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

WASHINGTON, D.C.

**HEARING ON
JUDICIAL TRANSPARENCY AND ETHICS**

**TESTIMONY OF THE
NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (NPPA)**

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**Hearing On
Judicial Transparency and Ethics**

Testimony of Mickey H. Osterreicher
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Committee Chairman Goodlatte, Committee Ranking Member Conyers, Subcommittee Chairman Issa, Vice Chairman Collins, Subcommittee Ranking Member Nadler and other members of the subcommittee, good morning and thank you for the opportunity to appear before you to discuss electronic coverage of federal court proceedings as it pertains to judicial transparency and ethics.

Background

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

As the “Voice of Visual Journalists” the NPPA is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. Our approximately 6,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism community. Since its founding, the NPPA has vigorously

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

Additionally, the NPPA is one of 20 legal and media organizations that are members of the Coalition for Court Transparency, a national non-partisan alliance that advocates for greater openness and transparency from the federal court system, including the U.S. Supreme Court.

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

During that career, I have covered hundreds of court cases from the Attica trials to the murder trial of O.J. Simpson. I was actively involved in the 10-year experiment (1987 -1997) under New York Judicial Law § 218, entitled "Electronic Coverage of Judicial Proceedings"¹ (such "electronic coverage" hereinafter referring to: audio-visual recordings, still photography, broadcasting, televising, or Internet streaming (real-time or hyperlinked replay)).

Electronic Coverage in Federal Courts

In a time of "fake news" and "alternative facts" there is no better way to ensure transparency and promote confidence in the fair administration of justice than to expand electronic coverage of federal court proceedings. The Sixth Amendment guarantees "the right to a speedy and public trial" and since the time that amendment was adopted, our history makes clear that openness in court proceedings improves the quality of testimony, persuades unknown witnesses to come forward, makes trial participants more conscientious and generally provides the American public the opportunity to

¹ See <http://codes.lp.findlaw.com/nycode/JUD/7-A/218>

better observe the workings of our judicial system. To foster that essential transparency, almost every state allows electronic coverage of criminal, civil and appellate proceedings to some degree.

In December 2014, I had the opportunity to testify² before this subcommittee in support of H.R.917 – “Sunshine in the Courtroom Act of 2015.” Last month Representatives Gerry Connolly (D-VA) and Judge Ted Poe (R-TX)³ reintroduced H.R. 464 – “The Cameras in the Court Act,”⁴ which would help ensure transparency and accountability in the judicial branch by “permitting the televising of Supreme Court proceedings.”⁵ If passed the measure would amend 28 U.S.C. 45 by adding language contained in Section 678 entitled “Televising Supreme Court proceedings,” which states: “The Supreme Court shall permit television coverage of all open sessions of the Court unless the Court decides, by a vote of the majority of justices, that allowing such coverage in a particular case would constitute a violation of the due process rights of one or more of the parties before the Court.”⁶

In 2015, Rep. Nadler (D-NY) along with Representatives Connolly, Poe and Mike Quigley (D-IL) introduced H.R. 3723 – “Eyes on the Courts Act of 2015” “to provide for media coverage of federal appellate court proceedings, and for other purposes.” Hopefully they too will reintroduce that bill. The NPPA commends and supports these ongoing efforts.

During the last few years there have been some advances, and some lost opportunities in the expansion of electronic coverage in federal court. For example, the Ninth Circuit, which in 2003 was the first federal appeals court to post audio of its hearings, began live-streaming audio of oral arguments in January 2015. The Second Circuit continues its policy of permitting electronic recording

² See <https://judiciary.house.gov/wp-content/uploads/2016/02/Corrected-120314-Testimony-H.R.-917-Osterreicher.pdf>

³ Connolly and Poe Push for Cameras in the Court, January 12, 2017

<https://connolly.house.gov/news/documentsingle.aspx?DocumentID=837>

⁴ See <https://www.congress.gov/bill/115th-congress/house-bill/464/text?q=%7B%22search%22%3A%5B%22cameras%22%5D%7D&r=1>

⁵ *Id.*

⁶ *Id.*

for cases with heightened interest, most recently allowing C-SPAN to record and broadcast a January 2015 hearing following remand after the Supreme Court’s decision in *Burwell v. Hobby Lobby*.⁷ Approximately fifteen (15) Second Circuit cases have been recorded since the end of the first federal cameras pilot program (1991-1994), in which the Second and Ninth Circuits participated along with four district courts.

By comparison, the Supreme Court has released the audio of an oral argument on the same day on which the argument occurred only once, despite numerous requests from media organizations and pro-transparency groups. In February 2015, when a dozen media and pro-transparency groups petitioned the high court for same-day audio for two of the year’s most closely-watched cases – *Whole Women’s Health v. Hellerstedt*⁸ and *U.S. v. Texas*,⁹ the Court denied the request, tersely stating, “The court will follow its usual practices regarding the posting of the audio for these arguments” – that being, posting the audio the Friday after the cases are argued. As the Committee is, I am sure aware, late Friday releases are the least effective time to bring important news to the public as people get ready for the weekend.

The most recent federal cameras-in-courts pilot program, (comprised of 14 federal trial courts throughout the country), officially ended on July 18, 2015. In March 2016, the Judicial Conference of the United States voted against expanding or continuing that program, although it did permit three of the participating trial courts in the Ninth Circuit – the Western District of Washington, Northern

⁷ 573 U.S. ____ (2014)

⁸ 579 U.S. ____ (2016)

⁹ 579 U.S. ____ (2016)

District of California and District of Guam – to keep their cameras rolling at the court’s discretion. To date only six proceedings have been recorded.¹⁰

During the 2011-2015 pilot program, only about ten percent (10%), of the more than 1,500 proceedings in which the parties were notified of the opportunity to record, resulted in a recording; and less than one-third (1/3) of the nearly 200 judges in pilot courts volunteered to participate in the program.¹¹

In April 2016, the U.S. Government Accountability Office (GAO) released a report on “Policies and Perspectives on Video and Audio Coverage of Appellate Court Proceedings.”¹² Requested by Senators Dick Durbin and Chuck Grassley along with Rep. Mike Quigley, the report details how state appellate courts and those in other countries handle the issue of electronic coverage. Nearly every appellate judge and attorney interviewed by GAO stated that such coverage enhances public understanding of the courts and offers countless educational opportunities for its citizens, including law students and legal practitioners looking to learn from the those at the pinnacle of their profession.

The GAO report also provided recommendations for improving guidelines for successful electronic coverage of court proceedings. For example, the Florida Supreme Court partners with a local public television station which uses its own equipment to record and live-stream audio and video,

¹⁰ Administrative Office of U.S. Courts webpage “Available Court Videos,” <http://www.uscourts.gov/about-federal-courts/cameras-courts> (retrieved Feb. 12, 2017)

¹¹ “Report of the Judicial Conference Committee on Court Administration and Case Management: Cameras Pilot Program,” March 2016, available at <http://pdfserver.amlaw.com/nlj/Cameras%20pilot%20project%20committee%20report.pdf>

¹² See <http://www.gao.gov/products/GAO-16-437>

while the Ninth Circuit operates its own remote-controlled, unobtrusive cameras and posts videos of hearings to YouTube.¹³

On Nov. 4, 2016, the U.S. Supreme Court live-streamed electronic coverage of a Supreme Court Bar meeting commemorating the life of Justice Antonin Scalia that took place in the building's Great Hall. Immediately following that service, a special session of the Court further honoring the late Justice took place. The Court permitted audio of that session to be live-streamed as well, establishing two High Court firsts on the same day. Most recently, the Supreme Court was asked to permit same-day audio of the oral arguments in *Lee v. Tam*¹⁴ and *Ashcroft v. Abbasi*.¹⁵ That request was made by Fix the Court and was accompanied by signatures from nearly 1,000 people from all 50 states.¹⁶ Unfortunately, the Court once again denied that request.¹⁷

On Dec. 6, 2016, the Eleventh Circuit Court of Appeals announced that by April 1, 2017, it would begin posting audio recordings of oral argument online. This leaves the Tenth Circuit as the only federal appeals court not to post online audio, thus requiring parties to file a motion to obtain such recordings. Last month the Third Circuit announced it will video-record some oral arguments and post them online a day or so later. Two such cases have already been recorded and posted.¹⁸

Just this month, two cases in the Ninth Circuit were widely broadcast to much acclaim. The U.S. District Court for the Western District of Washington permitted electronic coverage of the hearing regarding President Trump's temporary travel ban in *State of Washington v. Trump*. That proceeding

¹³ See <https://www.youtube.com/user/9thcirc>

¹⁴ Docket Number 15-1293

¹⁵ Docket Number 15-1359

¹⁶ See <http://fixthecourt.com/2017/01/fix-the-court-delivers-petition-to-supreme-court-from-citizens-from-50-states-calling-on-justices-to-release-same-day-audio-in-upcoming-cases/>

¹⁷ See <http://www.multichannel.com/news/courts/supreme-court-denies-same-day-audio-request/410011>

¹⁸ See <http://fixthecourt.com/2016/12/eleventh-circuit-agrees-to-post-oral-argument-audio-online/>

was recorded and uploaded to the court’s website. Last week, the telephonic arguments of the appeal in that case before a three-judge panel of the Ninth Circuit, were heard live. According to David Madden, Assistant Circuit Executive for the Ninth Circuit U.S. Court of Appeals, “there were approximately 137,000 connections to the live audio stream from the court’s YouTube site.”¹⁹ “The Situation Room with Wolf Blitzer on CNN averaged 1.5 million total viewers and 490 thousand in the 25-54 demo[graphic] in the 6 p.m. ET hour during the 9th Circuit Court audio hearings,” according to an email from Richard Hudock, Public Relations Manager at the CNN Washington bureau. Millions more may have tuned in on cable news outlets, local news stations and countless other news websites.

These latest developments weigh strongly in favor of electronic coverage and should also prompt the Judicial Conference along with the High Court itself to finally promulgate commonsense guidelines permitting such coverage throughout the federal court system, up to and including the U.S. Supreme Court.

Openness and Electronic Coverage of Court Proceedings

Aside from the audio-visual information provided by electronic coverage of court proceedings is the constitutional principle that courts are meant to be “open.” It is instructive to remember the words of Justice Stewart in his dissent in *Estes v Texas*²⁰ (the 1965 Supreme Court case dealing with the televising and broadcasting of a trial) where he admonished that “it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, *I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.*”²¹

¹⁹ Feb. 7, 2017 Tweet

²⁰ *Estes v. Texas*, 381 U.S. 532 (1965).

²¹ *Id.* at 603-04 (Stewart, J., dissenting) (emphasis added).

The Supreme Court also has recognized a rebuttable presumption of openness and transparency in general when it comes to court proceedings. In *Richmond Newspapers, Inc. v. Virginia*²² the Court held that under the First Amendment the public, including the press, had a right of access to a criminal trial, because such proceedings had traditionally been open to the public. “What is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe,”²³ Chief Justice Burger wrote in the plurality opinion.

In 2017 such information on matters of public concern come from broadcast television (including cable) and the Internet (including social media and electronic material on websites provided by once traditional print media). Thus, the ability of the press to disseminate information via electronic coverage of court proceedings is a critical component in affording the public the modern equivalent of attending and observing. As Chief Justice Burger further explained, “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.”²⁴ Justice Stewart, concurring in the judgment, wrote that “the right to speak implies a freedom to listen,” and that “the right to publish implies a freedom to gather information.”²⁵ Similarly, I would offer that the right to broadcast implies a similar freedom regarding electronic coverage of federal courtroom proceedings.

The Framers envisioned court as being part of the public square, a place in an emerging nation where anyone could stop in to observe the proceedings and be assured of the integrity of our system of justice. Given the increasing complexity of our society and the size of our communities, that aspiration is exceedingly more difficult. But the core need for openness and transparency is now more crucial

²² *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

²³ *Id.* at 564 (plurality opinion of Burger, C.J.).

²⁴ *Id.* at 572.

²⁵ *Id.* at 599 (Stewart, J., concurring in the judgment, *citing Branzburg v. Hayes*, 408 U.S. 665, 681).

than ever with accusations of the media reporting “fake news” and government purporting “alternative facts.” For citizens, there is no better way to more truthfully relay courtroom proceedings than through the direct and unfiltered lens of electronic coverage to be viewed and heard at home, at work or on the go.

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

Conclusion

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

More than a half century ago Justice Harlan predicted that “the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process.”²⁶ That day has not only come but long since passed into a digital age of instant information.

It cannot be overstated that in this current political climate, when democratic principles are being tested and long-established forms of journalism and mass communications are being questioned, opening courts to electronic coverage is an essential and directly deliverable medium for providing the public with the ability to see and hear that justice is being done; renewing confidence in governmental integrity; and creating improved transparency as to how decisions are made at all steps in the judicial process, especially in the Supreme Court.

We look forward to working with this Subcommittee and the full Judiciary Committee in addressing the issue of electronic coverage of federal court proceedings as it pertains to judicial transparency and ethics.

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

Respectfully submitted,

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²⁶ *Estes* at 595-596.