EXHIBIT 34

No. 09A648

IN THE

Supreme Court of the United States

DENNIS HOLLINGSWORTH, ET AL.,

Applicants,

v.

KRISTIN M. PERRY, ET AL.,

Respondents.

RESPONSE OF KRISTIN M. PERRY ET AL. TO APPLICATION FOR IMMEDIATE STAY

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D. The Balance Of Equities Weighs Against A Stay.

Finally, the balance of equities weighs against a stay because there is a strong interest in providing the public with meaningful access to the trial proceedings in this exceedingly important case.

Recording and publicly distributing this bench trial in other courtrooms and on the Internet will promote deeply rooted First Amendment principles that favor broad public access to judicial proceedings. Indeed, this Court has recognized that a "trial is a public event" and that "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. 367, 374 (1947). Because "it is difficult for [people] to accept what they are prohibited from observing" (*Richmond Newspapers v. Virginia*, 448 U.S. 555, 572 (1980) (op. of Burger, C.J.)), the First Amendment guarantees free and open access to judicial proceedings in order to foster public confidence in the judicial system. Broad public access to judicial proceedings also "protect[s] the free discussion of governmental affairs" that is essential to the ability of "the individual citizen . . . [to] effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982) (internal quotation marks omitted).

In light of the great public interest in the issues to be decided in this case, providing a broadcast of the proceedings is the most effective means of affording the public its constitutionally guaranteed right of access. More than 13 million Californians cast a vote for or against Prop. 8. And there are hundreds of thousands of gay and lesbian Californians who have a direct stake in the outcome of this case. Far from detracting

from the right of public access, the "highly contentious" character of the issues to be resolved in this case (Stay App. 24) underscores the importance of providing the public with a meaningful window into the trial proceedings so it can see and hear what is happening in the courtroom. *See Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed"). The "ability to see and to hear a proceeding as i[t] unfolds is a vital component of the First Amendment right of access." *ABC, Inc. v. Stewart*, 360 F.3d 90, 99 (2d Cir. 2004).

III. CONCLUSION

For the foregoing reasons, the Application for Immediate Stay should be denied.

Respectfully submitted.

/s/ Theodore B. Olson

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January 10, 2010

EXHIBIT 35

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KRISTIN M PERRY, SANDRA B STIER, PAUL T KATAMI and JEFFREY J ZARRILLO,

Plaintiffs,

CITY AND COUNTY OF SAN FRANCISCO,

Plaintiff-Intervenor,

v

ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G BROWN JR, in his official capacity as Attorney General of California; MARK B HORTON, in his official capacity as Director of the California Department of Public Health and State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder of the County of Alameda; and DEAN C LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles,

Defendants,

DENNIS HOLLINGSWORTH, GAIL J KNIGHT, MARTIN F GUTIERREZ, HAK-SHING WILLIAM TAM, MARK A JANSSON and PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, as official proponents of Proposition 8,

Defendant-Intervenors.
_____/

No C 09-2292 VRW

PRETRIAL PROCEEDINGS AND TRIAL EVIDENCE

✦

CREDIBILITY DETERMINATIONS

✦

FINDINGS OF FACT

✦

CONCLUSIONS OF LAW

✦

ORDER

b. Tr 1525:1-10: Segura and a colleague, through the Stanford Center for Democracy, operate the American National Elections Studies, which provides political scientists with data about the American electorate's views about politics;

c. Tr 1525:11-19: Segura serves on the editorial boards of major political science journals;

d. Tr 1525:22-1526:24: Segura's work focuses on political representation and whether elected officials respond to the voting public; within the field of political representation, Segura focuses on minorities;

e. PX2330; Tr 1527:25-1528:14: Segura has published about twenty-five peer-reviewed articles, authored about fifteen chapters in edited volumes and has presented at between twenty and forty conferences in the past ten years;

f. PX2330; Tr 1528:21-24: Segura has published three pieces specific to gay and lesbian politics and political issues;

g. Tr 1532:11-1533:17: Segura identified the methods he used and materials he relied on to form his opinions in this case. Relying on his background as a political scientist, Segura read literature on gay and lesbian politics, examined the statutory status of gays and lesbians and public attitudes about gays and lesbians, determined the presence or absence of gays and lesbians in political office and considered ballot initiatives about gay and lesbian issues.

PROPONENTS' WITNESSES

Proponents elected not to call the majority of their designated witnesses to testify at trial and called not a single official proponent of Proposition 8 to explain the discrepancies between the arguments in favor of Proposition 8 presented to voters and the arguments presented in court. Proponents informed the court on the first day of trial, January 11, 2010, that they were withdrawing Loren Marks, Paul Nathanson, Daniel N Robinson and Katherine Young as witnesses. Doc #398 at 3. Proponents' counsel stated in court on Friday, January 15, 2010, that their witnesses

"were extremely concerned about their personal safety, and did not want to appear with any recording of any sort, whatsoever." Tr 1094:21-23.

The timeline shows, however, that proponents failed to make any effort to call their witnesses after the potential for public broadcast in the case had been eliminated. The Supreme Court issued a temporary stay of transmission on January 11, 2010 and a permanent stay on January 13, 2010. See Hollingsworth v Perry, 130 SCt 1132 (Jan 11, 2010); Hollingsworth v Perry, 130 SCt 705 (Jan 13, 2010). The court withdrew the case from the Ninth Circuit's pilot program on broadcasting on January 15, 2010. Doc #463. Proponents affirmed the withdrawal of their witnesses that same day. Tr 1094:21-23. Proponents did not call their first witness until January 25, 2010. The record does not reveal the reason behind proponents' failure to call their expert witnesses.

Plaintiffs entered into evidence the deposition testimony of two of proponents' withdrawn witnesses, as their testimony supported plaintiffs' claims. Katherine Young was to testify on comparative religion and the universal definition of marriage. Doc #292 at 4 (proponents' December 7 witness list) Doc #286-4 at 2 (expert report). Paul Nathanson was to testify on religious attitudes towards Proposition 8. Doc #292 at 4 (proponents' December 7 witness list); Doc #280-4 at 2 (expert report).

Young has been a professor of religious studies at McGill University since 1978. PX2335 Young CV. She received her PhD in history of religions and comparative religions from McGill in 1978. Id. Young testified at her deposition that homosexuality is a normal variant of human sexuality and that same-sex couples possess

EXHIBIT 36

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.