Testimony of

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President and Co-COO
of the
C-SPAN Networks

before the

U.S. House of Representatives
Committee on the Judiciary Hearing

H.R. 2128 "Sunshine in the Courtroom Act of 2007"
September 27, 2007

Mr. Chairman and members of the committee, thank you for inviting C-SPAN to testify before you today on the issue of camera coverage of federal court proceedings.

C-SPAN is not here today to offer the committee its specific position on H.R. 2128. We don't believe it is our role as journalists to advise the Congress on pending legislation. Instead, we are here to reiterate our longstanding position that it is in the best interests of the American public for the federal courts to be more fully open to audio and video coverage.

We'd like to give you two examples that demonstrate the challenge of providing broadcast coverage of our federal courts today and how the varying guidelines among the courts have created what amounts to a 'patchwork quilt' of policies.[1] Only two circuits, the Second and Ninth, consider requests for television coverage, other courts release audiotapes, and others still have no broadcast access whatsoever.

Just two weeks ago, on September 11th, 2007, the Third Circuit Court of Appeals heard a broadcast indecency case stemming from an incident that is familiar to almost everyone in the United States.[2] *CBS v FCC* involves the 2004 CBS Super Bowl half-time performance of entertainer Janet Jackson for which the FCC fined CBS a half-million dollars for televising what became known as Ms. Jackson's "wardrobe malfunction."

[1] See attachment 1
[2] See attachment 2

Because of the enormous public awareness of this incident and the implications this case has for the national debate over television broadcasting standards, C-SPAN petitioned the Third Circuit's Chief Judge Anthony Scirica in March for special permission to televise this argument. In July, we received a letter from the Clerk of the Court denying our request because the Third Circuit does not permit camera coverage of its proceedings.[3] Later, the court agreed to same-day release of the audiotape of its argument, but we will explain more about that later.

Nine months earlier, another federal court—in this instance, the Second Circuit—heard another television decency case -- *Fox v FCC,* often referred to as the "fleeting expletives case." Just as it had with the CBS case, C-SPAN petitioned the Second Circuit Court for permission to televise the oral argument….and we further requested permission to telecast it *live.* The Second Circuit, which does have an expressed broadcast policy, approved C-SPAN's request.

Interestingly, our live telecast actually became part of the court's opinion in the case. In their ruling, the judges offered a hypothetical about whether the FCC would, in fact, impose a fine upon a news organization for its live telecast of an oral argument as the attorneys and judges repeated the very expletives that were at the heart of the case.

We wish we had better news to report on camera access to the federal courts. After all, as the members of this committee are well aware it's been 16 years since the Federal Judicial Conference first conducted a test of television and radio coverage of

[3] See attachment 3

selected trial and appeals courts. The Second and Ninth Circuit Courts were the testing grounds for this 1991-1994 experiment and C-SPAN was an active participant during that period, covering many arguments before them.

At the conclusion of this trial, the Federal Judicial Center released a summary evaluation that reported "small or no effects of camera presence on participants in the proceedings, courtroom decorum, or administration of Justice." The Judicial Center further found that "attitudes of the judges toward electronic media coverage…were initially neutral and became more favorable after experience under the pilot program."

Despite this favorable analysis, once the experiment concluded only the two circuits that had participated in the trial, the Second and Ninth, adopted guidelines for ongoing television and audio coverage of their proceedings.

From time to time over the ensuing 13 years, C-SPAN has petitioned the Second and Ninth Circuits for camera access to specific oral arguments. And in most, but not in every case, the courts in these two Circuits have agreed to our requests. Our resulting telecasts have allowed the interested public to witness the courts' deliberations on important Constitutional issues related to NSA warrantless wiretapping, late-term abortion, school integration and free speech.[4]

Once permission has been given to us, or any other requesting news organization, to bring cameras into the courtroom, the feed is then generally available to other

[4] See attachment 4

accredited news organizations for their use. Our practice at C-SPAN is to televise oral arguments in their entirety on one of the C-SPAN television networks, generally accompanied by contextual interviews with experts who explain the workings of the court and the issues surrounding the specific cases. Typically, these productions also air on our radio station and are simulcast, then archived on C-SPAN's website. In addition, as with all of our programming content, these televised oral arguments are digitally preserved at C-SPAN's Archives in West Lafayette, Indiana, where they will remain available to generations of students, scholars, reporters and others who are interested in workings of the federal courts.

This "gavel-to-gavel" style of coverage of federal court cases is similar to countless thousands of hours of public events concerning the Congress and the Executive Branch including House and Senate floor debate, Congressional hearings such as this one, Presidential addresses and press briefings, and many other such events that C-SPAN has televised over the past 28 years.

Throughout these years, America has increasingly become a video-oriented society; yet the judicial branch of our government remains mostly off-limits to television coverage. Today, despite the enormous significance of the federal courts in American life – a significance made all the more apparent to the nation as the federal courts deliberate high-profile issues that have arisen following the September 11th attacks and the wars in Iraq and Afghanistan—this lack of television coverage has caused the

Judiciary to become a nearly invisible branch of our national government for the public-at-large and the news media that serves them.

Some federal courts, including the Supreme Court itself, have taken what seems like small steps into the digital age by creating audio recordings of their proceedings and allowing them to become publicly available over time. And from time-to-time, C-SPAN -- along with or on behalf of other media organizations—has petitioned the courts for expedited access to these audiotapes, as we did in the Third Circuit's *CBS* case.

If such permission is granted, C-SPAN then 'televises the audio' by adding photos and graphics to illustrate the audio. As 'television productions' these telecasts are not particularly satisfying, but they do provide the important service of making these oral arguments more widely available to the public.

The Supreme Court's practice is to make audio recordings of every oral argument. At the end of the term, these tapes are turned over to the National Archives, which delays their public release until the start of the next term. In 2000, C-SPAN petitioned Chief Justice William Rehnquist for permission to televise the oral arguments in *Bush v Palm Beach County Canvassing Board*, its consideration of the 2000 presidential election results. The Chief Justice denied our television request but did respond by assenting to same-day release of the audiotape. Apparently satisfied with the resulting broadcast coverage of this case, Chief Justice Rehnquist further agreed to expedited audiotape

releases for nine other arguments during the remainder of his tenure, using his standard of 'heightened public interest.'

I'm pleased to report that Chief Justice Roberts has continued this tradition. While we wish our track record were better, the Chief Justice has agreed to immediate audiotape release for seven of the twelve arguments that C-SPAN has requested thus far.

Hoping to facilitate the Supreme Court's familiarity with the latest television technology, C-SPAN sent Chief Justice Roberts a letter shortly after his swearing-in, offering to set up a TV demonstration in the court's chamber. We explained that the latest digital television equipment combined with the experience and expertise of our technical staff and producers in creating long-form television would allow discreet, high-quality telecasts of the court's oral arguments. In that letter, C-SPAN also reiterated its commitment to televise every one of the court's arguments, should such coverage be permitted. Thus far, the Chief Justice has not accepted our offer for this demonstration.

The Federal Judiciary's reluctance to move beyond these nascent experiences with audio and video coverage is perplexing: Why are print reporters permitted to cover the federal courts, but broadcast journalists generally excluded? When two federal courts have 16 years of successful experience with television cameras, why have no other federal courts moved to join them in allowing cameras? Why do some courts facilitate audiotape release of proceedings, facilitating radio reporting, but not permit cameras in the courtroom?

Mr. Chairman, there are many good arguments for televising the public sessions of our federal courts and C-SPAN has made them in a variety of settings over the past 28 years.[5] But it seems to us that the fundamental argument in favor of a televised federal judiciary is simply that an open government such as our demands it.

The judges of our federal courts are public employees paid with public tax money who are conducting public business in a public building. The courts generally permit the print press and the few members of the public who can be accommodated in the courtrooms to observe their workings. In this digital age, why not allow the rest of the country to do the same via television? Video dominates our society's communications flow. Because of this, we believe it is simply not acceptable that the majority of our federal courts effectively shield themselves from public view by disallowing cameras.

Thank you again, for soliciting C-SPAN's input on this important question. We appreciate the committee's interest in a more open federal judiciary. And, if the federal courts agree to allow more television coverage of their proceedings, C-SPAN stands ready to provide much more coverage to the public.

[5] See attachment 5

DATA ACCOMPANYING C-SPAN TESTIMONY #1

Summary of TV/Radio Rules for Federal Courts

	Cameras	Audio	Notes
Supreme Court	No	Yes	Request made to Chief Justice. Granted on case by case basis.
First	No	Yes	Must send letter requesting audio tape. $26.00 per argument.
Second	**Yes**	Yes	Case by case basis.
Third	No	Yes	Must send letter requesting audio tape. $26.00 per argument.
Fourth	No	Yes	Must send letter requesting audio tape. $26.00 per argument.
Fifth	No	No	Petition court prior to argument for transcript: both counsels and panel members must agree. Petitioner must incur costs.
Sixth	No	Yes	Must send letter requesting audio tape. $26.00 per argument.
Seventh	No	Yes	Audio is provided through court's website.
Eighth	No	Yes	Can send letter or listen through website. $26.00 per argument.
Ninth	**Yes**	Yes	Case by case basis.
Tenth	No	No	Audio for judges only.
Eleventh	No	No	Audio for judges only.
DC	No	Yes	Audio is available after a case has completely closed. Fee of $26.00.
Federal	No	Yes	Available by request for $26.00 fee. Call admin office.

Source: Clerk of Court contacted for each circuit, July 2007

DATA ACCOMPANYING C-SPAN TESTIMONY #2

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No TV for Jackson Case

By John Eggerton -- Broadcasting & Cable, 9/3/2007

It's unlikely any cable viewers will be offended by visual evidence in arguments in Janet Jackson's breast-baring case being heard later this month.

The Third Circuit U.S. Court of Appeals in Philadelphia will not allow C-SPAN to televise the Sept. 11 oral arguments in CBS' challenge of the FCC's $550,000 indecency fine against the Janet Jackson/Justin Timberlake Super Bowl stunt.

The stunt, which lasted all of a second or so, led to time delays on live programming, editing of scripted fare and increased FCC fines.

The cable public affairs network televised the Dec. 20, 2006, oral argument in the challenge to the FCC's profanity finding against Fox in the Second Circuit. C-SPAN had hoped to do the same for the even more high-profile Jackson trial.

"We took a shot in the dark and sent them a letter," said Terry Murphy, VP of programming, for C-SPAN, "and they said no."

While the Second Circuit Court of Appeals has opened its court to TV cameras, the Third has not and won't start with the Jackson case, which is being argued on the afternoon of Sept. 11. C-SPAN will get access to audio from the arguments, however, and has been working with the court to try to get it as quickly as possible.

Unlike the Supreme Court, which releases the audio "right away," the Third Circuit is not as quick, but Murphy says the court has told C-SPAN it will try to release it to the press by the end of the day. If so, the recording will air on C-SPAN-2 that night, as well as be streamed online and carried on C-SPAN Radio.

(Murphy says it will air on C-SPAN-2 because C-SPAN will likely be devoted to the report from Gen. David Petraeus on the war in Iraq, scheduled to be released the same day.)

While C-SPAN's coverage of the profanity arguments contained numerous four-letter words which C-SPAN did not expurgate, the Jackson hearing is unlikely to need viewer warnings, though Murphy says it will add them if necessary.

CBS has already told the court in its brief that it is not pushing to get FCC out of the indecency enforcement business, but back to a policy of restraint that characterized the commission for decades, a policy it "abandoned" after it "failed to turn up even a shred of evidence" that CBS participated in or knew about the "Jackson/Timberlake" stunt.

The Second Circuit Court of Appeals, in rejecting the FCC's explanation for its crackdown on cursing, signaled the FCC's entire indecency enforcement regime could be suspect. CBS may not be looking to take down the indecency enforcement regime, but a win the Third Circuit might pave the way, ultimately for a Supreme Court challenge of the commission's content enforcement powers.

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DATA ACCOMPANYING C-SPAN TESTIMONY #3a

March 7, 2007

C-SPAN
CREATED BY CABLE
OFFERED AS A PUBLIC SERVICE

The Honorable Anthony Scirica
Chief Judge
U.S. Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106-1790

Dear Chief Judge Scirica:

C-SPAN is asking the Court to make an exception to its rule of barring cameras from taping oral argument in the case of CBS v. FCC # 06-3575, because of its heightened public interest to a national audience.

Beginning in 2000, Chief Justice William Rehnquist allowed same day oral argument release of audio in cases using the criteria of "a heightened public interest." We understand that the Third Circuit Court currently releases audio, but we're asking the Court to move one step further following the lead set by the Second and Ninth Circuit Courts' practice of allowing cameras on a case-by-case basis.

If granted, C-SPAN will air this case in its entirety on our networks including C-SPAN Radio, C-SPAN.org and our America and the Courts program.

We understand the apprehension of allowing cameras into the courtroom and will work with Yullio Robbins, the Court's Public Information Clerk, to assure our presence does not disrupt the Court.

C-SPAN is a private, non-profit public service provided by the cable television industry founded in 1979 and dedicated to covering the United States House, Senate and the Judiciary gavel-to-gavel and without commentary. We believe that in airing this oral argument, we will provide our viewers with a better understanding of the federal judiciary and its impact on the lives of Americans.

Thank you for your consideration of this request. Our Courts Producer, Tanya Chattman will be in touch with Yullio Robbins to follow up on your response.

Sincerely,

Terence Murphy

Terence Murphy
C-SPAN Vice President & Executive Producer

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02. 737. 3220

DATA ACCOMPANYING C-SPAN TESTIMONY #3b

OFFICE OF THE CLERK

MARCIA M. WALDRON
CLERK

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
2100 UNITED STATES COURTHOUSE
601 MARKET STREET
PHILADELPHIA, 19106-1790

TELEPHONE
215-597-2995

July 24, 2007

Mr. Terence Murphy
C-SPAN Vice President & Executive Producer
400 North Capitol St. NW
Suite 650
Washington, D.C. 20001

Dear Mr. Murphy:

Your letter to Chief Judge Scirica dated March 7, 2007 was referred to me for response. Your request to televise the oral argument, if scheduled, in CBS v. FCC, C.A. No. 06-3675, must be denied. You mention that the Second and Ninth Circuits permit televising oral argument. The Third Circuit Court of Appeals policy regarding cameras in the courtroom is more restrictive than those of the Second and Ninth Circuit's and does not permit live broadcasts of oral argument. I carefully considered your request, but have determined that it does not come within the court's policy.

Very Truly Yours,

Marcia Waldron

Marcia Waldron
Clerk

DATA ACCOMPANYING C-SPAN TESTIMONY #4

Cumulative C-SPAN Coverage of Lower Federal Courts, Since 1985

US Court of Appeals	39.5 hours
US District Court	13
US Court of Military Appeals	11
US Court of Military Commission Review	1.5

Total: 65 hours

C-SPAN Coverage of Lower Federal Courts, since January 2006

US Court of Appeals, 2nd Circuit	2 hours
US Court of Appeals, 3rd Circuit	1 – Audio only
US Court of Appeals, 6th Circuit	2 – Audio only
US Court of Appeals, 7th Circuit	1 – Audio only
US Court of Appeals, 9th Circuit	8.5 hours

Total: 14.5 hours

Cases Include
Voting Rights, Same Sex Marriage, Free Speech, Broadcast Indecency Regulations, Slave Reparations, NSA Warrentless Wiretapping

C-SPAN Coverage of 'Early Release' Supreme Court Oral Arguments, since 2000

Chief Justice	*Requested*	*Approved*
Rehnquist	11	9
Roberts	14	7

Cases Include
2000 Election results, Campaign Finance Reform, Affirmative Action, Military Tribunals "Don't ask, Don't tell" Military policy, Abortion, Energy Task Force, Securities Fraud & Presidential Powers.

C-SPAN Radio Coverage of Supreme Court Oral Arguments, since 1998

Archival cases	465 hours
Same-day release	16

Total: 481 hours

Source: C-SPAN Archives September 2007

DATA ACCOMPANYING C-SPAN TESTIMONY #5

C-SPAN has sought to provide its audience with coverage of the Judiciary, just as it has covered the Legislative and Executive branches of government. The prohibition of televised coverage of the Supreme Court's oral arguments has been an obstacle to fulfilling that goal. The following web page chronicles C-SPAN's efforts to make the Court more accessible to the public:

http://www.c-span.org/camerasinthecourt/timeline.asp