United States Senate
Committee on the Judiciary

Hearing on:
"Cameras in the Courtroom"
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Written Testimony of
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Chairman Specter and members of the Committee on the Judiciary. My name is Diarmuid O'Scannlain, United States Circuit Judge for the Ninth Circuit with chambers in Portland, Oregon. I have been invited to share my individual experiences with televised proceedings of the U.S. Court of Appeals for the Ninth Circuit and thus speak only for myself, except where I indicate that I am authorized to speak for the Judicial Conference of the United States.

I

Our court is one of two courts of appeals involved in a pilot program, under which audio equipment, still cameras, or video cameras, can be admitted to the courtroom upon request and with approval from the panel hearing the case. Since 1991 until last week we have logged 205 requests to allow media into oral arguments. Of these requests, the panels granted 133. A copy of this log is attached as an appendix to my written testimony. Video coverage has originated in at least four of our circuit courthouses: Seattle, Washington, Portland, Oregon, and San Francisco and Pasadena, California. Just to give some perspective, the Ninth Circuit has heard oral arguments in approximately 24,000 cases since 1991 – meaning that media requests for videotaping have been received in less than one percent of the total cases receiving oral argument!

To gain access to a Ninth Circuit courtroom, a member of the media with

cameras need only fill out a simple form requesting very basic information, a copy of which is also in the appendix. The Clerk of the Court then transmits the request to the panel, which can grant or deny the request by majority vote of the judges assigned to the case. The Ninth Circuit requires media representatives to obey modest guidelines which request proper attire, ban the use of flash photography or other potentially distracting filming, prohibit the broadcast of any audio conversations between clients and attorneys, and limit the total number of cameras that can be present for any single oral argument. These guidelines are also in the appendix.

The Committee might also be interested to know that the Ninth Circuit currently makes audio playback of all oral arguments available through its website the day after the hearing, and frequently provides a live audio feed of oral arguments in certain cases. Further, and this may not be generally known, all oral arguments (except in Anchorage, Alaska and Honolulu, Hawaii) are recorded on the court's internal videotaping system for the court's own records. In most of our courtrooms, the cameras are so tiny and unobtrusive as not to be noticeable. In our Portland, Oregon courtroom, the camera is hidden behind a grate.

II

I have personally had 44 requests to allow cameras in oral arguments in which I have been a panel member, of which nearly 80% have been granted. In other words, I have personally participated in 35 of appellate oral arguments which were videotaped in whole or in part or televised live, which experience is the basis of my testimony today. These requests range from high-profile attention-grabbers to the comparatively banal. Among the more "controversial" cases were Brown v. Woodland Joint Unified School District, which considered whether certain Sacramento area classroom activities required children to practice witchcraft, in violation of the First Amendment. Another First Amendment case was Separation of Church & State v. City of Eugene, where the panel had to consider whether a cross constructed in a public park violated the Establishment Clause.

Understandably, cases involving elections and the right to vote have generated substantial public interest and press coverage. For example, I sat as part of a limited en banc panel of 11 judges in a very high-profile live video coverage of a case evaluating whether the California recall election of Gray Davis should be enjoined as a violation of the Fourteenth Amendment because of the use of "punch-card" balloting machines. Similarly, the limited en banc panel in the case

of Bates v. Jones, also televised live, considered whether California's term limits violated the First and Fourteenth Amendments.

While our court does not allow media access to oral arguments in direct criminal appeals, criminal cases – even those dealing with the technical minutiae of the law – sometimes grab the public interest as well. In Dyer v. Calderon, videotaped, not live, another limited en banc panel on which I sat, considered whether in a habeas corpus case, a convicted murderer received a fair trial when one of his jurors lied during voir dire. Similarly, Tolbert v. Gomez, a videotaped limited en banc argument, considered the effect of peremptory challenges of African-American jurors.

You may be interested to know that not all cases where the media requested camera coverage were so flashy. The en banc panel in Bins v. Exxon considered whether an employee benefits plan administrator has a duty to inform participants that it is considering a mere proposal for more generous retirement benefits under the Employee Retirement Income Security Act (ERISA). Dry as it may sound, C-Span requested permission to videotape, and did so.

On two occasions, I have voted to grant blanket requests to tape court proceedings as well. For example, in December, 2004, the San Francisco Bureau of the News Hour with Jim Lehrer requested and received permission to film all

cases in Courtrooms 1 and 3 of the San Francisco courthouse on a certain day. As with individual cases where permission was granted to allow media coverage, the whole affair created no inconvenience and snippets were used as part of a special Public Broadcasting program on the Ninth Circuit.

Of course, not every request to bring media into the courtroom has been allowed. Panels, perhaps motivated by concern for the parties, have occasionally shunned cameras. For example, in Compassion in Dying v. Washington, the panel grappled with whether a state statute criminalizing the promotion of suicide violated the Fourteenth Amendment and refused to allow Court TV camera coverage. Similarly, in Planned Parenthood v. Miller, dealing with the infamous "WANTED" posters picturing doctors employed at abortion clinics, the en banc court denied C-Span's request to videotape. Some judges will vote to deny video access unless assured that the media will broadcast the tape on a gavel-to-gavel basis. Indeed, just last weekend C-Span aired the entire oral argument in Planned Parenthood v. Gonzales, a partial birth abortion case argued several weeks ago.

III

Let me address briefly some concerns expressed with regard to cameras in appellate courts. To the public at large, most oral arguments must be awfully boring. Hearing judges pepper attorneys about obscure bits of legislative history

and the construction of mysterious language in bureaucratic regulations does, one must admit, lack the excitement of the popular courtroom television dramas or even a live trial.

The concern has also been expressed that attorneys or (dare I say it) judges might grandstand before the cameras. My experience, fortunately, has been that as a general rule my colleagues and practitioners have acted with the civility and decorum appropriate to a federal appellate courtroom, by and large resisting the temptation to play to the television audience.

Similarly, I believe that concerns over politicization and the effects of public pressure are overstated. Federal judges, of course, have life appointments, greatly insulating them from political pressures and public disapproval – a fact the Ninth Circuit's steady stream of controversial opinions makes clear! Further, unlike television dramas, oral arguments in federal appellate courts are typically followed by several months of deliberation and opinion-writing before any final disposition is reached. Even if the public is riveted by oral arguments, unlikely in itself, the measured pace of the appellate decision-making process alleviates public pressure even further. I should add that, some of my federal judge colleagues are concerned about the increased security risk that camera exposure might invite in highly emotional cases.

Contrary to the politicization concern expressed by camera opponents, I believe that greater media access might *depoliticize* appellate proceedings and the public's perception of the appellate legal process, not the other way around. When barred from the courtroom, the news media is able only to report on court *holdings*, rather than *process*. This propagates the unfortunate view that appellate courts are results-oriented bodies, rather than thoughtful, deliberative error-correcting panels engaged in technical analysis and the application of legal reasoning. In my personal experience, selective television coverage of appellate oral arguments is perfectly compatible with the federal judicial function. To this end, I endorse the conclusions reached in the Federal Judicial Center's study of media coverage of federal civil proceedings: judges should be free to allow camera access to proceedings.

I believe the Ninth Circuit's pilot program has reflected well on the work performed by courts in general, and ours in particular, and I express my sincere hope that your committee will allow appellate courts to share their work with the public along the lines of the Ninth Circuit experiment. While some of my appellate colleagues are occasionally – and perhaps properly – circumspect in allowing cameras into the courtrooms, my general experience has been overwhelmingly positive.

IV

I appear before you today both in my individual capacity, supportive of cameras in appellate courtrooms, and on behalf of the Judicial Conference of the United States which generally opposes cameras in trial courtrooms. My personal testimony relates solely to the use of cameras in federal appellate courtrooms. I have never served as a trial court judge except on limited occasions, and I cannot confidently testify as to the impact of the media in trial settings. Trial courts and appellate courts differ in important respects, primarily the presence of victims, witnesses, and juries. For this reason, I have serious concerns regarding the placement of cameras in trial courts and suggest that questions about cameras in trial courts be directed to my district court colleague from Pennsylvania, Judge Jan DuBois.

On behalf of the Judicial Conference I have been asked to present written testimony to the committee specifically with respect to S.829 which also appears in the appendix at pages 40-65.

Thank you Mr. Chairman. I will be happy to take any questions that you may have on the use of cameras in the Circuit appellate setting.

APPENDIX

CAMERAS IN THE COURTROOM

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