Cameras in our federal courts—the time has come

Summary

In today's world, where television and the internet occupy such central places in peoples' lives, the most effective means of affording public access is by permitting cameras in our courtrooms.
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The debate regarding cameras in the federal courts is again in the news. The Ninth Circuit Judicial Council recently issued a news release stating that it "ha[d] approved, on an experimental basis, the limited use of cameras in federal district courts within the circuit." The vote was unanimous. Days later, a coalition of media companies requested permission from Chief Judge Vaughn Walker of the United States District Court for the Northern District of California to televise the non-jury trial of the action challenging the constitutionality of Proposition 8, which had amended California's constitution to ban same-sex marriages. Chief Judge Walker subsequently announced that a live audio and video feed of the trial would be streamed to several federal courthouses, and that the trial would also be taped and, upon approval by Chief Judge Alex Kozinski of the Ninth Circuit, broadcast over the internet. Chief Judge Kozinski approved the decision to allow real-time streaming of the trial to the specified federal courthouses, but did not act on the request to broadcast the trial on the internet because of unexpected technical difficulties.

The same day that Chief Judge Kozinski approved the live streaming, Third Circuit Chief Judge Anthony Scirica, who also chairs the Executive Committee of the Judicial Conference of the United States, and James Duff, Secretary of the Conference, wrote to Chief Judge Kozinski asking that he consider the Conference's policy against broadcast of any federal trial court proceeding. Chief Judge Kozinski responded that the pilot program had been approved after considerable research and deliberation. He also noted that technology and public attitudes had changed significantly since adoption by the Conference of the policy against broadcasts; that the public now demands much more transparency from its public institutions; and that, if the courts did not adopt a policy permitting some broadcasts, Congress would step in and do so.

At the same time, proponents of the same-sex marriage ban filed in the United States Supreme Court an application requesting that the Court stay the district court's order pending resolution of their soon-to-be-filed petitions seeking writs of certiorari and mandamus. Four days later the Supreme Court issued a

per curiam opinion granting the application for a stay because it appeared that neither the district court nor the Ninth Circuit had "follow[ed] the appropriate procedures set forth in federal law before changing their rules to allow . . . broadcasting."

Although many federal judges support cameras, the federal courts have long had a policy prohibiting broadcast of their proceedings. Electronic media coverage of criminal proceedings has been expressly prohibited since the adoption of Federal Rule of Criminal Procedure 53 in 1946. In 1994, following a three-year pilot program that tested the efficacy of electronic media coverage in selected district and circuit courts, the Judicial Conference's Court Administration and Case Management Committee recommended that the Conference authorize the photographing, recording, and broadcasting of civil proceedings in trial and appellate courts. However, the Conference concluded that the intimidating effect of cameras on some witnesses and jurors was cause for concern, and declined to approve the recommendation.

In 1996, the Conference urged each circuit council to adopt an order reflecting the Conference's 1994 decision not to permit still photography or radio or television coverage in district courts. It did, however, authorize each court of appeals to decide for itself whether to allow coverage of appellate arguments. To date, only the Second and Ninth Circuits have opted to allow cameras in their courtrooms.

The position of the Judicial Conference is based upon its conclusion that cameras in district court proceedings have the potential to undermine the right of citizens to a fair trial. There is also concern that allowing cameras could jeopardize court security generally, as well as the safety of trial participants; intimidate witnesses and jurors; infringe on privacy rights of participants in the proceedings; and cause participants to "play to the cameras." Finally, there is concern that camera coverage might be used as a negotiating tactic in pretrial settlement discussions, to discourage litigants from exercising their right to a trial.

The attitudes of the states regarding cameras in the courts stand in sharp contrast to that of the federal courts. While the degree of access covers a broad spectrum across the states, all 50 permit cameras and microphones in their courtrooms in some circumstances. Florida, which allows broad access, is worthy of further examination.

In response to a petition filed by a group of television stations in 1977, the Florida Supreme Court authorized a one-year pilot program in selected trial courts, during which the electronic media would be permitted to cover proceedings, subject to standards of conduct and technology adopted by the court. Following the conclusion of the pilot program, two surveys were conducted—one directed to jurors, witnesses, attorneys, and court personnel who had participated, and the other to participating judges. The results satisfied the court that most of the concerns now raised by the federal courts were, in fact, unfounded. While it acknowledged that the presence of cameras might conceivably prove problematic in certain cases, the court concluded that the potential problems could be averted by a carefully crafted procedural rule.

Noting that courts have a "significant effect on the day-to-day lives of the citizenry," the court found it "essential that the populace have confidence in the process, for public acceptance of judicial judgments and decisions is manifestly necessary to their observance," and that "public understanding of the judicial system, as opposed to suspicion, is imperative." The court concluded that, "on balance[,] there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage."

In the 30 years since that decision, cameras have become commonplace in Florida's trial and appellate courts. The presumption is in favor of allowing coverage in all types of cases. Cameras are now routinely installed in such a way as to make them inconspicuous, and most participants are not even aware of their presence. Florida has not experienced any of the problems that concern the critics, notwithstanding its share of high-profile cases, and the presence of cameras in Florida's courts allowed the world to view in real time the proceedings in the 2000 election cases. Florida has managed to accommodate both the rights of litigants and the rights of the public to see how the process works. And Florida is not alone.

The power and authority of the judiciary depend on public respect and support. Respect and support cannot reasonably be expected absent public understanding of, and involvement in, the process; and understanding of, and involvement in, the process cannot reasonably be expected without access. In today's world, where television and the internet occupy such central places in peoples' lives, the most effective means of affording public access is by permitting cameras in our courtrooms.

By making proceedings available for gavel-to-gavel broadcast on television or over the internet, we can educate the public about what actually goes on in our courts. We can let them see for themselves that, in fact, cases are routinely decided fairly and impartially, in accordance with the rule of law—that decisions are reached based on the facts and the applicable law, without regard to outside influences. Allowing such access can also improve the justice system. In a democracy, public institutions thrive when exposed to the sunshine. Such exposure assists in identifying and improving deficiencies and, thereby, in becoming even better.

The time has come for our federal courts to accept cameras. Some of the concerns expressed by the Judicial Conference may be valid, but that does not compel denial of access altogether. As in Florida and other states, procedural rules can be developed to address the legitimate concerns. Pilot programs can be developed to test whether the concerns can be adequately addressed. Failure to act will almost surely lead to the result predicted by Chief Judge Kozinski-Congress will step in with legislation mandating such access. (In fact, bills have been approved by both the House and Senate Judiciary Committees in recent years.) Such a mandate would be undesirable both because it would deprive the courts, as the group best qualified to devise such a plan, of the opportunity to do so, and it would cause an unnecessary confrontation between two coordinate branches of government over the scope of the separation of powers.

Overlying the issue of cameras in federal courtrooms is the dispute between Congress and the Supreme Court over televising Supreme Court hearings. This is an important, but separate, issue. The trial courts should not be a hostage in this debate.

We urge the federal judiciary to act on this important issue.