STATEMENT OF

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FOR THE EASTERN DISTRICT OF MISSOURI

ON BEHALF OF
THE JUDICIAL CONFERENCE
OF THE UNITED STATES

BEFORE THE SUBCOMMITTEE ON
COURTS, INTELLECTUAL PROPERTY AND THE INTERNET
OF THE
COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON PUBLIC ACCESS TO JUSTICE

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Chairman Johnson, Ranking Member Roby, and Members of the Subcommittee:

Good afternoon, I am Audrey Fleissig, United States District Judge for the Eastern District of Missouri. I am joined by Judge Richard Story, of the Northern District of Georgia. Thank you for inviting the Judiciary to testify on public access to federal courts. We are here on behalf of the Judicial Conference of the United States, the national policy-making body for the federal courts. I currently serve as Chair of the Judicial Conference Committee on Court Administration and Case Management (CACM). The responsibility of the CACM Committee is to study and make recommendations on matters affecting case management; the operation of appellate, district and bankruptcy clerks' offices; jury administration; and other court operational matters. Judge Story serves as a member of the Committee on the Judicial Branch. The responsibility of the Judicial Branch Committee is to address problems affecting the Judiciary as an institution and affecting the status of federal judicial officers.

Let me begin by assuring you and this Committee that the Federal Judiciary shares Congress's commitment to openness and accessibility of the courts and making the work of the courts as transparent as possible.

As Judges exercise the power vested in them by Article III of the United States Constitution, they do so with an eye towards balancing the rights of parties to the case, as well as the public's interest in judicial proceedings. These values of providing a forum for the pursuit of justice, fair proceedings, due process, equal protection, transparency, and public access have been hallmarks of the Federal Judiciary.

Today, as we focus on one of those foundational principles, public access, I would like to briefly discuss how that value is manifest in how the Judiciary conducts its business and how we open the courts to the public. The Federal Judiciary's work impacts the lives of the American

public in many ways. It is essential that the public has confidence in, access to, and understanding of the courts.

The Federal Judiciary is committed to the principle of public access

The mission of the Federal Judiciary is guided by the values of ensuring the availability of a fair trial and providing access to the courts and the adjudicatory process. For hundreds of thousands of individuals and organizations, the federal court is their chosen forum to seek justice, protect rights and liberties, and adjudicate disputes under law. It is the Judiciary's responsibility to ensure an impartial forum and to adjudicate disputes fairly. In ensuring fair adjudication, the courts must balance the other hallmarks of the pursuit of justice, including public access to the judicial process. The Judiciary's commitment to public access is evidenced by the fact that, with very limited exceptions, each step of the federal judicial process is open to the public. Any individual who wishes to observe a court in session may go to the federal courthouse and watch a proceeding.

There is a very strong presumption that all court proceedings are open to the public, though access may be limited in rare situations. In those cases, the courts work to balance the interests of a litigant's right to a fair hearing with the public's interest to open proceedings – weighing the privacy, deliberative, and public interest concerns.

The PACER system provides free access to most users

In addition to attending court proceedings, anyone may review case pleadings and other documents without charge by going to the clerk of court's office and viewing the case file on a public access terminal. Court dockets and case files also are available on the internet through the

Judiciary's Electronic Public Access (EPA) program. The EPA program provides electronic public access to court information in accordance with federal statues, judiciary policies, and user needs. One component of the EPA program is the internet-based Public Access to Court Electronic Records (PACER) service, available at www.pacer.gov. PACER provides courts, litigants, and the public with access to court dockets, case reports, and the more than one billion documents filed with the courts through the Case Management/Electronic Case Files (CM/ECF) system. PACER is a portal to CM/ECF, making both systems integral to effective public access. There are approximately 2.9 million registered users of the PACER system and in fiscal year (FY) 2018 alone, PACER processed more than 507 million requests for case information.

Part I

Electronic Public Access to Court Records

In 1992, Congress authorized the Judicial Conference to prescribe reasonable fees for access to electronic records (Pub. L. No. 102-140, Title III, § 303, 105 Stat. 782). Users of PACER are charged commensurate with the amount of data they access through the database, subject to exemptions and waivers. This user-based funding arrangement has worked well and has provided an unprecedented level of access to the federal courts, while providing a source of revenue to allow the Judiciary to maintain PACER, as well as to develop and introduce new technologies to expand public accessibility to court electronic records.

The Judiciary has endeavored to structure those fees in such a way as to maximize access to the public at large and avoid imposing unnecessary hardships on individuals. The Judicial Conference has established a fee exemption policy that automatically exempts or waives fees in four circumstances:

(1) Judicial opinions are available free of charge;

(2) Parties in a case (including pro se litigants) and attorneys of record receive one free copy of all documents filed in their cases;

(3) No fee is charged for viewing case information or documents at courthouse public access terminals; and

(4) No fee is charged when less than $15.00 of fees are incurred per quarter – the current fee for one page is $0.10 and there is a $3.00 maximum charge for any single document, without regard to its length unless it's a transcript.

Last week, at its biannual meeting, the Judicial Conference of the United States approved an increase to the quarterly waiver from $15.00 to $30.00, effective January 1, 2020. When this increase is implemented, the doubling of the quarterly waiver will result in no fees being charged to approximately 77 percent of active users, based on data from 2018. These users will be able to access up to 300 pages of court documents in a given quarter for free. In addition to these automatic fee exemptions and waivers, the EPA fee schedule allows courts to exempt certain people or categories of people from payment, such as *pro bono* attorneys, non-profit organizations, indigent individuals, or academics and researchers.

PACER's current structure fairly places the greatest cost burden on the system's largest users

Those users who do incur fees often are so-called "power users," whose utilization of PACER far exceeds that of the typical user.

Approximately 87 percent of total PACER revenue comes from less than three percent of the active accounts. These "power users" are generally large commercial entities, some of whom use data accessed from PACER as the foundation of their own business models. Individual litigants are generally de minimis users of PACER's services and rarely incur any fees.

Revenue from PACER fees is expected to be approximately $145.2 million during the current FY 2019, while the FY 2020 interim financial plan includes approximately $159.3 million in projected EPA requirements. This revenue is used to pay for a variety of expenses related to maintaining electronic public access, including CM/ECF development, operations, and maintenance. Developing, maintaining, and modernizing a large, national database like PACER is resource-intensive, and the fee revenue is essential for the Judiciary to maintain electronic public access. These funds are also vital to the development of Next Generation CM/ECF (NextGen), the system which will replace the Judiciary's original electronic filing system. Additionally, the Central Sign-On feature available through NextGen has made access to the courts easier by simplifying the sign-on process for users by giving each user a single account to access NextGen in all courts. We recognize that some have questioned whether PACER fees should be spent on CM/ECF functions and other programs to enhance electronic public access. While these matters are still in litigation, it is not disputed that the vast majority of PACER revenues are spent exclusively on PACER and CM/ECF expenses, and any serious disruption to PACER funding will affect those critical systems the most.

The Judiciary continually seeks to improve PACER and public access

To improve PACER further, the Judiciary is establishing an EPA Public Users Group. The final selection process is underway for members of this group. These individuals will include representatives of the legal sector, media, academia, government, the general public, and other PACER users. They will provide valuable advice on the further development, implementation, and enhancement of EPA services.

Over the years, the Judicial Conference has approved several initiatives aimed at enhancing public access. In addition to PACER providing access to court documents, it now includes digital audio recordings of certain court hearings. Other initiatives include a multi-court voice case information system (McVCIS) that provides case information over the phone in English or Spanish, and a program to post court opinions on the Government Publishing Office's website. These initiatives demonstrate the Judiciary's commitment to ensure access to court information through multiple avenues without imposing a financial burden on the public.

Proposed legislation to change the PACER fee structure could be unfair to litigants

Current proposals in Congress would eliminate all PACER fees, even for commercial entities that profit from the use of its data. This means the Judiciary would be unable to spend PACER fees to support the CM/ECF system and other expenses related to electronic public access. The Judiciary has serious concerns about the removal of the current funding mechanism with no replacement source of funds, effectively turning the PACER system and other elements of electronic filing and public access into a massive unfunded mandate. In practical terms, the Judiciary would be forced to scale back public access services to fit within limited available resources, which could entail the cancellation of planned improvements to CM/ECF, decreased user support at the PACER Service Center, and/or decreased bandwidth and network support. This would result in a degradation of public access in terms of both quantity and quality.

Because large parts of the Judiciary's budget are out of its control, requiring the Judiciary to absorb the costs of its public access program within the remainder of its budget would come largely at the expense of Judiciary staff, including clerks' office employees and probation and pretrial services officers.

Proposed legislation, which authorizes the Judiciary to impose higher filing fees to cover the cost of maintaining the PACER system raises additional concerns. The Judicial Conference has long held the position that filing fees should not be increased to generate revenue for Judiciary operations. Funding PACER through filing fee increases would drastically shift the cost burden to litigants – who may not be proportionate users of PACER's services or may not even use PACER at all. This would result in the well-resourced users of PACER, or "power users," avoiding the payment of PACER fees, while individuals exercising their constitutional rights to seek redress through federal courts would be required to pay increased filing fees. Increasing the financial burden on litigants, in order for others to receive free PACER access, would essentially give large corporate users and highly-funded research institutions a free ride for their commercial and for-profit access at the expense of litigants. The added financial burden to litigants could possibly deter them from pursuing their claims in federal court. This is a major concern for the Judiciary and should be an important consideration for anyone considering PACER fee legislation. The idea of a litigant not having access to the courts because of cost prohibitive filing fees is unacceptable and contrary to the basic notions of access to justice.

The increase in filing fees that would be necessary to cover the cost of maintaining PACER would be substantial. A preliminary cost estimate shows that filing fees would have to be increased by approximately $750.00 per case to produce revenue equal to the Judiciary's average annual collections under the current public access framework. This would be a dramatic increase for litigants. It could mean that the current district court civil filing fee of $350.00 (pursuant to 28 U.S.C. §1914(a)) would be increased to $1,100.00 and filing fees in non-personal bankruptcy cases (i.e., cases filed under Chapter 11, which are already over $1,000.00), would

increase to nearly $2,000.00. Such a drastic increase to filing fees could deter litigants from filing cases due to the prohibitive cost.

In addition to the proposed increase in filing fees, one legislative proposal introduces a sliding-scale fee. A sliding-scale approach to filing fees, where the fee would be commensurate with the burden imposed on the court by the party, as proposed, would be administratively unworkable. Filing fees are paid at the outset of litigation, at which point it is unclear how much of a burden will be imposed on the court by a party. Irrespective of the cause of action, some cases are relatively straightforward, requiring minimal filings and court involvement, while others are complicated and time-consuming for the court to resolve. Trying to determine the burden on the court by the type of case filed, or some other standardized method, would be speculative, burdensome to court staff, and would likely prove to be inaccurate.

Additionally, the idea of imposing a lesser fee on filers who are filing on behalf of individuals presumes that these litigants impose lesser burdens on the courts. This is not necessarily the case. Class actions and multi-district litigation matters often impose a substantial burden on the court's time and resources; however, they would probably be subject to the lesser filing fee prescribed by the legislation as they are filed on behalf of individuals. Pro se litigants can also impose a significant burden on the court and the filing system through duplicative and excessive filings, but they would potentially be exempted from filing fees due if a hardship exemption continues to exist.

Furthermore, proposed legislation to give state courts the option to participate in the Federal Judiciary's electronic public access systems raises significant policy and technological concerns. There would be very specific system demands and architecture designs that would be required by any state's particular needs. It may prove exceedingly difficult and expensive, if not

impossible, to design an entirely new system from the start that could foresee these unidentified and potentially differing requirements from at least 50 other entities.

Proposed changes to CM/ECF could greatly disrupt court operations

While the PACER funding issue is one of the Judicial Conference's major concerns, the Conference also has serious reservations regarding proposed requirements for a new consolidated case management system and other technical specifications that would create another unfunded mandate. CM/ECF is the federal courts' case management and electronic case files system. It provides courts enhanced and updated docket management and allows courts to maintain case documents in electronic form. It allows the parties to file case documents, such as pleadings, motions, and petitions, with the court using a computer and internet connection.

Under federal statute, the Federal Rules of Civil and Criminal Procedure, and long-standing Judiciary policy, each court, through its Clerk of Court, is responsible for maintaining its own civil and criminal dockets. *See* 28 U.S.C. § 457; Fed. R. App. Pro. 45(b)(1); Fed. R. Civ. Pro. 79(a); Fed. R. Crim. Pro. 55. The Judiciary's current filing system does not constitute a "single filing system" and, therefore, would need to be overhauled.

Legislative proposals would require all documents made available to the public through this system be text-searchable and machine-readable. This requirement fails to address the fact that pro se litigants often file handwritten documents.

Overhauling CM/ECF would likely take an enormous amount of time and money

While it is extraordinarily difficult to project how much it would cost to replace the Judiciary's current system as directed by the bill, one thing is certain: doing so within two years is not possible.

In assessing how much it might cost to overhaul the Judiciary's case filing system, we have looked to other efforts in this area. California's attempt to create a single filing system for its state courts is instructive. California spent 10 years and more than $500 million to build a single filing system for its state courts before abandoning the effort, which was projected to cost a total of $2 billion to complete. *See* Howard Mintz, *California Courts Scrap $2 Billion Tech Project*, Mercury News, March 27, 2012, https://www.mercurynews.com/2012/03/27/california-courts-scrap-2-billion-tech-project/ (last visited September 9, 2019). The new system would have replaced the patchwork of aging systems that varied by county and did not interact with each other. Similarly, the Federal Bureau of Investigation (FBI) first spent $170 million over four years on its initial effort to create a Virtual Case File records management system, only for the entire project to be declared a total failure. *See* John Foley, *FBI's Sentinel Project: 5 Lessons Learned*, Information Week, August 2, 2012, http://www.informationweek.com/applications/fbis-sentinel-project-5-lessons-learned/d/d-id/1105637? (last visited September 19, 2019). The FBI then had to completely start over, spending an additional $425 million over the course of another six years to get the new Sentinel case file system up and running, encountering missed deadlines, budget overruns, and other project management problems along the way, as well as significant employee complaints about the case searching function and other user concerns continuing for several years after completion. *See* Jeff Stein, *FBI's Expensive Sentinel Computer System Still Isn't Working,*

Despite Report, September 24, 2014, https://www.newsweek.com/fbis-expensive-sentinel-computer-system-still-isnt-working-despite-report-272855 (last visited September 19, 2019). Based on the experiences of California and the FBI, upgrading the current Judiciary filing system, as directed by the bill, could easily cost $2 billion to accomplish and could take more than 10 years to complete. Significantly, the legislative proposals do not include a funding mechanism to finance consolidation costs, thus creating a huge unfunded mandate which would adversely impact the Judiciary's ability to create the consolidated system Congress is seeking.

Allowing unlimited free access to PACER could create system risks

In addition to funding concerns, we have identified other policy and technical issues that must be carefully considered. The elimination of the PACER fee, coupled with the legislation's requirement that CM/ECF be consolidated into a single system, could have a negative and severe impact on the speed and reliability of the system. The current fee-based system, which requires users to register and allows traffic to be monitored, prevents users from downloading unlimited and voluminous content – unless they are willing to pay for that access. Completely free access for all members of the public (who could download as much information as they want with no cost constraints) could dangerously strain the system's capacity and performance.

The system has previously experienced serious performance issues caused by users running automatic scripts to extract large amounts of data. At that time, the Administrative Office of the U.S. Courts (AO) was able to work to resolve the issue – in part – because the fee-for-service model was in place. This model requires users to register for an account and allows their level of usage to be tracked. Consequently, the AO was able to identify the users in question and work with them to discuss modifying their use pattern, i.e., running the scripts at

off-peak hours, while the AO worked to establish a technical fix that would address the problem in the future. The fee-for-service model, which charges users commensurate with their use, makes it less likely that users will engage in this type of behavior, because it would result in large PACER charges. If the fee-for-service model were dismantled, however, there would be no incentive preventing users from running these types of automatic scripts to extract large amounts of data from the system in a way that can severely impact system performance for filing users. Moreover, as discussed above, the ability for anyone to access an unlimited amount of data from the system could exacerbate capacity issues.

The Judiciary is charged with ensuring the availability of a fair forum for resolution of cases and controversies, while balancing the public's need for reliable and convenient access to the courts. The Judiciary takes this charge seriously. Recent initiatives to establish higher fee waiver thresholds, develop an electronic public access user working group, provide access to telephonic case information in English and Spanish, post court opinions on GPO's website and make available digital audio recordings of hearings on PACER, demonstrate our commitment to promoting efficient electronic public access without placing unreasonable burdens on the public or on access to justice.

Part II

Audio and Video Access to Federal Court proceedings

Another example of how the Judiciary provides public access to the courts is how we use audio and video resources to engage and inform the public. Before I begin my testimony on this issue, I must emphasize, as have other judges testifying in previous years, that the Judicial Conference does not speak for the Supreme Court. My statements, therefore, are strictly limited

to policies applicable to federal district courts and courts of appeals, and do not address the broadcasting of Supreme Court proceedings.

The federal courts have cautiously permitted video and audio access over time

As I previously emphasized, the primary purpose and mission of the federal courts is to adjudicate disputes fairly and impartially, and we strive to do so while also providing the greatest feasible degree of public access to the proceedings. Over the years, the Judicial Conference has carefully considered how audio and video technology can be used to improve public access to trial and appellate court proceedings without jeopardizing the fairness and integrity of those proceedings. Today, a member of the public can easily access an oral argument from any federal court of appeals on the internet—in some cases in real-time, as the argument is happening before the panel. Four appellate courts also provide video of some or all appellate arguments. At the trial court level, audio and video coverage of trial court proceedings is restricted. The Judicial Conference has found that this step is necessary to preserve and protect the litigants' right to a fair and impartial trial. Access to trial court proceedings, however, remains open to the public to attend in-person, and the parties' filings, the trial transcript, and the opinions issued in these cases are available to the public online in multiple locations.

Following two multi-year, in-depth studies of the issue of whether cameras should be permitted in federal courts, the Judicial Conference has carefully developed policies on cameras and broadcasting that strike a balance between recognizing the right of public access to judicial proceedings and protecting litigants' rights to fair and impartial proceedings in both federal district courts and courts of appeals. I will describe how those policies apply to both the courts of appeals and the district courts below. Finally, I will provide a brief history of the

Conference's consideration of the cameras issue, which will demonstrate the time and effort it has devoted to understanding this issue over the years.

Audio of appeals courts proceedings is universal, and video coverage is authorized

The Judicial Conference has authorized each court of appeals to decide for itself whether to permit cameras in appellate proceedings. Consistent with this policy, four of the 13 federal courts of appeals have adopted policies that permit video coverage of appellate proceedings, subject to the circuit's practices and procedures. Today, the Second, Third, Seventh, and Ninth Circuits allow camera coverage in certain appellate proceedings.

The Judiciary's policy of leaving it up to each circuit's determination whether to allow video coverage ensures that each circuit can consider and develop its own procedures based on what is best for that court, while balancing the interests of the parties to the cases and the public. The courts of appeals are transparent and open about these procedures. The Ninth Circuit live streams audio and video of every court proceeding, including all *en banc* oral arguments, and posts each recording to its website. The Third and Seventh Circuits post video recordings of selected proceedings. Both circuits allow a party to object to a video being posted, subject to the panel's ultimate decision. The Second Circuit allows live video coverage of appellate arguments in civil cases on a case-by-case basis.

While each of the four circuits that currently permit video coverage has approached the practice differently, this discretion has allowed each court of appeals to develop procedures that fit the court's local rules and internal operating procedures, while also responding to fairness considerations in individual appellate proceedings.

Significantly, the public's access to appellate proceedings is not limited to those circuits that allow video coverage of hearings. Rather, *every* court of appeals posts audio recordings of oral arguments on its public website, which any member of the public can listen to and download at no cost. In fact, four appellate courts—the Second, Fourth, Ninth, and District of Columbia Circuits—live stream audio of some oral arguments. The Second Circuit recently allowed live streaming of an oral argument on C-SPAN's website. Thus, even if a circuit has not adopted a policy permitting cameras, the public still has access—in some cases immediate, real-time access—to audio of the hearing.

The audio currently provided by circuit courts (whether as live streaming or through downloadable files) accomplishes the goal of ensuring public access to appellate court proceedings. In appellate oral arguments, the attorneys do not call witnesses to testify, introduce evidence such as photos or documents, or raise objections. Instead, the attorneys present oral arguments from a podium and answer questions from the panel of judges—all of which is aptly captured by the audio recordings. There is rarely a visual component that needs to be memorialized or made available in appellate proceedings. Requiring circuit courts to provide video streaming or downloadable video, therefore, would not significantly enhance the public's access to the proceedings, but would cause the circuit courts to incur additional costs to provide the streams and store the electronic files.

The use of cameras in trial courts raises significant due process concerns

There are different considerations in the district (or trial) courts. After careful consideration and two multi-year studies, the Judicial Conference has consistently expressed the view that camera coverage can cause irreparable harm to a citizen's right to a fair and impartial

trial. The Conference believes that the effect of cameras on litigants, witnesses, and jurors can have a profoundly negative impact on the trial process. In civil and criminal cases, cameras can intimidate defendants who, regardless of the merits of the case, might prefer to settle or plead guilty rather than risk airing damaging accusations in a televised trial. Cameras also create security and privacy concerns for individuals, many of whom are not even parties to the case, but about whom personal information may be revealed at trial.

Historical Background on Cameras in the Federal Courts

Whether to allow cameras in the courtroom is not a novel question for the Federal Judiciary. Electronic media coverage of criminal proceedings in courts has been expressly prohibited under Federal Rule of Criminal Procedure 53 since the criminal rules were adopted in 1946. That rule states that "the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom." In 1972, the Judicial Conference adopted a prohibition against "broadcasting, televising, recording or taking photographs in the courtroom and areas immediately adjacent thereto . . .". The prohibition applied to both criminal and civil cases.

Since then, the Conference has repeatedly studied and considered the issue. In 1988, Chief Justice William Rehnquist appointed an Ad Hoc Committee on Cameras in the Courtroom, which recommended that a three-year experiment be established permitting camera coverage of certain proceedings in selected federal courts. In 1990, the Judicial Conference adopted this recommendation and authorized a three-year pilot program allowing photographing, recording,

and broadcasting of civil proceedings in six district and two appellate courts, which commenced July 1, 1991.[1]

The Federal Judicial Center (FJC) conducted a study of the pilot project and submitted its results to a committee of the Judicial Conference. After reviewing the FJC's report, the Conference decided in September 1994 that the potential intimidating effect of cameras on some witnesses and jurors was cause for considerable concern such that it could impinge on a citizen's right to a fair and impartial trial. The Conference, therefore, concluded that it was not in the interest of justice to permit cameras in federal trial courts.

Two years later, at its March 1996 session, the Judicial Conference again considered the issue and urged each circuit judicial council to adopt, pursuant to its rulemaking authority set forth in 28 U.S.C. § 332(d)(1), an order reflecting the Conference's September 1994 decision not to permit the taking of photographs or radio and television coverage of proceedings in federal district courts. The Conference also voted to strongly urge circuit judicial councils to abrogate any local rules that conflict with this decision, pursuant to 28 U.S.C. § 2071(c)(1). With respect to appellate courts, the Conference "agreed to authorize each court of appeals to decide for itself whether to permit the taking of photographs and radio and television coverage of appellate arguments, subject to any restrictions in statutes, national and local rules, and such guidelines as the Judicial Conference may adopt."

Fifteen years later, in September 2010, the Judicial Conference authorized another pilot program to evaluate the effect of cameras in district court courtrooms, video recordings of

[1] The courts that volunteered to participate in the pilot project were the U.S. Courts of Appeals for the Second and Ninth Circuits, and the U.S. District Courts for the Southern District of Indiana, District of Massachusetts, Eastern District of Michigan, Southern District of New York, Eastern District of Pennsylvania, and Western District of New York.

district court proceedings, and publication of such video recordings. Fourteen district courts[2] participated in the pilot, which ran for four years (from July 18, 2011 to July 18, 2015). For the pilot, the courts themselves recorded and edited proceedings (e.g., trials, routine motion hearings, and evidentiary hearings), with the parties' consent and the presiding judge's approval. Unless the parties objected, or the presiding judge decided not to make the recordings publicly available, the recordings were posted by the court on the Judiciary's public website at https://www.uscourts.gov/about-federal-courts/judicial-administration/cameras-courts/case-video-archive.[3] Over the four-year period, 158 proceedings were recorded and posted—approximately 10 percent of the proceedings that were eligible. The number of proceedings recorded in individual pilot districts ranged from 0 to 34. Significantly, in approximately 85 percent of eligible proceedings, at least one party declined to consent to have the proceeding video recorded.

The FJC analyzed the results of the pilot and submitted a report to the CACM Committee in November 2015. In December 2015, the CACM Committee reviewed the report and had an extensive discussion of the FJC's findings. First, the Committee found that, based on the number of proceedings recorded and posted and the number of times those postings were viewed, there was a low level of interest in recording the proceedings, both from the parties themselves and the judges, and viewing the recorded proceedings by public. Second, the Committee noted that while the FJC's report detailed some positive reactions from participants in the pilot, it also

[2] The 14 pilot courts were: the U.S. District Courts for the Middle District of Alabama, Northern District of California, Southern District of Florida, Guam, Northern District of Illinois, Southern District of Iowa, Kansas, Massachusetts, Eastern District of Missouri, Nebraska, Northern District of Ohio, Southern District of Ohio, Western District of Tennessee, and Western District of Washington.

[3] The videos could be searched by (1) district, (2) type of proceeding (e.g., jury trial, summary judgment motion), and (3) subject matter (e.g., personal injury, civil rights, habeas corpus, trademark infringement).

identified a number of significant concerns, including how cameras influenced the behavior of attorneys, witnesses, and jurors. These concerns were particularly troubling to the Committee given the fact that the Judiciary's most important responsibility is to ensure the availability of a fair trial to the parties in a case. Finally, the Committee noted there were significant costs associated with the equipment, labor, and video hosting.

Ultimately, the Committee concluded that the cameras pilot program did not produce sufficient or persuasive evidence of a benefit to the judicial process to justify the negative effect upon witnesses or the significant equipment and personnel costs. Therefore, the Committee agreed not to recommend any change to the Judicial Conference's policy regarding cameras. The March 2016 Judicial Conference considered the CACM Committee's report and declined to take any action modifying its long-established position on cameras in the courtroom at the trial court level.

I should note that the Ninth Circuit Judicial Council, in cooperation with the Judicial Conference, has authorized three districts in the Ninth Circuit that participated in the pilot program (California-Northern, Washington-Western, and Guam) to continue the pilot program under the same terms and conditions to provide longer term data and information to the CACM Committee and the Judicial Conference. Since the pilot program ended in July 2015, the three district courts have posted 36 proceedings on the uscourts.gov website, which have had a cumulative total of 12,413 views, with views of each proceeding ranging from 2 to 1,026.

It is important to note that while video coverage of trials is not permitted under the current policy, the policy does permit the use of cameras—as well as audio recording and photography—in several situations, most of which are designed to assist in the administration of justice. Specifically, a judge may authorize broadcasting, televising, recording, or taking

photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. Aside from these proceedings, a judge may authorize broadcasting, televising, recording, or photography in the courtroom: (1) for the presentation of evidence; (2) for the perpetuation of the record of the proceedings; (3) for security purposes; (4) for other purposes of judicial administration; (5) for the photographing, recording, or broadcasting of appellate arguments; or (6) in accordance with pilot programs approved by the Judicial Conference. For example, proceedings can be broadcasted to overflow courtrooms. In those situations when broadcasting, televising, recording, or photographing in the courtroom or adjacent areas is permitted, a judge should ensure that it is done in a manner that will: (1) be consistent with the rights of the parties; (2) not unduly distract participants in the proceeding; and (3) not otherwise interfere with the administration of justice.

As evidenced above, the Federal Judiciary consistently evaluates and balances its shared goals of ensuring an impartial and fair adjudicatory process to the parties involved with the public interest and access to the work of the courts. Conducting this balance ensures public confidence and trust in our judicial system, while maintaining the fundamental pillars of the Judiciary.

Additionally, there are distinctive differences in the branches of governments' interests in televising their proceedings. For the legislative and executive branches, the general public has a voting interest in the input and outcome of bills, law, and politics initiated in those branches. The Judicial branch is different. Although the public has an interest in the outcome of cases before the Judicial Branch, the Judiciary's role is to resolve conflict between two litigating parties. Those parties' interests in a fair adjudication of their conflict can be very different from the public's at large. Cameras in the courtroom could have an intimidating effect on witnesses,

litigants, and jurors. They can be used as a pre-trial negotiating tactic to the point of eliminating a trial entirely. They raise privacy concerns for witnesses and safety concerns for parties, witnesses, and jurors. These issues are very different concerns than interests the other two branches have. We believe strongly that this is an issue best left to the courts to decide for themselves, and that comity among the branches to determine their own procedures should be honored.

Mr. Chairman and members of the Subcommittee, thank you again for the opportunity to testify and present these views. I will be pleased to answer any questions you or the other members of the Subcommittee may have and request that my full statement be entered into the record.