Exhibit 21

available at: http://www.gpo.gov/fdsys/pkg/CHRG-106shrg1029/html/CHRG-106shrg1029.htm

PANEL CONSISTING OF HON. EDWARD R. BECKER, CHIEF JUDGE, U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT, PHILADELPHIA, PA, ON BEHALF OF THE JUDICIAL CONFERENCE OF THE UNITED STATES; HON. NANCY GERTNER, JUDGE, U.S. DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, BOSTON, MA; AND HON. HILLER B. ZOBEL, ASSOCIATE JUSTICE, SUPERIOR COURT DEPARTMENT, MASSACHUSETTS TRIAL COURT, BOSTON, MA

STATEMENT OF HON. EDWARD R. BECKER

Judge Becker. Thank you, Senator Grassley. On behalf of the Judicial Conference, I thank you for the opportunity to present our views on S. 721. My oral statement is somewhat longer than 5 minutes, but in light of the importance of the issues to the Federal judiciary, I respectfully request your indulgence to complete my remarks which will not exceed 10 minutes.

Senator Grassley. Granted.

Judge Becker. Thank you, sir.

Although the Conference strongly opposes the bill, before I explain why it is important to state that the Conference shares the sponsors' desire for improving public education about the Federal judiciary. But Federal courts are already fully open, and the wisdom of S. 721 therefore turns on whether it will advance public knowledge without damage to court processes. The Judicial Conference believes that the answer is no.

I will begin with what we perceive to be harm to the judicial process, but must first state two baseline premises. First, if this proposal can result in real and irreparable harm to a citizen's right to a fair and impartial trial, it is unacceptable to say that the harm is not great or that it is outweighed by the public good of televised court proceedings. We cannot tolerate in the Federal courts even a little bit of unfairness because that would be inconsistent with our sacred trust.

If one thing is clear to me after 30 years on the Federal bench, it is that balancing the positive effects of media coverage against the degree of damage that camera coverage would bring is not proper. Our mission is to administer the highest possible quality of justice to each and every litigant, not to provide entertaining backdrop for news reporters.

A second baseline point is that there can be a level of unfairness in a trial that does not amount to a constitutional deprivation. I speak here not as a decisionmaker in an individual case, but on behalf of a policymaking body which wants to ensure that no level of unfairness creeps into Federal courtrooms.

I will begin with the question of perceived harms. The Judicial Conference maintains that camera coverage would have a notably adverse effect on court proceedings. First, we believe that a witness telling facts to a jury will often act differently when he or she knows, or even believes that thousands of people are watching and listening to the story. This change in the witness' demeanor could have a profound effect on the jury's ability to accurately assess the veracity of that witness. Media coverage could exacerbate any number of human emotions in a witness, including bravado and over-dramatization.

What, you may ask, is the basis for my conclusion? It is the 1994 evaluation by the Federal Judicial Center of the 3-year pilot program of electronic media coverage of Federal civil proceedings in six district courts and two courts of appeals. Anyone who has cited that study in support of the bill has overlooked its most salient findings.

For example, 64 percent of the participating trial judges and 40 percent of the participating attorneys reported that at least to some extent cameras make witnesses more nervous than they otherwise would be. In addition, 46 percent of the trial judges believed that at least to some extent cameras make

witnesses less willing to appear in court. And 41 percent of the trial judges and 32 percent of the attorneys found that at least to some extent cameras distract witnesses. Just imagine what the findings would be if criminal cases or truly high-profile cases had been piloted. These are disquieting figures indeed.

But other findings of the FJC study bear on the ability of the courts to administer a fair trial in a televised case. Sixty-four percent of the trial judges found that at least to some extent the cameras caused attorneys to be more theatrical in their presentations. Forty-three percent of the appellate judges found the same syndrome at work.

Seventeen percent of the trial judges responded that at least to some extent cameras prompt people who see the coverage to try to influence their juror friends. These statistics are based on exit interviews with jurors. Seventeen percent of the trial judges and 21 percent of the attorneys found that at least to some extent cameras disrupt courtroom proceedings. The report by appellate judges was even higher--26 percent. Twenty-seven percent of the attorneys reported that the cameras distracted them, and 19 percent of the attorneys believed that at least to some extent the cameras distracted jurors.

There are also disturbing reports about the effect of the cameras on judges. Nine percent of the trial judges reported that at least to some extent the cameras caused judges to avoid unpopular decisions or positions. Fifty-six percent if the appellate judges found that, to some extent or greater, cameras cause attorneys to change the emphasis or content of their oral arguments. And 34 percent reported that at least to some extent cameras cause judges to change the emphasis or content of their questions at oral argument.

One more finding bears particular mention. Fifty-six percent of the trial judges reported their belief that media coverage violates witness privacy. Now, we appreciate S. 721's sensitivity to this issue, but we are concerned about the provision that would require courts to disguise the face and voice of a witness upon his or her request.

Anyone who has been in court knows how defensive witnesses can be. Frequently, they have a right to be. They are summoned into court to be examined in public. Sometimes, they are embarrassed or even humiliated. Providing them with the choice whether to testify in the open or blur their image and voice would be cold comfort indeed.

Sections 1(a) and (b) of the bill would allow the presiding judge of an appellate or district court to decide whether to allow cameras in a particular proceeding. If this legislation were to be enacted, I am sure that all Federal judges would use extreme care and judgment in making this determination.

Nonetheless, Federal judges are not clairvoyants. You never know what is going to happen in a trial. I sat on the trial bench for 11 years and I know that. Even the most straightforward or 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. The notion of conferring discretion upon the trial judge to decide on cameras in advance does not eliminate our concerns.

Now, there are a number of other harms that are detailed in my statement that I do not have the time to discuss here, but I mention them briefly and refer the committee to my prepared statement for supporting arguments in detail.

First, cameras can create security concerns. I note in this regard that there is a greater risk in Federal courts in this respect than in State courts. The number of threats against Federal judges and Federal facilities has escalated tremendously in recent years, and widespread media exposure could exacerbate this problem.

Second, S. 721 seems to assume that camera coverage will be without cost to the Federal judiciary. But that, I respectfully

submit, is not so. To the contrary, considerable costs will likely be required not only for equipment and retrofitting facilities, but also in hiring and training of media coordinators in each of the Federal courts. The media representatives surveyed by the FJC represented that a media coordinator was essential to the program.

Now, finally, let me turn to the other part of the putative equation, the supposed educational benefit of cameras in the courtroom. The proponents of cameras rely, of course, on the supposed benefits of public education and understanding court processes, but it has yet to be proven that cameras in the courtroom will significantly further them.

The FJC study sought to analyze the results achieved during the pilot project. The main approach to the issue lay in a content analysis of evening news broadcasts using footage obtained during the pilot program. The 90 stories analyzed presented an average of 56 seconds of courtroom footage per story. There is, I respectfully submit, precious little educational content in 56 seconds.

Moreover, 63 percent even of that courtroom footage was voiced over by a reporter's narration. Thus, the witnesses, parties and attorneys spoke on camera for just over one-third of the air time. The information about the nature of the case was provided by the reporters or anchors.

The FJC report concluded on this point that the vast majority of the stories did not even identify the proceeding as a civil matter. Seventy-seven percent of the stories failed even to identify the type of proceeding involved. The point is that the stories did not provide a high level of detail about the legal process in the cases covered. The analysis revealed that increasing the proportion of courtroom footage used in a story did not significantly increase the information given about the legal process.

In view of the foregoing, I suggest that the benefits of televised coverage of courtroom proceedings are greatly overrated and are certainly far outweighed by the detriments I have described. Television news coverage appears ofttimes simply to use the courtroom for a backdrop or a visual image for the news story which, like most stories on television, are delivered in short sound bites.

Two final points very briefly. The other vehicle for transmission of courtroom proceedings are the cable networks, but they do not alter the balance. First, they are not free. Moreover, cable networks rarely provide gavel-to-gavel coverage. What they do is to package limited trial excerpts with commentary, often interspersed with frequent commercial breaks. What results is not education into court processes, but entertainment.

In conclusion, I note, Mr. Chairman, that the Federal judiciary acknowledges that more needs to be done to improve the general understanding by the public of the Federal judiciary and its processes. But we believe that this goal can best be achieved by active, judicially-sponsored community outreach programs.

Federal courts have in the past few years begun to play an active role in this area through a variety of judicial outreach programs. We believe that this will provide true education about the courts and that any funds available are better spent on community outreach programs than a cameras in the courtroom project.

Mr. Chairman, I thank you for allowing me to testify and, of course, at the appropriate point will be pleased to answer any questions that you may have.

[The prepared statement of Judge Becker follows:]

Prepared Statement of Hon. Edward R. Becker

The Judicial Conference of the United States, which is the policy-

making body for the federal courts, strongly opposes enactment of S. 721, a bill that would ``allow media coverage of court proceedings'' in the federal courts. The Conference has thoroughly studied this issue and has taken the position that permitting cameras in the federal trial courts is not in the best interests of justice because it may threaten a citizen's right to a fair trial.

Among those reasons supporting the Conference's position are the following.

<bullet> The intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process.

<bullet> Allowing camera coverage of court trials could interfere with a citizen's right to a fair trial, even though judges would be provided discretion in permitting cameras.

<bullet> Permitting camera coverage would almost certainly become a potent negotiating tactic in pretrial settlement negotiations.

<bullet> Allowing cameras in federal courts can create security concerns and heighten the level and potential of threats to judges.

<bullet> 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.

<bullet> The negative responses in a 1994 Federal Judicial Center report reviewing a pilot program on cameras in the federal courts led the Conference to conclude that the intimidating effect of cameras on witnesses and jurors at trial was cause for alarm.

<bullet> Permitting cameras in the courtroom will not significantly further public education and understanding of court processes.

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. In addition, the judiciary has developed community outreach programs throughout the country to promote education about the judicial process. But a judge's paramount responsibility is to ensure that all citizens enjoy a fair and impartial trial. It is the mission of the federal judiciary to administer the highest possible quality of justice to each and every litigant, and not even some unfairness resulting from media coverage can be tolerated. Because cameras in court proceedings could compromise a citizen's right to a fair trial, the Judicial Conference opposes S. 721.

i. introduction

Mr. Chairman, and Members of the Subcommittee, my name is Edward R. Becker. I am presently Chief Judge of the United States Court of Appeals for the Third Circuit, having served on the court for over 18 years. Prior to that I was a judge of the United States District Court for the Eastern District of Pennsylvania for over 11 years. I will observe my 30th anniversary on the federal bench on December 11, 2000. I am appearing before you today in my capacity as a member of the Executive Committee of the Judicial Conference of the United States. On behalf of the Judicial Conference, I appreciate the invitation to testify. We hope that the testimony provided here is useful to you.

As you requested, this statement will comment on S. 721, a bill that would ``allow media coverage of court proceedings.'' The Judicial Conference strongly opposes this measure.

The federal judiciary has examined the issue of whether cameras should be permitted in the federal courts for more than six decades, both through case law and 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. We believe that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process. Moreover, in civil cases cameras can intimidate civil defendants who, regardless of the merits of their case, might prefer to settle rather than risk damaging accusations in a televised trial. Cameras can also create security concerns in the federal courts. Finally, 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 at trial.

These concerns are far from hypothetical. Since the infancy of motion pictures, cameras have had the potential to create a spectacle around court proceedings. Obvious examples include the media frenzies that surrounded the 1935 Lindbergh baby kidnapping trial, the murder trial in 1954 of Dr. Sam Sheppard, and the more recent Menendez brothers and O.J. Simpson trials. We have avoided such incidence in the federal courts due to the present bar of cameras in the trial courts, which S. 721 now proposes to overturn.

The federal courts have shown strong leadership in the continuing effort to modernize the litigation process. This has been particularly true of the federal judiciary's willingness to embrace new technologies, such as electronic case filing and access, videoconferencing, and electronic evidence presentation systems. The federal courts have also established community outreach programs in which several thousand students and teachers nationwide have come to federal courthouses to learn about court proceedings. Our opposition to this legislation, therefore, is not, as some may suggest, borne of a desire to stem technology or access to the courts. We oppose the broadcasting of federal court proceedings because it is contrary to the interests of justice, which it is our most solemn duty to uphold.

Today I will discuss some of the Judicial Conference's specific concerns with this legislation, as well as with the issues of cameras in the courtroom, generally. However, before addressing those concerns, I would like to provide you with a brief review of the Conference's experience with cameras, which will demonstrate the time and effort it has devoted to understnading this issue over the years. I must emphasize at the threshold that today, as in the past, the federal courts are at all times open to the public.

ii. background on cameras in the federal courts

Whether to allow cameras in the courtroom is far from a novel question for the federal judiciary. Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946. That rule states that ``[t]he taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court.''

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 criminal and civil cases. The Conference has, however, repeatedly studied and considered the issue since then.

In 1988, Chief Justice William 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. 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.

The Federal Judicial Center (FJC) conducted a study of the pilot project and submitted its results to a committee of the Judicial Conference in September 1994.\1\ The research project staff made a recommendation that the Conference ``authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms. . . .'' It is important to note that the recommendations included in the report were reviewed within the FJC but not by its Board.

\1\ In 1994, the Federal Judicial Center published a report entitled Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals. The period used by the Federal Judicial Center for its

study was July 1, 1991, to June 30, 1993.

The Conference disagreed with the conclusions drawn by the FJC staff and concluded that the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern. The paramount responsibility of a United States judge is to uphold the Constitution, which guarantees citizens the right to a fair and impartial trial. Taking into account this considerable responsibility placed upon judges, the Conference concluded that it was not in the interest of justice to permit cameras in federal courtrooms.

Two years later, at its March 1996 session, the Judicial Conference again considered the issue. At that session, the Conference voted to strongly urge each circuit judicial council to adopt, pursuant to its rulemaking authority articulated in 28 U.S.C. Sec. 332(d)(1), an order reflecting the Conference's September 1994 decision not to permit the taking of photographs or radio and television coverage of proceedings in U.S. district courts. The Conference also voted to strongly urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. Sec. 2071(c)(1).

The Conference, however, made a distinction between camera coverage for appellate and district court proceedings. Because an appellate proceeding does not involve witnesses and juries, the concerns of the Conference regarding the impact of camera coverage on the litigation process were reduced. Therefore, the Conference adopted a resolution stating that ``[e]ach court of appeals may 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 Conference may adopt.''

The current policy, as published in the Guide to Judiciary Policies and Procedures states:

> A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investigative, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such proceedings, only: (a) for the presentation of evidence; (b) for the perpetuation of the record of the proceedings; (c) for security purposes; (d) for other purposes of judicial administration; or (e) in accordance with pilot programs approved by the Judicial Conference of the United States.

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

Finally, it may be helpful to describe the state rules regarding cameras in the courtroom. While it is true that most states permit some use of cameras in their courts, such access by the media is not unlimited. The majority of states have imposed restrictions on the use of cameras in the court or have banned cameras altogether in certain proceedings. Although it is somewhat difficult to obtain current information, it appears that approximately 20 states that permit cameras have restrictions of some kind written into their authorizing statutes, such as prohibiting coverage of certain proceedings or witnesses, and/or requiring the consent of the parties, victims of sex offenses, and witnesses. Eleven states do not allow coverage of criminal trials. In eight states cameras are allowed only in appellate courts. Mississippi, South Dakota, and the District of Columbia prohibit cameras altogether. Utah allows only still photography at civil trials, and Nebraska allows only audio coverage in civil trials. In fact, only 16 states provide the presiding judge with the type of broad discretion over the use of cameras contained in this legislation. It is clear from the widely varying approaches to the use of cameras that the state courts are far from being of one mind in the approach to, or on the propriety and extent of, the use of cameras in the

to, or on the propriety and extent of, the use of cameras in the courtroom.

iii. judicial conference concerns regarding s. 721

I would now like to discuss some of the specific concerns the Judicial Conference has with S. 721, as well as the more general issue of media coverage in the courtroom.

A. Cameras 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. That is not the issue. While covert coverage may reduce the bright lights and tangle of wires that were made famous in the Simpson trial, it does nothing to reduce the significant and measurable negative impact that camera coverage can have on the trial participants themselves.

Proponents of cameras in the courtroom argue that media coverage would benefit society because it would enable people to become more educated about the legal system and particular trials. But even if this is true, and we take up this question later in the testimony, increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases. While judges are accustomed to balancing conflicting interests, balancing the positive effects of media coverage against an external factor such as the degree of impairment of the judicial process that camera coverage would bring is not the kind of thing judges should balance. Rather, our mission is to administer the highest possible quality of justice to each and every litigant. We cannot tolerate even a little bit of unfairness (based on media coverage), notwithstanding that society as a whole might in some way benefit, for that would be inconsistent with our mission.

The Conference maintains that camera coverage would indeed have a notably adverse impact on court proceedings. This includes the impact the camera and its attendant audience would have on the attorneys, jurors, witnesses, and judges. We believe, for example, that a witness telling facts to a jury will often act differently when he or she knows that thousands of people are watching and listening to the story. This change in a witness' demeanor could have a profound impact on a jury's ability to accurately assess the veracity of that witness. Media coverage could exacerbate any number of human emotions in a witness from bravado and over dramatization, to self-consciousness and under reaction. In fact, even according to the FJC study (which is discussed in more detail later in this statement), 64 percent of the participating judges reported that, at least to some extent, cameras make witnesses more nervous. In addition, 46 percent of the judges believed that, at least to some extent, cameras make witnesses less willing to appear in court, and 41 percent found that, at least to some extent, cameras distract witnesses.

Such effects could severely compromise the ability of jurors to assess the veracity of a witness and, in turn, could prevent the court from being able to ensure that the trial is fair and impartial. Likewise, television cameras could have a profound impact on the deliberations of a jury. The psychological pressures that jurors are already under would be unnecessarily increased by the broader exposure resulting from the broadcasting of a trial and could conceivably affect a juror's judgment to the detriment of one of the parties.

B. S. 721 Inadequately Protects the Right to a Fair Trial

The primary goals of this legislation is to allow radio and television coverage of federal court cases. While there are several provisions aimed at limiting coverage (i.e., allowing judges the discretion to allow or decline media coverage; authorizing the Judicial Conference to develop advisory guidelines regarding media coverage; and requiring courts to disguise the face and voice of a witness upon his or her request), the Conference is convinced that camera coverage could, in certain cases, so indelibly affect dynamics of the trial process that it would impair citizens' ability to receive a fair trial.\2\

\2\ We recognize that the legislation would sunset the authority for district court judges to permit cameras three years after the date

for district court judges to permit cameras three years after the date of enactment of the Act. There is no comparable sunset provision for the appellate courts.

For example, Section 1(a) and (b) of the bill would allow the presiding judge of an appellate or district court to decide whether to allow cameras in a particular proceeding before that court. If this legislation were to be enacted, we are confident that all federal judges would use extreme care and judgment in making this determination. Nonetheless, federal judges are not clairvoyants. Even the most straightforward or ``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, there is no opportunity to later rescind remarks heard by the larger television audience. This concern is of such importance to the Conference that it opposes legislation that would give a judge discretion to evaluate in advance whether television cameras should be permitted in particular cases.

We also are concerned about the provision that would require courts to disguise the face and voice of a witness upon his or her request. Anyone who has been in court knows how defensive witnesses can be. Frequently they have a right to be. Witnesses are summoned into court to be examined in public. Sometimes they are embarrassed or even humiliated. Providing them the choice of whether to testify in the open or blur their image and voice would be cold comfort given the fact that their name and their testimony will be broadcast to the community. It would not be in the interest of the administration of justice to unnecessarily increase the already existing pressures on witnesses.

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

> The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being reviewed by a vast audience is simply incalculable. Some may be demoralized and frightened, come 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 over dramatization. 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 these concerns that cause the Judicial Conference of the United States to oppose enactment of S. 721.

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

Cameras provide a very strong temptation for both attorneys and witnesses to try their cases in the court of public opinion rather than in a court of law. 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 sample threat that the president of a defendant corporation could be forced to testify and be cross examined, for the edification of the general public, might well be a real disincentive to the corporation's exercising its right to a public trial.

D. Cameras Can Create Security Concerns

Although the bill includes language allowing witnesses who testify to be disguised, the bill does not address security concerns or make similar provision regarding other participants in judicial proceedings. The presence of cameras in the 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

against judges has escalated over the years, and widespread media exposure could exacerbate the problem. Additionally, all witnesses, furors, and United States Marshals Service personnel may be put at risk because they would no longer have a low public profile.

Also, national and international camera coverage of trials in federal courthouses, would place these buildings, and all in them at greater risk from terrorists, who tend to choose targets for destruction that will give their ``messages'' the widest exposure. Such threats would require increased personnel and funding to adequately protect participants in court proceedings.

E. Cameras Can Create Serious Privacy Concerns

There is a rising tide of concern among Americans regarding privacy rights and the Internet. Numerous bills have been introduced in both the Congress and state legislatures to protect the rights of individual citizens from the indiscriminate dissemination of personal information that once was, to use a phrase coined by the Supreme court, hidden by ``practical obscurity,'' \3\ but now is available to anyone at any time because of the advances of technology. The judiciary is studying this issue carefully with respect to court records, and Congress has before it a bipartisan proposal to create a Privacy Study Commission to look at a number of issues, including public records.

\3\ United States Department of Justice v. Reporters Committee for the Freedom of the Press, 489 U.S. 749, (764 (1989).

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. Also, in many criminal and civil trials, which the media would most likely be interested in televising, much of the evidence introduced may be of an extremely private nature, revealing family relationships and personal facts, including medical and financial information. This type of information provided in open court, is already available to the public through the media. Televising these matters sensationalizes these details for no apparent good reason.

Involvement in a federal case can have a deep and long-lasting impact on all of its participants, 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 real interest in the case--and its elevation to an event that allows and encourages thousands to become involved intimately in a case that essentially concerns a small group of private people or entities.

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

F. S. 721 Does Not Address the Complexities Associated With Camera Coverage

Media coverage of a trial would have a significant impact on that trial process. There are major policy implications as well as many technical rules issues to be considered, none of which are addressed in the proposed legislation. For example, televising a trial makes certain court orders, such as those sequestering witnesses, more difficult to enforce. In a typical criminal trial, most witnesses are sequestered at some point. In addition, many related 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.

the jury box, and sound and light criteria.

Finally, S. 721 includes no funding authorization for implementation of its mandates. Regardless of whether funding is authorized, there is no guarantee that needed funds would be appropriated. The cost associated with allowing cameras, however, could be significant. For example, costs would be incurred to retrofit 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. When considering that these expenses may have to be incurred in each of the 94 districts, the potential cost could be significant. An additional considerable cost would be creation of the position of media coordinator or court administrative liaison to administer and oversee an electronic media program on a day-to-day basis. According to the FJC report, the functions of the media liaisons included receiving applications from the media and forwarding them to presiding judges, coordinating logistical arrangements with the media, and maintaining administrative records of media coverage.

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 to this manner to the news media. The Judicial Conference responds to such assertions by stating that today, as in the past, federal court proceedings are open to the public; however, nothing in the First Amendment requires televised trials.

The seminal case in this issue is Estes v. Texas, 381 U.S. 532 (1965). In Estes, the Supreme Court directly faced the question 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 excluding cameras from the courtroom. Justice Clark's plurality opinion and Justice Harlan's concurrence indicated that the First Amendment did not extend the right to the news media to televise from the courtroom. Similarly, Chief Justice Warren's concurrence, joined by Justices Douglas and Goldberg, stated:

> [n]or does the exclusion of television cameras from the courtroom in any way impinge upon the freedoms of speech and the press. . . . So long as the television industry, like the other communications media, is free to send representatives to trial 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 televise 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

broadcast trials. To the contrary, the Supreme Court has indicated that the First Amendment does not guarantee a positive right to televise or broadcast criminal trials.'' Edwards, 785 F.2d at 1295. The court went on to explain that while television coverage may not always be constitutionally prohibited, that is a far cry from suggesting that television coverage is ever constitutionally mandated.

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

H. The Teachings of the FJC Study

Proponents of S. 721 have indicated that the legislation is justified in part by the FJC study referred to earlier. The Judicial Conference based, in part, its opposition to cameras in the courtroom on the same study. Given this apparent inconsistency, it may be useful to highlight several important findings and limitations of the study. As I noted earlier in the statement, the recommendations included in the FJC report, which were proposed by the research project staff, were reviewed within the FJC but not by its Board.

First, the study only pertained to civil cases. This legislation, if enacted, would allow camera coverage in both civil and criminal cases. As this Subcommittee is acutely aware, the number of criminal cases in the federal courts continues to rise. 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 study's conclusions ignore 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:

<bullet> 32 percent of the attorneys who responded felt that, at least to some extent, the cameras distract witnesses;

<bullet> 40 percent felt that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;

<bullet> 19 percent believed that, at least to some extent, the cameras distract jurors;

<bullet> 21 percent believed that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;

<bullet> 27 percent believed that, at least to some extent, the cameras have the effect of distracting the attorneys; and

<bullet> 21 percent 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:

<bullet> 46 percent believed that, at least to some extent, the cameras make witnesses less willing to appear in court;

<bullet> 41 percent found that, at least to some extent, the cameras distract witnesses;

<bullet> 64 percent reported that, at least to some extent, the cameras make witnesses more nervous than they otherwise would be;

<bullet> 17 percent responded that, at least to some extent, cameras prompt people who see the coverage to try to influence juror-friends;

<bullet> 64 percent found that, at least to some extent, the cameras cause attorneys to be more theatrical in their presentations;

<bullet> 9 percent reported that, at least to some extent, the cameras cause judges to avoid unpopular decisions or positions; and

<bullet> 17 percent found that, at least to some extent, 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 too seek to ensure that all citizens enjoy a fair and impartial trial, and 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.

For the appellate courts, an even larger percentage of judges who

participated in the study related negative responses:

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

<bullet> 56 percent found that, at least to some extent, the cameras cause attorneys to change the emphasis or content of their oral arguments;

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

<bullet> 26 percent reported that, at least to some extent, the cameras disrupt courtroom proceedings.

While the Conference did allow each United States court of appeals to determine whether to permit the use of cameras in that circuit, these high negative responses give us a very real indication as to why only two out of 13 courts of appeals have allowed their proceedings to be televised. The two courts that do allow camera coverage are the Second and Ninth Circuits, which voluntarily participated in the pilot project.

Carefully read, the FJC study does not reach the firm conclusions for which it is repeatedly cited. The negative responses described above undermine such a reading. When considering legislation affecting cameras in the courtroom with such permanent and long-range implications for the judicial process, the negative responses should be fully considered. Certainly that is what the Conference focused on. In reality the recommendations of the study reflect a balancing exercise which may seem proper to social scientists but which is unacceptable to judges who cannot compromise the interests of the litigants, jurors, and witnesses, even for some amorphous public good. We turn to that issue now.

iv. the putative educational benefit of cameras in the courtroom

The proponents of cameras in the courtroom rely, of course, on the putative benefits of public education and understanding of court processes. The Judicial Conference supports that goal but does not agree that cameras in courtrooms will significantly further it. The FJC study analyzed the results achieved during the pilot project. The main approach to the issue lay in a content analysis of evening news broadcast using footage obtained during the pilot program.\4\ The content analysis is disquieting. The ninety stories analyzed presented a total of one hour and twenty-five minutes of courtroom footage, with an average of fifty-six seconds of courtroom footage per story. There is not too much educational content in 56 seconds. Moreover, most of the courtroom footage was voiced over by a reporter's narration. On average, reporters narrated 63 percent of all courtroom footage. Thus, the witnesses, parties, and attorneys spoke on camera for just over one-third of the total air time. In at least one-half of the cases photographed, information on the nature of the case was provided by reporters or anchors without relying on the participants.

\4\ This analysis was conducted by the Center for Media and Public Affairs under contract with the FJC. Content analysis is the objective and systematic description of communicative material. The content analysis performed for this study proceeded in two phases. First, a qualitative analysis was used to identify the symbols, stylistic devices, and narrative techniques shaping the form and substance of the news stories; this allowed the researchers to develop analytic categories based on the actual content of the stories rather than imposing priori categories. Second, the analytic categories that were developed and pre-tested formed the basis of a quantitative analysis, which involved the systematic coding of story content into discrete categories.

The FJC report also sought to determine specifically the extent to which the stories provided basic educational information about the legal system, examining whether five pieces of information were conveyed to the viewer: (1) identification of the case as a civil matter; (2) identification of the type or proceeding, such as a hearing or trial; (3) statements about whether a jury was present; (4)

descriptions of the proceedings on a given day; and (5) discussion of the next step in the legal process. The report concluded as follows:

> The vast majority of stories (95 percent of non-first day stories) did not identify the proceeding covered as a civil matter. In addition, 77 percent of the stories failed to identify the type of proceeding involved. Almost three-quarters (74 percent) of all stories did not provide information about whether a jury was present, including half of the stories that identified the covered proceedings as a trial.
>
> Most stories (74 percent) did explain what transpired in court on a particular day, such as who testified or what evidence was presented. In multiple-day cases, 90 percent of the stories explained the daily proceedings, compared to 63 percent in single-day stories. Seventy-six percent of the daily proceedings in a story were explained by a combination of reporter narration and participant discussion. Only 29 percent of stories mentioned the next step in the litigation process in the case.
>
> Thus, the stories did not provide a high level of detail about the legal process in the cases covered. In addition, the analysis revealed that increasing the proportion of courtroom footage used in a story did not significantly increase the information given about the legal process.

In view of the foregoing, we suggest that the benefits of televised coverage of courtroom proceedings are overrated (and are certainly far outweighed by the detriments described above). Television news coverage oftentimes appears simply to use the courtroom for a backdrop or a visual image for the news story which, like many of such stories on television, are delivered in short sound bites and not in depth.

The FJC study also reported that Court TV covered 28 cases under the program and that C-SPAN covered 7 cases. However, it does not appear from records available to us that these proceedings were broadcast either in their entirety or continuously. The paucity of cases selected by C-SPAN--seven in two years--suggests that the tediousness, technicality, and sheer length of trials are obstacles to comprehensive media transmission, except in the sensational kinds of cases where the harms described previously are the greatest.

v. a better vehicle for public education

The federal judiciary acknowledges that more needs to be done to improve the general understanding by the public of the federal judiciary and its processes. We believe that this goal can best be achieved by active federal judicial involvement. Federal courts have, in the past few years, begun to play an active role in this area through community outreach programs. Under the aegis of these programs, thousands of students, teachers, and other members of the public have come into federal courts to learn more about the federal courts and to engage in dialogue with judges, attorneys and court personnel. National initiatives to increase public understanding of the federal court system are underway in pilot programs in two circuits. In addition, over the last two years, the federal judiciary has conducted Law Day programs for high school seniors, during which mock trials were broadcast to 2,000 students at over 30 participating courthouses nationwide.

Additionally, plans are underway for federal courts to assist school personnel in planning curriculums designed to instruct about the federal judiciary, culminating in court visits (or visits by judges to schools). The positive results of these kinds of programs are self-evident. We believe that it would be preferable to expend the monies that would be necessary to support a cameras in the courtroom project on these community outreach programs.

vi. conclusion

When almost anyone in this country thinks of cameras in the courtroom today, they inevitably think of the Simpson case. I sincerely doubt anyone believes that the presence of cameras in that courtroom did not have an impact on the conduct of the attorneys, witnesses, jurors, and judge--almost universally to the detriment of the trial

process. Admittedly, few cases are Simpson-like cases, but the inherent effects of the presence of cameras in the courtroom are, in some respects, the same, whether or not it is a high-publicity case. Furthermore, there is a legitimate concern that if the federal courts were to allow camera coverage of cases that are not sensational, it would become increasingly difficult to limit coverage in the high-profile and high-publicity cases where such limitation, almost all would agree, would be warranted.

This is not a debate about whether judges would be discomfited with camera coverage. Nor is it a debate whether the federal courts are afraid of public scrutiny. They are not. Open hearings are a hallmark of the federal judiciary. It is also not about increasing the educational opportunities for the public to learn about the federal courts or the litigation process. The judiciary strongly endorses educational outreach, which could better be achieved through increased and targeted community outreach programs.

Rather, this is a decision about how individual Americans--whether they are plaintiffs, defendants, witnesses, or jurors--are treated by the federal judicial process. It is the fundamental duty of the federal judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. For the reasons discussed in this statement, the Judicial Conference believes that the use of cameras in the courtroom could seriously jeopardize that right. It is this concern that causes the Judicial Conference of the United States to oppose enactment of S. 721. 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, 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.

STATEMENT OF CHIEF JUDGE EDWARD R. BECKER
ON BEHALF OF
THE JUDICIAL CONFERENCE OF THE UNITED STATES

I. Introduction

Mr. Chairman, and Members of the Subcommittee, my name is Edward R. Becker. I am presently Chief Judge of the United States Court of Appeals for the Third Circuit, having served on the court for over 18 years. Prior to that I was a judge of the United States District Court for the Eastern District of Pennsylvania for over 11 years. I will observe my 30th anniversary on the federal bench on December 11, 2000. I am appearing before you today in my capacity as a member of the Executive Committee of the Judicial Conference of the United States. On behalf of the Judicial Conference, I appreciate the invitation to testify. We hope that the testimony provided here is useful to you.

As you requested, this statement will comment on S. 721, a bill that would "allow media coverage of court proceedings." The Judicial Conference strongly opposes this measure.

The federal judiciary has examined the issue of whether cameras should be permitted in the federal courts for more than six decades, both through case law and 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. We believe that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process. Moreover, in civil cases cameras can intimidate civil defendants who, regardless of the merits of their case, might prefer to settle rather than risk damaging accusations in a televised trial. Cameras can also create security concerns in the federal courts. Finally, 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 at trial.

These concerns are far from hypothetical. Since the infancy of motion pictures, cameras have had the potential to create a spectacle around court proceedings. Obvious examples include the media frenzies that surrounded the 1935 Lindbergh baby kidnapping trial, the murder trial in 1954 of Dr. Sam Sheppard, and the more recent Menendez brothers and O.J. Simpson trials. We have avoided such incidences in the federal courts due to the present bar of cameras in the trial courts, which S. 721 now proposes to overturn.

The federal courts have shown strong leadership in the continuing effort to modernize the litigation process. This has been particularly true of the federal judiciary's willingness to embrace new technologies, such as electronic case filing and access, videoconferencing, and electronic evidence presentation systems. The federal courts have also established community outreach programs in which several thousand students and teachers nationwide have come to federal courthouses to learn about court proceedings. Our opposition to this legislation, therefore, is not, as some may suggest, borne of a desire to stem technology or access to the courts. We oppose the broadcasting of federal court proceedings because it is contrary to the interests of justice, which it is our most solemn duty to uphold.

Today I will discuss some of the Judicial Conference's specific concerns with this legislation, as well as with the issues of cameras in the courtroom, generally. However, before addressing those concerns, I would like to provide you with a brief review of the Conference's experience with cameras, which will demonstrate the time and effort it has devoted to

understanding this issue over the years. I must emphasize at the threshold that today, as in the past,

the federal courts are at all times open to the public.

II. Background on Cameras in the Federal Courts

Whether to allow cameras in the courtroom is far from a novel question for the federal judiciary. Electronic media coverage of criminal proceedings in federal courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946. That rule states that "[t]he taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court."

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 criminal and civil cases. The Conference has, however, repeatedly studied and considered the issue since then.

In 1988, Chief Justice William 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. 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.

The Federal Judicial Center (FJC) conducted a study of the pilot project and submitted its results to a committee of the Judicial Conference in September 1994.[1] The research project staff made a recommendation that the Conference "authorize federal courts of appeals and district courts nationwide to provide camera access to civil proceedings in their courtrooms. . . ." It is important to note that the recommendations included in the report were reviewed within the FJC but not by its Board.

The Conference disagreed with the conclusions drawn by the FJC staff and concluded that the potentially intimidating effect of cameras on some witnesses and jurors was cause for considerable concern. The paramount responsibility of a United States judge is to uphold the Constitution, which guarantees citizens the right to a fair and impartial trial. Taking into account this considerable responsibility placed upon judges, the Conference concluded that it was not in the interest of justice to permit cameras in federal courtrooms.

Two years later, at its March 1996 session, the Judicial Conference again considered the issue. At that session, the Conference voted to strongly urge each circuit judicial council to adopt, pursuant to its rulemaking authority articulated in 28 U.S.C. § 332(d)(1), an order reflecting the Conference's September 1994 decision not to permit the taking of photographs or radio and television coverage of proceedings in U.S. district courts. The Conference also voted to strongly urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1).

The Conference, however, made a distinction between camera coverage for appellate and

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[1]In 1994, the Federal Judicial Center published a report entitled *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals*. The period used by the Federal Judicial Center for its study was July 1, 1991, to June 30, 1993.

district court proceedings. Because an appellate proceeding does not involve witnesses and juries, the concerns of the Conference regarding the impact of camera coverage on the litigation process were reduced. Therefore, the Conference adopted a resolution stating that "[e]ach court of appeals may 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 Conference may adopt."

The current policy, as published in the *Guide to Judiciary Policies and Procedures* states:

> A judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investigative, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such proceedings, only: (a) for the presentation of evidence; (b) for the perpetuation of the record of the proceedings; (c) for security purposes; (d) for other purposes of judicial administration; or (e) in accordance with pilot programs approved by the Judicial Conference of the United States.

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

Finally, it may be helpful to describe the state rules regarding cameras in the courtroom. While it is true that most states permit some use of cameras in their courts, such access by the media is not unlimited. The majority of states have imposed restrictions on the use of cameras in

the court or have banned cameras altogether in certain proceedings. Although it is somewhat difficult to obtain current information, it appears that approximately 20 states that permit cameras have restrictions of some kind written into their authorizing statutes, such as prohibiting coverage of certain proceedings or witnesses, and/or requiring the consent of the parties, victims of sex offenses, and witnesses. Eleven states do not allow coverage of criminal trials. In eight states cameras are allowed only in appellate courts. Mississippi, South Dakota, and the District of Columbia prohibit cameras altogether. Utah allows only still photography at civil trials, and Nebraska allows only audio coverage in civil trials. In fact, only 16 states provide the presiding judge with the type of broad discretion over the use of cameras contained in this legislation. It is clear from the widely varying approaches to the use of cameras that the state courts are far from being of one mind in the approach to, or on the propriety and extent of, the use of cameras in the courtroom.

III. Judicial Conference Concerns Regarding S. 721

I would now like to discuss some of the specific concerns the Judicial Conference has with S. 721, as well as the more general issue of media coverage in the courtroom.

A. Cameras 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. That is not the issue. While covert coverage may reduce the bright lights and tangle of wires that were made famous in the Simpson trial, it does nothing to reduce the significant and measurable negative impact that camera coverage can have on the trial participants themselves.

Proponents of cameras in the courtroom argue that media coverage would benefit society because it would enable people to become more educated about the legal system and particular trials. But even if this is true, and we take up this question later in the testimony, increased public education cannot be allowed to interfere with the judiciary's primary mission, which is to administer fair and impartial justice to individual litigants in individual cases. While judges are accustomed to balancing conflicting interests, balancing the positive effects of media coverage against an external factor such as the degree of impairment of the judicial process that camera coverage would bring is not the kind of thing judges should balance. Rather, our mission is to administer the highest possible quality of justice to each and every litigant. We cannot tolerate even a little bit of unfairness (based on media coverage), notwithstanding that society as a whole might in some way benefit, for that would be inconsistent with our mission.

The Conference maintains that camera coverage would indeed have a notably adverse impact on court proceedings. This includes the impact the camera and its attendant audience would have on the attorneys, jurors, witnesses, and judges. We believe, for example, that a witness telling facts to a jury will often act differently when he or she knows that thousands of people are watching and listening to the story. This change in a witness's demeanor could have a profound impact on a jury's ability to accurately assess the veracity of that witness. Media coverage could exacerbate any number of human emotions in a witness from bravado and over dramatization, to self-consciousness and under reaction. In fact, even according to the FJC study (which is discussed in more detail later in this statement), 64 percent of the participating judges reported that, at least to some extent, cameras make witnesses more nervous. In addition, 46 percent of the judges believed that, at least to some extent, cameras make witnesses less willing to

appear in court, and 41 percent found that, at least to some extent, cameras distract witnesses.

Such effects could severely compromise the ability of jurors to assess the veracity of a witness and, in turn, could prevent the court from being able to ensure that the trial is fair and impartial. Likewise, television cameras could have a profound impact on the deliberations of a jury. The psychological pressures that jurors are already under would be unnecessarily increased by the broader exposure resulting from the broadcasting of a trial and could conceivably affect a juror's judgment to the detriment of one of the parties.

B. S. 721 Inadequately Protects the Right to a Fair Trial

The primary goal of this legislation is to allow radio and television coverage of federal court cases. While there are several provisions aimed at limiting coverage (*i.e.*, allowing judges the discretion to allow or decline media coverage; authorizing the Judicial Conference to develop advisory guidelines regarding media coverage; and requiring courts to disguise the face and voice of a witness upon his or her request), the Conference is convinced that camera coverage could, in certain cases, so indelibly affect the dynamics of the trial process that it would impair citizens' ability to receive a fair trial.[2]

For example, Section 1(a) and (b) of the bill would allow the presiding judge of an appellate or district court to decide whether to allow cameras in a particular proceeding before that court. If this legislation were to be enacted, we are confident that all federal judges would use extreme care and judgment in making this determination. Nonetheless, federal judges are not clairvoyants. Even the most straightforward or "run of the mill" cases have unforseen

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[2]We recognize that the legislation would sunset the authority for district court judges to permit cameras three years after the date of enactment of the Act. There is no comparable sunset provision for the appellate courts.

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, there is no opportunity to later rescind remarks heard by the larger television audience. This concern is of such importance to the Conference that it opposes legislation that would give a judge discretion to evaluate in advance whether television cameras should be permitted in particular cases.

We also are concerned about the provision that would require courts to disguise the face and voice of a witness upon his or her request. Anyone who has been in court knows how defensive witnesses can be. Frequently they have a right to be. Witnesses are summoned into court to be examined in public. Sometimes they are embarrassed or even humiliated. Providing them the choice of whether to testify in the open or blur their image and voice would be cold comfort given the fact that their name and their testimony will be broadcast to the community. It would not be in the interest of the administration of justice to unnecessarily increase the already existing pressures on witnesses.

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

> 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 over dramatization.

> 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 these concerns that cause the Judicial Conference of the United States to oppose enactment of S. 721.

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

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

D. Cameras Can Create Security Concerns

Although the bill includes language allowing witnesses who testify to be disguised, the bill does not address security concerns or make similar provision regarding other participants in judicial proceedings. The presence of cameras in the 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. Additionally, all witnesses, jurors, and United States Marshals Service personnel may be put at risk because they would no longer have a low public profile.

Also, national and international camera coverage of trials in federal courthouses, would

place these buildings, and all in them at greater risk from terrorists, who tend to choose targets for destruction that will give their "messages" the widest exposure. Such threats would require increased personnel and funding to adequately protect participants in court proceedings.

E. Cameras Can Create Serious Privacy Concerns

There is a rising tide of concern among Americans regarding privacy rights and the Internet. Numerous bills have been introduced in both the Congress and state legislatures to protect the rights of individual citizens from the indiscriminate dissemination of personal information that once was, to use a phrase coined by the Supreme Court, hidden by "practical obscurity,"[3] but now is available to anyone at any time because of the advances of technology. The judiciary is studying this issue carefully with respect to court records, and Congress has before it a bipartisan proposal to create a Privacy Study Commission to look at a number of issues, including public records.

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. Also, in many criminal and civil trials, which the media would most likely be interested in televising, much of the evidence introduced may be of an extremely private nature, revealing family relationships and personal facts, including medical and financial information. This type of information provided in open court, is already available to

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

the public through the media. Televising these matters sensationalizes these details for no apparent good reason.

Involvement in a federal case can have a deep and long-lasting impact on all its participants, most of whom have neither asked for nor sought publicity. In this adversarial setting, reputations can be compromised and relationships can be damaged. In fact, according to the FJC study on live courtroom media coverage, 56% of the participating judges felt that electronic media coverage violates a witness's privacy. This is not to say that the Conference advocates closed trials; far from it. Nevertheless, there is a common-sense distinction between a public trial in a public courtroom—typically filled with individuals with a real interest in the case—and its elevation to an event that allows and encourages thousands to become involved intimately in a case that essentially concerns a small group of private people or entities.

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

F. S. 721 Does Not Address the Complexities Associated with Camera Coverage

Media coverage of a trial would have a significant impact on that trial process. There are major policy implications as well as many technical rules issues to be considered, none of which are addressed in the proposed legislation. For example, televising a trial makes certain court orders, such as those sequestering witnesses, more difficult to enforce. In a typical criminal trial, most witnesses are sequestered at some point. In addition, many related 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, S. 721 includes no funding authorization for implementation of its mandates. Regardless of whether funding is authorized, there is no guarantee that needed funds would be appropriated. The costs associated with allowing cameras, however, could be significant. For example, costs would be incurred to retrofit 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. When considering that these expenses may have to be incurred in each of the 94 districts, the potential cost could be significant. An additional considerable cost would be creation of the position of media coordinator or court administrative liaison to administer and oversee an electronic media program on a day-to-day basis. According to the FJC report, the functions of the media liaisons included receiving

applications from the media and forwarding them to presiding judges, coordinating logistical arrangements with the media, and maintaining administrative records of media coverage.

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

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

The seminal case on this issue is *Estes v. Texas*, 381 U.S. 532 (1965). In *Estes*, the Supreme Court directly faced the question 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 excluding cameras from the courtroom. Justice Clark's plurality opinion and Justice Harlan's concurrence indicated that the First Amendment did not extend the right to the news media to televise from the courtroom. Similarly, Chief Justice Warren's concurrence, joined by Justices Douglas and Goldberg, stated:

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

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

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

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

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

H. The Teachings of the FJC Study

Proponents of S. 721 have indicated that the legislation is justified in part by the FJC study referred to earlier. The Judicial Conference based, in part, its opposition to cameras in the courtroom on the same study. Given this apparent inconsistency, it may be useful to highlight several important findings and limitations of the study. As I noted earlier in the statement, the recommendations included in the FJC report, which were proposed by the research project staff, were reviewed within the FJC but not by its Board.

First, the study only pertained to civil cases. This legislation, if enacted, would allow camera coverage in both civil and criminal cases. As this Subcommittee is acutely aware, the number of criminal cases in the federal courts continues to rise. 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 study's conclusions ignore 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.

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 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.

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.

While the Conference did allow each United States court of appeals to determine whether to permit the use of cameras in that circuit, these high negative responses give us a very real indication as to why only two out of 13 courts of appeals have allowed their proceedings to be televised. The two courts that do allow camera coverage are the Second and Ninth Circuits, which voluntarily participated in the pilot project.

Carefully read, the FJC study does not reach the firm conclusions for which it is repeatedly cited. The negative responses described above undermine such a reading. When considering

legislation affecting cameras in the courtroom with such permanent and long-range implications for the judicial process, the negative responses should be fully considered. Certainly that is what the Conference focused on. In reality the recommendations of the study reflect a balancing exercise which may seem proper to social scientists but which is unacceptable to judges who cannot compromise the interests of the litigants, jurors, and witnesses, even for some amorphous public good. We turn to that issue now.

IV. The Putative Educational Benefit of Cameras in the Courtroom

The proponents of cameras in the courtroom rely, of course, on the putative benefits of public education and understanding of court processes. The Judicial Conference supports that goal but does not agree that cameras in courtrooms will significantly further it. The FJC study analyzed the results achieved during the pilot project. The main approach to the issue lay in a content analysis of evening news broadcast using footage obtained during the pilot program.[4] The content analysis is disquieting. The ninety stories analyzed presented a total of one hour and twenty-five minutes of courtroom footage, with an average of fifty-six seconds of courtroom footage per story. There is not too much educational content in 56 seconds. Moreover, most of the courtroom footage was voiced over by a reporter's narration. On average, reporters narrated 63% of all courtroom

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[4]This analysis was conducted by the Center for Media and Public Affairs under contract with the FJC. Content analysis is the objective and systematic description of communicative material. The content analysis performed for this study proceeded in two phases. First, a qualitative analysis was used to identify the symbols, stylistic devices, and narrative techniques shaping the form and substance of the news stories; this allowed the researchers to develop analytic categories based on the actual content of the stories rather than imposing *priori* categories. Second, the analytic categories that were developed and pre-tested formed the basis of a quantitative analysis, which involved the systematic coding of story content into discrete categories.

footage. Thus, the witnesses, parties, and attorneys spoke on camera for just over one-third of the total air time. In at least one-half of the cases photographed, information on the nature of the case was provided by reporters or anchors without relying on the participants.

The FJC report also sought to determine specifically the extent to which the stories provided basic educational information about the legal system, examining whether five pieces of information were conveyed to the viewer: (1) identification of the case as a civil matter; (2) identification of the type or proceeding, such as a hearing or trial; (3) statements about whether a jury was present; (4) descriptions of the proceedings on a given day; and (5) discussion of the next step in the legal process. The report concluded as follows:

> The vast majority of stories (95% of non-first day stories) did not identify the proceeding covered as a civil matter. In addition, 77% of the stories failed to identify the type of proceeding involved. Almost three-quarters (74%) of all stories did not provide information about whether a jury was present, including half of the stories that identified the covered proceedings as a trial.
>
> Most stories (74%) did explain what transpired in court on a particular day, such as who testified or what evidence was presented. In multiple-day cases, 90% of the stories explained the daily proceedings, compared to 63% in single-day stories. Seventy-six percent of the daily proceedings in a story were explained by a combination of reporter narration and participant discussion. Only 29% of stories mentioned the next step in the litigation process in the case.
>
> Thus, the stories did not provide a high level of detail about the legal process in the cases covered. In addition, the analysis revealed that increasing the proportion of courtroom footage used in a story did not significantly increase the information given about the legal process.

In view of the foregoing, we suggest that the benefits of televised coverage of courtroom proceedings are overrated (and are certainly far outweighed by the detriments described above). Television news coverage oftentimes appears simply to use the courtroom for a backdrop or a visual image for the news story which, like many of such stories on television, are delivered in

short sound bites and not in depth.

The FJC study also reported that Court TV covered 28 cases under the program and that C-SPAN covered 7 cases. However, it does not appear from records available to us that these proceedings were broadcast either in their entirety or continuously. The paucity of cases selected by C-SPAN—seven in two years—suggests that the tediousness, technicality, and sheer length of

trials are obstacles to comprehensive media transmission, except in the sensational kinds of cases where the harms described previously are the greatest.

V. A Better Vehicle for Public Education

The federal judiciary acknowledges that more needs to be done to improve the general understanding by the public of the federal judiciary and its processes. We believe that this goal can best be achieved by active federal judicial involvement. Federal courts have, in the past few years, begun to play an active role in this area through community outreach programs. Under the aegis of these programs, thousands of students, teachers, and other members of the public have come into federal courts to learn more about the federal courts and to engage in dialogue with judges, attorneys and court personnel. National initiatives to increase public understanding of the federal court system are underway in pilot programs in two circuits. In addition, over the last two years, the federal judiciary has conducted Law Day programs for high school seniors, during which mock trials were broadcast to 2,000 students at over 30 participating courthouses nationwide.

Additionally, plans are underway for federal courts to assist school personnel in planning curriculums designed to instruct about the federal judiciary, culminating in court visits (or visits by

judges to schools). The positive results of these kinds of programs are self-evident. We believe that it would be preferable to expend the monies that would be necessary to support a cameras in the courtroom project on these community outreach programs.

VI. Conclusion

When almost anyone in this country thinks of cameras in the courtroom today, they inevitably think of the Simpson case. I sincerely doubt anyone believes that the presence of cameras in that courtroom did not have an impact on the conduct of the attorneys, witnesses, jurors, and judge—almost universally to the detriment of the trial process. Admittedly, few cases are Simpson-like cases, but the inherent effects of the presence of cameras in the courtroom are, in some respects, the same, whether or not it is a high-publicity case. Furthermore, there is a legitimate concern that if the federal courts were to allow camera coverage of cases that are not sensational, it would become increasingly difficult to limit coverage in the high-profile and high-publicity cases where such limitation, almost all would agree, would be warranted.

This is not a debate about whether judges would be discomfited with camera coverage. Nor is it a debate about whether the federal courts are afraid of public scrutiny. They are not. Open hearings are a hallmark of the federal judiciary. It is also not about increasing the educational opportunities for the public to learn about the federal courts or the litigation process. The judiciary strongly endorses educational outreach, which could better be achieved through increased and targeted community outreach programs.

Rather, this is a decision about how individual Americans—whether they are plaintiffs,

defendants, witnesses, or jurors—are treated by the federal judicial process. It is the fundamental duty of the federal judiciary to ensure that every citizen receives his or her constitutionally guaranteed right to a fair trial. For the reasons discussed in this statement, the Judicial Conference believes that the use of cameras in the courtroom could seriously jeopardize that right. It is this concern that causes the Judicial Conference of the United States to oppose enactment of S. 721. 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, 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.

Exhibit 22

http://judiciary.house.gov/hearings/pdf/Richter070927.pdf.

Department of Justice

STATEMENT OF

JOHN C. RICHTER
UNITED STATES ATTORNEY
WESTERN DISTRICT OF OKLAHOMA
ON BEHALF OF THE DEPARTMENT OF JUSTICE

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

CONCERNING

H.R. 2128
THE "SUNSHINE IN THE COURTROOM ACT OF 2007"

PRESENTED

SEPTEMBER 27, 2007

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

IDENTIFIABLE HOLDS THE POTENTIAL FOR INCREASING THEIR VULNERABILITY.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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cameras violated witnesses's privacy).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[24] *See id.* at 92.

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

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

THANK YOU.