



Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

November 4, 1992

Honorable Dan Quayle
President of the Senate
United States Senate
Washington, D.C. 20510

Dear Mr. President:

This is to inform you of the decision of the Department of Justice not to defend the constitutionality of sections 4 and 5 of S. 12, the Cable Television Consumer Protection and Competition Act of 1992 (the "must-carry" provisions). The President, having received the advice of the Department in the matter, having appropriately determined that these provisions were unconstitutional (copy of veto statement attached), the Department would not substantively and could not ethically take a different position at this time. The Department will, however, defend against challenges to section 6 of the Act, which includes, among other things, the "retransmission consent" provisions.

The must-carry and retransmission consent provisions have been challenged under the First Amendment in Turner Broadcasting System, Inc. v. Federal Communications Commission, et al., No. 92-2247 (D.D.C.), and Daniels Cablevision, Inc. v. United States of America, No. 92-2292 (D.D.C.), which were filed on October 5, and October 13, 1992, respectively (copies of the complaints and scheduling order are enclosed).

The President's veto message of October 3, 1992, stated his position that the must-carry provisions, which require cable operators to carry on their systems a prescribed number of signals of local commercial and qualified noncommercial television stations, are unconstitutional. The Department of Justice provided the analysis that underlies the legal position taken in the President's message.

We note also that the President is the ultimate client of the Department of Justice in all litigation involving the Executive Branch, but because of the advice provided, especially in this matter. In light of the strong position taken by the President on must-carry in reliance on our analysis, an ethical

conflict of interest would be created were the Department now to defend these sections of the statute.

These considerations are not present with respect to the retransmission consent provisions which provide, inter alia, that no cable system or other multichannel video programming distributor shall retransmit the signal of a broadcasting station except by the express authority of the originating station. Accordingly, the Department of Justice, on behalf of the Federal Communications Commission and the United States, will defend section 6 in the above-described litigation.

Pursuant to section 23 of the Act, the "Judicial Review" provision, a three-judge district court has been designated to hear the constitutional challenges brought in the above cases. We will promptly notify this court of the Justice Department's decision not to defend the constitutionality of sections 4 and 5 of the Act, and of our notification to Congress of that decision.

Briefing schedules have been issued in both Turner Broadcasting System, Inc. and Daniels, requiring that plaintiffs file their motions for preliminary relief and/or summary judgment by Thursday, November 5, 1992, and that defendants file their response by Tuesday, November 24, 1992. These schedules are enclosed.

Sincerely,



Stuart M. Gerson
Assistant Attorney General

Enclosures

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THE PRESIDENT OF THE SENATE
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