

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
John Joseph Moakley United States Courthouse
1 Courthouse Way
Boston, Massachusetts 02210**

Chambers of Judge Nancy Gertner

**TESTIMONY OF THE HONORABLE NANCY GERTNER, OF THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS**

Re: H.R/ 2128 the "Sunshine in the Courtroom Act of 2007"

September 27, 2007

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I want to thank you for giving me this opportunity to speak before you. I am in favor of this bill. I spoke in favor of an earlier version of this bill in 2000. My opinions have not changed in the intervening seven years on the federal bench.

Let me say at the outset, that I speak only for myself, and surely not for the other judges of my Court, or judges around the country or the Judicial Conference. Other judges have raised important and sound concerns which need to be addressed. But as I describe in this testimony, those concerns about cameras in the courtroom involve "how" to implement televised proceedings, not "whether."

I come to this issue both as a judge and as a former litigator. I was a trial lawyer for twenty-two years, representing clients in both civil and criminal cases, in federal and state courts. Because Massachusetts has had cameras in the courtroom for a considerable period of time, I have had the privilege of participating in a number of televised trials and other proceedings. I can speak from personal experience.

I have been a judge for thirteen years. During that period of time I have presided over a number of cases which attracted media attention and would have been televised had that option been available. The most recent case was *Limone v. United States*, which involved accusations of FBI misconduct -- malicious prosecution under the Federal Tort Claims Act -- in connection with the imprisonment of four men. When I announced my decision in open court, the court was filled with spectators. There was an overflow from the courtroom into which a record of the proceedings was streamed.

My testimony here is based on two prongs -- the first, conceptual -- the idea that "public" means something different in the 21st century than it has ever meant before, and the second, anecdotal -- the actual experience of state courts with cameras.

Public proceedings in the 21st century necessarily mean televised proceedings. "Public access" means something different today than it meant years ago, and all of the institutions of government have to adjust to it. "Public" means more than simply opening up our courtrooms to the public. It means television, video, now internet. It means streaming transcripts in real time across a screen. In deference to this new view of "public" for example, the federal courts do more than simply make our files physically available in courtrooms around the country. We have created electronic access to court papers, accessible to all of our citizens with a computer and internet access.

The vast majority of the American public gets information about courts through screens - - television or the internet. Most, for good or for ill, are visual learners. Moreover, at a time when polls suggest that the public is woefully misinformed about the justice system, more information, and relatively unmediated information, is better than less information. Let me draw an analogy here. I have visited courts in many other countries throughout the world. Trial proceedings were open, my hosts would tell me, but the courtrooms were small and had only a single bench for the "public." It was formally open to everyone, but practically speaking, public access was extremely limited. In this country, we understand that to make something public requires affirmative efforts on our part -- courtrooms big enough to include the people who will be interested in the proceedings, handicapped access, provision for the media, etc. In *Limone*, it meant overflow courtrooms with monitors. Today, that effort necessarily means cameras.

Indeed, in deference to the public's new way of learning and their new expectations, we have modernized our courtrooms with technology capable of presenting all information on screens.

The concerns raised by the opponents of this bill are not insignificant but, in my judgment, point to *how* to go about televising proceedings, not *whether*. There is concern that the participants in televised trials somehow skew their presentation because of the gaze of the cameras. I believe that if such behavior occurs at all, it is a function of two things: The fact that most of the televised trials are high-profile cases, where the participants are already acutely aware of the publicity surrounding them, and the fact that televised trials, particularly in federal courts, were still a relative novelty.

In high-profile cases, with the sketch artist present, the courtroom filled to the rafters with people, the question is whether the presence of cameras materially changes the atmosphere, and in my experience, it does not. This is particularly the case with the change in technology; cameras are less physically obtrusive. (It is simply wrong to talk about the "glare" of the television cameras; while that may have been the case five, ten or fifteen years ago, it is no longer.) Lawyers may grandstand, judges may pontificate under the public's gaze, whether it is through the print media or cameras. And the reverse is just as likely -- the public will see why our judicial system is one of the most respected in the world.

Indeed, we have all had occasion to grimace while watching some of the more recently televised trials -- at the performance of the judge, or the lawyers. But in my judgment we would have grimaced if we had been in their courtrooms in a high-profile case with or without cameras. And the antidote to the grimacing is for cameras to show Judge Bill Young, of my court, when he sentenced the "shoe bomber," Richard Reid; Judge Mark Wolf, when he got to the bottom of

FBI involvement with certain defendants; Judge A. David Mazzone, when he was trying the case that led to cleaning up Boston Harbor. The antidote to cases that show the system at its worst, is to show the system at its best.

Moreover, many of the problems concerning cameras years ago derived from the fact that they were novelties -- neither judges nor lawyers were used to them. Whatever impact derived from their presence would surely be lessened as time passes, as everyone becomes more and more used to their presence.

That has been the experience of the Massachusetts court system and state court systems across the country. There are cameras in the courtrooms of forty-eight states. Numerous studies have been conducted by these jurisdictions to test the impact of the cameras on the proceedings. The results have been favorable -- that televised coverage does not impede the fair administration of justice, does not compromise the dignity of the court, and does not impair the orderly conduct of proceedings. Indeed, the opposite is the case -- that public education about the system is greatly enhanced. This is so even though the state court's docket is far, far more vulnerable to distortion than the federal court. The state court is where we try most murders, rape, child molestation charges, and the like. The state court is where the proceedings can be sensationalized, and yet, notwithstanding, cameras remain for good.

To be sure, there are concerns about the impact of televised trials on the public, that televising the proceedings in fact undermines their legitimacy with the public. I would be remiss if I did not admit that this problem gives me pause as well. The public watches a televised trial and believes that it is sitting in the shoes of the juror when it plainly is not. The citizen will answer the phone, take a bathroom break, make popcorn, and miss critical testimony. He or she

is watching the proceeding in their home, on their couch, relaxed, and without the obligation to make any decisions about the case. The jurors sit in a formal courtroom, the American flag at the front, and they are sworn to be attentive, to be fair. They are instructed about their awesome responsibilities; ideally, they have no other distractions. When the jury's decision is different from the viewing public's decision, the public may well become cynical about the system.

There is a wonderful moment in the movie, "Twelve Angry Men" that illustrates the point. A juror is recounting the testimony of a witness. The witness reported that he heard the sound of a body hitting the ground on the floor above him. He then ran to the door, opened it, and saw the defendant running down the stairs. The juror remembered that the witness, an elderly man, walked with a limp to the witness stand. The juror concluded that the witness' testimony about "running to the door" was less than credible. The point was that there is a difference between experiencing a trial within the four walls of a courtroom and experiencing it through a television screen.

On balance, however, I believe that given the strength of our system, seeing it in operation can only bolster the public's confidence. I believe that these concerns can be addressed by judges, by commentators, by educators, and that, in any event, they do not outweigh the advantages. There are surely concerns about sequestration orders -- whether witnesses who are sequestered will "cheat" and watch the testimony of other witnesses, for example. Nevertheless, we rely on system participants to follow our rules about sequestration just as we expect them to follow our rules about avoiding publicity during the trial. In a 24/7 news environment, we have no choice. And if there are real concerns in a given case, we can delay the broadcast of a particular witness,

just as the case law permits delaying the release of other information about the trial in particular cases. We can obscure the faces of witnesses, bind the media with protocols for the coverage of proceedings, etc.

Let me be clear: I am not suggesting that televising court proceedings necessarily means accurate, unedited, undistorted coverage. Obviously, television reporters can edit the proceedings, take snippets out of context, sprinkle it with inappropriate commentary. But that is endemic to the print coverage as well. Video recordings of trial will, at the very least, make available the full proceeding by which the snippets and the commentary may be judged.

Attorneys and judges must work with the media to make it clear to the public that their experience of trials is not the same as the participants. More "real time" court coverage should be encouraged, not just of the high-profile cases but of the ordinary cases. We can promulgate rules and protocols to insure the dignity of the proceedings.

At a time when judges are under attack, when judicial institutions are the fodder of late night talk shows, we need to work harder than ever before to show the public just what we do.

Finally, the strength of this bill is that it does not require cameras, insist on them, encourage them. Rather it allows judges to exercise their discretion to permit cameras in appropriate cases, subject to fair limitations. I, for one, would like to try.