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by Robert D. Nelon

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The truck bomb ripped into the A.P. Murrah Federal Building on April 19, 1995, at 9:02 a.m. One hundred sixty-eight men, women, and children died. None knew Timothy McVeigh or Terry Lynn Nichols, nor did McVeigh and Nichols know them. In fact, Nichols was not even in Oklahoma City when the bombing occurred. He is now—occupying a special cell in the Oklahoma County Jail, awaiting trial on state charges of murder, conspiracy to commit murder, and aiding in placing a bomb near a public building.[1]

Nichols' trip to Oklahoma City was circuitous. Initially, separate federal proceedings against McVeigh and Nichols were tried in a federal court in Denver. When the federal court handed down merely a life sentence, Oklahoma County District Attorney Bob Macy stated, "I'm not satisfied with the outcome

of the Nichols trial. I feel like he needs to be tried before an Oklahoma jury."[2] Macy then put his words into action, filing Oklahoma state charges against Nichols and seeking the death penalty.

Nichols was brought to Oklahoma City from the federal prison near Florence, Colorado, to be arraigned on state charges on February 2, 2000. His arrival in Oklahoma City occurred with little advance fanfare. Nevertheless, two television stations in Oklahoma City—KFOR-TV, an NBC affiliate, and KWTV, a CBS affiliate—quickly asked Associate District Judge Robert M. Murphy, Jr. if they could put a television camera in the courtroom to cover the arraignment. Judge Murphy denied the request orally, but did not foreclose the possibility that he would consider pool television coverage[3] for later proceedings in the case.

On February 25, 2000, a consortium of electronic media[4] filed a motion[5] asking permission to provide pool television coverage of Nichols' preliminary hearing, then scheduled for June 2000. The premise of the electronic media's motion was that the First Amendment (as well as the Oklahoma Constitution) made the courtroom in a criminal case presumptively open to the public; that the media, as the surrogates for the public, had a right to attend criminal proceedings; that there was no justifiable basis to permit access to print media while excluding electronic media from access to the criminal proceeding; and that restrictions on electronic media access[6] were therefore unconstitutional. The motion of the electronic media was supported by over 700 pages of exhibits, primarily reports of studies in various states, including California, Florida, and New York, on their experience with television cameras in courtrooms. Nichols and the State of Oklahoma each filed briefs opposing the electronic media's motion.

THE ARGUMENTS

The electronic media's argument began with the unremarkable supposition that the state proceeding against Nichols was of great interest to the public. Its brief summarized:

> What new evidence of guilt, if any, the State will offer beyond that presented in the federal trial; what new defenses, if any, the defendant will raise; what creative or innovative trial techniques will be employed by prosecution and defense, are all questions of interest to the public. Indeed, given the conviction of the defendant in federal court, the question of why this proceeding is being conducted at all is very much on the public's mind . . . .[7]

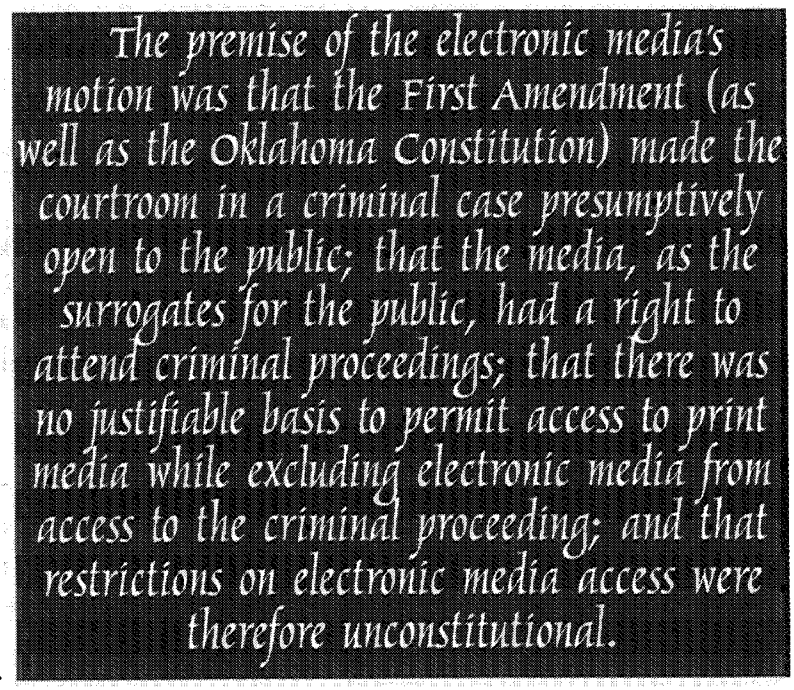
Next, the media petitioners observed that although the arraignment had been open to the public, and the press had attended and reported second-hand what had transpired, no audio-visual medium had been present. According to petitioners, "The general public knew only what those few who could attend the arraignment told them had happened. They had no way to see for themselves."[8] That would continue, they argued, because only a few members of the public would be able to attend the subsequent proceedings, which were being conducted in a make-shift courtroom in the basement of the Oklahoma County Jail capable of accommodating only about fifty spectators. "Without cameras in the courtroom," the media concluded, "the public will see at best only pictures of the outside of the building where proceedings are conducted, or 'sound bites' from out-of-court interviews of observers, sometimes out of context, rather than actual excerpts of the proceedings (let alone possibly full coverage). That should not be."[9]

In support of its position, the electronic media presented the argument that at least since Richmond Newspapers, Inc. v. Virginia,[10] judicial proceedings, especially criminal cases, have been presumptively open.[11] The Supreme Court has held that access can be limited or denied only by narrowly tailored restrictions necessary to protect a fundamental or compelling interest.[12] It follows, the electronic media argued, that keeping proceedings open to the public, in this day and time, means more than affording access "only to those who can squeeze in the door."[13] Since most people do not have the time and resources to attend criminal proceedings in person, they rely almost exclusively on the media to advise them of what is going on in their public courtrooms. In the words of the petitioners, "Acting as the 'eyes and ears of the public,' the media play a significant role in bringing information about judicial proceedings to the public at large. Thus, because 'people now acquire [information about trials] chiefly through the print and electronic media,' the media function as 'surrogates for the public.'"[14] The argument continued:

> [I]f the press is presumed to have a right to attend a judicial proceeding, there is no justification—absent clearly articulated and compelling reasons—for permitting some members of the press (print reporters) to attend and use

> the tools of their trade to report the proceedings, but permitting other members of the press (broadcast reporters) only to attend, and prohibiting them from using the tools or their trade to report the proceedings. '[I]f the print media, with its pens, pencils, and notepads, have a right of access to a criminal trial, then the electronic media, with its cameras, must be given *equal* access too.' Stated another way, 'in the context of the right of press access to the courtroom, there can no longer be a meaningful distinction between the print press and the electronic media.'[15]

Furthermore, the petitioners said, the premise that it is unfair, if not unconstitutional, to restrict electronic reporting of court proceedings while permitting print reporting of the same proceedings is not a novel one. Citing the Oklahoma Court of Criminal Appeals' holding in Lyles v. State[16] that "to deny television the same privileges as are granted to the press would constitute unwarranted discrimination,"[17] the media argued that precedent permitting electronic broadcasting of criminal proceedings was clearly in its favor.



However, "the commonsense wisdom of Lyles, let alone the mandate of Richmond Newspapers," the electronic media lamented, "does not seem to prevail today in Oklahoma. One component of the media—television news—is hamstrung in its efforts to be the 'eyes and ears,' the multi-sensory surrogate, of the public in reporting about judicial proceedings"[18] because of Canon 3(B)(9) of the Oklahoma Code of Judicial Conduct.[19] According to Canon 3(B)(9), any type of electronic broadcasting requires not only the permission of the judge, but also that of virtually any other party that could become a subject of the broadcast—including witnesses, jurors, and of course, the defendant. In order to broadcast in compliance with the Code, therefore, a radio or television station would have to get consent from all such parties.

Predictably, Terry Nichols declined to consent to the presence of electronic media at his preliminary hearing. The electronic media contended that allowing such a refusal improperly frustrated the First Amendment right of the media to televise court proceedings where the defendant cannot demonstrate any specific and compelling risk to his rights. In petitioners' words:

> Canon 3(B)(9) takes from the trial judge all the judicial discretion—the delicate balancing of the constitutional interests of the accused, the public, and the press which Richmond Newspapers requires him to exercise—and gives to the defendant in a criminal case the absolute power to veto the effective presence of the electronic media. The defendant need not take any action at all, and the absence of his consent forecloses the television reporter from using the tools of her trade in reporting on the proceedings. The judge is rendered powerless; no matter that the public and press have constitutional interests as well, and no matter that the defendant's constitutional interests would not be impaired by the presence of a silent, unobtrusive television camera. The judge cannot give the public, other than those actually physically present in the courtroom, the ability to see justice at work. The defendant is in control of the courtroom.[20]

Addressing the obvious question, "How did this come to be?" the media traced the ban on cameras in courtrooms to the trial of Bruno Hauptmann, who was accused and convicted of the kidnapping and murder of the son of Charles and Anne Morrow Lindbergh.[21] From all accounts, a circus atmosphere surrounded the Hauptmann trial.[22] Curious observers came from all over the world to Flemington, New Jersey, where 500 spectators jammed a courtroom designed to hold 200.

The international press included 350 reporters and 130 cameramen. News and entertainment blurred as celebrity commentators like Walter Winchell and Damon Runyon, sports figures such as Jack Dempsey, and movie stars like Ginger Rogers made cameo appearances. Tourists attended to see both the trial and the celebrities. Wires snaked across the floor from the courtroom to empty rooms in the courthouse where telegraph and telephone facilities were set up to enable correspondents to file their stories quickly. Actors even performed the trial participants' roles on radio daily and hidden cameras provided film clips that were shown in movie theatres.

The excessive media coverage led the American Bar Association in 1937 to recommend adoption of Canon 35 as an addition to the Canons of Professional and Judicial Ethics. As proposed, Canon 35 stated:

> Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.[23]

Though later labeled "an 'exaggerated response to an exceptional situation' on the part of the organized legal profession,"[24] it was nevertheless adopted by a majority of states, and later embodied, at least in spirit, in Rule 53 of the Federal Rules of Criminal Procedure.

In 1972, the ABA replaced the Canons of Judicial Ethics with a Code of Judicial Conduct. Canon 3(A)(7) of the new Code prohibited televising or broadcasting court proceedings except under certain conditions, including the consent of all parties and each witness.[25] In 1982, the ABA modified Canon 3(A)(7) to prohibit televising or broadcasting court proceedings unless electronic coverage was approved by a supervising appellate court or other appropriate authority and the coverage was unobtrusive, consistent with the fair trial rights of the parties, and did not interfere with the administration of justice.[26] Canon 3(A)(7) was eliminated by the ABA in 1990, although the identical provision is now found as Standard 8.3.8 of the ABA Criminal Justice Standards on Fair Trial and Free Press.[27]

Perhaps more importantly, versions of the original Canon 35 still linger in several states. Adopted with slight modification in Oklahoma on September 30, 1959, as part of the Canons of Ethics,[28] Canon 35 remained until the Canons of Ethics were withdrawn in 1975 by the Oklahoma Supreme Court and replaced with the Code of Judicial Conduct.[29] Even then, Canon 3(A)(7) of the 1975 version of the Code of Judicial Conduct paralleled the first ABA Canon 3(A)(7). However, by order dated October 25, 1978, the Oklahoma Supreme Court withdrew Canon 3(A)(7) and substituted a new version that took a somewhat more relaxed attitude toward cameras in Oklahoma courtrooms.[30] Indeed, Oklahoma engaged in an experimental program of television coverage of some judicial proceedings for several years beginning on January 1, 1979. The Oklahoma Supreme Court twice extended the experimental program, and eventually made the experimental coverage rules permanent.[31] But old rules lingered in *criminal* cases, where electronic coverage of the proceedings was still prohibited without the consent of the accused.[32]

In 1997, the Oklahoma Supreme Court repealed the 1975 version of the Code of Judicial Conduct and replaced it with the current version.[33] Canon 3(A)(7) became Canon 3(B)(9), and the tone of the Canon reverted to the more negative form: "Except as permitted by the individual judge, the use of cameras, television or other recording or broadcasting equipment is prohibited . . . ." In other words, like its predecessors, Canon 3(B)(9) prohibits the broadcast coverage of a criminal proceeding without the consent of the accused.

The electronic media called Canon 3(B)(9) "irrational."[34] They argued there was no empirical evidence that the presence of a television camera in the courtroom would invariably detract from the proceedings or impair the rights of the accused unless he consented. They cited Chandler v. Florida,[35] which some twenty years before had concluded that "at present no one has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on the [criminal judicial] process."[36] The electronic media said that recent experiments with cameras in courtrooms actually demonstrated that coverage of court proceedings "has greatly *enhanced* public understanding of and confidence in the judiciary and has not interfered with the administration of justice."[37] In particular, the petitioners cited studies in Alaska, Arizona, California, Florida, and New York, and submitted exhibits "reaffirm[ing] 25-years worth of cumulative empirical evidence which points to only one conclusion:

It is now demonstrable, as a matter of fact, that there is no 'reasonable likelihood' that the presence of an in-court camera 'disparages the judicial process' and . . . that cameras in the courtroom possess great social value."[38]

For example, in New York, the chief administrative judge reported to the governor and the legislature in 1989 that the presence of cameras in the courtroom had not influenced the ultimate outcome of any New York State trial during the period of the study. He recommended that televised trials become a permanent fixture of the legal system.[39] In May 1994, another committee created at the direction of the New York legislature, under the chairmanship of Judge Burton B. Roberts, reported that televised proceedings increased public respect for the judicial system, had no impact on the performance of attorneys or witnesses, and had not adversely impacted any defendant's right to a fair trial.[40] The New York State Committee to Review Audio Visual Coverage of Court Proceedings, created by the New York legislature in 1995, conducted yet another study of the effect of cameras on judicial proceedings. That committee, headed by John D. Feerick, Dean of the Fordham University Law School, issued its report in 1997.[41] The Feerick Report, like its predecessors, recommended that cameras should be permitted in New York courts on a permanent basis. The report concluded that cameras enhanced public scrutiny of the judicial system, which "works as a safeguard, not a threat, to the defendant's rights."[42] The Feerick Committee also found that most judges felt that compared to similar cases covered only by the print media, lawyers made about the same number of motions, objections, and arguments in camera-covered cases and presented about the same amount of evidence and witnesses. Moreover, there was "ample testimony and public comment that cameras raised some judge's performance and had a positive impact on judicial demeanor."[43]

The California experience was similar. In 1980 and 1981, California performed an experiment with respect to electronic coverage of court proceedings. The experiment was summarized and evaluated in a detailed report prepared by an independent consulting firm.[44] Participants reported little awareness of, and little distraction caused by, the presence of cameras. Ninety percent of the judges and attorneys surveyed said that the presence of cameras did not interfere at all, or interfered only slightly, with courtroom dignity and decorum. Most judges and attorneys also agreed that camera coverage did not affect the behavior of the various participants. As a result of that report, California enacted a rule permitting extensive coverage of criminal and civil trials.

While the 1984 report is among the more comprehensive studies conducted on the perceived effects of televised trials, the California story did not end there. Three weeks after the O.J. Simpson criminal trial concluded, a special task force was appointed by the Chief Judge of the California Supreme Court to evaluate the effects of cameras in the courtroom.[45] Despite the intense opposition from some quarters, the task force concluded that cameras should continue to remain in California's courtrooms. It stated, "actual physical attendance [of the public] at court proceedings is too difficult for the courts to countenance a total removal of the public's principal news source."[46] The task force found that judges who actually had experience with cameras in their courts plainly favored continued camera coverage of California trials. Ninety-six percent of those judges reported that the presence of a video camera did not affect the outcome of the trial in any way.[47] In addition, the overwhelming majority reported that the camera did not affect their ability to maintain courtroom order or control of proceedings.[48]

The electronic media conceded that there were instances in which the presence of cameras had affected the dignity of judicial proceedings or the outcome of the case. They gave as an example Estes v. Texas,[49] a case where the media coverage of the defendant's preliminary hearing and, to a lesser extent, his trial, had denied his rights of due process. At the preliminary hearing:

> [A]t least 12 cameramen were engaged in the courtroom . . . taking motion and still pictures and televising the proceedings. Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and counsel table. It is conceded that the activities of the television crews and news photographers led to considerable disruption of the hearings.[50]

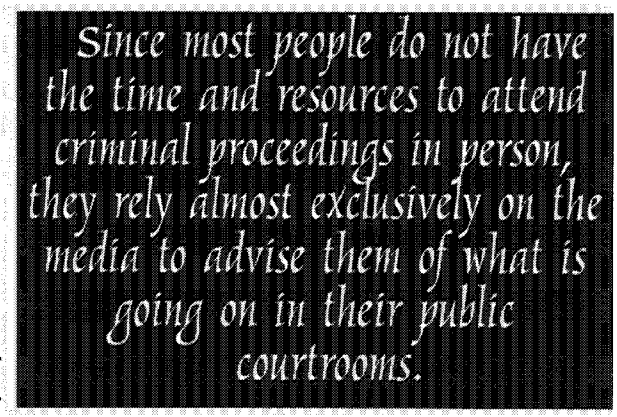
At one point, "the photographers were found attempting to picture the page of the paper from which [the defendant] was reading while seated at counsel table."[51] Press coverage of the trial inside the courtroom was more subdued, with concealed cameras intermittently filming only small portions of the courtroom, but reporting about the trial was nevertheless extensive.

However, the electronic media argued, "Estes did not announce a constitutional rule that all photographic or broadcast coverage of criminal trials is inherently a denial of due process,"[52] and in Chandler, the Court declined to promulgate any such per se rule. Noting that courts had devices available to them to prevent or cure potential prejudice, the Court said:

> An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage.[53]

In arguing that Chandler recognized how changes in technology had to be taken into account,[54] the media petitioners echoed Justice Harlan's concurrence in Estes:

> [T]he day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives [the banning of televised trials] would of course be subject to re-examination . . . .[55]



"That day has come," the electronic media concluded.[56] They observed that Court TV has successfully televised over 700 trials and other judicial proceedings all over the world without disrupting the proceedings, impairing the dignity of the courtroom or the judicial process, or invading the rights of the participants. They cited numerous cases where courts in other jurisdictions had permitted television coverage of judicial proceedings, many of them gavel-to-gavel, finding the salutary effects of television coverage to outweigh by far any speculative concerns of prejudice to the proceedings.[57]

According to the media, stationing a single, silent, unobtrusive camera inside a courtroom, would enable viewers to observe the proceedings as though they were in the courtroom. Such a camera would "permit citizens to watch for themselves the moment-to-moment work of the judicial process in action, . . . observ[ing] for themselves the demeanor, tone, cadence, contentiousness, and perhaps even competency and veracity of the trial participants."[58] Moreover, anticipating Nichols' arguments that television coverage of the preliminary hearing would create adverse pretrial publicity, the electronic media asserted that it was unlikely that any *television* coverage from the courtroom would result in pretrial publicity greater in scope or degree than the print and electronic coverage about the proceedings which would occur in any event.[59] Rather, seeing the proceedings first-hand would be more accurate, informative, and less invasive of anyone's interests than hearing about the proceedings through the filter of a reporter's observations.[60]

At the conclusion of their motion, the electronic media asked the judge to declare Canon 3(B)(9) unconstitutional because:

> [I]t divests the trial court of its constitutional duty under Richmond Newspapers, Globe Newspapers, Press-Enterprise I, and Press-Enterprise II to balance the respective interests of the defendant, the public, and the press, and to restrict electronic and print coverage of the proceedings only if there is 'an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'[61]

The electronic media then argued that the Canon "is clearly unconstitutional because it gives to the criminal defendant the power—without need to explain—to veto the use of the television in the courtroom, depriving the electronic media and thereby the public at large . . . of their First Amendment right of access to the courtroom."[62]

Both Nichols and the State of Oklahoma opposed the electronic media's motion.[63] Nichols' opposition was predictably both legal and tactical.[64] He argued that Canon 3(B)(9) was binding on the court, and suggested that the trial judge could face disciplinary action if he failed to abide by it.[65] He then argued in favor of the Canon's constitutionality, saying that "while the Supreme Court has

permitted states to televise court proceedings in some circumstances, the Court has never held that cameras must be allowed into a state courtroom."[66] Nichols, too, relied on Chandler, focusing on a statement in the decision that "we reject the argument . . . that the First and Sixth Amendments to the United States Constitution mandate entry of the electronic media into judicial proceedings."[67] Nichols also relied on various statements in Estes[68] that access to judicial proceedings by print reporters does not compel access for cameras;[69] on Nixon v. Warner Communications,[70] holding that the Sixth Amendment right to a fair trial did not require the trial to be broadcast;[71] and on the fact that Rule 53 of the Federal Rules of Criminal Procedure, which prohibits the broadcasting of federal criminal trials, has been upheld against constitutional challenge.[72]

Nichols did not confine his arguments to those based purely on law. He also contended that televising pretrial proceedings would unduly add to the pretrial publicity to which he was already exposed,[73] saying that it "[would] only make more toxic an already poisoned well,"[74] and that "the trial [was] likely to feed tabloid and irresponsible media coverage of this case."[75]

The electronic media submitted a brief in reply to Nichols' arguments on March 8, 2000.[76] In it, they contended that Estes was an anachronism, a case which even Justice Harlan's concurrence had recognized was prone to obsolescence.[77] The electronic media also discussed the dramatic change in technology since Estes was decided:

> Not only broadcast television but cable television has become pervasive in our society; the rapid development of the Internet, the appearance of interactive communications media, and the convergence of all forms of media have greatly altered how members of modern society receive information and communicate with each other. With C-SPAN, Court TV, CNN, and public interest channels, among others, the public has come to expect to see governmental proceedings, including courts, on television. Court TV has now televised hundreds of judicial proceedings, including 'high-profile' criminal cases, without disruption of the proceedings.[78]

> The ban on cameras in courtrooms can be traced to the trial of Bruno Hauptmann, who was accused and convicted of the kidnapping and murder of the son of Charles and Anne Morrow Lindbergh. From all accounts, a circus atmosphere surrounded the Hauptmann trial.

According to the media, such transformations had been clearly recognized in recent judicial decisions such as People v. Boss[79] (the murder case against four New York police officers accused of gunning down an unarmed immigrant, Amadou Diallo), holding unconstitutional NY Civil Rights Law § 52, which had imposed a complete ban on audio-visual coverage of court proceedings. The electronic media's reply also challenged the usefulness of cases construing Rule 53 of the Federal Rules of Criminal Procedure, saying those cases "are constructed of such thin fabric as no longer to provide support for their conclusion."[80] The reply also distinguished Nixon.[81]

THE HEARING

Judge Murphy conducted a hearing on the motion on March 10, 2000. The electronic media called three witnesses; Nichols and the State of Oklahoma called none. The petitioners' first witness, Tim Sullivan, Executive Producer for Court TV, explained that since Court TV began broadcasting in July 1991, it had covered over 700 trials and other proceedings in thirty-seven states, federal courts, and several foreign countries. Sullivan himself had been a reporter for Court TV, and had covered the World Trade Center bombing case in New York, the McVeigh and Nichols federal trials in Denver, and the Branch Davidian trial in San Antonio. His producing credits included the coverage of the impeachment trial of President Clinton, the hate-crime murder trial in Jasper, Texas, and most recently the Diallo murder case in Albany, New York. Beyond his own "personal" experiences, Sullivan offered testimony describing some of the "high-profile" cases which Court TV had televised, including the Menendez brothers murder case in California, the William Kennedy Smith trial in Florida, the Louise Woodward ("Nanny") trial in Boston, and, of course, the O. J. Simpson case in Los Angeles.[82]

Sullivan explained how the courtroom would be set up if television coverage of the Nichols case was allowed.[83] He described how the camera was operated, the function of the sound board (*e.g.*, microphones on the counsel

tables were turned down except when a lawyer at the table addressed the court, and each of the counsel's microphones had a "kill switch"), and how a "clean" signal[84] would be distributed to other media in the "pool." Sullivan identified Court TV's editorial guidelines and explained how its production crew coordinates with the judge to ensure that any concerns of the court or the parties are addressed. He concluded his direct testimony with opinions, based on his experience, that the presence of a television camera did not disrupt the proceedings or affect the performance of the participants, and that the public benefitted from having a more complete and accurate picture of what transpired in the courtroom than it would get from reading or hearing about it from others.

In response to questioning from Nichol's counsel, Sullivan conceded that the federal trials of McVeigh and Nichols had not been televised and that Court TV had not challenged the constitutionality of Rule 53 of the Federal Rules of Criminal Procedure.[85] He addressed concerns whether the microphones on the counsel tables might inadvertently pick up communications between lawyer and client.[86] Sullivan disagreed with questions suggesting that the riots in Los Angeles following the verdict in the Rodney King beating trial resulted because the trial was broadcast on television.

Questions from the Assistant District Attorney focused on whether the wiring for the camera and microphones and the camera operator were visible to trial participants and spectators (suggesting their visibility would be distracting); whether private communications between counsel could be overheard; and whether Court TV would destroy any videotape which inadvertently recorded a privileged communication between lawyer and client.[87]

The two other witnesses called by the electronic media were anchors for Oklahoma City television stations KFOR-TV (Linda Cavanaugh) and KWTV (Kelly Ogle). Cavanaugh described the television medium as powerful because it brings unfiltered images of an event to the public. She explained that most people—perhaps sixty to seventy percent—rely on television news as their first medium of information, and that television has become a fixture in almost all American homes. Cavanaugh, who had covered the McVeigh and Nichols trials in Denver for KFOR-TV, described how television reporters covering a criminal proceeding without a camera in the courtroom would have to stand in front of the courthouse and repeat what they heard inside. With pool television coverage, she said, reporters would "be able to show people the trial as it is unfolding, [which] gives them a much more accurate view because it goes from the courtroom to their home, without this filter in the middle from the reporter."[88]

Cavanaugh disagreed with the suggestion from Nichols' counsel that television news had become sensationalized. She also disagreed with his suggestion that the public would not understand that a preliminary hearing tends to be a one-sided event, and that a potential jury pool would be prejudiced if the preliminary hearing were televised. Cavanaugh pointed out that the information would be in the public domain anyway, and that it would be the responsibility of the electronic media to make sure the public understood the context of the testimony given in a preliminary hearing. Nichols' counsel asked Cavanaugh a series of questions about the impact of a television camera on witnesses—whether it would discourage or otherwise affect testimony, or perhaps allow sequestered witnesses to learn about the testimony by others—but she declined to agree that there might be such an adverse effect. In response to questions from the Assistant District Attorney, Cavanaugh again testified that a television camera in the courtroom would not affect the performance of attorneys or witnesses. She reiterated that televising the preliminary hearing would not create more pretrial publicity that might affect Nichols' fair trial rights: "We will be here every day whether the cameras are in the courtroom or not."[89]

Cavanaugh also confirmed that the single video image the media had of Nichols was a tape of his transfer from the sally port of the jail, handcuffed, clad in a bullet-proof vest, and surrounded by law enforcement authorities. Cavanaugh replied no when Judge Murphy asked, "As a viewer, does a person in handcuffs with a bullet proof vest look like an innocent person?" [90] She said that the media would prefer to have, and would use, tape of Nichols sitting at counsel table in business dress— which they would have if proceedings were televised—and that image would contribute to the appearance of the presumption of innocence. Otherwise, she said, the media will continue to use the only image of Nichols they have in connection with virtually every story they do about him.

Ogle, who like Cavanaugh covered the federal trials of McVeigh and Nichols as a reporter and anchor, explained why pictures are so important in television journalism:

We can use a thousand, two thousand words to

> try to describe a scene in a courtroom and try to convey the emotion, the quality of the testimony, the intent of the person giving it. But if you can show them a picture and share with them the sound, it can do far more than that.[91]

Ogle said that a better job of reporting was possible with video from the courtroom, as opposed to mere interviews of participants or even the reporter's own recounting of what happened. To illustrate his point, Ogle presented as evidence a videotape of two hypothetical news reports about the Diallo case, one without and one with videotape from the trial.[92]

Cross-examination of Ogle was similar to that of Cavanaugh. Nichols' counsel asked whether televising the preliminary hearing would not unfairly present one side of the case to a large audience. Ogle replied in the negative: "The Oklahoma viewer is pretty astute as to what has happened in this case over the last five years. I don't think we are going to plow any new ground with them."[93] The state's examination focused on whether the choice of words and video can affect the perception of the viewer. But in response to questions whether televising the preliminary hearing would affect a great number of Oklahomans, Ogle said that the hope of the electronic media is not to affect the public but to inform them. Ogle said he believed prospective members of a jury could put aside what they heard, and that television coverage of the preliminary hearing would not taint the jury pool.

Ogle concluded his testimony by answering questions from Judge Murphy about the Diallo case. Ogle expressed the view that the public had a greater appreciation of the facts and circumstances of the case because it was televised, and that members of the public were able to make their own judgment about the facts in the case because they were able to see the witnesses for themselves.

The electronic media offered several exhibits to conclude the evidentiary presentation.[94] At the close of the hearing, counsel presented short arguments to the court, and answered questions from Judge Murphy. Once satisfied, Judge Murphy adjourned, taking the electronic media's motion under advisement.[95]

THE TRIAL COURT'S RULING

On May 8, 2000, Judge Murphy conducted a hearing to announce his decision granting the motion. He made three findings: (1) The presence of a camera in the courtroom does not detract from the dignity of the proceedings; (2) the presence of a camera in the courtroom does not distract the parties or witnesses; and (3) the parties act more professionally in the courtroom when a camera is present. He then reached three legal conclusions: (1) Canon 3(B)(9) violates both the state and federal constitutions; (2) the Canon does not have the force of law; and (3) the Canon improperly transfers discretionary authority from the presiding judge to a criminal defendant. The judge issued a 26-page opinion outlining his reasoning.

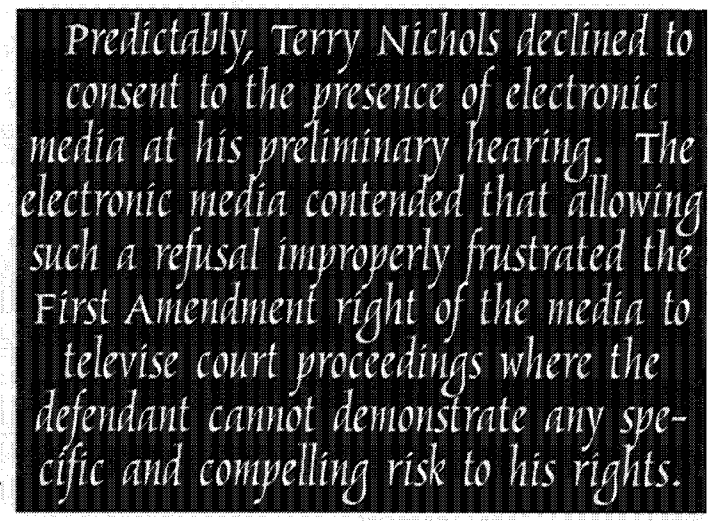
In addressing the constitutionality of Canon 3(B)(9), Judge Murphy said the parties' invocation of the Canon raised several issues. "First, the Canons generally are regarded as advisory guidelines, not intended to create substantive rights of the accused in a criminal proceeding." Second, he expressed doubt that in adopting the Canons the Oklahoma Supreme Court, which does not hear appeals in criminal cases, intended to create such substantive rights. Finally, even if the Canon was intended to create a "veto right" for a criminal defendant, it could "pass constitutional muster" only "if the Canon advanced a compelling state interest" and was "narrowly tailored to serve that interest." "Even if the Canon does not restrain constitutional rights," the court said, "it would have to be rational to survive constitutional scrutiny."[96]

The court, referring to the First and Sixth Amendments (and comparable provisions of the Oklahoma Constitution), posed the question, "Do these state and federal constitutional rights provide authority for a presiding judge to allow cameras in the courtroom over which he presides even in the face of an objection by a defendant in a criminal proceeding?"[97] To answer that question, he said, one had to review the history of the Code of Judicial Conduct from its origins in the ABA Canons of Judicial Ethics and examine the rights of the press to cover legal proceedings.

In doing so, the court found that the trial of Billie Sol Estes in Texas in 1962 encouraged the ABA to maintain the ban on cameras when the Code of Judicial Conduct replaced the Canons of Judicial Ethics in 1972. However, the Senate Watergate hearings in the early 1970's began to alter the conventional wisdom that Estes imposed a per se ban on cameras in criminal prosecutions. The court summarized: "The hearings kept the American public spellbound. Seeing the development of the evidence in the logical pattern of a trial like setting and its effect on the public led many courts to rethink the wisdom of the Estes decision."[98]

Although the ABA continued to oppose courtroom cameras even after Watergate, state courts began to experiment with live coverage of courtroom proceedings. For instance, Florida's plan originally required the consent of the participants, but that proved unworkable as few parties consented. The requirement of consent was subsequently removed, and the decision to permit a camera was left to the discretion of the judge. Florida's experiment led to the decision in Chandler. According to Judge Murphy, Chandler:

> [R]emoved any confusion created in the aftermath of Estes. Accordingly, the ABA removed Canon 3(A)(7) from the Code of Judicial Conduct and inserted it as Standard 8.3.8 of the Standards for Criminal Justice and of the Standards for Fair Trial and Free Press. This standard adopts the neutral position of Chandler in leaving the matter to the discretion of the presiding judge.[99]



The court then discussed the history of the Oklahoma version of the Canon prohibiting cameras in the courtroom. In particular, Judge Murphy focused on the impact of Lyles,[100] where the Oklahoma Court of Criminal Appeals upheld the use of a camera in a criminal proceeding. In Lyles, the court stated that not only had the presence of the camera failed to obstruct any rights of the accused (either of privacy in the proceedings or freedom from extraneous influences on the proceedings), but also it had salutary effects on the proceedings, opening them to public scrutiny of the officials involved. The court put a great deal of emphasis on the discussion in Lyles regarding the role of the presiding judge in exercising proper control over the proceedings.

Judge Murphy found Nichols' argument that Lyles was effectively overruled by the Supreme Court's adoption of Canon 3(B)(9) "less than certain."[101] But he nevertheless concluded that whether Lyles was still good law was not as important as the fact that "the wisdom of Lyles is even greater today."[102] That is, Lyles rejected the oft-cited assumption that a camera in the courtroom invariably distracted the participants and disrupted the proceedings. According to Judge Murphy, "Moreover, the 'anvil of experience' over the last [forty] years supports Judge Brett's observations [in Lyles]. Of the more than 700 trials and other proceedings televised by Court TV the appellate courts have yet to reverse a single case due to the presence of a camera."[103]

The court concluded its review of the Oklahoma situation by discussing briefly the experiment with cameras authorized by the Oklahoma Supreme Court in 1978, and the revision of what was then Canon 3(A)(7), which regulated how cameras could be used. The court said that the Oklahoma experiment "never got off the ground" because the consent of the accused was required, and few criminal defendants consented.[104] The court observed that the Oklahoma Supreme Court had recently repealed the Code of Judicial Conduct adopted in 1975 and replaced it with a new code effective November 1, 1997, in which Canon 3(A)(7) was redesignated as Canon 3(B)(9).

Quite simply, Judge Murphy concluded that Canon 3(B)(9) did not have the force of law. But he did so for reasons other than those suggested by the electronic media. Judge Murphy's approach was based on the unusual division of appeal responsibility between Oklahoma's appellate courts, the Supreme Court and the Court of Criminal Appeals.[105] He reasoned that if the Court of Criminal Appeals has exclusive jurisdiction in criminal cases, and Lyles (which has never been overruled) says that in criminal cases the presiding judge has discretion to permit cameras, then the Oklahoma Supreme Court could not adopt an administrative rule (such as Canon 3(B)(9), governing ethics) which was contrary to the holding of the court which had exclusive appellate jurisdiction in criminal cases. Finding comfort in several criminal appellate cases giving the presiding judge broad discretion in determining the procedure to be followed in the courtroom, Judge Murphy concluded that the presiding judge should have "the authority to exercise final discretion in all discretionary matters [including] the final decision on whether broadcasting of proceedings degrades the proceedings or works to deny the litigants a fair hearing."[106] Accordingly, he concluded that the Oklahoma Supreme

Court could not constitutionally transfer the determination whether a camera would be present in a criminal proceeding from the presiding judge to the accused by adopting Canon 3(B)(9). Simply put, "[t]he Canon in question does not create a right of an accused to dictate to a presiding judge whether cameras may be allowed in the courtroom."[107]

The court then turned to a due process analysis. Tracking the arguments advanced by the electronic media, the court explored the Oklahoma constitutional provisions providing for open courts, observing that Oklahoma follows the mandate of Richmond Newspapers. The court discussed the benefits of open proceedings and said that those proceedings can be closed or restricted only for compelling reasons. That being so, the court said, the ability of the press to report on those proceedings was important, because few members of the public had the time or resources to attend. Judge Murphy rejected Nichols' suggestion that televising the preliminary hearing—often,"the prosecution's show"—would be prejudicial to him.[108] The judge reflected again on the Watergate experience, recalling that despite the "barrage of adversarial pre-trial publicity," the principals were "prosecuted in front of juries that satisfied both the trial and appellate judges that they had no prejudicial predispositions."[109] Judge Murphy noted, "[a]lthough the instant case has already received a great amount of publicity, it is hard to imagine how televising the orderly legal proceedings could further prejudice the defendant."[110]

> Court TV has successfully televised over 700 trials and other judicial proceedings all over the world without disrupting the proceedings, impairing the dignity of the courtroom or the judicial process, or invading the rights of the participants.

Judge Murphy concluded his opinion with a comparison of the experiences of those jurisdictions where cameras are permitted with those jurisdictions where they are not. He found particularly persuasive the decision in People v. Boss in New York,[111] and was not persuaded by the ban in Mississippi upheld in Associated Press v. Bost.[112] He commented that the hypothetical news reports by Kelly Ogle "demonstrate[d] there was no question but that the public can get a better feel of what happened in court when they can actually see the testimony as opposed to hearing a reporter's version of what the testimony was."[113] The court noted that most states have deleted any provision requiring the consent of the accused before a court could exercise its discretion to permit television coverage of a proceeding.[114] He ended his decision by turning once again to Nichols' concerns that television coverage would adversely impact him. Judge Murphy said the short experimentation he had with a camera during the March 10 hearing showed that it added, rather than detracted, from the dignity of the proceedings.[115] And he rejected the idea that televising the preliminary hearing would unfairly prejudice the defendant. The court said:

> The issue raised by the motion of the [electronic media] is not whether this proceeding will generate publicity. It already has. The issue becomes whether the public should be limited to second hand summaries of the news, prejudicial inflammatory characterizations by interested third parties; or whether they will be able to see for themselves what actually transpires in the courtroom under the control of the presiding judge.[116]

THE PROCEEDINGS IN THE OKLAHOMA COURT OF CRIMINAL APPEALS

The electronic media were understandably delighted with Judge Murphy's decision. Of course, Nichols and the State were not, and in the end, both parties announced at the May 8 hearing that they would likely seek extraordinary relief in an appellate court.[117]

Nichols did so on May 26, 2000, filing a writ application in the Court of Criminal Appeals.[118] But he was immediately faced with a problem: was the Court of Criminal Appeals the right appellate court in which to file? The case was a criminal prosecution, which would normally be heard on appeal by the Court of Criminal Appeals. But the basis on which Nichols had resisted a camera in his courtroom proceeding, and the rule which Judge Murphy had declared unconstitutional, was Canon 3(B)(9), a rule adopted by the Oklahoma Supreme Court. Who had jurisdiction to hear the writ?

Nichols took a cautious approach to the issue, on which there appeared to be no decisive authority. He filed the writ application in the Court of Criminal Appeals, but asked that court to "enter a stay of the

pending criminal proceedings and transfer the case to the Supreme Court of Oklahoma to determine which court should address this Petition."[119]

The rules of the Oklahoma Court of Criminal Appeals govern procedures for extraordinary writs.[120] Rule 10.3 provides that no petition for extraordinary relief will be heard without notice to the adverse party. Rule 10.4(A) says that oral argument or a response to the petition may be ordered by the court, or the court may remand the petition to the district court for a hearing if necessary; Rule 10.4(B) provides that the court may dismiss the petition or decline to assume jurisdiction. No rule specifically says that a petition for extraordinary relief may be granted without an opportunity for the opposing party to be heard. Nevertheless, the Court of Criminal Appeals did just that.

The electronic media were stunned to learn on June 1, 2000, that the Court of Criminal Appeals had assumed jurisdiction in the case and granted Nichols' writ application.[121] The court vacated Judge Murphy's May 8 order allowing television coverage of Nichols' preliminary hearing. The court did not, as Nichols had requested, stay the proceedings and transfer the case to the Oklahoma Supreme Court.

The order granting petition was succinct. It declined to address the validity of Judge Murphy's ruling invalidating Canon 3(B)(9), saying that jurisdiction to decide the constitutionality of the Code of Judicial Conduct is vested in the Oklahoma Supreme Court.[122] It did, however, say that the Court of Criminal Appeals had the obligation to "ensure due process in criminal proceedings."[123] To do so, the court said, it would grant extraordinary relief because Nichols "has met the burden" for a writ.[124]

The remainder of the order granting petition is mystifying. One might have expected the court to recognize the respective interests protected by the First and Sixth Amendments, and balance them in light of the evidence presented in the March 10 hearing.[125] However, the court's analysis began and nearly ended with the Sixth Amendment. The court's stated premise was that a "public trial" is a right belonging to the accused and not the public, and its conclusion was that any "balance" between private rights to a fair trial and the public right of a free press had already been struck by Estes. The Supreme Court, it said, had found that the use of television "cannot be said to contribute materially to [the] objective of a fair trial. Rather, its use amounts to the injection of an irrelevant factor into court proceedings."[126] The court concluded that the defendant's right to a fair trial takes precedence over the interest of the electronic media in televising a proceeding. Paying only slight homage to the educative function of television, the court found little use for it in a criminal proceeding:

> At its best, it educates and informs. At its worst, it has the potential for 'distorting the integrity of the judicial process bearing on the determination of the guilt or innocence of the accused, and more particularly, for casting doubt on the reliability of the fact-finding process carried on under such conditions.'[127]

Relying on Nixon,[128] the court determined that the requirement of a public trial was satisfied by the opportunity of the public and press to attend the proceedings and report what they observed. As for any argument that the electronic media had a constitutional interest, the court's answer was crisp and direct: "No constitutional provision guarantees a right to televise trials."[129] The court's only reference to the First Amendment was the observation that speech and press rights are subject to reasonable time, place, and manner restrictions.[130] The court made no mention of Chandler or its own prior decision in Lyles, both of which had held that the presence of a television camera did not violate the fair trial rights of the accused.

The court concluded its order granting petition comparing federal and state constitutional provisions. Recognizing that its discussion had relied "extensively upon United States Supreme Court precedent in resolving the federal constitutional questions as . . . required . . . under principles of federalism," the court remarked that "as the court of last resort for criminal appeals in the State of Oklahoma we are equally obligated to apply the Oklahoma Constitution."[131] But ultimately, the court equated the rights of the accused to a fair trial[132] and the rights of the press[133] under the Oklahoma Constitution to those afforded by the federal constitution, saying that "the issue before us presents the same clash of constitutional rights as discussed above in our analysis of the federal constitutional claims."[134]

"And we reach the same result," the court summarily concluded. In the end, the message was simple: "We specifically find that to televise or record a criminal trial over the objection of a defendant would violate an accused's right to due process of law as guaranteed by Section 7, Article 2 of the Oklahoma Constitution."[135]

THE PROCEEDINGS IN THE OKLAHOMA SUPREME COURT

The rules of the Court of Criminal Appeals prohibit rehearing a decision on a writ application.[136] The electronic media thus faced what appeared to be a difficult choice: accept the decision or petition the United States Supreme Court for certiorari. The former was almost unthinkable, because the electronic media strongly believed that the Court of Criminal Appeals' analysis was severely flawed,[137] and that the outcome was an obstacle in the path of television coverage of court proceedings in all jurisdictions. But while more palatable in some respects, the latter option was impractical. Aside from the cost, it was unlikely that a petition for certiorari could be presented and acted upon before the pretrial proceedings in State v. Nichols concluded, and the electronic media did not want to ask for the criminal prosecution to be stayed. Moreover, the order granting petition was not clearly grounded on federal, as opposed to state, constitutional rights. Was there an independent and adequate non-federal ground for the decision? Would the Court even entertain a certiorari petition?

Challenged by this dilemma, the electronic media opted to pursue a third course and petition the Oklahoma Supreme Court for an extraordinary writ of certiorari. After all, the basis for Judge Murphy's decision granting the motion was the unconstitutionality of Canon 3(B)(9), a Supreme Court-adopted rule, and the Court of Criminal Appeals had declined to address that issue on the ground that it had no jurisdiction to do so. In addition, the electronic media reasoned, the Court of Criminal Appeals was flat wrong, and perhaps the Oklahoma Supreme Court would wish to correct the obvious error. The Court of Criminal Appeals had granted the writ without any opportunity for the electronic media to respond to Nichols' writ application, it had ducked the issue of the constitutionality of the Canon, and it had adopted what appeared to be a per se ban on cameras in a criminal proceeding, irrespective whether there was any demonstrable risk of harm to the rights of the accused, and in possible conflict not only with the weight of precedent but also with the First Amendment. The Court of Criminal Appeals was subject to the supervening authority of the Supreme Court; maybe the highest Court would do justice for the electronic media.

On June 5, 2000, four days after the Court of Criminal Appeals had vacated Judge Murphy's decision, the electronic media filed their own petition for extraordinary relief in the Oklahoma Supreme Court.[138] The media application named as respondents the Court of Criminal Appeals and the four judges who had joined in the order granting petition.[139]

The media application recited the background facts that the Court of Criminal Appeals had granted Nichols' writ application without any chance for the electronic media to respond; and that the Court of Criminal Appeals had not done what Nichols requested—stay the proceedings and transfer the writ application to the Supreme Court to consider the constitutionality of Canon 3(B)(9)—but had instead fashioned a per se rule that to televise a criminal case over the objection of the accused violates his due process rights under the state and federal constitutions.[140] The media application asserted that the Court of Criminal Appeals violated the constitutional rights of the electronic media, contrary to Chandler.[141] Furthermore, it claimed that the Court of Criminal Appeals had exceeded its jurisdiction by adopting a new rule applicable in all criminal cases that was even more restrictive than Canon 3(B)(9), thereby invading the province of the Supreme Court to promulgate court rules; that it had done so not only without evidentiary foundation but also contrary to the only evidence in the record before the appellate court; and that the rule adopted by the Court of Criminal Appeals was itself unconstitutional.[142] The media application asked the Supreme Court to assume jurisdiction, vacate the order granting petition entered by the Court of Criminal Appeals, and either let Judge Murphy's decision stand, or eliminate or revise Canon 3(B)(9) to conform to the federal and state constitutions and to reflect the evidence that "the mere presence of the modern broadcast media does not have an inherently adverse impact on the criminal process."[143]

On June 14, both Nichols[144] and the State of Oklahoma[145] filed responses opposing the media application. The arguments they made were familiar. Nichols argued that the Court of Criminal Appeals alone had jurisdiction to affirm or vacate Judge Murphy's decision because it was given exclusive jurisdiction over criminal cases. He said that the conclusions of the Court of Criminal Appeals and Canon 3(B)(9) were "congruent, not conflicting,"[146] in that both prohibited television coverage of a criminal proceeding without the consent of the accused. Nichols reiterated that Rule 53 of the Federal Rules of Criminal Procedure also prohibited televised federal criminal proceedings.[147] Finally, he argued that Judge Murphy and the electronic media had glossed over

the risk to Nichols of pretrial publicity if the preliminary hearing was televised.[148] Interestingly, Nichols, like the Court of Criminal Appeals, avoided any reference to Chandler or Lyles.

The State of Oklahoma presented similar arguments. It stated that the Court of Criminal Appeals could assume jurisdiction of Nichols' writ application because it has exclusive jurisdiction in criminal cases. It contended that the Court of Criminal Appeals did not invade the Supreme Court's rule-making province because it did not decide the constitutionality of Canon 3(B)(9).[149] Unlike Nichols, the State tried to address Chandler.[150] According to the State, Florida's rules on televised proceedings giving the presiding judge discretion to forbid television coverage if it would have an adverse effect on the accused were "time, place and manner restrictions . . . upheld by the Supreme Court as valid restrictions on the media."[151] The State said:

> [Canon 3(B)(9)] sets out the same basic guidelines, with the exception that it grants a veto right to the defendant . . . . Oklahoma does not have an absolute ban on broadcast coverage of criminal trials. Oklahoma has a time, place and manner restriction that allows a defendant to make the choice determining whether cameras will affect his fundamental right to a fair trial.[152]

The State treated the Court of Criminal Appeals' order granting petition as simply a determination that "with respect to this case, to allow broadcast of these proceedings would violate the defendant's right to a fair trial."[153] The Court of Criminal Appeals did not leave it entirely to the real parties in interest to represent its position as the respondent in the Supreme Court. The four judges who had participated in the order granting petition filed a document entitled "Notice" on June 14. Although leaving the duty of appearing at oral argument to the real parties in interest,[154] the Court of Criminal Appeals nevertheless put its own spin on the order granting writ. The Notice stated:

> We do not dispute the constitutional authority of the Oklahoma Supreme Court to determine jurisdiction when there is a question as to whether jurisdiction of a matter lies in the Supreme Court or the Court of Criminal Appeals.[155] In our order of June 1, 2000, this Court sought to respect the constitutional prerogative of the Oklahoma Supreme Court and specifically refrained from engaging in any analysis which would infringe on the jurisdiction of the Oklahoma Supreme Court. However, we recognized our responsibility and authority to ensure due process was afforded a criminal defendant in the State of Oklahoma at all stages of the criminal process . . . . In applying the constitutional provisions of due process, this court limited its ruling to the facts of the case as contained in the record and presented to us for review. Our order speaks for itself as to the adjudication of the issues.[156]

Oral argument was presented to a referee of the Supreme Court on June 19, 2000.[157] The Supreme Court rendered its decision one week later. The Court said, simply: "The application to assume original jurisdiction is denied. Petitioners' motion for en banc oral argument is denied."[158]

ARE TV CAMERAS BANNED IN OKLAHOMA CRIMINAL COURTS?

Despite the electronic media's motion, Canon 3(B)(9) remains in effect, and there will be no television coverage of Nichols' preliminary hearing.[159] But are cameras really banned in all Oklahoma criminal proceedings unless the accused consents? The answer is hardly clear, and questions abound.

Perhaps the most fundamental question is the one that both the Court of Criminal Appeals and the Oklahoma Supreme Court avoided: is Canon 3(B)(9) constitutional? The order granting petition from the Court of Criminal Appeals did not discuss Chandler, and the court did not overrule its earlier case of Lyles. Thus, the force of the arguments made by the electronic media—that the assumptions in Estes about the disruptive effect of the media on criminal proceedings are anachronistic in light of modern technology, and that Chandler limited the holding of Estes to the particular facts of that case—remains unchallenged. But even Chandler did not hold that television coverage was *mandated* under the First Amendment. Will it take another Supreme Court case to get to the next step of a presumptive right of the electronic media to cover court proceedings, or will it be left to the states (perhaps, now, other than Oklahoma) to progress to that point?

The order granting petition by the Court of Criminal Appeals appears to create a blanket constitutional ban on televised criminal proceedings without the consent of

the accused: "We specifically find that to televise or record a criminal trial over the objection of a defendant would violate an accused's right to due process of law . . . ."[160] But Chandler said that:

> [A]n absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter. The risk of juror prejudice in some cases does not justify an absolute ban on news coverage of trials by the printed media; so also the risk of such prejudice does not warrant an absolute constitutional ban on all broadcast coverage.[161]

Then is the order granting petition necessarily something less than an absolute constitutional ban, despite the due process language used by the Court of Criminal Appeals?

The Court of Criminal Appeals did not discuss any facts reflected in the record of the hearing conducted by Judge Murphy on March 10. Its decision was predicated almost entirely on quotes from Estes.[162] Yet in its Notice filed in the Supreme Court writ proceedings, the Court of Criminal Appeals said its decision was "limited . . . to the facts of the case as contained in the record."[163] Is the order granting petition based on Estes assumptions or facts contained in record?

If it is the latter, another question arises: what facts? Judge Murphy found on the evidence presented at the hearing that there was no disruption of the proceedings, that television coverage of the preliminary hearing would not result in any more publicity than would be generated by the media in any event, and that the coverage would likely present a more accurate picture than would second-hand accounts by reporters. Neither Nichols nor the State of Oklahoma presented any evidence at the hearing. If the Court of Criminal Appeals' order granting petition was limited to the facts on the record, and all of those facts appear to support the electronic media's position, how was the opposite conclusion reached?

The Oklahoma Supreme Court did not say why it was declining to assume jurisdiction over the electronic media's writ application. Did it believe that the Court of Criminal Appeals' analysis was correct? Did it simply believe that, right or wrong, the Court of Criminal Appeals had exclusive jurisdiction to determine the matter, and the Supreme Court could not interfere? If the Court of Criminal Appeals was wrong, either because there were no facts of record to support its conclusion, or because it imposed an absolute constitutional ban contrary to Chandler, how and when can the issue ever be raised again?

And what if the Supreme Court decided to eliminate the defendant-consent requirement in Canon 3(B)(9), or even eliminate the Canon altogether? Would that action override the Court of Criminal Appeals' ruling that the presence of a television camera in a criminal proceeding without the consent of the accused violates the defendant's due process rights? Can the legislature permit cameras in criminal proceedings by statute?

For now, there are no answers to these questions. The immediate certainty is that absent Nichols' consent, there will be no television coverage of his preliminary hearing. There nevertheless remains reason to believe that cameras will eventually be in Oklahoma courtrooms. In this writer's view, that result is inevitable; the question is not whether, but when. The movement to television coverage will be driven by technology and the public, not the bench and bar, but the legal community will eventually be dragged along and forced to concede the greater value served by electronic coverage of judicial proceedings.

The signs are there. The Oklahoma Supreme Court has quietly initiated an experimental program of television recording in the Fourth Judicial District (seated in Kingfisher, a town of about 15,000 people less than fifty miles northwest of Oklahoma City) under the supervision of Judge Susie Pritchett. Her courtroom contains seven small digital cameras which can pan and zoom remotely; the courtroom is wired with microphones. Judge Pritchett is currently formulating rules for the use of the cameras. For now, the cameras are intended to provide backup to the stenographic reporter, not for broadcast. However, the cameras are capable of providing a digital signal for broadcast, and one can surmise that if the fear some judges express that participants in judicial proceedings act differently in front of the camera proves unfounded in Kingfisher County, as it undoubtedly will, it is but a small step to move from televising a proceeding to make a record to televising a proceeding to inform the public.

There *will* be cases in which the parties and other participants consent to television coverage in Oklahoma. And, certainly, the continuing experience of television

coverage in other jurisdictions will ultimately wear away the last remnants of Estes. The decision of the Oklahoma Court of Criminal Appeals in the Nichols case, based as it is almost entirely on the skeleton of Estes, will likewise prove ephemeral. In the meantime, however, this peculiar case reveals another victim of the bombing—the public confidence in a judicial process observed only indirectly.

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[1] Terry Lynn Nichols was convicted on federal charges of conspiring to use a weapon of mass destruction and eight counts of involuntary manslaughter related to the deaths of eight federal agents who were in the Murrah building. The federal jury acquitted Nichols of using a weapon of mass destruction, destruction by explosives, and eight counts each of first and second-degree murder. He was sentenced to life imprisonment on the conspiracy count and six years on each of the manslaughter counts. The conviction and sentence were affirmed by the Court of Appeals for the Tenth Circuit. U.S. v. Nichols, 169 F.3d 1255 (10th Cir. 1999). Timothy McVeigh was convicted of conspiracy to use a weapon of mass destruction, use of a weapon of mass destruction, destruction by explosives, and first degree murder. His conviction and death sentence were affirmed by the Tenth Circuit. U.S. v McVeigh, 153 F.3d 1166 (10th Cir. 1998). The course of proceedings against McVeigh and Nichols can be found in the plethora of reported decisions. See U.S. v. McVeigh, 157 F.3d 809 (10th Cir. 1998) (affirming district court's permitting government disclosure of information to state authorities); 153 F.3d 1166 (10th Cir. 1998) (affirming McVeigh conviction); 119 F.3d 806 (10th Cir. 1997) (denying writ application of media challenging district court's sealing of certain documents); 106 F.3d 325 (10th Cir. 1997) (dismissing government appeal of victim-impact witness sequestration); 964 F. Supp. 313 (D. Colo. 1997) (denying media motion to vacate or modify restrictions on extrajudicial statements); 958 F. Supp. 512 (D. Colo. 1997) (addressing rights of victims to attend proceedings even if they might give victim impact testimony); 955 F. Supp. 1281 (D. Colo. 1997) (denying McVeigh motion to dismiss indictment because of allegedly prejudicial pretrial publicity); 955 F. Supp. 1278 (D. Colo. 1997) (denying motion regarding admissibility of laboratory tests); 954 F. Supp. 1454 (D. Colo. 1997) (denying motions to suppress testimony and force disclosure of government notes); 954 F. Supp. 1441 (D. Colo. 1997) (addressing McVeigh's motions to compel discovery); 944 F. Supp. 1478 (D. Colo. 1996) (upholding government's notice of intent to seek death penalty); 940 F. Supp. 1571 (D. Colo. 1996) (denying motions to dismiss certain counts of indictment); 940 F. Supp. 1541 (D. Colo. 1996) (denying motions to suppress evidence); 169 F.R.D. 362 (D. Colo. 1996) (granting motions for separate trials of McVeigh and Nichols); 931 F. Supp. 756 (D. Colo. 1996) (restricting extrajudicial statements of participants in proceedings); 931 F. Supp. 753 (D. Colo. 1996) (prohibiting public distribution of audio tapes of court proceedings); 923 F. Supp. 1310 (D. Colo. 1996) (addressing discovery issues and government's duty of disclosure); 918 F. Supp. 1467 (W.D. Okla. 1996) (changing venue from Western District of Oklahoma to District of Colorado); 918 F. Supp. 1452 (W.D. Okla. 1996) (denying media groups access to sealed documents, but establishing guidelines for sealing); 896 F.Supp. 1549 (W.D. Okla. 1995) (directing McVeigh to give handwriting exemplars to grand jury); and U.S. v. Nichols, 184 F.3d 1169 (10th Cir. 1999) (awarding attorneys' fees and expenses); 169 F.3d 1255 (10th Cir. 1999) (affirming Nichols' conviction); 67 F. Supp.2d 1198 (D. Colo. 1999) (denying motion for new trial); 897 F. Supp. 542 (W.D. Okla. 1995) (denying motion for pretrial release). See also Nichols v. Reno, 931 F. Supp. 748 (D. Colo. 1996) (challenging government's notice of intent to seek death penalty).

[2] The N.Y. TIMES, Mar. 30, 1999, (quoting Macy at a press conference announcing the filing of state charges).

[3] In a pool situation, the representative of the media which is providing coverage shares the print or broadcast information with other members of the media. Pool coverage limits the number of media present in the courtroom without limiting the ability of all media to report on the event.

[4] The consortium included Courtroom Television Network LLC (Court TV), The New York Times Company, for itself and its division KFOR-TV (Channel 4, Oklahoma City), Ohio/Oklahoma Hearst-Argyle Television, Inc., (KOCO-TV, Channel 5, Oklahoma City), KOTV, Inc. (Channel 6, Tulsa), KTUL, L.L.C. (Channel 8, Tulsa), and Griffin Television, L.L.C. (KWTV, Channel 9, Oklahoma City). Later, Scripps Howard Broadcasting, d/b/a KJRH-TV (Channel 2, Tulsa) joined the consortium. In this article, this group of television broadcasters will be referred to as "the electronic media."

[5] Motion to Allow Use of Television Camera in the Courtroom, and Supporting Brief, State v. Nichols, No. CF-99-01845 (Okla. Dist. Ct. 2000) [hereinafter "Motion"].

[6] The regulation of electronic media access to court proceedings in Oklahoma is contained in the Code of Judicial Conduct adopted by the Oklahoma Supreme Court. The Code is codified at OKLA. STAT. tit. 5, Ch. 1, App. 4. The latest version, in effect at the time of the electronic media's motion, can be found electronically on the Oklahoma Supreme Court Network (http://www.oscn.net) as 1997 OK 79.

[7] Motion, *supra* note 5, at 1-2.

[8] Id. at 2.

[9] Id. at 2-3. It was noted in the Motion that the court had entered a gag order on the participants in the proceedings at their request, as a result of which little of the public information would come from those most directly involved; what the public knew would come only through the filtered reports of the few public observers.

[10] See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

[11] The Motion argued: "Openness of criminal proceedings is 'no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. [Early commentators] saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality.' Richmond Newspapers, 448 U.S. at 569. Stated another way, 'a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes

place.' Id. at 556. It is widely acknowledged that public trials have significant 'community therapeutic value,' id. at 570, especially when a shocking crime occurs; and both process and outcome need to be public if the trial is to serve its prophylactic purpose. '[W]here the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. . . . 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.' Id. at 571-572."

[12] After Richmond Newspapers, 448 U.S. 555, and Globe Newspaper Co. v. Superior Court of Norfolk County, 457 U.S. 596 (1982), which dealt with criminal trials, the Court expanded the presumption of openness to trial voir dire in Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984)(Press-Enterprise I) and then to preliminary hearings in Press-Enterprise Co. v. Superior Court of California, 478 U.S. 1 (1986)(Press-Enterprise II).

[13] Motion, *supra* note 5, at 6 (quoting United States v. Antar, 38 F.3d 1348, 1360 (3rd Cir. 1994)). In United States v. Criden, 648 F.2d 814, 822 (3rd Cir. 1981), the court said: "Thus, the public forum values emphasized in [Richmond Newspapers] can be fully vindicated only if the opportunity for personal observation is extended to persons other than those few who can manage to attend the trial in person."

[14] Motion, *supra* note 5, at 6 (internal citations omitted).

[15] Motion, *supra* note 5, at 7 (internal citations omitted). In a footnote, the electronic media invited the court's attention to In re Clear Channel Communications, Inc. (N.Y. Sup. Ct., Mar. 3, 1999, Rosen, J.) ("This court can hardly envision any serious argument that a rational basis can be crafted to justify what appears to be clear discrimination against the electronic media [in prohibiting broadcasts of judicial proceedings]."), quoted in People v. Boss, 2000 WL 136826 (N.Y Sup. Ct., Jan. 25, 2000, Teresi, J.).

[16] See Lyles v. State, 1958 OK CR 79, 330 P.2d 734 (Okla. Crim. App. 1958).

[17] Id. at 739. The court said: "Basically, there is no sound reason why photographers and television representatives should not be entitled to the same privileges of the courtroom as other members of the press. Certainly there is much force in the Chinese proverb, one picture is worth a thousand words." Id. at 741.

[18] Motion, *supra* note 5, at 9.

[19] Canon 3(B)(9) provides:

Except as permitted by the individual judge, the use of cameras, television or other recording or broadcasting equipment is prohibited in a courtroom or in the immediate vicinity of a courtroom.

(a) Before cameras, television or other recordings or broadcasting equipment are used, express permission of the judge must be obtained.

***

(d) No witness, juror or party who expresses any objection to the judge shall be photographed nor shall the testimony of such witness, juror or party be broadcast or telecast.

(e) There shall be no photographing or broadcasting of:

(1) any proceeding which under the laws of this State are required to be held in private; or

(2) *any portion of any criminal proceedings* until the issues have been submitted to the jury for determination *unless all accused persons who are then on trial shall have affirmatively, on the record, given their consent to the photographing or broadcasting.*

[20] Motion, *supra* note 5, at 10-11.

[21] See L. Handman and A. Liptak, *Media Coverage of Trials of the Century*, 26 LITIGATION 35, 38 (Fall 1999) ("According to A. Scott Berg, whose biography of Lindbergh won the Pulitzer Prize, as a result of their 'ability to sway emotion in the Lindbergh case—both in the performances they encouraged and in the reactions they could manipulate outside the courtroom—cameras were banned from virtually every trial in America for the next sixty years.'").

[22] See R. GOLDFARB, TV OR NOT TV: TELEVISION, JUSTICE, AND THE COURTS (New York University Press 1998).

[23] 62 ABA Rep. 1134-35 (1937).

[24] Richard Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14, 15 (1979).

[25] E. Thode, Reporter's Notes to Code of Judicial Conduct 56-59 (1973), cited in Chandler v. Florida, 449 U.S. 560, 563 (1981).

[26] See "News Media Coverage of Judicial Proceedings (1998)" published by the Radio-Television News Directors Association ("RTNDA"), at 3.

[27] Id.

[28] See OKLA. STAT. tit. 5, Ch. 1, App. 4 (1961).

[29] See OKLA. STAT. tit. 5, Ch. 1, App. 4 (1991).

[30] See 49 Okla. B.J. 2150. "A judge may permit broadcasting, televising, recording and taking photographs in the courtroom during sessions of the court, including recesses between session, under the following conditions: . . ." Some of the background of the change in Canon 3(A)(7) is discussed in the Letter to the Editor of the Oklahoma Bar Journal from Ernest J. Schultz, then Director of Information at KTVY (KFOR's predecessor) and President of RTNDA. See 49 Okla. B.J. 1241.

[31] See 53 Okla. B.J. 584.

[32] See Donna Kelly Broyles, *New Rules for Open Courts: Progress or Empty Promise*, 18 TULSA L. J. 147 (1982) (exploring the issue of cameras in the courtroom under Canon 3(A)(7), and recommending that requirements of participant consent be eliminated).

[33] In re Amendments to the Code of Judicial Conduct, 1997 OK 79.

[34] Motion, *supra* note 5, at 14.

[35] See Chandler, 449 U.S. 560.

[36] Id. at 578-579.

[37] Motion, *supra* note 5, at 15.

[38] Id. at 21.

[39] *Report of the Chief Administrative Judge to the Legislature, the Governor, and the Chief Judge of the State of New York on the Effect of Audio-Visual Coverage on the Conduct of Judicial Proceedings* (March 1989) ("Rosenblatt Report"). Judge Rosenblatt commented that "[t]he evils of the Lindberg case are safely behind us, at least so far as the courtroom is concerned. . . The best argument against a noisy courtroom is a quiet camera and a good judge. We have plenty of both." Rosenblatt Report at 106.

[40] *Report of the Committee on Audio-Visual Coverage of Court Proceedings* (May 1994) ("Roberts Report"). The Roberts Committee adopted numerous methods designed to account for and test any concerns raised by opponents of televised proceedings. Specifically, it solicited observations of trial judges who presided over proceedings in which audio-visual coverage was permitted; it solicited complaints from members of the Criminal Justice Section of the Bar Association and from the New York State District Attorneys' Association; it compiled and analyzed data from all applications for television coverage; it reviewed and analyzed prior studies from New York and other jurisdictions; it conducted two public hearings, at which 46 witnesses testified, and it reviewed written submissions prepared by other organizations and individuals who did not testify; and it met as a group on several occasions to discuss and debate the issue relating to cameras in the courtroom.

[41] *An Open Courtroom: Cameras in the New York Courts: 1995-1997* (April 1997) ("Feerick Report").

[42] Id. at 76. The committee said: "Although televised coverage could, at times, show the judicial system in an unfavorable light, we do not view that as a detriment. Rather, to the extent that such coverage offers an opportunity for improving the judicial system, we view it as a strength of our democratic system." Id. at 78.

[43] Id. at 74.

[44] *Evaluation of California's Experiment with Extended Media Coverage of Courts* (September 1981) ("Short Report").

[45] *Task Force on Photographing, Recording and Broadcasting in the Courtroom*, California Administrative Office of the Courts Report Summary (February 16, 1996).

[46] Id. at 10

[47] Id. at 7. Interestingly, among *all* judge respondents, fifty-five percent preferred that video cameras be banned from the courtroom; sixty-three percent believed that cameras impaired judicial dignity and courtroom decorum; and seventy percent thought video broadcast media in the court had a negative impact on the fair trial rights of the parties. Id. These statistics strongly suggest that almost all judicial opposition to cameras in the courtroom comes from judges who have *no* experience with cameras, and react to the issue of cameras on a visceral rather than experiential basis.

[48] *Task Force on Photographing, Recording and Broadcasting in the Courtroom*, California Administrative Office of the Courts Report Summary (May 10, 1996).

[49] See Estes v. Texas, 381 U.S. 532, *reh. denied*, 382 U.S. 875 (1965).

[50] Id. at 536.

[51] Id. at 538.

[52] Motion, *supra* note 5, at 23, quoting Chandler, 449 U.S. at 574.

[53] See Chandler, 449 U.S. at 575.

[54] Id. at 575-581.

[55] See Estes, 381 U.S. at 595-596.

[56] Motion, *supra* note 5, at 24.

[57] See, e.g., Hamilton v. Accu-Tek, 942 F. Supp. 136 (E.D. N.Y. 1996); Marisol, A. v. Giuliani, 929 F. Supp. 660 (S.D. N.Y. 1996); Katzman v. Victoria's Secret Catalogue, 923 F. Supp. 580 (S.D. N.Y. 1996); People v. Boss, 2000 WL 136826 (N.Y. Sup. Ct. 2000); Cook v. First Morris Bank, 719 A.2d 724, 27 Med. L. Rptr. 1090 (N.J. 1998); Sunbeam Television Corp. v. State, 723 So. 2d 275, 26 Med. L. Rptr. 2553 (Fla. Dist. Ct. App. 1998); WFTV, Inc. v. Florida, 704 So. 2d 188, 26 Med. L. Rptr. 1862 (Fla. Dist. Ct. App. 1997); In re Times-World Corp., 488 S.E.2d 677, 26 Med. L. Rptr. 1330 (Va. Ct. App. 1997); Duff v. Basilica of Saint John, 26 Med. L. Rptr. 1156 (Iowa Dist. Ct. 1997); The Hearst Corp. d/b/a WCVB-TV Channel 5 v. Justices of the Superior Court, 24 Med. L. Rptr. 1478 (Mass. 1996); State v. Haygood, 23 Med. L. Rptr. 1636 (N.Y. 1995).

[58] Motion, *supra* note 5, at 25-26.

[59] Motion, *supra* note 5, at 26. The electronic media noted that Nichols had contended in motions then pending before the trial court that the extensive coverage of the bombing, the investigation by authorities, and the federal prosecutions of McVeigh and Nichols had already so prejudiced the citizens of Oklahoma that he could not get a fair trial anywhere. The electronic media argued that if the reporting has been so extensive as to make that argument plausible, then any additional prejudice allegedly resulting from the television coverage of the preliminary proceedings would be *de minimus*.

[60] The electronic media said in a footnote to their argument: "In-court cameras do not cause out-of-court reporting; they only capture what actually happens in court and nothing more. The question is therefore not whether cameras in the courtroom in this case will generate publicity, but whether the defendant should have the power to decide unilaterally (with or without reason) if the public will receive its information about this trial solely from second-hand summaries on the news or whether it will be permitted, as it has a right to do, to observe itself the entirety of the actual in-court proceedings, dignified, somber, and under the control of the court." As Supreme Court Justice Anthony Kennedy stated in testimony to Congress:

> You can make the argument that the most rational, the most dispassionate, the most orderly presentation of the issue is in the courtroom and it is the outside coverage that is really the problem. In a way, it seems somewhat perverse to exclude television from the area in which the most orderly presentation of the evidence takes place.
>
> *Hearings before a subcommittee of the House*

Committee on Appropriations, 104th Cong., Second Sess. 30 (1996). Moreover, the defendant should hardly be heard to object. At present, the images of the accused normally seen on television—dressed in an orange jumpsuit, wearing a flak jacket, and surrounded by FBI agents—come from file footage taken when he was first accused by federal authorities. To show the defendant in the courtroom, dressed in a pin-striped shirt and sport coat or similar street clothing, assisting his counsel at the table, is arguably a much-improved image to which he ought to have no objection." Motion, *supra* note 5, at 26 n.22.

[61] Motion, *supra* note 5, at 27-28, citing Press-Enterprise I, 464 U.S. at 510; Globe Newspapers, 457 U.S. at 608.

[62] Motion, *supra* note 5, at 28. A few days after the electronic media filed their Motion, The Reporters Committee for Freedom of the Press and the Radio-Television News Directors Association submitted letters to the court supporting the Motion.

[63] Nichols' 16-page Response and Opposition to Media's Motion to Allow Use of Television Cameras in the Courtroom, State v. Nichols, No. CF-99-01845 (Okla. Dist. Ct. 2000) [hereinafter "Nichols' Response"]. The State of Oklahoma had filed a two-page objection to KFOR-TV and KWTV's motion to televise the arraignment on February 1, 2000. It did not file a separate brief in response to the Motion, but the Assistant District Attorneys responsible for the Nichols prosecution made it clear in personal appearances before the trial court that they did not want to be on television, and that the State objected to the Motion on the same grounds stated in their earlier submission.

[64] Nichols first challenged the electronic media's standing to file its motion, on the ground that they had not intervened in the proceeding.

[65] Nichols argued that "this Court does not have discretion to ignore the Judicial Code" and that the Code of Judicial Conduct "provides for potential discipline of judges." Nichols' Response, *supra* note 63, at 3. This response was directed primarily at the electronic media's passing mention (Motion at 27) that two cases—Nix v. Standing Committee on Jud. Perform. of Okla. Bar Ass'n, 1966 OK 264, 422 P.2d 203, and Lyles v. State, 1958 OK CR 79, 330 P.2d 734, both of which were decided prior to the Oklahoma Supreme Court's adoption of Canon 3(B)(9)—described the former Code of Judicial Conduct as "of persuasive force only and not mandatory," Nix, 422 P.2d at 207, or as not having the force of law, Lyles, 330 P.2d at 736.

[66] Nichols' Response, *supra* note 63, at 8.

[67] Id. at 9, quoting Chandler, 449 U.S. at 569 (quoting Florida Supreme Court's opinion).

[68] See Estes, 381 U.S. at 540.

[69] Nichols' Response, *supra* note 63, at 10.

[70] See Nixon v. Warner Communications, 435 U.S. 589 (1978).

[71] Nichols' Response, *supra* note 63, at 9-10.

[72] Id. at 10-13, citing U.S. v. Hastings, 695 F.2d 1278 (11th Cir. 1983), and cases following Hastings: Conway v. U.S., 852 F.2d 187 (6th Cir. 1988)(per curiam); U.S. v. Edwards, 785 F.2d 1293 (5th Cir. 1986)(per curiam); U.S. v. Kerley, 753 F.2d 617 (7th Cir. 1984). Nichols also cited Associated Press v. Bost, 656 So.2d 113 (Miss. 1995), and U.S. v. McVeigh, 931 F. Supp. 753 (D. Colo. 1996)(refusing press access to audio recordings of proceedings used as backup for court reporter on ground that recordings were "functional equivalent" of broadcast prohibited by Rule 53).

[73] Nichols' Response did not contain any exhibits. However, Nichols had motions pending before the court which asserted he could not get a fair trial anywhere in Oklahoma in light of the adverse pretrial publicity. He had also subpoenaed all newspapers and television and radio stations in Oklahoma to obtain everything they had published or broadcast about the Oklahoma City bombing since April 19, 1995. After a hearing on March 3, 2000, the trial court refused to compel the production of the subpoenaed material, in part because much of the material was available online or was archived at the Oklahoma Historical Society.

[74] Nichols' Response, *supra* note 63, at 15. Nichols said: "Even if we accept the position that television does not inherently corrupt the trial process, this is not the case for experimentation. It is the most passionately charged case in the State's history. . . As judges and commentators have noted, there are differences between televising an ordinary criminal trial and televising a 'trial of the century.' While it may be true that in an ordinary case, jurors may not be affected by the presence of television cameras, this is not the ordinary trial. It is inconceivable that anyone could conclude that cameras would have no effect on a witness who knew his or her testimony was about to be watched by hundreds of thousands of his or her fellow Oklahomans. . . Attorneys may be affected as well. The participants in this case have plenty to worry about without having to think about how they look on national television." Id. at 15-16.

[75] Nichols' Response. *supra* note 63, at 16. To avoid a direct slap at Court TV, Nichols said: "Even if Court TV is completely responsible, it will be supplying sound bites for responsible and irresponsible media alike." Id.

[76] Reply Brief in Support of Motion to Allow Use of Television Camera in the Courtroom, State v. Nichols, No CF-99-01845 (Okla. Dist. Ct. 2000) [hereinafter "Reply Brief"]. As for Nichols' argument that they lacked standing for not having intervened in the case, the electronic media noted that the Supreme Court had said the media must be given meaningful opportunity to be heard on any issue of limiting their right of access, citing Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 609 n.25 (1982); and that they were aware of no case requiring intervention to do so. In any event, they said, they would seek leave to intervene if the court felt that was necessary.

[77] See Estes, 381 U.S. at 595-96.

[78] Reply Brief, *supra* note 76, at 4.

[79] See People v. Boss, 701 N.Y.S.2d 891 (N.Y. Sup. Ct. 2000).

[80] Reply Brief, *supra* note 76, at 6. The electronic media argued that U.S. v. Hastings, which was the first case to uphold Rule 53, considered no empirical data and relied solely on Estes; and that the subsequent cases cited by Nichols—Conway v. U.S., U.S. v. Edwards, and U.S. v. Kerley—relied primarily on Estes

and Hastings. The Reply Brief concluded: "Thus, the entire body of case law relied on by the defendant to defend the constitutionality of Rule 53—and by implication, the constitutionality of Canon 3(B)(9)—is constructed on the foundation of Estes, does not consider any empirical data to support its analysis, and arrives at a common conclusion based, at bottom, *on the speculative fears about televised trials of judges who have never experienced a trial before a television camera.*" Reply Brief, *supra* note 76, at 7.

81 Reply Brief, *supra* note 76, at 8. The reply observed that the issue in Nixon was whether the media were entitled to access to audio tapes of conversations recorded by President Nixon which had been admitted into evidence in criminal trials of other Watergate defendants. As the Court said in Nixon, "the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying." Nixon, 435 U.S. at 609 (emphasis by Court). Nixon was therefore distinguishable, the electronic media said, because they were not asking for access *superior* to what the public enjoys. They asked only that, as the eyes and ears of the public, they be permitted to transmit to the extended public—those persons who do not have the means or resources to attend these proceedings in person—the same images and sounds that the person in the courtroom could see and hear. The reply observed further that in Nixon (a case decided before Richmond Newspapers opened access to courts on First Amendment grounds), the Court's First Amendment analysis was based on access to documents, not access to the courtroom; and its analysis of the media's argument that the *defendant's* Sixth Amendment right to a fair trial required release of copies of the tapes was limited, with conclusory statements about the Sixth Amendment right to a public trial based on citations to Estes.

82 Sullivan said Court TV had even televised one criminal trial in Oklahoma in 1991.

83 Judge Murphy had earlier granted the request of the electronic media to conduct a demonstration of television coverage, provided that Nichols would not be shown. The night before the hearing on March 10, the technical crew from Court TV set up a single Beta camera on a swivel just outside the bar in the courtroom; placed microphones at strategic locations on the bench, counsel table, witness stand, and attorney's podium; and put a large monitor in the front of the courtroom and a small monitor on the bench. Wiring was taped to the floor so as to be unobtrusive, and cable was run to an adjacent room where the producer and sound engineer were located. The demonstration was "closed circuit;" that is, no signal was sent out of the courtroom. Only the Court TV technical crew and those in the courtroom could see what was on the television screen. A portion of the hearing was videotaped for the appellate record; the tape was ordered sealed.

84 An unedited signal is carried to a satellite truck and distribution box outside the building. Any media wishing to receive the signal can plug into the box and either transmit the signal directly on its own channel or network or tape the feed for later editing or broadcast.

85 Sullivan later said that Court TV had challenged the constitutionality of New York's ban on television coverage of trials in People v. Boss (the Diallo case), and had succeeded in having the ban declared unconstitutional.

86 Sullivan said that there had been only one previous instance of which he was aware that a confidential conversation had been overheard; that the kill switch would eliminate that risk; and that, in any event, the microphones on counsel tables could be removed without seriously affecting the quality of audio production from the courtroom if counsel insisted.

87 Judge Murphy had several questions for Sullivan about the use of a monitor by the court, and he asked why there were times when witnesses or counsel could not be heard well during Court TV's coverage of the Diallo case. (Sullivan explained that the judge had limited the number of microphones in the courtroom until he became aware that there were "dead spots.")

88 *Transcript of Motion Hearing*, Vol. II, at 10.

89 Id. at 39.

90 Id. at 49.

91 Id. at 57.

92 The hypothetical report covered the emotional testimony of one of the officers accused of murder. The officer was describing his reaction when he approached the body of Amadou Diallo and realized that the man was unarmed.

93 *Transcript of Motion Hearing*, Vol. II, at 65.

94 Those exhibits were excerpts from the American Bar Association Journal (former President Phillip Anderson's editorial views in favor of cameras in the courtroom) and an editorial and two articles from Judicature, a publication of the American Judicature Society, which is interested in the efficient administration of justice, about the issue of cameras in the courtroom.

95 On March 14, 2000 the electronic media sent a letter to Judge Murphy with additional authority in response to questions the court had asked at the end of the hearing. In particular, the electronic media explained why they believed a trial court could declare unconstitutional a Canon of judicial ethics adopted by the Oklahoma Supreme Court (it could do so, they said, because the Canon was adopted in the Court's legislative rather than adjudicative function, rules adopted by the Supreme Court had to conform to the constitution, and a trial court had the power to declare legislative acts unconstitutional). The letter challenged the wisdom of Associated Press v. Bost, 656 So.2d 113 (Miss. 1995), a case which had upheld a ban on courtroom cameras in that state. And it distinguished two cases from the Oklahoma Court of Criminal Appeals, Brennan v. State, 1988 OK CR 297, 766 P.2d 1385, and Kennedy v. State, 1982 OK CR 11, 640 P.2d 971, which had touched on the issue of cameras in the courtroom.

96 State v. Nichols, No. CF-99-01845 (Okla. Dist. Ct. May 8, 2000), <http://www.oscn.net> [hereinafter, "the Decision"].

97 Decision, *supra* note 96, at 6.

98 Id. at 8.

99 Id. at 9.

100 See Lyles, 330 P.2d 734.

[101] Decision, *supra* note 96, at 12. The court referred to footnote 38 in Estes v. Texas, in which Justice Clark for the majority described the Oklahoma situation as "unclear," because the Canon was adopted by the Oklahoma Supreme Court in the midst of cases decided by the Oklahoma Court of Criminal Appeals which left the televising of criminal proceedings to the discretion of the trial judge. Justice Clark cited Lyles (pre-Canon)and Cody v. State, 361 P.2d 307 (1961)(post-Canon).

[102] Decision, *supra* note 96, at 12.

[103] Id.

[104] Id. at 13. The court said: "The most notable exception is Roger Dale Stafford who received death sentences for two separate multiple murders and was ultimately executed. [State v. Stafford, 1983 OK CR 86, 665 P.2d 1205, and 1993 OK CR 23, 853 P.2d 223] Perhaps his experience with cameras in the courtroom had a chilling effect on the willingness of any other criminal defendants to grant such consent. Others who consented were Gene Leroy Hart (acquitted of Girl Scout murders) and Glen Ake. [Ake v. State, 1983 OK CR 48, 663 P.2d 1, *rev'd*, Ake v. Oklahoma, 470 U.S. 68, *after remand*, 1989 OK CR 30, 778 P.2d 460] Now only two states that allow the televising of criminal proceedings require the consent of the accused, that being Oklahoma and Alabama."

[105] According to article VII, § 4 of the Oklahoma Constitution, the Oklahoma Supreme Court is the only "constitutional" court. It is given supervening authority over all inferior courts, including the Court of Criminal Appeals. However, § 6 provides that until determined otherwise by the legislature, the Court of Criminal Appeals has exclusive jurisdiction over appeals in criminal cases.

[106] Decision, *supra* note 96, at 15.

[107] Id. at 16. The court said the Oklahoma Supreme Court "is on thin ice when it makes rules solely concerning criminal proceedings. Significantly, the canon does not grant a right to a civil litigant such as a medical doctor in a medical negligence case to veto the use of a camera in a civil trial. This right [under Canon 3(B)(9)] applies only to criminal defendants in criminal proceedings." Id.

[108] Id. at 19.

[109] Id. at 20.

[110] Id.

[111] See Boss, 701 N.Y.S.2d 891.

[112] See Associated Press v. Bost, 656 So. 2d 113 (Miss. 1995).

[113] Decision, *supra* note 96. at 24.

[114] Id. at 23 n.30: "Initially 26 states required the consent of the defendant before the court could exercise its discretion to allow broadcasting. Then 15 states followed Florida and deleted this provision. Later other states followed and now there are only 2 states that have kept this requirement. Tennessee is one of the most recent states to rescind the defendant's veto. State v. Pike, 978 S.W.2d 904 (Tenn. 1998), cert. denied Pike v. Tennessee, 526 U.S. 1147, 119 S. Ct. 2025, 143 L. Ed. 2d 1036. See Tennessee Supreme Court Rule 30."

[115] The court said: "Specifically, the attorneys were on much better behavior than they had been for any prior proceedings. This court noted that shortly after the taping began few if any of the participants showed any awareness of the camera's presence. . . If anything was noticeable to this court, it was how uneventful the camera's presence was." Decision, *supra* note 96, at 24.

[116] Id. at 25.

[117] The court denied oral motions of Nichols and the State to stay his Decision. He directed the electronic media to designate a representative to work with the Office of the Court Administrator in ironing out any technical or logistical issues which might arise in connection with pool television coverage from the location of the preliminary hearing. (At the time, the court and the parties anticipated that the preliminary hearing would be conducted in a courtroom at the Juvenile Justice Center, rather than at the Oklahoma County Jail).

[118] Petitioner's Application to Assume Jurisdiction for Alternative Writ of Prohibition and/or Mandamus (with combined Brief), Nichols v. Dist. Court of Oklahoma, 2000 OK CR 12 (Okla. Crim. App. 2000) (No. P-2000-703) [hereinafter "Nichols' Application"]. The State of Oklahoma did not file a writ application.

[119] Nichols' Application, *supra* note 118, at 4.

[120] OKLA. STAT. tit. 22, Ch. 18.

[121] Nichols v. Dist. Court of Oklahoma, 2000 OK CR 12, 6 P.3d 506 (June 1, 2000) [hereinafter "Order Granting Petition"]. The Order Granting Petition was unanimous. Presiding Judge Reta M. Strubhar, Vice Presiding Judge Gary L. Lumpkin, and Judges Charles S. Chapel and Steve Lile joined in the decision. Judge Charles A. Johnson, the remaining judge on the court, had earlier recused.

[122] Order Granting Petition, *supra* note 121, at ¶ 3.

[123] Id. at ¶ 4.

[124] Id. at ¶ 5.

[125] The court did begin its legal analysis correctly, saying that the "concepts of fair trial and free press are embodied within our constitutional framework." Id. at ¶ 6.

[126] Id. (quoting Estes, 381 U.S. at 544).

[127] Id. at ¶ 8 (quoting Estes, 381 U.S. at 592).

[128] See Nixon, 435 U.S. at 589.

[129] Order Granting Petition, *supra* note 121, at ¶ 7.

[130] Id. The court also mentioned Fed.R.CrimP. 53, noting that its prohibition of televising federal criminal proceedings had been upheld against constitutional challenge.

[131] Id. at ¶ 9.

[132] OKLA. CONST. art. 2, § 7.

[133] OKLA. CONST. art. 2, § 22.

[134] Order Granting Petition, *supra* note 121, at ¶ 9.

[135] Id. at ¶ 9. OKLA. CONST. art. 2, § 7 provides simply: "No person shall be deprived of life, liberty, or property, without due process of law."

[136] Rule 10.6(D): "Once this Court has rendered its decision on an extraordinary writ, that decision shall constitute a final order. A petition for rehearing is not allowed. The Clerk of this Court shall return to the movant any petition for rehearing tendered for filing."

[137] The Court of Criminal Appeals also had immediately directed the court clerk to transmit copies of the Order Granting Petition to West Publishing, CCH, LEXIS-NEXIS, BNA, the Oklahoma Bar Journal, and the media.

[138] Application to Assume Original Jurisdiction and Petition for Extraordinary Writ, or Alternatively, Petition for Writ of Certiorari, Courtroom Television Network, LLC v. Court of Criminal Appeals, No. 94,798 (Okla. 2000) <http://www.oscn.net> [hereinafter "Media Application"]. The application was accompanied by a fourteen-page supporting brief. On June 13, the electronic media also filed a motion for oral argument *en banc*.

[139] The Media Application was only the fifth time in the state's history that the Supreme Court had been asked to exercise its superintending powers over the Court of Criminal Appeals.

[140] Media Application, *supra* note 138, at ¶¶ 4-7.

[141] Id. at ¶ 8.

[142] Id. at ¶ 9.

[143] Id. at ¶ 13.

[144] Respondent Nichols' Response to Petitioners' Application to Assume Original Jurisdiction and Petition for Extraordinary Writ, or Alternatively, Petition for Writ of Certiorari and Brief in Support, Courtroom Television Network, LLC v. Court of Criminal Appeals, No. 94,798 (Okla. 2000) <http://www.oscn.net> [hereinafter "Nichols' Writ Response"].

[145] Brief of Respondent (State of Oklahoma) in Opposition to Petitioner's Application to Assume Original Jurisdiction and Petition for Extraordinary Writ, or Alternatively, Petition for Writ of Certiorari, Courtroom Television Network, LLC v. Court of Criminal Appeals, No. 94,798 (Okla. 2000) <http://www.oscn.net> [hereinafter "State Writ Response"].

[146] Nichols' Writ Response, *supra* note 144, at 11.

[147] Id. at 13.

[148] Id. at 14.

[149] State Writ Response, *supra* note 145, at 8-10.

[150] Id. at 10-12.

[151] Id. at 11.

[152] Id.

[153] Id. at 12.

[154] Notice, Courtroom Television Network, LLC v. Court of Criminal Appeals, No. 94,798 (Okla. 2000) [hereinafter "Notice"]. The judges said in the Notice at 3: "We interpret the order and notice to the 'real parties in interest' to require those parties and not the members of The Oklahoma Court of Criminal Appeals to appear for argument on the pending application and petition. In addition, due to the ongoing litigation in the criminal proceedings filed by the State against Terry Nichols, which this court will be required to review, The Court of Criminal Appeals and the Judges thereof respectfully decline further participation in these proceedings."

[155] OKLA. CONST. art. 7, § 4.

[156] Notice, *supra* note 154, at 2-3.

[157] Ironically, the Supreme Court permitted television coverage of the argument.

[158] Order, Courtroom Television Network, LLC v. Court of Criminal Appeals, No. 94,798 (Okla. 2000) <http://www.oscn.net> Eight Justices concurred in the decision; one Justice did not participate.

[159] Rule 1.13 of the Oklahoma Supreme Court Rules prohibits a petition for rehearing from the denial of an application to assume original jurisdiction. The electronic media elected not to petition the United States Supreme Court for certiorari.

[160] Order Granting Petition, *supra* note 121, at ¶ 9.

[161] Chandler, 449 U.S. at 575.

[162] All of the quotes from Estes are from Justice Clark's plurality opinion. The decision of the Court to reverse Estes' conviction was formed by the concurrence of Justice Harlan in that plurality opinion. But as the Court observed in Chandler, "[p]arsing the six opinions in Estes, one is left with a sense of doubt as to precisely how much of Justice Clark's opinion was joined in, and supported by, Justice Harlan. In an area charged with constitutional nuances, perhaps more should not be expected. Nonetheless, it is fair to say that Justice Harlan viewed the holding as limited to the proposition that '*what was done in this case* infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment,' id., 587." 449 U.S. at 572-573 (emphasis by the Court). Thus, to the extent the Court of Criminal Appeals Order Granting Petition is predicated on broad deductive principles expressed in Justice Clark's opinion, it is of questionable soundness.

[163] Notice, *supra* note 154, at 3.