



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

HONORABLE ROSLYNN R. MAUSKOPF
Secretary

June 23, 2021

Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

I write today to convey the views of the Judicial Conference of the United States (the Judicial Conference) concerning S. 818, the “Sunshine in the Courtroom Act of 2021,” a bill that would authorize federal appellate and district judges to permit photographing, electronic recording, broadcasting, or televising courtroom proceedings to the public. After decades of study and several pilots, the Judicial Conference continues to strongly oppose legislation that would allow electronic media coverage and broadcasting of federal trial court proceedings. Further, while for the past 25 years the Judicial Conference has authorized courts of appeals to decide whether to allow cameras, it opposes legislation that would transfer such decisions to any individual judge in any court of appeals.

The Judicial Conference has consistently expressed the view that camera coverage can do irreparable harm to a citizen’s right to a fair and impartial trial. The intimidating effect of cameras on litigants, witnesses, and jurors has a profoundly negative impact on the trial process. In both civil and criminal cases, cameras can intimidate defendants who, regardless of the merits of the case, might prefer to settle or plead guilty rather than risk damaging accusations in a televised trial. Cameras can also create security and privacy concerns for individuals, many of whom are not even parties to the case, but about whom very personal information may be revealed at trial. Cameras can also affect courtroom security of judges, employees, and U.S. marshals. This is of particular concern in light of recent increased threats to federal judges. The Judicial Conference believes that these and other negative effects of cameras in trial court proceedings far outweigh any potential benefit. Please see Appendix A for a prior letter that provides a detailed explanation of our objections to a similar bill.

Since March 2020, when courts had to restrict courthouse access because of the pandemic, district courts have been using various conferencing platforms to provide the public with real-time audio access to civil proceedings and limited audio or video access to the usual participants in and observers of the criminal proceedings identified in the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). These are stop-gap emergency measures and

are limited to conferencing platforms. More traditional forms of broadcasting trial court proceedings remain prohibited by both Judicial Conference policy and Criminal Rule 53, which prohibits the photographing or broadcasting of courtroom proceedings in criminal cases.

As written, the bill would effectively amend Rule 53 outside of the Rules Enabling Act process, thereby undermining the careful balancing of rulemaking roles that Congress wisely put in place nearly 90 years ago. This comprehensive and deliberative process ensures a thorough evaluation of proposals while reducing the ever-present risk of unintended consequences. In fact, as detailed in Appendix B, there are several issues with the bill as currently drafted that would be avoided if subject to the multi-layered Rules Enabling Act process, which requires broad public participation and review by the bench, bar, academia, the Judicial Conference, the Supreme Court, and Congress. Ensuring this comprehensive consideration would be essential for any proposal to amend Rule 53.

While the Judicial Conference is opposed to this legislation for the reasons stated above, the Judiciary has learned a great deal about the benefits and risks of providing audio and video access during emergency situations, and is endeavoring to determine whether, and under what circumstances, conferencing platforms and real-time audio could be used in the district courts. For example, earlier this year, the Judiciary launched a new pilot program that permits district and bankruptcy courts to livestream audio of certain civil and bankruptcy proceedings involving matters of public interest. Also, as directed by the CARES Act, the Judicial Conference Committee on Rules of Practice and Procedure, through its Advisory Committees on Appellate, Bankruptcy, Civil, and Criminal Rules, is developing possible rules for future emergencies. Those rules are slated to be published for public comment in August of this year, with a potential effective date of December 1, 2023.

Finally, the Judicial Conference does not speak for the Supreme Court and it would not be appropriate for the Judicial Conference to promulgate mandatory guidelines for them.

Thank you for the opportunity to provide our views on this legislation. The legislation raises issues of vital importance to the Judiciary. If we may of additional assistance to you, please do not hesitate to contact the Office of Legislative Affairs, Administrative Office of the U. S. Courts, at 202-502-1700.

Sincerely,



Roslynn R. Maukopf
Secretary

Enclosures

Identical letter sent to: Honorable Chuck Grassley



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

September 23, 2009

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Sessions:

As you are aware, the Judicial Conference of the United States strongly opposes S. 657, the "Sunshine in the Courtroom Act of 2009." Please be advised that the Judicial Conference would also oppose S. 448, the "Free Flow of Information Act of 2009," if S. 657 is added as an amendment. Until now, the Conference has not taken a position on media shield legislation, such as S. 448.

The Judicial Conference's opposition to legislation, such as S. 657, that would allow for the use of cameras in federal trial court proceedings is more fully explained in my letter to you of July 23, 2009. (See enclosed letter.) As explained in that letter, cameras can affect behavior, security of persons in the courtroom, such as judges, witnesses, and law enforcement, and even whether a case goes to trial. Cameras can also interfere with a fair and impartial trial. In short, the negative effects of cameras in the trial courts far outweigh any potential benefit.

Consequently, the Conference would oppose S. 448 if cameras legislation were added to it. If you have any questions, please contact our Office of Legislative Affairs at 202-502-1700.

Sincerely,

A handwritten signature in black ink that reads "James C. Duff".

James C. Duff
Secretary

Enclosure

cc: Members, Senate Judiciary Committee



JUDICIAL CONFERENCE OF THE UNITED STATES

WASHINGTON, D.C. 20544

THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JAMES C. DUFF
Secretary

July 23, 2009

Honorable Patrick J. Leahy
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Honorable Jeff Sessions
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman and Senator Sessions:

The Judicial Conference of the United States strongly opposes the "Sunshine in the Courtroom Act of 2009," S. 657 (111th Cong.), because it provides for the use of cameras in federal trial court proceedings. Cameras can affect behavior in court proceedings. Cameras can even affect whether a case goes to trial. Cameras can also affect courtroom security of judges, witnesses, employees, and U.S. marshals. This is of particular concern in light of recent increased threats to federal judges. The Judicial Conference believes that these and other negative affects of cameras in trial court proceedings far outweigh any potential benefit. The Judicial Conference also opposes the legislation because it would empower any appellate court panel to permit cameras in their courtroom rather than retain that power within the management of each circuit.

The Judicial Conference bases its policy and opposition to the use of cameras in the federal trial court proceedings on decades of experience and study. The Conference considered the issue in a number of different situations and contexts – including a pilot project – and concluded that the presence of cameras in federal trial court proceedings is not in the best interest of justice. Federal judges must preserve each citizen's right to a fair and impartial trial. Of course, federal trials have long been open to the media and public. But it is the studied judgment of the Judicial Conference that cameras can

interfere with a fair and impartial trial. Thus, the use of cameras in trial courts would differ substantially from the impact of their use in legislative, administrative, or ceremonial proceedings.

Cameras can interfere with a fair trial in numerous ways. First, broadcasting proceedings can affect the way trial participants behave. Television cameras can intimidate litigants, witnesses, and jurors, many of whom have no direct connection to the proceeding and are involved in it through no action of their own. Witnesses might refuse to testify or alter their stories when they do testify if they fear retribution by someone who may be watching the broadcast.

Second, and similarly, camera coverage can create privacy concerns for many individuals involved in the trial, such as witnesses and victims, some of whom are only tangentially related to the case but about whom very personal and identifying information might be revealed. For example, efforts to discredit a witness frequently involve the revelation of embarrassing personal information. Disclosing embarrassing facts or accusations in a courtroom already creates challenges in court proceedings. Those challenges would be multiplied enormously if that information were aired on television with the additional possibility of taping and replication. This concern can have a material effect on a witness's testimony or on his or her willingness to testify at all.

Third, and as a consequence of the aforementioned points, camera coverage could also become a potent negotiating tactic in pretrial settlement discussions. Parties may choose not to exercise their right to trial because of concerns regarding possible camera coverage. Thus, allowing cameras could cause a "chilling effect" on civil rights litigation; plaintiffs who have suffered sex or age discrimination may simply decide not to file suit if they learn that they may have to relive the incident and have that description broadcast to the public at large. Or, parties litigating over medical issues may not wish to reveal their personal medical history and conditions to a broad audience.

Fourth, the presence of cameras in a trial court will encourage some participants to become more dramatic, to pontificate about their personal views, to promote commercial interests to a national audience, or to lengthen their appearance on camera. Such grandstanding is disruptive to the proceedings and can delay the trial.

The Federal Judiciary is therefore very concerned that the effect of cameras in the courtroom on participants would be to impact negatively the trial process and thereby interfere with a fair trial.

Honorable Patrick J. Leahy
Honorable Jeff Sessions
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In addition to affecting the fairness of a trial, the presence of cameras in a trial courtroom also increases security and safety issues. Broadcasting the images of judges and court employees, such as court reporters, courtroom deputies, and law clerks, makes them more easily identified as targets by those who would attempt to influence the outcome of the matter or exact retribution for an unpopular court ruling. Threats against judges, lawyers, and other participants could increase even beyond the current disturbing level. Cameras create similar security concerns for law enforcement personnel present in the courtroom, including U.S. marshals and U.S. attorneys and their staffs.

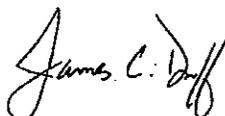
Finally, regarding the courts of appeals, in 1996 the Judicial Conference adopted the position that each circuit may decide for itself whether to permit photographic, radio, and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Conference may adopt. This policy ensures consistency within each circuit. The Sunshine in the Courtroom Act of 2009 would allow panels within the circuits to determine whether cameras will be allowed at their proceedings, rather than leaving the initial decision to the circuit's management. This will result in differing treatment of litigants within each circuit. Currently, the circuit-wide policies avoid piecemeal and ad hoc resolutions of the issue among the various panels convened within a court of appeals, and that approach is therefore better than the proposed legislative change.

* * *

For the foregoing reasons, the Judicial Conference of the United States strongly opposes legislation that allows the use of cameras in federal trial court proceedings and permits individual panels to use of cameras in all courts of appeals instead of deferring to each circuit's rules on such use.

Thank you for the opportunity to provide the position of the Judicial Conference on this legislation. The legislation raises issues of vital importance to the Judiciary. If we may be of additional assistance to you, please do not hesitate to contact our Office of Legislative Affairs at 202-502-1700.

Sincerely,



James C. Duff
Secretary

cc: Members, Senate Judiciary Committee

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JOHN D. BATES
CHAIR

RAYMOND M. KETHLEDGE
CHAIR
ADVISORY COMMITTEE
ON CRIMINAL RULES

Sunshine in the Courtroom Act of 2021 (S. 818)
Concerns Regarding Applicability to Criminal Proceedings in the District Courts

The “Sunshine in the Courtroom Act of 2021” (S. 818) would effectively amend Criminal Rule 53 (Courtroom Photographing and Broadcasting Prohibited) outside of the Rules Enabling Act process by giving judges the discretion to permit “photographing, electronic recording, broadcasting, or televising to the public of *any* court proceeding” (emphasis added). In addition, the bill’s provisions for the promulgation of guidelines as opposed to rules amendments effectively precludes review by the Rules Committees.

The following are just five examples of problematic provisions that would result in unintended yet fundamental changes to criminal proceedings. These problems could be avoided by referring the issue to the Rules Committees for consideration pursuant to the Rules Enabling Act which authorizes amendments to the federal rules only after broad public participation and review by the bench, bar, academia, the Judicial Conference, the Supreme Court, and Congress.

- First, the bill would provide for media coverage of “any court proceeding” (page 3, lines 24-25). This broad directive would presumably apply to proceedings that are not subject to the public’s right to access under the First Amendment, and is far broader than the access contemplated in other statutes (e.g., the Crime Victims’ Rights Act, which is limited to “public proceedings”).
- Second, the bill provides for the obscuring of witnesses “in such a manner as to render the witness unrecognizable to the broadcast audience of the trial proceeding” (p. 4, lines 1-10), but does not address types of witnesses and situations where that would be insufficient (e.g., testifying cooperators and proceedings other than trials). Further, the bill only provides for obscuring a witness “during the testimony of the witness” (p. 4, line 16), which is not the only time a witness may need to be obscured (e.g., walking to and from the witness stand).

- Third, the bill provides an exception to the provision for obscuring witnesses if the presiding judge determines that doing so “would constitute a violation of the due process rights of any party” (page 4, lines 21-22), but does not address other constitutional or statutory protections that may be affected by obscuring witnesses.
- Fourth, the language provides that courts can avoid having conferences recorded or streamed if they “are not part of the official record of the proceedings,” but this does not account for scenarios in which conferences may be included in the transcript that are inappropriate for contemporaneous streaming or recording.
- Finally, the prohibition on interlocutory appeals would not prevent the media from seeking a writ to challenge a judge’s decision.