

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

Hearings on
Cameras in the Courtroom

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Introduction

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

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

At a fundamental level, ours is a government in which the people are sovereign and therefore possess the concomitant right to observe its functioning.² Applying these principles, the Supreme Court has long recognized that the public is entitled to observe and scrutinize the operation of government, including especially the workings of the Nation’s judicial system: “People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.”³ As the Supreme Court has emphasized in the judicial context: “A trial is a

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

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

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

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

in part reflects the widespread acknowledgement, long before there were behavioral scientists, that [such openness] had significant community therapeutic value. Even without such experts to frame the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

To work effectively, it is important that society’s criminal process ‘satisfy the appearance of justice,’ and the appearance of justice can best be provided by allowing people to observe it.⁵

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

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

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

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

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

⁸ *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) (“*Press-Enterprise I*”).

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

¹⁰ *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (“*Press-Enterprise II*”).

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

For the same reasons, the courts have been equally solicitous of the right of the public, and of the media as the public's representative, to access judicial records.¹²

Significantly in this context, the majority of the federal circuits to have addressed the question have concluded that the media, as the representative of the public, has a right to copy such records – including audiotape and videotape evidence that the media seeks to copy for broadcast.¹³ In reversing a denial of access to videotaped material, one federal court of appeals held:

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

¹¹ *Id.* at 13-14.

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

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

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

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

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

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

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

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

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

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

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

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

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

can attest, the ‘cold’ record is a very imperfect reproduction of events that transpire in the courtroom.”¹⁸

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

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

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

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

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

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

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

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

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

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

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

²¹ 381 U.S. 532 (1965).

²² *Id.* at 536, 542-43.

²³ *Id.* at 551-52.

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

so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.”²⁵

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

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

²⁵ *Id.* at 595-96.

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

²⁷ *Id.*

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

²⁹ *Id.* at 573-74.

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

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

³⁰ *Id.* at 575.

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

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

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

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

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

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

³⁴ *Id.* at 1284.

³⁵ 205 F.R.D. 183 (E.D. Va. 2002).

³⁶ *Id.* at 186.

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

The Judicial Conference Guidelines

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

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

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

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

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

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

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

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

⁴² *Id.* at 24.

⁴³ *Id.* at 43.

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

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

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

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

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

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

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

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

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

⁵⁰ *Id.* at 1168-69.

⁵¹ *Id.* at 1170.

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

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

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

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

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

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

Other Recent Experience in the Federal Courts of Appeals

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

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

⁵⁵ *Id.* at 8 n.3.

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

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

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

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

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

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

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

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

Courts' Own Use of Cameras

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

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

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

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

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

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

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

Experience with Cameras in the State Courts

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

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

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

⁶⁵ *Id.*

⁶⁶ *Id.*

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

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

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

⁶⁷ *Id.*

⁶⁸ *Id.*

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

⁷⁰ *Id.*

⁷¹ *Id.* at 39-42.

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

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

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

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

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

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

⁷⁵ See California Rule of Court 980.

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

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

State courts who have had occasion to consider this issue more recently have reached similar conclusions. For example, in 2002, the New Hampshire Supreme Court implemented new guidelines for lower courts to follow in permitting cameras into the state's courts.⁷⁸ The Court recognized that the original rationale underlying its prior rule restricting camera access was the product of a bygone era in which camera technology was bulky and distracting: "the increasingly sophisticated technology available to the broadcast and print media today allows court proceedings to be photographed and recorded in a dignified, unobtrusive manner."⁷⁹ The court concluded that the beneficial effects of cameras outweighed their negative effects⁸⁰ and that cameras should be allowed in all courtroom proceedings otherwise open to the public, with trial judges able to limit television coverage in cases only where there was a "substantial likelihood of harm to any person or other harmful consequence."⁸¹

⁷⁷ *Id.*

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

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

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

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

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

Conclusion

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

Moreover, a number of federal courts have felt constrained by the Judicial Conference guidelines, local rules based on them, or Federal Rule of Criminal Procedure 53 not to allow camera coverage when they otherwise would have viewed such coverage as beneficial, and have, in essence, invited legislative action on the subject.

Congressional action will therefore open the doors of the Nation's federal court system to

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

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

⁸³ *Id.*

millions of Americans who are otherwise unable as a practical matter to view its judicial proceedings.