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

WASHINGTON, D.C.

**HEARING ON
H.R. 917, THE SUNSHINE IN THE COURTROOM ACT OF 2013**

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

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Hearing On
H.R. 917, The Sunshine in the Courtroom Act of 2013

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Chairman Goodlatte, Chairman Coble, Ranking Member Conyers, and other members of the subcommittee, good morning and thank you for the opportunity to appear before you to discuss H.R. 917, the Sunshine in the Courtroom Act of 2013.

Background

My name is Mickey Osterreicher. I am of counsel to the law firm of Hiscock & Barclay LLP in its Media & First Amendment Law Practice Area in Buffalo, NY 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 National Press Photographers Association (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. Our approximately 7,000 members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. 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 19 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 courts system, including the U.S. Supreme Court.

As way of background I am an award winning visual journalist with almost 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, where I had the opportunity to watch the late William Kunstler and Ramsay Clark defend their clients, 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 And by electronic I mean audio-visual recording as well as still images.

Judicial Conference Pilot Program (1991 – 1993)

Much in the same way, H.R. 917 would provide for media coverage of federal court proceedings. Among other things, the Sixth Amendment guarantees "the right to a speedy and public trial." There is a strong societal interest in public trials. Openness in court proceedings has been shown to improve the quality of testimony, persuade unknown witnesses to come forward with relevant testimony, induce trial participants to perform their duties more conscientiously, and generally give the public, either directly or through press coverage, an opportunity to observe the workings of our judicial

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

system. As part of that openness almost every state allows electronic coverage of criminal, civil and appellate proceedings.

That is not the case at the federal level. In 1990 following the advice of its Ad Hoc Committee on Cameras in the Courtroom, the Judicial Conference of the United States² commenced a three-year (July 1, 1991 to June 30, 1993) pilot program permitting “the broadcasting, televising, electronic recording, or photographing of courtroom proceedings by the media ”in civil cases in six district and two appellate courts .³ At the conclusion of the experiment in 1994, the Court Administration and Case Management Committee presented a report and recommendation to the Judicial Conference, which included an evaluation of the pilot program by the Federal Judicial Center (FJC) of the pilot covering civil proceedings.⁴ The report also included an analysis⁵ of studies conducted in state courts regarding electronic coverage.

After reviewing the FJC Report, the “Committee was confident that the experimental media coverage did not create sufficient disruption to civil proceedings to warrant the continuation of the prohibition against such coverage.⁵ In a supplemental report the FJC once again stated that “most jurors and witnesses believe electronic media presence has no or minimal detrimental effects on witnesses and jurors, while a minority believe there are detrimental effects on them.”⁶ Based upon these evaluations, the Committee recommended that the Judicial Conference allow electronic coverage of civil proceedings in accordance with the Conference’s policy and standards.

² The Judicial Conference of the United States is the rulemaking body for the entire federal court system, with the exception of the United States Supreme Court. See 28 U.S.C. § 331.

³ Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals (1994) <http://ftp.resource.org/courts.gov/fjc/electmediacov.pdf>

⁴ See U.S. JUD. CONF., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 46-47 (1994), available at <http://www.uscourts.gov/judconf/94-Sep.pdf>

⁵ U.S. JUD. CONF., COMM. ON CT. ADMIN. & CASE MGMT., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 3 (Sept. 1994).

⁶ *Id* at 4.

Unfortunately the Judicial Conference chose to disregard those favorable assessments, data and recommendations, by dismissively stating, “the intimidating effect of cameras on some witnesses and jurors was cause for concern.”⁷ Based on this reasoning, the Conference declined to approve the Committee’s recommendation to continue such coverage of civil proceedings⁸ and the initial pilot program ended on December 31, 1994.⁹

Despite that setback a number of progressive district court judges defied what they considered to be only the persuasive position of the Judicial Conference on this issue.¹⁰ In 1996 New York District Court Judge Robert W. Sweet permitted electronic coverage¹¹ under the “presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to view those proceedings on television.”¹² He also took judicial notice that “the equipment [was] no more distracting in appearance than reporters with notebooks or artists with sketch pads.”¹³

In that same year Senior District Judge Jack B. Weinstein also allowed coverage while finding that “actually seeing and hearing court proceedings, combined with commentary of informed members of the press and academia, provides a powerful device for monitoring the courts.”¹⁴

⁷ U.S. JUD. CONF. RPT. OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S., 47 (Sept. 1994), available at <http://www.uscourts.gov/judconf/94-Sep.pdf>.

⁸ *Id.*

⁹ *Id.*

¹⁰ These cases were *Katzman v. Victoria’s Secret Catalogue*, 923 F. Supp. 580 (S.D.N.Y. 1996); *Marisol A. v. Giuliani*, 929 F. Supp. 660 (S.D.N.Y. 1996); *Sigmon v. Parker Chapin Flanau & Kimpl*, 937 F. Supp. 335 (S.D.N.Y. 1996); and *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996).

¹¹ *Katzman v. Victoria’s Secret Catalogue*, 923 F. Supp. 580, 583 (S.D.N.Y. 1996). The rule provided that “No one other than court officials engaged in the conduct of court business shall bring any camera, transmitter, receiver, portable telephone or recording device into any courthouse or its environs without written permission of a judge of that court.” *Id.* (quoting S.D.N.Y. Gen.R. 7). Judge Sweet read this language to allow camera coverage, writing that, “Although [Rule 7](#) does not state in the affirmative that court proceedings may be televised, it plainly permits cameras in the courtroom with a judge’s written permission.” *Id.* at 584.

¹² *Id.* at 589. Judge Sweet also noted that “[t]he equipment [used] is no more distracting in appearance than reporters with notebooks or artists with sketch pads.” *Id.* at 582.

¹³ *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996).

¹⁴ *Id.* at 138.

Judicial Conference Pilot Program (2011 – 2014)

Since 1996, a number of bills have been introduced in Congress with bipartisan support which would require federal courts – the Supreme Court, the circuit and district courts, or all federal courts, depending on the bill – to allow television broadcasting of their proceedings. In 2000 during the 106th Congress, the Judicial Conference voiced its opposition S. 721, a bill permitting electronic media coverage of federal court proceedings. In twenty-two pages of testimony before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, Chief Judge Edward R. Becker (3rd Cir.) “strongly opposed”¹⁵ the legislation and the concept. Despite the previous positive findings of the Court Administration and Case Management Committee and the Federal Judicial Center he reiterated the Judicial Conference’s belief “that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process.”¹⁶

The latest of these is the Sunshine in the Courtroom Act of 2013, which would authorize the presiding judge of a federal appellate district court to “at the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides.”¹⁷ It would also allow the Judicial Conference of the United States to “promulgate guidelines with respect to the management and administration of photographing, recording, broadcasting, or televising” of such proceedings.¹⁸

In 2010 the Judicial Conference authorized a second Cameras in the Courtroom Pilot Project, to last up to three years.¹⁹ Once again the pilot was to “evaluate the effect of cameras in district court

¹⁵ Statement of Chief Judge Edward R. Becker on Behalf of the Judicial Conference of the United States, at 1 (2000)

¹⁶ *Id.*

¹⁷ See: <https://www.govtrack.us/congress/bills/113/hr917/text>

¹⁸ *Id.*

¹⁹ See U.S. JUD. CONF., REPORT OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S. (Sept. 14, 2010), at 11-12, *available at* <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/ju>

courtrooms, of video recordings of proceedings therein, and of publication of such video recordings,”²⁰ with the Federal Judicial Center once again studying the effects of the program.²¹

In 2011 the selection of fourteen (14) federal trial courts that had voluntarily agreed to take part in the pilot was announced.²² The announcement stressed that the judges volunteering for the pilot must follow already adopted guidelines that among other things stated that “pilot recordings will not be simulcast, but will be made available as soon as possible on the US Courts and local participating court websites at the court’s discretion.”²³ Only those participating courts “may record court proceedings for the purpose of public release,”²⁴ with the presiding judge making the case selection which also required the consent of all parties “of each proceeding in a case”²⁵

This time it would be court personnel and not the media operating the equipment used to record the selected proceedings, with the presiding judge having the ability to instantly stop a recording if necessary. It is entirely up to the judge which cases are recorded, and according to the guidelines “it is not intended that a grant or denial . . . be subject to appellate review.”²⁶ Recordings by any other entities or persons have been prohibited. The guidelines also recommended three to four inconspicuously fix-placed cameras focused “on the judge, the witness, the lawyers’ podium, and/or counsel tables,”²⁷ along with “a feed from the electronic evidence presentation system.”²⁸ Additionally “the recording equipment should transmit the camera inputs to a switcher that incorporates them onto

[dconf/proceedings/2010-09.pdf](http://www.uscourts.gov/dconf/proceedings/2010-09.pdf). See also U.S. JUD. CONF., JUDICIARY APPROVES PILOT PROJECT FOR CAMERAS IN DISTRICT COURTS (press release), Sept. 14, 2010, available at [http://www.uscourts.gov/News/NewsView/10-09-14/Judiciary Approves Pilot Project for Cameras in District Courts.aspx](http://www.uscourts.gov/News/NewsView/10-09-14/Judiciary%20Approves%20Pilot%20Project%20for%20Cameras%20in%20District%20Courts.aspx).

²⁰ REPORT OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S. (Sept. 14, 2010), *supra*, at 11.

²¹ *Id.* at 12.

²² See: [http://www.uscourts.gov/News/NewsView/11-06-08/Courts Selected for Federal Cameras in Court Pilot Study.aspx](http://www.uscourts.gov/News/NewsView/11-06-08/Courts%20Selected%20for%20Federal%20Cameras%20in%20Court%20Pilot%20Study.aspx)

²³ *Id.*

²⁴ See: <http://www.uscourts.gov/uscourts/News/2011/docs/CamerasGuidelines.pdf>

²⁵ *Id.* at 2

²⁶ *Id.* at 1

²⁷ *Id.* at 3

²⁸ *Id.*

one screen.”²⁹ Unfortunately it was also stated at the outset of the pilot that funding for equipment or technical support would be limited and the courts were discouraged “from purchasing new equipment.”³⁰

Another major limitation to true openness is that live or slightly delayed electronic coverage is not allowed. Not only is the media prohibited from providing electronic coverage they are also precluded from getting a feed of those proceedings from court personnel. The guidelines specifically state, “The media or its representatives will not be permitted to create recordings of courtroom proceedings”³¹. For example, in *EMC Hightower v. City and County of San Francisco*,³² from the Northern District of California, the judge in the video opens the hearing by mentioning the cameras pilot project, and he lays down the rules, which in effect make the video unavailable to the public (and the press) until after the video has been reviewed by him. Under those rules the public and the press are only able to acquire the video by download from the court’s website once the recordings are posted. It is this absolute control of such electronic coverage which limits public access.

For the most part courtroom proceedings, especially in civil cases, do not make for compelling viewing and are more like watching paint dry. Recording in such a way that it appears like one is watching the simultaneous output from four surveillance cameras on one screen rather than a court proceeding does not improve things. After viewing some of the recorded proceedings I observed that often nothing is happening in one or more sectors of the screen while the person speaking in another sector is either out of focus or has his body halfway off the edge of the frame. At the very least this could be easily remedied by having professionally trained personnel operate the equipment rather than

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 5.

³² See: <http://www.uscourts.gov/Multimedia/Cameras/NorthernDistrictofCalifornia.aspx>

it being fixed with no ability to focus, pan, tilt, zoom or appropriately frame a shot. As recorded many of these cases are unsuitable for broadcast.

Openness and Electronic Coverage of Court Proceedings

Aside from the aesthetics of electronic coverage is the constitutional principle that courts are meant to be “open.” I believe it is instructive to remember the words of Justice Stewart in his dissent in *Estes v Texas*³³ (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.*”³⁴

Just as the Supreme Court articulated an evolving standard of decency in capital punishment cases, I respectfully suggest that there should also be an evolving standard of openness when it comes to court proceedings. In *Richmond Newspapers, Inc. v. Virginia*³⁵ 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,”³⁶ Chief Justice Burger wrote in the plurality opinion.

In 2014 most such information comes from broadcast television, cable/satellite programming and Internet content, including 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

³³ *Estes v. Texas*, 381 U.S. 532 (1965).

³⁴ ³⁴ *Id.* at 603-04 (Stewart, J., dissenting) (emphasis added).

³⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

³⁶ *Id.* at 564 (plurality opinion of Burger, C.J.).

observing. As Chief Justice Burger explained further, “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.”³⁷ 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.”³⁸ Similarly, I would offer that the right to broadcast implies a freedom to electronically record images.

In 1983 the lone dissent in *US v. Hastings*³⁹ (an 11th Circuit case regarding electronic trial coverage) wrote “The institutional interests cited in support of the restriction [on electronic coverage of courtroom proceedings] are, at best, mere commendations for the ideals our judicial system strives to maintain. At worst, they represent pretexts for an abhorrence to change and ignore the advances of modern day technology. When suitably circumscribed by appropriate and detailed standards, the public interests which favor electronic media coverage far outweigh the honestly perceived but unsubstantiated concerns over a possible lessening of courtroom decorum and fairness.”⁴⁰

Opening courts to electronic coverage is essential for the public to see that justice is being done, to be assured of the integrity of the process, and to better understand how decisions are made at both the trial and appellate levels, especially those of the Supreme Court.

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 complexity of our society and the size of our communities, that’s just no longer possible. But the core need for true openness continues, particularly as our courts have become

³⁷ *Id.* at 572.

³⁸ *Id.* at 599 (Stewart, J., concurring in the judgment, *citing Branzburg v. Hayes*, 408 U.S. 665, 681).

³⁹ *US v. Hastings*, 695 F.2d 1278 (11th Cir. 1983).

⁴⁰ *Id.* at 561 (citing *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764, 775 (Fla. 1979)).

national in scope and central agents of either change or maintaining the status quo in matters as significant as who will be president and whether health-care reform is constitutional.

The true openness foreseen by the Framers is closer in nature to that provided by electronic coverage of court proceedings than by second-hand reporting. The only way that the public at large can have full faith in the decisions of our courts is to be able to see them firsthand, and the only way they can do so is to permit journalists to convey electronic coverage of the courts directly to the public.

Supreme Court

Being admitted to the Supreme Court bar and having submitted amicus briefs in a number of cases I am always both in awe and disbelief that I am only one of about three hundred people while in that austere courtroom who actually get to see and hear the arguments.

This term the Court is hearing landmark cases on health care, voting rights, employment law, business and environmental regulations – and will likely take up same-sex marriage. Right now the Court is hearing the case of *Young v. United Parcel Service*,⁴¹ that issue being: Whether, and in what circumstances, the Pregnancy Discrimination Act, requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are “similar in their ability or inability to work.”⁴² Given the scope of this case it is very likely that a very sizable segment of the population would want to view and listen to the oral argument.

As the Justices take up issues of great import, it’s clear that Americans’ interest in the court’s work is only increasing. But there’s a real problem. Millions of Americans, who do not have the time or money to travel to Washington, D.C., to stand in line for hours to get one of the hundred or so

⁴¹ See: <http://www.scotusblog.com/case-files/cases/young-v-united-parcel-service/>

⁴² *Id.*

coveted seats inside the building on argument day, are unable to experience the very openness espoused by the High Court itself – even though modern technology affords the opportunity to do just that.

Every state supreme court in the country has a more open technology policy than that of the U.S. Supreme Court. Former federal judge and solicitor general Ken Starr has said: “There is no reason the public should be denied access to consideration of urgent [legal] questions – from global warming to health care – that affect us all. Cameras in the courtroom of the Supreme Court are long overdue.”⁴³

Ohio Supreme Court Chief Justice Maureen O’Connor agrees, saying: “An absolutely necessary condition of openness and accessibility in this new era [of transparency] is allowing video cameras”⁴⁴ in public courts. Former U.S. Attorney General Richard Thornburgh, once a proponent of the ban on electronic coverage, said twenty years ago that he “changed his views and now supports the televising of criminal proceedings.”⁴⁵ He also stated that he was “amazed at the number of people, not lawyers, picking up on the intricacies of our system and realizing that this Bill of Rights is for everybody.”⁴⁶

The Justices claim that cameras will lead to grandstanding during oral arguments. Experience in state supreme courts and other federal courts of appeal suggest otherwise. Advocates before the court are professionals – and they know the only audience they need to convince is the nine justices themselves.

The Justices have also expressed concerns about their personal privacy. This does not conform to their obligations as public figures. Citizens can watch, via electronic coverage, their local town council or Congress in action; the Supreme Court should not conduct itself differently. Justices do not

⁴³ See: http://www.nytimes.com/2011/10/03/opinion/open-up-high-court-to-cameras.html?_r=0

⁴⁴ See: <http://www.c-span.org/video/?293580-1/supreme-court->

⁴⁵ Memorandum of Points and Authorities of Court TV in Opposition to Termination of Film and Electronic Coverage, *People v. Simpson*, No.BA097211,1994 WL 621389 at *12 (Cal. Super. Ct. Nov. 7, 1994).

⁴⁶ *Id.*

hesitate to provide interviews when they have a book to promote and often appear at speaking events across the country in full view of electronic coverage. As a stark divide between the Justices intransigence on this subject and “the people’s business”⁴⁷ is a recent C-Span poll that showed 95 percent of adults thought the Supreme Court should be more open, while 74 percent indicated that all oral arguments should be televised.⁴⁸

In the last decade, members of both parties have proposed legislation to convince the justices to adopt electronic coverage of the Court. Senators Grassley and Schumer, Cornyn and Durbin, and Congressman Poe – who sits on this subcommittee – and just a month before the introduction of H.R. 917, Congressman Connelly, along with 8 cosponsors, proposed a bill (H.R. 96) that would permit electronic 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,” by amending Chapter 45 of title 28 of the United States Code. 28 U.S.C. § 1 also legislates that “the Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum,” a fact which should help blunt any "separation of powers" argument by the judiciary.

A similar bill (S. 1207) was introduced by Senator Durbin, cosponsored by Senator Grassley and 3 others. As you are all aware Senator Grassley, who is expected to become the new Chair of the Senate Judiciary Committee, has been a staunch advocate of “transparency and accountability” in the nation’s federal courts by allowing electronic coverage of court proceedings.⁴⁹

⁴⁷ See: <http://www.nationallawjournal.com/supremecourtbrief/id=1202676220755/As-Judiciary-Chair-Grassley-Likely-to-Push-for-Cameras-in-Supreme-Court?slreturn=20141101072759>

⁴⁸ *Id.*

⁴⁹ *Id.*

Public Proceedings

In that same vein, Justice Holmes took judicial notice of the “vast importance” of the “public trial” phenomenon when he wrote about, “the security which publicity gives for the proper administration of justice.” Holmes continued that “[i]t is desirable that the trial of [civil] causes should take place under the *public eye*.”⁵⁰ This public scrutiny was deemed crucial “because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with *his own eyes* as to the mode in which a public duty is performed.”⁵¹ In 2014 electronic coverage *is* the unblinking eye of the public and to deny its unrivaled potential to convey information instantly and to the widest audience is to deny reality.

Federal courts should not be viewed with suspicion and distrust. Instead they should be governed by the words of Chief Justice Burger when delivering the opinion of the Court in *Nebraska Press Association v. Stewart*: “the value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the acceptance of fairness so essential to public confidence in the system.”⁵²

Such electronic coverage provides modern society with almost all of its current information. In order to be fully informed about decisions made in federal courts, the press must be permitted to provide electronic coverage of those proceedings so that the public may see the administration of justice for itself.

⁵⁰ *Publicker Industry v. Cohen*, 733 F.2d 1059, 1069 (3d Cir. 1984) *citing* 3 W. Blackstone, Commentaries 373) *quoting* *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884))(emphasis added).

⁵¹ *Id.* emphasis added.

⁵² *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984)

To that end the press must be permitted to do what it does best – inform its viewers by presenting to them the sights and sounds of things, places and people which they would not ordinarily be able to see or hear. The right of a free press is embodied in the First Amendment and predicated on the belief that an informed society will remain just and free. It will take courage and vision for this doctrine to endure and dynamically continue to evolve as one of the fundamental principles upon which this country was founded.

As Justice Brandeis noted in his dissent in a 1932 due process case, “To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. But in the exercise of this high power, *we must be ever on our guard, lest we erect our prejudices into legal principles.*”⁵³

The federal judiciary must be mindful of its high power not to erect its own prejudices into judicial rules. Society can ill afford to let the arbitrary and speculative objections of jurists antagonistic to the electronic press substantially undermine a fundamental constitutional right by lens-capping the very tools of its profession and eviscerating the very means by which most Americans receive their news.

Justice Holmes also stated “it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”⁵⁴

⁵³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311(1932)(Brandeis, J., dissenting)(footnote omitted)(emphasis added).

⁵⁴ Vol. 3 OLIVER W. HOLMES, *The Path of the Law*, in *Collected works of Justice Holmes* 391, 399 (Sheldon M. Novick ed., University of Chicago Press 1995) (1897).

In light of current broadband and storage capabilities to present gavel-to-gavel electronic coverage of court proceedings on the Internet, whether through live streaming or archived files, along with the ability to watch such coverage on hand-held devices, makes the quaint notion of citizens gathered around in living rooms to watch live TV on small black & white screens just as passé.

In an age when it is no longer practical for all members of the community to pack into the courthouse and personally take in “court day,” the media act as public surrogates, transmitting court proceedings to a vast public audience and enabling the public to satisfy its civic duty in monitoring the government.

Conclusion

The benefits of allowing such 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 systems 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 judicial actions potentially harmful to the interests of justice. The non-electronic 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 sensationalistic or inaccurate reporting will be readily verifiable by a public able to view the underlying proceedings for itself.

Although some critics of electronic coverage have asserted that it will likely impede the fair administration of justice or cause irreparable harm, empirical studies of these concerns have proved to

be speculative at best. Critics have argued against electronic coverage on numerous grounds: because they claim that cameras and other hardware are disruptive of trials, that increased public scrutiny frequently leads to grandstanding and lawyers “trying their case in the press,” and that the sensationalistic nature of electronic coverage will infringe upon the privacy of participants and create public misperceptions about the judiciary. Each of these concerns, however, has either been specifically refuted by prior experiments with, and studies of, electronic coverage in the courts, or can be expressly addressed by enacting intrinsic safeguards to complement judicial trial court discretion.

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 a viewer’s 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 the democratic system of governance than this right of the people to know how their government is functioning on their behalf.

The Internet has enabled gavel-to-gavel electronic coverage of courtroom proceedings because of its intrinsic capacity to permit unlimited content rather than be bound by the time constraints of traditional broadcast and cable media. Additionally, newspaper websites have made it possible for the print media to also provide electronic coverage where they previously were relegated to artist’s renderings, still images and written words. Websites carrying news and information have the capacity to convey and archive video of full trial proceedings. A growing trend of many communities to have all-news cable television stations that focus around the clock on local events also would permit extended coverage of federal court proceedings – not just short stories with sound bites.

Finally, modern technology has long since transcended the difficulties that led to bans on such coverage. There are no more whirling, noisy cameras. There are no more glaring lights. Nor does a thundering herd of technicians have to go in and out of the courtroom to set up and tear down their gear. Modern equipment is inaudible, requires no flashes or extra lights, and can be operated by a limited number of trained professionals.

And while courtroom artists have greatly contributed to the coverage of courtroom proceedings in the absence of cameras, for the public to be relegated to viewing something more akin to cave drawings in an age of high-definition television could not be more anachronistic.

In 1996, the Judicial Conference recognized that “technology that permits the reproduction of sound and visual images provides our courts with a valuable resource to assist in their efforts to improve the administration of justice. That resource should be utilized, however, for purposes and in a manner consistent with the nature and objective of the judicial process.”⁵⁵

One would hope that by 2015, after what will have been a four year experiment, the federal judiciary will finally acknowledge that those concepts are not mutually exclusive and permit electronic coverage in all courtrooms for all proceedings on a permanent basis. As Chief Justice John Roberts jokingly acknowledged during his confirmation hearings in 2005 “television cameras are nothing to be afraid of.”⁵⁶

⁵⁵ See: <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR1993-04.pdf> at 284.

⁵⁶ Transcript: Day Three of the Roberts Confirmation Hearings. See: <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401451.html>

Justice Harlan was a bit more eloquent when he 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.”⁵⁷

Justice Stewart expanded on that notion with some prognostications of his own by stating, “the suggestion that there are limits upon the public’s right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms.”⁵⁸

We look forward to working with this Subcommittee and the full Judiciary Committee as you move forward with H.R. 917 and other similar legislation.

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

⁵⁷ *Estes* at 595-596.

⁵⁸ *Id.* at 614-615 (Stewart, J., dissenting).