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Via Email and Fedex

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE, Room 7-300
Washington, DC 20544
RulesCommittee_Secretary@ao.uscourts.gov

Re: Revising Federal Rule of Criminal Procedure 53

Dear Secretary Byron:

One year ago, on behalf of a coalition of media organizations,[1] this firm wrote to request that the Judicial Conference revise Rule 53 of the Criminal Rules of Procedure to permit broadcasting of criminal proceedings or to at least create an "extraordinary case" exception to the prohibition on broadcasting. Our letter prompted the Standing Advisory Committee on Criminal Rules to create a Rule 53 Subcommittee to study the coalition's proposal. We understand that, since then, the Subcommittee twice met to discuss Rule 53, and on October 9, 2024, it addressed a four-page memorandum to the Standing Committee

[1] The media organizations are Advance Publications, Inc., American Broadcasting Companies, Inc. d/b/a ABC News, The Associated Press, Bloomberg L.P., Cable News Network, Inc., CBS Broadcasting, Inc., Dow Jones & Company, Inc., publisher of The Wall Street Journal, The E.W. Scripps Company (operator of Court TV), Los Angeles Times Communications LLC, National Association of Broadcasters, National Cable Satellite Corporation d/b/a C-SPAN, National Press Photographers Association, News/Media Alliance, The New York Times Company, POLITICO LLC, Radio Television Digital News Association, Society of Professional Journalists, TEGNA Inc., Univision Networks & Studios, Inc., and WP Company LLC d/b/a The Washington Post.

that "recommends no change in Rule 53 at the present time."[2] We now write to suggest that the Standing Committee ***reject*** the Subcommittee's recommendation and amend Rule 53 so that judges have discretion to permit cameras in courtrooms or, alternatively, to create an "extraordinary case" exception.

As a preliminary matter, we are concerned that the Subcommittee was comprised of only federal judges, a federal public defender, and a representative for the U.S. Department of Justice. Given that these Subcommittee members all work within the federal judicial system, none of them would seem to have any recent, significant, first-hand experience with cameras in courtrooms. Meanwhile, members of the coalition, and other members of the media, have extensive experience livestreaming and broadcasting state court proceedings, and state court judges and jurists around the country have overseen or participated in televised trials for decades. These individuals all could have addressed many of the concerns apparently raised during the Subcommittee's two meetings, yet, to our knowledge, no journalist was invited into those meetings, nor was a judge or jurist from any of the many states that permit cameras in courts. For that matter, no researcher who studies cameras in courts and who might have offered further insights into academic literature on the topic appears to have been invited, either.[3]

Moreover, members of the media—along with the general public—have an interest in maximizing courtroom transparency that is separate and distinct from that of judges and lawyers. For this reason, the Supreme Court has time and again recognized the press and public's right to be meaningfully heard on issues of court access, *see, e.g.*, *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982), and the composition of the Subcommittee ignores the spirit, if not the letter, of this long line of precedent. Indeed, in our experience, judges and trial lawyers are often aligned in their opposition to cameras (at least until they personally experience a televised trial), due to the perceived hassle or unwanted scrutiny audiovisual coverage may cause.[4] The Subcommittee's recommendation thus

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[2] *See* Meeting Agenda, Advisory Committee on Criminal Rules (October 9, 2024), Tab 2A, at 105-109, *available at* https://www.uscourts.gov/sites/default/files/2024-11_criminal_rules_meeting_agenda_book_final_10-24.pdf (hereinafter "Meeting Agenda").

[3] The coalition acknowledges that William Raftery at the National Center for State Courts apparently provided some information to the Subcommittee, as did individuals at the Federal Judicial Conference, though the Subcommittee's memorandum does not specify what information they provided or whether they joined the Subcommittee's discussions and offered any personal insights.

[4] While there may be administrative burdens to implementing cameras in courtrooms, transparency is a core feature of our courts and government, not a bug in the system. *See*,

suffers from its failure to consider the divergent viewpoints of obvious stakeholders. For this reason alone, we ask that you reject the Subcommittee's recommendation. In addition, we would appreciate the opportunity to appear before the Standing Committee, along with select journalists, judges, jurists, and academics, and address any questions it has before this conversation is brought to a close.

Moving to the substance of the Subcommittee's four-page memorandum, we ask that you reject it and the Subcommittee's ultimate recommendation for several reasons.

First, in rejecting the coalition's proposal, the Subcommittee seems to contemplate an exception-free amendment to Rule 53 in which cameras are constantly streaming and presiding judges have no authority to restrict when they are rolling or who they are trained upon. The Subcommittee then proceeds to address the perceived pitfalls of this strawman situation, pointing, for example, to the legitimate fears experienced by indigenous women who experience sexual assault. *This sort of amendment is not at all what the coalition proposes, nor is it how **any** state court rule on cameras in courts is fashioned*.[5] Rather, the coalition acknowledges that judges have inherent authority to manage their courtrooms and even to restrict camera coverage of certain proceedings or certain trial participants where the situation warrants. Indeed, even "[a] bank teller in a robbery case" would be entitled to have their interests in safety and privacy considered. In short, no one is asking for blanket *permission* to use cameras; the coalition is asking to abolish Rule 53's blanket *prohibition*.

Second, the Subcommittee's memorandum fails to recognize that many of the supposed "negative effect[s]" of cameras have actually been present in courtrooms since our nation's founding, due to its profound commitment, embodied in both the First and Sixth Amendments, to open criminal trials. The decision to value transparency over privacy

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e.g, *In re Associated Press*, 172 F. App'x 1, 5-6 (4th Cir. 2006) (acknowledging "[w]e do not doubt that the administrative burdens facing the district court are enormous," but granting a petition for writ and directing the trial court to ensure same-day release of trial exhibits shown in court in furtherance of First Amendment right to judicial records).

[5] *See Cameras In The Courts – A State-By-State Coverage Guide*, Radio Television Digital News Ass'n, https://courts.rtdna.org/cameras-overview.php. In Minnesota, for example, the recently modified rules "*prohibit* a district court judge from allowing visual and audio coverage if there is a substantial likelihood that coverage would expose any victim or witness who may testify at trial to harm, threats of harm, or intimidation." *See* Order Promulgating Amendments to the Gen. Rules of Practice for the Dist. Cts., *In re Rules of Crim. Proc.*, No. ADM10-8049 (Minn. Mar. 15, 2023), included in Meeting Agenda, Tab 2C, at 128-35 ("Minnesota Order").

involves some very real trade-offs, which the coalition discussed at length in its October 5 suggestion.[6] But to put a finer point on it, jurors and witness are potentially *already* afraid of gangs, whose members are free to sit in public courtrooms and watch proceedings unfold. Any open-court testimony of confidential informants is *already* public and subject to public discussion. The media *already* have access to photographs of jailhouse bookings and so-called "perp walks," photographs of judges and lawyers obtained from websites or other appearances outside the courthouse, body-camera footage and other images entered into evidence, names of witnesses, transcripts of their testimony, and a long list of other publicly available information. All of this is *already* subject to reporting by the media, and the Subcommittee has not explained how courtroom camera coverage would exacerbate the risks to trial participants.

Third, and related, is the Subcommittee's expressed concern that "it might be possible to capture the image of a person involved in a criminal case and create a narrative around it" and "[t]his might have very negative consequences for that person." The coalition does not understand this concern, which is actually just a description of journalism and its unavoidable consequences. Journalists, authors, and documentarians have for decades (perhaps centuries) been creating narratives around court proceedings, ranging from books such as *A Civil Action* and *The Innocent Man* to documentaries such as *Making a Murderer* to podcasts such as *Serial*. These publications indeed leave readers, viewers, and listeners with viewpoints on trial participants, but that is an unavoidable consequence of our national commitment to open trials, regardless of whether the publications incorporate courtroom footage. Moreover, such public debate over how trials are conducted and whether justice has been served is not only healthy but also is a hallmark of our democracy and should be encouraged, not stifled.

Indeed, given the technology available to content creators of wide-ranging ethical standards, it would be naïve to assume that banning cameras in courtrooms will somehow prevent recreations of courtroom scenes and discussion about the proceedings depicted. Already, artificial intelligence tools can create convincing courtroom scenes using existing public imagery and transcripts of testimony.[7] The coalition respectfully submits that the public is entitled to authentic audiovisual records, and that preventing access to legitimate

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[6] *See* Meeting Agenda, Tab 2B, at 123-35, https://www.uscourts.gov/sites/default/files/2024-11_criminal_rules_meeting_agenda_book_final_10-24.pdf.

[7] *See, e.g., Brown Revisited*, Oyez, https://brown.oyez.org/ ("Experience history like never before, reimagined with AI-generated voices. Dive into the heart of the courtroom, where technology meets the pivotal moments that shaped civil rights.")

recordings will exacerbate the spread of mis- and dis-information and the rise of potentially dangerous conspiracy theories.

Fourth, the coalition rejects the Subcommittee's claim that "there has been very little empirical research evaluating the effect of expanded remote public access." The coalition's October 5 suggestion cites many studies and anecdotes that *uniformly* conclude that cameras in the courtroom do not impact the fair administration of justice, and that participating judges and attorneys are in favor of video recording proceedings.[8]

Beyond these cited sources, the "empirical evidence" of the impact of cameras in courtrooms is found in more than four decades of judicial decisions in states such as Florida and Wisconsin, where the administration of criminal justice has proceeded apace with that of other states such as Minnesota, which only recently began to permit cameras at criminal trials. There is simply *no* evidence that states permitting cameras have a higher rate of mistrials or verdict reversals due to prejudicial publicity, reluctant witnesses, or intimidated jurors.

Indeed, empirical evidence is even available from federal courts themselves. Thirty years ago, Court TV Founder and CEO Steven Brill wrote to the Standing Committee expressing frustration at the Judicial Conference's decision to reject any attempt to amend Rule 53 following studies of a pilot program in civil proceedings, after which "the judges

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[8] *See, e.g.*, Molly T. Johnson, Carol Krafka, & Donna Stienstra, *Video Recording Courtroom Proceedings in United States District Courts: Report on a Pilot Project*, Fed. Jud. Ctr. (2016), *available at* https://www.fjc.gov/content/311380/video-recording-courtroom-proceedings-united-states-district-courts-report-pilot; Jordan M. Singer, *Judges on Demand: The Cognitive Case for Cameras in the Courtroom*, 115 Colum. L. Rev. Sidebar 79, 83 (2015), *available at* https://columbialawreview.org/content/judges-on-demand-the-cognitive-case-for-cameras-in-the-courtroom/; *In re Pet. of Post-Newsweek Stations, Fla., Inc.*, 370 So. 2d 768, 775 (Fla. 1979) (finding that, after a one-year experiment, concern that cameras in the courtroom would negatively affect lawyers, judges, witnesses or jurors was "unsupported by any evidence."). *See also An Open Courtroom: Cameras in N.Y. Cts. 1995-1997*, N.Y. State Comm. to Review Audio Visual Coverage of Ct. Proceedings (Fordham Univ. Press 1997); *Report of the Comm. on Audio-Visual Coverage of Ct. Proceedings* (State of N.Y. 1994); Ernest H. Short & Assocs., *Evaluation of Cal.'s Experiment with Extended Media Coverage of Cts.* (Sept. 1981), *Report of the Chief Admin. Judge to the Legislature, the Governor, and the Chief Judge of the State of N.Y. on the Effect of Audio-Visual Coverage on the Conduct of Jud. Proceedings* (Mar. 1989); Molly T. Johnson & Carol Krafka, *Electronic Media Coverage of Federal Civil Proceedings* at 7, Fed. Jud. Ctr. (1994), *available at* https://www.fjc.gov/sites/default/files/2012/elecmediacov.pdf.

threw out their own evidence; they asked for an experiment to see if cameras could be present without impeding the judicial process, but when their own evidence came in they simply threw it out."[9] More recently, the federal courts had an opportunity to see the impact of a small lift on the Rule 53 ban, when the CARES Act permitted them to provide audio access to criminal proceedings during the height of COVID-19. At that time, thousands of individuals from all over the country were being prosecuted in the U.S. District Court for the District of Columbia for their participation in the January 6 riot at the U.S. Capitol. Journalists and members of the public who were not able to attend because of COVID, and may have not been able to travel to Washington even if the courtrooms were open to the public, were able to listen in on telephonic lines and follow the prosecutions of people from their communities. We are unaware of any disruptions or due process concerns raised by this limited opening of proceedings to the public.

Moreover, it bears noting that, even though the Subcommittee found the empirical evidence that exists insufficient, it cites and relies on the Minnesota Supreme Court Advisory Committee's finding that "[m]ost of the data shows that very few negative impacts are realized when cameras are in the courtroom." It also bears noting that although the Subcommittee relies heavily on the Minnesota committee's report, it fails to explicitly acknowledge that the Minnesota Supreme Court essentially *rejected* those findings and recommendation and amended the Minnesota rules to grant judges broad discretion in permitting cameras in criminal trials. All that being said, if there is some additional, empirical research that the Standing Committee would like to see conducted, the coalition would welcome a discussion about how it might support that research and what methodology the Standing Committee might find acceptable in the absence of another pilot program under Rule 53 that would provide the best and clearest evidence of how cameras impact federal criminal proceedings.

Fifth, although the Subcommittee did not find four decades of state court experience instructive, it did find "especially helpful" a nearly quarter-century-old statement by Judge Edward Becker, who served exclusively on the federal bench and thus never presided over a

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[9] *See* Statement by Court TV Founder and CEO Steven Brill, Meeting Agenda, Advisory Committee on Criminal Rules (Oct. 6-7, 1994), at 103-04, *available at* https://www.uscourts.gov/sites/default/files/fr_import/CR1994-10.pdf. Through that program, Court TV alone "covered 36 federal cases," and "[a]fter each and every trial we also surveyed the judge involved and those judges told us that the camera experience had not in any way impeded the process of justice and had, according to them, enhanced the public's understanding of the justice system." *Id*.

televised trial.[10] Judge Becker's statement included passages from *Estes v. Texas*, 381 U.S. 532 (1965), "regarding the impact of publicity on the quality of witness testimony." While recognizing the precedential value of *Estes*, the coalition submits that a 60-year-old decision is largely a product of its time: In 1965, camera technology was big, loud, and manually operated, and "the activities of the television crews and news photographers led to considerable disruption of the hearings." *Id*. at 536. Now, though, technology is discrete and may be remotely operated, thus certain proceedings may be recorded or broadcast without intruding on the "judicial serenity and calm" of a courtroom to which the Court stated a criminal defendant is entitled. *Id*. Additionally, Justice Harlan had the foresight to observe that "the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process." *See id*. at 595 (Harlan, J., concurring). Indeed, the Court itself recognized, four decades ago, how dated the *Estes* principle already had become, retreating from its categorical disapproval of cameras in *Chandler v. Florida*, 449 U.S. 560 (1981), which recognizes that each trial judge is in the best position to determine case-by-case whether cameras are harmonious with fair-trial concerns. In 2024, we all have personal audiovisual devices in hand or in our pockets at all hours of the day, and in high-profile cases, such as one against a former president, we will all be absorbing information about the case on our handheld screens. In other words, the day that the justices anticipated has long since passed.

Finally, we are disappointed that, even though our October 5 suggestion was the impetus for the Subcommittee's formation and was called "very thoughtful," the Subcommittee failed to address its key idea: that certain trials—including the upcoming trial of former President Trump for conspiring to obstruct the certification of the 2020 presidential electoral vote on January 6, 2021, *see United States v. Donald J. Trump*, 23-cr-257-TSC (D.D.C.)—are of such significant public interest and concern that barring cameras threatens to undermine trust in our institutions and democracy itself. Even Defendant Trump has said his upcoming trial in Washington should be televised.[11] It appears that the

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[10] *See* Meeting Agenda, Advisory Committee on Criminal Rules (April 18, 2024), Tab 4, at 94-96, https://www.uscourts.gov/sites/default/files/2024-04_agenda_book_for_criminal_rules_meeting_final.pdf.

[11] *See* President Trump's Response to Media Coalition's Motion for Audiovisual, *United States v. Trump*, 23-mc-99-TSC (D.D.C.) (ECF No. 19) ("President Trump calls for sunlight. Every person in America, and beyond, should have the opportunity to study this case firsthand and watch as, if there is a trial, President Trump exonerates himself of these baseless and politically motivated charges."); *see also He did 'absolutely nothing wrong':*

Subcommittee did not discuss the value in ensuring maximum public access to similar cases of national interest (and with national potential implications). Rather, the Subcommittee appears to have focused solely on the misperceived dangers and unsubstantiated risks of broadcasting or livestreaming trials involving sensitive crimes such as sexual abuse, not-so-sensitive crimes such as bank robberies, and the misplaced fears trial participants have in cases involving gangs—risks that the Subcommittee members must realize already exist in courtrooms open to the public.

Given that there are two constitutional amendments requiring that criminal trials and proceedings be public, the first reaction to a purported lack of "empirical evidence," good or bad, should be to permit *more* public access to the courtrooms, not less. We respectfully ask that the Standing Committee reject the Subcommittee's recommendation and take up the coalition's original suggestion to amend Rule 53 to provide federal judges broad discretion to permit cameras in courtroom, or alternatively, to create an "extraordinary case" exception so that audiovisual recordings of trials of incredible import do not get lost in time.

Very truly yours,

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Trump attorney John Lauro, Fox News (July 21, 2023), https://www.foxnews.com/video/6331632263112, at 6:05-6:31.