

First Amendment LAW LETTER



CONTENTS

When Do "Experience and Logic" Matter Under the First Amendment? **P. 1**

HIPAA and Newsgathering **P. 1**

Cable Networks and the FCC's Political Broadcasting Rules **P. 4**

WHEN DO "EXPERIENCE AND LOGIC" MATTER UNDER THE FIRST AMENDMENT?

Federal Government Challenges Traditional Public Disclosure Principles in War on Terror

BY JEFFREY L. FISHER

The federal government's actions against persons suspected of connections to terrorism continue to raise questions about the Bill of Rights' applicability to novel measures taken in the name of national security. Nowhere are those questions more pressing than with regard to the First Amendment's guarantee of open government.

A central objective of the First Amendment is to ensure that citizens have access to information enabling them to participate in and contribute to our republican system of self-government. Information about how the government itself is operating lies at the core of this notion. Unless we know how the officials who serve us are behaving, how can we govern ourselves?

Beginning in 1980, a short series of cases established a test to protect our right to know. In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the Supreme Court made it clear that the First Amendment not only prevents the government from censoring private parties' expression; it also requires the government to disclose certain information about itself. This latter doctrine, the Court explained in subsequent cases, is driven by "experience and logic": When governmental records or proceedings traditionally have been made public ("experience") and doing so serves

CONTINUED ON NEXT PAGE

HIPAA AND NEWSGATHERING: BASIC TIPS FOR REPORTERS AND EDITORS

BY ANDREW M. MAR AND ALISON PAGE HOWARD

Journalists throughout the country are wrestling with the impact of the Health Information Portability and Accountability Act (HIPAA), a federal health privacy law that went into effect earlier last spring.³ Fortunately, HIPAA does not regulate what the media can report about. Nonetheless, journalists should be prepared to deal with and, if necessary, challenge, the manner in which agencies they cover interpret these regulations.

Perhaps because HIPAA imposes stiff penalties on agencies that disclose private health information, there are instances of law enforcement and fire department personnel saying they can no longer disclose information – such as names, addresses and medical conditions – once commonly disclosed. In Chicago, for example, the media had a difficult time reporting on the deadly porch collapse in late June 2003 because hospitals refused to disclose routine information about the victims. In addition, while the Washington State Patrol quickly recognized that HIPAA does not apply to it, other law enforcement agencies have refused to respond to reporters' requests for information, claiming HIPAA prevented them from releasing it. Thus, the Vancouver, Wash., Police Department cited HIPAA when it refused to confirm whether a kidnap victim had been assaulted. While municipal attorneys later clarified that HIPAA did not apply to the police department, the department's initial response – and the related delay in release of information – reflects the chilling effect that HIPAA has created.

CONTINUED ON PAGE SEVEN

EXPERIENCE AND LOGIC

CONTINUED FROM PAGE ONE

an important function of monitoring governmental conduct (“logic”), the First Amendment imposes a presumption of openness. See *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8 (1986); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984). The government may not suppress such information absent an individualized showing of a particular need for secrecy.

The Supreme Court, however, has never laid down clear parameters explaining how broadly the experience and logic standard is applicable to governmental actions. The Court has held that the standard imposes a presumption that the government must hold criminal trials and preliminary court proceedings in public. But does the experience and logic test impose a presumption that the government must hold *non-criminal proceedings* in public? Does it generally require the government to release information to the public about persons it has arrested or detained *but not charged* with any crime?

These are questions that Bush Administration policies and court filings in the “war on terror” recently have required the federal circuit courts to grapple with – and with differing results.

In August of 2002, the Sixth Circuit of the United States Court of Appeals rejected the federal government’s attempt to close all terrorism-related immigration deportation hearings – which, unlike criminal trials, are conducted by the executive branch – holding that the First Amendment requires such hearings to be held in public absent a showing that national security requires a particular hearing to be closed. *Detroit Free Press v. Ashcroft*, 303 F.3d 681 (6th Cir. 2002). Two months later, the Third Circuit agreed that the experience and logic test applied to deportation hearings, although a 2-1 majority disagreed with the Sixth Circuit and found that deportation hearings did not “boast a tradition of openness

sufficient to satisfy” the test and could therefore remain closed. *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 212 (3rd Cir. 2002). These opinions followed previous federal appellate rulings that the experience and logic test applies outside the realm of criminal judicial proceedings.¹

But a decision last summer in another important case took a sharply different approach. In the weeks and months following 9/11, the federal government instituted a policy of detaining several hundred, if not thousands, of individuals (the exact number is not known) on American soil that it suspected of having ties to terrorism. The government charged only a handful with crimes and confined the others based on alleged immigration violations and other suspicions, or using material witness warrants. All the while, the government withheld the names and all other information concerning these “non-criminal” detainees, citing national security concerns.

A coalition of public interest groups sued the Department of Justice (DOJ), arguing principally that the Freedom of Information Act (FOIA) and the First Amendment required the government to disclose the detainees’ names and other basic information. The district court ordered the DOJ to release the names of the detainees and their attorneys but stayed its decision pending appeal.

On June 17, 2003, a divided panel of the D.C. Circuit reversed, interpreting the *Richmond Newspapers* doctrine much more narrowly than the Sixth or Third Circuits. *Center for National Security Studies v. U.S. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003). The Court first held that FOIA did not require the government to disclose any of the information sought because it was compiled for law enforcement purposes and the government contended that its release could interfere with the ongoing terrorism investigation.

The Court, however, could not so easily overcome the First Amendment’s experience and logic test. The majority

acknowledged that arrest records and jail logs “have traditionally been public” – a remark that, if anything, is an understatement. English common law has demanded that records of detention be made public ever since the abolition of the Star Chamber’s secret procedures in the mid-seventeenth century. The Federalist Papers unambiguously denounced secret arrests, terming them a “more dangerous engine of arbitrary government” than convictions without trials. The federal government disclosed the names of persons it detained pursuant to the Alien and Sedition Acts of 1798 as well as during the Civil War (at the demand of Congress), even while the writ of habeas corpus was suspended. And since the turn of the century, federal, state, and local governments have kept “police blotters” and jail logs, and virtually every state has statutes or judicial decisions requiring these records to be made public.

The logic behind making detention records open is patent. As the Wisconsin Supreme Court put it in requiring police blotters to remain public: “The power to arrest is one of the most awesome weapons in the arsenal of the state. It is an awesome weapon for the protection of the people, but it also is a power that may be abused.” *Newspapers, Inc. v. Breier*, 279 N.W.2d 179, 188 (Wis. 1979).

The D.C. Circuit nonetheless refused to find a First Amendment presumption of openness of these records, reasoning that “[t]he narrow First Amendment right to access to information recognized in *Richmond Newspapers* does not extend to *non-judicial documents that are not part of a criminal trial*, such as the investigatory documents at issue here.”²

This interpretation of *Richmond Newspapers* highlights the confusion among courts trying to articulate the parameters of the First Amendment’s guarantee of public governmental information. It is true, as the D.C. Circuit noted, that the Supreme Court has never applied the experience and logic standard outside of criminal judicial proceedings. But the Court also has

never said that the standard does *not* apply outside of that context. And it is hard to understand why the doctrine should be so constrained.

Neither First Amendment precedent nor basic civics dictates that it is more important for the public to monitor governmental actions in criminal trials than in other adjudicative realms, in which federal officials exercise enormous power over persons and severely affect their rights and freedoms. The government’s use of its arrest power would seem to be exhibit A in this respect. By detaining people against their will, the government deprives them of their physical liberty and imposes significant burdens on them. Arrests are often the first step in the process of the criminal justice system – a system that all acknowledge carries a presumption of openness.

Unfortunately, we cannot expect the Supreme Court to clarify the scope of the *Richmond Newspapers* test anytime soon. The losing plaintiffs in the D.C. Circuit case filed a petition for certiorari in the fall of 2003, asking the Supreme Court to resolve the confusion surrounding this issue and to rule that the experience and logic test applies to arrest and detention records. DWT, as it did in the D.C. Circuit, authored an amicus brief on behalf of the media in favor of such a presumption of openness. The Court denied the plaintiffs’ petition without comment on Jan. 12, 2004.

So the “war on terror” continues unabated, and we await guidance and analysis as to when experience and logic really matter under the First Amendment.

¹ See, e.g., *id.* at 207 n.3 (collecting several decisions applying experience and logic standard to civil trials); *Whiteland Woods, L.P. v. Township of W. Whiteland*, 193 F.3d 177, 181 (3rd Cir. 1999) (meeting of town planning commission); *Cal-Almond, Inc v. United States Dept. of Justice*, 960 F.2d 105, 109 (9th Cir. 1992) (Department of Agriculture’s voter list).

² *CNSS*, 331 F.3d at 934 (emphasis added).

CABLE NETWORKS AND THE FCC'S POLITICAL BROADCASTING RULES: TIME FOR CLARIFICATION

BY JAMES S. BLITZ AND ROBERT CORN-REVERE

In late 2003, just as the presidential election season of 2004 was preparing to swing into high gear, a series of quirky scenarios emerged that highlight the oddities of the FCC's "equal opportunities" rule governing political broadcasting. For example, as the year drew to a close, a number of NBC affiliates refused to carry an episode of *Saturday Night Live* hosted by Democratic presidential candidate Al Sharpton.⁴ They were concerned that the appearance would trigger an obligation to provide similar free exposure to the large field of candidates.

Stranger questions cropped up earlier in the year during the unprecedented California recall election for governor, with its 135 candidates. Radio shock jock Howard Stern was advised to cancel a proposed interview with front-runner (and eventual winner) Arnold Schwarzenegger because of potentially staggering equal opportunities requirements. Yet the dilemma led to an even more remarkable outcome:

the FCC declared interview segments of Stern's show a "bona fide news interview," and therefore exempt from the political broadcasting rules.⁵

While these two examples are not unlike many of the questions that may arise in an election year, they pale in comparison to the anomaly of the rules' disparate application to broadcast stations and cable operators on the one hand and to cable networks on the other. This, too, was highlighted by events in the California recall election. Residents of California could watch *The Terminator* or reruns of *Diff'rent Strokes* on their favorite cable channels but not on broadcast stations. The FCC's political

rules apply to any "use" by a candidate of broadcast facilities (including appearances for any reason in non-political programs). Consequently, the National Association of Broadcasters advised members to avoid airing programs with celebrity-candidates during the California recall. However, the situation for cable networks (such as A&E Television Network, Court TV, or Discovery) was far more ambiguous. According to news reports, the FCC informally advised attorneys for the cable industry that the equal opportunities requirements do not apply to cable networks, but it was reluctant to issue an official advisory on the issue. Thus, some networks, such as the SciFi Channel, dropped plans to air Arnold Schwarzenegger movies, while others, such as TNT, did not alter their programming schedules.⁶

Over the years, the FCC has avoided opportunities to clarify the distinction between broadcasters and cable networks under its political broadcasting rules. Indeed, the agency has been quite cagey about taking any action that would have the effect of limiting its jurisdiction. But the events of the California recall and the impending 2004 election suggest that resolving this matter is imperative.

The political broadcasting rules

A key political broadcasting regulation, frequently but incorrectly referred to as the "equal time" rule, derives from Section 315 of the Communications Act of 1934, 47 U.S.C. § 315(a). Under this rule, if an FCC licensee permits a qualified candidate for public office to use its facilities, the licensee must afford equal opportunities to all other candidates for that same office to appear under the same conditions. This means that if a candidate appears on the air for free, the licensee must make available a comparable amount of free time to opposing candidates.⁷ A licensee has no affirmative obligation to notify the candidate's opponents of this opportunity but must promptly place a notice in its "political file" providing full details about the nature, duration, and cost of the "use." However, Section

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315(a)(1)-(4) exempts from the definition of a "use" a legally qualified candidate's appearance on a *bona fide* newscast, interview or documentary (if the appearance is incidental to the presentation of the subject covered by the documentary) or on-the-spot coverage of a *bona fide* news event (including political conventions and related incidental activities). Thus, coverage of candidates in *bona fide* news programs is exempt from these requirements.

The question of what to do with appearances by actors-turned-candidates arose in California (where else?) during the first presidential bid of Ronald Reagan. The FCC held that Section 315 applied to broadcasts of movies in which Reagan appeared as an actor because "[a] candidate who becomes well-known to the public as a personable and popular individual through 'non-political' appearances certainly holds an advantage when he or she formally discuss[es] political issues to the public over the same media."⁸ In that case the FCC simply applied the principle it had established a few years earlier, in reviewing the satirical presidential campaign of comedian Pat Paulsen, that there was "no basis for distinguishing between political and non-political appearances by candidates."⁹ The Commission briefly rescinded this interpretation of Section 315 in the early 1990s, reasoning that candidates lack control over the airing of movies or reruns of entertainment shows in which they may appear.¹⁰ However, it reimposed the broader interpretation of Section 315 after concluding that the issue warranted "more comprehensive examination."¹¹

Cable networks and equal opportunities

It is often assumed that the FCC has jurisdiction over political programming transmitted on cable networks; consequently, cable operators generally require programmers to adhere to the FCC's political programming requirements and other rules as a condition of their affiliation agreements.

A typical provision in a cable television affiliation agreement requires that the "network shall comply with all provisions of the Communications Act of 1934, the Cable Communications Policy Act of 1984, and the Cable Television Consumer Protection and Competition Act of 1992." Cable networks at times are obligated to warrant that they comply with, inter alia, political equal time and personal attack rules "to the extent applicable under federal law." But a closer examination of the law suggests that such conditions are unjustified.

The initial decisions applying Section 315 to "non-political" programming were adopted when cable was in its infancy and the question of how the rules should apply (if at all) to cable television networks simply did not arise. In 1971 Congress amended Section 315 to cover "community antenna television systems" (i.e., cable systems) as well as broadcast licensees.¹² Due in part to the nascent state of the cable industry in 1971 and because the only non-broadcast programming carried on most cable systems was programming originated by the cable systems themselves, the FCC's rules implementing the change applied only to "origination cablecasting," which is defined as programming carried on a cable system "subject to the exclusive control of the cable operator."¹³ Consistent with this approach, all of the Commission's political programming rules that apply to cable television expressly target cable systems, not cable networks.¹⁴ The statutory language, legislative history, and constitutional considerations all support the conclusion that Section 315 does not apply to cable networks, but the FCC has never clearly addressed this issue.

"Origination cablecasting," the focus of the 1971 amendment, clearly does not apply to the programming carried on cable networks. Although cable operators make editorial decisions about network carriage or channel placement, they do not exert editorial control over most networks or the content of particular programs. In a typical affiliation agreement, a cable operator simply agrees to distribute network programming "without delay, addition

(excepting local availabilities), deletion, alteration, editing or amendment.” In this regard, affiliation agreements for cable networks are quite different from those entered by broadcast networks, which are governed by the FCC’s “chain broadcasting” rules.¹⁵ Those rules, which accord broadcast network affiliates the specific right to reject or refuse a network program and to substitute their own content, do not apply to cable networks.¹⁶ Accordingly, cable networks and the programs they present should fall outside the scope of Section 315.¹⁷ Indeed, because of this fundamental difference in the regulatory treatment of broadcasting and cable networks, it would be implausible to suggest that the Commission has ancillary authority to extend Section 315 to cable networks. The legislative history of the 1971 amendment includes little discussion of its scope, but what exists supports the conclusion that Congress was concerned with programming a cable operator originates, rather than network programming it retransmits.¹⁸

Similarly, while Commission interpretations of these regulations are sparse, they support the straightforward understanding that cable networks are excluded from Section 315 requirements.¹⁹ In *Albert J. Zawicki*, 60 R.R.2d 1657 (Mass Media Bureau 1986), FCC staff ruled that Section 315 does not apply to programming carried on PEG access channels over which a cable operator lacks editorial control. In that case, the staff reasoned that Section 315 was inapplicable to the program in question because “the designated user of the channel retains editorial control over the channel” and the programmer “is not a cable operator.” *Id.* More recently, in *A&E Television Networks*, 15 FCC Rcd 10796 (Mass Media Bureau 2000), FCC staff was asked to rule on the applicability of Section 315 to cable networks. It granted an exemption to the A&E “Biography” series as a “*bona fide* news interview” program, declining to resolve the question of Commission jurisdiction. In doing so, however, it observed that “[u]nlike broadcast stations, which are potentially subject to Section 315 requirements with

respect to all programming broadcast by a station, cable systems are subject to Section 315 *only to the extent they ‘originate’ programming.*”²⁰ The full Commission has not been presented with a similar question. However, where it has referred to the cablecasting requirements in connection with other requests, the FCC has stated that Section 315 applies only to programming over which a cable system exercises exclusive control.²¹

Constitutional limits on regulating cable networks

Excluding cable networks from the scope of the political broadcasting rules reflects the fact that the FCC has limited jurisdiction over most cable networks and the programming they transmit. Unlike broadcast networks, which are subject to FCC rules by virtue of their status as licensees of their “owned and operated” television stations, cable networks and their owners are not licensed by or directly subjected to FCC rules. Some may suggest that the solution is for Congress or the FCC to change the law and extend equal opportunities requirements to cable networks as well as broadcasters. But any attempt to extend Section 315 obligations to cable television networks would raise significant First Amendment obstacles.

The Supreme Court has made clear that absent the “special characteristics” of the broadcast medium, such as its use of the limited radio spectrum, restrictions similar to Section 315 are unconstitutional.²² And in *Turner Broadcasting System v. FCC*, 512 U.S. 622, 637 (1994), which held that the FCC’s must-carry rules would be evaluated under the “intermediate” level of scrutiny, the Court declared that “the rationale for applying a less rigorous standard of First Amendment scrutiny to broadcast regulation, whatever its validity in the cases elaborating it, does not apply in the context of cable regulation.”²³ Noting the “fundamental technological differences between broadcast and cable transmission,” the Court found that application of “the more relaxed standard of scrutiny adopted in *Red Lion [Broadcasting Co. v. FCC]*, 395 U.S. 367 (1969)] and the other broadcast cases is inapt when

CONTINUED ON PAGE EIGHT

HIPAA AND NEWSGATHERING*CONTINUED FROM PAGE ONE*

Fortunately, some states are clarifying what type of information is covered by HIPAA. In Texas, for example, the attorney general issued an opinion in February 2004 that the state's public information law takes precedence over HIPAA, and health care information must be disclosed unless it is covered by a specific exemption. The opinion is available at <http://www.oag.state.tx.us/opinions/or50abbott/ord-681.htm>.

In addition, according to news reports, Kentucky, Arkansas and Utah are also involved in HIPAA reviews.

What HIPAA does and does not cover

HIPAA applies only to businesses or agencies that bill or receive payment for health care services or transmit information for payment in electronic form. Business or agencies covered by HIPAA generally cannot disclose, without the patient's consent, personally identifying information such as names, addresses or specific medical condition. Thus, in most cases, a hospital cannot give journalists a patient's name. However, the hospital should be able to confirm if a patient the journalist names is in the hospital and provide some additional details such as general medical condition, an age range and a general address (including that person's state or region).

It is not clear how HIPAA and the Freedom of Information Act (FOIA) interact. Some public information officers have contended HIPAA requirements supersede FOIA disclosures, but journalists should still be able to obtain some information from public records requests.

HIPAA does not apply to every entity that has a health care function. For example, it does not apply to a medical examiner's or prosecuting attorney's office. Records that should generally still be available include police- or fire-incident reports, birth records, autopsy records and court records. In fact, for entities such as the fire department or police department, which offer health care services as an ancillary service, HIPAA should apply only to health care information generated by the ancillary service. In other words, if a fire department public information officer (PIO) sees an individual burned at a fire, but the individual drives herself to the hospital, then

the department PIO may disclose information about the injured person because it was not obtained as part of the fire department's health care service.

What journalists can do

Health care information the media obtains independently is not subject to HIPAA and may be published or broadcast freely, subject to limitations and internal policies on printing information about minors or the deceased. Because HIPAA prevents covered agencies from disclosing names, reporters should obtain as much information as possible from non-covered agencies before turning to hospitals or medical providers for confirmation.

Journalists should also be prepared to challenge a source's claim that a particular agency is covered by HIPAA. If a law enforcement agency, fire department or other agency claims it cannot provide health care information because of HIPAA, one helpful resource may be the Department of Health and Human Services web page "Is a Person, Business or Agency a Covered Health Care Provider" at <http://www.cms.hhs.gov/hipaa/hipaa2/support/tools/decision-support/default.asp>. This website will ask a few questions designed to determine if the business or agency is covered. Walking a source through this short question-and-answer process may help convince him or her that HIPAA does not apply.

To assist in efforts to understand and clarify the impact of HIPAA, journalists should collect examples of information they are unable to obtain because of HIPAA (whether applied correctly or incorrectly). With this information industry groups such as the Newspaper Association of America and American Society of Newspaper Editors can explore lobbying and potential litigation that will clarify the impact of HIPAA on newsgathering at the national level. At the local level, reporters and editors should meet with agency Public Information Officers to clarify their application of HIPAA. In this way, the media can help structure the application of HIPAA and take action to remedy its inevitable misuses.

³ HIPAA is codified at 42 U.S.C. § 1320d-6. The implementing regulations can be found at 45 C.F.R. §§ 160, 164.

CABLE NETWORKS

CONTINUED FROM PAGE SIX

determining the First Amendment validity of cable regulation."²⁴ Similarly, the United States Court of Appeals for the District of Columbia Circuit has held that the more rigorous First Amendment scrutiny precludes the Commission from applying to cable operators the same type of rules that have been upheld in the broadcasting context, even when the subject involves structural regulations. The Commission's authority is all the more questionable when it seeks to regulate in the area of cable programming.²⁵

Consequently, the First Amendment should preclude the FCC or Congress from applying Section 315 to cable networks.

A time for clarity

The question of whether the FCC's political broadcasting rules apply to cable networks has been simmering on the back burner for some time. In May 1999, for example, CNN initially scheduled, then canceled, an appearance by Vice President Al Gore as guest host of the *Larry King Show*.²⁶ The scheduling reportedly led the Republican National Committee to urge party activists to call the network and demand equal time, and the offer to the Vice President was rescinded. The issue arose again in 2000, when A&E Television aired profiles of the presidential candidates as part of its *Biography* series. But the issue moved to the forefront during the 2003 California recall election because of its large candidate field that included former child TV actors, porn stars and current movie actors.

The bizarre scenario of the California recall may be unlikely to recur, but the question of how to treat cable networks under the FCC rules undoubtedly will re-emerge as the 2004 presidential race heats up. Given the growth in basic cable viewership and the increasing tendency for candidates to appear on all types of shows, it is inevitable that sooner or later the issue will be presented squarely to the Commission. For example, Comedy Central's *The Daily Show with Jon Stewart*

already has aired interviews with six of the Democratic presidential candidates.²⁷ While the network certainly could seek a "bona fide news interview" exemption if a demand for equal opportunities is ever filed (it worked for Howard Stern, didn't it?), it raises the interesting question of what the FCC can say about a program whose host regularly describes his show as a "fake newscast."

If the question is ever presented, there should be no doubt that the *Daily Show* interviews would qualify for an exemption under Section 315(a) even though it is an entertainment show. But the more legally sound and intellectually honest way to deal with the issue would be for the Commission to declare that Comedy Central and all other cable networks are excluded entirely from Section 315's reach. Such an approach would preclude the recurring program-by-program questions that come up with increasing frequency during each election cycle. The Commission might also consider reinstating its 1991 decision that candidate appearances in non-political programs, such as old movies, do not trigger equal opportunities obligations even in the broadcasting context. But in the meantime, the FCC should clear up the confusion and formally declare what the law requires – that cable networks are free from equal opportunities obligations.

⁴ *Many Viewers Miss Sharpton's 'SNL' Act*, USA TODAY, Dec. 8, 2003 (www.usatoday.com/life/television/news/2003-12-08-sharpton-snl_x.htm).

⁵ *In re Request of Infinity Broadcasting Operations, Inc. for a Declaratory Ruling*, 18 FCC Rcd. 18603 (2003).

⁶ Sue Zeidler, *Cable TV Networks Pull Schwarzenegger Films*, Forbes.com, August 14, 2003.

⁷ *Branch v. FCC*, 824 F.2d 37 (D.C. Cir. 1989) (newscaster-candidate would trigger free time requirement).

⁸ *In re Request by Adrien Weiss*, 58 F.C.C.2d 342 (Broadcast Bureau 1976). When Reagan ran for Governor of California in the 1960s the TV show *Death Valley Days* reportedly replaced him as host to avoid the constraints of the political broadcasting rules. See Gary Gentile, *Schwarzenegger Films Would Trigger FCC Equal Time Rule*, Associated Press, August 12, 2003.

⁹ See *Pat Paulsen*, 33 F.C.C.2d 835 (1972), *aff'd sub nom. Paulsen v. FCC*, 491 F.2d 887 (9th Cir. 1974). Although Pat Paulsen was a comedian and not a politician, he qualified for the ballot in one state, thus triggering application of the FCC's rules.

¹⁰ *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd. 678, 685 (1991).

¹¹ *Codification of the Commission's Political Programming Policies*, 9 FCC Rcd. 651, 651 (1994).

¹² See Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86th Stat. 3 (1972).

¹³ 47 C.F.R. § 76.5(p). This definition has remained the same since the Commission adopted comprehensive cable television regulations in 1972. See *Cable Television Report and Order*, 36 F.C.C.2d 143, 215 (1972) (definition initially codified at 47 C.F.R. § 76.5(w)).

¹⁴ See, e.g., 47 C.F.R. § 206(a) ("The charges, if any, made for the use of any system..."); *id.* § 207(a) ("Every cable television system shall keep and permit public inspection of a complete and orderly record (political file) of all requests for cablecast time ...").

¹⁵ See 47 C.F.R. § 73.658 (2002).

¹⁶ 47 C.F.R. § 73.658(e)(1).

¹⁷ See *FCC v. Midwest Video Corp.*, 440 U.S. 689, 707-709 (1979); *MPAA v. FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002); *Home Box Office v. FCC*, 567 F.2d 9, 28 (D.C. Cir. 1977) (rejecting ancillary authority to impose cable television content controls).

¹⁸ See *Federal Election Campaign Act of 1971*, Hearings before the Subcomm. on Communications of the Senate Comm. on Commerce, 92nd Cong., 1st Sess. 387 (1971). Those who testified on the issue focused on

the issue of programming originated by cable operators. See *id.* at 398 (Testimony of Dr. Frank Stanton) ("suppose the CATV originates a political program themselves"); *Political Broadcasting—1971*, Hearings before the Subcomm. on Communications and Power, House Comm. on Interstate and Foreign Commerce, 92nd Cong. 1st Sess. 89 (1971) (Statement of Rep. Torbert MacDonald).

¹⁹ In its comprehensive primers on the law of political broadcasting and cablecasting, the FCC does not address how Section 315 applies to uses by political candidates on cable television networks. See *The Law of Political Broadcasting and Cablecasting: A Political Primer* (1984 Edition); *The Law of Political Broadcasting and Cablecasting*, 69 F.C.C.2d 2209 (1978); *Use of Broadcast Facilities by Candidates for Public Office*, 24 F.C.C.2d 832 (1970).

²⁰ *Id.* at 10796 n.2 (emphasis added).

²¹ *Fox Broadcasting Co.*, 11 FCC Rcd. 11,101, 11,107 n.12 (1996) ("In implementing [Section 315(c)], the Commission has applied Section 315 only to a cable system's origination cablecasting, defined as programming over which it exercises exclusive control."); *A.H. Belo Corp.*, 11 FCC Rcd. 12306, 12,307 n.3. (1996).

²² *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974) (state right of reply law for newspapers violates the First Amendment).

²³ *Id.* at 639.

²⁴ *Compare Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) and *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) (both affirming the constitutionality of FCC broadcast ownership rules), with *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) (striking down national cable ownership rule).

²⁵ *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 815 (2000); *MPAA v. FCC*, 309 F.3d 796, 804-805 (D.C. Cir., 2002); *HBO, Inc. v. FCC*, 567 F.2d 9, 28 (D.C. Cir. 1977).

²⁶ See Howard Kurtz, *CNN Cancels Gore's Gig as Talk Host*, WASHINGTON POST, May 7, 1999 at C 1.

²⁷ See *Stewart Gets a General Visit*, MULTI-CHANNEL NEWS, December 10, 2003.

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ABOUT OUR COMMUNICATIONS AND MEDIA LAW PRACTICE

A national leader in the field, Davis Wright Tremaine's (DWT) Communications, Media and Information Technologies Department has nearly 100 lawyers in seven offices from coast to coast. The department's experience is as broad as its geographic scope. Our attorneys assist broadcasters, publishers, online content providers and journalists in all aspects of media law, including prepublication review, access to courtrooms and public records, newsroom subpoenas and defamation, and invasion of privacy defense. Our First Amendment and intellectual property lawyers represent advertisers nationwide. We provide counseling, regulatory, business and litigation services for national and regional clients.

Our firm has been representing the media and protecting First Amendment and intellectual property rights for decades. In a time of unprecedented innovation, we understood the impact of new technology on intellectual property and the need to expand our resources to better serve the telecommunications and information technology industries. Today we are a leader in these fields as well; and with an already renowned leadership in media law, no firm knows more about the issues affecting the content of new technologies.

Defamation, privacy, newsgathering and the First Amendment

Our experience in this area is unparalleled and encompasses matters of national, local and international concern. For more than 40 years, DWT lawyers have been representing clients in all types of communications and media litigation, including defamation and privacy defense and a wide range of First Amendment matters before the U.S. Supreme Court and in federal and state trial and appellate courts throughout the country.

Related experience includes:

- Defending publishers and broadcasters against defamation, newsgathering and invasion of privacy claims;
- Advising online content providers, publishers and other businesses regarding compliance with privacy regulations;
- Obtaining dismissals and fee awards under anti-SLAPP (Strategic Lawsuits Against Public Participation) statutes;
- Defending media clients in obscenity actions;
- Representing anonymous individuals in "cyber-libel" cases, defending both their anonymity and their online speech;
- Opposing attempts to restrain publications and broadcasts; and
- Providing around-the-clock delivery of prepublication and newsgathering counseling

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Our purpose in publishing this law letter is to inform our clients and friends of recent First Amendment and communications law developments. It is not intended, nor should it be used, as a substitute for specific legal advice since legal counsel may be given only in response to inquiries regarding particular factual situations.

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