CAMERA RULE REPEAL

HEARING

BEFORE THE

COMMITTEE ON RULES
HOUSE OF REPRESENTATIVES

ONE HUNDRED FIFTH CONGRESS

FIRST SESSION

ON

H. RES. 298

A RESOLUTION AMENDING THE RULES OF THE HOUSE OF REPRESENTATIVES TO REPEAL THE RULE ALLOWING SUBPOENAED WITNESSES TO CHOOSE NOT TO BE PHOTOGRAPHED AT COMMITTEE HEARINGS

November 4, 1997

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H. RES. 298, A RESOLUTION AMENDING THE RULES OF THE HOUSE OF REPRESENTATIVES TO REPEAL THE RULE ALLOWING SUBPOENAED WITNESSES TO CHOOSE NOT TO BE PHOTOGRAPHED AT COMMITTEE HEARINGS

Tuesday, November 4, 1997

HOUSE OF REPRESENTATIVES,
COMMITTEE ON RULES,
Washington, D.C.

The committee met, pursuant to call, at 6:15 p.m. in Room H–313, The Capitol, Hon. Gerald B.H. Solomon [Chairman of the committee] presiding.

Present: Representatives Solomon, Dreier, Diaz-Balart, Myrick, Hastings, McInnis, Goss, Moakley, Frost, and Hall.

The CHAIRMAN. The committee will come to order. You will have to excuse my voice. I am running out of voice today. It has been a long year.

The subject matter of this hearing is a resolution which repeals the exception in House rules to the requirement that public committee proceedings be open to the media. I have a brief opening statement before I yield to my good friend, Mr. Moakley.

Let me just say that in several high-profile congressional investigations in recent years certain witnesses, subpoenaed to appear before congressional committees, have invoked a little-known House rule, clause 3(f)(2) of rule 11, during their appearances before these various committees.

This rule, as the Members are aware, allows a subpoenaed witness, and we are talking about subpoenaed witnesses here, to demand that TV cameras be turned off, that still photography cease, and that radio coverage end as well, while the witness is testifying before the committee after being sworn. That means a witness, for no reason at all, can arbitrarily kick out radio, television, photographers, leaving the written media with what I would consider to be an unfair news reporting advantage.

The assertion of this right before several committees since the late 1980s has given many Members on both sides of the aisle firsthand experience with this rule. Several Members from both sides of the aisle who are very active in their committee work have found the rule frustrating and have approached me and other members of this Rules Committee on the House floor to change that rule.

The sweeping changes in electronic communications, and the vast number and scope of news media outlets available to cover Government events, has also led Members to wonder if this rule may be an anachronism.

The chairman of the Executive Committee of the Radio-Television Correspondents' Galleries, Mr. Vic Ratner has written to the Rules Committee, and you all have copies of his letter, for the second year in a row requesting that the committee repeal this House rule. The rule, the Radio-TV Correspondents' rightly argue, unfairly discriminates against the electronic media. I do not think there can be any question about that.

The Rules Committee finds the practical concerns of Members and the arguments of the Radio-TV Correspondents' to be well-founded. By repealing this rule, House committees, in their infinite wisdom, can still consider whether to close a meeting and expel all press and all public, if an assertion is made that testimony may tend to defame, degrade or incriminate any person. And that does not have to be made just by the witness, it can be made by a Member of Congress or by anyone.

Witnesses enjoy several important protections, which require committee votes under current House rules, clause 2(g) and (k) of rule 11. These rules will remain in effect if we proceed to repeal the so-called camera rule.

House Members may be so accustomed to TV coverage of the House floor and its committees that they may forget that for many years the practice of the House was not to allow television broadcast of any committee proceedings, and I am sure that some of you, Mr. Moakley, Mr. Dingell and others who were here way back in the early 1970s would recall that. It was not until 1970 that the House permitted committees the ability to adopt rules allowing TV broadcast coverage if a committee voted to do so.

In 1995, as part of the historic Republican opening day reform package, we revised this rule to allow more sunshine to illuminate committee proceedings for the public. Under the new House rule, any meeting, as all of you know, any meeting or hearing must be open to all media coverage, nobody to be excluded, if the session is open to the public, which in fact most hearings and meetings are today.

I consider the resolution before us today as a natural follow-through to those sunshine reforms adopted at the beginning of the 104th Congress. I believe the House can, from time to time, adapt itself to new technology and at the same time assist in the education of the public about Congress. We should keep in mind that an informed citizenry is critical to the success of our republic.

Having said that, I yield to my good friend, Joe Moakley, for any opening statement that he might have before we entertain witnesses.

[The prepared statement of Mr. Solomon follows:]

Opening Statement of Chairman Solomon
on "Camera Rule" Repeal
November 4, 1997

The Committee will come to order. The subject matter of this hearing is a resolution which repeals the exception in House rules to the requirement that public committee proceedings be open to all media.

I have a brief opening statement before I yield to Mr. Moakley.

In several high-profile congressional investigations in recent years certain witnesses, subpoenaed to appear before congressional committees, have invoked a little-known House rule - clause 3(f)(2) of rule 11 - during their appearances before those committees.

This rule, as the Members are aware, allows a subpoenaed witness to demand that TV cameras be turned off, still photography cease, and radio coverage end as well, while the witness is testifying before the committee.

The assertion of this right before several committees since the late 1980's has given many Members - on both sides of the aisle - firsthand experience with the rule. Several Members who are very active in their committee work have found the rule frustrating and have approached me on the House floor to discuss it.

The sweeping changes in electronic communications, and the vast number and scope of news media outlets available to cover government events, has also led Members to wonder if this rule may be an anachronism.

The Chairman of the Executive Committee of the Radio-Television Correspondents' Galleries, Mr. Vic Ratner, has written to the Rules Committee for the second year in a row requesting that the Committee repeal this House rule.

This rule, the Radio-TV Correspondents' rightly argue, unfairly discriminates against the electronic media.

The Rules Committee finds the practical concerns of Members and the arguments of the Radio-TV Correspondents' to be well-founded.

By repealing this rule, House committees, in their infinite wisdom, can consider whether to close a meeting and expel all press and public, if an assertion is made that testimony may tend to defame, degrade, or incriminate any person.

Witnesses enjoy several important protections, which require committee votes, under current House rules. (clauses 2(g) and (k) of rule 11). These rules will remain in effect, if we proceed to repeal the so-called camera rule.

House Members may be so accustomed to TV coverage of the House floor and its committees that they may forget that for many years the practice of the House was to *not* allow television broadcast of committee proceedings. It was not until 1970 that the House permitted committees the ability to adopt rules allowing TV broadcast coverage, if a committee voted to do so.

In 1995, as part of the historic Republican opening day reform package, we revised this rule to allow more sunshine to illuminate committee proceedings for the public. Under the new House rule, any meeting or hearing must be open to all media coverage if the session is open to the public, which in fact most hearings and meetings are.

I consider the resolution before us today as a natural follow-through to those sunshine reforms adopted at the beginning of the 104th Congress.

I believe the House can, from time to time, adapt itself to new technology and at the same time assist in the education of the public about Congress. We should keep in mind that an informed citizenry is critical to the success of our republic. With that, I would yield to Mr. Moakley for any opening statement he might have.

Mr. MOAKLEY. Thank you very much, Mr. Chairman. We are here tonight with very little notice to take away fundamental rights guaranteed witnesses by the House rules.

But before we get into the substance of the resolution, Mr. Chairman, let me ask, what is the rush? We only received notice of this meeting late Friday afternoon for today's 6 p.m. hearing. The House had already adjourned for the week, Members had already left town for the weekend, the House was out of session until Tuesday, and votes were not expected before 5 o'clock. There was no indication, no announcement last week by you, Mr. Chairman, that this matter was likely to come before the Rules Committee. It was not even announced by the majority leader on Friday as part of the schedule for the following week. It was not listed on the floor schedule that was distributed on Monday morning. No advanced notice was given to anyone, at least on our side of the aisle, that consideration and disposal of this measure was expected to occur in the immediate future. There is no justifiable reason why we must act in this careless and this hurried fashion.

The rule you want to repeal, Mr. Chairman, was adopted in response to the shameful abuses by this House in the McCarthy era. Some say it originated in a suicide note. In June of 1957, the House Un-American Activities Committee opened up hearings in San Francisco. A young cancer researcher named William Sherwood was subpoenaed to appear on camera before the committee. Two days before his scheduled appearance he wrote a note expressing his "fierce resentment of being televised." He then jumped from his hotel window to his death.

Cameras and live broadcasts were banned from committee hearings from 1957 until the Congress enacted the Legislative Reorganization Act of 1970. The 1970 act, Mr. Chairman, which grew out of an extensive and lengthy hearing process by a special subcommittee, contained the identical language, word for word, that is in the current rules, the same language, the very same language, that you seek to repeal.

Senator Javits, while serving in the House, representing your great State, Mr. Chairman, was one of the first Members to champion the use of TV cameras in the Congress. However, he was cognizant of how it might impact on the rights of witnesses, and in February of 1952 he said, "the indiscriminate use of television and radio could very easily in many cases work out to invade the individual's rights." How right he was.

Representative Hugh Scott, Republican of Pennsylvania, and Chairman of the Rules Subcommittee in the Republican-controlled 83rd Congress, said in March of 1955 that a code of fair committee procedures must protect a witness from distraction, harassment, or nervousness that could be caused by radio, TV, and motion picture coverage at hearings. The closest we have to this law is clause 3(f) of rule 11.

Mr. Chairman, witnesses do not always have the opportunity to rebuff statements made to them by members of the panel. They cannot object to a question that is misleading or incriminating. They can be held in contempt if they refuse to answer any question, regardless of how inappropriate that question may be. They

may have a lawyer present, but that lawyer is virtually powerless to halt an unfair line of questioning. To further subject these witnesses to unwarranted television and radio coverage, I feel, is a flagrant abuse of the power by the Members of Congress.

Mr. Chairman, let us not forget that committees also make mistakes. Recently Chairman Burton subpoenaed the records of the wrong Chi Wong. They did it again and subpoenaed the records of the wrong Li Ping Chen. They subpoenaed the records of Li Ping Chen Hudson, who had nothing to do with any kind of fund-raising. These subpoenas were for documents, but these innocent citizens might just as easily have been called and grilled before rolling TV cameras.

The protection provided in clause 3(f)(2) of rule 11 is all that a witness can use to protect him or herself from such exploitation. Now even that small refuge is to be taken away leaving witnesses at the mercy of an often hostile panel.

When I sat in your chair, Mr. Chairman, I, too, heard from frustrated Chairmen who wanted to repeal the rule because an individual invoked their rights. They said the rule inhibited the freedom of the press. I told them the first amendment rights of the press and the public's right to know are in no way diminished by the rule in its present form. The print and broadcast press are not excluded from a hearing and nothing in this rule prevents any reporter from fully covering the hearing.

But American citizens, Mr. Chairman, have a right of privacy, a right to avoid the limelight of cameras. And when Congress compels—when Congress compels; these are not volunteers—when Congress compels an individual to testify, he or she should have an absolute right to demand that the cameras be turned off.

I deeply regret that we are moving in this direction today. I can only implore you and the Majority to listen to our witnesses who are here today and take careful heed of all they have to say on this issue. Let us not blindly jump in and strip away this vital protection from these witnesses who are obliged to testify by order of congressional subpoena.

Just hours ago we reported a rule on a measure to reform the Internal Revenue Service. The legislation was needed, Mr. Chairman, because the IRS is sometimes overzealous and intimidates American citizens. We have to pass that bill because the average American cannot escape the callous tactics of this organization. So let us think, let us reflect, let us not allow ourselves to become another IRS in the eyes of the American public.

[The prepared statement of Mr. Moakley follows:]

We're here tonight -- with very little notice -- to take away the fundamental right guaranteed to witnesses by the House Rules.

Before we even get into the substance of this resolution, let me ask what is the rush? We only received notice of this meeting late Friday afternoon for today's 6:00 p.m. hearing. The House had already adjourned for the week. Members had already left town for the weekend. The House was out of session until Tuesday and votes were not expected to occur before 5:00 p.m.

There was no indication or announcement last week by you, Mr. Chairman, that this matter was likely to come before the Rules Committee this soon. It was not announced by the majority leader on Friday as part of the schedule for the following week. It was not listed on the Floor schedule that was distributed on Monday morning. No advanced notice was given to anyone, at least on our side of the aisle, that consideration and disposal of this measure was expected to occur in the immediate future.

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The 1970 Act, which grew out of an extensive and lengthy hearing process by a special subcommittee, contained the identical language – word for word -- that is in current rules – the same language you seek to repeal.

Senator Javits, while serving in the House representing your great state of New York, was one of the first members to champion the use of TV cameras in Congress. However, even he was cognizant of how it might impact the rights of a witness. In February of 1952 he said, "the indiscriminate use of television and radio could very easily in many cases work out to invade the individual's rights." How right he was!

Representative Hugh Scott (R-PA) and Chairman of a Rules Subcommittee in the Republican controlled 83d Congress said in March of 1955 that a code of fair committee procedures must "protect a witness from distraction, harassment, or nervousness caused by radio, TV, and motion picture coverage of hearings." The closest we have is clause 3(f) of Rule XI.

Witnesses do not always have the opportunity to rebuff statements made to them by members of the panel. They can't "object" to a question that is misleading or incriminating. They can be held in contempt if they refuse to answer any question, regardless of how inappropriate it may be.

They may have a lawyer present, but that lawyer is virtually powerless to halt an unfair line of questioning. To further subject these witness to unwanted television and radio coverage is a flagrant abuse of power by the members of ~~the Committee~~ Congress.

Let's not forget that the committees make mistakes. Recently Chairman Burton subpoenaed the records of the wrong Chi Wong. Then they did it again; they subpoenaed the records of the wrong Li Ping Chen. They subpoenaed the records of Li Ping Chen Hudson, who had nothing to do with fundraising. These subpoena were for documents, but these innocent citizens might just as easily have been called to be grilled before rolling TV cameras.

The protection provided in clause 3(f)(2) of Rule XI is all that a witness can use to protect him or herself from such exploitation. Now even that small refuge is to be taken away leaving witnesses at the mercy of an often hostile panel.

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But American citizens have a right to privacy, a right to avoid the limelight of the camera. And when Congress compels an individual to testify, he or she should have an absolute right to demand that the cameras be turned off.

I deeply regret that we are moving in this direction today. I can only implore you in the majority to listen to our witnesses who are here today and take careful heed of all they have to say on this issue.

Let's not blindly jump in and strip away this vital protection from those witnesses who are obliged to testify by order of Congressional subpoena.

Just hours ago we reported a rule on a measure to reform the Internal Revenue Service. The legislation is needed because of the IRS is sometimes overzealous, and intimidates American citizens. We have to pass that bill because the average American can't escape the callous tactics of this organization. Let's not allow ourselves to become another IRS in the eyes of the American public.

Mr. FROST. Mr. Chairman.

The CHAIRMAN. I will recognize the gentleman in just a minute, but I just need to respond so that everyone knows exactly what we are doing here this evening.

Now before us we have the proposition to repeal this provision, and you all should listen carefully because then I am going to cite what we are going to leave in place, which tends to support the gentleman's argument, and we are going to leave that in place.

What we are going to repeal this evening would be this: No witness served with a subpoena by the committee shall be required against his or her will to be photographed at any hearing or 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 who does not wish to be subjected to radio, television or still photography coverage, all lenses—this is simply at the request, arbitrarily by anyone—at the request of any such witness who does not wish to be subjected to radio, television or still photography coverage, all lenses shall be covered and all microphones used for coverage turned off.

Now, that is what we are proposing to repeal. Now, this is what is left in place. This is what the rule of the House is now:

"Whenever it is asserted that the evidence or testimony at an investigatory hearing may tend to defame, degrade, or incriminate any person"—you all heard that and understand that—"such testimony or evidence shall be presented in executive session, notwithstanding the provisions of clause 2(g)(2) of this rule, if by a majority of those present, there being in attendance the requisite number required under the rules of the committee to be present for the purpose of taking testimony, the committee"—and this is the key part—"the committee determines that such evidence or testimony may tend" —not will, but may tend—"to defame, degrade, or incriminate any person."

Now, that is what is going to be left in place. Now, that means that whoever the witness may be, whoever the Member of Congress may be, they can request the committee to immediately make the decision on whether this would tend to defame or incriminate or degrade any person. And if the committee in its infinite wisdom decides that it would, then the meeting is completely closed, all the media is removed, and they proceed in executive session. That is what we are proposing here today.

I think, Joe, you made the statement that the witness have the rights, but I think the American people, we made this decision a long time ago, for right or for wrong, that we would televise the proceedings of this House and of the committee proceedings and we are going to continue to do that.

Mr. MOAKLEY. Because we are all here voluntarily to do that.

The CHAIRMAN. And this simply clarifies and allows the committee to close the hearing if there would tend to be damage to any Member.

Mr. MOAKLEY. May I respond, Mr. Chairman?

The CHAIRMAN. I will let Mr. Moakley respond, then Mr. Frost.

Mr. MOAKLEY. You are still depriving the American citizen of a right and you are putting it up to the majority of the committee sitting. That is not what our people who set up this rule intended.

These are absolute rights given to the American citizen, and I do not think the committee should be able to make the decision to take those rights away, even if it is on a case-by-case individual ruling.

The CHAIRMAN. Mr. Frost.

Mr. FROST. Mr. Chairman, I have to leave the committee for a little while because I have an engagement I have to go to, but I want to give a little background on this. And I think it is important to realize that sometime in the future there will be a Democratic majority in this House just as there was a Democratic majority in the past.

In 1989, I served as chairman of the caucus rules committee of the Democratic Caucus and there was a proposal from Democrats to change this rule before my committee, before my caucus rules committee. My caucus rules committee rejected that proposal. Let me tell you what the situation was.

There was a Republican, former Republican cabinet member who came and testified before a committee controlled by Democrats and that Republican cabinet member invoked this rule and it made the Democrats on the committee so mad that they wanted to abolish the rule so that no Republican cabinet member could ever come forward and be shielded from television.

Now, what goes around comes around. What we have right now is the Republicans in control and you want to bring Democrats before the committee. We had a situation 10 years ago when the Democrats were in control and we wanted to bring Republicans before the committee and we chose, the Democratic Caucus chose, to leave this rule in place and let Republicans who appeared before the committee invoke the rule and not be required to be on television.

I think it is important to understand what the current situation may not be the situation 2 years or 4 years from now and that we should not be caught up, swept up in the emotions of the moment, but we should try and understand why this rule is in place and why it has been in place for a number of years and why when we were in the majority we chose to keep it in place even though some members of our own caucus wanted to throw this rule over the side.

The CHAIRMAN. As I call Congressman Bob Barr to the witness table, I think it is important to submit three documents. One is the testimony that came out a subcommittee hearing conducted by Congressman Lantos of California, and I think it would the identical meeting that Mr. Frost was just referring to. He was the subcommittee Chair of Employment and Housing in the old Government Operations Committee and they were interviewing Mr. Pierce at the time.

And Mr. Lantos said, quote: ″I want to thank all my colleagues for their comments. As we know, the Rules of the House presently in existence allow a subpoenaed witness to request that live telecasting and broadcasting of the proceedings not take place while he is in the witness chair. I fully disagree with this rule, and I have

introduced legislation, H.Res. 253, to change the Rules of the House, because I believe the American people are entitled to open government. But, as long as the rule is on the books I, of course, intend to enforce the rules.″

And he went to you, Mr. Moakley, and spoke to you and Mr. Foley at the time, and I would ask unanimous consent to submit this for the record.

[The information follows:]

ABUSES, FAVORITISM, AND MISMANAGEMENT IN HUD PROGRAMS (Part 4)

FRIDAY, OCTOBER 27, 1989

HOUSE OF REPRESENTATIVES,
EMPLOYMENT AND HOUSING SUBCOMMITTEE
OF THE COMMITTEE ON GOVERNMENT OPERATIONS,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2154, Rayburn House Office Building, Hon. Tom Lantos (chairman of the subcommittee) presiding.

Present: Representatives Tom Lantos, Barney Frank, Jon L. Kyl, and Christopher Shays.

Also present: Representatives Bruce Morrison and Charles E. Schumer.

Staff present: Stuart E. Weisberg, staff director and chief counsel; Celia Boddington, professional staff member; Andrea Nelson, counsel; June Livingston, clerk; Jeff Albrecht, minority professional staff, Committee on Government Operations, and Peter Carson, legislative assistant to Congressman Shays.

Mr. LANTOS. The meeting of the Subcommittee on Employment and Housing will please come to order.

At today's hearing, we will continue our examination of abuse, waste, favoritism, and mismanagement of housing programs during the administration of HUD Secretary Samuel Pierce. On May 25, more than five months ago, Secretary Pierce appeared voluntarily before this Subcommittee and testified at length about his stewardship at HUD. Subsequent testimony by other witnesses and documents uncovered by Subcommittee investigators were at odds with Mr. Pierce's testimony.

Accordingly, by letter of July 8, I invited Mr. Pierce to testify further. At his request, Mr. Pierce's return appearance was scheduled for August 3, the last day before the Congressional District work period. In late July, Mr. Pierce informed the subcommittee that he was having difficulty obtaining counsel and asked for a postponement. I agreed to postpone his appearance for an additional six weeks, and the hearing was rescheduled for September 15.

In early September, Secretary Pierce and his attorneys requested a further delay. I declined to grant that request, but as a special accommodation to Secretary Pierce, I agreed to limit his testimony to only three subjects and to permit him to delay answering any specific question if he felt he needed to review certain relevant documents. Nevertheless, despite a firm agreement and a clear under-

Thank you, Mr. Chairman.

Mr. LANTOS. Thank you very much. I am very pleased to call on my distinguished colleague from New York, Mr. Schumer.

Mr. SCHUMER. Thank you, Mr. Chairman. Again, let me thank you for your graciousness in inviting Bruce Morrison and I and Marge Roukema of the Housing Committee to sit in.

Let me also say, Mr. Chairman, I think this is an appropriate time to commend you on the outstanding job that you have done. These hearings are clearly at a crossroads right now. You have led them in an exemplary way. You have been straightforward, honest, you have given every witness every opportunity, you have been gracious and yet, you haven't let all the diversions that many have placed in your way get in the way of the ultimate purpose of these hearings, which is to find out what the heck went on in HUD for eight years.

We have now begun to learn. Despite the fact that a number of witnesses won't testify, we have begun to learn. Already prescriptions for reform are emanating from one place and another, and that is due to your work and your work alone. I think the country owes you a real debt of thanks for the job that you have done.

To the matter at hand, today is—one can only describe it as a sad day. It is a sad day, because we have a former Cabinet Secretary repeatedly taking the Fifth Amendment, which is his right. It is a sad day to see a man who everyone had perceived to be an honorable man, here before us saying that he cannot testify because he is concerned that he might incriminate himself. That is why he is not testifying. It is not, that he hasn't had enough time, it is not the tone of the member of this panel, it is not that he hasn't found an attorney, he has two very able ones sitting right before us.

I would say that the game of legal hide and seek that is being played here has sullied the reputation of Samuel Pierce almost as much as what has gone on at HUD, because we are just not getting anywhere. We hear different reasons all the time as to why he won't testify. We all know that the reason is a Fifth Amendment one, fear of self-incrimination and none other. And then, we are asked to play a different game.

Mr. Chairman, I for one, am sick of the game. I think we have had enough, and I don't think we should have to deal with it any longer. The Secretary, I would like to believe, is an honorable man. But the one way that he can get his side of the story out publicly and in a forum where there is nothing in between him and the television camera is by coming here and testifying. The fact that he will not testify has done far more to convince this gentleman that something really rotten went on in HUD than anything else.

So, I don't think the legal game of hide and seek is really doing Samuel Pierce or his reputation very much of a service. I hope that one way or another, we will somehow just end all of these shenanigans.

Mr. LANTOS. I want to thank all of my colleagues for their comments. As we know, the Rules of the House presently in existence allow a subpoenaed witness to request that live telecasting and broadcasting of the proceedings not take place while he is in the witness chair. I fully disagree with this rule, and I have introduced legislation, H.R. 253, to change the Rules of the House, because I

believe the American people are entitled to open government. But, as long as the rule is on the books I, of course, intend to enforce those rules.

Therefore, let me briefly read the relevant paragraph.

"No witness served with a subpoena by the Committee shall be required against his or her will to be photographed at any hearing or 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 who does not wish to be subjected to radio, television or still photography coverage, all lenses shall be covered and all microphones used for coverage turned off."

I would like to ask the media to observe this. As on previous occasions, if members of the media wish to use a tape recording, they need to sign a statement which reads as follows. The audio tape recording of Secretary Pierce's testimony before the Subcommittee, which I have requested to be permitted to make, is not intended for the purpose of broadcasting and will not be broadcast in any manner. I declare under the penalty of perjury and under the laws of the United States of America, the foregoing is true and correct.

I want to caution all members of the media that we fully request that they comply with House Rules. We will wait a moment for the House Rules to be complied with, and then we will invite Secretary Pierce to the witness table. He will be accompanied by his attorneys.

Mr. MOAKLEY. Tell them what Mr. Moakley said to him.

The CHAIRMAN. Let me finish this. Then on November 29, 1996, which was just last year, Mr. Barney Frank of Massachusetts wrote a letter to David Dreier, who was Chair of our subcommittee, and he said:

"Dear David, it was brought to my attention in the last Congress that any witness who is served with a subpoena to appear before Congress may request to do so without any radio, television, or still photography coverage. I am inclined to think we should reconsider this and treat subpoenaed witnesses as we do all other witnesses who appears before Congress."

And, finally, let me just quote, who is this I am quoting, it is the Vice President of the United States.

Mr. MOAKLEY. Which one?

The CHAIRMAN. Then-Representative Al Gore, when he was chairman of the subcommittee in 1978 and 1981. He said, quote, "Rule XI relating to the presence of TV cameras is one which the Chair personally disagrees with and will endeavor to change." That was in 1978.

In 1981 he said again, "The Chair will announce that, notwithstanding the views of this Member of Congress and the views of others that this rule is unwise."

I see a good friend, Mr. Dingell, who is going to appear here later on, and I have witnessed Mr. Dingell on any number of occasions when he would insist that the witness continue with the TV cameras rolling, but—just a minute, John, and you will be recognized—but stating that they were not sworn yet and, therefore, the cameras would keep rolling.

So I think we need to remember all these things as we go along. And I am certain Mr. Dingell will be a witness here in a minute.

Mr. MOAKLEY. Mr. Chairman.

The CHAIRMAN. Mr. Moakley.

Mr. MOAKLEY. I am so happy that you are really paying attention to what Al Gore says. I would hope you would pay attention to what he says on everything and not just on this one matter.

The CHAIRMAN. If we did that, Mr. Moakley, my property owners would not have any property rights left at all.

Mr. MOAKLEY. Okay, but you may recall when Tom Lantos did come before the committee that I said this must be treated with extreme caution and pushed him to a subcommittee for more extensive hearings, and we never allowed that change to take place. Remember that?

The CHAIRMAN. Well, let us hear the witnesses and see what they have to say here today.

The first witness before us is the Honorable Bob Barr, who has filed legislation which would repeal that rule which I have spoken about earlier. Mr. Bob Barr.

STATEMENT OF THE HON. BOB BARR, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF GEORGIA

Mr. BARR. Mr. Chairman, it is an honor to be here before you and the other members of the Rules Committee to consider a rule that, unfortunately, we need to bring forward. The reason we need

to bring it forward is because there is a rather strange rule in the House that permits certain proceedings before certain committees, at the request of certain individuals, for whatever reason possible, to exclude certain portions of the media from letting the public know what is going on in that hearing.

Mr. Chairman, it is unfortunate that we need to bring this forward because, really, the hallmark, the underpinning of this entire Congress, from its very inception, that is embodied in this manual and these rules has been openness.

Similar to other work with which I am familiar, having served as a United States attorney, there are certainly specific proceedings for specific statutory reasons reflecting very specific rights of individuals or of the Government at which that general hallmark of our Government, and that is that everything ought to be, insofar as possible, made public, because out of that public knowledge and perception of what the Government is doing comes public confidence in the Government and out of that comes strength of Government.

But even in those circumstances, in which as a United States attorney I had to abide by certain court proceedings, rules of criminal procedure, civil procedure or grand jury rules, Mr. Chairman, that provide otherwise, that is, that provide for secrecy or exclusion of the public, it was always a burden on the Government to justify why an exception to the general rule under which our Government operates, and that is that the public ought to know what is gong on and the public has a right to know, an overarching right, the burden is always on the Government to make sure that the exemption fits within the exemption that the proposed secrecy, such as grand jury proceedings to protect an ongoing investigation, to protect the name or identity of a witness because it might endanger people's lives, or of course there are national security areas similarly, the burden is always on the Government.

And in our proceedings also, Mr. Chairman, that certainly is and ought to remain the overarching and indeed the foundation on which we operate here, and that is the strength of what we do here, the public's confidence in what we do here is borne in large part out of the fact that what we do, how we operate is uniformly and consistently open to the public. And those circumstances under which we draw exceptions for that ruling ought to be very, very limited and very carefully circumscribed and based on a very specific requirement or right that supersedes that general right of the public to know what is going on in Government.

The proposal that I put forward, despite some folks' attempt to make it appear partisan, has nothing to do with partisan politics. The most recent instance in which this particular provision of the rule was invoked involves some witnesses before the Government Reform Committee. It had nothing to do with partisan politics. I do not know which sides of the aisle had more or less of an interest in ensuring that the public knew more or less about what those witnesses were testifying to. It may have broken down that it really did not affect the Democrats or the Republican side more than another.

The fact of the matter is, Mr. Chairman, as you have so eloquently indicated, the current provision that allows arbitrarily for

any particular witness to exclude a certain type of broadcasting; namely television and radio broadcasting exclusively, and photography, from his or her testimony, would lead to some very strange results. You might have one witness on a panel who wants to do that. Does that mean the other witnesses on that panel similarly are circumscribed? And what about the public's rights to hear and see what those other witnesses are testifying to?

There is no requirement that there be any rational basis for the assertion of this particular provision, which I do not believe is founded in some absolute overarching constitutional right of the people to appear before the Congress in secret.

There is also, Mr. Chairman, as you have also very eloquently stated and referenced in the rules, there is full opportunity in the rules, if my proposal is adopted by the House, for any particular committee or subcommittee in any particular circumstance, where there is good reason for it, to exclude the media, exclude the public, in order to protect an important articulable circumstance or right of a witness.

So I would very much appreciate the committee's careful consideration of this proposal. It is in keeping not only with, as the Chairman indicated, the way we started business in the 104th Congress, but really it is consistent with the way Congress has always operated, and that is to the greatest extent possible, unless there is some very, very well-articulated, very important, very specific reason not to, we operate in the public, in the open, and so that the media, all of the media, not discriminating against one branch of the media over another, which the current rules do, has the opportunity to let the public know what is going on.

So I would urge adoption of this and a favorable report on it. It is a very limited proposal, Mr. Chairman. It does not, as you have indicated, do away with the full range of powers that our committees and subcommittees will continue to retain to close certain hearings for good reason.

The CHAIRMAN. Well, thank you, very much, Congressman Barr. I think the record ought to show that Congressman Barr is a former U.S. attorney with the Justice Department; that he is also a member of the Judiciary Committee and a member of the Government Reform and Oversight Committee. We appreciate your knowledge and your being here today.

Mr. BARR. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Moakley.

Mr. MOAKLEY. Mr. Barr, why do you think it is necessary to rush this resolution through with such short notice, with such inadequate time to thoroughly study the ramifications of the rule changes?

The CHAIRMAN. Before the gentleman answers that, would my good friend yield?

Mr. MOAKLEY. Love to.

The CHAIRMAN. Well, Joe, I somewhat resent your implication that this is being rushed through. This is being considered under the rules of the House. Were you given 48 hours' notice, like you are on all legislation?

Mr. MOAKLEY. But how come we were not notified when other matters were coming up at the same time and your leader did not give us—

The CHAIRMAN. If I could, I will give you a very good reason. It is the intent of this Member of Congress to see that we adjourn here this weekend, and I do not much care what else happens but we are going to try to get out of here this weekend.

And if we are going to get out of here this weekend, then this rule change ought to be in place because we will not be back here until January 27th, and then only for a couple of days. We will be off for the entirety of Lincoln's birthday, which means we will not be down to serious business until the last of February.

So that is good enough reason why we should consider this today. Now, Mr. Barr can answer your question.

Mr. MOAKLEY. You forgot one other reason, the Burton hearings are going to start next week.

The CHAIRMAN. I would hope so.

Mr. MOAKLEY. How could he do it without television?

The CHAIRMAN. Well, if I am sitting home in the Adirondack Mountains, we get television up there.

Mr. MOAKLEY. I hope so.

The CHAIRMAN. And I want to see what is going on down here.

Mr. MOAKLEY. Now, Mr. Barr, you can answer my question.

Mr. BARR. Mr. Moakley, thank you, and of course all I can do, and I would never be so presumptuous to speak for yourself or any other member of the committee as to why the committee elects to take certain action, all I can do, respectfully, is submit my rule change, my resolution.

I believe it is important to address this. I appreciate a prompt hearing by the committee. I wish all our committees operated as promptly and responsive to Members' wishes as this one does.

Mr. MOAKLEY. You have used the word "secrecy" and "closed hearings." Not allowing television or radio in there does not close the hearing down, and there is not secrecy. Those people can sit there like anybody else and take notes down. The only thing this stops them from is taking pictures and hearing sound. So it is not secrecy. It is still an open hearing; would you agree?

Mr. BARR. It is sort of strange the way it does it, because, for example, you are absolutely correct, members of the printed media can stay in there, members of the public can stay.

Mr. MOAKLEY. TV reporters can sit in there but they cannot come in with cameras.

Mr. BARR. But the cameras, the microphones and the lenses have to be covered.

Mr. MOAKLEY. That is right, but the people who staff them can write and read and do everything else.

Mr. BARR. Which raises the question, why have the rule? It is sort of a halfway rule anyway.

Mr. MOAKLEY. As a former States attorney, you know that under questioning even the most straight, honest citizen can appear guilty because he is sweating and stuttering and stammering, and I think the television camera has a chance to do an awful injustice on a person who is appearing involuntarily before that committee, against his will. I think he should at least have the right that is

prescribed to him in the rules of having no television or radio coverage.

Mr. BARR. I do not, frankly, think it is the television camera that intimidates the witness, I think it is the badgering by certain members of the committee, which I have seen before. That may be more of a problem than whether the camera exists.

Mr. MOAKLEY. And these witnesses will not be badgered by anybody in these hearings?

Mr. BARR. They are, but it has nothing to do with whether the cameras are there. It is the badgering by certain Members that causes a witness to sweat.

Mr. MOAKLEY. What if a witness is an informer about organized crime and he comes before the committee and he is on television. That does not exactly increase his life-span.

Mr. BARR. And that is why we now have and would continue to have under my proposal, even if it was adopted, very adequate remedies to protect against disclosure.

I was at a subcommittee hearing just 2 weeks ago in which we had a person from Colombia that appeared before the National Security Subcommittee under just those circumstances, and we, I hope, maintained very adequate protection for her identity.

The CHAIRMAN. Would the gentleman yield at that point, just to cite the existing House rule even after we repeal this one?

We can still close the meetings for national security information, sensitive law enforcement information, information that would tend to defame, degrade, or incriminate any person and information that would violate any law or rule of the House.

Mr. MOAKLEY. After a vote of the committee. After a vote of the majority of the committee.

You still are taking away that American citizen's rights. And what we did today to chastise the IRS because of their overzealous agents, I think would be a prime example of why we should not rush ahead on something like this.

The CHAIRMAN. Mr. Moakley, could I just show one reason why we could? You seem to think the written news media always reports exactly what happened and what transpired.

Mr. MOAKLEY. I never said that.

The CHAIRMAN. Wait a minute, let me show you a headline here. Says "Clinton Labels Tax Cut Selfish." Now I do not know whether he really said that or not. That is a pretty absurd statement, but I am sure if the people watching it on television saw him say that, they would understand it. And that is why we have such a large viewing audience for C-SPAN these days. The American people like to see what is going on here.

Mr. MOAKLEY. Where are they tonight?

The CHAIRMAN. You probably did not want them here.

Mr. MOAKLEY. I did not have a thing to do with that, you are the one that calls them.

The CHAIRMAN. Go right ahead.

Mr. MOAKLEY. I am all done.

The CHAIRMAN. Mr. Dreier.

Mr. DREIER. Thank you very much, Mr. Chairman.

I will say, having been the recipient of that letter Mr. Solomon referred to from Mr. Frank, this is an issue we have spent a great

deal of time thinking about and, obviously, I am, as is Mr. Moakley, concerned about the rights of those witnesses. But it does seem to me that the operative words here are certain members of the media, and I do not like the idea of discriminating against one media source over another. So I think that that is something that does clearly need to be brought into the mix.

Second, I do believe that there are protections here, and while Joe continues to raise this issue of a majority of the committee, I have some degree of confidence in the levelheadedness of Members of this institution. I will admit there are some who may have a tendency to shoot from the hip on occasion, but I believe that if there are very justifiable concerns that are raised that going into executive session to address issues of concern, if a member of the Minority were to come to me and talked about a very, very compelling concern that existed on his part of a certain witness, assuming that it is a Democrat, and gave reason to go into executive session and say that the print and electronic media should not be there, I would be more than willing to entertain the arguments that are brought forward.

Mr. MOAKLEY. Would the gentleman yield?

Mr. DREIER. Be happy to yield.

Mr. MOAKLEY. The print and electronic media can be there but they cannot use the radios and television. They can be there like every other print reporter to take it down.

Mr. DREIER. But if we were to vote to go into executive session is what I am saying, if that decision were made.

Mr. MOAKLEY. I am glad you would feel so good for the Minority, but just, for instance, if a witness came before this committee, four Democrats and nine Republicans, how many votes would I win?

Mr. DREIER. I told you I would entertain it.

Mr. MOAKLEY. You may entertain it but you may not vote for me.

Mr. DREIER. Well, let me just say that I think there clearly is an opportunity for—

Mr. MOAKLEY. There is always an opportunity.

Mr. DREIER. That is right and the interests of the Minority to be heard on this. So I think we are moving ahead in a very responsible way.

The CHAIRMAN. Any further questions of the witness?

Mr. MOAKLEY. Mr. Chairman, I have one question.

The CHAIRMAN. Mr. Moakley.

Mr. MOAKLEY. You are a Federal prosecuting attorney?

Mr. BARR. Former U.S. attorney.

Mr. MOAKLEY. How many cases did you try that were televised?

Mr. BARR. Well, the trials are not televised in Federal Court.

Mr. MOAKLEY. Thank you.

The CHAIRMAN. Any other questions of the witness?

If not, Bob, we certainly appreciate your coming and giving us your expertise. Thank you again.

Mr. BARR. Thank you, Mr. Chairman.

The CHAIRMAN. And now we will have a panel of three of the most distinguished Members of this body. One is the dean of the entire House, John Dingell of Michigan, along with Henry Waxman of California, Barney Frank of Massachusetts, and is the gentleman from Pennsylvania here to join that panel?

By all means, Mr. Kanjorski, if you would come forward. I do not have you on my witness list, but you are always welcome. If the four of you would come forward. And if there are only two of you, I am sure you can hold your own.

Mr. Dingell, since you are senior to everybody, you may feel free to submit your entire statement for the record, but you can summarize and you may take as much time as you would like, sir.

STATEMENT OF THE HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. DINGELL. Thank you, Mr. Chairman. I was about to ask unanimous consent that I be permitted to insert my full statement for the record and that is entirely acceptable to me.

Mr. Chairman, for the record, I am a former prosecutor. I have engaged in fairly extensive private practice of law handling all kinds of cases. I have been a Member of Congress, as you have noted, for 41, almost 42 years. I have run probably as many congressional investigations as any man in this room or indeed in the Congress and have had a remarkable record of success in those investigations.

I tried my first lawsuit before I was 20, when I was a second lieutenant in infantry and was assigned the task of defending an individual as defense counsel, and I have had, as I mentioned, not inconsiderable experience with the practice of law and protection of the rights of citizens.

I would observe that there have been two very divisive periods in my kind of service in the Congress, one was the old McCarthyite era and the other was the Vietnam time. The time when Joe McCarthy and others committed some grotesque excesses in their congressional investigations struck me very hard. When I became the Chairman of the Oversight and Investigations Committee, I became very aware of the need to protect the rights of people, and one of my major concerns was to see to it that although we ran hard, tough, fair and vigorous investigations, that we did not commit any of the abuses which I had found to be so appalling.

And so we had two rules that we applied, one was that we had to be fair and the other was we had to appear fair, because I did not want anybody likening me to the things I had seen during the days Joe McCarthy was handling matters, and when Members of this body were doing the same kind of things, I will not mention their names, but they are not revered today and should not be.

And we have dealt with the rule that this committee would seek to repeal. We never found it inhibited the investigations. We never found that it inhibited the media knowing fully what was going on.

The rule that you cited, Mr. Chairman, with regard to the closure of the meeting, going into executive session, we have used, too. We never found that that inhibited the committee in its investigations and we never found that it ever inhibited the public in knowing what the committee was doing. We found that the public was able to be fully informed by the press.

To give you an example of what transpires when a witness comes in under the rule that we are discussing repealing, the witness has to come into the committee room. As he enters, he is subject to being photographed by the still cameras and by the television cam-

eras. As he moves forward to his place at the witness table, he is again subject to being photographed because he has not yet had the opportunity or the time to invoke his rights. And at the proper time, he has the right to insist that the cameras be turned off, the loudspeakers and the microphones be turned off and that the still cameras be shuttered. Prior to that time, he is subject to being photographed at any time.

When he concludes his testimony he is again subject to being photographed as he departs from the committee room, as he goes outside the Capitol, outside the room and the building where the committee is sitting. The members of the press have full opportunity to, and the media have full opportunity to take down any of the words which he says during the time that he is there and to also quote in full the remarks of the witnesses, of other witnesses, and also the questioners and Members of the Congress or the committee counsel who might be inquiring of this witness as to his behavior or for whatever matter.

Mr. DINGELL. I think that in the numerous occasions where this rule was invoked, and I always respect it, and I respected it assiduously, no witness was ever handled in such a way that the media and the public didn't full well know everything that went around, and the 5:00 and the 6:00 or the 7:00 or the 10:00 or the 11:00 news or the 7:00 news, the next morning always had full access to a full array of pictures which were taken showing the individual and quoting from his testimony in the proceeding.

I don't know how many in this room have participated in congressional investigations, but they are a rather scary event. You are up there very much alone. You may have a counsel present, but that counsel can only advise you as to your rights. He can't defend you. And the rights that you have in an appearance before a congressional committee are far less, far less, than the rights that you have when you appear in court.

A Member of Congress under the speech and debate clause can say almost anything he wants to you. He can abuse you. He can make some of the most scandalous and outrageous charges. He can deny you the real right to respond to the questions and answer it; charges that are made in his comments to you, about you. It is terrifying and it is ofttimes a demeaning experience.

The rule that you cited, Mr. Chairman, is a good rule but it doesn't go very far. And it is a rule upon which the individual who appears before the committee is entirely dependent, not on his—on his assertion of his rights, but upon the whim and the caprice of the committee, which may choose to afford him the judgment that he is about to be defamed or degraded or to come to the conclusion he ain't. And that is their absolute judgment, not subject to appeal.

I had a number of people before the committee. As I said, in the investigations we always afforded them full protection of this right. We never found it inhibited us in the slightest in arriving at the truth. And one thing else, we found that it also gave us the appearance of fairness and it enabled us to be fair. So it was not a rule which in any way inhibited the committee from carrying out its proper responsibilities or doing that which was right and important in terms of our duty to gather the facts, to lay the basis for law,

to find wrongdoing, to see whether or not other public officials are properly carrying out their responsibilities.

My good friend, Mr. Moakley, mentioned that two distinguished Republicans, Mr. Scott and Mr. Javits, both Members of this body, Members of the Senate, found that it was necessary for the Congress to have a rule of this kind for protection. Sam Rayburn was quite outraged about events which occurred, and he became supportive of the idea that the rules should be changed to protect the rights of witnesses who appear against this kind of thing. And it all stemmed from, in part, an awareness about a witness who killed himself because he didn't want to be photographed before, on television.

I don't think that, as I mentioned, the system that we have inhibits us from doing a thorough and a careful and a proper job investigating. But I wonder how many of us want to have that kind of consequence upon our souls. There are some who probably wouldn't find it at all troublesome, but I think I would, and I think everybody in this room would.

I remember on one occasion we called Michael Milken before a hearing. He was accompanied by his attorney, a very great and famous attorney by the name of Edward Bennett Williams, a very close and dear friend of mine. In fact, he was a former law school professor of mine in criminal law. He was a man that I not only very much loved, but deeply respected. And at the appropriate time, on his attorney's advice, he requested that the cameras be turned off, which I immediately ordered.

Mr. Williams made a simple point, and it was propounded in his book, which he wrote in 1962 entitled, "One Man's Freedom." And he said this: The average person is extremely nervous when he appears before any court or committee. It is unfair to ask him to appear before the entire country as well.

I am not quite clear why it is that there is this terrible rush towards this change in the rules. I am not aware of any business that is going to require us to rush to this kind of a change. I am not aware of any great public need, and speaking as one who has probably conducted more investigations than everybody else in the room here together, I can tell you that it has never inhibited us in either informing the people or conducting the business of the House or carrying out a proper and a successful investigation.

I think that if you look at it in that way, you are not protecting the rights of criminals. You are protecting the rights of citizens, citizens who have not been convicted of any crime. Indeed, not been charged with any particular kind of wrongdoing, appearing before perhaps one of the most terrifying institutions in this country, a congressional investigating committee, one whose powers to abuse and to destroy the name and the good name, the reputation, the rights, the opportunity of an individual even to defend himself, are no less in many particulars than the Court of Star Chamber or the Spanish or the Portuguese Inquisition.

I don't think that to make this change is going to make it easier for us to investigate here in the Congress. I think it is going to make it a great deal easier for us to abuse people, a great deal easier for us to create a situation where the public will ultimately feel the kind of revulsion they did of the sort of excesses I described

in the days of Joe McCarthy or Parnell Thomas or some of the other people like that who brought real, real distrust and disgust and distaste down on this body.

I would urge you not to do this. It isn't going to benefit us. There is no need. There is no help to be achieved for us in carrying out our mission, but we are going to tamper with and hurt the good name of this body and each and every one of us here if we take this step. We are not going to benefit the press. We are not going to benefit the country. We are not going to better inform the people. And we are not going to hurt only wrongdoers. We are going to hurt a lot of innocent people who are going to be destroyed in many different ways by committees which will commit excesses because there is literally no limit on the awesome and awful and terrifying power of a committee of a Congress when it is engaged in these investigations.

I beg you for your sake, for my sake, and for the sake of this institution, do not do this thing.

[The prepared statement of Mr. Dingell follows:]

Statement of Hon. John D. Dingell
Before Committee on Rules
November 4, 1997

Mr. Chairman, and Members of the Rules Committee, you are meeting today to consider the repeal of Rule XI (3)(f)(2) which states that no witness served with a subpoena shall be required against his or her will to be photographed at any hearing or give testimony while the hearing is being broadcasted. The provision also states: "This subparagraph is supplementary to clause 2(k)(5) of this rule, relating to the protection of the rights of witnesses."

Clause 2(k)(5) is an even more basic rule protecting the rights of witnesses, and one with which I am very familiar. It was adopted on March 23, 1955, less than 9 months before I began my service in the House, and three months after the Democrats had regained control of the House. The genesis of this rule and one of the many reasons my Republican colleagues lost control of the House for forty years are related, and it can be summarized in two words: Joseph McCarthy.

Clause 2(k)(5) simply states that if it is asserted that evidence at a hearing may tend to defame, degrade, or incriminate any person, the hearing shall be conducted in executive session, unless the committee by a majority vote determines that the testimony will not defame, degrade, or incriminate any person. Subsequently, the Congress passed the Legislative Reorganization Act of 1970, which established procedures for televising hearings. It included the specific provision before you today to protect a witness who is testifying under a subpoena from being exposed to cameras against his or her will.

While many of my colleagues do not remember the unseemly spectacle of Senator Joseph McCarthy or the House Un-American Activities Committee calling in dozens of ordinary citizens, some famous and some not, to defend their reputations against baseless charges and innuendoes from Congressmen and Senators, I certainly do. It represented perhaps the lowest point in the history of the Congress. The reform of the Committee process, much of which came at far too slow a pace, was an ongoing one for the 40 years of Democratic control of this institution. Now just 3 years after regaining control of the House, my Republican colleagues, proving they have learned nothing from their 40 years of wandering in the desert, apparently wish to turn back the clock and repeal one of the two most important witness' rights protections in the House rules.

I do not mean to suggest that the reform of the committee process has always been solely a Democratic concern. To the contrary, many of the leading reformers were Republicans. In fact, the broadcast rule under consideration today was first propounded by then-Representative and future Senate Republican leader Hugh Scott in 1954. He properly criticized the Democratic rules package in 1955 as lacking this provision, but noted at the time that Speaker Rayburn's policy against televising any hearings made the issue moot for the time being.

Speaker Rayburn had been a staunch critic of televising hearings, and his opposition was only heightened in 1957 when an individual called to testify before the House Un-American Activities Committee committed suicide. A suicide note said the individual had a "fierce resentment of being televised." Speaker Rayburn was not alone in his concerns. In remarks on the House Floor in 1952, then-Representative and future Senator Jacob Javits stated that even if television were allowed in some circumstances, "it is very essential to protect witnesses, and the indiscriminate use

of television and radio could very easily in many cases work out to invade individual rights."

I would note that this right has been asserted very rarely over the years. I can recall only few instances of its use in my oversight subcommittee, and I immediately ordered the removal of all cameras. The rule is rarely invoked, because at a fair hearing, most witnesses believe that they have a story to tell, and want it to be heard.

One case I can recall was an occasion when I called Michael Milken to appear at my hearing. He was accompanied by his attorney, the late Edward Bennett Williams, a former law school professor of mine, and a man I deeply respected. Upon his attorney's advice, he requested that the cameras be turned off, which I then ordered. Williams' point was a simple one, propounded in his 1962 book, One Man's Freedom: "The average person is extremely nervous when he appears before any court or committee. It is unfair to ask him to appear before the entire country as well."

I have often been characterized as a very tough overseer. It has been said that witnesses often did not look forward to a hearing that I chaired. Yet aware of the enormous power that we in Congress wield, first and foremost I wanted to ensure that all of my hearings were fair. As any of my ranking members on the committee would tell you, I always proceeded in a bipartisan fashion. In particular, subpoenas were always issued after close consultation with the minority.

We cannot ignore the potential for abuse in Congressional investigations. Members of Congress are given the right to say anything, slanderous or defamatory, at a Congressional hearing with total immunity under the Speech and Debate clause of the Constitution. Witnesses have minimal rights compared with those in a courtroom. Given this balance of power, it is not surprising that over time, a few committee chairmen, both Democratic and Republican, have abused the process.

Unfortunately, in this Congress many of the lessons learned from the McCarthy era are being forgotten. On the Government Reform and Oversight Committee, for example, the Chairman issues subpoenas without even consulting majority or minority members, much less seeking their approval. We are moving back toward the use of Congressional hearings for political and partisan purposes, with authority being placed in the hands of single individuals rather than committees.

Let me be clear about one thing. I favor government in the sunshine. I would never encourage a witness to close a hearing to cameras. Bringing the public's attention to important issues is a key purpose of investigative hearings. Yet I also care about individual's rights. I find it ironic that the same Republican leadership that devoted weeks of hearings to various individual rights ranging from those of David Koresh at Waco, to taxpayers being harassed by the IRS, finds it so difficult to understand that an unrestrained Congress is very capable of using a heavy hand.

Is the Republican leadership so thin-skinned that the first time a witness asserts his or her rights their first impulse is to take away the right? Is the Republican leadership so worried that the American people are just not bright enough to read about a hearing in a newspaper, if it is important enough? I know what Joe McCarthy's answer would have been. What will the Republicans' answer be?

The CHAIRMAN. John, thank you very much. And now, Mr. Kanjorski.

Mr. KANJORSKI. Mr. Chairman, the power—

The CHAIRMAN. Your entire statement will appear in the record without objection as well

STATEMENT OF THE HON. PAUL E. KANJORSKI, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF PENNSYLVANIA

Mr. KANJORSKI. Thank you. The power of the subpoena is an extraordinary constitutional power. I know of no other greater power exercised either by the courts or the executive branch of government. It was given the representatives of the people because at some time the public's need to know and the people's representatives need to know, properly legislated, passes over rights of individuals.

And so in the Constitution, when that right was placed in our hands, I think we should exercise it with extreme caution. I worry about the request of Mr. Barr because I think it is an exercise of the power of the Majority to accomplish a very short partisan or political end or gain.

I know from what experience Mr. Barr's request comes. Recently, before the Government Reform and Oversight Committee, we had three witnesses that exercised their privilege of requesting the cameras be turned off. I took part in the examination of those witnesses.

Quite frankly, although I did not agree at the time that that privilege should have been exercised or would I have supported the exercise of it, I have got to tell you that I am glad they did. One of those witnesses testified to something that he knew an individual delivered money to him on a certain day and a certain place in California, and yet we had six or seven pieces of almost incontrovertible evidence that that individual was in New York City.

So you had such a factual difference that was incredible. In attempting to determine whether this witness was telling the truth or maligning the individual that we thought and still think was in New York, we came down very heavily on him. I, for one, reminded him what perjury meant because I knew about what appeared to be incontrovertible evidence.

To this day we are not absolutely certain because we are still getting evidence, to prove the precise time that the individual testified, of him being in California when he was, in fact, in New York. But I wonder, if we are wrong, what would we have done to that individual. The whole world would have seen the Congress of the United States or a good portion, represented by that committee, coming down very heavily on a witness. The poor witness maybe honestly misunderstood who the individual was that gave the money.

I do not have any doubt that he was given money. It was a question of identity. But his reputation, and his name would have been ruined. Now, if he hadn't the right to exercise the privilege of having the cameras turned off, regardless of the final conclusion of the facts, his life would be, for all intents and purposes, ruined.

I think what we are dealing with is the idea of whether or not we should take into consideration the rights of individuals that we call before us under an extraordinary constitutional power. Now, as my good friend and colleague from Michigan has pointed out, the history of this rule goes back nearly 50 years when this Congress experienced a man committing suicide sooner than subjecting himself to what he called assassination by publicity. In his mind, it was sufficient.

You know, most recently, we had a member of the White House staff who did take his own life and in part of his note that he left for all of us to ponder on, he said here, speaking of Washington, ruining people is considered sport.

Those of us who are in public life have been hardened to the rights of privacy and secrecy and privilege just being average citizens. We sometimes think that all of the citizens that we represent have a right to be badgered, lied about, rumored about, and innuendoes circulated about. Maybe our hardened nature allows us to pursue these public positions, but average citizens consider their privacy, their integrity, their family reputations and their private business to be their rights that we should protect.

I think this rule runs directly into that problem. If this Congress is likely to accomplish some purpose in the hearings between now and when the Congress comes back from recess, where deliberation could be held as to what we want to do, if we just move in for the purposes of a few congressional hearings to accomplish what end I do not know. It certainly will not affect an election. It certainly will not establish any facts that are prosecutable. It probably will destroy a lot of people or at least add a great deal of embarrassment to them. If that is the purpose of this rule change, I do not think that is a sufficiently deliberative and thought-out purpose.

I would think that at the very least, we should examine into what has happened that caused this, and how it can be rectified. I want to call your attention to several points. Mr. Barr made the point in response to Mr. Moakley that he was a prosecuting attorney and they do not have a television camera in a courtroom in the Federal system. They do not have it in the Supreme Court deliberative chambers, which are important to all Americans. Why would Americans not like to know how a case is decided?

They do not have television cameras in the Oval Office. I think the Congress of the United States is a very open body, and when people say that things are done in secret, that is not true. A congressional hearing, as my good friend from Michigan pointed out, is a public hearing. There is a transcript and a record. The only thing it does not have is the ability to put a face and words on a living screen that can go to tens of millions of people, the image never to be called back.

The instantaneous ability through modern science and technology to ruin an individual is the question we are really faced with here.

How do we interface with this new technology in a parliamentary democratic system?

I am not sure, but I certainly do not think that the right of an individual that has been protected by precedent and by 27 years by

rule should be summarily changed in 48 hours. I see no reason for that.

I find that there will be a disturbing negative impact if this rule is passed. If I were a counselor and I had a witness who was subpoenaed before the Congress of the United States, I would encourage that witness to examine every potential possibility that he could legitimately plead the Fifth Amendment. If a witness under subpoena does that, you receive neither a picture nor a testimony that can injure that witness.

Some can say, that can be overcome because the Congress can grant immunity, and I would agree with you. But immunity does not require a simple majority of the committee; It requires a two-thirds vote of the committee. Therefore, you will have to have a participation in most instances of the Majority and the Minority coming to a reasonable conclusion that that action should be taken. That supermajority, at the very least, should be a portion of this rule, that an individual would have a right to request the permission of cameras and recordings be turned off. However, his privilege or asserted privilege or right could be reversed if two-thirds of the member of the committee thought it so important that he be pictured live. At least that would protect the Majority and the Minority, and for all intents and purposes, take it out of a partisan or political consideration.

I do not know and have not had the time to examine this case law, Mr. Chairman, but I seem to think that Solomon versus New York Times says that if you become a celebrity, you lose certain liable and slander protections under the law. Of course, we know there is immunity for testimony before the committee, but if a witness is called to testify before the Congress, it would seem to me that he becomes a public celebrity.

At that point, that image recorded and reproduced a thousand times for a thousand days will subject him to all kinds of embarrassment, can be made a ridicule on any television program, or can be reproduced in the newspapers, all to his great detriment. That image can not be made to the service of enlightenment, not to the service of legislation, but we now take that private individual and make him a public property to be exposed to all kinds of things without any of the protections of the law. The Supreme Court, and I think for good reason, saw the protection of the first amendment and ruled in Solomon versus New York Times that public individuals could not just sue; they would have to have a standard which the libeler or slanderer violated.

Now, I would make this final point. We have had two recent trials in the United States. One is the murder trial of O.J. Simpson. There is not an individual in this room that could identify the photograph of a member of the jury of the O.J. Simpson case. I think that situation was properly handled.

Most recently, in Massachusetts, in the case of a young lady tried for murder, again, the jury was sequestered from the observation of television and the public.

I would think we would have to ask the reason why, and I think it is very simple: If you become controversial or involved in a controversial idea, you are subject to social and political retribution. I do believe that many of the witnesses that are subpoenaed before

the committee are coming here against their will. These witnesses have no desire to be subjected to such process, but under the Constitution are forced to come there to provide a greater benefit to the society as a whole. Now the minimal protection that this House 50 years ago granted individuals is to be summarily ripped out from its roots to satisfy political desires over the next 60 days. I believe this change is being done for a partisan political purpose.

I would agree with Mr. Moakley's questions of why should a deliberative body not deliberate when fundamental rights of American citizens are at stake? Can anything be so compelling in these hearings before the Government Reform and Oversight Committee that we should dismiss and run to judgment on revoking a rule that has existed in principle and, in fact, for 50 years to the great protection of the American people?

I would urge the committee, one, not to return this resolution to the House; and two, if we differ, and reasonable people can, to at least provide for a bipartisan, nonpolitical purpose that the right can be asserted and only reversed if the same vote carried that would carry on immunity. In that instance, at least it would require something more than an emotionally charged Majority with denying or running amuck on Minority rights and individual rights.

I urge you, as a person who has taken part in all of these hearings, there is absolutely no good reason to subject many of the decent and innocent people that will be called before the Government Reform and Oversight Committee to something more than just being examined by Congress but, in fact, to be embarrassed in their community.

I would suggest there are many other people that would not want to come before the committee. Those that are in the Witness Protection Program may not even have the ability to tell us that they are in that program. The location of people who are subject to abuse, is then known. Some people may get financial retribution if they appear in public. All of these things are casting aside in a big net and we are just saying for purely political and partisan purposes to the American people, we just do not give a damn about your rights. And I think that is wrong.

[The prepared statement of Mr. Kanjorski follows:]

STATEMENT OF
REPRESENTATIVE PAUL E. KANJORSKI

BEFORE THE HOUSE COMMITTEE ON RULES
REGARDING H. RES. 298

NOVEMBER 4, 1997

- Thank you for allowing me to testify against H. Res. 298, a resolution that if passed by the House of Representatives could have serious consequences for not only the civil liberties of individuals, but also the consciences of every Member serving in this body.

- I am prompted to testify today because of my experience in the 104th Congress. As some of you remember, David Watkins, a witness before the House Committee on Government Reform and Oversight, asserted his right to turn the cameras off under House Rules. I urged Mr. Watkins to reconsider his decision.

  - Although Mr. Watkins continued to assert that right, this event helped me to recognize the balance between protecting an individual and the need for Congress, and the press, to obtain information.

- On the balance, I believe that the decision whether to televise a hearing should continue to rest with a subpoenaed witness, and not with Congress.

- Should the House seek to abridge this right, it should at least ensure that some safeguards are in place. H. Res. 298, as it is currently drafted, provides no such safeguards.

- The history surrounding witnesses requests to turn off the cameras has been part of the House precedent for nearly fifty years.

  - In fact, in 1952 and in response to a parliamentary inquiry, House Speaker Sam Rayburn allowed a witness to turn off the television cameras.

  - Moreover, the House included clause 3(f)(2) of Rule XI of the Rules of the House of Representatives as part of the Legislative Reauthorization Act of 1970. Since then, the House has never amended this specific provision.

- Acts of Congress to compel an individual to testify before cameras and recorders can have serious consequences and should, therefore, not be taken lightly.

  - For example, as part the House Un-American Activities Committee hearings run by Joseph McCarthy, a young cancer researcher named William K. Sherwood committed suicide in June 1957 rather than testify on television.

  - In his suicide note, Sherwood stated that he had a "fierce resentment of being televised." He also noted that he would "be in the next two days assassinated by publicity."

  - In response to Sherwood's suicide, his widow sued the Committee and Speaker Rayburn established the ban.

- Moreover, recent history reminds of us of the potential pitfalls of parading individuals before the media. In the last sentence of his suicide note, Vince Foster noted that "Here ruining people is considered sport."

- As you can see from the examples of Sherwood and Foster, if the House votes to change its rules and adopts this ill-conceived amendment, it could have the potential to not only invade the privacy of individuals, but also, in some extreme instances, lead to their deaths.

- Congress should not change its rules merely for the sake of temporary political advantage or partisan gain. It should consider the consequences very carefully.

- Congressional oversight requires us to investigate and correct problems, not to persecute individuals. This change in the House Rules could lead to such persecutions.

- I find it somewhat ironic that some Members of the Majority are seriously considering this change.

  - After all, the Majority on the Committee on Government Reform and Oversight, despite repeated requests from the Minority, continues to refuse to release the transcripts of individuals deposed by the Committee as part of its campaign finance investigation, but once passed this provision could require individuals to harm and/or embarrass themselves before the cameras.

- Furthermore, the provision as drafted could seriously hamper the ability of Congress to conduct effective investigations. It could, for example, compel individuals to hide from congressional investigators and limit our ability to learn the truth. It could also compel witnesses to assert their Fifth Amendment rights.

- Therefore, I urge this Committee not to report H. Res. 298 to the full House.

- In the event that this Committee decides to place partisan advantage ahead of the civil rights of individuals and reports the H. Res. 298, I ask that it specifically make in order an amendment that I plan to offer.

- This amendment would permit individual witnesses to request that they not be televised during congressional investigations.

- It would also permit a full committee or subcommittee to override this request with a two-thirds vote.

  - This safeguard would permit the Committee to carefully consider the situation of the individual witness before moving forward.

  - Beyond the extreme situations that I noted above where individuals took their lives rather than face the glare of television cameras, I can think of many other situations where someone might not want to have their voice recorded or their face televised.

  - These situations include battered spouses trying to hide from their abusers, individuals in a witness protection program, someone with religious objections, and people fearing financial or even violent retribution.

- The two-thirds vote of the full committee has its precedence in the procedures used by Congress to grant immunity to witnesses.

- In closing, I again ask the Committee to carefully consider its actions in reporting H. Res. 298.

- If passed, the changes of the Rules of the House of Representatives would trample on the rights of individuals and, in an extreme instance, potentially lead to someone's death. That is a burden which I do not want to face.

- Nevertheless, if the Committee moves ahead with H. Res. 298, I ask that it specifically make in order my substitute which will seek to ensure that at least some minimum safeguards remain in place to protect the rights of individuals and the dignity of the House of Representatives.

The CHAIRMAN. Let me just respond to Mr. Kanjorski first and then pose a question to Mr. Dingell.

But, you know, you are one of the most respected Members, seriously. I say that about a lot of people, but you are, and I consider you a friend, and I know everything you said was sincere, but it bothered me when you sort of inferred that this committee was doing this for political expediency, political reasons, and that bothers me.

Mr. KANJORSKI. Mr. Chairman, I certainly do not want to imply what this committee is doing. I understand this is being put forward by a Member of the House, not this committee.

The CHAIRMAN. Well, it has been put forth through a member of the media, Mr. Vic Ratner, who you all know. I mean, he has notoriety and he has requested this of this committee a number of times and just recently about 3 weeks ago.

But let me tell you what I think. I do not get too excited about campaign finance violations. I know these are serious matters, but I tell you what I do get excited about, and that is economic espionage that hurts jobs in my district. I get excited about national security breaches and I get excited about foreign countries, particularly those that I don't like, who have a philosophy which I think goes against everything I believe in, and that is the People's Republic of China trying to influence this government. Those things excite me, and I get mad.

Mr. KANJORSKI. Mr. Chairman—

The CHAIRMAN. Let me finish. Just a minute now. And, therefore, if this Congress is going out of session in the next 4 or 5 days, which I expect it to do, I would hope that we would be able to make this small change.

Now, having said that, let me ask a question of John and then you can respond. John, you mentioned that you were not inhibited by this rule in any way.

Mr. DINGELL. We were never in the slightest degree inhibited. I know of no other committee which has in any way been inhibited.

The CHAIRMAN. Okay.

Mr. DINGELL. I am unaware of any member of the media who has been inhibited in gathering all the facts and all the information he needed. I know of no citizen who has ever been denied the fullest possible information on citizens who invoke this rule, or on proceedings in which this rule was invoked.

The CHAIRMAN. Has any Member—

Mr. DINGELL. I am totally unaware of any need for doing this.

The CHAIRMAN. To your knowledge, has any Member of the Senate ever been inhibited by this rule?

Mr. DINGELL. This rule does not apply in the Senate. This is a House rule.

The CHAIRMAN. So the rule that we are attempting to repeal does not exist in the Senate?

Mr. DINGELL. I don't know what the Senate rules provide. All I know is the Rules of the House, and I know why they are—I know why those rules are here. They are here because of some rather extraordinary abuses, most of which took place in the Senate, but some of which took place here.

The CHAIRMAN. The point—

Mr. DINGELL. That brought great opprobrium and great disgust upon this body and upon that body and upon those who abused the rights of citizens in the proceedings which triggered the creation of this rule.

The CHAIRMAN. The point I was trying to make is that this rule does not exist in the Senate.

Mr. DINGELL. I don't know whether it does or doesn't.

The CHAIRMAN. And it has gone without incident for many, many years now, as long as you have been in this Congress. So what we are attempting to do is to conform this rule with those of the Senate.

Mr. Kanjorski.

Mr. KANJORSKI. Mr. Chairman.

Mr. DINGELL. Are you prepared to conform every rule in this body with the rules of the Senate? Is that such an important goal?

The CHAIRMAN. No. I am just making a factual finding.

Mr. KANJORSKI. Mr. Chairman, unlike my colleague in the Senate, Mr. Torricelli, that was present at some hearings 8 days before he was born, I can recall the McCarthy Army hearings. I sat there. I served as a page in those hearings and I saw many individuals' lives ruined in the course of those hearings and during the course of that whole era. There are still American citizens that have lost their productive years in capacities because they were in some way indirectly or directly associated, sometimes improperly so, with communism. They have never recovered from that.

I think for us to cite the Senate and when we go back to McCarthy hearings as justification for not having protection is foolhardy. If ever a body does need a protection, it is certainly the Senate. But I understand that is based on each committee's decision on itself according to the rules. In the Senate, there is such a thing as comity which the House in most recent time has lacked, as you know. The comity I sometimes think exists in the Senate because the Minority is able to tie the Senate up for considerable periods of time. In the House, the Minority does not have that protection.

The CHAIRMAN. Mr. Moakley.

Mr. MOAKLEY. No, I just appreciate the testimony. I, too, remember the McCarthy hearings and, in fact, Joseph Welch, the great lawyer, was from my hometown. It was masterful, but absent him that thing could have destroyed many, many more people and it was the—well, they have even had movies about it and many times on PBS shows that would run the trials and it was terrible. Just the possibility that that could happen again should be enough not to change the rules we have got now.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you very much, Mr. Moakley.

Mr. Dreier.

Mr. DREIER. No questions.

The CHAIRMAN. Mr. Goss.

Mr. GOSS. No questions.

The CHAIRMAN. Any questions of the witness? If not, gentlemen, we appreciate your coming. As usual, we respect your opinion. We may not always agree with it.

Mr. DINGELL. Well, we have no great hopes that we have convinced anyone, but I think history will, Mr. Chairman.

The CHAIRMAN. You are very convincing, John. You always have been.

Mr. KANJORSKI. Mr. Chairman, I would appreciate if the committee would consider the two-thirds protection rule. This rule is going to last a long time in this Congress. Many Members are going to come to serve after we have been here.

The CHAIRMAN. We appreciate your coming, sir.

The next scheduled witness is Mr. Stanley Brand, the former House counsel of the U.S. House of Representatives. Stanley, if you would like to come forward. And, again, you have, I think, testified before congressional hearings before.

Mr. BRAND. Yes.

The CHAIRMAN. You are familiar with the proceedings.

Mr. BRAND. I am.

The CHAIRMAN. You may summarize. Your entire statement will appear in the record without objection.

STATEMENT OF STANLEY M. BRAND, FORMER HOUSE COUNSEL, U.S. HOUSE OF REPRESENTATIVES

Mr. BRAND. Thank you, Mr. Chairman.

The CHAIRMAN. Would you withhold for just one minute?

Mr. BRAND. Yes.

The CHAIRMAN. Mr. Brand, if you would like to continue, sir.

Mr. BRAND. Mr. Chairman, thank you. One of the staff was reminding me about the last time I was testifying in this room was actually after the one House veto case which I argued and lost in the Supreme Court. So I give that as a disclaimer. I don't know if you want to listen to what I have to say now, but I offer it in any event.

The CHAIRMAN. Mr. Brand, don't think I am leaving because you said that. But I have to take a phone call in the other room.

Mr. BRAND. Sure.

The CHAIRMAN. Mr. Dreier will take over. I will be right back.

Mr. BRAND. I can't really improve on either the history or the basis for the rule that Mr. Moakley gave in his opening statement or that Chairman Dingell, former Chairman Dingell, gave when he was here.

What I would like to do is zero in on a couple of points, if I could, and add maybe some practical legal reasons why I think this rule, as presently constituted, is a good idea.

The first of those revolves around the fact that in the modern era what has come to pass is the phenomenon known as parallel investigations. Nothing gets investigated anymore by one agency or by one committee. There is a tendency for each to pursue its own jurisdiction, so that you have simultaneously proceeding congressional investigations and hearings, Department of Justice investigations and hearings and State and Federal agency investigations.

To the extent that the rule tamps down the pretrial publicity that surrounds many of these parallel proceedings and denies to witnesses later claims that the public has been inflamed and that their ability to get a fair trial, given televised hearings on the same

subject matter, I think the rule does serve a salutary legal purpose. There is a famous case involving ironically, in light of the discussion in the committee tonight, an IRS agent called Delaney versus United States.

Delaney was under criminal investigation. He was simultaneously called and indicted and called before a congressional committee. The committee refused to desist until the criminal trial proceeded. He was convicted and his conviction was reversed, because the Court of Appeals said that the pretrial televised publicity surrounding his case denied him a nonprejudiced jury.

Had the television rule existed at that time, that was in 1952, before the enactment of the current rule, it could well be that a court would not have found that that tainted and infected the proceeding and that, in fact, his conviction could stand. That is at least one example of the way in which I think the rule can have a beneficial effect on the congressional proceedings themselves, by not allowing a defendant's attorney, the defendant himself, to use the publicity generated by the congressional hearing as an excuse for avoiding his conviction.

We have seen in recent hearings just concluded in the Government Affairs Committee in the Senate that one essential element of proceeding effectively in the Congress is that the people who are subpoenaed have due regard for the powers of the committee.

When the people against whom these subpoenas are directed perceive that the power is being unfavorably applied, it can have serious consequences. In that case, a broad array of groups across the—across the political spectrum resisted subpoenas that were issued by the committee, forcing the committee to either forego compliance or narrow its request.

I think rules like clause 3(f)2, under Rule 11, have served as a bulwark for fairness to witnesses. As former Chairman Dingell indicated, the witness really has very, very few rules that he can mandatorily invoke. He has many rules that, as a matter of discretion or act of grace, the committee can confer on him.

His role of counsel is limited. He can't cross-examine witnesses. He can't appeal from overrulings of objections. He is really very seriously limited. The one thing he can do with absolute certainty is shut off the TV cameras in connection with a highly charged and volatile committee hearing.

And the last point that I would make on that is that if you look at the history of the hundreds, literally hundreds, of congressional oversight hearings that have occurred since the beginning of the republic, somewhere I read one time in the realm of 700 or 800, I think we could count on one hand the number of witnesses who have been able to invoke this rule or who have even decided it was in their interest to invoke the rule.

This is not a rule that a lawyer can easily advise a client to invoke. There is public opprobrium oftentimes associated with advising a witness, as I did, in the Marcos investigation, to invoke this rule. It engages the ire of the media who literally chased the witness and I down the hall through the caverns of the Rayburn Building screaming and yelling, how dare we turn off the TV cameras. And it also sets up the witness for the sense that somehow

they may have something to be concerned about or hide. Why else would they turn off the cameras?

So it is not an automatic knee-jerk reaction that every client in every situation wants to turn off the television cameras. It is reserved for those few and far between cases, where the witness, as the legislative history of the rule indicates, has a serious, serious question about whether he can get a fair hearing in light of the sometimes disruptive and distracting element of TV coverage.

I think at this time in our history, Congress—and I speak of this as a person who believes in the Congress, having worked here for 8 years as counsel and defended it in court, it doesn't need another reason to give to its detractors to disrespect it and in some cases to actually disobey its processes. I think it is a rule that has served well in those narrow few cases where it has been used and has been pointed out does not inhibit or stop a congressional committee from doing its constitutional duty.

[The prepared statement of Mr. Brand follows:]

Testimony of Stanley M. Brand, Esq.
Before the House Rules Committee

November 4, 1997

I have been asked to address the constitutional and legal implications of proposed repeal of House Rule XI, cl. 3(f)(2) which provides:

> No witness served with a subpoena by the committee shall be required against his or her will to be photographed at any hearing or to give evidence or testimony while the broadcasting of that hearing, by radio or television, is being conducted.[1]

This rule, as its text indicates, "is supplementary to clause 2(k)(5) of this rule, relating to the protection of the rights of witnesses." (Emphasis added.) These rules were adopted in the past HUAC (House Unamerican Activities Committee) era in response to public criticism and judicial repudiation of the manner in which this Committee's hearings were conducted.

This rule has been invoked infrequently by witnesses (I have done so myself only once in 15 years of representing witnesses before the House)[2], and is not a secrecy rule. It simply permits a witness to shut off TV coverage in the interests of reducing the highly charged atmosphere of investigative hearings.

The investigative power of the Congress, which includes the power to subpoena witnesses and compel their testimony, "is an institution rivaling most legislative institutions in the antiquity of its origins."[3] The powers of the Congress to investigate inhere in the Article I legislative power and so it may extend to any subject "on which

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[1] Rules of the House of Representatives, reprinted in H.R. Doc. No. 103-342, 103d Cong., 2d Sess. 487 (1995). The rules for the 104th Congress contain the same provision.

[2] See Investigation of Philippine Investments in the United States: Hearings Before the House Subcomm. on Asian and Pacific Affairs of the Comm. On Foreign Affairs, 99th Cong., 1st Sess. 375-376 (1986).

[3] James M. Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev 153, 159 (1926).

legislation may be had"[4] – a very broad and expansive power that courts have infrequently limited, except where fundamental, constitutional or procedural rights of the witness have been violated. Because of Congress' dominant role not only in legislating but in appropriating funds, overseeing the Executive Branch's administration of existing law, in ratifying treaties and confirming nominations, the inherent investigative power is broad indeed.

Variously referred to as the "Grand Inquest of the Nation"[5] or as a "debauch of investigation"[6] depending on one's perspective, congressional investigating committees have a vast armamentarium of powers with which to subjugate and humiliate witnesses – including contempt for contumacious conduct[7], prosecution for perjury for false statements or testimony under oath[8] and for obstruction for interference in performance of the investigative function.[9]

Not surprisingly, critics of the congressional investigative process have railed against its excesses since the beginning of the Republic. In a critique that could be as easily authored today, Justice Samuel Miller, the second of Lincoln's five Supreme Court appointees, authored a decision affirming a witnesses' right to sue the House

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[4] McGrain v. Daugherty, 273 U.S. 135, 177 (1926).
[5] William Pitt, the elder, referred to English Parliament's investigative power in 1742 in this way.
[6] Professor Wigmore, the noted legal scholar, referring to the 1927 Teapot Dome investigation. Wigmore, Evidence – Legislative Power to Compel Testimonial Disclosure, 19 Ill. L. Rev. 452, 453 (1925).
[7] 2 U.S.C. § 192.
[8] 18 U.S.C. § 1621.
[9] 18 U.S.C. § 1505, United States v. Lavelle, 751 F.2d 1266 (D.C. Cir. 1985).

Sergeant-at-Arms for false imprisonment when he arrested the witness for refusing to produce papers subpoenaed by a committee investigating the bankruptcy of Jay Cooke & Co.:[10]

> I think the Public has been much abused, the time of legislative bodies uselessly consumed and rights of the citizens ruthlessly invaded under the now familiar pretext of legislative investigation and that it is time that it was understood that courts and grand juries are the only inquisitions into crime in this country. I do not recognize the doctrine that Congress is the grand inquest of the nation, or has any such function to perform, nor that it can by the name of a report slander the citizen so as to protect the newspaper which publishes such slander
>
> As regards needed information on subjects purely legislative no doubt committees can be raised to inquire and report, money can be used to pay for such information and laws may be made to compel reluctant witnesses to give it under personal guaranty of their personal rights. This is sufficient, without subjecting a witness to the unlimited power of a legislative committee or a single branch of the legislative body.[11]

The witness in a Congressional investigation, unlike at a court proceeding, has no right to cross examine adverse witnesses[12], or appeal directly to judicial authority on objections.

Arrayed against this vast power are exceedingly few enforceable rules whose purpose is to protect the witness from abuse of authority. One of those rules is the rule under discussion today.

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[10] Kilbourne v. Thompson, 103 U.S. 168 (1880).
[11] Fairman, Justice Samuel F. Miller: A Study of a Judicial Statesman, 50 Pol. Sci. Q. 15, 35-36 n. 72 (1935) quoting Letter from Samuel F. Miller to William Pitt Ballinger (Mar. 20, 1881).
[12] Fort v. United States, 443 F.2d 670 (D.C. Cir. 1970), cert denied, 403 U.S. 932 (1971).

This rule simply permits the witness to shut off the TV cameras – it permits unimpeded review and access of the witnesses' testimony by every other means available, including by contemporaneous written transcription or in stenographic form. The reason for the rule seems as compelling today as when it was adopted:

> My fear is that the presence of TV cameras would interfere with the orderly conduct of hearings. The temptation would be too great for politicians to be more concerned about how they will appear on TV to their constituents rather than the legislative purpose of the hearing. Committee Members might avoid asking important questions because they might not be well received by television viewers. Contrariwise, they might phrase other questions for their dramatic value and the favorable impression they might make on viewers rather than on their probative value. In addition, I do not see how we could avoid the circus-like atmosphere, which always accompanies the presence of photographers and television and radio crews.

116 Cong. Rec. 24974 (1970) (remarks of Rep. Hogan).

As Justice Holmes stated early in this century:

> It must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts.

Missouri, Kansas & Texas Ry. v. May, 194 U.S. 267, 270 (1904).

Unfortunately, the casebooks are littered with the debris of judicial disrespect and rebuke of the exercise of congressional investigative power, in every era from the 1880's to the present. From conducting illegal searches and seizures[13], to investigating murders deemed irrelevant to pursuit of proper legislative goals,[14] to failure to maintain

[13] McSurely v. McClellan, 553 F.2d 1277 (D.C. Cir. 1977)(en banc).
[14] United States v. Icardi, 140 F.Supp. 383 (D.D.C. 1956).

a quorum for taking allegedly perjurious testimony[15], the judicial treatment of the congressional investigative power has been significantly repudiatory.

In one case, a court of appeals held (prior to the adoption of Rule XI, cl. 3(f)(2)) that prejudicial pretrial publicity generated by parallel televised congressional hearings required reversal of the defendant's conviction.[16] The modern phenomena of parallel investigations into the same subject matter by grand juries, federal and state agencies and the Congress increases the danger that procedures in Congress may materially impact outcomes in these other fora.

The television rule certainly has the salutory effect of tamping down the kind of prejudicial pretrial publicity a defendant could later attempt to use to void conviction on criminal charges.

As we have seen in the recent Senate hearings conducted by the Government Affairs Committee, respect for the congressional investigatory power is essential in pursuing a legislative inquiry. When the community against whom that power is directed perceives that the power is unevenly or unfairly applied, it has serious consequences for the efficacy of Congress. In that case, a broad array of groups across the political spectrum has resisted subpoenas forcing the Committee to narrow its requests or forego compliance.

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[15] Christoffel v. United States, 338 U.S. 84 (1949).
[16] Delaney v. United States, 199 F 2d 107 (1st Cir. 1952).

Rule XI, cl. 3(f)(2) has served as a bulwark of fairness for witnesses. Repeal of that rule will only further weaken and diminish the respect that the Courts and the public have for the Congressional investigating committee. At this time in our history, Congress hardly needs to give its detractors another reason to disrespect and in some cases, to disobey its processes.

Mr. DREIER [Presiding.] I appreciate your perspective.

Mr. BRAND. Thank you.

Mr. DREIER. Mr. Brand. That's very helpful.

Mr. Moakley.

Mr. MOAKLEY. Stan, great job. Right on point.

Mr. BRAND. Thank you.

The CHAIRMAN. Mr. Goss.

Mr. GOSS. I am sorry. I am very puzzled by that. It seems to me you build credibility when you have government in the sunshine. You are talking about a fence of somebody who is subpoenaed here, and the disruption of the television. And I don't see that a well-run hearing creates a disruption of a proceeding.

Now, if you are going to tell me that if this rule changes and we are going to stop grandstanding by Members of Congress in front of TV or something, I might be persuaded that you make a very good point, right on target. That might do it. There is probably some evidence for that.

But I am having trouble trying to figure out, since the other protections are already there, the national security protections, somebody can take the fifth, you know, you go right down the line, the personal protections and the constitutional protections, what we are doing—I am trying to find out why it is that we enhance our credibility as an institution by saying we don't want the public to see this.

Mr. BRAND. Well, as has been pointed out, Congressman, the public—they are not seeing it contemporaneously on TV. It is being transcribed. The press is able to—

Mr. GOSS. It is being spun, too, I am sure.

Mr. BRAND. It is being transcribed. It is available for anybody who wants to sit and listen. It is not a secrecy rule. It is simply a rule that requires the television cameras be shut off, not that the hearing be conducted in executive session.

Mr. GOSS. Yes, but that's the radio, and, you know, this is the watchdog of government out there being told they can't do their job. It seems to me you create a bigger problem for your witness, such as you have described being chased down the hall. Surely you got more publicity being chased down the hall than you would have gotten from straightforward answers in a committee room.

I would be happy to yield to Mr. Moakley.

Mr. MOAKLEY. Will the gentleman yield?

The TV media and radio aren't precluded from coming into the hearing room.

Mr. GOSS. Right.

Mr. MOAKLEY. And writing their notes down. They get pictures of the witnesses coming in, pictures of them going out. They can spin their entire story on TV so they are really not—it doesn't preclude them—it doesn't freeze them out of the process. The thing is that, you know—you are a former agent of the CIA. You know that when a person is brought before a legislative committee, he can be the toughest guy in the world but he is going to start sweating, he is going to stammer, he is going to give motions off that may elicit some erroneous feelings on the part of the people watching him. And some of the statements coming from this side of the table can

be very misleading from a hostile witness and he has got no right to appeal. I mean, I think it is—I think the press should be there and the people have a right to interview him coming in and coming out. But if a fellow is mandated, subpoenaed before a committee, against his will, I think he should have a right to say, please turn off the cameras and radio.

Mr. GOSS. Well, I am willing to debate that point, but I don't think that the argument that you have made is persuasive to me on the point.

We have C-SPAN, and we all agree that C-SPAN has been a good thing for democracy. Now, you could say that it is lousy theater. You could argue that probably a lot of people are disillusioned about how democracy works.

Mr. MOAKLEY. Why don't we move them into the Federal courts if it is that great?

Mr. GOSS. Well, the jurisdictional problem is there, but the other question that I would raise, you know, back in the case in 1952 that you cited, I would agree with you that in 1952, television was probably quite a thing. I don't think we had television in 1952. I am a Member of the House. I don't have the same vivid imagination as Members in the other body, perhaps, but I don't remember television in 1952. And I can imagine if there was television in 1952, that it would have been quite a big deal.

But now everything is on television. In fact, there is so much on television, the natural instinct of my family is to turn it off because it is a distraction to whatever else you might be doing which might otherwise be useful.

So I think the times have changed very much. I argue just the other way, that you are creating a mystery. You are creating a question of why won't they let us see this?

And I think that very much is the tendency of the press. And I think you create a bigger problem for your witness than not. So I am just telling you that, while I understand the point you have made, I come down just exactly on the other side of the fence on it.

Mr. MOAKLEY. I think it is because of your training.

Mr. GOSS. That could be.

Mr. BRAND. I, for one, wouldn't equate, by the way, the interests of a witness in claiming the fifth amendment with turning off the television cameras. That is obviously a different set of considerations.

Mr. GOSS. Well, it is.

Mr. BRAND. And waiving the assertion of those rights.

Mr. GOSS. But you are making a distinction as a professional, as a man who has a great deal of expertise and knowledge and training in an area where you can make the distinction correctly and aptly.

I am talking about the guy out there at the other end of the television. I mean, they don't understand it. The guy doesn't want to be seen, he doesn't want to talk, won't let us see what is going on. That is how it comes through. There is no distinction there. You know, he is hiding behind the fifth. He is running down the hall with a bag over his head, whatever it is. There is something to hide there. That is not dignified.

You know, government in sunshine works. We do it in Florida. It is an amazing thing.

Mr. MOAKLEY. Again, this is government in the sunshine. The problem is that we don't have to do everything—to titillate every viewer that wants to see some fellow pressured and squeezed and asked leading questions that he can't defend himself against. I mean, that person, even though he says turn off the cameras, turn off the television, he is not saying I am taking the fifth. He is a willing responsive—he is responding to the questions that are asked. But he just doesn't want everybody in the world to see somebody who might be a—how many times have you been in a hearing and seen a hostile Member who just wants to go after a fellow?

Mr. GOSS. Right. Reclaiming my time on that, to answer.

Mr. MOAKLEY. All right.

Mr. GOSS. I will tell you that I think quite often it is the Member who comes out second best. I mean, I can think of some very remarkable hearings, and I imagine you can, too—you have been here longer than I have—where the potted palm did a lot better than the guy on this side of the dais.

Mr. MOAKLEY. Absolutely. But if you are the potted palm you feel awful uncomfortable at times.

Mr. GOSS. There is still the opportunity for the committee to shut down.

Mr. MOAKLEY. You are taking away an individual's right and supplanting it with the majority of a committee. That is not a fair thing.

Mr. GOSS. I have a little problem with that, because presumably we are in a system here and the system is run, and when somebody comes before a committee with a subpoena, there is a process involved. There is an expectation that these things are going to happen.

Mr. MOAKLEY. Yes.

Mr. GOSS. Now, if that witness had his druthers to do all things he wanted he would probably get up and walk out the door and say, no thanks I would rather not.

Mr. MOAKLEY. But he can't.

Mr. GOSS. That is the point. He can't.

Mr. MOAKLEY. He is there against his will. The least we should do is let him apply probably the only right he has got remaining, the only right he has got remaining.

Mr. GOSS. I would suggest he has lots of rights remaining. It is guaranteed in the Constitution. But it would appear to me that it is the responsibility of the committee who has brought him there to make sure that fairness is observed. So it is not the witness' right. It is the committee's responsibility.

Mr. MOAKLEY. Well, usually if the committee brings him before them, they have got some kind of idea that he has done something wrong and they are not going to ask him questions.

Mr. GOSS. It might be just a supportive witness.

Mr. MOAKLEY. Well, no use arguing it here, but I think we have made our points.

Mr. GOSS. Thank you.

Mr. DREIER. The argument that I was making before you came in, Porter, and actually Paul Kanjorski sort of referred to this, he talked about the comity that exists in the Senate versus the harsh partisanship that exists here, and it does seem to me that there can be some reasonableness on occasion.

You can use the 9 to 4 ratio here as an argument against that, Joe, but I think that if a Member of the Minority who may be working or, you know, have some rapport with the witness, makes a compelling case, then I think it would be quite possible to get votes from those in the Majority.

Mr. MOAKLEY. Would the gentleman yield?

Mr. DREIER. Yes.

Mr. MOAKLEY. As a Member who is one of four, being one of four for about 2 years now, at least—3 years now.

Mr. DREIER. Almost three if we adjourn on Sunday.

Mr. MOAKLEY. There are only two votes I can recall that were 8 to 5. The rest were 9 to 4.

Now, don't tell me that some of those witnesses didn't have compelling stories to tell.

Mr. DREIER. Well, we haven't had—these are procedures for moving down to the floor. But the ratio that we have here is obviously different than it is in a lot of other committees. I mean, you know that this is a much different setup than there are in investigative committees. We don't do those sorts of things in the Rules Committee.

Mr. MOAKLEY. You know the votes are already counted before the people come in.

Mr. DREIER. On occasion.

Thank you, Mr. Brand, for being here.

Mr. BRAND. Thank you.

Mr. DRIER. I am sorry. Before you leave, are there any questions from Sue or Mr. Hastings?

Mr. HASTINGS. No.

Mrs. MYRICK. No.

Mr. DREIER. Mr. Hall? I am sorry.

Mr. HALL. The only thing I had to add—and I came in the middle of what Porter was saying—was the fact that—you raised the issue and maybe I have it out of context about we have C-SPAN on all the time. The fact is we are politicians, we volunteer for this job. We know what we are getting into. We are used to the cameras.

We should be used to the cameras after a while. The people that are subpoenaed before the committee might be very, very innocent. They are not politicians for the most part.

Mr. GOSS. I agree.

Mr. HALL. And it is a scary thing.

Mr. GOSS. I agree.

Mr. HALL. To be subpoenaed in the first place and then to have to have your picture taken—they ought to have some rights. For the most part a lot of them are probably innocent.

Mr. GOSS. If the gentleman would yield back. I would agree that that is a possibility that can always happen, and that can always happen with the testimony and the committee has the right to deal with the testimony in such a way that there is no defamation and so forth.

But the other side of this—see, this is a legitimate argument. I am not trying to be cute here in any way at all. There is, in my view, a very compelling reason to do the public's business in public. I have seen all of the consequences of it done in public and there are miscarriages of justice sometimes when it is done that way because the sunshine is indeed very bright and some can tolerate it better than others, there is no doubt about it, but I have seen much more egregious violations of government out of the sunshine in my years of experience and at the level of State and local and the Federal level.

So I have come to the conclusion I would rather err on the side of letting the sunshine in. I don't mean to say there aren't times when it is appropriate to take things out of the sunshine. National defense is clearly one. National security I feel very strongly about; a grotesque injustice, a threat to a witness, something like that, bodily harm that type of stuff. But I think that we have already got those provided for.

So I think what we are really talking about now is convenience. I don't really want to be seen on television and so I am going to use my right to shut it off. And I am not so sure that the public's right to see what is going on doesn't override that.

Mr. MOAKLEY. Will the gentleman yield?

Mr. DREIER. Actually, it is Tony's time.

Mr. MOAKLEY. Will the gentleman yield?

Mr. HALL. Yes.

Mr. MOAKLEY. I wish the gentleman were here, and I really mean this, to listen to the testimony of John Dingell who has had more hearings than all of us combined.

Mr. GOSS. I am sure.

Mr. MOAKLEY. Telling how awesome it is the power that the committee has in the way the witnesses feel. I don't mind sunshine. It is the moonlight that I am afraid of.

Mr. GOSS. Well, if the gentleman from Ohio would yield?

Mr. HALL. I yield.

Mr. GOSS. If you would allow me to respond to his observation and pass it along to the gentleman from Massachusetts, I will tell you that when I came to Washington I was astonished at the lack of manners here, what I thought were good manners, and I was horrified at the way people beat up on witnesses that came up.

The Foreign Affairs Committee comes to mind. It was hugely unfair, I thought, and partisan and aggressive and I am not sure much good came out of it. And I am not sure that the people who were asking the outrageous questions or the nasty questions actually won any friends or respect among their colleagues or scored any points or got any useful information out or furthered the purposes of the committee.

I think the way you deal with that is to stop that on the committee, to the best of your ability. Now, you can never stop an individual Member from making a fool of himself or herself, I suspect, if they are determined to do it. But I think a strong Chairman, with support—it is part of the responsibility. I understand the responsibility of any witness who comes in front of my committee and I try and protect that individual's rights and if there was an overwhelming reason, I would go to each Member and say I think we

are going to close this and I would tell him why, and I would hope to get—I hope that's the right way to do it.

I agree, I mean, we are talking very narrow degrees here and a spectrum where we are pretty close to each other. Thank you for yielding.

The CHAIRMAN [Presiding.] Are there other questions? If not, the Chair would now call Peter Robinson, former Assistant Parliamentarian, U.S. House of Representatives, along with Charles Tiefer, former General Counsel for the U.S. House of Representatives. If you don't mind, gentlemen, we would like to try to expedite the hearing.

Peter, since you are first on the list, why don't you proceed. Your entire statement would appear in the record without objection. Take whatever time you feel is necessary.

STATEMENT OF PETER ROBINSON, FORMER ASSISTANT PARLIAMENTARIAN, U.S. HOUSE OF REPRESENTATIVES

Mr. ROBINSON. Well, thank you for having me today. Frankly, a lot of what I was going to say has already been said so I will kind of cut to the chase.

Mr. MOAKLEY. You are used to that, Pete.

Mr. ROBINSON. That's right. Actually, when I came to the House Parliamentarian's Office in the early 1970s this rule was just being adopted and taking place. I do have a fairly clear recollection that the witness protection part of it was conceived to be part and parcel of the whole bit, that if you were going to broadcast committee hearings that this right was very important.

And if you go back and read the record of the debates in the 1950s, where those Members who thought that committee hearings ought to be opened up to broadcast media, and they would continually ask Speaker Rayburn, well, isn't this allowed under the rules, and he would steadfastly say from the Chair, it is not allowed under the rules, under the present state of the rules and hearings cannot be broadcast. But if you read the statements of these Members, like Javits, Meader and the alternatives that they were put forth in terms of resolutions, they always had—accompanying the broadcast of hearings question, they always had this right included as if it had become just part of the same deal.

There is not a lot of legislative history on the Legislative Reorganization Act of 1970 when it came out of this committee and the committee report just basically recites what the rule on witness protection rights says, as if it were simply to be naturally assumed.

In my experience, there have always been individual cases of hearings where specific Members have been frustrated by the rule and its operation and unable to publicize what they wanted to publicize. I don't think until this point that there has been any kind of consensus that it has been an inconvenience to committees operating.

Of course, it is argued that 1997 is a different time than 1990; that witnesses can be caught coming or going, and that the Senate does not have a comparable rule. I kind of agree with those who say, however, once it is out, it is out. If there is going to be prejudice from broadcast coverage once it is out, it is done.

With respect to following the Senate, which I would certainly not argue for in too many cases, I would point out that the Senate does have a rarely invoked Senate rule and that if you repeal this rule and leave in place only clause 2(k)5 of rule 11, the defame, degrade and incriminate rule, that the Senate actually has a broader test for witness protection in closing hearings.

Now, it is true that under the Senate rule the witness cannot invoke the rule. It is totally at the committee's discretion. But what the Senate rule says is that hearings can be closed if matters to be discussed will, quote, ″tend to charge an individual with crime or misconduct, to disgrace or injure the professional standing of an individual or otherwise to expose an individual to public contempt or obliquity or will represent a clearly unwarranted invasion of the privacy of an individual.″

My main suggestion on this whole issue is that the committee proceed cautiously. Of course, that is my bias. Parliamentarians don't like to change rules, especially if they have been around for a while. I do think some of Stan Brand's points are very well taken, and that the—really the committee ought to look into some of the legal ramifications of this and get a full input from the legal community, the academic community, the media community, for that matter.

It may be an unintended consequence of this rule that if you repeal this rule, that there, as some have indicated, will be a much greater tendency to try to invoke clause 2(k)5 of Rule 11, the defame, degrade or incriminate rule, perhaps in frivolous cases, requiring the committee then to assemble a full quorum and to vote on that issue.

And the other consequence may be simply that for this informative process an investigation is supposed to be that a witness who can't turn off the cameras is going to be, as others have noted and as Edward Bennett Williams wrote, may be uncomfortable, less articulate and probably less forthcoming.

One final point. Clearly, this rule exists for the protection of the witness. That is how it was conceived. But you might take the point of view that it also is a protection for the institution; that it gives some breathing space; that it is an escape clause and that it shows that the institution believes in fundamental fairness. That is one way to look at it.

I think on this issue, you kind of agree or you don't. Those are my comments.

The CHAIRMAN. Well, Peter, we appreciate your insight into this. It is a complex issue.

Mr. ROBINSON. Very

The CHAIRMAN. Mr. Charles Tiefer.

Mr. TIEFER. Thank you.

The CHAIRMAN. Your statement will appear in the record without objection as well.

STATEMENT OF CHARLES TIEFER, FORMER GENERAL COUNSEL TO THE CLERK, U.S. HOUSE OF REPRESENTATIVES

Mr. TIEFER. I appreciate that. Since so many points have already been covered, I can skip a number of things that I was going to say. I am testifying based on my experience as Solicitor and Dep-

uty General Counsel of the House for 11 years, and as a full-time professor of legislation.

The origin of this rule in the McCarthy era and the reaction against that era's abuses have been discussed. One thing that I want to underline is that there has been a memorable history of the operation of this rule. It is true that it is not invoked often, but it is invoked sometimes on occasions of great moment.

One has been mentioned and that was in 1989, when former HUD Secretary Pierce was brought back to a hearing. He was brought back to a hearing specifically because it had to be determined whether he really was going to take the fifth amendment or not. He had testified before in hearings about the HUD scandal at an early stage. Then the scandal became much more serious. And the question was, was he willing to continue his previous testimony or was he now going to say, I must claim my right, my fifth amendment right against self-incrimination?

There are other instances when this rule has come into use for a witness who wants to take the fifth amendment. In a very controversial matter, much debated by civil liberties people on one side and by congressional investigative people on the other side Congressional committees have retained the power to say, you must appear in public. If you are going to claim the fifth amendment, we have the right to test whether you, in an open and formal proceeding, are going to take this fifth amendment right or not.

And what this rule has meant—another instance when we came close to the use of this rule, was when Oliver North and John Poindexter appeared before the House Foreign Affairs Committee in December of 1986. They seriously discussed, through their counsel, invoking their right. They knew they had it. It mattered a lot to them, that they could say, we are not—we are not appearing here under the gun. The fact that the—or, rather, we are appearing here under the gun, but it is we who are allowing the television broadcasting of our testimony to occur. We could shut the cameras off—

The CHAIRMAN. That is right.

Mr. TIEFER. —if we intended to. We have chosen to let the public watch as we take the position that we are going to take.

And those are examples of why this is considered a rule that is ultimately fair to witnesses. I use the analogy in my testimony of a witness who has to take the fifth amendment right in public. It is necessary for the openness and the publicity, the public sense of the rightness of proceedings in Congress that the print press be present; that the press be able to watch this; that a transcript be prepared.

But, it is a permanent, in the minds of the witness, shaming of some witnesses. And I think this is what Secretary Pierce felt like. It is effectively as if you required them to appear in prison stripes and that forever afterwards everyone who knew them was going to associate their voice and their image with appearing as someone who had said, I am subject to incrimination. In effect, someone who will wrongly be perceived by the viewing public as having said, I am guilty. I know I am guilty. I am admitting I am guilty. And that is what-- why in the McCarthy era the shutting off of the cameras was considered of central importance and that is why for dis-

tinguished witnesses who have taken this right, the House has continued to allow it, because there is something about the image of someone being subject in public to an incriminating proceeding that is considered to be unfair.

One thing I would say in my last point, something I would mention, there are two proposals before this committee, as I understand. One is the Barr resolution which would absolutely do away with the Rule 11 right to shut off the cameras and the other is a resolution by Congressman Ganske which would make the right subject to a vote by a majority of the committee. That is similar to the fact that a majority of a committee or subcommittee can close hearings under 2(k)5. A majority of the committee or subcommittee could shut off the cameras if the witness invoked the right.

Although I favor retaining the rule, I would urge you to either give the House the choice or yourself make it that if you are going to change the rule, you go to the Ganske formulation rather than the Barr formulation, and it comes out of the scenario that I have described.

You are going to be faced again in the future, whoever is in the Majority, whatever the subject, with witnesses whose fifth amendment claim you want to test; witnesses, whether it is the current campaign finance hearings or the HUD hearings who are going to be taking the fifth amendment. If you have the Gankse formulation at least the committee has the option of saying—the matter must occur in public, but we will shut the cameras off. And that is an option that is invaluable for the committee.

I think the existence of that option is one of the things that Chairman Dingell had in mind when he talked about the Milken situation and he said we can conduct our proceeding. Milken could come in; we could do this. You throw away that option and you force this shaming procedure that I have described to occur if you go with the Barr formulation.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Tiefer follows:]

TESTIMONY BEFORE THE HOUSE COMMITTEE ON RULES OF CHARLES TIEFER, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF BALTIMORE

RE: RIGHTS OF INVOLUNTARY CONGRESSIONAL WITNESSES NOT TO BE BROADCAST

Mr. Chairman and Members:

Thank you for the opportunity to testify regarding House Rule XI's provisions for involuntary Congressional witnesses not to be broadcast against their will. My view is based both on academic study as a full-time professor of legislation since 1995 and as author of scholarly works on Congressional rules,[1] and on extensive experience with investigations as Solicitor and Deputy General Counsel of the House in 1984-95.

Rule XI has a respectable history of many decades, originating in a sound reaction against the McCarthy era. The Rule in its traditional form restraints somewhat what are otherwise irresistible temptations for media-hungry chairs of the House's hundred or so subcommittees to inflict, upon involuntary witnesses like Oliver North in 1986 or HUD Secretary Samuel Pierce in 1989 whom the Rule protects, an extraordinary type and level of destructive exposure. Rule XI

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[1] I am the author of Congressional Practice and Procedure (Greenwood Press 1989); of a series of articles on Congressional investigations in Legal Times of Washington in recent years, such as "The Fight's the Thing: Why Congress and Clinton Rush to Battle with Subpoena and Executive Privilege," Legal Times, Oct. 14, 1996, at 25; "Contempt of Congress: Turf Battle Ahead," Legal Times, May 27, 1996, at 26; "Privilege Pushover: Senate Whitewater Committee," Legal Times, Jan. 1, 1996, at 24; and, with co-author George W. Van Cleve, then-counsel to the Republican leadership, of "Navigating the Shoals of 'Use' Immunity and Secret International Enterprises in Major Congressional Investigations: Lessons of the Iran-Contra Affair," 55 Mo. L. Rev. 43-92 (1990).

exists to prevent a coarsening and brutalizing of House investigative hearings. The same arguments to abolish these witness's rights that you hear today have been made to, but rejected by, both parties' wise and fair leaders for decades now past. There is no need to rush through, on the eve of the session's adjournment, this change, unless its proponents fear that its unfairness would become apparent during even the briefest period of study.

If the Committee chooses to change Rule XI, at least take the Ganske Resolution, H. Res. 275, which allows a witness his rights if a majority of the committee or subcommittee so wills it, rather than the Barr Resolution, H. Res. 298. It will embarrass this Committee, the House, and the investigating committees if the majority does not reserve for itself, as the Ganske Resolution does and the Barr Resolution does not, the power to head off situations in which the unfairness to witnesses becomes starkly apparent to all concerned.

Historic Origin of the Rule

Rule XI-3(f)(2) provides that:

> No witness served with a subpoena by the committee shall be required against his or her will to be photographed at any hearing or to give evidence or testimony while the broadcasting of that hearing, by radio or television, is being conducted . .

The history of the rule about involuntary witness' rights not to be broadcast against their will, like many of the House's rules about witness's rights, has its roots in the reaction against the excesses in the McCarthy era of the House Un-American Activities Committee ("HUAC"). That history starts with the infamous HUAC "Hollywood Ten" hearing, in which public denunciations of Hollywood figures were filmed and broadcast, followed by their blacklisting and often the

complete destruction of the lives. This sequence showed the ugly potential of the broadcast Congressional hearing and lead to early reactions against it.[2]

However, it was a dramatic event in 1957 that provided the rule's firm basis. In June, 1957, as HUAC opened new hearings in San Francisco, a young researcher named William K. Sherwood jumped to his death from a hotel window, leaving a note: "My life and my livelihood are now threatened by the House Committee . . . I will be in two days assassinated by publicity." The witness's suicide note had stated that he had a "fierce resentment of being televised." Thereafter Speaker Rayburn wired for broadcast coverage to stop, and subsequent witnesses were granted the right not to be televised while testifying.[3] This type of protection had support from distinguished Members of both parties, as well as the bar.[4]

The Rule in Operation

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[2] The earliest rule against television coverage dates back to a pronouncement of Speaker Sam Rayburn in 1952 upon a parliamentary inquiry. 98 Cong. Rec. 1334-35 (1952). The heart of the concern about televising was always the objecting witness. Then Representative, later Senator, Jacob Javits, known as a leading defender of civil rights, urged in a debate that even if a resolution were adopted allowing television in some situations, "it is very essential to protect witnesses, and the indiscriminate use of televisions and radio could very easily in many cases work out to invade individual rights . . . For example, if a witness is obviously unable to be at ease or to do himself justice under the probing of the television camera." 98 Cong. Rec. 1567, 1568 (1952).

[3] For sources and details, see W. Goodman, the Committee: The Extraordinary Career of the House Committee on Un-American Activities 445 (1964); D.B. Hardeman & D.C. Bacon, Rayburn: A Biography 424-25 (1989); L.K. Davies, Walter Ignores Rayburn TV Ban: He Fails to Halt Televising of Coast Inquiry--Damage Suit is Filed on Suicide, New York Times, June 21, 1957; TV Wrangles Wax Hot at Red Probe: Stage Set for Repeat Performances, San Francisco Examiner, June 21, 1957; Eleazer, Rayburn Will Ban Televised Hearings, Washington Post and Times Herald, June 20, 1957.

[4] Scott & King, Rules for Congressional Committees, 40 VA. L. REV. 277 (1954); 111 Cong. Rec. 3579 (1955)(authored by Rep. Hugh Scott (R-Pa), later Senate Minority Leader); Association of the Bar of the City of New York, Repot on Congressional Investigations 8 (1948).

The rule has had a memorable history of operation, which reflects its close connection with the constitutional protection of witnesses, pursuant to the Fifth Amendment, not to be compelled to incriminate themselves. In 1989, during the hearings on waste and fraud at HUD, it was invoked by former HUD Secretary Samuel Pierce. Pierce had been summoned to determine whether, as he claimed, he would invoke his Fifth Amendment rights; he did, but because of the rule, at least he did not have to do so on camera. In 1986, the House Foreign Affairs Committee summoned Oliver North and John Poindexter. They invoked their Fifth Amendment rights; they had the option of invoking the rule against broadcasting, and their counsel gave some indications in advance that they might, but they ultimately chose not to. In 1985-86, in the Marcos "hidden wealth" hearings of a subcommittee of the House Foreign Affairs Committee, several witnesses invoked the rule.

This Committee does not need me to describe that the Rule, while giving witnesses a minimal floor of dignity and protection, does not cripple House investigations. Your distinguished Chairman, Rep. Solomon, was on the Marcos "hidden wealth" investigation, as well as at the 1986 North-Poindexter hearing. Both times, Representative Solomon had a proper concern that the hard-driving majority Members of the committees respect the witnesses' position and rights, and produce a fair and balanced record. The frustration of the chairs of those hearings, when they had to face the possibility of the cameras being turned off for their star witnesses, did not reflect a serious impairment of the Congressional power to investigate. Moreover, however frustrated the particular chairs might sometimes be, the mature and sober judgment of both party's leaders of decades past — and I emphasize that this has been a bipartisan judgment — was to keep this rule. As the agreement on this point by Jacob Javits,

Hugh Scott, and Sam Rayburn that I have cited in my footnotes above reflects, respect for witness's rights was not a partisan issue; it is a measure of the wisdom and balance possessed by both parties' wise leaders to leave witnesses this minimal level of rights. This is not some House rule that Republicans discussed reforming during the many rules-change debates of the late 1980s and early 1990s, like the rule regarding voting of proxies in committee. There never has been a "reform agenda" by either party in the House to change this rule. For both parties, this rule amounts to a sacrifice of a small amount of broadcast coverage, in return for an increased reality of fairness, and appearance of fairness, to witnesses. This rule exists solely as a recognition by both parties that it serves a moderating and dignifying role as a check on the appearance of oppression at investigative hearings.

I look back on Mr. Solomon's role in the Marcos hearings, and the North-Poindexter hearing of December 1986, as a valuable one in keeping the hearings fairer. I would hope that looking back, he would agree with me that it was beneficial to let witnesses like Oliver North or Marcos' financial associates or Samuel Pierce have at least the minimal level in the House rules.

A few witnesses in the 1995-97 hearings of the House Committee on Government Reform and Oversight have invoked the rule.[5] That seems to have been the most recent event, if any there be, triggering in part this consideration of changing the rule. However, this rule has hardly been a significant obstacle to the work of that committee, any more than it was a serious obstacle to the investigations of HUD, of Marcos' holdings, and others in which it has been invoked.

In the work of the House Committee on Government Reform, the overwhelming majority

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[5] David Watkins in 1996; and a series of witnesses on October 9, 1997, in a hearing about Charlie Trie.

of witnesses who could have invoked the rule, did not, just as Oliver North could have invoked it in December 1986, but did not. I myself represented hearing witnesses in the "Waco" hearings of summer 1995 and the "Travelgate" hearings of fall 1995, neither of whom chose to invoke the rule. Like North and Poindexter in December 1986, these witnesses drew dignity and strength from the fact that televising of their questioning occurred by their choice and consent, not as an involuntary disposition forced upon them.

The Arguments Against Changing the Rule

1. The supposed vital need for televised testimony

You will hear it argued that televising witnesses, even the involuntary witnesses who would be televised against their will, may be vitally important to the public and the House. The short answer is that to the extent an investigation rises to the level of seriousness and importance that it becomes necessary to conduct it that way, the decision to do so belongs to the House as a whole, on recommendation by this committee. During the full-scale Iran-contra investigation of 1987, the House's authorizing resolution allowed the Iran-contra committee not to follow the rule. That was a one-time judgment, which the House, and this committee, made that time. Other times, even when the House adopted a resolution empowering a major investigation, it did not waive this rule.

For example, earlier this year, the House adopted H. Res. 167, reported by this Committee, giving deposition and international investigating power to the Government Reform Committee's campaign finance investigation. According to the committee report, it was because of the praiseworthy judgment of Chairman Solomon that the resolution did not give tax-record power to the investigation. The power to expose a witness's tax records to the world is one of

those extreme and supreme powers that the rules soundly reserve to occasions when the House, on recommendation of this Committee, decide warrant it. The same is true of the power to force an involuntarily appearing witness, against his will, to testify on camera.

Just as H. Res. 167 did not grant the tax-record power, so it did not waive the rule about broadcast of involuntary witnesses. If this Committee, and the House, thought that the investigation warranted such power, it would have written H. Res. 167 differently. If this Committee, and the House, think so today, they can adopt a committee-specific resolution to do so. The right place for that judgment is here, in this Committee, and in the House as a whole. Change Rule XI, and the power goes to a far less responsible quarter. Every individual subcommittee chairman, amounting to a hundred or so in the House — few of whom have the maturity, wisdom, and larger perspective found in places like the Rules Committee -- will get to decide to sacrifice witness's rights. Worse, the decision will be made by the chairman who himself loses much-prized personal publicity. There is a reason that after the suicide of the witness in 1957, it took a directive from the Speaker to the investigating chair to stop the involuntary televising. This is a decision that needs to be made by someone, like the Rules Committee and the House, at a remove from the actual prospect and inducement of broadcast coverage held out to the investigating chairman.

2. The existing print coverage, and the supposedly different Senate practice

There is no comparison between print coverage, and broadcast coverage, of witnesses. What must be kept in mind is the most significant occasion for Rule XI, the witness, like Oliver North in December 1986 or former Secretary Pierce in 1989, who invokes his Fifth Amendment right. A serious debate occurs on every such occasion about whether to require the witness to

invoke the Fifth Amendment at a public hearing. Without dealing with the many complex aspects of that debate, Rule XI provides that the witness need not have his face and voice permanently and indelibly linked for the entire public with the invocation of the prospect of self-incrimination. Even an arrested suspect in a vicious crime is usually allowed by the police to drape a garment over his head in the presence of television cameras, so that, until he has had due process, his face is not linked with an unproven accusation. That is the twentieth century's version of the Bill of Rights. It is no comparison that such an arrested suspect's name appears in an indictment and in the print media, and it is no comparison that a Congressional witness's name and testimony appear in the hearing record and the print media. Print coverage is a necessary part of open, formal proceedings. Broadcast coverage of someone who has not gotten due process goes further than mere openness and formality; unless carefully considered, imposing it against the witness's will and without his consent can threaten, under some circumstances, to amount to inappropriate and unjustified public shaming.

The broadcast media point out that the Senate does not have this rule. However, my own observation of many years of investigative hearings is that the Senate has a stronger informal tradition than the House against making witnesses invoke the Fifth Amendment in public. Moreover, it is new for me to hear the Rules Committee consider abolishing a House Rule because the Senate lacks it. The Senate also does not have a germaneness rule for floor amendments; shall the Rules Committee abolish that House rule also?

3. Choose the Ganske Resolution over the Barr Resolution

If Rule XI is to be changed, at least choose the Ganske Resolution, so that a majority of the committee or subcommittee could avert broadcast coverage of an involuntary witness against

his will. Consider the situation, outlined above, when an investigation has to decide whether to require a witness to invoke the Fifth Amendment in public. Strong arguments will be made as to the unfairness of doing so at all. Yet, a committee will have its reasons. At least, under the Ganske Resolution formulation, a committee which requires the witness to do so, could still vote to let the witness do so without broadcast coverage. This gives the House, the Rules Committee, and the investigative committee the justification that, at the key junctures, the fair procedure will be followed, or at least one not as unfair as possible. Under the Barr Resolution formulation, if a committee felt it formally necessary to check Secretary Pierce's claim of the Fifth Amendment, or Oliver North's, it would have no choice but to do so in the way that the witness would say inflicts maximum unfair degradation. That is inadvisable.

The CHAIRMAN. Well, Charles, thank you very, very much. I guess I did not understand, Peter, your description, saying that the Senate version would then be broader than what is left with the House.

As I read the language, the Senate rule says, matters which will tend to disgrace or injure the professional standing of an individual or otherwise expose an individual to public contempt or obliquity or will represent a clearly unwarranted invasion of the privacy of an individual. You compare that to Clause 2(g)(1) of Rule XI, which says information which would tend to defame, degrade or incriminate any person, and it goes on to say other things. It seems to me they are equally as broad.

The only difference I see, and that our staff has seen in analyzing the two, is that the Senate has one small clause which deals with certain trade secrets, which we do not normally deal with in the House of Representatives. We do not deal with treaties and things.

But at any rate, Mr. Goss, do you have any questions of the witness?

Mr. GOSS. The only observation I wanted to make was Mr. Tiefer's comment on the question of, if there is a reason to close down, who makes the decision. That is what we are arguing about, I think. I would say the decision rests with the institution, and you are arguing the decision rests with an element of the institution.

There has to be some justification of that, and I do not know what the justification is, thinking of the protections that are already built in. That is why I am on the other side of the issue. I can see your point. I think you are giving an abundance of caution to the witness and tilting the field that way, and that could work out, but I believe the responsibility is of a higher order, and that lies with the committee.

Mr. TIEFER. I understand your point, Mr. Goss. Let me mention something that has not been brought up which bears on your point. That is, we currently have a situation where if it is necessary to conduct hearings and to insist that the cameras roll, even when you have an involuntary witness, the House can do so. That is, it is possible when the House authorizes a major investigation, for the House to include in the authorizing resolution that the particular investigating committee will not be subject to Rule XI. That occurred, to my knowledge, once. It occurred for the Iran-contra committee in 1987.

And the value of having that—I am going to describe that as the current system—in the current system, ironically, it is this Rules Committee that decides. This is the committee that processes the resolutions for investigating committees. Just like for the current investigation by the Government Reform and Oversight Committee, it is this committee that processed H.Res. 167 that said it could have deposition authority and overseas investigative authority. It is this committee and then the House acting on the recommendation of this committee that makes the judgment how many, in effect, of these very powerful tools that an investigating committee of Congress can have—these clubs with which it can beat a witness, how many will it have?

And my knowledge of the report of this committee is a judgment was made in H.Res. 167: for deposition authority, yes; investigative authority overseas, yes. The ultimate H.Res. 167 did not include the authority to get tax reports of witnesses. I take that as a positive sign that this committee engaged in a judgment process as to how many powers to give out and whether it was an occasion to give away the store, you might say.

The CHAIRMAN. You are absolutely right.

Mr. TIEFER. Okay. And that was a judgment that represented a lot of maturity and wisdom, because there is a temptation to give the store away. Some would say, give it away every time, and this committee did not.

Similarly, on H.Res. 167, the committee could have said, oh, and by the way, you will not be subject to the broadcast ban either. You could have written that into H.Res. 167. You could have said the Government Reform Committee will not be subject to the broadcast ban for subpoenaed witnesses.

Why something does not appear in a final version of an investigation authorizing resolution is due to many factors. You could have; you could still do that now. The current system, I think, is a good system because it is this committee and the House, in effect, that make the judgment as to when the broadcast ban will be in effect and when it will not.

If you go to the Barr resolution, you go the full distance and you say not only is it not this committee and the House that are acting as a screen, nobody is acting as a screen. No matter how wise it would be to give the witness rights, they will not have them any more.

Mr. ROBINSON. I would add that I agree with Charles on that point; that I would certainly prefer, rather than an outright repeal, a vote of some sort, though I would think about that. I have not had a lot of time to think about this, about some kind of standard for that vote, and I am not sure what it is.

Mr. GOSS. There are so many different circumstances that you can think about that come to mind. If you are dealing with an ethics committee problem you have a set of safeguards already built in. If you are dealing with intelligence or national security problems, you have a different set of rules and a process for the House where the House closes itself. I think we guide ourselves thinking about sort of the edges of this rather than the normal business, which is the public's business.

I think we are throwing a lot of scare stories out there trying to say, well, we might be giving something away here, where I think most of the time we are going in the right direction, in the direction of sunshine, and the rest of the time we are counting on the committee to be responsible. That seems to me to be a fairly reasonable way to do the government's business.

I do not see the horror stories here. Going on a very bottom line, the nugget, to me is, who makes the decision about whether television and radio broadcast and print media people are there doing their thing; and I think that is the committee's, I think it is the institution's decision. That is really where I am coming from on this. Now, I do not expect the institution to roll over American citizens.

Mr. TIEFER. Well, you have a valid point that you will still have the procedure under Rule 2(k)(5), by which an investigating committee can go to closed proceedings.

I would suggest that there is a very strong and appropriate tendency in the House not to go to closed proceedings, and that what you are doing is eliminating any middle ground; that either the committee must close the doors and allow no visibility whatsoever of what it is doing, or it must force the witness, as I have said, to bare himself, in these incriminating–looking situations, to the TV cameras. So you are taking away the middle ground.

Mr. GOSS. Right.

Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Moakley.

Mr. MOAKLEY. Are you not, in effect, eliminating the sunshine policy that Mr. Goss has been talking about by going to that rule?

Mr. TIEFER. Mr. Moakley, I think that there is going to be, what there was at the origin of this rule in the 1950s, when there was debate over what to do about the McCarthy era excesses. There was a fair push at the time to say if there is any hearing that is incriminating for a witness at all, the witness should be able to close it. Those were proposals made at the time. There will be a thrust in that direction again if there is no middle ground.

Mr. MOAKLEY. Sure.

Tell me, what rights would the person coming before a committee have if this right is stripped away from him? How can he testify himself or appear to be innocent or whatever?

Mr. TIEFER. As I was listening to some discussion earlier that suggested that witnesses in front of congressional committees are in a wonderful position and have a lot of rights, you compare them with a defendant in a criminal trial, who is not in the strongest position as it is. A defendant in a criminal trial can summon witnesses on his behalf, a witness in Congress cannot summon witnesses. A defendant has the right to confront people. A witness in Congress has no right to confront people; under Jencks and Brady, a defendant has the right to see the notes that the investigators have compiled against him.

Mr. MOAKLEY. Discovery.

Mr. TIEFER. We have no Jencks and Brady for congressional witnesses.

Mr. MOAKLEY. Cross-examination.

Mr. TIEFER. He has no cross-examination powers.

Mr. MOAKLEY. And this is the people's House. We are supposed to protect people's rights.

Mr. TIEFER. Well, it was mentioned earlier, you occasionally get a congressional witness like Oliver North, who is able to battle the committee, blow for blow. On the other hand, in the last year, in the Government Reform Committee and the Senate, we have seen witnesses whose command of English is not so great, and they appear—

Mr. MOAKLEY. On this side of the table.

Mr. TIEFER. Well, the ones I am referring to appeared terrified. I am not sure about the ones you are referring to. But they looked terrified to me.

Mr. MOAKLEY. Pete, both of you did a great job. Thank you.

The CHAIRMAN. Mr. Hall.

Mr. HALL. No questions.

The CHAIRMAN. No questions.

Gentlemen, let me just say that I am impressed with your testimony. You both certainly have great experience in this area.

I am just a little concerned that we try to portray this as being identical to the courts. I do not think it is, personally. I think there is a separation of powers, that we have an obligation to look out for the Constitution.

We are not here to convict people, we are not here to plea bargain, and so the roles are a little bit different. So we really are not comparing apples to apples in this particular instance. But we appreciate your testimony and thank you so much for coming.

The committee is going to stand in very brief recess. There will be an end of this vote momentarily, and then I understand there are two or three 5-minute votes in series. We will reconvene 1 minute after the last of the series of votes, which should be in about 15 or 16 minutes or so.

So if the last two witnesses, who are Mrs. Barbara Cochran and Mr. Tom Dillon, will bear with us, we will be back just as soon as we can. The committee stands in recess.

[Recess.]

The CHAIRMAN. The committee will come back to order. We have two more witnesses that will appear in a panel, if they do not object, Mrs. Barbara Cochran, the President of Radio-Television News Directors Association; and Tim Dillon, the Chairman of the Standing Committee of Press Photographers. And if you two would like to come forward—

I do not have biographical information on you, Tim, but I do on Barbara, and I just would like to call attention to the fact that Barbara Cochran was Executive Producer of Politics for CBS News and supervised political coverage for all CBS News programs during the 1996 election cycle.

From 1989 to July 1995, Ms. Cochran served CBS as Vice President and Washington Bureau Chief. She directed CBS coverage of the Bush and Clinton administrations, including coverage of U.S. military involvement in the Persian Gulf War, the 1992 elections and inauguration, and the Republican victory in the 1994 congressional elections.

An industry insider, Ms. Cochran's career in journalism has covered almost 3 decades in Washington. In 1983, she joined the television ranks as Political Director for NBC News, later serving as Executive Producer of Meet The Press. And something I enjoy saying is, she holds a master's degree from Columbia University, Graduate School of Journalism, in New York.

I am sorry, Tim, I do not have one of your bios. Would you like to tell us anything about yourself?

Mr. DILLON. I am sorry. On such short notice, we did not have a chance to get anything together.

I am the Chairman of the Standing Committee of Press Photographers and have been for the last year. I am a staff photographer for USA Today and have worked in Washington since 1979. Before this, I was with the Washington Star.

The CHAIRMAN. You both were. How about that? Did you know that?

Mr. DILLON. No. For the last 3 years.

Mr. MOAKLEY. You did not meet at the water cooler?

Ms. COCHRAN. No.

The CHAIRMAN. Well, let me welcome both of you here and apologize for having to keep you so late in the evening. It was a big inconvenience, and we apologize for that.

But having said that, I am most interested in your testimony and, Barbara, if you would like to go first, your entire statement will appear in the record, but take whatever time you need. And likewise for Tim as well.

STATEMENT OF BARBARA COCHRAN, PRESIDENT, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION

Ms. COCHRAN. Thank you. Thank you very much, Mr. Chairman. It is a great honor to have the opportunity to testify before this committee on a subject which is one that I have been involved in pursuing at least since 1989, because this is a rule that has interfered with the ability of the organizations that I have worked for to adequately cover events in the House. So I am glad to see that you are considering making a change.

You did quite a nice job of summarizing my experience here. The only thing I would add is that I also had experience in radio as Vice President for News at National Public Radio during the time when Morning Edition was created.

Over the years, numerous witnesses have invoked Rule XI to prohibit television camera and radio coverage of their testimony in full or before subcommittee hearings. The public was denied, therefore, witnessing through audio and visual coverage the testimony of many important witnesses in key House proceedings. Among those who successfully barred cameras and microphones in recent years were relatives and associates of Charlie Trie in the investigation of the 1996 campaign finance scandals; David Watkins, a former White House aide in the White House Travel Office investigation; Charles Keating, former president of Lincoln Savings & Loan; and as has been mentioned here, Samuel Pierce, former Secretary of Housing and Urban Development.

And, in fact, in 1989, the four networks, including CBS, where I was then the Bureau Chief, went to court to try to get Congress to open up coverage of hearings that he was attending. As we have heard, that was denied and, in fact, the judge ruled that it was up to the House to make those rules for itself and that the courts had no jurisdiction. So since that time our only recourse has been to seek from the House some kind of a revision in Rule XI.

Currently, clause 2 of Rule XI directly inhibits the ability of radio and television correspondents to cover the proceedings of the House of Representatives in an open and fair manner. No similar prohibition exists in the Senate, as has been noted here. RTNDA believes no basis exists for continuing to bar electronic journalists from this kind of coverage.

As a preliminarily matter, the rule is biased against electronic media. There is no rule barring newspaper and periodical reporters from remaining in the room while a subpoenaed witness testifies.

Thus, if a witness invokes Rule XI, print media coverage can continue unaffected, but microphones and cameras are the equivalent of the pencil and pad of the print media, and these are prohibited.

In an era when the Supreme Court has recognized that disparate treatment of different media is highly suspect, restricting the rights of the electronic media to report on congressional hearings cannot be justified absent a compelling showing that such coverage would inherently have a unique adverse effect on the pursuit of justice.

Precluding the electronic media from covering witness testimony, while permitting access to others, may in fact violate the equal protection clause in the First Amendment. I would strongly urge government officials not to continue to discriminate between members of the media in this regard.

Originally, the rule was deemed necessary to protect the rights of witnesses, but given the proliferation of video media, that reason is no longer justified. Witnesses can be captured on camera right up until the moment they testify and immediately afterward. The only recording that would be barred would be of the witness in the committee room, and even those words, as spoken, are later available in transcript form.

Most importantly, in this modern age when most Americans rely on the broadcast media as their primary source of information and where advances in technology have eliminated any unique logistical problems with electronic coverage, prohibiting full electronic coverage of these proceedings serves only to deny the public access to and observation of important government proceedings.

Maximum public access has long been the ideal in our country, and electronic coverage is the primary means through which realistic access to the workings of government can be provided to most segments of the public. In part, this is a function of the importance that radio and television now plays in individuals' daily lives. Radio and television news serve as the primary source of information for the public worldwide.

The House of Representatives and this committee have frequently led the way in providing public access to the proceedings of this body. The House was the first to permit cameras to broadcast from the floor of the Chamber during regular business. The 104th Congress amended its rules to permit radio and television coverage of all proceedings open to the public. We appreciate the House's willingness to address issues of public access and to seek to provide coverage on an equal basis for all media. Repeal of clause 2 of Rule XI would be another critical step in achieving that goal.

I would also like to add that exceptions that you have mentioned to protect witnesses' safety, in the case of whistleblowers, who might deserve some protection, have always been accommodated by the electronic media. We have made accommodations for that kind of coverage, and all we are asking for is equal treatment with our colleagues in print.

The Supreme Court has noted that people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. The importance of openness to the workings of government cannot be

overemphasized. Through electronic coverage, people not actually attending congressional hearings can have confidence that standards of fairness are being observed by their representatives in government.

Moreover, through radio and television coverage, the public is afforded direct and unfiltered access through the opportunity to hear the witness speak his or her own testimony. This allows our citizenry to reach more informed conclusions regarding important and often complicated issues.

In sum, witnesses called to testify before Congress should not be allowed to hide from the public and the press. Hearings of significant public interest should be open to cameras as a matter of course. RTNDA urges this committee to change Rule XI and to open all public House committee hearings to full coverage by all of the media.

Thank you.

The CHAIRMAN. Barbara, thank you very much.

[The prepared statement of Ms. Cochran follows:]

TESTIMONY BEFORE HOUSE RULES COMMITTEE
November 4, 1997
Barbara Cochran
President, Radio-Television News Directors Association

Thank you, Mr. Chairman, for the opportunity to appear and testify before the Committee this evening on the subject of the amendment of clause two of House Rule XI, which provides that no witness served with a subpoena by the committee shall be required against his or her will to be photographed at any hearing or to give evidence or testimony while the broadcasting of that hearing, by radio or television, is being conducted. The Radio-Television News Directors Association, which represents local and network news executives in broadcasting, cable and other electronic media in the United States and 30 other countries, has long urged the House of Representatives to change this rule.

Over the years numerous witnesses have invoked Rule XI to prohibit television camera and radio tape coverage of their testimony in full or subcommittee hearings. The public was denied, therefore, witnessing through audio and visual coverage, the testimony of many important witnesses in key House proceedings. Among those who successfully barred cameras and microphones in recent years were relatives and associates of Charlie Trie in the investigation of 1996 campaign finances; David Watkins,

a former White House aide in the White House travel office investigation; and Charles Keating, former president of Lincoln Savings & Loan.

Currently, clause two of Rule XI directly inhibits the ability of radio and television correspondents to cover the proceedings of the House of Representatives in an open and fair manner. No similar prohibition exists in the Senate. RTNDA believes that no basis exists upon which electronic journalists can continue to be barred from covering these hearings.

As a preliminary matter, the rule is biased against the electronic media. There is no rule barring newspaper and periodical reporters from remaining in the room while a subpoenaed witness testifies. Thus, if a witness invokes Rule XI, print media coverage can continue unaffected. In an era when the Supreme Court has recognized that disparate treatment of different media is highly suspect, restricting the rights of the electronic media to report on congressional hearings cannot be justified absent a compelling showing that such coverage would inherently have a unique, adverse effect on the pursuit of justice. Precluding the electronic media from covering witness testimony while permitting access to others may violate the Equal Protection Clause and the First Amendment.

I would urge government officials not to continue to discriminate between members of the media in this regard.

Originally, the rule was deemed necessary to protect the rights of witnesses. But given the proliferation of video media, that reason is no longer justified. Witnesses can be captured on camera right up until the moment they testify and immediately afterward. The only recording that would be barred would be of the witness in the committee room and even those words spoken are later available in transcript form.

Most importantly, in this modern age, when most Americans rely on the broadcast media as their primary source of information, and where advances in technology have eliminated any unique logistical problems with electronic coverage, prohibiting full electronic coverage of these proceedings serves only to deny the public access to and observation of important governmental proceedings. Maximum public access has long been the ideal in our country, and electronic coverage is the primary means through which realistic access to the workings of government can be provided to most segments of the public. In part, this is a function of the importance that radio and television now plays in individuals' daily lives. Radio and television news serve as the primary source of information for the public worldwide.

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House was the first to permit cameras to broadcast from the floor of the chamber during regular business. The 104th Congress amended its rules to permit radio and television coverage of all proceedings open to the public. We appreciate the House's willingness to address issues of public access and to seek to provide coverage on an equal basis for all media. Repeal of clause 2 of Rule XI would be another critical step in achieving that goal.

The Supreme Court has noted that "people in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." The importance of openness to the workings of government cannot be overemphasized. Through electronic coverage, people not actually attending congressional hearings can have confidence that standards of fairness are being observed by their representatives in government. Moreover, through radio and television coverage, the public is afforded direct and unfiltered access through the opportunity to hear the witness speak his or her own testimony. This allows our citizenry to reach more informed conclusions regarding important and often complicated issues.

In sum, witnesses called to testify before Congress should not be allowed to hide from the public and the press. Hearings of significant public interest should be open to cameras as a matter of course. RTNDA urges this

committee to change Rule XI and to open all public House committee hearings to full coverage by all of the media.

The CHAIRMAN. Let me now turn to Tim Dillon and, Tim, again, you may take whatever time you feel is necessary

STATEMENT OF TIM DILLON, CHAIRMAN, STANDING COMMITTEE OF PRESS PHOTOGRAPHERS

Mr. DILLON. I will try to be brief. Obviously, I did not have enough—quite as much time to prepare for this, as we were asked to support the letter Mr. Radner wrote, and we certainly are in agreement with everything they have said.

Most of the testimony today centered around the radio and television aspect of the Rule XI. Unfortunately, that rule covers our gallery also. My main point in coming here, what I wanted to stress, was that when a subpoenaed witness is testifying, print media reporters are not barred from the room. They are covering the remarks, the gestures, whatever, of the witness. And I, along with all of the other members of my gallery, and the journalists also, I just happen to work with a camera instead of a pencil and pad.

I would tell you that we have at least ten members in our gallery that have a Pulitzer Prize, which is journalism's top prize. Most of us went to journalism school. All of us have worked in the business for a fair amount of time to get to the level to cover this sort of news event. And I feel that we are covered by the same First Amendment right that the print reporters are covered by. Removing us from the room at the point the witness says, I do not want to have my picture taken, is equivalent to letting those people stay in the room with the pads and pencils, but saying, you cannot use them. They are taking my tool away, and they are not having their tools taken away.

Mr. Goss had a point earlier about the potted palm. Rule XI states that the camera has to be covered up, microphones unplugged. Well, when you cover the cameras and you unplug the microphones, you are doing that not only to the witness, but to everybody up on the dais. And as you pointed out, the potted palm won that fight. I was there. And so was Mr. North.

If Mr. North had been in the House rather than in the Senate, because that was in the Russell Senate Office Building where that took place, he could have, which he did not, invoked Rule XI. I doubt that Mr. North would now be on radio or own a bulletproof vest company or that anybody would know who he was had he not been on television. He was an instant, instant hit as a result of that.

As a matter of fact, I went back to my newspaper, USA Today, and the switchboards were jammed. It was like this guy is a hero immediately because of his testimony.

I also might say that if I were a witness sitting here, and I was a little nervous about something, I would more likely be nervous about the Chairman who is going to ask me, where were you at 12 o'clock last night when such and such happened rather than a TV guy over in that corner of the room. That would scare me.

I am sure there are a few people, like I had some people at work that wanted to photograph me, and I was going to invoke Rule XI

if they came up here to take pictures of me, but I understand that they can be nervous.

The other thing I do understand is that in the Senate, where that rule does not exist, I do not think there has been a problem as long as I have been working in Washington. I realize this all grew out of the McCarthy hearings. And back in the early 50s, I can remember, Mr. Goss, watching the McCarthy hearings on television in 1952 because there was television then.

Mr. GOSS. We just did not have it.

Mr. DILLON. It was in black and white, but it was there. I do understand, and it has happened numerous times that there are times when the witness cannot be photographed. The last instance in the Senate that I can recall was the IRS people that testified. They put a curtain up and you could not photograph them, but you could still photograph the panel and the questions that were being asked.

Other examples would be witness protection people, Federal witness protection people, or whistleblowers, or people who are testifying regarding national security. We all understand that those people have to be protected.

But my main reason for testifying is that in addition to supporting radio and TV, I am supporting my people because virtually everyone that I work with is working for print media, which is the press, as in the First amendment; and I am not being allowed to do my job, while my counterpart with a pencil is. That is about all I have to say.

The CHAIRMAN. Thank you very, very much. Your testimony is interesting and I, for one, do not believe that Members of Congress ever distinguish themselves in a favorable light when they are arrogant or rude, as sometime Members of Congress are when they are interrogating witnesses. I think that comes across in an unflattering way, and I, for one, would not mind keeping the cameras on if that were going to happen, and then let the American people see certain Members of Congress in action.

I think, for the most part, most of the Members of Congress are polite, they are reasonable, and I do not think they would ever conduct themselves in a way that would harass the witness; but if they did, I think the cameras ought to be on, and the American people ought to see it, and then those Members ought to be ashamed of themselves.

Ollie North happened to come from my hometown, and I had the great privilege of nominating his two brothers, younger brothers, to the military academies, one to West Point and one to the Naval Academy. Neither of them made it, because their SATs were not high enough, but they went on to become commissioned officers and had very good careers in the other branch than the one Ollie and I served in, the Marine Corps.

Let me just ask you, Barbara, you cover the Senate, as well, your people?

Ms. COCHRAN. Yes.

The CHAIRMAN. In all of the years that the Senate has been covered by television and radio, do you ever recall an incident that would have reflected badly on the Senate because of the cameras being on?

Ms. COCHRAN. No, I do not.

The CHAIRMAN. I do not either. I have been trying to recall and done a lot of research on it, and the very fact that they do not have a similar rule as we have does not seem to have made any difference as far as any abuses are concerned.

Ms. COCHRAN. No, they seem to have been able to operate just fine.

The CHAIRMAN. And in both your opinions, if we were to repeal this one rule, leaving in effect an almost identical rule to the Senate, that we would probably have the same kind of experiences that the Senate has had?

Ms. COCHRAN. I would think so.

The CHAIRMAN. Mr. Dreier.

Mr. DREIER. I do not have any questions, but appreciate your thoughts and input and, obviously, we will be considering this shortly after your departure, I guess.

The CHAIRMAN. Mr. Moakley.

Mr. MOAKLEY. Ms. Cochran, you said that the rule inhibits your profession in covering the hearing; and Mr. Dillon, you said that the print media can stay in the room when your people have to go. But you do not have to go. You can stay in the room and cover it. You can take pictures of the witness coming into the room, you can take pictures of the witness going out of the room, and you can make the statement that he made while he was in the committee room.

So, in fact, if I were the print media, I would say you have an advantage over them because you have instant coverage and they have to wait until the next day to get the picture and their stuff in the paper. So it would never be equal, no matter what happens.

Ms. COCHRAN. First of all, it is only fair to tell you that the representatives of the print media also support this change in the rule. The American Society of Newspaper Editors has joined in hoping that the House would overturn Rule XI.

But secondly, to the question of how a story is told on television or on radio, we think one of the reasons that it is such an appealing form of presenting the news to the public is because it captures the essence of the moment. Rather than having the reporter's account of what a witness said, you have the actual words of the witness. You have the demeanor of the witness.

We think that that can provide a more accurate record and a more accurate way of telling the story, certainly a more vivid way of telling the story, than to have a reporter talking himself and giving an account of what was said inside the committee room.

Mr. MOAKLEY. Now, you have talked about people who have availed themselves of Rule XI, and I am sure you have done a lot of research on people, and your industry has only come up with 11 cases. So, I mean, it is not used very often.

Ms. COCHRAN. That is correct. But when it is used, as in the Samuel Pierce case, it is something that is often a very newsworthy story, something that might be considered for live coverage, particularly by a station such as C-SPAN that specializes in that kind of coverage. And so it has interfered with our ability to tell stories on those occasions.

Mr. MOAKLEY. Are you telling me that a committee hearing cannot be adequately covered by the print press media?

Ms. COCHRAN. Cannot be adequately covered by the print press?

Mr. MOAKLEY. Yes.

The CHAIRMAN. In today's times, I would say so.

Ms. COCHRAN. Well, we like to feel that we are also offering the same variety and menu of stories to our viewers and listeners that are available through newspapers or periodicals, and so if we—particularly on—

Mr. MOAKLEY. Probably quicker.

Ms. COCHRAN. On a hot story we want to be able to be competitive. We want to offer our audiences as full and complete a report as we possibly can.

Mr. MOAKLEY. You people didn't say it but it is almost inferred that when they say no more radio, no more TV, that your people are ousted out of the room. You people are still staying there and you can take your notes.

You can't stay there?

Mr. DILLON. No. I have a camera. I don't write.

Mr. MOAKLEY. I understand that, sir.

Mr. DILLON. My only job is to take pictures and I get thrown out—I have no interest in interviewing the witness. It is not my job.

Mr. MOAKLEY. But you don't have to leave. You just don't take any pictures.

Mr. DILLON. Why would I stay?

Mr. MOAKLEY. Because you can write.

Mr. DILLON. I am not a writer. I am a photographer.

And the point you made, you were asking about the witness—photographing the witness before.

Mr. MOAKLEY. And after, right.

Mr. DILLON. You can't photograph the interaction between a witness and the committee. As Mr. Solomon pointed out, sometimes Members beat up on the witness. There are two sides to this story, and you can't tell people with cameras they have to leave and rely on somebody over in the corner with a pencil to describe what is going on. It is much more accurately described in video and with still pictures.

Mr. MOAKLEY. Don't you think in fairness to a person who is summoned before a committee against his will that he should have some rights?

Mr. DILLON. I believe the committee has outlined the other provisions in the rule 11 that protect that.

Mr. MOAKLEY. But you have to take a vote of the committee to ensure that he has got his rights. Do you think you should take care of—take away a rule and leave it up to a committee? You have seen the way some of these committees operate.

Mr. DILLON. I have been up here awhile, yes.

Mr. MOAKLEY. Yes, I know. That is why I said that.

The CHAIRMAN. Would the good gentleman yield?

Mr. DILLON. I would also be more intimidated by the committee, not by the television camera. I mean, if you are up here minding the business you are here for, that television camera is going to be the last thing on your mind.

Mr. MOAKLEY. Oh, no, but if you are a person coming into probably a legislative body for the first time and looking at those cameras and looking at some of the mean faces that you have, like the Chairman over here, the poor person would be scared to death. I mean, if he has nothing to hide he would be afraid something would go wrong.

Mr. DILLON. Congressman Moakley, the way technology is these days, those cameras are so far back and the way the thing is lit, I doubt the witnesses can even see the cameras.

Mr. MOAKLEY. But he knows that they are there because he is told going in by his lawyer or whatever, watch those cameras. Don't shake your head when you shouldn't. Smile. Look confident and all of these things, and the fellow is trying to think of all of that and still answer the questions the proper way.

Thank you.

The CHAIRMAN. Mr. Moakley, if you would yield, before I came to this committee 10 years ago or more, I served on a number of committees, but one of them was the Foreign Affairs Committee and we had a particular subcommittee Chairman, who was very arrogant, very rude and belittled and heckled and harassed the witnesses, and I began to apologize to the witnesses for him, on television. And it didn't take too long before this young fellow was straightened out and now he is over in the Senate. He is a Senator but he is not as rude as he used to be. He is almost a gentleman.

Mr. MOAKLEY. That is because he is with more unruly people.

The CHAIRMAN. That is why we should keep these cameras rolling.

Any questions of the witness?

Mr. MOAKLEY. Thank you, sir.

The CHAIRMAN. If not, we really appreciate your coming. Again, we apologize for the lateness of the evening. Your testimony was well taken, believe me.

Ms. COCHRAN. Thank you.

Mr. DILLON. Thank you for having us.

The CHAIRMAN. This concludes the hearing on the camera legislation.

This meeting stands adjourned.

[Whereupon, at 9:35 p.m., the committee was adjourned.]

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