

# MEDIA LAW NOTES

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## Head Notes

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Like many of you, I participated recently in my state's presidential caucus. Once we had gathered, each person in the room explained why they supported a particular candidate. My support is deep, long-standing, and based on emotion. My husband, however, told the group he supported his candidate because of that person's view on media policy. That got me thinking—most folks don't think much about media law and policy (hard to believe, isn't it?)—what do or don't the candidates say?

As I write this in mid-February, the presidential campaign is in full—and fascinating—swing. While I expect that each of you has a favorite, and that you have excellent reasons for favoring the candidate you do, I thought I would compare the candidates based on whether they offer positions on aspects of media law and policy. To make the comparison simple, and fair, I focused only on the four major candidates' websites—assuming that the policies they consider important will be found there. They are ranked

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## FOIA reforms

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On New Year's Eve, President Bush gave access advocates a little belated Christmas present, signing a series of amendments to the federal Freedom of Information Act that many of us in the access community – myself included had given up hope on.

In the immediate aftermath of the signing, open government advocates hailed the passage of the first amendments to FOIA in a decade, a series of largely procedural steps intended to improve government responsiveness to information requests and to strengthen the hand of requesters.

Others were less cheery, noting that FOIA is in need of a structural overhaul. I don't disagree, but let's not lose sight of the significance of what has been accomplished here, lest we downplay a signal moment of bipartisan support for the principle of government transparency.

The OPEN Government Act, which Congress passed Dec. 18, was co-sponsored by Senators Patrick Leahy (D-VT) and John Cornyn (R-TX). Rep. William Lacy Clay (D-MO), Rep. Tom Davis (R-VA) and Rep. Henry Waxman (D-CA) led passage in the House.

In the political schism that is Washington, if the OPEN Government Act accomplished nothing beyond a symbolic agreement that open government was a good thing, I'd be as discouraged as some of the legislative critics.

That's simply not the case. The OPEN Government Act is full of good news, from its language restoring meaningful deadlines for agency action under FOIA to the imposition of real consequences on federal agencies for missing FOIA's 20-day statutory deadline for responding to requests.

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# Justice Scalia speaks at Iona College

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In nearly 22 years on the U.S. Supreme Court, Associate Justice Antonin Scalia has defended his “textualist” interpretative approach, while denouncing the idea of a “living Constitution” philosophy as dangerous to our democracy.

The articulate and witty Scalia, 71, preaches his gospel of “originalism” to discover the original meaning of the text and attacked those who interpret the Constitution as evolving to reflect our “maturing society.” One of those lectures was at Iona College in New Rochelle, N.Y., where I teach media law and ethics. Scalia’s quotes and comments come from that presentation.

“I am part of a small, but hearty group of judges and scholars known as originalists,” Scalia told his receptive audience, even injecting some humor. “There are very few of us around.

“Sometimes people come up to me, ‘Justice Scalia when did you first become an originalist?’ - like it’s some kind of horrible disease. When did you first start eating human flesh?”

Citing Chief Justice John Marshall twice in his talk, Scalia justified his approach as a long-standing safeguard to preserving the intent of the framers.

“But what you should know is that originalism used to be orthodoxy,” he said. “What it is says is the Constitution doesn’t change. It is that rock to which the Republic is anchored.”

With the “living Constitution” philosophy being embraced by judges, attorneys, law professors, even “little children who come to the Court,” the American people have “bought into” this evolutionary approach. In the past, people would call for a new law to fix a problem, but now try changing the Constitution.

“If something’s terrible, if it’s really bad, it’s really stupid, it must be unconstitutional,” Scalia said. “Never mind the text, never mind the history, we have a Constitution that does what it ought to do.”

In criticizing the evolutionary interpretation of the Eighth Amendment, Scalia warned against those who believe “but it changes from age to age to comport with the evolving standards of decency that mark the progress of a maturing society.” They not only ignore the framers’ intent, but also promote judicial activism by allowing the Supreme Court to change the Constitution.

“That was not the frame of mind possessed by the people who thought it necessary to write an Eighth

Amendment and to write a Bill of Rights,” he stated.

“Those were the people who thought, ‘Yes, society sometimes will mature and sometimes not. And we know that future generations might not be as blind as we are or as virtuous we are and therefore we are going to lay down these unchangeable principles. They are changeable but you have to do through the enormous trouble of amending the Constitution.’”

Acknowledging his conservative reputation, Scalia argued that the originalist-evolutionist debate does not revolve around political philosophy.

“[Some say] this is really a liberal-conservative fight that the Constitution doesn’t change. That is simply not true. Whether you are an originalist or an evolutionist has nothing to do with what your social views are.

“It’s not a question of liberal or conservative....It’s whether or you want a new Constitution to be written year by year by unelected officials, the judges of the Supreme Court.”

Scalia’s two arguments against the living Constitution approach focused on flexibility and legitimacy.

“The Constitution is not a living organism,” he said. “It’s a legal document adopted democratically. And it says some things and it doesn’t say other thing.

“If you think that the people who favor the living want to bring you flexibility, think again.”

Citing debates over the death penalty and abortion as examples of the misguided “living document” approach, the associate justice warned about creating new rights.

“You want the right to abortion, create one like all rights are created in a democratic society,” Scalia said. “Persuade your fellow citizens it’s a good idea and have them make a law. And once again you can change your mind. But don’t amend the Constitution...that no state may prohibit abortion.”

In attacking the legitimacy of the evolutionary approach, Scalia cautioned against allowing “unelected” activist judges, not Congress, be the “authoritative voice” in our democracy.

“There is nothing in Constitution that the Supreme Court should be the authoritative voice,” he said. “[It does] not say Supreme Court can ignore statutes of Congress that violate the Constitution.”

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# Sessions at Annual AEJMC Conference

By Ed Carter  
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Several hot topics in communications law will enliven Law and Policy Division panels at the Chicago convention in August, and various division members have prepared strong program offerings on important and interesting topics.

As you might know, the 2008 convention is scheduled Aug. 6-9 at the Marriott Downtown on Chicago's Magnificent Mile. The Law and Policy Division will cosponsor eight panel discussions and five refereed research sessions that should be of interest to Division members.

Although details of the sessions are still being finalized, we know that the first day of the convention – Wednesday, Aug. 6 – the Law and Policy Division will have a full day as we cosponsor panel discussions on free expression in the classroom (with the Radio-Television Journalism Division), equal employment opportunities in broadcasting (with the Minorities and Communication Division), scholastic speech (with the Scholastic Journalism Division) and universal broadband access (with the Media Management and Economics Division). In addition, we have a refereed research session.

On Thursday, we sponsor a refereed research session in the morning and a division business meeting

in the evening. In between, we are planning panel discussions on IRBs and the First Amendment (with the Small Programs Interest Group) and regulation of video news releases (with the Media Management and Economics Division).

Friday brings another refereed research session plus panels on online journalism (with Media Ethics) and the role of advertising in childhood obesity (with Mass Communication and Society). In addition, we will have presentations of research during the Scholar-to-Scholar session Friday.

We wrap up our programming for the conference Saturday with two refereed research sessions.

I hope division members will begin making plans to join us in the Windy City for these stimulating discussions as well as all the other great things that go along with being part of an AEJMC convention. I hope, too, division members will join me in expressing gratitude to all those who have made and will make valuable efforts to propose, prepare or join panels as well as to conduct and submit research. These efforts benefit all of us as we seek greater understanding of our discipline and the world in which we work and live.

Please see the Law & Policy Division paper call on page 6 for more information.

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New rights should not be fashioned to fit the times, the associate justice cautioned.

“The biggest attraction of the living constitution is that it’s enormously seductive. It’s wonderful. Everything you care passionately about. Whether it’s the right to an abortion or the right not to be aborted, or whether it’s the right to homosexual sodomy or whatever it is you care passionately about -- it’s there in the Constitution.”

Scalia admitted that his textual approach has faced serious criticism, even in his own home. In 1989, when he cast the fifth vote in *Texas v. Johnson*, his patriotic wife, Maureen, didn’t appreciate his views.

“She’s humming ‘Stars and Stripes Forever’ while making breakfast,” Scalia told the delighted audience. “True story. I don’t need that.”

(In his 2006 book “The Supreme Court: The Personalities and Rivalries that Defended America,” Jeffrey Rosen mentioned the same anecdote, but quoted Scalia saying his wife was humming “It’s a Grand Old Flag.”)

Nominated by Reagan in 1986 and unanimously confirmed by the Senate (98-0), Scalia lamented he “couldn’t get 60 votes today.” In selecting a potential justice, the American people “are picking someone who’s going to rewrite the Constitution.”

“This is crazy,” Scalia warned. “It’s like having a mini constitutional convention every time you appoint someone to the Supreme Court.

“And didn’t used to be that way. Is it that way now and it until the American people get off this living constitution thing band wagon.”

In conclusion, a solemn Scalia exhorted his audience to take action to save the Constitution from the evolving majority’s whims.

“The end of the road is essentially to have a Constitution that is determined by the people, namely the majority. What’s wrong with that? What’s wrong with it is what the Bill of Rights is meant to protect you and me against is the majority. And to have a Constitution whose meaning is ultimately determined by the majority is to have a C that is not worth having.”

# Teaching an FOI Seminar

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Freedom of Information, or access to government, is a broad area of law key to journalistic practice, but the area gets little attention relative to the constitutional and tort law meat and potatoes of media law. The administrative law orientation and multi-state range of FOI make it seem arcane. In fact, state and federal FOI laws adhere today to well established policy norms. As such, FOI lends itself well to class study.

I have taught an FOI seminar for five years now, and I've developed reliable approaches and materials. My three-hour class is offered to law and graduate journalism students and has a dual focus: the specifics of FOI statutes and broad FOI policy.

On state FOI, I assign a treatise on the Arkansas FOIA; most states have some such work, at least a press guide. That reading is the jumping off point. Each student in the class chooses a different state for the semester and each week researches a specific legal question in the assigned state. For example:

Accused by a subordinate of sexual harassment, the Capital City police chief resigns. The investigation is closed as moot. Ace Reporter receives a tip; can she gain access to the investigation file?

The discussion allows us to examine an access issue at multiple levels and to compare the laws of the states. (Journalism students start the semester with a crash course in legal research.)

On the policy side, I assign readings, mostly in case law, and a book, such as Daniel Patrick Moynihan's *Secrecy* (1998). I've lately collected and edited readings into a draft casebook, *The Law of Access to Government*, which I have not yet pitched to a publisher. I'm happy to make this manuscript available for you to try, and I include the chapter and topic outline that follows.

Of course, an essential part of the seminar is "the FOIA experience": Each student makes a real FOIA request, pre-approved by me. The student then writes a report on the experience, noting compliance with the law and the demeanor of public officials. The exercises often prove memorable.

Teaching FOI is challenging but rewarding. Contact me or e-mail the media-L listserv for materials and ideas.

## *The Law of Access to Government*

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not by what their policies are, but by whether they have policy positions at all.

Barack Obama is the clear winner of the “Media Law and Policy Presidential Primary,” primarily because he’s the only one to address issues directly related to the topic, and because he ties his ideas to broader issues of democracy. For example, he favors net neutrality, writing that the internet “remains a platform for free speech and innovation that will benefit consumers and our democracy.” He places himself in the middle of the media ownership issue, suggesting that “[a]n Obama presidency will promote greater coverage of local issues and better responsiveness by broadcasters to the communities they serve” (<http://www.barackobama.com/issues/technology/>). He also discusses the right to privacy and protecting children, both as they relate to 21<sup>st</sup>-century media technology.

John McCain comes in a close second. Not surprisingly, given his history with campaign finance law, his website discusses what he sees as the unfair influence of “big-moneyed special interests” on the political process. This topic, while one step removed from media law and policy, does at least indirectly address the issue of free speech (<http://johnmccain.com/Informing/Issues/cb15a056-ac87-485d-a64d-82989bdc948c.htm>).

McCain and Mike Huckabee both get partial credit for discussing their views on appointing judges with a particular judicial philosophy. McCain outlines his strict constructionist philosophy, writing that “the role of the judge is not to impose their own view as to the best policy choices for society but to faithfully and

accurately determine the policy choices already made by the people and embodied in the law.” McCain also outlines his views on federalism and the separation of powers. (<http://johnmccain.com/Informing/Issues/b8529d0e-381e-4a29-9c39-6a57c7e182c9.htm>).

Huckabee’s views are similar. He writes of the “ever-increasing politicization of the federal judiciary,” with which he disagrees. He favors a philosophy of original intent, and “flatly reject[s] the notion of a ‘living Constitution.’” He challenges the foundation of privacy law head on, rejecting “penumbras, or any other judicial fiction.” Beyond these clearly outlined views on judicial philosophy, though, Huckabee has nothing to say on issues of media law and policy. Both McCain and Huckabee have prominent pages devoted to the Second Amendment, but nothing comparable for the First Amendment.

Hillary Clinton ties Huckabee for third place. Her website contains only passing reference to media law and policy issues; buried on her “Innovation” and “About Hillary—U.S. Senator” pages are a few sentences on encouraging broadband networks (<http://hillaryclinton.com/feature/innovation/>, <http://hillaryclinton.com/about/senator/>). Finally, and this is a stretch for media law and policy, though not for First Amendment law, she wants to “[m]odernize and strengthen the federal hate crimes law” (<http://hillaryclinton.com/issues/reform/>). Her website does contain transcripts of her speeches—it’s possible that she has outlined other policy initiatives within those.

So...the “winners” in the Media Law and Policy Presidential Primary, determined by their acknowledgement of relevant issues, are Barack Obama and John McCain. I’m looking forward to those issues taking center stage soon!

# AEJMC Southeast Colloquium Update

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The Law and Policy Division was well represented at the 33rd AEJMC Southeast Colloquium, which was hosted by Auburn University in March.

The division hosted five research panels, and 20 research papers were presented by students and faculty. The panels covered a broad array of topics, including freedom of information, reporter's privilege, Internet law, political and artistic communication, and a "media law potpourri" panel.

Ed Carter, the research chair of the Law and Policy Division for the colloquium, said that 40 papers were submitted for the research competition, meaning the division had a 50 percent acceptance rate.

"We got more papers this year from northern areas," Carter said, noting that papers came from Minnesota, Wisconsin, Rutgers and Penn State. "I'm glad to see the colloquium is inviting to those outside of the Southeast."

Clay Calvert, a professor at Penn State University, presented three papers, and he won the division's Top Faculty Paper award for his paper titled "Support Our [Dead] Troops: Sacrificing Political Expression Rights for Familial Control Over Names and Likenesses."

Patrick File, a master's student at the University of Minnesota, won the division's Top Student Paper award for his paper considering the way the law deals with bloggers titled "Do the Courts Think Blogging is Journalism? An Early Examination of Descriptive and Functional Approaches to Analysis in Case Law Involving Blogs."

The University of North Carolina-Chapel Hill was very active at the conference, as professor Michael Hoefges led a contingent of 10 master's and doctoral students who presented papers.

The lunch panel on Friday covered freedom of information issues in the Southeast. Dennis Bailey, general counsel of the Alabama Press Association, discussed the movement to pass stronger open meetings and open records laws in Alabama. Carol Pappas, publisher of the Talladega Daily Home, described some of her paper's open records fights that led to several award-winning stories about corrupt public officials and water quality.

Also at the lunch panel, Bill Chamberlin, University of Florida professor and director of the Marion Brechner Citizen Access Project, discussed the recent work the project has done to gather information about state open government laws in one place and to provide ratings to gauge the relative strength of these laws. The project's Web site is [www.citizenaccess.org](http://www.citizenaccess.org).

According to John Carvalho, the director of the Southeast Colloquium this year, 51 people were in attendance. In 2009, the colloquium is tentatively scheduled to take place March 19 to 21 at the University of Mississippi in Oxford, Miss.

## AEJMC 2008 Annual Conference Law and Policy Division Paper Call

The Law and Policy Division invites submission of original research papers on communications law and policy for the 2008 AEJMC Convention in Chicago, Illinois. Papers may focus on any topic related to communications law and/or policy, including defamation, privacy, Federal Communications Commission issues, copyright, obscenity, and a myriad of other media law and policy topics.

The Division welcomes a variety of theoretical orientations and any method appropriate to the research question. A panel of judges will blind referee all submissions, and selection will be based strictly on merit. Authors need not be AEJMC or Law and Policy Division members, but they must attend the convention to present accepted papers.

Paper authors should submit via the online submission process as described in the Uniform Paper Call. Please see submission criteria and instructions at

[www.aejmc.org](http://www.aejmc.org).

Law and Policy Division papers must be no longer than 50 double-spaced pages (including appendices, tables, notes and bibliography). Although Bluebook citation format is preferred, authors may employ any recognized and uniform format for referencing authorities. There is no limit on the number of submissions authors may make to the Division.

Student authors of single-authored papers should clearly indicate their student status. Student submissions will be considered for the Top Student Research Paper and the \$100 Whitney and Shirley Mundt Award. The Law and Policy Division will also cover convention registration fees for the top three student paper presenters.

For questions please contact: Amy Gajda, Law and Policy Division Research Chair, University of Illinois, Department of Journalism, Gregory Hall, 810 S. Wright St., Urbana, IL 61801; Phone: (217) 333-5461; email: [agajda@uiuc.edu](mailto:agajda@uiuc.edu)

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The amendments also contain useful language making it clear that FOIA applies to government records held by outside private contractors. The establishment of a FOIA hotline service for all Federal agencies should pay dividends immediately, as any frequent user of FOIA can attest to the run-around requesters face.

To gauge my optimism, I turned to the experts on federal FOIA, who made me feel even better.

Steven Aftergood, director of the Federation of American Scientists Project on Government Secrecy and the force behind Secrecy News, an award-winning electronic newsletter on all things clandestine, said that while the OPEN Government Act does not open any documents currently closed under FOIA, it does provide meaningful procedural changes.

"The new FOIA law is entirely good," Aftergood said in an e-mail response. "It doesn't do anything bad. It makes several useful procedural changes that will help both ordinary requesters (e.g. in helping to track requests) and hard-core FOIA litigators (e.g. making it easier to get attorneys fees). So it's a genuine positive accomplishment."

Dan Metcalfe, Faculty Fellow in Law and Government at the Washington College of Law at American University and Executive Director of the Collaboration on Government Secrecy, said in an e-mail that the new legislation might be a harbinger of greater things to come.

"It's quite noteworthy that in the 'findings' part of the legislation, Congress spoke of the need to 'determine whether further changes' to the Act are necessary," Metcalfe said. "When together with the explicit statements made by both Chairman Leahy and Chairman Waxman about the need for 'more reforms,' it suggests that Congress might soon break the mold of the FOIA's 10-year amendment cycle."

Metcalfe, the former director of the Office of Information and Privacy at the U.S. Department of Justice, sponsored a panel discussion on the OPEN Government Act Jan. 16 in which the changes to the attorney's fees provision raised spirited discussion.

Harry Hammitt, editor of the influential FOIA newsletter Access Reports, said that Section 4 of the act, which restores the previous status quo on attorney's fees

awards that existed before the Supreme Court's decision in *Buckhannon Board & Care Home v. West Virginia Dept of Health and Human Resources*, is perhaps the most important change.

Buckhannon had required a court order changing the legal relationship between the parties to qualify a plaintiff as having "substantially prevailed" – meaning that winning FOIA litigants seldom if ever met the standard.

Previously under FOIA case law, an intervening event – in the case of FOIA litigation, most often further voluntary disclosure on the part of the agency – was adequate to qualify the requester for attorney's fees as the prevailing party.

The OPEN Government Act amendments clarify that *Buckhannon* does not apply to FOIA cases, and, instead, a plaintiff is eligible for fees if he or she obtains relief.

"I think the final provisions restore the catalyst theory -- that filing the suit caused the favorable end result whether or not it was achieved by a court decision," Hammitt said.

One of Washington's best FOIA lawyers, Thomas Susman, a partner in the Washington offices of Ropes & Gray, is enthused about the provision creating the Office of Government Information Services at the National Archives.

"I think the OGIS holds the potential to be the most important advancement in access to information in the US since the 1974 amendments," Susman said. "A FOIA ombudsman could help requesters and agencies alike avoid litigation and contention, and could provide a continuing process oversight that Congress has never been willing or able to provide. The key will be that Office's being given adequate resources, establishing reasonable procedures and priorities, and gaining the respect and confidence of both agencies and requesters - no small feats, those."

While the amendments don't change a word of the FOIA's exemptions, nor overrule the infamous "Ashcroft memo" overturning the presumption of openness that held sway under Janet Reno's Justice Department, it still contains much to cheer about. There's much work to be done, however, to address the next great reforms: narrowing the FOIA's exemptions and providing access to a greater range of documents.

PHILADELPHIA  
2008 FOI Summit  
*Let Freedom of Information Ring!*

The National Freedom of Information Coalition and the Pennsylvania Freedom of Information Coalition are hosting the 2008 Freedom of Information Summit.

The summit will be held May 9-10 at the Loews Philadelphia Hotel.

For more information, go to:  
[www.nfoic.org/2008\\_summit](http://www.nfoic.org/2008_summit)

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