example——

Mr. DELAHUNT. But let me interrupt you. I mean, can't a judge and a prosecutor and counsel for the defendant—aren't they situated to determine potential problems and issues? They are more familiar with the case than the collective position of the Department of Justice or even, with all due respect, to the perspective of one particular circuit court of appeal?

I mean, I hear—I do not know whether it was from you, Mr. Richter, or maybe it was from Judge Tunheim—about impacting negotiations as it relates to settlements or even being used as a tool in terms of negotiating plea agreement. I mean, give me a break.

You know, I would challenge the department and anyone to come forward and present, you know, some empirical data that would establish that that the threat of a camera in the courtroom has been used as a tool in terms of affecting a plea bargain. That argument just is silly.

You know, we can create all sorts of scenarios that have no basis in reality. We all live in the world. We are all familiar with the experience. I think it was maybe Judge Gertner that said, I mean, we have—well, in Massachusetts—26 years of experience. This is not something new. It would be my position that the Federal Government or the Federal system is way behind, way behind the States.

I yield to you, Mr. Lungren.

Mr. LUNGREN. I would like to raise this because Mr. Richter raises this in his prepared testimony, and I would like Mr. Richter to respond and also Judge Gertner, and that is the assertion that "The bill does not protect against the televising of evidence that should not be disseminated except to the limited degree necessary to ensure due process and fair trial, for example, sensitive information relating to terrorism prosecutions and that the bill does not account for the increased harm caused by wider than necessary dissemination of sensitive law-enforcement techniques when disclosed in open court."

I am concerned about those two things. I presume judges would take care of those as they take care of unnecessary dissemination in the open courtroom of those things. But, Mr. Richter, if you could, you know, sort of flesh that out, I would appreciate that.

Mr. RICHTER. Sure.

Mr. LUNGREN. That is a concern of mine, and particularly in terrorism, that would be a generally unique circumstance for Federal court versus State court.

Mr. RICHTER. Well certainly. Obviously, when we go through a decision in which we are going to make use of information that is classified and make a use decision that the attorney general signs off on to authorize, with, obviously, the consent of the classifying agency, the ultimate declassification of information so that we could use it during the course of a criminal proceeding, we necessarily have to calculate some of the risks, obviously, to national security in weighing that against the benefits of going forward with a criminal prosecution.

The concern we have, of course, is that to the extent that you are televising a proceeding—and more than just the one-time broadcast—the fact that broadcasts now in the modern world do not just include major networks or Court TV or C-SPAN, but also include, of course, bloggers and all kinds of Web sites and all kinds of unique other delivery mechanisms.

Mr. LUNGREN. Al Jazeera perhaps.

Mr. RICHTER. And Al Jazeera, for example, yes.

And so when information is conveyed in a courtroom, at some level, there is still a degree in a continuum of privacy for any information that is conveyed because you are only telling the people that are in that courtroom. Now some of those people may go out and tell a lot of other people, and the information may be disseminated. But there is a difference to some degree.

There is, I think we all have to concede, a difference—otherwise, we would not have this bill—between the amount of dissemination that follows from a regular proceeding that is not televised or in which cameras are not present, and the amount of dissemination possible when cameras are there.

So I think from a national security perspective, obviously, in those kinds of cases, if such a bill like this existed, we would be, one, factoring in the possible risks. Again, it will depend on the judge that we draw under a bill like this, and that, obviously, is not something we know until the charges are filed and we go forward.

And so while we would, of course, hope under those circumstances that a judge would come down on the side that you,

Congressman, wisely have indicated you would. There is certainly no guarantee, as this bill is currently drafted.

Mr. LUNGREN. Judge Gertner?

Judge GERTNER. Well, we already have some experience with this, even in the Federal courts. The Federal court now, all our records, all the filings are electronic, and we have had to come up with degrees of access because there are some things that—Social Security numbers, all sorts of things—should be sealed, things that are ex partes, things that may be sealed and the lawyers only have access to, things that are more broadly sealed, and literally we have come up with electronic devices that would affect who has access to what. So, again, it was a technical issue, and we worked on that.

In the open court—I have an electronic courtroom—likewise, I had to learn to deal with how contemporaneously information was now put on the screens. So we put in a kill switch so that if the information as not properly admitted, I could just press the button. It would then be only for me or only for me and counsel. I do not remember who it was that said that this is going to happen, and we have to come up with techniques and rules to identify how to control it.

Terrorism is a unique situation, and it may be that those trials ought to not be televised. Again, even with respect to ordinary public trials—I am in the middle of a patent case now—portions of the case deal with trade secrets. We empty the courtroom, and we move on. It seems to me the parties in the case are able to identify what the concerns are, and there is not a court in the country that would not be deferential to those concerns, particularly given how hostile judges are to cameras.

What is going to happen the day after this bill is passed is not that, you know, suddenly the Federal courts are going to be wide open. This is going to proceed in baby steps, as it should.

Mr. DELAHUNT. Mr. Keller?

Mr. KELLER. Thank you, Mr. Chairman.

Let me begin by going to Judge Gertner. Why is it that you think there is a split among the Federal judges the way that there is? Is it possibly a deference by some of them just to the Judicial Conference and to other folks, or do most judges in the Federal genuinely oppose the cameras in the courtroom?

Judge GERTNER. That is a very hard question for me to answer. I think that one is in deference to the Judicial Conference. [Laughter.]

Mr. KELLER. Okay.

Mr. DELAHUNT. Hit that kill switch, please.

Judge GERTNER. Right. I love that kill switch.

I think that part of it is the O.J. Simpson case completely soured the Federal bench on this issue. I think that it is also safer to say no than it is to engage with the technology.

Mr. KELLER. It would appear to me that maybe they do not want to have the discretion because that would put them in a tough view on those situations when they say no.

Judge GERTNER. No comment on that.

Mr. KELLER. All right.

Let me go to the next question here. Mr. Richter, based on the policy arguments that you have made here today, is it your view that the 43 States that currently allow TV coverage in civil trials and 39 States which allow TV coverage in criminal trials are wrong to do that?

Mr. RICHTER. Well, as we all know, we live in a Federal republic, and it is the decision of each individual State to make its own decisions about how each individual system of justice operates in those States. Certainly, in formulating our position, we——

Mr. KELLER. But do you see what I am getting at? The same policy reasons that you have made could be made by the State judges as well, correct?

Mr. RICHTER. Yes. We have looked, of course, and examined those experiences to the degree that you can ascertain anything. The concerns that we have—and, again, I have been cut off a couple of times on this—there are things that cannot be quantified, that simply cannot be identified by a judge, that are not going to be quantifiable in a case such that it would ever lead to reversal. You know, when——

Mr. KELLER. What is a unique concern that is different in the Federal courts than State courts?

Mr. RICHTER. Well, I do not know that it is necessarily unique. I think some of these concerns——

Mr. KELLER. All right. Let me stop you there.

Mr. RICHTER [continuing]. There are always significant security——

Mr. KELLER. I understand. My focus——

Mr. RICHTER. There are significant security——

Mr. KELLER. I understand, and I——

Mr. RICHTER [continuing]. Concerns that extend at the Federal level that are far greater in many circumstances than you find at the State level.

Mr. KELLER. All right. Let me stop you there because I do not want to go too far, but it is a Federal crime to misuse the 4-H emblem. Murder is typically a State crime. So I think it is a pretty broad generalization to say, "What we do here in Federal court is so important and unique, we cannot have cameras. But what they do in State court is not that big of a deal, so it is okay to have cameras." Would you agree with me at least that that is a little too broad?

Mr. RICHTER. I was a State prosecutor. I prosecuted lots of cases as an Assistant District Attorney. I know that the work that State and local prosecutors and State and local law enforcement does is God's work and some of the most important work that we do in this country.

What I am trying to articulate is what we believe is best for our Federal system of justice and the cause of justice at the Federal level.

Mr. KELLER. Let me just comment, too. One of my bright colleagues, Judge Gohmert, has said that essentially maybe if we give these judges a raise, they will swallow the TV cameras. [Laughter.]

I am summarizing there here, and I am empathetic. But let me just point out to my esteemed jurist who knows a lot more about these issues than I do that the Supreme Court justices made

$202,000 a year. Judge Judy makes $27 million a year. So we are never going to be able to come up with that kind of money to make them happy. But I sympathize that they are underpaid for the great value that they bring to society.

I would also point out that they write decisions like *Brown v. Board of Education.* She wrote a book called "Don't Pee on My Leg and Tell Me It's Raining." I will let you know which one has a bigger W-2 form, but sometimes life is not fair.

Let me just go to now Ms. Swain. One of the things I am having a hard time with on the folks who want to shut down the cameras in the Federal courtroom is they are saying, "Well, it is okay," as Judge Roberts said, "that somehow we have audiotapes in the Federal courtroom. It is okay to have the sketch artists. It is okay to have the journalists. It is okay to have members of the public present. But it is somehow not okay to have the cameras there." Can you articulate why you think you should have the cameras there if all the other stuff is being allowed?

Ms. SWAIN. Well, I think you have just made my case for me, that the discrimination between the types of media that are currently allowed to cover the proceedings does not make any sense to us. In fact, it seems to be a level of discrimination between print press and electronic press by allowing the print press into the room, but not allowing the electronic journalist to take his or her tools into the same courtroom. So we do not understand the inconsistency.

Obviously, the galleries, whether press or public, in the Supreme Court or any of the Federal courts, there for a very important reason, can only accommodate so much, and the whole system was envisioned at a time when travel was not as distant as it is today. The cameras just seem like a logical extension to us.

Mr. KELLER. Okay.

Mr. Chairman, my time has expired.

Mr. DELAHUNT. Judge Gohmert?

Mr. GOHMERT. I thank my friend from Massachusetts.

And, you know, that was a very loose paraphrase of what I said. The camera issue aside, Federal judges should have a raise. I do not have any qualms about that, and I would not want—I did not know she was making $27 million.

But I would like to comment on a few things that were brought up. For one thing, my friend from California, my good friend from California, brought up about sidebars and concerns about things like that being picked up. My experience was when the media knows that they will be kicked out of the courtroom and will no longer be allowed to have any footage, any audio, they are very careful, especially my experience with Court TV was they went out of their way to be careful.

Especially after you have been covering a case for 3 or 4 weeks, if you do something and violate the rule or the law of the order and you get yanked from the case, your viewers get real upset with you, and they quit paying attention and may watch something else because they do not want that interrupted.

By the same token, in Tyler, having three networks that were constantly wanting footage from trials because they knew in our small market to compete they had to get the things people were in-

terested in, they were very careful not to violate the protective order because they did not want the other two stations to be able to show stuff on the news that they could not broadcast, and with that looming continuous threat, it was my experience everyone was very careful. We never had a problem in 10 weeks on that.

Now I will say on the issue of discriminating against the types of media, I discriminated against the types of media based on one issue, are you a distraction to the jury, because when we were in session, anything that distracted the jury was not going to be allowed in the courtroom. That was made very clear to the media. Court TV was incredibly good. I kept watching the jury because if I ever saw them distracted one time, the camera was gone. And they were never distracted. It was not a problem.

I got the ire of the print media because their cameras made noise when they clicked, and, as I told them, "You come in here with a camera that does not click, you are welcome. Take all the pictures you want." And he said, "Well, our editor and publisher will not buy cameras that do not click." I said, "That is your problem. You are not clicking and making noise in the courtroom because that is a distraction." So sometimes it is necessary to discriminate between various types of media if they are a distraction.

On another point, something I meant to bring up earlier, I have heard so many people say when you bring a camera in the courtroom, you just lengthen the trial, and I remember hearing people say after the O.J. Simpson case, "See, television was in the courtroom. Therefore, it was long. In Susan Smith's case, there were no cameras in the courtroom. Therefore, it went very fast."

That was not the reason. The reason the case I tried went so long, the reason O.J. Simpson's case went long, is the defendant had lots of money in both of those cases. They went toe to toe with every witness. When one side had a witness, the other side had a witness. As judges, we can control if there is duplicitous testimony, things like that, but when it is fresh testimony, you know, you have to allow it.

It was not so much an issue of television. It was an issue of whether the judge will control the courtroom and also whether or not the parties want to spend the money, and in those cases, they did.

And I will say this, this is true, but I have had judges tell me, "Look, I know you allowed cameras in your courtroom from time to time. I like the anonymity." And there is a lot of comfort in anonymity when you are a judge that makes tough rulings, and I recognize that, and there are cases it would be nice to give anonymity, so you balance those things, and I think you come out ahead if you say the public should be allowed to see and hear what goes on in our courtrooms.

And I thank the Chairman and yield back.

Mr. DELAHUNT. Thank you.

Thank you to this panel for sharing your insights and your expertise and experience.

And without objection, Members will have 5 legislative days to submit any additional written questions to you, which we will forward and ask that you answer as promptly as you can to be made part of the record.

And without objection, the record will remain open for 5 legislative days for the submission of any other additional materials.

It has been a very good hearing. It has generated valuable input from all of you. I think we all concur that greater transparency in the judicial process can enhance our democracy by promoting greater public understanding of our judicial system, and we do need to be cognizant that access to Federal judicial proceedings is granted in a manner that does not detract but enhances.

And with this, the hearing is adjourned.

[Whereupon, at 3:42 p.m., the Committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

Since 1946, the photographing and broadcasting of federal district court criminal and civil proceedings have been prohibited by directive of the Judicial Conference. Federal appellate courts, in contrast, have been authorized by the Conference to use their discretion in determining whether to allow electronic media coverage of appellate arguments. Currently, only the Second and Ninth Circuit Courts of Appeals permit cameras in their courtrooms.

In recent years, however, there has been growing public interest in having all federal judicial proceedings televised, which may reflect a greater general desire for transparency, as well as heightened interest in certain well-publicized cases.

Today's hearing provides an opportunity for us to consider H.R. 2128, the "Sunshine in the Courtroom Act of 2007," which would allow the presiding federal district or appellate court judge to permit electronic media coverage of court proceedings. I commend my colleagues on both sides of the aisle, Bill Delahunt and Steve Chabot, for their leadership on this measure.

It is my hope that this hearing will shed some sunlight on the following issues.

First, would this measure help promote greater understanding of the judicial process by the public, by making it more transparent? It is vital to our democracy that the public understand the critical role that our federal judicial system plays in our system of open government with respect to protecting the rights of all citizens. Greater transparency also helps enhance the public's trust and confidence in the judicial process. As Justice Louis Brandeis once said, "Sunshine is the best disinfectant."

Second, would the measure grant access to federal judicial proceedings in a way that promotes fairness? Many believe that the constitutional right to a fair trial requires that all court proceedings be open to the public, including the press. They cite, for example, the Supreme Court's ruling in *Richmond Newspapers, Inc. v. Virginia,* which held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment." Similar statements could be made with respect to civil trials.

Third, would the measure undermine due process and privacy rights of participants in federal judicial proceedings by opening them to intrusive electronic media? We should be appropriately careful that media coverage of these proceedings not impair the fundamental right of a citizen to a fair and impartial trial.

The prospect of public disclosure of personal information may have a material effect on an individual's willingness to testify, or place an individual at risk of being a target for retribution or intimidation. Likewise, the safety and security of our judges, law enforcement officers, and other participants in the judicial process should not be jeopardized. Accordingly, we should take proper precautions to ensure that the privacy of all participants in the judicial process is appropriately protected.

I look forward to having an informative discussion on the advantages and disadvantages of electronic media coverage of court proceedings.