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HEARING ON THE FEDERAL JUDICIARY IN THE 21ST CENTURY:
ENSURING THE PUBLIC'S RIGHT OF ACCESS TO THE COURTS

COMMENTS OF THE NATIONAL PRESS PHOTOGRAPHERS ASSOCIATION (NPPA)

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Hearing On
The Federal Judiciary in the 21st Century:
Ensuring the Public's Right of Access to the Courts

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The National Press Photographers Association (NPPA) greatly appreciates the opportunity to submit comments in advance of the subcommittee hearing on "the Federal Judiciary in the 21st Century: Ensuring the Public's Right of Access to the Courts."

Background

The NPPA is the "Voice of Visual Journalists." Founded in 1946, it is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. Our members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding, the NPPA has vigorously promoted and defended the rights of photographers and journalists, including intellectual property rights and freedom of the press in all its forms, especially as it relates to visual journalism.

Additionally, the NPPA is a member of the Coalition for Court Transparency, a national non-partisan alliance that advocates for greater openness and transparency from the federal courts system, including the U.S. Supreme Court.

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

During that career I have covered hundreds of court cases from the Attica trials, where I had the opportunity to watch the late William Kunstler and Ramsay Clark defend their clients, to the murder trial of O.J. Simpson. I was actively involved in the 10-year experiment (1987 -1997) under New York Judicial Law § 218, entitled "Electronic Coverage of Judicial Proceedings."[1] And by electronic, I mean audio-visual and audio recordings as well as still images.

Day has long since passed and yet . . .

In 1965 for the first time, the U.S. Supreme Court heard a case dealing with the televising and broadcasting of a trial. In the opinion, Justice Harlan predicted that "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process."[2] Fifty-four years later, there can be no real argument that day has long since passed . . . . and yet meaningful electronic coverage of the federal courts, including the U.S. Supreme Court is still aspirational at best despite the exponential advancement of technology and the widespread reliance on electronic coverage and social media to disseminate news and information.

[1] *See*: http://codes.lp.findlaw.com/nycode/JUD/7-A/218
[2] *Estes v. Texas*, 381 U.S. 532, 595-596 (1965).

At the outset, it should be noted that under Federal Rule of Criminal Procedure 53, adopted in 1946, electronic media coverage of criminal proceedings in federal courts has been expressly prohibited. Rule 53 states: "[e]xcept as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom."[3]

The Judicial Conference of the United States extended that prohibition "against "broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto" to civil proceedings as well in 1972.[4]

In 1990 following the advice of its Ad Hoc Committee on Cameras in the Courtroom (appointed by Chief Justice Rehnquist in 1988), the Judicial Conference of the United States[5] commenced a three-year (July 1, 1991 to June 30, 1993) pilot program permitting "the broadcasting, televising, electronic recording, or photographing of courtroom proceedings by the media "in civil cases in six district and two appellate courts .[6] At the conclusion of the experiment in 1994, the Court Administration and Case Management (CACM) Committee presented a report and recommendation to the Judicial Conference, which included an evaluation of the pilot program by the Federal Judicial Center (FJC).[7] The report also included an analysis of studies conducted in state courts regarding electronic coverage.

After reviewing the FJC Report, the "Committee was confident that the experimental media coverage did not create sufficient disruption to civil proceedings to warrant the continuation of the

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[3] Rule 53. Courtroom Photographing and Broadcasting Prohibited https://www.law.cornell.edu/rules/frcrmp/rule_53
[4] *See*: https://www.rcfp.org/journals/the-news-media-and-the-law-winter-2006/shuttered-justice/
[5] The Judicial Conference of the United States is the rulemaking body for the entire federal court system, with the exception of the United States Supreme Court. See 28 U.S.C. § 331.
[6] Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals (1994)) http://ftp.resource.org/courts.gov/fjc/elecmediacov.pdf
[7] *See* U.S. JUD. CONF., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 46-47 (1994), *available at* http://www.uscourts.gov/judconf/94-Sep.pdf

prohibition against such coverage.[8] In a supplemental report the FJC once again stated that "most jurors and witnesses believe electronic media presence has no or minimal detrimental effects on witnesses and jurors, while a minority believe there are detrimental effects on them."[9] Based upon these evaluations, the Committee recommended that the Judicial Conference allow electronic coverage of civil proceedings in accordance with the Conference's policy and standards.

And yet the Judicial Conference chose to disregard those favorable assessments, data and recommendations, by dismissively stating, "the intimidating effect of cameras on some witnesses and jurors was cause for concern."[10] Based on this reasoning, the Conference declined to approve the Committee's recommendation to continue such coverage of civil proceedings[11] and the initial pilot program ended on December 31, 1994.[12]

Despite that setback a number of progressive district court judges defied what they considered to be only the persuasive position of the Judicial Conference on this issue.[13] In 1996 New York District Court Judge Robert W. Sweet permitted electronic coverage[14] under the "presumptive First Amendment right of the press to televise as well as publish court proceedings, and of the public to

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[8] U.S. JUD. CONF., COMM. ON CT. ADMIN. & CASE MGMT., REPORT OF THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 3 (Sept. 1994).
[9] *Id* at 4.
[10] U.S. JUD. CONF. RPT. OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S., 47 (Sept. 1994), *available at* http://www.uscourts.gov/judconf/94-Sep.pdf.
[11] *Id.*
[12] *Id.*
[13] These cases were *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580 (S.D.N.Y. 1996); *Marisol A. v. Giuliani*, 929 F. Supp. 660 (S.D.N.Y. 1996); *Sigmon v. Parker Chapin Flanau & Kimpl*, 937 F. Supp. 335 (S.D.N.Y. 1996); and *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996).
[14] *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 583 (S.D.N.Y. 1996). The rule provided that "No one other than court officials engaged in the conduct of court business shall bring any camera, transmitter, receiver, portable telephone or recording device into any courthouse or its environs without written permission of a judge of that court." *Id.* (quoting S.D.N.Y. Gen.R. 7). Judge Sweet read this language to allow camera coverage, writing that, "Although Rule 7 does not state in the affirmative that court proceedings may be televised, it plainly permits cameras in the courtroom with a judge's written permission." *Id.* at 584.

view those proceedings on television."[15] He also took judicial notice that "the equipment [was] no more distracting in appearance than reporters with notebooks or artists with sketch pads."[16]

In that same year Senior District Judge Jack B. Weinstein also allowed coverage while finding that "actually seeing and hearing court proceedings, combined with commentary of informed members of the press and academia, provides a powerful device for monitoring the courts."[17]

And yet in 2000 during the 106th Congress, the Judicial Conference voiced its opposition to electronic media coverage of federal court proceedings. In twenty-two pages of testimony before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts, Chief Judge Edward R. Becker (3rd Cir.) "strongly opposed"[18] the legislation and the concept. Despite the previous positive findings of the CACM Committee and the Federal Judicial Center, he reiterated the Judicial Conference's belief "that the intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process."[19]

And yet for over twenty years senators and congressmen have been proposing a bill known as the since "Sunshine in the Courtroom Act" which would authorize the presiding judge of a federal appellate district court to "at the discretion of that judge, permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides."[20] The latest in this long list of fruitless proposals is the Sunshine in the Courtroom Act of 2019, which would establish a framework to allow federal court proceedings—in district courts, in circuit courts, and at the Supreme Court—to be photographed, recorded, broadcast, or televised."[21]

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[15] *Id.* at 589. Judge Sweet also noted that "[t]he equipment [used] is no more distracting in appearance than reporters with notebooks or artists with sketch pads." *Id.* at 582.
[16] *Hamilton v. Accu-Tek*, 942 F. Supp. 136 (E.D.N.Y. 1996).
[17] *Id.*at 138.
[18] Statement of Chief Judge Edward R. Becker on Behalf of the Judicial Conference of the United States, at 1 (2000)
[19] *Id.*
[20] See: https://www.govtrack.us/congress/bills/113/hr917/text
[21] See: https://www.congress.gov/bill/116th-congress/senate-bill/770

And the beat goes on . . .

In 2010 the Judicial Conference authorized a second Cameras in the Courtroom Pilot Project, to last up to three years.[22] Once again the pilot was to "evaluate the effect of cameras in district court courtrooms, of video recordings of proceedings therein, and of publication of such video recordings,"[23] with the Federal Judicial Center once again studying the effects of the program.[24]

In 2011 the selection of fourteen (14) federal trial courts that had voluntarily agreed to take part in the pilot was announced.[25] The announcement stressed that the judges volunteering for the pilot must follow already adopted guidelines that among other things stated that "pilot recordings will not be simulcast, but will be made available as soon as possible on the US Courts and local participating court websites at the court's discretion."[26] Only those participating courts "may record court proceedings for the purpose of public release,"[27] with the presiding judge making the case selection which also required the consent of all parties "of each proceeding in a case"[28]

This time it would be court personnel and not the media operating the equipment used to record the selected proceedings, with the presiding judge having the ability to instantly stop a recording if necessary. It is entirely up to the judge which cases are recorded, and according to the guidelines "it is not intended that a grant or denial . . . be subject to appellate review."[29] Recordings by any other entities or persons have been prohibited. The guidelines also recommended three to four

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[22] *See* U.S. JUD. CONF., REPORT OF THE PROCEEDINGS OF THE JUD. CONF. OF THE U.S. (Sept. 14, 2010), at 11-12, *available at* http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/2010-09.pdf. *See also* U.S. JUD. CONF., JUDICIARY APPROVES PILOT PROJECT FOR CAMERAS IN DISTRICT COURTS (press release), Sept. 14, 2010, *available at* http://www.uscourts.gov/News/NewsView/10-09-14/Judiciary_Approves_Pilot_Project_for_Cameras_in_District_Courts.aspx.

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

[24] *Id.* at 12.

[25] *See*: http://www.uscourts.gov/News/NewsView/11-06-08/Courts_Selected_for_Federal_Cameras_in_Court_Pilot_Study.aspx

[26] *Id.*

[27] *See*: http://www.uscourts.gov/uscourts/News/2011/docs/CamerasGuidelines.pdf

[28] *Id.* at 2

[29] *Id.*at 1

inconspicuously fix-placed cameras focused "on the judge, the witness, the lawyers' podium, and/or counsel tables,"[30] along with "a feed from the electronic evidence presentation system."[31] Additionally "the recording equipment should transmit the camera inputs to a switcher that incorporates them onto one screen."[32] Unfortunately it was also stated at the outset of the pilot that funding for equipment or technical support would be limited and the courts were discouraged "from purchasing new equipment."[33]

In 2016 "the Judicial Conference received the report of its Committee on CACM, which agreed not to recommend any changes to the Conference policy at that time. the Ninth Circuit Judicial Council, in cooperation with the Judicial Conference authorized the three districts in the Ninth Circuit that participated in the cameras pilot (California Northern, Washington Western, and Guam) to continue the pilot program under the same terms and conditions to provide longer term data and information to CACM."[34]

Currently, in federal trial courts, "a judge may authorize broadcasting, televising, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such other proceedings, only: 1) for the presentation of evidence; 2) for the perpetuation of the record of the proceedings; 3) for security purposes; 4) for other purposes of judicial administration; 5) for the photographing, recording, or broadcasting of appellate arguments; or 6) in accordance with pilot programs approved by the Judicial Conference."[35] When broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is

[30] *Id.* at 3
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] See: https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/history-cameras-courts
[35] *Id.*

permitted, a judge should ensure that it is done in a manner that will: 1) be consistent with the rights of the parties, 2) not unduly distract participants in the proceeding, and 3) not otherwise interfere with the administration of justice."[36]

Limitations

Because live or slightly delayed electronic coverage is not allowed, not only is the media prohibited from providing electronic coverage they are also precluded from getting a feed of those proceedings from court personnel. The guidelines specifically state, "The media or its representatives will not be permitted to create recordings of courtroom proceedings"[37]. For example, in *EMC Hightower v. City and County of San Francisco,*[38] from the Northern District of California, the judge in the video opens the hearing by mentioning the cameras pilot project, and then articulates the rules, which in effect make the video unavailable to the public (and the press) until after the video has been reviewed by him. Under those rules the public and the press are only able to acquire the video by download from the court's website once the recordings are posted. It is this absolute control of such electronic coverage which limits meaningful public access.

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

[36] *Id.*
[37] *Id.* at 5.
[38] *See:* http://www.uscourts.gov/Multimedia/Cameras/NorthernDistrictofCalifornia.aspx

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

Meaningful Access and Electronic Coverage of Court Proceedings

Aside from the aesthetics of electronic coverage is the constitutional principle that courts are meant to be "open." It is instructive to remember the words of Justice Stewart in his dissent in *Estes* where he admonished that "it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, *I would be wary of imposing any per se rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights*."[39]

Just as the Supreme Court articulated an evolving standard of decency in capital punishment cases, there should also be an evolving standard of openness and meaningful access when it comes to electronic coverage of federal court proceedings. In *Richmond Newspapers, Inc. v. Virginia*[40] the Court held that under the First Amendment the public, including the press, had a right of access to a criminal trial, because such proceedings had traditionally been open to the public. "What is significant for present purposes is that throughout its evolution, the trial has been open to all who care to observe,"[41] Chief Justice Burger wrote in the plurality opinion.

In 2019 most information regarding court proceedings comes from broadcast television, cable/satellite programming and Internet content, including electronic material and social media on websites provided by once traditional print media. Thus, the ability of the press to disseminate information via electronic coverage of court proceedings is a critical component in affording the public the modern equivalent of attending and observing. As Chief Justice Burger explained further, "people in an open society do not demand infallibility from their institutions, but it is difficult for them to

[39] *Id.* at 603-04 (Stewart, J., dissenting) (emphasis added).
[40] *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).
[41] *Id.* at 564 (plurality opinion of Burger, C.J.).

accept what they are prohibited from observing."[42] Justice Stewart, concurring in the judgment, wrote that "the right to speak implies a freedom to listen," and that "the right to publish implies a freedom to gather information."[43] Similarly, that right should apply to electronic coverage of court proceedings.

More than a quarter-century ago, the lone dissent in *US v. Hastings*[44] (an 11th Circuit case regarding electronic trial coverage) wrote "The institutional interests cited in support of the restriction [on electronic coverage of courtroom proceedings] are, at best, mere commendations for the ideals our judicial system strives to maintain. At worst, they represent pretexts for an abhorrence to change and ignore the advances of modern-day technology. When suitably circumscribed by appropriate and detailed standards, the public interests which favor electronic media coverage far outweigh the honestly perceived but unsubstantiated concerns over a possible lessening of courtroom decorum and fairness."[45]

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

The Framers envisioned court as being part of the public square, a place in an emerging nation where anyone could stop in to observe the proceedings and be assured of the integrity of our system of justice. Given the complexity of our society and the size of our communities, that's just no longer possible. But the core need for true openness and meaningful access is more important than ever, particularly as our courts have become national in scope and central agents of either change or

[42] *Id.* at 572.
[43] *Id.* at 599 (Stewart, J., concurring in the judgment, *citing Branzburg v. Hayes*, 408 U.S. 665, 681).
[44] *US v. Hastings*, 695 F.2d 1278 (11th Cir. 1983).
[45] *Id.* at 561 (citing *Petition of Post-Newsweek Stations, Florida, Inc*., 370 So. 2d 764, 775 (Fla. 1979)).

maintaining the status quo in matters as significant as who will be president, whether health-care reform is constitutional, and who will have the right to marry.

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

U.S. Supreme Court

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

As the Justices take up issues of great import, it's clear that Americans' interest in the court's work is only increasing. But there's a real problem. Millions of Americans, who do not have the time or money to travel to Washington, D.C., to stand in line for hours to get one of the hundred or so coveted seats inside the building on argument day, are unable to experience the very openness and meaningful access espoused by the High Court itself – even though modern technology affords the opportunity to do just that.

Every state supreme court in the country has a more open technology policy than that of the U.S. Supreme Court. Former federal judge and solicitor general Ken Starr has said: "There is no reason the public should be denied access to consideration of urgent [legal] questions – from global warming to health care – that affect us all. Cameras in the courtroom of the Supreme Court are long overdue."[46]

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

Ohio Supreme Court Chief Justice Maureen O'Connor agrees, saying: "An absolutely necessary condition of openness and accessibility in this new era [of transparency] is allowing video cameras"[47] in public courts. Former U.S. Attorney General Richard Thornburgh, once a proponent of the ban on electronic coverage, said twenty years ago that he "changed his views and now supports the televising of criminal proceedings."[48] He also stated that he was "amazed at the number of people, not lawyers, picking up on the intricacies of our system and realizing that this Bill of Rights is for everybody."[49]

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

The Justices have also expressed concerns about their personal privacy. This does not conform to their obligations as public figures. Citizens can watch, via electronic coverage, their local town council or Congress in action; the Supreme Court should not conduct itself differently. Justices do not hesitate to provide interviews when they have a book to promote and often appear at speaking events across the country in full view of electronic coverage. As a stark divide between the Justices intransigence on this subject and "the people's business"[50] is a C-Span poll that showed 91 percent of adults thought the Supreme Court should be more open, while 64 percent indicated that agree that "the U.S. Supreme Court should allow television coverage of its oral arguments" while 23 percent disagreed.[51]

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[47] *See*: http://www.c-span.org/video/?293580-1/supreme-court-

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

[49] *Id.*

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

[51] *See*: https://static.c-span.org/assets/documents/scotusSurvey/CSPAN%20PSB%202018%20Supreme%20Court%20Survey%20Agenda%20of%20Key%20Findings%20FINAL%2008%2028%2018.pdf .

Public Proceedings

Justice Holmes took judicial notice of the "vast importance" of the "public trial" phenomenon when he wrote about, "the security which publicity gives for the proper administration of justice." Holmes continued that "[i]t is desirable that the trial of [civil] causes should take place under the *public eye*."[52] This public scrutiny was deemed crucial "because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with *his own eyes* as to the mode in which a public duty is performed."[53] In 2019 electronic coverage continues to be the unblinking eye of the public and to deny its unrivaled potential to convey information instantly and to the widest audience is to deny reality as well as meaningful access to the courts.

Federal courts should not be viewed with suspicion and distrust. Instead they should be governed by the words of Chief Justice Burger when delivering the opinion of the Court in *Nebraska Press Association v. Stewart*: "the value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and that deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the acceptance of fairness so essential to public confidence in the system."[54]

Such electronic coverage provides modern society with almost all its current information. In order to provide meaningful access to federal courts, electronic coverage of its proceedings must be permitted so that the public may see the fair administration of justice for itself.

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[52] *Publicker Industry v. Cohen*, 733 F.2d 1059, 1069 (3d Cir. 1984) *citing* 3 W. Blackstone, Commentaries 373) *quoting Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884))(emphasis added).
[53] *Id.* emphasis added.
[54] *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984)

To that end the right to receive information under the First Amendment must be permitted. Meaningful access through electronic coverage of proceedings will better help the public by presenting to them the sights and sounds of things, places and people which they would not ordinarily be able to see or hear. The First Amendment is predicated on the belief that an informed society will remain just and free. It will take courage and vision for this doctrine to endure and dynamically continue to evolve as one of the fundamental principles upon which this country was founded.

As Justice Brandeis noted in his dissent in a 1932 due process case, "to stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. But in the exercise of this high power, *we must be ever on our guard, lest we erect our prejudices into legal principles*."[55]

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

Justice Holmes also stated "it is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."[56]

In light of current broadband transmission and storage capabilities to present gavel-to-gavel electronic coverage of court proceedings on the Internet, whether through live streaming or archived

[55] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311(1932)(Brandeis, J., dissenting)(footnote omitted)(emphasis added).
[56] Vol. 3 OLIVER W. HOLMES, *The Path of the Law, in* Collected works of Justice Holmes 391, 399 (Sheldon M. Novick ed., University of Chicago Press 1995) (1897).

files, along with the ability to watch such coverage on hand-held devices, makes the quaint notion of citizens gathered around in living rooms to watch live TV on small black & white screens just as passé.

In an age when it is no longer practical for all members of the community to pack into the courthouse and personally take in "court day," the electronic coverage of court proceedings to a vast public audience and enables the public to satisfy its civic duty in monitoring the government through meaningful access.

Conclusion

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

Although some critics of electronic coverage have asserted that it will likely impede the fair administration of justice or cause irreparable harm, empirical studies of these concerns have proved to be speculative at best. Critics have argued against electronic coverage on numerous grounds: because they claim that cameras and other hardware are disruptive of trials, that increased public scrutiny frequently leads to grandstanding and lawyers "trying their case in the press," and that the

sensationalistic nature of electronic coverage will infringe upon the privacy of participants and create public misperceptions about the judiciary. Each of these concerns, however, has either been specifically refuted by prior experiments with, and studies of, electronic coverage in the courts, or can be expressly addressed by enacting intrinsic safeguards to complement judicial trial court discretion.

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

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

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

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

In 1996, the Judicial Conference recognized that "technology that permits the reproduction of sound and visual images provides our courts with a valuable resource to assist in their efforts to improve the administration of justice. That resource should be utilized, however, for purposes and in a manner consistent with the nature and objective of the judicial process."[57]

One would hope that by 2019, after a number of pilot experiments, the federal judiciary will finally acknowledge that those concepts are not mutually exclusive and permit electronic coverage in all courtrooms for all proceedings on a permanent basis. As Chief Justice John Roberts jokingly acknowledged during his confirmation hearings in 2005 "television cameras are nothing to be afraid of."[58]

Justice Stewart also took note of electronic coverage by stating, "the suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms."[59]

Thank you for the opportunity to submit these comments. We look forward to working with this Subcommittee and the full Judiciary Committee in helping to create more meaningful access to federal courts, including the U.S. Supreme through electronic coverage of court proceedings.

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[57] *See*: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Criminal/CR1993-04.pdf at 284.
[58] Transcript: Day Three of the Roberts Confirmation Hearings. *See*: http://www.washingtonpost.com/wp-dyn/content/article/2005/09/14/AR2005091401451.html
[59] *Estes.* at 614-615 (Stewart, J., dissenting).

Respectfully submitted,

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