



Written Statement of
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on behalf of the
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

before the
Senate Committee on the Judiciary

Re: "Cameras in the Courtroom"
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Ms. Bergman is President of the National Association of Criminal Defense Lawyers ("NACDL"). Since 1987, she has been a professor at University of New Mexico School of Law, where she teaches Trial Practice, Evidence, Criminal Procedure and Criminal Law. She is currently is a visiting professor at the Columbus School of Law, Catholic University of America. Ms. Bergman received her J.D. in 1976 from Stanford University and her B.A. from Bradley University. Following law school, she practiced law in Washington, D.C. for ten years including five years at the D.C. Public Defender Service. She is the co-author of the eight-volume treatise *Wharton's Criminal Evidence* as well as *Wharton's Criminal Procedure* (14th edition) and *The Everytrial Criminal Defense Resource Book*.

Mr. Chairman and Distinguished Members of the Committee:

As President of the 13,000-member National Association of Criminal Defense Lawyers (NACDL), I am honored to be here today to share the Association's views regarding the important issue of cameras in the courtroom. We commend the sponsors of S. 829 (the "Sunshine in the Courtroom Act of 2005") and S. 1768 (to permit the televising of Supreme Court proceedings) for their efforts to promote greater public awareness of the judicial system.

While current rules do not permit cameras in federal district courts, the NACDL's members have experience with televised proceedings in their state courts and the two camera-accessible federal appellate courts. Indeed, the NACDL's immediate past president, Barry Scheck, served as defense counsel in the most hotly debated example of extended media coverage. Before explaining the NACDL's position regarding this issue, I am compelled to make two preliminary disclosures. First, in discussing this issue with our Board of Directors recently, it was apparent that there is no consensus within the defense community regarding the overall desirability of cameras in courtrooms. The position of our association reflects that diversity of experience and opinion. Second, in keeping with the NACDL's mission, our position is limited to criminal proceedings, which are subject to both broader constitutional guarantees and, generally speaking, broader public interest.

The question of whether cameras should be permitted in the federal courts cannot be answered merely by invoking the media's or public's "right of access." The Supreme Court has held that there is no constitutional right of access for cameras in the courtroom.¹ The decision to ban cameras is simply a restriction on the manner of the media's access to trials, and it is rationally based. In criminal cases, the purported value of televised court proceedings must be weighed against the accused's constitutional rights to due process and a fair trial. The NACDL believes that S. 829

does not strike the right balance. We would like to see the bill amended so as to authorize cameras in district court criminal proceedings and interlocutory appeals only with the express consent of the parties. In all other criminal matters coming before the United States Courts of Appeals and the Supreme Court, the NACDL favors access for cameras.

I. The arguments in favor of cameras in the courtroom: promoting civic awareness, government accountability, and legal professionalism.

To the extent that cameras in the courtroom promote greater public understanding of the judicial process and the constitutional protections that apply to that process, we generally support their expanded use. A citizenry that understands such fundamental guarantees as the presumption of innocence, the government's burden to prove the offense elements beyond a reasonable doubt, and the accused's Fifth Amendment right to remain silent will more faithfully fulfill the solemn duties of jury service. Beyond this positive effect on potential jurors, extended media coverage of criminal trials may foster respect for outcomes that do not necessarily comport with public sentiment. In some cases, televised trials may dispel the damning stigma of pretrial publicity and help to restore the reputation of a criminal defendant against whom charges are dismissed or a not guilty verdict is returned. Finally, televised trials may provide the public with greater insight regarding the appropriateness of certain laws and the potential need for reform. Court TV must be credited for its considerable contributions in all of these areas.

However, these societal benefits are largely intuitive and difficult to measure. Of greater concern to the NACDL are the values underlying the defendant's Sixth Amendment right to a public trial. The purposes of this guarantee are to protect the accused from the abuses that may attend secret proceedings and to subject courtroom events to public scrutiny. Aside from deterring official

¹ *Chandler v. Florida*, 449 U.S. 560 (1981).

misconduct, the print and broadcast media make an invaluable contribution to our justice system by shining a light on miscarriages of justice when they do occur. The instances where cameras have helped to prevent or expose injustice are too numerous to mention, and this factor should weigh heavily in any policy decision regarding courtroom access.

Not unrelated is the notion that televised trials encourage greater preparation and a higher standard of professionalism. It stands to reason that some lawyers and judges -- aware that their actions will be televised -- will strive to perform at a higher level and comport themselves with a greater degree of civility and ethics. If true, this may enhance both the quality of our justice system and public perceptions of the legal profession. This factor, therefore, tends to bolster the foregoing arguments in favor of cameras in the courtroom.

II. The arguments against cameras in the courtroom: the adverse effect on participants and the fair administration of justice.

One primary concern regarding cameras in the courtroom is that they will affect the participants' behavior in ways that would undermine the fair administration of justice. That is, the presence of cameras and the attendant glare of publicity may cause lawyers, judges, jurors, defendants and witnesses to act differently and to base their decisions on irrelevant factors. In rare cases, the prejudicial impact may be apparent, providing grounds for relief, but more often the effect will be "so subtle as to defy detection by the accused or control by the judge."²

If jurors are filmed and their verdict publicized, concern about how their verdict will be accepted by the mass television audience may invade the deliberations process. The decision to televise a trial signals to the jury that the case is celebrated or notorious and that their verdict is to be scrutinized by the viewing public. Defendants are less likely to receive a fair trial when jurors feel

² *Estes v. Texas*, 381 U.S. 532, 544-45 (1965).

the need to reconcile their verdict with strong public sentiments in favor of a particular result. As U.S. District Court Judge Edward F. Harrington said:

I am disinclined to allow cameras into the courtroom because it lets jurors know this is an unusual, that is, a celebrated case. And when jurors are asked to make a judgment in an ordinary case, that is a heavy responsibility. When they are asked to make a judgment in a celebrated case, I think that puts undue pressure on them. And it might distort the verdict.³

There is some evidence that citizens will be less willing to serve on juries if there are cameras in the courtroom. Should a case result in a mistrial, past television coverage may make it more difficult to select an impartial jury for the retrial.

While life-tenured federal judges enjoy a greater degree of insulation from public and political pressure than their elected counterparts, this is still an area of concern. Like other participants, judges may tailor their actions to win the admiration or approval of the viewing public and commentators. Even the appearance of this can undermine confidence in the justice system and the fairness of the proceeding, because “[j]udges as the embodiment of the process, must appear above reproach at all times if the system and the rule of law are to receive respect.”⁴

Televised proceedings can adversely affect witness behavior in many ways. The prospect of television coverage may chill witness cooperation and heighten the reluctance of some witnesses to appear and testify. Not just an issue for the prosecution, the effect of cameras in deterring witnesses from testifying may have serious implications for a defendant’s right to receive a fair trial. Just as damaging to the truth-seeking process, some witnesses may exaggerate or distort their testimony so

³ *Bench Conference*, Massachusetts Lawyers Weekly, July 25, 1994, at 40.

⁴ David A. Harris, *The Appearance of Justice: Court TV, Conventional Television, and Public Understanding of the Criminal Justice System*, 35 *Arizona Law Review* 785, 792 (1993).

as to gain personal publicity. The effect of television coverage may also impact witness demeanor – for example, making self-conscious witnesses appear agitated or ill-tempered – thus hindering the jury’s vital efforts to determine credibility. Provisions in S. 829 that would permit the witness the option of obscuring their face and voice would not fully address such concerns, given that the witness’s name and other personal facts would be televised.

In addition to these potential threats to the defendant’s right to a fair trial, courtroom cameras may alter the defendant’s behavior as well. As with witnesses, cameras in the courtroom may affect the accused’s demeanor and willingness to testify. More fundamentally, the prospect of extended media coverage may discourage the accused from exercising their right to trial in the first place. This may be of particular concern in cases involving notorious, repugnant or humiliating accusations or corporate defendants unwilling to expose themselves to negative publicity. Even when the accused is acquitted, the stain on their reputation is not easily erased, and camera coverage may exacerbate this unwarranted punishment. Televised trial also may subject the accused (or other participants) to harassment or physical threats during the course of the trial, necessitating additional security measures at public expense.

III. Striking the right balance: cameras should be permitted to televise criminal proceedings in the United States district courts and interlocutory appeals to the Circuit Courts with the express consent of the parties; cameras should be permitted in the United States Courts of Appeals and the United States Supreme Court in all other criminal proceedings.

The sponsors of S. 829 have wisely avoided a rule authorizing unrestricted camera access. Rather than placing the ultimate decision in the hands of the presiding judge, however, we think the consent of the parties – the accused (acting with the advice of counsel) and the government -- should

be required before cameras are permitted to televise criminal trials or interlocutory appeals.⁵ The positive or negative effects of cameras depend on the facts and circumstances of each case. The parties, who are familiar with the witnesses who will testify, the evidence that will be offered, and other facts that might indicate the potential for prejudice, are in the best position to determine the appropriateness of cameras.

Moreover, permitting the parties to withhold their consent avoids the time-consuming distraction of litigation regarding the judge's decision to permit or forbid camera coverage. The decision to bring cameras into the courtroom is usually made a few days prior to the start of trial. The defendant, if he opposes camera coverage, would be required to enter into an extended process of brief writing and oral argument to convince the trial judge that cameras will unfairly prejudice his client. Often, you will have a criminal defense attorney who is a solo practitioner or works out of a small firm and a defendant who has severely limited financial resources to pay for his defense; other times, the defendant will be represented by an attorney appointed under the Criminal Justice Act or employed by one of the Federal or Community Public Defenders. Forcing a defense attorney to focus on such matters at a critical moment in a case and requiring a defendant or taxpayers to pay for that representation on an issue that is irrelevant to a determination of guilt or innocence undermines the "proposition that the criminal trial under our Constitution has a clearly defined purpose, to provide a fair and reliable determination of guilt, and no procedure or occurrence which seriously threatens to divert it from that purpose can be tolerated."⁶

⁵ Subject to certain statutory distinctions, party consent is required in order to televise criminal trial proceedings in Alabama, Arkansas, Minnesota, and Oklahoma. *See* Cameras in the Court: A State-By-State Guide <<http://www.rtndf.org/foi/scc.shtml>>

⁶ *Estes v. Texas*, 381 U.S. 532, 564 (1965) (Warren, C.J., concurring).

This position is supported by the fact that any prejudice as a result of the decision to allow cameras will be difficult to detect and virtually impossible to rectify. “The prejudices of television may be so subtle that it escapes the ordinary methods of proof.”⁷ Any rule that fails to honor the accused’s objection would too easily jeopardize the fundamental right to a fair trial, upon which the accused’s life or liberty depends, for the sake of less important societal goals. While we support efforts to ensure more sunshine on our democratic institutions, that goal should not be allowed to eclipse the fundamental purpose of a criminal trial: not education, not entertainment, but justice.

⁷ *Id.* at 578 (1965) (Warren, C.J., concurring).