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Video Broadcasting from the Federal Courts: Issues for Congress

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Summary

Members of Congress, along with the legal community, journalists, and the public, have long considered the potential merits and drawbacks of using video cameras to record and/or broadcast courtroom proceedings. The first bill to propose video camera use in the federal courts was introduced in the House of Representatives in 1937, and since the mid-1990s, Members of Congress in both chambers have regularly introduced bills to expand the use of cameras in the federal courts and have sometimes held hearings on the subject.

Video cameras are commonly used in state and local courtrooms throughout the United States to record and broadcast proceedings. All 50 state supreme courts in the United States allow video cameras under certain conditions, and cameras are allowed in many states for trial and appellate proceedings. Yet video cameras are not widely used in federal circuit and district courts, and they are not used at all in the Supreme Court. Rule 53 of the Federal Rules of Criminal Procedure has banned photography and broadcasting of any federal criminal proceedings since 1946, and this policy remains in effect. The Judicial Conference of the United States conducted pilot programs from 1991 to 1994 and from 2011 to 2015 to study the use of video cameras in federal courtrooms in civil proceedings. As a result of their participation in these pilot programs, two federal circuit courts and three federal district courts presently allow video cameras in their courtrooms under certain circumstances.

Even as the use of cameras in courts has become more widespread during the past few decades, many of the fundamental questions about the use of video cameras in the courts remain relatively unchanged.

The debate regarding video cameras in federal courtrooms revolves around these and other issues:

- the appropriate degree of congressional involvement in matters related to the operation of the federal judiciary;
- the degree of access the public and media should have to the federal courts;
- the advantages and disadvantages of additional judicial transparency;
- the potential effects of cameras in the courtroom on ensuring a fair trial and protecting participants' privacy; and
- the possible ways in which cameras may alter the way courts conduct business and affect judicial integrity.

Addressing these issues often involves balancing one consideration against another. For example, protections to make sure the accused receives a fair trial might lead to more restricted public or media access to the courts.

Generally, while Congress may legislate in this area, to date, considerable deference has been given to the Supreme Court Justices and other officials within the federal judiciary in determining if and how video recording and broadcasting should be implemented in the federal courts.

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Introduction

The issue of whether or not to allow video cameras into the courtroom has been discussed and debated by Members of Congress, the legal community, journalists, and the public since the introduction of newsreel films in the early 20th century.[1] Technological advances have shifted some of the considerations in this ongoing dialogue, as newsreel cameras gave way to television cameras and internet video. Increasingly, new technology makes video recording less disruptive, accessible to more people, and able to be distributed quickly, if not instantaneously. Most state courts, and several international supreme courts, allow video cameras to record and televise, or otherwise broadcast, their proceedings under certain circumstances.[2]

Although the U.S. Supreme Court does not allow cameras of any sort in its chamber, a few federal circuit and district courts do allow video recording of their proceedings, and the Judicial Conference of the United States has considered expanding the use of cameras in the lower federal courts. Some judges who have experience with video cameras in their chambers support the use of video recording or broadcasting in the courts; other judges have reservations, typically related to the effects cameras might have on the proceedings. The public generally tends to support televising U.S. Supreme Court proceedings.[3]

In this context, some Members of Congress have introduced measures to enable, or expand, the use of video cameras in the federal courts. Typically, since the mid-1990s, a handful of bills have been introduced each session. Four distinct proposals, for example, were introduced in the 115th Congress addressing cameras in the federal courts, and two similar proposals have been introduced thus far in the 116th Congress. Due to the assortment of considerations in this policy debate, the provisions of these cameras in the courtroom bills vary on several dimensions,

[1] "Cameras in the Courtroom," in *History of the Mass Media in the United States: An Encyclopedia*, ed. Margaret A. Blanchard, 3rd ed. (New York: Routledge, 2013), pp. 118-120. The first bill in Congress to allow video cameras in the federal courts was H.R. 4848, introduced on February 17, 1937, "To provide for the recording of certain proceedings in the district courts of the United States by motion pictures and synchronized sound-recording equipment and for the reproduction of such proceedings by talking pictures in the circuit courts of appeals of the United States and in the Supreme Court of the United States upon the review of any such case."

[2] For details on U.S. state courts, see National Center for State Courts, "Cameras in the Court: Resource Guide," March 20, 2019, at https://www.ncsc.org/Topics/Media/Cameras-in-the-Court/Resource-Guide.aspx; Radio Television Digital News Association, "Cameras in the Court: A State-By-State Guide," at http://www.rtdna.org/content/cameras_in_court; and Robert L. Brown, "Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Court," *Journal of Appellate Practice and Process*, vol. 9, no. 1 (Spring 2007), pp. 1-15. The highest national courts of Israel, Brazil, Great Britain, Canada, and Australia each allow some degree of video recording and/or broadcasting. The International Criminal Court at The Hague also provides video streaming of its hearings, following a long-standing tradition set by preceding international criminal tribunals to maintain audio and video records of their proceedings. For more information on some international perspectives on cameras in the courts, see Kyu Ho Youm, "Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning from Abroad?" *Brigham Young University Law Review*, vol. 2012, no. 6 (December 2012), pp. 1989-2031.

[3] C-SPAN has tracked these public attitudes since June 2009, and, in every iteration of its poll, at least 61% of U.S. adults surveyed support televising the Court's oral arguments; in August 2018, supporters represented 64% of U.S. adults surveyed. See *C-SPAN/PBS Supreme Court Survey 2018*, August 28, 2018, at https://www.c-span.org/scotussurvey2018/. A poll reported by the *Washington Post* in September 2014 showed similar findings, with 41% of U.S. adults strongly supporting live broadcasting of Supreme Court proceedings, 33% somewhat supporting, 13% somewhat opposed, and 7% strongly opposed. See Nancy Scola, "Three-Quarters of Americans Want Cameras in the Supreme Court as One Federal Judge Demonstrates Why Some of his Colleagues Don't," *The Switch*, September 3, 2014, at https://www.washingtonpost.com/news/the-switch/wp/2014/09/03/three-quarters-of-americans-want-cameras-in-the-supreme-court-as-one-federal-judge-demonstrates-why-some-of-his-colleagues-dont/.

balancing concerns about preserving judicial integrity and due process with other goals, like improved public education, media access, or government transparency.

This report is not intended to provide a legal analysis of court cases relevant to the use of video cameras in federal courtrooms.[4] The following sections of this report provide

- information about the current judicial policies and attitudes related to video camera use in the U.S. Supreme Court, federal circuit courts, and federal district courts;
- summaries of the major debates and considerations for policymakers on the subject of courtroom cameras, including the appropriateness of congressional action, standards for public and media access to the courts, and potential effects on courtroom proceedings;
- a summary of congressional actions in the 116th Congress to date related to broadcasting from the federal courts and descriptions of four recent legislative proposals, including the Cameras in the Courtroom Act, the Sunshine in the Courtroom Act, the Transparency in Government Act, and the Eyes on the Courts Act; and
- complementary policy measures that might accomplish similar objectives.

Current Status of Court Media Access

This section describes the current policies that the U.S. Supreme Court and the federal circuit and district courts have adopted regarding video cameras in their courtrooms, along with the attitudes Supreme Court Justices and other federal judges have expressed toward expanding video use. Video broadcasting can be treated as one of several means by which the courts provide information about their proceedings to the public and the press. As such, the other policies the federal courts have in place related to public and media access are also briefly discussed where relevant.

U.S. Supreme Court

The U.S. Supreme Court does not allow the use of any type of camera within its courtroom.[5] For cases involving criminal matters, the Supreme Court abides by the Federal Rules of Criminal Procedure,[6] which are submitted to Congress by the Supreme Court[7] after consultation with the Judicial Conference of the United States.[8] In 1946, Rule 53 was added to the Federal Rules of Criminal Procedure, which states the following:

[4] For legal analysis, contact the American Law Division at CRS.

[5] U.S. Supreme Court, "Visiting the Court - Etiquette," at https://www.supremecourt.gov/visiting/etiquette.aspx.

[6] "These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States." 1 Fed. R. Crim. P. 1(a)(1). For the full text of the *Federal Rules of Criminal Procedure*, see U.S. Congress, House Committee on the Judiciary, *Federal Rules of Criminal Procedure*, committee print, 115th Cong., 2nd sess., December 1, 2018, No. 9 (Washington: GPO, 2018), at https://www.uscourts.gov/file/25240/download.

[7] P.L. 76-675, 54 Stat. 688, June 29, 1940; 28 U.S.C. §§2072, 2074.

[8] 28 U.S.C. §331.

> Except 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.[9]

The Judicial Conference added further prohibitions on cameras and broadcasting from federal courtrooms in 1973 through its Code of Conduct for United States Judges.[10] Although Supreme Court Justices are not required to abide by the Code of Conduct,[11] they do follow its guidance on many matters and seemingly have adopted its position on the issue of cameras in the courtroom.

Even though cameras and recording devices are prohibited in the Supreme Court chambers, there is no statute that designates possession or use of them in the courtroom a criminal act. An individual's use of such equipment, however, may constitute a disruption to the Supreme Court, which is a violation of federal law.[12] As Rule 53 indicates, the prohibition on cameras could be lifted if the Supreme Court and Judicial Conference amend the Federal Rules of Criminal Procedure, or if Congress passes a statute that allows or requires cameras in the courtroom.

Supreme Court oral arguments and opinion announcements are open to the public on a first-come, first-served basis. There are about 400 seats in the courtroom, but the number of seats available to the public varies, based on the number of guests of the Justices, journalists, and members of the Supreme Court bar who are also in attendance.[13] During oral arguments, some public seats are reserved for those who wish to stay for the full day's session, and other public seats are available for short-term (3-5 minute) viewing.[14]

The Supreme Court posts transcripts of its opinions, as well as transcripts and audio recordings of oral arguments, to its official website. Opinion transcripts are posted "within minutes" of their release,[15] and argument transcripts are also posted on the same day of their release.[16] Typically,

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[9] Fed. R. Crim. P. 53, p. 64, at http://www.uscourts.gov/file/document/rules-criminal-procedure.

[10] Andrew J. Lievense and Avern Cohn, "The Federal Judiciary and the ABA Model Code: The Parting of the Ways," *Justice System Journal*, vol. 28, no. 3 (2007), pp. 271-282.

[11] The Code of Conduct "applies to United States circuit judges, district judges, Court of International Trade judges, Court of Federal Claims judges, bankruptcy judges, and magistrate judges. Certain provisions of this Code apply to special masters and commissioners.... The Tax Court, Court of Appeals for Veterans Claims, and Court of Appeals for the Armed Forces have adopted this Code." See United States Judicial Conference, "Code of Conduct for United States Judges," March 12, 2019, at http://www.uscourts.gov/judges-judgeships/code-conduct-united-states-judges.

[12] 40 U.S.C. §6134, P.L. 107-217, August 21, 2002, 116 Stat. 1183. In February 2014, protestors interrupted Supreme Court oral arguments and posted unauthorized video recordings of the incident and some additional courtroom proceedings to YouTube. The man who interrupted the Court was arrested for creating a disturbance in violation of this statute, but no one was arrested or otherwise penalized for the act of creating or posting an unauthorized video.

[13] The number of seats to the public may be especially low in high-profile cases: for the March 2013 same-sex marriage cases, one estimate is that about 70 full-day seats and 30 "three-minute" rotating seats were available for members of the public during oral arguments. See Adam Liptak, "Supreme Court Spectator Line Acts as a Toll Booth," *New York Times*, April 15, 2013, at http://www.nytimes.com/2013/04/16/us/supreme-court-spectator-line-acts-as-a-toll-booth.html.

[14] U.S. Supreme Court, "Courtroom Seating," at http://www.supremecourt.gov/oral_arguments/courtroomseating.aspx.

[15] Beginning in 1992, the HERMES Bulletin Board System made opinions available online to those with a subscription. In 1995, the Court created its own bulletin board system, followed by its own website in 2000, where opinions were posted for public viewing. See Mary-Rose Papandrea, "Moving Beyond Cameras in the Courtroom: Technology, the Media, and the Supreme Court," *Brigham Young University Law Review*, vol. 2012, no. 6 (2012), pp. 1909-1910. For current policies and opinions available, see U.S. Supreme Court, *Opinions*, at https://www.supremecourt.gov/opinions/opinions.aspx. Paper copies of Supreme Court opinions are still distributed to members of the press as decisions are announced in the courtroom.

[16] Beginning in October 2000, the Supreme Court has posted oral argument transcripts to its website. Initially, these were posted within 10-15 business days of the end of the argument, but have been posted on the same day since October 2006. For current policies and available oral argument transcripts, see U.S. Supreme Court, "Argument

the Supreme Court posts the audio recordings of oral arguments on Fridays, meaning that most oral arguments are not posted on the same day they were made.[17] For some high-profile cases, the Supreme Court has released same-day audio recordings.[18]

At the Supreme Court level, none of the present Justices have consistently advocated for cameras in their courtroom, but several have expressed a willingness to consider the idea. Although the current Justices may seem reluctant, some observers note that their ambivalence might reflect greater receptivity toward bringing cameras into the Supreme Court, given that some of their predecessors strongly opposed cameras in the courtroom.[19] While several of the current Justices have remarked that they would consider permitting cameras in the Supreme Court if their

Transcripts," at http://www.supremecourt.gov/oral_arguments/argument_transcript.aspx.

[17] The Supreme Court began recording audio of oral arguments in 1955, though tapes were only available to researchers for educational purposes after the close of a term from the National Archives and Records Administration (NARA), and tapes were not sent to NARA between 1971 and 1986. Following the commercial publication of excerpts from some of the tapes, the public was granted access to the NARA recordings. Beginning in 2003, an independent website, Oyez (http://www.oyez.org) posted many of the Court's oral arguments on its site. By 2011, Oyez had digitized all the past oral argument audio tapes available from NARA, and it continues to post new oral arguments when audio is released. At the start of the October 2010 term, the Supreme Court began posting oral arguments to its own website. For current policies and available audio, see U.S. Supreme Court, "Argument Audio," at http://www.supremecourt.gov/oral_arguments/argument_audio.aspx.

[18] Prior to October 2010, same-day audio recordings were released only to the media but are now available to anyone with access to the Supreme Court's public website. The first time the Supreme Court released same-day argument audio was for *Bush v. Gore*, 531 U.S. 98 (2000). Recent examples of same-day audio releases have included cases related to campaign finance (*Citizens United v. FEC*, 558 U.S. 50 (2010), the Affordable Care Act (*Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S.Ct. 2566 (2012)), and same-sex marriage (*Hollingsworth v. Perry*, 133 S.Ct. 2652, (2013), *United States v. Windsor*, 133 S.Ct. 2675, and *Obergefell v. Hodges*, 135 S. Ct. 2071, 2015).

[19] Justice David Souter (who retired and was replaced by Justice Sonia Sotomayor in 2009) once told Members of the House, "the day you see a camera coming into our courtroom it is going to roll over my dead body," U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, Justice, State, and Judiciary, *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997, Part 6*, 104th Cong., 2nd sess., March 28, 1996, p. 31. Some observers suggest that the Supreme Court's reluctance to allow cameras is a generational effect, and that as older Justices retire, their younger replacements may be increasingly from a cohort of judges who are comfortable allowing video cameras in the courtrooms. Justice Stephen Breyer has made statements alluding to this dynamic on several occasions, and one example follows: "I'm not in the generation that's grown up with [television] to that point—I actually can remember radio. That will change and eventually people will be on the court that grew up with nothing but that and I believe it will change and probably they'll come in." See Nikki Schwab, "Why Of Course Justice Stephen Breyer Has a Pocket Constitution," *U.S. News & World Report*, January 15, 2014, at http://www.usnews.com/news/blogs/washington-whispers/2014/01/15/why-of-course-justice-stephen-breyer-has-a-pocket-constitution. Justice Samuel Alito has similarly indicated that future Justices may have a different perspective on broadcasting; see U.S. Congress, House Committee on Appropriations, Subcommittee on Financial Services and General Government, *Supreme Court Budget Hearing*, 116th Cong., 1st sess., March 7, 2019.

colleagues agreed,[20] many of the Justices have also revealed personal apprehension toward video broadcasting of Supreme Court proceedings.[21]

For the lower federal courts, and, in particular, the appellate circuit courts, the current Supreme Court Justices are somewhat more supportive of allowing cameras. Each Justice has made public statements recognizing potential benefits of televising judicial proceedings, but each has also made public statements that acknowledge the potential risks. Some of the Justices had experience with cameras in the courtroom while they were serving on these lower courts and have commented on their positive experiences.[22] As a circuit court judge, for example, Justice Stephen

[20] Chief Justice John Roberts and Associate Justices Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan all made comments to this effect during their confirmation hearings. See U.S. Congress, Senate Committee on the Judiciary, *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States*, 103rd Cong., 1st sess., July 20-23, 1993, S. Hrg. 103-482 (Washington: GPO, 1993), p. 576; U.S. Congress, Senate Committee on the Judiciary, *The Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States*, 103rd Cong., 2nd sess., July 12-15, 1994, S.Hrg.103-715 (Washington: GPO, 1994), p. 160; U.S. Congress, Senate Committee on the Judiciary, Confirmation Hearing on the Nomination of John G. Roberts Jr. to be Chief Justice of the United States, 109th Cong., 1st sess., September 12, 2005, S. Hrg. 109-158 (Washington: GPO, 2005), pp. 239, 324; U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States*, 111th Cong., 1st sess., July 13, 2009, S.Hrg. 111-503, p. 83; U.S. Congress, Senate Committee on the Judiciary, *The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States*, 111th Cong., 2nd sess., June 28, 2010, S.Hrg. 111-1040 (Washington: GPO, 2010), pp. 83, 136. At their confirmation hearings, Associate Justices Samuel Alito, Neil Gorsuch, and Brett Kavanaugh each stated that they would approach the issue with "an open mind"; see U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Hon. Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States*, 114th Congress, 2nd sess., January 9-13, 2016, S.Hrg. 109-277 (Washington: GPO, 2006), pp. 480-481; U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, 115th Congress, 1st sess., March 20-23, 2017, S.Hrg. 115-208 (Washington: GPO, 2017), p. 150; U.S. Congress, Senate Committee on the Judiciary, *Nomination of the Honorable Brett M. Kavanaugh to be an Associate Justice of the Supreme Court of the United States*, September 4-7, 2018.

[21] At the House subcommittee hearing for the FY2020 Supreme Court budget, for example, Justices Samuel Alito and Elena Kagan both expressed support for providing greater access to the Court's proceedings but were also concerned that televising them could affect the decisionmaking process and change the operation of the Court in unintended ways. See U.S. Congress, House Committee on Appropriations, Subcommittee on Financial Services and General Government, *Supreme Court Budget Hearing*, 116th Cong., 1st sess., March 7, 2019; also reported by Sylvan Lane, "Alito, Kagan Oppose Cameras in Supreme Court," *The Hill*, March 7, 2019, at https://thehill.com/regulation/433109-alito-kagan-oppose-cameras-in-supreme-court. At an event in 2015, when speaking about cameras in the courtroom, Justice Sonia Sotomayor remarked, "I am moving more closely to saying I think it might be a bad idea," and Justice Kagan was similarly quoted as now being "conflicted" on the issue. See Matt Sedensky and Sam Hananel, "Supreme Court's Kagan, Sotomayor Rethink Support for Cameras in the Courtroom," *Washington Post*, February 2, 2015, at http://www.washingtonpost.com/politics/courts_law/supreme-courts-kagan-sotomayor-rethink-support-for-cameras-in-the-courtroom/2015/02/02/1fb9c44c-ab34-11e4-ad71-7b9eba0f87d6_story.html. During a 2015 interview, Justice Stephen Breyer stated, "Part of me wishes [cameras] were in the courtroom because I think people would find this a very educational experience. Part of me is slightly afraid that it would be misleading." See Justice Stephen A. Breyer, interview with Joe Scarborough, Mika Brzeznski, and Mike Barnacle, *Morning Joe*, MSNBC, September 28, 2015, at http://www.msnbc.com/morning-joe/watch/justice-breyer-scotus-not-the-most-secret-court-533556291958.

[22] For the positive experiences of Justice Samuel Alito and Justice Sonia Sotomayor with cameras in their courtrooms in the federal circuit courts, see U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Samuel A. Alito, Jr., to be an Associate Justice of the Supreme Court of the United States*, 109th Cong., 2nd sess., January 9-13, 2006, S.Hrg. 109-277 (Washington: GPO, 2006), p. 480. U.S. Congress, Senate Committee on the Judiciary, *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to be an Associate Justice of the Supreme Court of the United States*, 111th Cong., 1st sess., July 13, 2009, S.Hrg. 111-503, pp. 82-83. Former Justice David Souter, however, recounted a more negative personal experience with cameras in the courtroom at the state supreme court level: see U.S. Congress, House Committee on Appropriations, Subcommittee on Commerce, Justice, State, and Judiciary, *Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations for 1997, Part 6*, 104th Cong., 2nd sess., March 28, 1996, p. 31.

Breyer voted in favor of the Judicial Conference's first pilot program and volunteered his court for the program, though it was not chosen.[23]

The concerns the Justices have raised about cameras in the courtroom are often related to the effect the videos might have on the judicial process. Justice Clarence Thomas, for example, has expressed support for cameras in the courtroom as long as the proceedings are not affected.[24] Some are concerned that cameras may cause the Justices or others in court to behave differently,[25] or that a change may alter how arguments are made.[26] Other Justices, however, note that oral arguments are only a small part of the overall decisionmaking process: as long as their deliberations still occur in private, the decisionmaking process would remain largely unchanged.[27] Some Justices also express the view that judges would lose their relative anonymity, which could bring greater political pressure or security threats and affect judges' ability to be neutral arbiters of the law.[28]

The Supreme Court is, by nature, an institution that is slow to change, according to its own members.[29] It is often cautious in its jurisprudence related to new technology, and is similarly cautious about introducing new technology into judicial procedures.[30] To some observers, video

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[23] U.S. Congress, Senate Committee on the Judiciary, *The Nomination of Stephen G. Breyer to be an Associate Justice of the Supreme Court of the United States*, 103rd Cong., 2nd sess., July 12-15, 1994, S.Hrg.103-715 (Washington: GPO, 1994), p. 159.

[24] U.S. Congress, Senate Committee on the Judiciary, *The Nomination of Clarence Thomas to be Associate Justice of the Supreme Court of the United States*, 102nd Cong., 1st sess., September 10, 1991, S. Hrg. 102-1084, Pt. 1 (Washington: GPO, 1991), p. 284, 385.

[25] See comments from Justice Samuel Alito from U.S. Congress, House Committee on Appropriations, Subcommittee on Financial Services and General Government, *Supreme Court Budget Hearing*, 116th Cong., 1st sess., March 7, 2019; U.S. Congress, Senate Committee on the Judiciary, *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States*, 100th Cong., 1st sess., December 14, 1987, S. Hrg. 100-1037, p. 218.

[26] U.S. Congress, House Committee on Appropriations, Subcommittee on Transportation, Treasury, and Housing and Urban Development, The Judiciary, District of Columbia, *U.S. Representative Joseph Knollenberg (R-MI) Holds a Hearing on Fiscal Year 2007 Appropriations for the Supreme Court*, 109th Cong., 2nd sess., April 4, 2006 (Washington: GPO, 2006), at http://congressional.proquest.com/congressional/docview/t65.d40.bea434f300007d42?accountid=12084.

[27] Carolyn Sackariason, "Kagan Reflects on First Year as Supreme Court Justice," *Aspen Daily News*, August 3, 2011, at http://www.aspendailynews.com/section/home/148362; Justice Stephen A. Breyer, interview with Joe Scarborough, Mika Brzeznski, and Mike Barnacle, *Morning Joe*, MSNBC, September 28, 2015, at http://www.msnbc.com/morning-joe/watch/justice-breyer-scotus-not-the-most-secret-court-533556291958.

[28] U.S. Congress, House Committee on Appropriations, Subcommittee on Transportation, Treasury, and Housing and Urban Development, The Judiciary, District of Columbia, *U.S. Representative Joseph Knollenberg (R-MI) Holds a Hearing on Fiscal Year 2007 Appropriations for the Supreme Court*, 109th Cong., 2nd sess., April 4, 2006 (Washington: GPO, 2006), at http://congressional.proquest.com/congressional/docview/t65.d40.bea434f300007d42?accountid=12084; Justice Stephen A. Breyer, Interview with Stephen Colbert, *The Late Show with Stephen Colbert*, CBS, September 15, 2015, at https://www.youtube.com/watch?v=Oj2yh6QJJJk.

[29] U.S. Congress, House Committee on Appropriations, Subcommittee on Transportation, Treasury, and Housing and Urban Development, The Judiciary, District of Columbia, *Departments of Transportation, Treasury, HUD, the Judiciary, D.C., and Independent Agencies Appropriations for 2006, Part 8*, 109th Cong., 1st sess., April 12, 2006, H.181-70 (Washington: GPO, 2006), p. 228; Justice Stephen A. Breyer, Interview with Joe Scarborough, Mika Brzeznski, and Mike Barnacle, *Morning Joe*, MSNBC, September 28, 2015, at http://www.msnbc.com/morning-joe/watch/justice-breyer-scotus-not-the-most-secret-court-533556291958.

[30] See Mary-Rose Papandrea, "Moving Beyond Cameras in the Courtroom: Technology, the Media, and the Supreme Court," *Brigham Young University Law Review*, vol. 2012, no. 6 (2012), pp. 1901-1951. In one example from 2010, while avoiding the larger question of whether trials should ever be broadcast, the Supreme Court halted plans by the U.S. District Court for the Northern District of California to offer live audio and video streaming of a high-profile federal case regarding same-sex marriage. The Court argued that the lower court, in changing its rules to allow broadcasting, did not follow the correct procedure. Yet some observers believed that the Court used the procedural

recording may seem like a tried and true technology, but to the Supreme Court and others, the need to maintain the integrity of the courtroom and its proceedings may outweigh the potential benefits of video cameras. In recent years, observers note that the Supreme Court has become more accessible through its own initiatives.[31] New policies, like posting oral argument audio recordings online, help those interested in court proceedings receive information quickly and fully. Observers also note that the Justices also seem increasingly willing to speak at public engagements or on television interviews where they are often given the opportunity to better explain their judicial philosophy and reasoning behind decisions.[32]

Federal Circuit and District Courts

Currently, two federal circuit courts and three federal district courts allow video recordings of their proceedings under certain, limited circumstances.[33] Historically, federal statutes and professional guidelines have generally prohibited or discouraged use of cameras in federal circuit and district courts. Rule 53 of the Federal Rules of Criminal Procedure prohibits photography in and radio broadcasting from lower federal courtrooms during criminal cases, and, in 1948, Congress passed legislation that applied its provisions to the federal courts.[34] This prohibition applies both during the initial criminal trials and during any subsequent appeals. The Judicial Conference continues to support Rule 53, given concerns about maintaining the right to a fair trial in criminal proceedings.

Although these policies prohibit the recording or broadcasting of criminal proceedings, cameras may be allowed for civil cases. The use of video cameras in civil proceedings has increased since the 1990s, but most of the lower federal courts still do not allow cameras to record or broadcast from the courtroom, nor have they expanded camera coverage of criminal proceedings. For most of the 20th century, the American Bar Association (ABA) advised judges against permitting cameras in courtrooms. Although the ABA Canons of Judicial Ethics were not initially binding,

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grounds as a technicality and that the decision indicated the Court's reticence toward cameras in the courtroom. See *Hollingsworth v. Perry*, 558 U.S. __ (2010) (per curiam); Associated Press, "Supreme Court Blocks Video Broadcast of Trial on Legality of California's Gay Marriage Pan, Prop 8," *New York Daily News*, January 11, 2010, at http://www.nydailynews.com/news/politics/supreme-court-blocks-video-broadcast-trial-legality-california-gay-marriage-ban-prop-8-article-1.173703; Robert Barnes, "Supreme Court Bars Broadcast of Prop 8 Trial in California," *Washington Post*, January 14, 2010, at http://www.washingtonpost.com/wp-dyn/content/article/2010/01/13/AR2010011304348.html.

[31] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584 (Washington: GPO, 2012), pp. 2, 31-32; Lawrence Hurley, "U.S. Supreme Court Plans to Improve Access to Documents," Reuters, December 31, 2014, at http://www.reuters.com/article/us-usa-court-technology-idUSKBN0K919620141231.

[32] U.S. Congress, Senate Committee on the Judiciary, *Cameras in the Courtroom*, 109th Cong., 1st sess., November 9, 2005, S. Hrg. 109-331 (Washington: GPO, 2006), pp. 10, 35-37; James Oliphant, "Justices Come Off the Bench to Chat," *Chicago Tribune*, April 30, 2008, at http://articles.chicagotribune.com/2008-04-30/news/0804290910_1_supreme-court-justice-stephen-breyer-high-court; Tony Mauro, "Let the Cameras Roll," *Reynolds Court and Media Law Journal*, vol. 1, no. 3 (2011), p. 269; Richard A. Posner, "The Supreme Court and Celebrity Culture," *Chicago-Kent Law Review*, vol. 88, no. 2 (April 2013), pp. 299-308.

[33] Presently, the federal courts that do allow cameras in the courtroom were among the participants in the Judicial Conference pilot programs, described subsequently in this section. These courts were simply allowed to continue using cameras after the formal conclusion of the pilot programs. The two circuit courts that presently allow cameras are the Second and the Ninth Circuit. The three district courts that presently allow cameras are the Northern District of California (San Francisco), District of Guam, and Western District of Washington (Seattle); each of these district courts is located in the Ninth Circuit.

[34] 18 U.S.C. §3004.

many federal judges voluntarily followed them once they were adopted in 1924.[35] In 1937, the ABA added Canon 35, which discouraged judges from allowing cameras in the courtroom, and which was amended in 1952 to include televised proceedings.[36]

In April 1973, the Judicial Conference formally adopted its own Code of Judicial Conduct for federal judges, based upon the standards created by the ABA the preceding year.[37] A general ban of cameras in the courtroom, similar to Canon 35, was found in Canon 3A(7), which stated, "A judge should prohibit broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court, or recesses between sessions," but also noted a few exceptions of acceptable use.[38] Since the late 1980s, the Judicial Conference has shown more openness toward allowing cameras in the courtroom for civil proceedings, particularly at the appellate level. In 1989, the Conference's Ad Hoc Committee on Cameras in the Courtroom reported that it viewed Canon 3A(7) as "unduly restrictive,"[39] and in 1990, after consultation with federal judges, state judges, and media representatives, the Judicial Conference eliminated Canon 3A(7) from the Code of Conduct, expanded permissible camera uses in its *Guide to Judicial Policies and Procedures*, and authorized a three-year pilot program experiment permitting photographs, recordings, and broadcasts in up to two circuit courts and up to six district courts.[40] The results from this pilot program, which ran from 1991 to 1994, and a second pilot program, which ran from 2011 to 2015, are discussed in the sections below.

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[35] Andrew J. Lievense and Avery Cohn, "The Federal Judiciary and the ABA Model Code: The Parting of Ways," *Justice System Journal*, vol. 28, no. 3 (2007), pp. 273-276.

[36] As amended in 1952, Canon 35 read, "[p]roceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings are calculated to detract from the essential dignity of the proceedings, distract the witness in giving his testimony, degrade the court, and create misconceptions with respect thereto in the mind of the public and should not be permitted." 77 A.B.A. Rep. 61611 (1952). The 1952 version of Canon 35 also provided an exemption that allowed cameras in the courtroom for naturalization and other ceremonial proceedings. For the story of courtroom photography in the early 20th century and the initial ABA, judicial, and public responses to it, see Richard B. Kielbowicz, "The Story Behind the Adoption of the Ban on Courtroom Cameras," *Judicature*, vol. 63, no. 1 (June-July 1979), pp. 14-23.

[37] U.S. Congress, House Committee on the Judiciary, *Proceedings of the Judicial Conference of the United States, 1971*, Communication from Chief Justice of the United States Transmitting Proceedings of the Judicial Conference of the United States, April 5-6, 1973, prepared by Chief Justice Warren E. Burger, 93rd Cong., 1st sess., May 21, 1973, H. Doc 93-103, p. 10. When ABA revisions to the Canons of Judicial Ethics were finalized in 1972, they were also renamed the Model Code of Judicial Conduct.

[38] American Bar Association, "Code of Judicial Conduct," *ABA Journal*, vol. 58 (November 1972), p. 1208. The exceptions judges may make are described in Canon 3(a)(7) (a-c) as follows: "(a) The use of electronic or photographic means for presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration; (b) The broadcasting, televising, recording or photographing of investigative, ceremonial, or naturalization proceedings; (c) The photographic or electronic recording or reproduction of appropriate court proceedings under the following conditions: (i) The means of recording will not distract participants or impair the dignity of the proceedings; (ii) The parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction; (iii) The reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and (iv) The reproduction will be exhibited only for instructional purposes in educational institutions."

[39] Chief Justice William H. Rehnquist, Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States, Washington, DC, September 20, 1989, p. 34, at http://www.uscourts.gov/file/1650/download.

[40] Chief Justice William H. Rehnquist, Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States, Washington, DC, March 13, 1990, p. 104, at http://www.uscourts.gov/file/1651/download.

The lower federal courts that allow video cameras typically make their video recordings available online, but other records of their proceedings are, at least in some cases, somewhat more difficult to obtain than those of the U.S. Supreme Court. Most of the federal circuit courts post audio recordings of oral arguments on their websites, but the availability varies from court to court. Typically, transcripts of oral arguments are not posted by the circuit courts, nor are transcripts or audio recordings of oral arguments at the district court level, though policies among the district courts can vary as well. Generally, copies of district court transcripts or audio may be purchased from the court or online via the federal judiciary's PACER system.[41] Copies of current federal circuit and district court decisions are available for free from GPO's United States Courts Opinions collection and on most of the courts' websites. Past years are also available, though coverage varies depending on the court.

There has not been a comprehensive survey of federal circuit and district court judges about their opinions toward cameras in the courtroom. As the use of cameras has expanded in local, state, and a few federal courts, some federal judges have had experience with cameras in their courtrooms, yet other federal judges may not have had personal experience with cameras in their courtrooms. Although some federal judges have made statements supporting cameras and others have made statements against cameras,[42] many have not expressed any opinion on the subject. This report does not provide any conclusions about the overall attitudes of federal judges.

1991-1994 Judicial Conference Pilot Program

The initial Judicial Conference pilot program ran from July 1, 1991, to December 30, 1994, covered two federal circuit courts and six federal district courts, and was administered by the Federal Judicial Center (FJC).[43] The most common type of media request in the program was for television cameras to report from the courtroom, and, generally, judges were supportive of this type of electronic media coverage for civil proceedings.[44] In a follow-up survey, many of the participating judges indicated that they were initially neutral toward cameras at the beginning of the program and grew more supportive of cameras in the courtroom by the end of the program. Many of the federal judges affirmed that cameras were not disruptive and did not change their behavior.

Responses from judges concerning the pilot program reflected less of a consensus about whether or not the cameras affected the behavior of attorneys, violated privacy of the witnesses, or educated the public, and these concerns prevented the Judicial Conference from recommending an expanded use of courtroom cameras at that time.[45] In September 1994, the Judicial Conference

[41] Access to PACER and more information about the service is available at https://www.pacer.gov/.

[42] For some examples of these comments, see Molly Treadway Johnson, Carol Krafka, and Donna Stienstra, *Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project*, Federal Judicial Center, Washington, DC, March 15, 2016, pp. 29-30 and Appendix F, at https://www.fjc.gov/content/311380/video-recording-courtroom-proceedings-united-states-district-courts-report-pilot.

[43] The Second and Ninth Circuit Courts participated in the first pilot program, along with the Southern District of Indiana (Indianapolis), District of Massachusetts, Eastern District of Michigan (Detroit), Southern District of New York (New York City), Eastern District of Pennsylvania (Philadelphia), and Western District of Washington (Seattle).

[44] For more details about the program and the findings, see Molly Treadway Johnson and Carol Krafka, Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals, Federal Judicial Center, Washington, DC, 1994, at http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf.

[45] See Molly Treadway Johnson and Carol Krafka, Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals, Federal Judicial Center, Washington, DC, 1994, pp. 7, 14-15, 17, at http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/

voted against a recommendation to expand camera coverage in district courts, citing that the "intimidating effect of cameras on some witnesses and jurors was cause for concern."[46] Yet, in March 1996, the Judicial Conference did "authorize each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments."[47]

The two circuit courts that participated in the initial pilot program continued to allow cameras, and are currently the only two federal appellate courts to do so. In 2013, one of these, the Ninth Circuit Court, began to live-stream oral argument videos on its website.[48]

2011-2015 Judicial Conference Pilot Program

In September 2010, the Judicial Conference authorized a second pilot program to study cameras in the courtroom for civil proceedings before federal district courts.[49] This pilot program began in July 2011 and concluded in July 2015,[50] with 14 federal district courts participating.[51] One notable change to the second study was that video footage of district court proceedings was posted online at USCourts.gov.[52] After the formal conclusion of the pilot program, three of the participating district courts (Northern District of California, District of Guam, and Western District of Washington) have "continue[d] the pilot program under the same terms and conditions to provide longer-term data and information."[53] Results from the second pilot program were released in March 2016.[54] Over the course of the study, 64 active and senior judges notified

elecmediacov.pdf.

[46] Chief Justice William H. Rehnquist, Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States, Washington, DC, September 20, 1994, p. 45, at http://www.uscourts.gov/file/2120/download.

[47] Chief Justice William H. Rehnquist, Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States, Washington, DC, March 12, 1996, p. 17, at http://www.uscourts.gov/file/2119/download.

[48] For available live-streams, see United States Courts for the Ninth Circuit, "Live Oral Arguments," at http://www.ca9.uscourts.gov/media/live_oral_arguments.php. Audio and video from past cases are posted the day after the argument at http://www.ca9.uscourts.gov/media/.

[49] Chief Justice John G. Roberts, Judicial Conference of the United States, Report of the Proceedings of the Judicial Conference of the United States, Washington, DC, September 14, 2010, pp. 3-4, at http://www.uscourts.gov/file/2161/download.

[50] For the most recent information on the pilot program, refer to Administrative Office of the U.S. Courts, "Overview of Cameras in Court Pilot," at http://www.uscourts.gov/about-federal-courts/cameras-courts/overview-cameras-courts-pilot.

[51] The district courts that participated in the second pilot program were the Middle District of Alabama (Montgomery), Northern District of California (San Francisco), Southern District of Florida (Miami), District of Guam, Northern District of Illinois (Chicago), Southern District of Iowa (Des Moines), District of Kansas, District of Massachusetts, Eastern District of Missouri (St. Louis), District of Nebraska, Northern District of Ohio (Cleveland), Southern District of Ohio (Cincinnati), Western District of Tennessee (Memphis), and Western District of Washington (Seattle). See Administrative Office of the U.S. Courts, "Overview of Cameras in the Courtroom Pilot," at http://www.uscourts.gov/about-federal-courts/cameras-courts/overview-cameras-courts-pilot.

[52] For available videos, see Administrative Office of the U.S. Courts, "Cameras in Courts," at https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts.

[53] Ibid.

[54] Molly Treadway Johnson, Carol Krafka, and Donna Stienstra, *Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project*, Federal Judicial Center, Washington, DC, March 15, 2016, at https://www.fjc.gov/content/311380/video-recording-courtroom-proceedings-united-states-district-courts-report-pilot.

parties of the opportunity to record a proceeding, and a total of 158 proceedings were recorded before 33 judges.[55]

The pilot program report states that a variety of proceedings and case types were represented in this set of recordings, and it also notes that the participating judges, on average, "are likely to be favorable in their views of video recording" because of the voluntary nature of the program.[56] Some courts reported significant demands on information technology staff implementing the program requirements.[57]

Courts in the second pilot program largely determined their own processes for notifying parties about the video recordings and establishing consent procedures for participants.[58] The most commonly reported reasons individuals declined to participate in the pilot program were to maintain confidentiality or avoid publicity, but in many instances, individuals did not provide a reason for declining.[59]

The report found that the greatest operational demand on judges was the process of notifying parties and obtaining consent, and that the administrative demands of the program were lower in courts that had more standardized notice and consent procedures.[60] Approximately a third of participating judges surveyed after the conclusion of the second pilot program suggested modifications to this part of the process, including changing to an "opt-out" system rather than an "opt-in" system or simply doing away with requirements to obtain consent from all parties.[61]

When asked about some of the commonly hypothesized effects of cameras in the courtroom in a survey after the pilot program, participating judges and attorneys often thought that most of those effects occurred to little or no extent.[62] A majority of the participating judges and attorneys surveyed thought that video broadcasts of court proceedings increased public access or education to a moderate or great extent.[63] The report noted that 21,530 viewers accessed a pilot program recording in 2014, and among the 258 viewers who opted to take a pop-up survey, many viewers stated that they watched the video due to a general interest in proceedings or for an educational reason.[64]

The participating judges surveyed expressed mixed opinions on whether or not filming attorneys could lead to more theatrical behavior or could increase public confidence in the courts. Approximately a third of the surveyed judges thought that cameras in the courtroom could distract witnesses to a moderate or great extent; motivate attorneys to prepare better to a moderate or great extent; and prompt more courteous behavior from attorneys to a moderate or great extent.[65] Approximately a quarter of the judges interviewed recommended video recordings for criminal proceedings.[66]

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[55] Ibid., p. viii.

[56] Ibid., pp. viii, 3, 55.

[57] Ibid., pp. x, 46-49, 54.

[58] Ibid., pp. 7-13.

[59] Ibid., p. 23.

[60] Ibid., pp. x, 36, 46-47.

[61] Ibid., p. ix.

[62] Ibid., pp. 26-27, 55.

[63] Ibid., pp. 27-29, 39, 55.

[64] Ibid., pp. 49-52.

[65] Ibid., pp. 26-27, 55.

[66] Ibid., pp. ix, 35-36.

Major Debates and Considerations for Policymakers

There are many factors involved in the cameras in the courtroom debate that might be relevant to policymakers considering related legislation. In addition to the more particular arguments related to cameras in the courtroom, Members of Congress may first want to evaluate the implications of congressional action in this area, given its potential effects on interbranch relations with the judiciary. Members may also wish to consider more practical considerations relating to how these policies might be introduced and implemented. Examples from past, current, and proposed cameras-in-the-courtroom programs may help illustrate potential benefits and drawbacks of these initiatives, and they may also illustrate how different values or concerns may be balanced.

Appropriateness of Congressional Action

Under the U.S. Constitution, Congress has significant legislative powers over the operation of the federal judiciary.[67] The expectation of judicial independence, however, has typically led to a congressional tradition of deference to the courts, allowing the federal judiciary to determine its own procedures for its daily operations. During the 20th century, Congress somewhat formalized this practice of deference through the creation, in 1922, of the Judicial Conference as the policymaking body for the federal courts,[68] and through the passage of the Rules Enabling Act in 1934.[69]

Proponents of cameras-in-the-courtroom legislation argue that Congress has the constitutional power to legislate judicial administrative matters and that authorizing cameras in federal

[67] Congress has the power to create courts subordinate to the Supreme Court, such as today's federal district and circuit courts of appeals (U.S. Const. art. I, §8, cl. 9; U.S. Const. art. III, §1). Other powers under which Congress can exercise control over the operations of the federal judiciary include the appropriation powers (U.S. Const. art. I, §8, cl. 1) and Congress's authority over federal property (U.S. Const. art. IV, §3). For instance, Congress has established rules of conduct on the Supreme Court grounds and in its building (40 U.S.C. §§6131- 6137). The ways in which Congress has interpreted and used this authority are frequently discussed in political science literature, as are other ways in which Congress and the Supreme Court engage with one another under the separation-of-powers system. See, for example, Roger Handberg and Harold F. Hill Jr., "Court Curbing, Court Reversals, and Judicial Review: The Supreme Court versus Congress," *Law & Society Review*, vol. 14, no. 2 (Winter 1980), pp. 309-322; John M. De Figueiredo and Emerson H. Tiller, "Congressional Control of the Courts: A Theoretical and Empirical Analysis of Expansion of the Federal Judiciary," *Journal of Law & Economics*, vol. 39, no. 2 (October 1996), pp. 435-462; John A. Clark and Kevin T. McGuire, "Congress, the Supreme Court, and the Flag," *Political Research Quarterly*, vol. 49, no. 4 (December 1996), pp. 771-781; Stephen B. Burbank, "Judicial Independence, Judicial Accountability & Interbranch Relations," *Daedalus*, vol. 137, no. 4 (Fall 2008), pp. 16-27; Dawn M. Chutkow, "Jurisdiction Stripping: Litigation, Ideology, and Congressional Control of the Courts," *Journal of Politics*, vol. 70, no. 4 (October 2008), pp. 1053-1064; Tom S. Clark, "The Separation of Powers, Court Curbing, and Judicial Legitimacy," *American Journal of Political Science*, vol. 53, no. 4 (October 2009), pp. 971-989.

[68] P.L. 67-298, 42 Stat. 837, September 14, 1922, provided for an annual conference of the Chief Justice of the United States and senior circuit judges to report on annual circuit business and make recommendations for policies that would improve judicial administration. The early body was known as the Conference of Senior Circuit Judges, but the name was changed to the Judicial Conference of the United States in 1948 (P.L. 80-773, 62 Stat. 902, June 25, 1948). Presently, the Judicial Conference is comprised of the Chief Justice and representatives from the lower federal courts, including the chief judge of each circuit, a district judge from each circuit, and the chief judge of the Court of International Trade, and it is charged with reviewing the current business operations and procedures of the federal courts and making recommendations for policy changes (28 U.S.C. §331). For more information on the history of the Judicial Conference, see Federal Judicial Center, "History of the Federal Judiciary," at http://www.fjc.gov/history/home.nsf/page/landmark_14.html.

[69] P.L. 73-415, 48 Stat. 1064, June 19, 1934, 28 U.S.C. §2071-2077. The Rules Enabling Act allows the Supreme Court (often acting upon recommendations from the Judicial Conference) to implement procedural rules for the federal courts, which could be approved or rejected by Congress.

courtrooms falls under this jurisdiction.[70] Because there are concerns that cameras may substantively affect judicial proceedings, others argue that this decision is more than a simple administrative matter. Some may view this as an imprudent exercise of congressional authority, especially given Congress's past tendency to let the judiciary determine many of its own procedures.[71] Some may even argue that such legislation raises constitutional concerns.[72]

These questions regarding appropriate institutional authority also raise concerns for some that congressional action permitting cameras in federal courts could lead to greater interbranch tensions.[73] Given the concerns related to Congress's authority in this arena, many on both sides of the issue propose that the decision to allow or prohibit cameras should be left to the federal judiciary to decide for itself. As Senator Mike Lee noted in a 2011 Senate hearing on cameras in the court, "regardless of what we can do as a matter of raw political power, there is a question of what we should do."[74] At a House hearing in 2006, Justice Clarence Thomas warned that there may be "some conflict between the branches" if Congress mandated televising of judicial proceedings, but noted that "[t]he bills that allow for members of the court to make that determination, of course, don't have that problem. I guess if there's going to have to be a bill, the better method is probably to allow the members of the court to decide which cases."[75]

Some of the questions surrounding Congress's authority to implement such legislation may be less consequential if congressional legislation introducing cameras to the courtroom includes particular measures to prioritize judicial autonomy or discretion. Policies that authorize, or allow, judges to introduce cameras at their discretion, rather than requiring cameras in the courtroom, may potentially avoid some of these concerns. This approach also mirrors the process for the

[70] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584, p. 19.

[71] Justice Anthony Kennedy, speaking on behalf of the Supreme Court in 2006, argued, "we feel very strongly that we have an intimate knowledge of the dynamics and the needs of the court, and we think that proposals which would mandate direct television in our court in every proceeding is inconsistent with that deference, that etiquette, that should apply between the branches.... [W]e feel very strongly that this matter should be left to the courts," U.S. Congress, House Committee on Appropriations, Subcommittee on Transportation, Treasury, and Housing and Urban Development, The Judiciary, District of Columbia, *U.S. Representative Joseph Knollenberg (R-MI) Holds a Hearing on Fiscal Year 2007 Appropriations for the Supreme Court*, 109th Cong., 2nd sess., April 4, 2006 (Washington: GPO, 2006). See also U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Allowing Cameras and Electronic Media in the Courtroom*, 106th Cong., 2nd sess., September 6, 2000, S. Hrg. 106-1029 (Washington: GPO, 2001), p. 4; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584, pp. 12-13, 19, 22-23; U.S. Congress, House Committee on the Judiciary, *Sunshine in the Courtroom Act of 2013*, hearing on H.R. 917, 113th Cong., 2nd sess., December 3, 2014, H. Hrg 113-121 (Washington: GPO, 2015), p. 11.

[72] For an example of an evaluation of the constitutional grounding of one proposed bill, see Bruce G. Peabody, "Supreme Court TV': Televising the Least Accountable Branch?" *Harvard Journal on Legislation*, vol. 33, no. 2 (May 2007). Analysis of the constitutionality of proposed legislation on this issue is beyond the scope of this report.

[73] Bruce Peabody, "Constitutional Etiquette and the Fate of 'Supreme Court TV'," *Michigan Law Review First Impressions*, vol. 106, no. 1 (2007), pp. 19-23.

[74] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584, p. 19.

[75] U.S. Congress, House Committee on Appropriations, Subcommittee on Transportation, Treasury, and Housing and Urban Development, The Judiciary, District of Columbia, *U.S. Representative Joseph Knollenberg (R-MI) Holds a Hearing on Fiscal Year 2007 Appropriations for the Supreme Court*, 109th Cong., 2nd sess., April 4, 2006 (Washington: GPO, 2006), at http://congressional.proquest.com/congressional/docview/t65.d40.bea434f300007d42?accountid=12084.

Judicial Conference's pilot programs, wherein the chosen courts were selected from a group that volunteered to participate and allow cameras.

Even among the legislative proposals that require cameras in the courtroom, most include an opt-out measure, allowing the presiding judge or others in the judiciary to prohibit cameras if they might interfere with due process and/or safety of the participants in the case. If legislation contains an opt-out provision, policymakers may want to consider the circumstances under which participants may opt out of recordings (e.g., to ensure safety or due process), the scope of these exemptions (e.g., no filming of the proceedings at all or no filming of particular individuals/parts of the proceedings), and who can make these determinations (e.g., the presiding judge, a panel of judges, or any participant in the case).

Public and Media Access to the Judiciary

One of the policy issues that Congress has discussed related to cameras in the courts is the extent to which the public and the media are entitled to have access to courtrooms and their proceedings.[76] Proponents argue that these are constitutionally-protected rights, yet others contend that there are limits to these rights. Some suggest that public and media access to the courts, for example, may need to be limited in the interest of preserving procedural fairness, which they believe reflects another constitutionally-protected right.[77]

The Sixth Amendment of the U.S. Constitution, for example, includes the "right to a speedy and public trial," which some have argued implies that members of the general public have an inherent right to observe criminal trials. Others, however, argue that this provision is a protection for the accused and not a right of the public, reflecting the Framers' attempt to prevent secretive trials involving only a judge and defendant.[78] Some also argue that the public and media have rights to access the courts under the First Amendment, and that cameras in the courtroom are a natural extension of these rights.[79] Proponents believe that it is important to have a more expansive view of public access to the courts, particularly for the Supreme Court and its proceedings, given that Supreme Court decisions often affect a broad segment of American society but has limited seats for the public and is geographically remote for most people.[80]

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[76] U.S. Congress, Senate Committee on the Judiciary, *Cameras in the Courtroom*, 109th Cong., 1st sess., November 9, 2005, S. Hrg. 109-331 (Washington: GPO, 2006), pp. 3, 25; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584 (Washington: GPO, 2012), pp. 1, 7; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, Sunshine in the Courtroom Act of 2013, 113th Cong., 2nd sess., December 3, 2014, S. Hrg. 113-121, p. 14.

[77] William O. Douglas, "The Public Trial and the Free Press," *American Bar Association Journal*, vol. 46, no. 8 (August 1960), pp. 840-844; Gregory K. McCall, "Cameras in the Criminal Courtroom: A Sixth Amendment Analysis," *Columbia Law Review*, vol. 85, no. 7 (November 1985), pp. 1546-1572.

[78] Some analysts have pointed out that additional measures in the Sixth Amendment, like the inclusion of a jury, witnesses, and defense counsel in a criminal trial, similarly open the proceedings to participation of others to help ensure procedural fairness. See John S. Martel, "Fair Trial V. Free Press in Criminal Trials," *California Law Review*, vol. 47, no. 2 (May 1959), pp. 366-373; Francis T. Goheen, "Trials: Right to 'Public Trial': Power of Judge to Exclude General Public," *Michigan Law Review*, vol. 35, no. 3 (January 1937), pp. 478-479; Dolores K. Sloviter, "If Courts Are Open, Must Cameras Follow?," *Hofstra Law Review*, vol. 26, no. 4 (1998), pp. 873-889.

[79] U.S. Congress, Senate Committee on the Judiciary, *Cameras in the Courtroom*, 109th Cong., 1st sess., November 9, 2005, S. Hrg. 109-331 (Washington: GPO, 2006), pp. 3, 6-7.

[80] U.S. Congress, Senate Committee on the Judiciary, *Cameras in the Courtroom*, 109th Cong., 1st sess., November 9, 2005, S. Hrg. 109-331 (Washington: GPO, 2006), pp. 1, 5; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th

In addition to the expectation of a general media right to access the courts, many argue that journalists should be able to cover the courts using video because it is the medium through which many Americans receive their news. Television remains a major source of political information for Americans, and although younger Americans may be looking more to the internet for news, videos are often distributed online as well.[81] Thus, proponents argue that video, more than other media formats, would be instrumental in informing the public about the courts and their decisions.[82] Media outlets and journalism advocacy groups often also support greater access for cameras in the courtroom.[83]

The provision of public knowledge about the courts through television news, however, is contingent on news outlets broadcasting sufficient information to educate the public, and the public's willingness to watch it. When given a choice, many Americans typically do not choose to watch news or public affairs programming.[84] As private companies, news outlets must compete with one another for viewers and advertisers, and news networks might not have the incentive to cover most court proceedings.[85]

Cong., 1st sess., December 6, 2011, S. Hrg. 112-584 (Washington: GPO, 2012), pp. 7, 23.

[81] A number of studies and surveys report similar findings on news consumption trends. First, the audience for broadcast network news has decreased over the last twenty years, as more Americans tune to cable news channels. News consumption via the internet has also been a growing trend, but many Americans treat internet news as a supplementary news source, consulted in addition to their primary, traditional news source. For an overview, see Norman H. Nie, Darwin W. Miller, III, and Saar Golde, et al., "The World Wide Web and the U.S. Political News Market," *American Journal of Political Science*, vol. 54, no. 2 (April 2010), pp. 428-439; see also Kristen Purcell, Lee Raine, and Amy Mitchell, et al., *Understanding the Participatory News Consumer*, Pew Research Center, Washington, DC, March 1, 2010, at http://www.pewinternet.org/2010/03/01/understanding-the-participatory-news-consumer/. A recent Pew survey indicates that younger Americans may be increasingly getting news on the internet, but exposure is often incidental. When asked to name the outlet they most turn to for news about government and politics, the top three responses for Millennial, Generation X, and Baby Boomer respondents all were television news outlets. See Amy Mitchell and Dana Page, *Millennials & Political News*, Pew Research Center, Washington, DC, June 1, 2015, at http://www.journalism.org/files/2015/06/Millennials-and-News-FINAL-7-27-15.pdf.

[82] U.S. Congress, Senate Committee on the Judiciary, *Cameras in the Courtroom*, 109th Cong., 1st sess., November 9, 2005, S. Hrg. 109-331 (Washington: GPO, 2006), pp. 26, 51; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584 (Washington: GPO, 2012), pp. 8, 57-58.

[83] For selected examples, see "Time for TV in the Supreme Court," editorial, *New York Times*, July 2, 2015, at http://www.nytimes.com/2015/07/02/opinion/time-for-tv-in-the-supreme-court.html; "Opinion: Cameras in Supreme Court Would Lift Shroud of Secrecy," editorial, *Chicago Sun-Times*, March 1, 2016, at http://chicago.suntimes.com/opinion/opinion-cameras-in-supreme-court-would-lift-shroud-of-secrecy/; "End the Ban on Cameras," editorial, *Washington Post*, October 9, 2015, at https://www.washingtonpost.com/opinions/end-the-ban-on-cameras/2015/10/09/058d73a2-6eb6-11e5-9bfe-e59f5e244f92_story.html; C-SPAN, "C-SPAN Statement on Today's Senate Judiciary Committee Passage of Two Bills Concerning TV Cameras in the Supreme Court," press release, April 29, 2010, http://sites.c-span.org/camerasInTheCourt/pdf/C-SPAN%20Senate%20SCOTUS%20cameras%20bill%20042910.pdf; National Press Photographers Association, Advocacy Committee, at http://blogs.nppa.org/advocacy/category/cameras-in-the-courtroom/.

[84] Robert M. Entman, *Democracy without Citizens: Media and the Decay of American Politics* (New York: Oxford University Press, 1990), ch. 1; Michael X. Delli Carpini and Scott Keeter, *What Americans Know about Politics and Why It Matters* (New Haven, CT: Yale University Press, 1997), pp. 273-276; Stephen Earl Bennett, "Young Americans' Indifference to Media Coverage of Public Affairs," *PS: Political Science and Politics*, vol. 31, no. 3 (September 1998), pp. 535-541; Neil Postman, *Amusing Ourselves to Death: Public Discourse in the Age of Show Business*, 2nd ed. (New York: Penguin Books, 2005); Markus Prior, "News vs. Entertainment: How Increasing Media Choice Widens Gaps in Political Knowledge and Turnout," *American Journal of Political Science*, vol. 49, no. 3 (July 2005), pp. 577-592.

[85] Dell Champlin and Janet Knoedler, "Operating in the Public Interest or in Pursuit of Private Profits? News in the Age of Media Consolidation," *Journal of Economic Issues*, vol. 36, no. 2 (June 2002), pp. 459-468; James T. Hamilton, *All the News That's Fit to Sell: How the Market Transforms Information into News* (Princeton, NJ: Princeton University

Although the public has shown great interest in watching certain trials on television, these cases may not be representative of the judicial system as a whole.[86] Proceedings that do not involve celebrities and/or shocking crimes may not be televised at all. This raises concerns about the educational potential of cameras in the courtroom, especially if television stations may show video clips out of context or employ other editing techniques in an effort to make the courtroom proceedings appear more dramatic or controversial.[87] The 24-hour news cycle pushes stations to try to be the first with any scoop, and this emphasis on fast turnaround can also cause serious errors in judicial reporting.[88]

From the 1950s to the early 2000s, before high-speed internet, the cameras-in-the-courtroom debate was largely framed as whether or not journalists should be able to film court proceedings for television broadcasts, making the arguments in the preceding section more consequential. Today, cameras-in-the-courtroom advocates often envision that cameras will be operated by the court and that the main broadcast forum will be the court's own website. This is how the Federal Judicial Center (FJC) pilot program, many state courts, and several international supreme courts utilize courtroom cameras. While the internet and its potential for self-published media alleviate

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Press, 2004); Herbert J. Gans, *Deciding What's News*, 2nd ed. (Evanston, IL: Northwestern University Press, 2004), Ch. 5, 7-8.

[86] Frequently mentioned is the 1995 murder trial of O.J. Simpson. CNN's live broadcast of the first day of the trial generated a 700% increase in daytime viewers. When the verdict was announced, its audience accounted for 91% of home TV viewing in the U.S. See Steve Weinstein, "The O.J. Simpson Murder Trial: Live Coverage of Trial Gives TV Ratings a 30% Boost," *Los Angeles Times*, January 26, 1995, at http://articles.latimes.com/1995-01-26/news/mn-24704_1_o-j-simpson-trial; Lee Margulies, "The Simpson Verdicts: Huge TV Audience Saw Trial Climax," *Los Angeles Times*, October 5, 1995, at http://articles.latimes.com/1995-10-05/news/mn-53645_1_simpson-verdict. Some observers noted a decrease in network news watching during the trial, surmising that Americans were instead choosing to watch the gavel-to-gavel coverage in its entirety. See Lawrie Mifflin, "The Media Business; Simpson Case Gives Cable An Edge on the Networks," *New York Times*, February 20, 1995, at http://www.nytimes.com/1995/02/20/business/the-media-business-simpson-case-gives-cable-an-edge-on-the-networks.html. Throughout much of the 1990s and 2000s, enough interest in this and other trials existed to support Court TV, a cable network dedicated to continuous, live broadcasts of courtroom proceedings and legal analysis. See also Sara Sun Beale, "The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness," *William and Mary Law Review*, vol. 48, no. 2 (2006), pp. 397-481.

[87] Linda Greenhouse, "Disdaining a Sound Bite, Federal Judges Banished TV," *New York Times*, September 24, 1994, p. E4, at http://www.nytimes.com/1994/09/25/weekinreview/the-nation-disdaining-a-sound-bite-federal-judges-banish-tv.html; Molly Treadway Johnson and Carol Krafka, *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals*, Federal Judicial Center, 1994, p. 7, at http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf; U.S. Congress, Senate Committee on the Judiciary, *Nomination of Ruth Bader Ginsburg, to be Associate Justice of the Supreme Court of the United States*, 103rd Cong., 1st sess., July 20-23, 1993, S. Hrg. 103-482 (Washington: GPO, 1993), p. 199; Jack T. Litman, "Show Trials? Cameras in the Courtroom Can Easily Prejudice the Rights of the Accused," *Los Angeles Daily Journal*, February 22, 1996, p. 6; Michael McGough, "Sensationalizing Supreme Court Sound Bites," *Los Angeles Times*, April 4, 2012, at http://articles.latimes.com/2012/apr/04/news/la-ol-supreme-court-sound-bites-20120403; Justice Stephen A. Breyer, Interview with Joe Scarborough, Mika Brzeznski, and Mike Barnacle, *Morning Joe*, MSNBC, September 28, 2015, at http://www.msnbc.com/morning-joe/watch/justice-breyer-scotus-not-the-most-secret-court-533556291958.

[88] CNN and Fox News infamously misreported the Supreme Court's decision on the Patient Protection and Affordable Care Act on June 28, 2012. As reporters and news producers quickly skimmed the written decision, language on the second page of the Court's opinion gave the impression that the individual mandate in the health care law was unconstitutional. Given the primacy placed on reporting quickly, both CNN and Fox News announced on air that this was the case. The third page, however, noted that under another constitutional provision, the individual mandate was constitutional, and clarified that the Court was not striking down the law. See Tom Goldstein, "We're Getting Wildly Differing Assessments," *SCOTUSblog*, July 7, 2012, at http://www.scotusblog.com/2012/07/were-getting-wildly-differing-assessments/.

many concerns about biased or limited courtroom video coverage from selective television coverage, some of these issues still persist.[89]

Existing programs permitting cameras in the courtroom often contain restrictions on what can be covered and how, reflecting a balance between access to the courts and procedural fairness for participants in the case. If the courts themselves control the recording and/or broadcasting of their proceedings, then many potential problems related to inappropriate or prejudicial media coverage can be potentially mitigated. Proceedings covered in their entirety may better show both sides fairly, and prevent accusations of bias for or against one party, though this approach may be more intrusive to the courtroom and require greater resources. The decision to broadcast live or to record proceedings for later release is also consequential—in trial courts especially, simultaneous broadcasts sometimes raise concerns about their effects on ongoing proceedings.

Transparency and Open Government

Institutionally, the judicial branch was designed to be relatively insulated from public and political pressure to ensure that the courts functioned as neutral arbiters of the law. As an unelected branch of government, whose members receive lifetime appointments, some intrinsic concerns about the accountability of the federal judiciary always have existed.[90] Although many still recognize the value of the courts' role and support the institutional features that attempt to maintain its neutrality, there has been an overall tendency toward greater transparency and openness in American government over the last half century, and a perception among some that the federal courts lag behind the other branches in this respect.[91] Thus, some view cameras in the courtroom as a way to better ensure transparency and openness in judicial proceedings.[92]

If cameras in the courtroom provide greater judicial transparency, there are a number of parties who might benefit from this improved openness. Some proponents believe that Members of Congress will be better informed about the courts' proceedings via complete video broadcasts, enabling Congress to perform better oversight of the judiciary. Others argue that having a more complete view of court proceedings could help other courts fully understand rulings and the logic

[89] Scholars frequently note that the internet simply magnifies existing trends in news production (e.g., the emphasis on reporting quickly, or the need to differentiate one's news product from an array of competitors) and news consumption (e.g., following more entertainment stories and quick reads, or seeking out news sources that reinforce existing political views). See David Tewksbury, "What Do Americans Really Want to Know? Tracking the Behavior of News Readers on the Internet," *Journal of Communication*, vol. 53, no. 4 (December 2003), pp. 694-710; Natalie Jomini Stroud, *Niche News: The Politics of News Choice* (New York: Oxford University Press, 2011); Pablo J. Boczkowski, *Digitizing the News: Innovation in Online Newspapers* (Cambridge, MA: MIT Press, 2005); and Howard Rosenberg and Charles S. Feldman, *No Time to Think: The Menace of Media Speed and the 24-Hour News Cycle* (New York: Bloomsbury Academic, 2008).

[90] Tony Mauro, "Let the Cameras Roll," *Reynolds Courts & Media Law Journal*, vol. 1, no. 3 (2011), pp. 271-272.

[91] A few key indications of these policy shifts toward transparency in the other branches of government include the Freedom of Information Act (P.L. 89-487, 80 Stat. 250, July 4, 1966, 5 U.S.C. §552), the Legislative Reorganization Act of 1970 (P.L. 91-510, 84 Stat. 1140, October 26, 1970), and the Federal Election Campaign Act (P.L. 92-225, 86 Stat. 3, February 7, 1972, 2 U.S.C. §431), although there are many others.

[92] U.S. Congress, Senate Committee on the Judiciary, *Cameras in the Courtroom*, 109th Cong., 1st sess., November 9, 2005, S. Hrg. 109-331 (Washington: GPO, 2006), pp. 1-2, 7, 25, 88, 107-109, 119; U.S. Congress, House Committee on the Judiciary, *Sunshine in the Courtroom Act of 2007*, Hearing on H.R. 2128, 110th Cong., 1st sess., September 27, 2007, H. Hrg. 110-160 (Washington: GPO, 2009), pp. 1, 12-13; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584 (Washington: GPO, 2012), pp. 2, 12, 17, 48-49; Keith J. Bybee, "Open Secret: Why the Supreme Court Has Nothing To Fear From the Internet," *Chicago-Kent Law Review*, vol. 88, no. 2 (April 2013), pp. 309-323.

behind them. In turn, all courts may become more consistent in their interpretations of past case precedents and become more uniform in how subsequent decisions are made.[93] Finally, it is often argued that the public would benefit from the improved openness and transparency that videos of the court would bring. By seeing inside the courtroom, observing full arguments, and seeing the norms court participants follow, the public may better understand the judicial process.[94] The public might also learn more details of and implications from important cases heard before the courts.[95]

Few argue against the overall value of ensuring government openness and transparency in the American political system. Many opponents of cameras-in-the-courtroom legislation, however, believe that the federal courts and their proceedings are already sufficiently open and transparent.[96] This view stems from the constitutional right to a public trial discussed in the preceding section, and the resulting measures that are already in place to provide public and media access to the courts and their records. Some note that videos in the courtroom would duplicate the existing materials available on audio or on paper, citing that the real decisionmaking process would still occur behind closed doors, where judges privately deliberate. Instead of video broadcasting, some suggest that greater judicial transparency may be achieved through alternative, or supplementary, policy measures, like live-streaming audio of the court's proceedings on the internet, releasing same-day audio recordings for all cases, or allowing journalists to bring tablets or laptops into the courtroom to file reports in real time.[97]

Others contend that video, as a medium, is able to distribute information in a way that other formats cannot and that there is a substantial, unique benefit from seeing and hearing the proceedings via video footage.[98] Video, for example, shows body language and visual cues that other formats cannot. Since observers can see the speakers in video, it may be easier for them to

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[93] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584 (Washington: GPO, 2012), p. 12.

[94] Molly Treadway Johnson and Carol Krafka, Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals, Federal Judicial Center, Washington, DC, 1994, p. 24, at http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf; U.S. Congress, Senate Committee on the Judiciary, Cameras in the Courtroom, 109th Cong., 1st sess., November 9, 2005, S. Hrg. 109-331 (Washington: GPO, 2006), pp. 3, 5, 7, 21, 24; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, Access to the Court: Televising the Supreme Court, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584 (Washington: GPO, 2012), pp. 2, 7-9; Lisa T. McElroy, "Cameras at the Supreme Court: A Rhetorical Analysis," Brigham Young University Law Review, vol. 2012, no. 6 (December 2012), pp. 1837, 1869.

[95] U.S. Congress, Senate Committee on the Judiciary, *Cameras in the Courtroom*, 109th Cong., 1st sess., November 9, 2005, S. Hrg. 109-331 (Washington: GPO, 2006), pp. 1, 5; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584 (Washington: GPO, 2012), p. 23.

[96] For a discussion of "transparency as visibility" alongside alternative conceptualizations of government transparency, see Jonathan R. Bruno, "The Weakness of the Case for Cameras in the United States Supreme Court," *Creighton Law Review*, vol. 48, no. 2 (March 2015), pp.182-186, 196.

[97] RonNell Andersen Jones, "U.S. Supreme Court Justices and Press Access," *Brigham Young University Law Review*, vol. 2012, no. 4 (2012), pp. 1791-1818; Mary-Rose Papandrea, "Moving Beyond Cameras in the Courtroom: Technology, the Media, and the Supreme Court," *Brigham Young University Law Review*, vol. 2012, no. 4 (2012), pp. 1901-1952; Nancy S. Marder, "The Conundrum of Cameras in the Courtroom," *Arizona State Law Journal*, vol. 44, no. 4 (Winter 2012), pp. 1567-1568; Michael McGough, "Making Us Wait to Listen to Supreme Court Arguments," *Los Angeles Times*, March 18, 2015, at http://www.latimes.com/opinion/opinion-la/la-ol-supreme-court-audio-gay-marriage-20150318-story.html.

[98] U.S. Congress, Senate Committee on the Judiciary, Cameras in the Courtroom, 109th Cong., 1st sess., November 9, 2005, S. Hrg. 109-331 (Washington: GPO, 2006), p. 6.

identify whether it is the judge, the attorney, the defendant, or another person in the courtroom who is speaking. Video can visually inform the audience about what is occurring during breaks or pauses in the proceedings, which could help educate the public about the judicial process.[99] On the other hand, some argue that even the best courtroom coverage would still be an incomplete picture of the judicial process, as it would not capture the reading, deliberation, and conference meetings that may influence judges' decisionmaking.[100]

Administering Trials

Discussions before Congress have also raised the argument that increasing public or media access through video broadcasting might hurt the ability of the accused to receive a fair trial.[101] Typically, these concerns fall into three categories. First, there are concerns that cameras and/or other reporting equipment may be disruptive to the courtroom. Second, there is an expectation of privacy for various participants and processes in a courtroom that cameras may breach. Finally, there are concerns that, for better or worse, cameras may affect how cases are argued and/or decided. Video broadcasting legislation, in this view, may be problematic if the legislation does not provide sufficient procedural protections for courtroom participants and proceedings.

Disruptive Nature of Cameras and Media Equipment

Historically, video and photographic cameras were bulky, sometimes noisy, and could create an interruption and distraction in the courtroom.[102] Technological advancements, however, have made cameras increasingly discreet. By the early 1980s, video cameras were unobtrusive enough that they were successfully used by some state courts.[103] Now, even handheld smartphones can record and transmit high-definition videos and these types of devices have become so unobtrusive that, on a few recent occasions, they have secretly been brought into and used in the Supreme Court.[104]

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[99] For more on video as a medium, see Sonja R. West, "The Monster in the Courtroom," *Brigham Young University Law Review*, vol. 2012, no. 6 (December 2012), pp. 1953-1988.

[100] U.S. Congress, House Committee on Appropriations, Subcommittee on Financial Services and General Government, *Financial Services and General Government Appropriations for 2011*, Part 6, 111th Cong., 2nd sess., April 15, 2010 (Washington: GPO, 2010), p. 93; Nancy S. Marder, "The Conundrum of Cameras in the Courtroom," *Arizona State Law Journal*, vol. 44, no. 4 (Winter 2012), p. 1494; C-SPAN, "Behind the Scenes at the Supreme Court," interview with Justice Elena Kagan at University of Alabama Law School, October 4, 2013, at http://www.c-span.org/video/?c4502470/decision-making-1; CBS/AP, "Clarence Thomas Asks Questions in Court for 1st Time in 10 Years," *CBS News*, February 29, 2016, at http://www.cbsnews.com/news/clarence-thomas-asks-questions-supreme-court-argument-1st-time-in-10-years/.

[101] U.S. Congress, Senate Committee on the Judiciary, *Cameras in the Courtroom*, 109th Cong., 1st sess., November 9, 2005, S. Hrg. 109-331 (Washington: GPO, 2006), pp. 9, 14-16; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S. Hrg. 112-584 (Washington: GPO, 2012), p. 3; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Courts, Intellectual Property, and the Internet, *Sunshine in the Courtroom Act of 2013*, 113th Cong., 2nd sess., December 3, 2014, S. Hrg. 113-121, p. 113.

[102] Daniel G. MacLeod, "Fair Trial and Free Press—The Sheppard Case," *Massachusetts Law Quarterly*, vol. 51, no. 2 (June 1966), pp. 130-133. Joseph A. Boyd Jr., "Cameras in Court: *Estes v. Texas* and Florida's One Year Pilot Program," *University of Miami Law Review*, vol. 32 (1977-1978), pp. 815-838.

[103] Gregory B. Smith, "They Televise Trials Don't They: Chandler v. Florida Allows Cameras in the Courtroom," *Southern University Law Review*, vol. 8, no. 2 (1981-1982), pp. 327-334.

[104] Unauthorized videos of oral arguments posted to a YouTube channel since February 2014 show brief, partial proceedings of four separate days of Court oral arguments. Although it is not known what type of device was used to make these videos, given the Court's ban on cameras, the device(s) were small enough to be sneaked into the

Although clunky cameras may no longer be physically disruptive to the courtroom, there are other ways video cameras may interfere with court proceedings. Today, for example, the number of people with cameras could be a problem and distraction if anyone, and not just credentialed members of the press, is allowed to film proceedings. Administering cameras in the courtrooms may create additional work for judges or court staff that detracts from their other responsibilities. Review of applications from news outlets, if cameras are only authorized on a case-by-case basis, could be time-consuming. Video policies that enable participants to object to coverage, which is a common mechanism used to help ensure procedural fairness, creates extra paperwork and meetings for the presiding judge or panel charged with adjudicating these appeals. Even if cameras are stationary in the courtroom and activate on a motion or voice sensor, someone (usually a presiding judge) must constantly monitor what is captured by the camera and prevent bench conversations, juries, or protected witnesses from being filmed.

Privacy Issues

A second category of concerns regarding the administration of trials involves ensuring proper privacy protections for courtroom participants and particular elements of the proceedings. Many of the privacy concerns are more applicable to the trial court level and especially for criminal cases.[105] Existing policies adopted by the Judicial Conference and several states reflect these considerations by having expanded use of cameras in appellate proceedings and restricted use of cameras, or a prohibition on them altogether, in initial civil or criminal proceedings.[106] Although privacy concerns may simply reflect personal preferences of courtroom participants to retain their anonymity, others argue there are reasons why increased public exposure of these individuals could impede procedural fairness.

Maintaining privacy protections for jurors if cameras are introduced to the courtroom is an important and long-standing consideration. Since 1956, "recording, listening to, or observing proceedings of grand or petit juries while deliberating or voting" has been prohibited by law in federal courts.[107] In recent years, courts at all levels and state legislatures have increasingly enacted measures to keep the identities of jurors and their trial-related activities private.[108] If jurors' identities are known in high-stakes cases, there are fears that outside pressure—financial bribes or violent threats—may prevent them from considering case facts fairly and objectively.[109] Even less direct coercion, in the form of peer pressure or the added stress of interacting with reporters, may adversely affect jurors' impartiality. Courtrooms often use measures like gag

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courtroom and utilized without detection. See also Nancy S. Marder, "The Conundrum of Cameras in the Courtroom," *Arizona State Law Journal*, vol. 44, no. 4 (Winter 2012), pp. 1506-1508; Bill Mears, "Supreme Court Secretly Recorded on Camera, *CNN*, February 27, 2014, at http://www.cnn.com/2014/02/27/politics/supreme-court-video/.

[105] Derek Green, "Live! Broadcasting High-Profile Appeals Reignites Cameras in the Courtroom Debate," *News Media & the Law*, vol. 35, no. 1 (Winter 2011), pp. 37-39.

[106] The special concerns surrounding due process in initial trials and in criminal trials are reflected in present federal and state court policies that ban or restrict cameras in the courtroom in these situations, like Rule 53 of the Federal Rules of Criminal Procedure. Although the state policies described might be outdated, the different treatment of video cameras in criminal versus civil proceedings is illustrated in Christo Lassiter, "An Annotative Descriptive Summary of State Statutes, Judicial Codes, Canons, and Court Rules Relating to Admissibility and Governance of Cameras in the Courtroom," *Journal of Criminal Law and Criminology*, vol. 86, no. 3 (Spring 1996), pp. 1019-1095.

[107] P.L. 94-919, August 2, 1956, 70 Stat. 935; 18 U.S.C. §1508.

[108] Steven D. Zansberg, "The Public's Right of Access to Juror Information Loses More Ground," *Communications Lawyer*, vol. 17 (Winter 2000), pp. 11-15.

[109] Ashley Gauthier, *Secret Justice: Anonymous Juries*, The Reporters Committee for Freedom of the Press, Arlington, VA, Fall 2000, at http://www.rcfp.org/rcfp/orders/docs/SJANONJURIES.pdf.

orders or sealed records about the jurors to insulate them from outside pressure while a case is pending, and many courtrooms with video cameras prohibit any filming of jurors as an additional protection.

Similarly, there are concerns that witnesses may feel intimidated, directly or indirectly, if their testimony is broadcast outside the courtroom.[110] Witnesses may be called upon to divulge sensitive personal information, and although their testimony is generally part of the public record, witnesses can maintain better anonymity when proceedings are not televised. The media spotlight and potential for public criticism may make witnesses reluctant to testify, or cause witnesses to focus on preserving their public image rather than focusing solely on their testimony.[111]

There are also concerns that judges and lawyers could lose their relative anonymity. Although they are public figures, many federal judges and even Supreme Court Justices are not widely recognized. Because judges and lawyers often make controversial decisions, or are considered responsible for unpopular verdicts, there are genuine concerns for the safety of these legal professionals.[112] This may also lead to greater expenses for courtroom security and protection from the U.S. Marshals Service.[113] Although these threats of violence exist regardless of whether proceedings are televised, limiting the amount of public exposure these individuals receive may help protect them.

A related concern is that the broadcast of an initial trial may turn the defendant into a well-known public figure. Having been "tried in the court of public opinion," this publicity could affect the ability of the defendant to receive a fair re-trial, appeal trial, or subsequent trials for other charges. Media exposure from the first trial could lead to prejudice for or against the defendant among prospective jurors or others involved with later proceedings.

In addition to affecting the privacy and anonymity of individuals associated with the case, there are ways in which video cameras might violate elements of confidentiality typically associated with judicial proceedings. For example, attorneys will often speak with their clients, or attorneys will approach the bench to converse privately with the judge. Although it may be possible for others to surmise the content of these discussions, they are not treated as part of the formal court record. It is a common concern that cameras in the courtroom may inadvertently pick up these traditionally private conversations and share them with unintended audiences. There may be

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[110] U.S. Congress, House Committee on the Judiciary, *Sunshine in the Courtroom Act of 2013*, hearing on H.R. 917, 113th Cong., 2nd sess., December 3, 2014, H. Hrg 113-121 (Washington: GPO, 2015), pp. 12, 27-28.

[111] One recent example of widespread and negative media coverage about a trial witness occurred during the George Zimmerman murder trial in 2013. See Justin Peters, "Rachel Jeantel Gets the Trayvon Martin Treatment," *Slate Crime*, June 28, 2013, at http://www.slate.com/blogs/crime/2013/06/28/ rachel_jeantel_witness_in_george_zimmerman_trial_gets_the_trayvon_martin.html.

[112] Threats and harassment against judges and lawyers are fairly common and have been increasing in recent years: according to the Department of Justice, these types of communications doubled from 592 in FY2003 to 1,278 in FY2008. Instances of actual violence are much less common, but there have been physical attacks and murders of judges due to their involvement in particular cases. See Office of the Inspector General, Evaluation and Inspections Division, *Review of the Protection of the Judiciary and the United States Attorneys*, U.S. Department of Justice, I-2010-002-R, Washington, DC, December 2009, at https://oig.justice.gov/reports/plus/e1002r.pdf; National Public Radio, "Life Under Death Threats: Dangers Faced By Judges, Prosecutors," *Talk of the Nation*, April 1, 2013, at http://www.npr.org/2013/04/01/175938445/the-dangers-facing-judges-and-prosecutors; U.S. Congress, House Committee on the Judiciary, *Sunshine in the Courtroom Act of 2013*, hearing on H.R. 917, 113th Cong., 2nd sess., December 3, 2014, H. Hrg 113-121 (Washington: GPO, 2015), p. 110.

[113] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Allowing Cameras and Electronic Media in the Courtroom*, 106th Cong., 2nd sess., September 6, 2000, S. Hrg. 106-1029 (Washington: GPO, 2001), pp. 5, 14-15.

concerns that a due process violation could occur if sharing these conversations affects the outcome of a trial and/or the relationship between the accused and the defense counsel.[114]

Generally, courts that allow cameras are mindful of these privacy concerns and have implemented measures to prevent many issues from becoming problematic.[115] Some state courts prohibit any coverage of criminal or initial trials. Other policies require obscuring witnesses' identities, or notifying witnesses that they have the right to obscure their identities or opt out of video recording. Categorical exemptions sometimes prohibit filming of particular types of participants or cases.[116] Others authorize the presiding judge to block filming on a case-by-case basis when privacy concerns are presented. Some courts require consent from all participants before filming of proceedings is authorized.

Effects on Courtroom Behavior: How Cases are Argued/Decided

Providing a defendant a fair trial requires adherence to objective legal and procedural standards, with the assumption that keeping this protocol will result in a fair verdict, grounded in factual evidence, and in keeping with the law. As a result of the concerns addressed above, some believe that adding cameras to the courtroom might change the way in which cases are argued and decided. Some of these changes may not seem to impact proceedings or outcomes, but any deviation from these standard judicial norms might lead to charges of procedural unfairness.[117]

The concern that video recording may alter participants' behavior has existed since the earliest days of newsreel cameras in the courtroom. Some maintain that, even if cameras are inconspicuous and people are increasingly accustomed to being recorded, the simple knowledge of being watched or filmed may lead to behavior changes that can be difficult to pinpoint.[118] Cameras may, for example, cause witnesses to act nervous, and judges or juries may misinterpret their behavior as a signal that they are not being truthful. At a 2014 hearing, Representative John Conyers noted that "experience teaches that there are numerous situations in which [cameras in

[114] Ronald F. Loewen, "Cameras in the Courtroom: A Reconsideration," *Washburn Law Journal*, vol. 17, no. 3 (Spring 1978), p. 509; U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Allowing Cameras and Electronic Media in the Courtroom*, 106th Cong., 2nd sess., September 6, 2000, S. Hrg. 106-1029 (Washington: GPO, 2001), p. 4.

[115] For an overview of policies across states, see National Center for State Courts, "Media Relations: State Links," at http://www.ncsc.org/Topics/Media/Media-Relations/State-Links.aspx?cat=Cameras%20in%20the%20Courtroom; Kathy Kirby and Kat Scott, "Cameras in the Court: A State-By-State Guide," Radio Television Digital News Association (2012), at http://rtdna.org/article/cameras_in_the_court_a_state_by_state_guide_updated.

[116] These exclusions might apply to cases involving juveniles, domestic abuse, or sexual assault. See, for example, Susan-Elizabeth Littlefield, "Cameras Flick on in Minnesota's Criminal Courtrooms," *CBS Minnesota*, November 10, 2015, at http://minnesota.cbslocal.com/2015/11/10/cameras-flick-on-in-minnesota-courtrooms/.

[117] Identifying, defending, or refuting these effects can be difficult for political scientists and others: "Nearly everyone ... thinks cameras have the potential to change a proceeding, if only subtly.... But the larger half of the question—do cameras change a proceeding *for the worse?*—is the part that 'exhausts' scholars and analysts." Marjorie Cohn and David Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* (Jefferson, NC: McFarland & Company, Inc., 1998), p. 62.

[118] In describing the limitations of a survey related to its 1991-1994 camera pilot program, the FJC cautioned that it was unable to "include measure of the *actual* (as opposed to *perceived*) effects of electronic media on jurors, witnesses, counsel, and judges." To measure actual effects, the FJC would have needed to compare two similar groups of cases: one group where cameras were present (a treatment group) and one where there were no cameras (a control group). It is difficult to find these types of comparable cases and to rule out other factors, besides the presence of cameras, which might also explain the different outcomes of the two groups. See Molly Treadway Johnson and Carol Krafka, *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals*, Federal Judicial Center, Washington, DC, 1994, p. 8, at http://www.fjc.gov/public/pdf.nsf/lookup/elecmediacov.pdf/$file/elecmediacov.pdf.

the courtroom] might cause actual unfairness, some so subtle as to defy detection by the accused or controlled by the judge."[119] Policies requiring notification of or consent from all parties being filmed may also lead to an observer effect, by increasing awareness of the otherwise discreet video cameras.

The traditional conceptualization of judicial decisionmaking assumes that individual case facts, the letter of the law, and past case precedents should be the guiding factors in a judicial decision.[120] Scholars today typically acknowledge that a variety of other factors may influence judicial decisionmaking.[121] Public opinion has always been among these other influences, yet televised judicial proceedings leads to concerns that too much weight will be placed on public opinion and the courts will lose their ability to be neutral arbiters of the law. [122]

If the audience outside the courtroom becomes more consequential, lawyers, judges, and other courtroom actors might change how they act in court. Similar concerns were raised when television cameras were introduced in Congress, alleging that congressional behavior would be affected in a number of ways, including increased grandstanding and a tendency of Members to talk more directly to the public, rather than to their colleagues.[123] Yet since members of the federal judiciary are not elected officials, and therefore understand their relationship to the public differently than Members of Congress, it may be less likely that marked behavior changes would occur among judges in front of the camera.

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[119] U.S. Congress, House Committee on the Judiciary, *Sunshine in the Courtroom Act of 2013*, hearing on H.R. 917, 113th Cong., 2nd sess., December 3, 2014, H. Hrg 113-121 (Washington: GPO, 2015), p. 12.

[120] Edward Levi, *An Introduction to Legal Reasoning* (Chicago, IL: University of Chicago Press, 1949); Walter F. Murphy, *Elements of Judicial Strategy* (Chicago, IL: University of Chicago Press, 1964); Jeffrey A. Segal, "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1984," *American Political Science Review*, vol. 78, no. 4 (December 1984), pp. 891-900.

[121] Tracey E. George and Lee Epstein, "On the Nature of Supreme Court Decision Making," *American Political Science Review*, vol. 86, no. 2 (June 1992), pp. 323-337; Forrest Maltzman, James F. Spriggs II, and Paul J. Wahlbeck, *Crafting Law on the Supreme Court* (New York, NY: Cambridge University Press, 2000), pp. 10-16.

[122] Compared to other, elected branches of government, scholars have historically noted that the Supreme Court is relatively insulated from public opinion. See, for example, Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven, CT: Yale University Press, 1962); Jeremy Waldron, "The Core of the Case Against Judicial Review," *Yale Law Journal*, vol. 115, no. 6 (April 2006), pp. 1364-1406. Yet although scholars may disagree about the extent of when, why, and how the Supreme Court shows responsiveness to public opinion, many have written in defense of the general concept. For a few examples, see William Mishler and Reginald S. Sheehan, "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions," *American Political Science Review*, vol. 87, no. 1 (January 1993), pp. 87-101; James A. Stimson, Michael B. Mackuen, and Robert S. Erikson, "Dynamic Representation," *American Political Science Review*, vol. 89, no. 3 (September 1995), pp. 543-565; Kevin T. McGuire and James A. Stimson, "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences," *Journal of Politics*, vol. 66, no. 4 (October 2004), pp. 1018-1035; Christopher J. Casillas, Peter K. Enns, and Patrick C. Wohlfarth, "How Public Opinion Constrains the U.S. Supreme Court," *American Journal of Political Science*, vol. 55, no. 1 (January 2011), pp. 74-88.

[123] In attempts to quantify these behavior changes, political scientists have examined changes in House and Senate procedures, noting, among other things, that since the introduction of C-SPAN and C-SPAN 2, House sessions have been longer, and included more One-Minute Speeches and Special Orders Speeches and Senate sessions have included more filibusters. See Ronald Garay, *Congressional Television: A Legislative History* (Westport, CT: Greenwood, 1984), pp. 137-140; Timothy E. Cook, *Making Laws and Making News: Media Strategies in the U.S. House of Representatives* (Washington, DC: Brookings Institution, 1989); Franklin G. Mixon Jr., David L. Hobson, and Kamal P. Upadhyaya, "Gavel-to-Gavel Congressional Television Coverage as Political Advertising: The Impact of C-SPAN on Legislative Sessions," *Economic Inquiry*, vol. 39, no. 3 (July 2001), pp. 351-364; Franklin G. Mixon Jr., M. Troy Gibson, and Kalam P. Upadhyaya, "Has Legislative Television Changed Legislative Behavior?: C-SPAN2 and the Frequency of Senate Filibustering," *Public Choice*, vol. 115, no. 1/2 (April 2003), pp. 139-162.

Others suggest that cameras may change behavior in court for the better, as the public exposure they bring might improve judicial accountability.[124] If lawyers know they are being watched by a broader audience, they may come to court better prepared for their arguments. All actors may act with greater courtesy and professionalism to each other, out of the interest of maintaining judicial legitimacy and authority.[125]

Recent Congressional Activity

In the modern history of Congress, there have been a number of legislative attempts to allow or require video cameras in federal courtrooms. This section provides an overview of congressional activity and bills that have been introduced to date in the 116th Congress, as well as information on bills that were introduced during recent Congresses related to video cameras in the federal courts. To provide a summary of activity from the most recently completed Congress, **Table 1** provides a side-by-side comparison of the four legislative proposals that were introduced in the 115th Congress. Many of the legislative initiatives discussed in this section are identical or substantively similar to bills introduced in previous Congresses—when applicable, comparisons will be made between various versions of bills (introduced since the 110th Congress). This section will be updated periodically to reflect additional legislative developments.

Two stand-alone bills addressing video broadcasting from the federal courts have been introduced in the 116th Congress to date. The Cameras in the Courtroom Act (S. 822) would require the Supreme Court to broadcast its proceedings, and the Sunshine in the Courtroom Act (S. 770) would authorize broadcasting from the federal circuit and district courts. More detailed summaries of these bills can be found in the sections below. Language encouraging broadcasting from the Supreme Court was also contained in the House Appropriations Committee report to accompany the FY2020 Financial Services and General Government Appropriations bill.[126]

Cameras in the Courtroom Act (S. 822)

The Cameras in the Courtroom Act (S. 822) was introduced in the Senate on March 14, 2019. This bill would amend 28 U.S.C. ch. 24, adding Section 678 titled "Televising Supreme Court Proceedings." Under the bill's provisions, the Supreme Court "shall permit television coverage of all open sessions of the Court." Television coverage could be blocked if a majority vote of the Supreme Court Justices decided that "such coverage in a particular case would constitute a violation of the due process rights of one or more of the parties before the Court." The Cameras in the Courtroom Act does not address cameras in the federal circuit or district courts.

Substantively identical versions of the Cameras in the Courtroom Act were introduced in both chambers during the 110th to 115th Congresses.[127] During the 112th Congress, the Senate Judiciary

[124] Talbot D'Alemberte, "The Case for an Open Judicial System," *Judicature*, vol. 58, no. 2 (August/September 1974), pp. 64-65; Joel Hirschhorn, "Cameras in the Courtroom? No," *The Barrister*, vol. 7, no. 1 (Winter 1980), p. 8. Alex Kozinski and Robert Johnson, "Of Cameras and Courtrooms," *Fordham Intellectual Property, Media and Entertainment Law Journal*, vol. 20, no. 4 (2010), pp. 1113-1114.

[125] Kenneth N. Flaxman, "Will It Make My Job Easier, Or What's in it for Me?" *Michigan Law Review First Impressions*, vol. 106, no. 1 (2015), p. 17.

[126] U.S. Congress, House Committee on Appropriations, *Financial Services and General Government Appropriations Bill, 2020*, report to accompany H.R. 3351, 116th Cong., 1st sess., June 19, 2019, H.Rept. 116-122 (Washington: GPO, 2019), p. 39.

[127] In the 115th Congress, see H.R. 464 and S. 649; 114th Congress, see H.R. 94 and S. 780; 113th Congress, see H.R. 96 and S. 1207; 112th Congress, see H.R. 3572 and S. 1945; 111th Congress, see H.R. 429 and S. 446; and 110th Congress,

Committee also held a hearing related to the bill titled, "Access to the Court: Televising the Supreme Court."[128]

Sunshine in the Courtroom Act (S. 770)

The Sunshine in the Courtroom Act was introduced in the Senate (S. 770) on March 13, 2019. This bill addresses only the federal circuit and district courts, and its provisions applying to district courts would expire after three years. Under its requirements, a presiding judge could, at his or her discretion, "permit the photographing, electronic recording, broadcasting, or televising to the public of any court proceeding over which that judge presides." The Judicial Conference would be able to issue guidelines to assist with the management and administration of these provisions, and the presiding judge would be able to issue further rules and disciplinary actions related to media use in his or her courtroom.

Under the Sunshine in the Courtroom Act, jurors may not be subjected to media coverage during jury selection or during the trial itself. Furthermore, presiding judges would be directed to prohibit filming or broadcasting if the judge (or a majority vote of the participating judges on a panel) determined that "the action would constitute a violation of the due process rights of any party." Broadcasts of conferences between attorneys and clients, between attorneys and judges, or among attorneys would not be permitted. The bill would direct the Judicial Conference to create guidelines for obscuring the identities of certain vulnerable witnesses. District courts also would be required to disguise the face and identity of any witness, if requested by the witness, and inform all witnesses of their right to remain anonymous. The Sunshine in the Courtroom Act has been introduced in each previous session of Congress, dating back to the 110th Congress, though versions of the bill have differed with respect to whether or not they included provisions limiting the duration of the bill's provisions.[129]

see H.R. 1299 and S. 344. Before the 112th Congress, the bill was referred to by only its official title ("A bill to permit the televising of Supreme Court proceedings"). The short title, Cameras in the Courtroom Act, was added in the 112th Congress.

[128] U.S. Congress, Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Access to the Court: Televising the Supreme Court*, 112th Cong., 1st sess., December 6, 2011, S.Hrg. 112-584 (Washington: GPO, 2011).

[129] For the Sunshine in the Courtroom Act in the 115th Congress, see S. 643; 114th Congress, see H.R. 917 and S. 783; 113th Congress, see H.R. 917 and S. 405; 112th Congress, see H.R. 5163 and S. 410; 111th Congress, see H.R. 3054 and S. 657; 110th Congress, see H.R. 2128 and S. 352 (also S.Rept. 110-448).

Table 1. Comparison of Legislation in the 115th Congress to Allow Video Broadcasting of Federal Court Proceedings

	H.R. 464	S. 649	S. 643	H.R. 4504	H.R. 1025
Provisions	**Cameras in the Courtroom Act**		**Sunshine in the Courtroom Act**	**Transparency in Government Act**	**Eyes on the Courts Act**
Courts Covered	Supreme Court		Federal Circuit and Federal District Courts	Supreme Court (and other federal agencies)	Supreme Court and Federal Circuit Courts
Authorizes or Requires Coverage	Requires		Authorizes	Requires	Requires
Type of Media Coverage	Television		Photographing, electronic recording, broadcasting, or televising	Television; simultaneous posting of audio recordings on the internet	Photographing, electronic recording, broadcasting, televising, or streaming on the internet
Oversight/Guidelines	Not specified		Judicial Conference; presiding judge	Not specified for television; Chief Justice for audio recordings	Judicial Conference; presiding judge
Due Process Protections	Majority vote of Justices to opt out for due process concerns		Majority vote of judges on panel for due process or safety concerns; prohibits coverage of jurors, or attorneys' conferences	Majority vote of Justices to opt out for due process concerns	Presiding judge can opt out for due process concerns
Committee(s) of Referral	House Judiciary	Senate Judiciary	Senate Judiciary	Oversight and Government Reform; Rules; House Administration; House Judiciary; Ethics; Ways and Means; Financial Services	House Judiciary
Legislative Actions and Status	Referred to Subcommittee on Courts, Intellectual Property and the Internet (2/6/17)	Referred to the Committee on the Judiciary (3/15/17)	Referred to the Committee on the Judiciary (3/15/17)	Referred to House Oversight and Government Reform; Rules; House Administration, Judiciary; Ethics; Ways and Means; and Financial Services (11/30/17)	Referred to House Judiciary Committee, Subcommittee on Courts, Intellectual Property, and the Internet (3/2/17)
Introduced Previously	Yes		Yes	Yes	No

Source: CRS compilation of current legislative information available at http://www.congress.gov, as of October 24, 2019.

Transparency in Government Act

The Transparency in Government Act was introduced during the 113th-115th Congresses.[130] This bill would have addressed televising Supreme Court proceedings and expanding access to its audio recordings, among other provisions related to open government. Its scope was broader than that of many of the other bills introduced during recent Congresses addressing cameras in the federal courts. The Transparency in Government Act contained additional changes for the federal judiciary as well as ethics and transparency initiatives for other parts of the federal government.

Regarding televising of the Supreme Court, Section 801 of the Transparency in Government Act included provisions that are identical to the Cameras in the Courtroom Act, stating that the Court "shall permit television coverage of all open sessions" unless a majority vote decides against it to ensure due process for the parties before the Court. It does not mention broadcasting video on the internet, but in Section 802, the Transparency in Government Act also would have required the Chief Justice to "ensure that the audio of an oral argument before the Supreme Court of the United States is recorded and is made publicly available on the Internet website of the Supreme Court at the same time that it is recorded."

The version of the Transparency and Government Act introduced in the 113th Congress (H.R. 4245) contained the same Section 802 requirement of posting same-day oral argument audio recordings to the Court's website as later versions of the bill, but had a different provision regarding televised proceedings. Instead of introducing television directly, Section 801 in the Transparency in Government Act of 2014 would have directed the Government Accountability Office (GAO) to conduct a study to assess the effects that cameras during oral arguments would have "on costs, and on the atmosphere of such arguments."

Eyes on the Courts Act

The Eyes on the Courts Act was introduced in the House during the 115th Congress (H.R. 1025) and also in the 114th Congress (H.R. 3723). Unlike some other bills, which either address the Supreme Court or the federal circuit and district courts together, the Eyes on the Courts Act would have addressed all federal appellate courts, meaning the Supreme Court and the U.S. circuit courts. The bill's provisions note that the Judiciary Conference would have provided implementation guidelines, supplemented by rules or disciplinary actions set forth by the presiding judge.

Under the Eyes on the Courts Act, the presiding judge would have been directed to "permit the photographing, electronic recording, broadcasting, televising, or streaming in real time or near-real time on the Internet of that proceeding to or for the public." Like other bills, it would have allowed the presiding judge to make an exception for a participant if it was believed that these activities would violate his or her due process rights. This bill also would have allowed the presiding judge to opt out if these activities were "otherwise not in the interests of justice." A judge would have been required to issue any exemption in writing at least 72 hours before the start of the proceedings.

[130] For the Transparency in Government Act in the 115th Congress, see H.R. 4504; 114th Congress, see H.R. 1381; 113th Congress, see H.R. 4245.

Complementary Policy Measures

Legislation intended to expand video broadcasting in the federal courts can reflect a number of legislative goals, including greater judicial transparency, public education about the courts, improved public access to proceedings, or expanded media access to the courts. As the debate surrounding cameras in the courtroom continues almost 100 years after it began, it is important to consider what underlying goals these policy measures are intended to achieve. Policymakers may want to consider whether there are complementary measures that could achieve similar goals through other means.

Historically, the issue of cameras in the courtroom has been framed as a matter of expanding media access to the courts. In the era before electronic broadcasting, the press served as an indispensable intermediary between the public and the courts. Unless citizens could personally witness trial proceedings, they had to rely upon the reports and accounts that were created by the media. If journalists are still viewed as critical intermediaries, and one of the goals of adding cameras to the courtroom is to improve journalists' ability to cover its proceedings, there may be other policy measures that might help fulfill this objective.

At the Supreme Court level, for example, other measures could improve the Court's communications with journalists. The Court could revise its press credentialing requirements to include more internet-based news outlets,[131] use email or social media to announce decisions, distribute email copies of opinions to members of the press corps, allow reporters to use tablets or smartphones for note-taking, or provide wireless internet in the courthouse (if not the courtroom).[132] These initiatives may help fulfill the goal of improved media access to the Supreme Court and other federal courts, without the possible downsides associated with introducing cameras to the chambers.

The public still learns about major events from the media, but the internet has fostered a growing expectation that more complete information about a story or an event will be readily available online. Primary source documents and raw video footage of political proceedings or newsworthy events are commonly available on the internet, contributing to the sense that information about today's current events does not have to be mediated by the press. Thus, the contemporary cameras-in-the-courtroom debate today may be framed in part as a means to improve direct public access to information about court proceedings. This objective could be fulfilled by improvements to existing forms of public information, like introducing same-day audio recording releases or live-streamed audio from the Supreme Court. Other suggested measures, like

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[131] Scott E. Gant, *We're All Journalists Now: The Transformation of the Press and the Reshaping of Law in the Internet Age* (New York: Free Press, 2007), pp. 109-113; Rosemary Lane, "In the Age of New Media, Who Counts as a Journalist?," *News Media & The Law*, vol. 35, no. 1 (Winter 2011), p. 27; Tom Goldstein, "The Walls Erected by Traditional Media," *SCOTUSblog*, June 23, 2014, at http://www.scotusblog.com/2014/06/the-walls-erected-by-traditional-media/; Debra Cassens Weiss, "SCOTUSblog Can't Get Supreme Court Press Credentials Under New Policy," *ABA Journal*, February 10, 2015, at http://www.abajournal.com/news/article/scotusblog_cant_get_supreme_court_press_credentials_under_new_policy_what_a/; Erik Wemple, "SCOTUSblog Gets Day Pass for Pivotal Supreme Court Hearing," *Washington Post*, March 4, 2015, at https://www.washingtonpost.com/blogs/erik-wemple/wp/2015/03/04/scotusblog-gets-day-pass-for-pivotal-supreme-court-hearing/.

[132] Debra Cassens Weiss, "Capital Murder Trial Chronicled Via Twitter," *ABA Journal*, June 15, 2008, at http://www.abajournal.com/news/article/reporter_covers_murder_trial_on_twitter/.

Richard M. Goehler, Monica L. Dias, and David Bralow, "The Legal Case for Twitter in the Courtroom," *Communications Lawyer*, vol. 27 (April 2010), pp. 14-17; Derrick Nunnally, "No Tweeting in the Court?," *Philadelphia Inquirer*, June 27, 2010, at http://articles.philly.com/2010-06-27/news/24965352_1_justice-ronald-d-castille-trials-social-networking.

providing closed-circuit cameras to broadcast exclusively to a larger venue outside the courtroom, could still face some of the potential challenges that policies to televise or broadcast proceedings more broadly face.

Because records of proceedings are available and the courtrooms are not closed to the public or the press, it can be argued that the courts may already meet a sufficient standard of transparency and access, and legislative action may not be necessary. Lack of congressional action would not preclude the federal judiciary from setting its own policies that could expand the use of cameras in the courtroom. Recent actions taken by the courts, such as the Supreme Court's measures to improve the timely release of audio recordings and the Judicial Conference's 2011-2015 pilot program on cameras in the courtroom, may suggest that the courts themselves may be inclined to take measures to improve access to their proceedings.

Concluding Observations

International, state, and local courts have expanded the use of video cameras to record and/or broadcast their proceedings over the last 20 years, and the federal judiciary has experimented with video cameras in the federal circuit and district courts as well. Where cameras are permitted in courtrooms, many safeguards have been implemented to try to maintain judicial integrity and the rights of courtroom participants. In many courtrooms where cameras operate today, they typically do so without notable opposition or legal challenge. Proponents argue that these measures help improve transparency and accountability in the courts, better meet the needs of modern journalists, and improve public access to information about the courts.

During the same time period, legislative attempts to expand the use of video cameras in the federal courts have frequently been introduced but have not been enacted. Even as video technology has changed and become more commonplace, fundamental concerns persist about potentially negative effects of video cameras in the courtroom. Although many bills include provisions to help alleviate these concerns, the important role that the judiciary plays in American society leads some to approach any changes in this area with caution. Since many of the debates on cameras in the courtroom center around differing constitutional interpretations, some maintain that Congress should defer to the judiciary's position on these questions.

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