

## BROADCAST COVERAGE OF ADMINISTRATIVE PROCEEDINGS

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On June 8, 1972, the Administrative Conference of the United States adopted a recommendation which, if implemented by the federal agencies to which it is addressed, will result in broadcast coverage of large numbers of administrative proceedings. The Conference recommendation would normally encourage broadcast coverage of "[n]otice-and-comment and on-the-record rulemaking proceedings, and adjudication in which a public interest standard is applied to authorize service or determine its level or quality . . . ." It would, however, forbid coverage of "adjudicatory proceedings involving the rights or status of individuals . . . in which individual past culpable conduct or other aspect of personal life is a primary subject of adjudication and the person in question objects to coverage." In other proceedings, such as adjudications concerning culpable conduct of large corporations or labor unions, the Conference recommends a weighing by the agencies of the pros and cons of allowing coverage.<sup>1</sup>

The Conference was closely divided. The margin on the crucial vote was one. There remains considerable opposition within some agencies to allowing coverage, and it seems likely that implementation will be spotty, at least at first.

It is nonetheless very significant that the Administrative Conference has taken this action. The recommendation represents a substantial break with the tradition—which shows no sign of weakening—of almost total exclusion of broadcast recording equipment from court proceedings. While television brought us events in China and even on the moon, it could not broadcast the Supreme Court arguments in the Pentagon Papers case or the trial of Angela Davis, even if all parties to those proceedings interposed no objection. If the Conference recommendation is followed, our local channel may at least bring us its own FCC license renewal hearing.

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<sup>1</sup> The full text of the Conference's recommendation is set forth in the Appendix to this article.

Until now the agencies, unlike the courts, have had no well-developed policy on broadcasting of their proceedings. The Conference does not counsel admission of broadcasters to all proceedings they wish to cover. Rather, the recommendation is cautious and limited and provides safeguards for those proceedings where it recommends allowing coverage. Thus, agencies are cautioned to "impose reasonable restrictions on lighting, multiple microphones and other possible sources of disruption." Witnesses are to be given an absolute privilege to prevent coverage of their testimony.

It is the purpose of this article<sup>2</sup> to set out the history and policy considerations which bore on the Conference action and to indicate a few minor respects in which the Conference recommendation is unnecessarily restrictive.

### BACKGROUND

The consumer and environmental movements have only recently produced great public concern with the workings of administrative agencies. Public concern has aroused the interest of the various news media, so that the activities of some administrative agencies lately have been covered more frequently and thoroughly by the press. Most administrative proceedings are open to the public, and the desire of reporters to sit in and even take notes has met no particular resistance. The electronic media, however, have naturally wanted to bring broadcast equipment into proceedings, and this has encountered considerable opposition.

The Atomic Energy Commission has perhaps aroused as much media interest as any of the federal agencies. The Commission's permission is necessary before a nuclear power plant may be constructed,<sup>3</sup> and this permission may be given only after a public hearing.<sup>4</sup> Since the mid-1960's these hearings have been held in the locales of the proposed plants and have often attracted much local attention.

The AEC has attempted to cooperate with the media by arranging background conferences and making facilities available for

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<sup>2</sup> This article is adapted from a report written as consultant to the Administrative Conference of the United States Committee on Information, Education and Reports in support of the Committee's recommendation to the Conference concerning broadcasting of agency proceedings.

<sup>3</sup> 42 U.S.C. § 2233 (1970).

<sup>4</sup> 42 U.S.C. § 2239 (1970).

interviews of hearing participants before or after the hearings or during recesses. It has even allowed tape recording of the hearings themselves. The Commission in addition has received repeated requests by local television stations to allow audio-visual recording during the hearings. These have been uniformly denied.

The Social Security Administration also holds hearings in the field which attract much media attention. Since December, 1969, the Administration has held at least seven "conformity hearings" to determine if states are complying with the Social Security Act in administering their federally-supported public assistance programs.<sup>5</sup> Television stations have sought to bring recording equipment into most of these hearings and have been rebuffed in each instance.

Other agencies have been more equivocal in their responses to importunate television stations. The rules of the Interstate Commerce Commission forbid television cameras in any agency hearings without the permission of the Chairman.<sup>6</sup> At least one examiner has allowed cameras on several different occasions without obtaining that permission. In contrast, the Federal Communications Commission has cooperated with television recording of a number of the inquiries conducted before the Commission over the years. FCC examiners have the authority to admit or exclude in their discretion.<sup>7</sup> Of those who have recently faced the question in license renewal proceedings, two have allowed quite extensive audio and visual recording, and one has forbidden it altogether.

Forces are at work which will likely increase the volume of requests by stations to record all or parts of proceedings. The tolerance of some agencies and examiners undoubtedly encourages requests to others. Recently developed videotape equipment and other innovations allow relatively unobtrusive recording. This should lower the resistance of agencies. The advent of cable television in larger cities means that many more visual communications channels will be available in the future. It is likely that some of these channels will be set aside for use by governmental agencies or for other service to the public. The broadcasting of entire administrative proceedings, if allowed, would provide ready fare for many of

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<sup>5</sup> See 42 U.S.C. § 604(a) (1970).

<sup>6</sup> 49 C.F.R. § 1100.70(b) (1972).

<sup>7</sup> There is no explicit FCC rule on the subject. 47 C.F.R. § 1243(f) (1972) gives the examiner general authority to regulate a hearing and exclude disruptive persons.

these channels. For these reasons it is virtually certain that the number of requests for broadcast coverage of administrative proceedings will continue to increase. This makes the action of the Administrative Conference of the United States both timely and important.

## BROADCASTING OF OTHER PUBLIC GOVERNMENTAL PROCEEDINGS

### *The Legislative and Judicial Practice*

Before they were interested in recording administrative proceedings, the electronic media were seeking access to the legislative and judicial halls. They have had some success with the various legislatures, so that parts of committee hearings and even sessions of state and local legislatures are occasionally seen on television or heard on radio. The response of the national legislature has been cautious. Neither radio nor television is allowed on the floors of either the House of Representatives or the Senate. The Senate has long allowed television and radio into committee hearings on a selective basis. The decision is left up to the respective committees by the Senate rules.<sup>8</sup> Senate tradition dictates that the actual authority to admit or exclude usually resides in the committee or subcommittee chairman. Until recently the House of Representatives maintained a strict prohibition against broadcast coverage even of committee hearings. In 1970 the Legislative Reorganization Act of 1946 was amended, and a change was included in the House Rules so that broadcast presence at a Committee's hearings is allowed with the permission of a majority of the House Committee.<sup>9</sup> Despite the apparent receptiveness of these Senate and House Rules to electronic media presence at legislative hearings, it is still rare for Committee chairmen in the Senate or Committee majorities in the House to admit the cameras and microphones.

Without doubt the arena most hostile to audio-visual recording has been the judicial one. In one form or another, the Judicial Canons of the American Bar Association have forbidden broadcasting of court proceedings since 1937.<sup>10</sup> In its present form Judicial Canon 35 provides:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court

<sup>8</sup> See Act of Oct. 26, 1970, Pub. L. No. 91-510, § 101, 84 Stat. 1143; 2 U.S.C. § 190a-1(b) (1970).

<sup>9</sup> See Act of Oct. 26, 1970, Pub. L. No. 91-510, § 116(b), 84 Stat. 1153.

<sup>10</sup> See *Estes v. Texas*, 381 U.S. 532, 596-601 (1965) (Harlan, J., concurring).

room, during sessions of the court or recesses between sessions, and the broadcasting or televising of court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony and create misconceptions with respect thereto in the mind of the public and should not be permitted . . . [with a limited exception for naturalization proceedings].<sup>11</sup>

Similar blanket proscriptions have been adopted by the Bar or courts in most of the states.<sup>12</sup> Indeed, only two states<sup>13</sup> appear to allow the televising of trials. Those leave the decision in the discretion of the trial judge, with one state apparently allowing the judge to let cameras in even if the defendant in a criminal trial objects.<sup>14</sup> The Federal Rules of Criminal Procedure<sup>15</sup> prohibit broadcasting of criminal trials in federal courts, and the Judicial Conference of the United States has "condemn[ed]" broadcasting of judicial proceedings.<sup>16</sup>

*Constitutional Restrictions in the Court Setting:  
The Estes Case*

*The Opinions in Estes.* Any discussion of the broadcasting of administrative proceedings must take account of *Estes v. Texas*,<sup>17</sup> a 1965 decision in which the Supreme Court held that the telecasting of a criminal trial over the objection of the defendant deprives him of due process of law. There are obvious differences between a criminal trial and most administrative proceedings. Nonetheless, the hostility toward televised proceedings which the Supreme Court displayed in *Estes* casts its shadow over any discussion of the problem in the administrative setting. Indeed, a number of agencies specifically rely on *Estes* and the judicial analogy in support of an exclusionary policy.<sup>18</sup> Before turning to the administrative scene,

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<sup>11</sup> ABA CANONS OF PROFESSIONAL ETHICS No. 35.

<sup>12</sup> See *Estes v. Texas*, 381 U.S. 532, 580-82, nn.38-39 (1965) (Warren, C.J., concurring).

<sup>13</sup> These are Colorado and Texas. The position of a third, Oklahoma, was uncertain at the time of the *Estes* decision. *Id.* at 580-81 n.38. See *id.* at 581 n.39.

<sup>14</sup> *Estes* decided that broadcasting a trial over a criminal defendant's objections deprived him of due process of law. See text accompanying notes 17-31 *infra*.

<sup>15</sup> FED. R. CRIM. P. 53.

<sup>16</sup> See *Estes v. Texas*, 381 U.S. 532, 601 (1965) (Harlan, J., concurring).

<sup>17</sup> 381 U.S. 532 (1965).

<sup>18</sup> Cf. NLRB, TRIAL EXAMINERS PUBLIC MANUAL § 17118.1 (1968), which sets forth a quotation from *Estes* but also cites an article suggesting relaxation of

therefore, it seems best to discuss the various opinions in *Estes* and attempt to place the decision in perspective.

*Estes'* indictment for swindling has been well publicized. Texas is one of the two states which allows the telecasting of criminal trials, and, prior to the date of the trial, *Estes'* attorney filed a motion with the trial judge to have all cameras excluded from the courtroom during the trial. The hearing on this motion, which occupied the better part of two days, was itself covered by numerous reporters and cameramen. Cameras, microphones and wires were strewn all over the courtroom. The hearing was televised live over two Texas television stations with the insertion of commercial messages. It was conceded that "[t]he activities of the television crews . . . led to considerable disruption of the hearings."<sup>19</sup>

The motion to exclude cameras was denied, but the judge imposed certain restrictions for the trial on the number, movement and placement of equipment, and relative serenity prevailed thereafter. A number of jurors had seen the earlier proceedings, however, and the presence of television at the trial undoubtedly fed the continuing publicity surrounding the trial.

Justice Clark delivered an opinion for "the Court,"<sup>20</sup> but at most it expressed the position of four justices and really seems to have represented fully only Justice Clark's own views. He did not say specifically whether the telecasting of any criminal trial over the defendant's objection deprives him of due process. Thus, it could be that the holding only reaches factual situations such as those presented by *Estes'* trial. This was the position espoused by Justice Harlan's concurrence.<sup>21</sup> Still the tone and some of the language of Justice Clark's discussion support the conclusion that, at least at the level of the television art at the time of trial in 1962, a state could never, consistent with due process, allow televising of a criminal trial over the defendant's objection.

Justice Clark acknowledged the benefits which flow from press coverage of governmental activities, including judicial proceedings: "The free press has been a mighty catalyst in awakening public in-

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the "[*Estes*] rule." On a more informal basis, a number of agency personnel cited the *Estes* case to me as a basis for keeping broadcasting recording equipment out of agency hearings.

<sup>19</sup> 381 U.S. at 536.

<sup>20</sup> *Id.* at 534.

<sup>21</sup> *Id.* at 587 (Harlan, J., concurring).

terest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences including court proceedings."<sup>22</sup> But, he said, this press freedom "must necessarily be subject to the maintenance of absolute fairness in the judicial process."<sup>23</sup>

Justice Clark elaborated several evils thought to flow from telecasting of criminal trials: "The potential impact of television on the jurors is perhaps of the greatest significance."<sup>24</sup> The cameras may distract the jury. In those states (unlike Texas) where the juries are not sequestered, jurors may obtain different and distorted perspectives of the evidence through viewing trials. In addition, the mere fact of televising, because it is uncommon, emphasizes the public importance of the case, thus putting added and unnecessary pressure on the veniremen.

Justice Clark also decried the potential impact on trial participants other than the jurors. Witnesses, judges, and attorneys may consciously alter their behavior or unconsciously react to the presence of recording equipment. The judge will have to spend time controlling physical disruption of the proceedings. And finally a camera may harass the defendant or make it difficult for him effectively to communicate with his attorney.

To the State's insistence that these dangers were hypothetical and that *Estes* had not shown any specific prejudice to himself, Justice Clark replied that the adverse impact might be difficult to find in specific cases, but that did not make it less real or likely, and the very difficulty of pinning that impact down relieved *Estes* of the necessity of showing specific prejudice.

Chief Justice Warren "join[ed] in the Court's opinion" but also wrote an opinion for himself and Justices Douglas and Goldberg.<sup>25</sup> He discussed many of the same arguments against broadcast presence but also emphasized the discrimination against some defendants by the broadcasting of their trials and the detriment to the dignity of judicial proceedings caused by the presence of broadcasting equipment.

Justice Warren's opinion does not share the uncertainty of Jus-

<sup>22</sup> *Id.* at 539.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 545.

<sup>25</sup> *Id.* at 552 (Warren, C.J., concurring).

tice Clark's on whether its analysis applies to all criminal trials. Indeed, Justice Warren did not think Justice Clark's opinion unclear on this question, for he purported to "agree" with it "that the televising of criminal trials is inherently a denial of due process."<sup>26</sup>

Justice Harlan wrote a separate concurring opinion. He expressed uncertainty about whether television should constitutionally be excluded from all criminal trials, preferring to confine his opinion to "heavily publicized and highly sensational" trials such as *Estes*.<sup>27</sup> In another respect Justice Harlan framed the issue much more restrictively than had his colleagues:

All would agree . . . that at its worst, television is capable of distorting the trial process so as to deprive it of fundamental fairness. Cables, klieg lights, interviews . . . commentary . . . "commercials" . . . makeup . . . would not conduce to the sound administration of justice by any acceptable standard. But that is not the case before us. We must judge television as we find it in this trial—relatively unobtrusive, with the cameras contained in a booth at the back of the courtroom.<sup>28</sup>

Even such subdued physical presence in a highly sensational case raised in Justice Harlan's mind sufficient danger of distortion of the trial process that he concluded that *Estes* had been denied due process of law.

Justice Harlan's opinion also adverted more directly than had his colleagues to an additional problem in considering limits on broadcast coverage of trials: first amendment protection for the recording activities of broadcasters as an adjunct of their and the public's free speech and press rights. For Justice Harlan, the argument for a constitutional right to broadcast trials was "greatly overdrawn:"<sup>29</sup>

Many trials are newsworthy, and televising them might well provide the most accurate and comprehensive means of conveying their content to the public. Furthermore, television is capable of performing an educational function by acquainting the public with the judicial process in action. Albeit these are credible policy arguments in favor of television, they are not arguments of constitutional proportions. The rights to print and speak, over television as elsewhere, do not embody an

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<sup>26</sup> *Id.* at 553 (Warren, C.J., concurring).

<sup>27</sup> *Id.* at 590 (Harlan, J., concurring).

<sup>28</sup> *Id.* at 588 (Harlan, J., concurring).

<sup>29</sup> *Id.* at 589 (Harlan, J., concurring).

independent right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom. . . . [T]he line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.

I see no force in the argument that to exclude television apparatus from the courtroom, while at the same time permitting newspaper reporters to bring in their pencils and notebooks, would discriminate in favor of the press as against the broadcasting services. The distinctions to be drawn between the accoutrements of the press and the television media turn not on differences of size and shape but of function and effect. The presence of the press at trials may have a distorting effect, but it is not caused by their pencils and notebooks. If it were, I would not hesitate to say that such physical paraphernalia should be barred.<sup>30</sup>

Justices Stewart, Black, Brennan and White dissented. They shared Justice Warren's understanding that Justice Clark's opinion meant that televising any criminal trial over objection is constitutionally forbidden. They agreed that televising criminal trials such as *Estes*' was probably unwise. But due to the sequestration of the jury, the relative unobtrusiveness of the television presence at *Estes*' trial and the absence of any demonstrable prejudice, they could not agree that *Estes* had been deprived of his fourteenth amendment rights.

Justice Stewart's opinion for the four referred to the first amendment considerations in the case:

[T]here are intimations in the opinions filed by my Brethren in the majority which strike me as disturbingly alien to the First and Fourteenth Amendments' guarantees against federal or state interference with the free communication of information and ideas. The suggestion that there are limits upon the public's right to know what goes on in the courts causes me deep concern. The idea of imposing upon any medium of communications the burden of justifying its presence is contrary to where I had always thought the presumption must lie in the area of First Amendment freedoms. . . . And the proposition that nonparticipants in a trial might get the

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<sup>30</sup> *Id.* at 589-90 (Harlan, J., concurring).

“wrong impression” from unfettered reporting and commentary contains an invitation to censorship which I cannot accept. Where there is no disruption of the “essential requirement of the fair and orderly administration of justice,” “[f]reedom of discussion should be given the widest range.”<sup>31</sup>

*The Significance of Estes for Administrative Proceedings.* The prevailing opinions in *Estes* contain notes of hostility to television intrusion at any proceedings where witnesses testify. It is impermissible, however, to conclude that anybody adversely affected in a proceeding where television was present has an objection of due process proportions. Indeed, Justice Harlan’s refusal to go along with his four brethren and extend his due process argument to all criminal defendants means that due process questions in non-criminal proceedings are still very much open.

Justice Harlan’s approach might suggest that *Estes* deals not so much with televising of criminal trials as with publicity about them. A large part of *Estes*’ legitimate grievance was not the peering cameras as such, but the notoriety of the trial and the continuing publicity of which the cameras were a sign and to which they contributed. Tracing the grievance to its source, it is probably the impact of publicity on participants which is the real evil. Domineering publicity can take place without audio-visual recording presence, and, when it does, the publicity itself may deprive a criminal defendant of due process.<sup>32</sup>

Furthermore, *Estes* involved an individual’s criminal trial, a proceeding to which American law has attached important procedural safeguards<sup>33</sup> which do not encumber other types of proceedings. The presence of a jury, which is peculiar to judicial trials, also distinguishes *Estes*’ ordeal from administrative proceedings. It was television’s “potential impact ” “on the jurors” which Justice Clark found “perhaps of the greatest significance.”<sup>34</sup> These considerations set *Estes* apart from administrative proceedings and make it inappropriate to draw more than general guidance from the case in considering the much more variegated puzzle posed by broadcast coverage of administrative proceedings.

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<sup>31</sup> *Id.* at 614-15 (Stewart, J., dissenting).

<sup>32</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 355 (1966).

<sup>33</sup> *See, e.g.*, U.S. CONST. amend. V, which contains several safeguards applicable exclusively or principally to criminal proceedings.

<sup>34</sup> 381 U.S. at 545.

THE SPECTRUM OF ADMINISTRATIVE PROCEEDINGS AND THE  
EXPERIENCE OF THE AGENCIES

For purposes of evaluating the appropriateness of broadcast coverage, it is necessary to consider various categories of administrative proceedings rather than approaching the problem as a unitary one. In light of the objections usually raised against broadcast recording of governmental proceedings, public<sup>35</sup> agency proceedings can usefully be divided into six categories: 1) directly functional proceedings; 2) general fact gathering or investigative proceedings; 3) proceedings of general applicability; 4) proceedings of particular applicability and future effect; 5) proceedings of particular applicability where the inquiry is into past conduct or present status of corporate bodies; and 6) proceedings of particular applicability where the inquiry is into past conduct or present status of individuals. What follows is an attempt at definition and examples of these six categories of proceedings and a look at agency experience with broadcast recording for each.

*Directly Functional Proceedings*

Most administrative hearings focus on the collection and evaluation of facts. A small number are more directly functional. In these limited instances the proceeding itself accomplishes the substantive administrative purpose. The draft lottery conducted by the Selective Service System<sup>36</sup> is the clearest example. In these proceedings publicity—including radio and television coverage—will usually serve the purpose of the agency and hence will be encouraged. Thus, the Selective Service System has cooperated fully with broadcast coverage of the lottery and indeed holds the lottery in a large auditorium so that the media can be easily accommodated. Some of the general fact gathering proceedings—those which have public exposure or education as one of their acknowledged purposes—might be put in the same category.

*General Fact Gathering or Investigative Proceedings*

Some agencies have no enforcement or decisional powers but still investigate or gather facts and then issue reports. The Civil Rights

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<sup>35</sup> Some proceedings are not open to the public at all. While that decision might be challenged, it is axiomatic that broadcasting recording would not be allowed in proceedings from which the public was excluded.

<sup>36</sup> See 32 C.F.R. § 1631.1 (1972).

Commission is such an agency.<sup>37</sup> An important, though perhaps secondary, purpose of Civil Rights Commission hearings is public dissemination of the facts and opinions unearthed. For that reason the Civil Rights Commission encourages and aids broadcast coverage of its hearings. The Commission is one of the few agencies to have promulgated a rule covering broadcast access to proceedings:

Reasonable access for coverage of public sessions shall be provided to the various means of communication, including newspapers, magazines, radio, newsreels, and television, subject to the physical limitations of the room in which the session is held and consideration of the physical comfort of Commission Members, staff, and witnesses. However, no witness shall be televised, filmed, or photographed during the session nor shall his testimony be broadcast or recorded for broadcasting, if he objects.<sup>38</sup>

Besides its receptiveness to broadcast recording, the Civil Rights Commission rule displays a sensitivity to the interests of witnesses. This suggests one important difference between Civil Rights Commission hearings and more directly functional proceedings such as the draft lottery. Commission hearings may be intended to and may actually educate the public, but they also involve testimony which some individual or group may not want widely known or, if known, not broadcast. The information may be in some sense private or may involve allegedly culpable past conduct by some individual, organization or group. The Commission's rule thus strikes a balance between the educative function the hearing can serve and the private interests possibly infringed by broadcast dissemination.

Some agencies with enforcement or decisional powers also conduct general inquiries for their own edification. The Federal Communications Commission, for instance, has arranged for panel discussions before it on a variety of regulatory problems. While public exposure or education has not been a motivating purpose for the hearings, it was a possible incidental benefit which could result from broadcast coverage. As a result, the Commission has cooperated with television recording. In these proceedings the panel members are all present at their own request, and it is not likely that any of them has objections to his words and features being broadcast. In any case, the FCC has not thought it necessary to provide safeguards for those who might object.

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<sup>37</sup> 42 U.S.C. § 1975c (1970).

<sup>38</sup> 45 C.F.R. 702.16 (1972).

The Bureau of Mines conducts public investigatory hearings after mine disasters, which provide an additional example of this type of proceeding. Civil or criminal penalties are possible as a result of dereliction leading to the disaster, but they may be imposed only after later separate proceedings. The hearings are for the general information of the Bureau and the evidence unearthed is legally irrelevant at any such later punitive proceeding. The Bureau has not promulgated any rule or policy on broadcast presence, but at the 1971 hearing into the disaster at Hyden, Kentucky, broadcast recording equipment was admitted by the presiding officer.

*Proceedings of General Applicability and Future Effect*

A great many agencies have authority to promulgate binding substantive rules.<sup>39</sup> The Administrative Procedure Act provides that participation in rulemaking may be "with or without opportunity for oral presentation,"<sup>40</sup> and oral hearings to which the public is admitted are not uncommon.

The APA definition of a rule is quite broad:

[A]n agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy . . . and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuation costs, or accounting, or practices bearing on any of the foregoing. . . .<sup>41</sup>

It is apparent that APA "rules" may actually have an impact on only one or a few individuals or entities. In such cases, the rule-making inquiry will focus on the past or probable future behavior of those persons or entities. Those entities may thus have a particular interest in the type of media coverage allowed. For the purposes of this discussion it seems best to treat such proceedings of limited applicability later and confine the present discussion to truly "general" rulemaking proceedings.

Even proceedings looking towards "general" rules may delve into culpable conduct, or into what are in some sense the "private" affairs of individuals or entities. The National Labor Relations

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<sup>39</sup> See, e.g., 47 U.S.C. § 303 (1970) (FCC); 49 U.S.C. § 1324 (1970) (CAB).

<sup>40</sup> 5 U.S.C. § 553(c) (1970).

<sup>41</sup> 5 U.S.C. § 551(4) (1970).

Board, for instance, should it ever use its acknowledged rulemaking authority,<sup>42</sup> might generally prohibit certain bargaining techniques when it learns of their misuse by one or a few unions or employers. Nonetheless the general applicability of the rule helps assure that the inquiry will attract general interest and hence not be confined to the affairs of a few. Electronic coverage exclusion, if appropriate, might extend to the part of the inquiry which embarrasses the few without reaching the entire hearing process.

The Internal Revenue Service did grant a request to allow network television cameras into its hearings on record keeping for travel and entertainment expenses held in the early 1960's. Similarly the Federal Aviation Administration has allowed cameras into hearings on rules dealing with airport congestion and flight paths over the Atlantic Ocean. On the whole, however, agencies have encountered rather few requests for electronic media access to rulemaking proceedings of general applicability.

Only two agencies appear to have rules covering radio and television access to rulemaking, and those rules are general ones covering all the agency's proceedings. The Interstate Commerce Commission rules provide:

Live, delayed, or recorded television or radio broadcasting of Commission hearings, or the taking of pictures in hearing rooms, will not be permitted without special permission of the Chairman of the Commission.<sup>43</sup>

The rule was prompted by media attempts to record adjudications, and the Commission does not appear to have had requests for access to its rulemaking proceedings. The Federal Power Commission has an even more restrictive rule:

[T]he use of television, movie and still cameras and recording equipment is permitted in hearing rooms prior to the opening of a hearing or argument and during recesses, pursuant to prior arrangements with the Commission or presiding Examiner, as the case may be. All equipment must be removed from the room before the proceedings begin or resume; . . . the use of television, movie, still cameras or recording equipment is not permitted while Commission hearings and oral arguments are in progress. . . .<sup>44</sup>

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<sup>42</sup> 29 U.S.C. § 156 (1970); see *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759 (1969).

<sup>43</sup> 49 C.F.R. § 1100.70(b) (1972).

<sup>44</sup> 18 C.F.R. §§ 3.102(j)(2), (3) (1972).

*Proceedings of Particular Applicability and Future Effect*

Many administrative proceedings deal with rights and responsibilities of one or a few individuals or entities and are to have only future effect. The Food and Drug Administration approves standards for new drugs<sup>45</sup> which may be produced only by one or a few companies. The APA's definition of rules includes "approval of rates, wages, corporate or financial structures . . ."<sup>46</sup> which will typically apply to one or a few entities. Hearings on construction permits and initial licenses also fit into this category, though for some APA purposes those proceeding may be classified as "adjudications."<sup>47</sup>

In some cases the line between proceedings with "future" and "past" effect may be difficult to draw. License renewal proceedings, for instance, theoretically address the question of whether the applicant should have a license for the ensuing period. In practice, however, these proceedings focus almost exclusively on whether the licensee's past conduct is such as to entitle him to renewal. This will often be the case with hearings on financial "reorganizations," also classified as rulemaking under the APA. Where the focus is on past conduct in this way, those being regulated have a stronger interest in restricting media coverage and such proceedings should be considered separately from proceedings of exclusively future effect.

In most proceedings which really are to have only future effect, the agency will be engaged in some sort of "public interest" determination. The Federal Communications Commission awards an initial license if such will serve the "public interest, convenience, and necessity."<sup>48</sup> When the FDA sets standards for a new drug it is charged with deciding whether the drug will be "safe."<sup>49</sup> Long distance telephone rates are set so as to be "just and reasonable."<sup>50</sup> In making such a "public interest" determination, an agency may consider many factors, sometimes quite novel ones. The "public's" interest in information about the proceedings is obviously greater than when the agency is inquiring ex-

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<sup>45</sup> 21 U.S.C. § 355(a) (1970).

<sup>46</sup> 5 U.S.C. § 551(4) (1970).

<sup>47</sup> See 5 U.S.C. §§ 551(6), 554(a) (1970).

<sup>48</sup> 47 U.S.C. § 309(a) (1970).

<sup>49</sup> 21 U.S.C. § 355(d) (1970).

<sup>50</sup> 47 U.S.C. § 205 (1970).

clusively into past, possibly culpable or "private," conduct of an individual or entity.

When confronted with requests for broadcast recording of proceedings of particular applicability and future effect, agency reactions have ranged to extremes. The Atomic Energy Commission has strictly forbidden television coverage of its hearings on site selection for new nuclear power plants. Television cameras were welcomed, on the other hand, at a Department of Interior hearing on the environmental impact of a planned Alaska pipeline.

*Proceedings of Particular Applicability Where the Inquiry is into Past Conduct or Present Status of Corporate Bodies*

Probably the bulk of public administrative hearings are directed at one or a few entities and are concerned with past conduct. These are usually classified as "adjudications" and often bring into play special protective procedures under the APA.<sup>51</sup> They are typically conducted before an examiner or hearing officer, though the administrator or agency will occasionally preside. The regulated entity will often be a corporation or other corporate body such as a labor union, association or political entity, and it seems sensible to consider such proceedings separately from adjudications of the rights or status of individuals because of the individual's arguably greater interest in avoiding recording and dissemination of the facts of his affairs.

Some proceedings in this category, such as FCC license renewal hearings, involve a "public interest" determination in theory, while in practice they delve almost exclusively into past culpable or deficient conduct. Others, such as National Labor Relations Board unfair labor practice hearings<sup>52</sup> or Federal Trade Commission inquiries into unfair acts and practices,<sup>53</sup> do not even in theory involve a public interest determination.

ICC adjudications involve corporate bodies. Pursuant to the ICC rule allowing coverage only with the permission of the Chairman, most ICC examiners have excluded broadcast equipment during adjudicative hearings, though occasionally cameras have been granted entrance by an examiner, sometimes with and sometimes without the required approval.

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<sup>51</sup> See 5 U.S.C. §§ 554(b), 556-57 (1970).

<sup>52</sup> See 29 U.S.C. § 160 (1970).

<sup>53</sup> See 15 U.S.C. § 45 (1970).

The FCC, which also deals mainly with corporations, has no rule on broadcast coverage; the examiners assume total discretion to allow or forbid it. There have been a number of requests to cover television license renewal hearings in recent years. While some have been denied, at least two examiners have allowed extensive recording for purposes of broadcast.

The Federal Trade Commission also leaves the decision in the discretion of its examiners. With possibly one exception, they have uniformly denied admission.

The Army Corps of Engineers is inclined to admit cameras to adjudicative hearings on (typically corporate) dumping permit suspensions.<sup>54</sup> The hearing examiners of the Social Security Administration, on the other hand, have turned down repeated requests for broadcast access to SSA conformity hearings in which the inquiry is into the conformity of state welfare plans with federal legislative and administrative requirements.

*Proceedings of Particular Applicability Where the Inquiry  
is into Past Conduct or Present Status of Individuals*

Finally, a few agencies conduct adjudicative inquiries into past conduct or present status of individuals. The deportation proceedings of the Immigration and Naturalization Service<sup>55</sup> and Veterans Administration beneficiary claims hearings are examples.<sup>56</sup> Quite often similar proceedings by other agencies are not open to the public and hence do not pose the question of broadcast access to public hearings. In this category are Department of Defense industrial security hearings<sup>57</sup> and Civil Service Commission proceedings with regard to an individual's job status.<sup>58</sup>

Sometimes a corporation is simply a legal form for the activities of an individual. Adjudication delving into the culpable conduct of the corporation will be virtually indistinguishable in respects other than this form from inquiries into the individual's conduct. Where a corporation is so exclusively associated with an individual in this way, it seems appropriate to include adjudication with regard to the corporation in this category.<sup>59</sup>

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<sup>54</sup> See 33 U.S.C. § 407 (1970).

<sup>55</sup> 8 U.S.C. § 1252(b) (1970).

<sup>56</sup> See 38 U.S.C. § 321 (1970).

<sup>57</sup> 32 C.F.R. § 155.7(c)(2) (1972).

<sup>58</sup> See 5 U.S.C. §§ 3501-84 (1970); 5 C.F.R. § 771.210(a) (1972).

<sup>59</sup> The Administrative Conference recommendation includes adjudications involv-

It does not seem that broadcasters have ever sought access to any proceedings inquiring into culpable conduct or present status of individuals, though there has been some controversy over whether they could set up cameras in the halls outside Immigration and Naturalization Service hearings. And the Service appears to be the only such agency with a specific policy on the subject. Its Administrative Manual provides that "The same rules observed in court are followed . . . [T]hus, photographers, news cameramen, and tape recorders shall not be permitted. . . ."<sup>60</sup>

#### THE PROS AND CONS OF BROADCAST COVERAGE

The arguments in favor of allowing audio-visual coverage of administrative proceedings are an extension of the arguments in favor of a free press. The free press educates and informs about all of our affairs and, as one by-product, helps induce government with honesty and integrity.

Broadcast coverage provides an added dimension to these benefits. Printed media coverage or, indeed, simple broadcast reporting without recording may inform the public and may keep government officials on their toes, but there is something about the realism and immediacy of recorded coverage which enhances public awareness of the events depicted. Radio coverage provides something of this added dimension, television much more. This added impact of the audio-visual media is what has led to the predominance of broadcast advertising. Indeed, it is presumably a judgment about relative effectiveness which led Congress to forbid cigarette advertising on radio and television while continuing to allow it in the printed media.<sup>61</sup> The courts appear to have made a similar judgment about effectiveness of audio-visual depiction in allowing the states limited prior restraint of possibly pornographic film presentations while forbidding prior restraint of possibly pornographic printed matter.<sup>62</sup>

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ing the rights or status of "small corporations likely to be indistinguishable in the public mind from one or a few individuals" in the same class with adjudications of the rights or status of individuals. It might be appropriate further to limit this class of corporate adjudications, which are treated as involving individual conduct or status, by imposing an upper limit on the size of a corporation (measured perhaps by revenues), adjudications with regard to which could be so categorized. Indeed, it might plausibly be argued that one who does business in corporate form foregoes rights he might retain as an individual.

<sup>60</sup> IMMIGRATION AND NATURALIZATION SERVICE, ADMINISTRATIVE MANUAL § 2090.04(4) (1970).

<sup>61</sup> See 15 U.S.C. § 1335 (1970).

<sup>62</sup> See *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961).

Related to the social benefits of broadcast recording and reporting of governmental proceedings may be constitutional arguments or considerations limiting the extent to which they may be restricted. There is no doubt that first amendment protection extends to the broadcast as well as the printed media.<sup>63</sup> It imposes identical restrictions on the application of state libel laws regardless of whether the alleged libel is printed or broadcast,<sup>64</sup> and that is true despite the fact that the added impact of a broadcast libel gives it the potential for greater harm than a printed one.<sup>65</sup>

It is true that for some purposes the first amendment's freedoms may vary with the medium. A broadcasting station is required periodically to identify its call letters,<sup>66</sup> while the first amendment may forbid a state to require that printed handouts identify their source.<sup>67</sup> Probably the government could limit the amount of advertising permissible on radio and television, but it is doubtful that it could do so for newspapers. And, as already mentioned, prior restraint of certain filmed (and presumably televised) communications may be permissible, while the same type of material could not be restrained prior to publication in printed form.

Another part of the first amendment puzzle is the extent to which its protection extends to collection of information by the press. The central first amendment concern has always been the dissemination of information and views. Even complete freedom to disseminate what it has obtained, however, would not necessarily mean that the press has any right to be free from governmental restraints on access to information.

Except for unhelpful general statements of principle,<sup>68</sup> the reported cases to date do not shed much light on the problem of a first amendment "right" of access to information.<sup>69</sup> Consider a case of attempted exclusion of reporters from a public trial, or prohibition

<sup>63</sup> See, e.g., *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971).

<sup>64</sup> *Id.*

<sup>65</sup> See 15 U.S.C. § 1335 (1970) (congressional restrictions on broadcast cigarette advertising).

<sup>66</sup> 47 C.F.R. § 73.1201 (1972).

<sup>67</sup> See *Golden v. Zwickler*, 394 U.S. 103 (1969) (reversing on other grounds a district court holding to this effect).

<sup>68</sup> See, e.g., *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information").

<sup>69</sup> See Note, *The Right of the Press to Gather Information*, 71 COLUM. L. REV. 838 (1971).

of their taking notes once admitted. On the assumption that the mere presence of reporters or taking of notes did nothing to interfere with the proceeding, the only purpose of exclusion would be to prevent reporting of this "public" event. There is first amendment protection of a public right to know,<sup>70</sup> with which the government would then be interfering without justification. This polar example shows, I think, that as a corollary of the public's right to know there must be some constitutional protection for press access to newsworthy events and material.<sup>71</sup>

I do not read Justice Harlan's *Estes* concurrence as joining issue in dispute of this conclusion. He said, "The rights to print and speak . . . do not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom. . . ." <sup>72</sup> At the same time, he seemed to feel that press presence at a trial was protected despite the fact that, even without physical paraphernalia, such presence "may have a distorting effect [on the trial]." <sup>73</sup> It thus could only be the peculiar disruptive influence of the electronic paraphernalia which made it permissible to forbid them.

Constitutional protection, however, certainly would not mean total insulation from governmental restraint. Freedom of the press, not to mention freedom of the broadcast press, has not usually been thought to mean absolute freedom to say or not say anything at all.<sup>74</sup> Access to information, historically less central to the first amendment than freedom to disseminate news and views, might have less but would not have more protection. *Estes* itself indicates this. But with access as with dissemination, a balance is required.

It is not necessary to strike the balance here. Regardless of the degree of protection offered by the first amendment, the values it embodies counsel that the government not lightly restrict access to information of public interest.<sup>75</sup> Moreover, even if the first

<sup>70</sup> See *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

<sup>71</sup> See Note, *supra* note 69. The Supreme Court's recent decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), while rejecting the specific claim advanced there for first amendment protection of newsgathering, actually supports this analysis.

<sup>72</sup> *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring).

<sup>73</sup> *Id.* at 590.

<sup>74</sup> See *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969); *Near v. Minnesota*, 283 U.S. 697 (1931).

<sup>75</sup> Cf. *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Bridges v. California*, 314 U.S. 252 (1941).

amendment were irrelevant, agency policy should strive to accommodate press access to information. This is simply good public policy, which has found voice in Congressional enactment of the Freedom of Information Act erecting a heavy presumption in favor of public access to administrative documents.<sup>76</sup>

Whether inspired by the first amendment or by "public policy," this interest in access to information will often be opposed to the private interests of some affected by agency proceedings. *Estes* is the extreme case; there this private interest so predominated that due process for an individual precluded audio-visual access to which he objected. In other cases, private interest must be considered, but only as part of a balance in which the public's interest in knowing is not lightly sloughed aside. It is with these general advantages of coverage in mind that I turn to the various arguments advanced against audio-visual recording and reporting of governmental proceedings to see the extent to which they should lead to the exclusion of recording equipment from various types of administrative proceedings.

### *Physical Interference*

The lights, cameras, microphones and wires which usually accompany broadcast (particularly television) recording can cause significant physical interference with the conduct of proceedings. There is ample evidence that, if unrestricted, broadcast crews will often deploy equipment and personnel all over a hearing room, with serious disruption of the proceedings as the consequence.<sup>77</sup> This physical disruption was a major problem at the hearing on the motion to exclude in *Estes*. Similar complaints are occasionally voiced by those who have participated in other protracted proceedings covered by television.

It is not true, however, that physical disruption is an inevitable consequence of television presence at a hearing. Proceedings covered by cameras and other equipment have proceeded quite smoothly.<sup>78</sup> When complaints are heard they are usually about the hot lights rather than obnoxious conduct. Lighting which throws off a

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<sup>76</sup> See 5 U.S.C. § 552 (1970).

<sup>77</sup> Monroe, *The Case for Television in the Courtroom*, 21 FED. COM. B.J. 48, 51 (1967).

<sup>78</sup> *Id.* at 50-51; *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 132 Colo. 591, 296 P.2d 465 (1956).

great deal of heat is not necessary, however, except perhaps when the agency desires to encourage particularly good coverage.

Cameras were allowed in an FCC hearing on renewal of the license of KRON-TV, a San Francisco television station. The presiding officer insisted that only natural lighting and only one microphone be used and that the cameras be set up before each hearing session. The crews would have preferred artificial light and more microphones, but they cooperated and apparently produced quite suitable film. The officer's conclusion was that the television presence was "about as unobtrusive as a court reporter."

Even with established restrictions, minor problems may remain. If more than one station wants to cover a proceeding, they can all be fed from one microphone, but video duplication problems require that each station have a separate camera. Even the problem of multiple cameras can be controlled if necessary by simply limiting numbers. It does seem that, with well understood and strictly enforced guidelines, the problems of physical disruption can be kept within easily tolerable limits.

A closely related problem is that of physical distraction of witnesses, attorneys and the presiding officer. If cameramen or technicians are moving around in the hearing room, this can be quite distracting. This too is controllable. Cameras can be required to be stationary or cameramen kept beyond a certain distance. Television cameras, unlike film cameras, can record a proceeding from a very great distance. Thus, while this aspect of the problem cannot be entirely eliminated, it too can be greatly minimized. The examiner in the KRON-TV proceeding felt that witnesses were distracted only upon first seeing the camera and soon devoted their entire attention to the attorneys' questions. Attorneys for all parties at the hearing agreed that there was no significant problem of physical distraction.<sup>79</sup>

It is obvious that while physical disruption and distraction need not be problems, they may be. In those cases where agencies admit recording equipment, they should establish and enforce guide-

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<sup>79</sup> One attorney refused to discuss the matter with me. He had objected to the presence of the cameras at the hearings (though the point was not being pressed further) and obviously thought it bad policy to admit them. All other attorneys in the proceeding to whom I spoke found the cameras unobjectionable. See also Waco-McLennan County Bar Ass'n, *Courtroom Television*, 19 TEX. B.J. 73, 108 (1956).

lines for its operation. The new rules of the House of Representatives provide certain limitations on the use of types of equipment once the decision to allow recording has been made:

- (3) Not more than four television cameras operating from fixed positions shall be permitted in a hearing room. . . .
- (4) Television cameras shall be placed so as not to obstruct in any way the space between any witnesses . . . and any member of the committee. . . .
- (5) Television cameras shall not be placed in positions which obstruct unnecessarily the coverage of the hearing by the other media.
- (6) Equipment . . . shall not be installed . . . or removed . . . while the committee is in session.
- (7) Floodlights . . . [etc.] shall not be used . . . except that the television media may install additional lighting . . . in order to raise the . . . lighting level . . . to the lowest level necessary to provide adequate television coverage . . . at the then current state of the art. . . .<sup>80</sup>

Further restrictions on light, microphones, positioning and late arrivals might appear reasonable in one or another agency setting, and the Administrative Conference recommendation specifically calls for "reasonable restrictions."

### *Interference with the Dignity of Proceedings*

The presence of cameras, microphones and wires is often said to detract from the dignity of formal proceedings.<sup>81</sup> Probably many of those voicing this concern are simply expressing in a different way the problem of physical disruption. Beyond this concern, however, there may be some who feel that even non-disruptive recording equipment is undignified. The judgment is one of a kind of professional aesthetics.<sup>82</sup>

Any such concern is patently too insubstantial to justify an exclusionary policy. A man without a tie could hardly be excluded as "undignified." Nor could newspaper reporters because of a concern that press reporting was not a fitting complement to a formal

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<sup>80</sup> Act of Oct. 26, 1970, Pub. L. No. 91-510, §§ 116(f)(3)-(7), 84 Stat. 1154-55.

<sup>81</sup> See ABA CANONS OF PROFESSIONAL ETHICS No. 35; Douglas, *The Public Trial and the Free Press*, 33 ROCKY MT. L. REV. 1 (1960).

<sup>82</sup> See Douglas, *supra* note 81, at 10.

proceeding. With reference to the problem of trial publicity the Supreme Court has said:

where there was "no threat or menace to the integrity of the trial," . . . we have consistently required that the press have a free hand, even though we sometimes deplored its sensationalism.<sup>83</sup>

Similarly, unless there is a more substantial basis for exclusion than interference with "dignity" alone, the public's interest in electronic recording must prevail.

### *Psychological Distraction*

Besides the possible physical disruption or distraction, the presence of broadcast equipment is thought by some to present a risk of psychological distraction.<sup>84</sup> Electronic media presence, the argument goes, strengthens the impression of parties, witnesses, attorneys and agency personnel that their actions are being closely scrutinized by the public. This may lead some to withdraw in shyness and others to play to that larger audience. In either event it will distort the conduct of the proceeding from what would have transpired without the electronic media presence.<sup>85</sup>

This objection can be greatly exaggerated. Television cameras have been present in dozens of federal administrative proceedings. I have spoken with participants in many of these, and none who volunteered an opinion thought there was any substantial psychological distraction from the presence of recording equipment. This has also been the conclusion of most people associated with those criminal trials which have been recorded with unobtrusive equipment.<sup>86</sup> This is particularly significant since the danger of at least intentional grandstanding would probably be greater in the criminal

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<sup>83</sup> Sheppard v. Maxwell, 384 U.S. 333, 350 (1966).

<sup>84</sup> Estes v. Texas, 381 U.S. 532, 546 (1965); Note, *Constitutional Aspects of Television in the Courtroom*, 35 U. CIN. L. REV. 48, 63 (1966) [hereinafter cited as *Constitutional Aspects*]; Note, *Canon 35: Cameras, Courts and Confusion*, 51 Ky. L.J. 737, 738, 754-57 (1963) [hereinafter cited as *Cameras*]; Griswold, *The Standards of the Legal Profession: Canon 35 Should Not Be Surrendered*, 48 A.B.A.J. 615, 617 (1962). But see Day, *Colorado Canon Preserves Constitutional Guarantee*, 37 FLA. B.J. 21, 22 (1963); Monroe, *supra* note 77, at 52.

<sup>85</sup> See Doubles, *A Camera in the Courtroom*, 22 WASH. & LEE L. REV. 1, 14 (1965).

<sup>86</sup> *Constitutional Aspects*, *supra* note 84, at 69; Hall, *Colorado's Six Years Experience Without Canon 35*, 48 A.B.A.J. 1120 (1962); see *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 132 Colo. 591, 296 P.2d 465 (1956).

context, where prosecutors may have continuing political ambitions and hence a desire for publicity.<sup>87</sup>

Nonetheless, it is probably true that some hearing participants will unconsciously react to the presence of recording equipment. This is not a problem peculiar to situations in which such equipment is present. The mere presence of reporters lends an impression that the public is watching.<sup>88</sup> Cameras may heighten this effect somewhat, but will not do so significantly if kept stationary and in the background.

More serious perhaps is the temptation for lawyers or participants to play to the cameras. This too is a problem presented by any press coverage. It may be aggravated, but is not created, by electronic recording. Certain of the more adamant environmentalists view some administrative proceedings—even without television coverage—as “the means of transmitting to the public the truth about the particular abuse of the environment.”<sup>89</sup>

The presiding officer must have authority to deal with interference with the progress of a hearing, whether electronic equipment is the cause or not. The Conference recommendation appears to allow such authority. If equipment appeared to be the cause of trouble, the officer could order the equipment shut off or expelled. Such instances would probably be rare, however, even in controversial proceedings. With the provision for presiding officer control, the danger of this psychological impact does not seem sufficient to justify prior exclusion of recording equipment from any administrative proceeding.

### *Prejudicial Impact upon Decision-Makers*

The presence of electronic media may conceivably have a prejudicial impact upon the decision-makers.<sup>90</sup> It may distort the flow of information upon which the decision is supposed to be made.

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<sup>87</sup>Both the chief prosecutor and the trial judge were candidates for elective judicial office at the time of the trial of Sam Sheppard, whose conviction was reversed because of prejudicial publicity. See *Sheppard v. Maxwell*, 384 U.S. 333, 342 (1966).

<sup>88</sup> See *Monroe*, *supra* note 77, at 50.

<sup>89</sup> See Like, *Multi-Media Confrontation—The Environmentalists' Strategy for a "No Win" Agency Proceeding*, 1 *ECOLOGY L.Q.* 495 (1971). This article focuses on AEC site selection hearings, where, as we have seen, a strict exclusionary policy has been enforced.

<sup>90</sup> See *Estes v. Texas*, 381 U.S. 532, 546 (1965).

This danger is usually raised by the selectivity of recorded reports on official proceedings.<sup>91</sup> Unless an entire hearing is being carried, the broadcaster will choose particularly dramatic or otherwise interesting portions to put on the air. This will necessarily create an impression different from that which would have been received from viewing the entire proceeding. If the decision-maker then views or sees the selections at home, his overall impression of the evidence he heard may be slanted.<sup>92</sup>

Beyond this possibility, it is argued that the presence of cameras may heighten the impression of public concern with the proceeding, thus pressuring the decision-maker to decide upon grounds other than those which are legally relevant.<sup>93</sup>

Both these concerns were voiced by the Supreme Court in *Estes*. They both seem most properly confined to the jury trial setting of *Estes*. Where a jury is the decision-maker, it may easily be swayed by extra-record considerations, both because veniremen are typically untrained in the law and because they do not have available a written transcript of the proceedings. Where the decision-maker is an examiner or commissioner with a verbatim transcript available, he should more easily be able to identify the material he should consider. This is not to suggest that examiners or agency members cannot be swayed by extraneous forces. That danger, however, is always presented by press coverage of proceedings. The difference between audio or video recording and written or spoken second-hand reports should not add significantly to the extraneous influence on a professional decision-maker.<sup>94</sup>

### *Interference with Privacy*

Individual respondents or applicants and witnesses in administrative proceedings have an interest in not having their private affairs made known to the world at large. Recording of the defendant's "gestures and expressions during the ordeal of his trial" is part of what bothered the *Estes* plurality.<sup>95</sup> More important, an individual whose private life is made the subject of governmental inquiry suffers an invasion of privacy to the extent that private facts are

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<sup>91</sup> See *Cameras*, *supra* note 84, at 744.

<sup>92</sup> See *Constitutional Aspects*, *supra* note 84, at 66.

<sup>93</sup> See *Estes v. Texas*, 381 U.S. 532, 545 (1965).

<sup>94</sup> Cf. *Craig v. Harney*, 331 U.S. 367, 376 (1947).

<sup>95</sup> 381 U.S. at 549.

made widely known. Interference with the right not to have private matters published or broadcast is a tort for which one who publishes the information may be answerable in damages.<sup>96</sup> No tort action is available for the accurate reporting of testimony in a legal proceeding,<sup>97</sup> but the interest protected still may properly be taken into account in determining the type of coverage of proceedings which should be allowed.<sup>98</sup> Non-recorded reporting of proceedings interferes with this interest in privacy, and it cannot be doubted that broadcast recording significantly enhances that interference.<sup>99</sup>

Part of the problem here is determining what is "private" and what is "public" in an admittedly "public" proceeding. A number of distinctions seem pertinent. A proceeding may center around an individual or entity which will usually be the petitioner or respondent or applicant in the administrative context. He may simply be the only individual or entity affected by a rulemaking proceeding, or one of a few, but let us call these individuals and entities "respondents" for lack of a more convenient general term. They have a legitimate concern with whether the proceeding is broadcast at all. In lawyers' jargon, they should have "standing" to raise the question of total exclusion of broadcast recording equipment. Other individuals are simply witnesses whose legitimate interest if any is in not having their own testimony or possibly testimony about them recorded. They should have "standing" to raise this question but not that of exclusion.

Individuals should be distinguished from corporations or other corporate bodies. The former have a protectable right of privacy, while the latter do not—though for these purposes a small respondent corporation wholly owned by one individual might be classified as an individual. It is thus only in proceedings where the respondents are individuals that a protected interest in privacy affords an argument for complete exclusion. Witnesses, however, are always individuals, and hence will always have "standing" to raise the issue of the privacy implications of recording of their own testimony.

A distinction should also be drawn between types of proceedings. Even where there is a protected privacy interest, there will

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<sup>96</sup> W. PROSSER, LAW OF TORTS § 117, at 802-18 (4th ed. 1971).

<sup>97</sup> Authority on this is collected in *In re Hearings Concerning Canon 35 of the Canons of Judicial Ethics*, 132 Colo. 591, 599-60, 296 P.2d 465, 470 (1956).

<sup>98</sup> See *Constitutional Aspects*, *supra* note 84, at 52-53; Note, *Television and Newsreel Coverage of a Trial*, 43 IOWA L. REV. 616, 624 (1958).

<sup>99</sup> See *Ex parte Sturm*, 152 Md. 114, 119, 136 A. 312, 314 (1927).

always be a countervailing public interest in obtaining information about the proceeding. A balance must be struck. When the proceeding is looking toward announcement of a rule of general applicability or toward a determination of what is in the "public interest," there is substantial public benefit in widespread knowledge of that proceeding. There will usually be no countervailing privacy interest, since the respondent in such proceeding is typically a corporate body. Even in the occasional case where the respondent is an individual, his private concern seems insufficient to stifle the public's right to know.<sup>100</sup>

On the other hand, in adjudications where the inquiry is a factual one into allegedly culpable conduct of an individual, the privacy interest is great and the interest in informing the public relatively unimportant. This is the situation most closely analogous to the criminal trial and seems a proper one in which to allow an individual to require exclusion. If the culpable past conduct is that of a corporation, however, there is no privacy interest to be protected, and hence no such justification for complete exclusion.

In deportation proceedings which delve into culpable past conduct of individuals, the present exclusionary rule applies whether the individual consents to coverage or not. When he consents, however, his interest in privacy affords no basis for forbidding recording and the application of exclusionary rules on that ground appears improper.

When a witness is testifying about impersonal data or facts about others there is only minimal interference with his privacy caused by recording. When testimony is about personal matters, including the witness' allegedly culpable conduct, however, there is an infringement of privacy worthy of consideration. Again the type of proceeding might make a difference, because the countervailing public concern with hearing the testimony varies with the type of proceeding. In "public interest" proceedings or proceedings of general applicability, this public concern is great. In proceedings focusing on culpable conduct of individuals or other entities the countervailing public concern is small.

If a witness had a privilege not to have his own testimony about his private affairs recorded, that would not usually mean that the public would be totally deprived of recorded testimony about the

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<sup>100</sup> Cf. *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971).

matter. If the private matter were germane to the proceedings, there would often be other testimony about it, and this could still be recorded. This both partially satisfies the public's concern for information and applies some pressure on the witness not to invoke his privilege. For this reason it seems best to strike the balance in all cases where recording is allowed in favor of a witness privilege to forbid recording of his own testimony about matters in which he has a legitimate privacy interest.

The rules of the House of Representatives on broadcasting provide certain protections for witnesses:

No witness served with a subpoena . . . shall be required against his will to be photographed at any hearing, to give evidence or testimony while the broadcasting of that hearing by radio or television is being conducted. At the request of any such witness . . . all lenses shall be covered and all microphones used for coverage turned off.<sup>101</sup>

This protection for the witness seems justified when any private matter is the subject of testimony. When the witness is testifying to essentially business facts or economic data or the activities of others, however, the rule seems too restrictive, for it could allow a witness to cloak what a corporation could not with no real personal interest in doing so. The broader protection might be justified by the ease of administering it, but if such administration did not prove too cumbersome, it would be preferable to narrowly tailor the witness privilege to serve the purpose which justifies it.

In one respect the House rule may afford too narrow a protection to witnesses. Under the rule a witness may object to the cameras only if he is present involuntarily. A witness could quite plausibly agree to appear to testify while not wishing to have his testimony recorded and transmitted over the air. Voluntary appearance at a hearing should be encouraged rather than discouraged. Therefore, any witness, voluntary or involuntary, should be allowed to require the cameras and audio recording equipment to be shut off where he has a legitimately protected personal interest in doing so.

The Administrative Conference recommendation is generally responsive to these privacy interests of respondents and witnesses. It gives a witness the right to exclude coverage of his testimony

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<sup>101</sup> Act of Oct. 26, 1970, Pub. L. No. 91-510, § 116(f)(2), 84 Stat. 1154. The rule of the Civil Rights Commission contains a similarly broad protection for all witnesses whether subpoenaed or not. 45 C.F.R. § 702.16 (1972).

and an individual respondent the right to totally exclude coverage where the proceeding involves his rights or status and his "past culpable conduct or other aspect of personal life is a primary subject of [the] adjudication." The Conference's witness privilege goes perhaps further than it need, however, in making the privilege absolute rather than limiting it to coverage of the witness' personal affairs.

### *Distortion of Facts of Proceedings*

Media recording of administrative proceedings will usually result in episodic coverage rather than broadcasting of entire proceedings. The media selectivity may distort the meaning of what transpired, thus misinforming the public.<sup>102</sup> This danger is inherent in press reporting of proceedings and has always yielded to the imperatives of freedom of the press. Broadcasting perhaps exacerbates the harm, but in other contexts any such harm has always been felt to be outweighed by the good promoted by wide dissemination of facts and opinion. Accuracy of reporting is primarily the responsibility of the media, not the government. Thus, first amendment protection of even defamatory statements is extended to print and electronic media alike.<sup>103</sup> No persuasive reason is apparent why this possibility of inaccuracy should lead to the exclusion of broadcast equipment from administrative proceedings.

### *Additional Burdens on Presiding Officers*

Concern has often been voiced that the presence of media recording equipment will increase the burdens on presiding officers.<sup>104</sup> It seems undeniable that there will be some increase in these burdens. They can be limited greatly, however, if the agency promulgates rules regarding placement and numbers of cameras and microphones, scheduling and other possible sources of physical and psychological disruption. Nonetheless the necessity for some examiner rulings will remain. Indeed the suggested privilege for witnesses not to have their own testimony about their private affairs or alleged culpable conduct broadcast will call for a number of rulings. The only determination, however, will be whether the matter is "private" in this sense and rulings should be handled rather routine-

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<sup>102</sup> See Doubles, *supra* note 85, at 8-9.

<sup>103</sup> Rosenbloom v. Metromedia, 403 U.S. 29 (1971).

<sup>104</sup> Cantrall, *A Country Lawyer Looks at Canon 35*, 47 A.B.A.J. 761, 762 (1961); Griswold, *supra* note 84, at 615, 617.

ly. If this proved not to be the case, the privilege could be extended to testimony regardless of its private nature. This is what the Conference has recommended. Even so the examiner will on rare occasions probably have a real additional burden, but this seems a small price to pay for the wider dissemination of information about the activities of administrative agencies.

#### SUMMARY AND CONCLUSION

Of the seven commonly voiced objections to electronic media recording of administrative proceedings, none (with the possible exception of the concern with the "dignity" of proceeding) can be said to be frivolous. The importance of several is, however, easily exaggerated. Others, while of real concern, have, in other contexts, given way in the face of the central importance we attach to the wide dissemination of information of genuine public interest.

Certain features peculiar to the criminal trial counsel caution in allowing electronic recording. These are the criminal sanctions with the consequent obloquy which may result, and the use of a jury—that untrained and in some sense fragile body of the public which acts as a guilt determiner. These two factors have led to multiple safeguards in the criminal process which occupy fully as important a position in our scheme of values as does a free press. They have also led to the exclusion of electronic recording equipment from at least sensational criminal trials when the defendant objects.

One similarity between court trials and some administrative proceedings is the possibility of more serious intrusion upon an individual's private affairs when he is charged with some misconduct or his right to some benefit is challenged. If the person around whom such an administrative proceeding revolves objects to intrusion on his privacy from broadcasting, it seems just to abide by his decision, particularly since matters of broad public policy or the granting of large publicly controlled benefits will not be involved.

Similar infringement of a witness' interest in privacy counsels that there be a witness privilege not to have testimony about one's private affairs or culpable conduct recorded. This does not provide any reason for complete exclusion from the proceeding; hence, agencies should normally not be allowed totally to exclude electronic recording equipment unless the proceeding revolves around an individual's private affairs.

In almost all cases these private privileges to exclude or limit electronic recording, together with power in the presiding officer to control sources of disruption, should strike the desired balance between the requirements of the administrative process, legitimate private interests and the imperatives of a free press. It must be recognized, however, that all objections to broadcast recording of administrative proceedings cannot be foreseen. Unusual circumstances may arise where additional power to control seems imperative. For instance, if a proceeding were being telecast live, erroneous testimony might lead to some public panic—a run on a bank or fear of danger from a nuclear power plant. Such instances will be rare, since proceedings delving into delicate matters will usually not be open to the public and broadcast coverage will be forbidden on that ground. The possibility does, however, make it wise to repose a residual power in the presiding officer to exclude or limit broadcast coverage of a proceeding, but only if he provides compelling reasons for doing so on the public record.

The Administrative Conference recommendation is generally responsive to these considerations. Its witness privilege is unnecessarily broad but could be justified by administrative convenience. The only significant respect in which it deviates from what seems appropriate is in allowing agencies to weigh the advantages and drawbacks of audio-visual coverage in non-public interest adjudications involving corporate entities. In such cases there seem to be no drawbacks to weigh or at least none which do not call into question the overall receptivity to coverage which the recommendation as a whole displays. Still an agency is called upon to justify any such exclusion, and the recommendation as a whole, if implemented, will represent a remarkable advance in bringing the processes of government closer to the people. It is hoped that the Judicial Conference would follow suit.

## APPENDIX

RECOMMENDATION 32: BROADCAST  
OF AGENCY PROCEEDINGS  
(Adopted June 8, 1972)

In recent years radio and television broadcasters have sought live or delayed coverage of many kinds of public governmental proceedings. While Canon 35 of the Canons of Judicial Ethics of the American Bar Association states that broadcasting or televising of court proceedings "should not be permitted," the reasons for this policy, to the extent they are applicable to administrative proceedings, are often outweighed by the need to inform the public concerning administrative proceedings, particularly those of broad social or economic impact, and to encourage participation in and understanding of the administrative process. Therefore, the public interest will be served by permitting radio and television coverage of many administrative proceedings, subject to appropriate limitations and controls.

## RECOMMENDATION

A. Audiovisual Coverage of Public Administrative  
Proceedings

An agency which conducts proceedings of interest to the general public should adopt regulations, consistent with the principles stated below, which state whether audiovisual coverage of each type of proceeding is permitted, precluded or left to the discretion of the presiding officer or other official under standards determined by the agency.

1. Proceedings in which audiovisual coverage should be encouraged. Notice-and-comment and on-the-record rulemaking proceedings, and adjudications in which a public interest standard is applied to authorize service or determine its level or quality, normally involve issues of broad public interest. An agency should take affirmative steps to encourage audiovisual coverage of public hearings or oral presentations in such proceedings, including provision of adequate space and facilities, convenient schedules, and the like.

2. Proceedings in which audiovisual coverage should be excluded. Audiovisual coverage should be excluded in adjudicatory proceedings involving the rights or status of individuals (including those of small corporations likely to be indistinguishable in the public mind from one or a few individuals) in which individual past culpable conduct or other aspect of personal life is a primary subject of adjudication and the person in question objects to coverage.

3. Proceedings in which agencies should balance conflicting values.

In adjudicatory proceedings not governed by paragraphs 1 and 2, an agency should determine whether the drawbacks of audiovisual coverage outweigh the advantages of informing the public. When audiovisual coverage is excluded or restricted, the agency should state the reasons for such exclusion or restriction on the record of the proceeding.

B. Prevention of Disruption

Audiovisual coverage should be conducted with minimal physical intrusion on the normal course of the proceeding. Agencies should impose reasonable restrictions on lighting, multiple microphones and other possible sources of disruption.

C. Protection of Witnesses

In any public proceeding a witness should have the right, prior to or during his testimony, to exclude audiovisual coverage of his testimony.