

**STATEMENT OF
THE HONORABLE JULIE A. ROBINSON
JUDGE, UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF KANSAS**

**ON BEHALF OF
THE JUDICIAL CONFERENCE
OF THE UNITED STATES**



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

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

December 3, 2014

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

SUMMARY OF STATEMENT OF JUDGE JULIE A. ROBINSON ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES

The Judicial Conference of the United States, which is the policy-making body for the federal courts, opposes enactment of H.R. 917, a bill that would “provide for media coverage of Federal Court proceedings.” The Conference has taken the position that permitting cameras in the federal trial courts is not in the best interests of justice because doing so has the potential to impair substantially the fundamental right of citizens to a fair trial.

Among the reasons supporting the Conference’s position are the following:

- The intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process;
- Allowing camera coverage of trials could interfere with a citizen’s right to a fair trial by affecting witness behavior;
- Permitting camera coverage could become a potent negotiating tactic in pretrial settlement negotiations;
- Allowing cameras in federal courts would create security concerns and undermine the safety of jurors, witnesses, and other trial participants and heighten the level and potential of threats to judges;
- Cameras can create privacy concerns for countless numbers of persons, many of whom are not even parties to the case, but about whom very personal information may be revealed;
- Each federal court of appeals currently is authorized to decide for itself whether to allow camera coverage in appellate proceedings. The Conference opposes legislation which would leave this decision up to the presiding judge of each panel, thereby creating a piecemeal and ad-hoc approach among the scores of panels convened within each court of appeals; and
- A pilot project is currently underway to evaluate the effect of cameras in district court courtrooms.

Open proceedings have been a hallmark of the Federal Judiciary, and the federal courts are leaders in the use of technology to promote access to and use of the federal courts. The Judiciary supports the objectives of educating the public, transparency and accountability. However, a judge’s paramount responsibility is to ensure that all citizens enjoy a fair and impartial trial. Because cameras in court proceedings could compromise a citizen’s right to a fair trial, the Judicial Conference opposes H.R. 917.

**STATEMENT OF THE HONORABLE JULIE A. ROBINSON
UNITED STATES DISTRICT JUDGE FOR THE DISTRICT OF KANSAS
ON BEHALF OF
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December 3, 2014

I. Introduction

Chairman Coble, Ranking Member Nadler, and members of the Subcommittee:

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

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

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

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

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

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

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

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

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

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

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

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

II. Background

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

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

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

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

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

access terminals in the clerk's office to provide free access to these court records.

Approximately 50 district courts and 80 bankruptcy courts are using a common, free internet tool, RSS, to "push" notification of docket activity to users who subscribe to their RSS feeds; much like a Congressional committee might notify its RSS subscribers of press releases, hearings, or markups.

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

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

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

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

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

III. Historical Background on Cameras in the Federal Courts

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

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

Since then, the Conference has repeatedly studied and considered the issue. In 1988, Chief Justice Rehnquist appointed an Ad Hoc Committee on Cameras in the Courtroom, which recommended that a three-year experiment be established permitting camera coverage of certain proceedings in selected federal courts. In 1990, the Judicial Conference adopted this recommendation and authorized a three-year pilot program allowing electronic media coverage of civil proceedings in six district and two appellate courts, which commenced July 1, 1991.¹

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

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

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

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

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

The current policy states:

A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only:

- (a) for the presentation of evidence;
- (b) for the perpetuation of the record of the proceedings;
- (c) for security purposes;
- (d) for other purposes of judicial administration;
- (e) for the photographing, recording, or broadcasting of appellate arguments; or
- (f) in accordance with pilot programs approved by the Judicial Conference.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Cameras Can Create Security Concerns

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

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

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

E. Cameras Can Create Serious Privacy Concerns

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

H. The Lessons of the 1994 FJC Study

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

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

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

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

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

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

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

- 64% found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 9% reported that, at least to some extent, the cameras cause judges to avoid unpopular decisions or positions; and
- 17% found that, at least to some extent, cameras disrupt courtroom proceedings.

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

- 47% of the appellate judges who responded found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;
- 56% found that, at least to some extent, the cameras cause attorneys to change the emphasis or content of their oral arguments;
- 34% reported that, at least to some extent, cameras cause judges to change the emphasis or content of their questions at oral arguments; and
- 26% reported that, at least to some extent, the cameras disrupt courtroom proceedings.

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

V. Conclusion

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

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

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

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

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