Remarks by
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"REEDING" THE FIRST AMENDMENT-- A DISAGREEMENT
(Without being Disagreeable)

Lately I have received continued inquiries about my current status and future plans: loosely paraphrasing an old saying, "Rumors of my FCC demise now seem premature." In announcing my retirement plans early this spring I mentioned that I would continue serving until someone is confirmed in my place. As you know, the confirmation process for proposed FCC and FEC nominees has become complicated and even argumentative with no immediate resolution in sight. It is comforting not to be seeking reappointment during these contentious times.

Of course, you have heard that Chairman Reed Hundt is also resigning from the FCC. I issued a statement on his announcement that stated:

> "Chairman Hundt and I had marked differences in regulatory approach. However, the Chairman was a tireless dedicated worker, brilliant in understanding the complexities of the computer and other highly technical industries, a most formidable litigator in debating his viewpoints before the FCC and against adversaries, and an effective public speaker and FCC spokesman. Also, the Chairman played a leading role in establishing a distinguished legacy -- the wiring of schools and libraries throughout the nation. In the overall count of Commission items, we agreed substantially more than we disagreed."
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> And, I am adding, I certainly would hire him or recommend him as a very effective lawyer.

I was touched by his recent gracious remarks before a Federal Communications Bar Association in which he listed numerous of my FCC accomplishments -- a few of these even I would not have recalled. The sumptuous anniversary dinner sponsored by the Chairman and Commissioners was probably the most memorable event in my lifetime career. We have worked together and voted together on a great many items since he arrived at the FCC over three years ago.

Nevertheless, there is a fundamental philosophical difference in the way the Chairman and I view the First Amendment and the regulatory role of government. This is what I am compelled to discuss today.

I am afraid that I have failed in convincing the Chairman to change what many criticize as his over-regulatory fixation. For example, I cannot understand his long-standing aggressive PR campaign for additional quantifiable public interest requirements for digital broadcasting.

After all, broadcasters initiated and developed HDTV and digital broadcasting over an eight year period with hugh investment in funds and executive and engineering talent. They developed HDTV and digital to provide advanced improved video and audio for the public, their customers. This really serves the public interest.

I cannot understand the equity in rewarding the introduction of improved video and audio quality which serves the public interest with additional quantifiable public interest requirements.

We must remember that all broadcasters already have longstanding existing statutory public interest requirements that are conscientiously implemented by a great majority. Any imposition of burdensome additional quantifiable public interest obligations for new costly undeveloped services will impede growth, smacks of "big government." and could easily run afoul of our most cherished constitutional rights -- the First Amendment.

DTV or digital broadcasting will initially be an expensive challenging exploratory process. Government can encourage its development by limiting its intrusion.

A special commission formed by Vice President Gore is studying the extent and nature of additional public interest obligations for digital broadcasting. I'm looking forward to the commission report and recommendations. There is no need for the FCC to be "out front," ahead of the Vice President.

Also, I cannot understand the logic in claiming it is a "give-away" to grant existing licensees digital spectrum for services that they themselves developed. I do not see the equity in proposing that existing licensees compete in auctions against subscriber supported businesses to be able to remain in business. Furthermore, broadcasters are merely being loaned the digital spectrum with the requirement that one of the channels be returned. Most TV licenses were granted in 1949 and 1950 and broadcasters lost money for years in initiating TV services. Nothing happened to the initial TV spectrum grant until broadcasters invested in acquiring property and buildings, buying equipment, hiring personnel and creating and buying programs. Since the initial TV pioneering, broadcasters have paid the full marketplace price.

We must also remember that it was the broadcasting industry that developed technological and program production advances, not government financing, and certainly not government regulation.

Broadcasters serve the public interest every day in ways in which no other medium or business does. They provide news, information, emergency bulletins, documentaries and public service announcements, entertainment, and education -- all free of charge. This year more than ever broadcasters provided immediate life saving information on floods, tornados and other natural disasters. No other medium can make that claim, and this tradition of free service is, in itself, an important, underestimated contribution to the public interest. Broadcasters contribute millions of dollars worth of public service programs and announcements every single month.

From my experience in broadcasting, I can tell you that the great majority of broadcasters make a commitment to community service over and above what the Communications Act requires because it is good citizenship and because it is good business -- not because of FCC regulations. And certainly not because broadcasting, the prime information and news medium, has a government mandate to make a "social contract" with their communities, outlining how many hours and what types of specific public interest programming they must air to mollify government regulators.

The simple fact is that broadcasters enter into a "social contract" with their communities every day when they transmit their programs and the public votes its approval or disapproval every day through audience ratings. Broadcasters depend on overall public acceptance for economic survival.

Also, in the multichannel world of today with cable, movies, DBS, the Internet, VCRs, along with newspapers, sophisticated computer billboards, and magazines, it is disingenuous to center blame for all society's ills on broadcasting. There are always other more important influences to consider besides media -- like parents, relatives, friends, home environment, teachers and schools.

But now back to my principal concern: the First Amendment and my philosophic and regulatory differences or disagreements with the Chairman.

Recently, Chairman Hundt has been making positive sounds expounding First Amendment rights. In an article published last March in BROADCASTING & CABLE, the Chairman wrote that "No values in our society are more important than those advanced and protected by the First Amendment." More recently, the Chairman called for "a stronger and more well articulated set of First Amendment principles for broadcast news."

This is good.

Or is It?

What can we make of these kudos to the concept of free expression when they are made by a public official who conditioned network mergers upon specific programming commitments; who campaigned vociferously not only for quantitative requirements for children's TV, but for specific time and scheduling mandates, (eventually his over-regulatory children's programming proposal was corrected to provide common sense flexibility); who proposes to quantify all public interest mandates; who plans to make broadcasters the universal donors for political campaigns; who is proposing to restrict broadcasters' rights with respect to advertising; who favors mandatory counter advertising; and, who would compel licensees to program more PSAs with the government having the role of casting director and script writer? Has the Chairman suddenly changed his mind?

When people reach my age, they often become more religious or more ecumenical. Some call it "cramming for finals." So too, when some public officials leave office, they would like to ensure that their legacy is free of criticism, even if that criticism is well founded. Especially if that criticism is well founded.

So, I think the Chairman's recent discovery of the First Amendment has less to do with an end of term conversion, and far more to do with what we in Washington call "spin control."

Let's face it. The recent record on First Amendment issues before this Commission is well documented and cannot be prettied up or explained away by a press release and a couple of speeches. When it comes to controlling broadcasters' speech, the past three years have been the most intensely regulatory of all the twenty-three years that I have been at the FCC. Fortunately, many of the initial proposals by the Chairman were rejected by three Commission votes (DARs, LMDS, DTV and the Chairman's first of the year "Spectrum Management White Paper"). But the Chairman still has some rules on the table he would like to push through before he leaves office.

So I will ask the question again. What is one to think of the Chairman's recent statements praising the First Amendment? Or of his personal creative interpretation of First Amendment "values." The answer is to be found, I believe, by reading his statements carefully, and by reading them in the context of his actions.

The difference in the way that the Chairman and I view the First Amendment can be summed up in two sentences: First, I see the Bill of Rights as a limitation upon government action; the Chairman apparently sees it as a regulatory mission statement. Second, I consider freedom of expression to be the result of the government's abstention from editorial decisionmaking; the Chairman evidently sees it as a gift to be bestowed by politically appointed bureaucrats.

The first of these statements is borne out both by the Chairman's promotion of government federal power to force broadcasters to carry programs on the subjects he

considers worthy, and by his many speeches and articles on the subject. In his BROADCASTING & CABLE article, for example, after writing that First Amendment values are most important, Chairman Hundt promoted using government power to compel free time for candidates, additional and quantified public interest commitments for digital broadcasting and, of course, quantified specific children's programming requirements. Such requirements, it was explained, are consistent with First Amendment "values" because they promote an informed and educated citizenry. Chairman Hundt said he saw no difference between the experiment in free time this past election in which the networks and major broadcasters donated specified blocks of time for the major presidential candidates, with a quantifiable obligation for every licensee "to deliver media access to all participants in federal elections."

But there is a vast difference under the First Amendment between being permitted to speak and being forced by government to do so. Under this view of the Constitution, First Amendment rights -- to be free from government intrusion -- can be limited or canceled, so long as the intervention can be justified by pointing to First Amendment "values." So long as the government provides specific quantifiable program requirements, and does not seek to impose its opinions on licensees, then even the most intrusive rules can be described as pro-First Amendment.

Such theories are alien to our Constitutional system. If First Amendment commands, designed to restrict government involvement with the press, can be brushed roughly aside in the pursuit of First Amendment "values," then it is time to rethink those values. There is no limit to this justification for government action, and it really does permit activist bureaucrats to promote their personal wish lists as if they were constitutional mandates. The novel "values" theory seems to be Chairman Hundt's "reeding" of the First Amendment that I reject and I believe the courts will reject. After all, how much is enough? One day it is specific children's programming accompanied by time and scheduling mandated requirements, then comes free time for politicians, followed by mandatory public service announcements, quantified additional public interest obligations -- and whatever else someone might describe as a First Amendment value.

A basic flaw in the Chairman's theories is that they add up to the notion that for free speech to exist, the government must regulate. This understanding of the First Amendment is exactly backwards. As I said, the First Amendment is not a charter or a mission statement for more regulation of the media.

The second major problem with the Chairman's approach is that he appears to believe that free speech is something to be doled out to worthy recipients. In this case, much of what he says sounds First Amendment friendly. In a recent speech at the Museum of Television and Radio, the Chairman praised broadcast journalism, noting that "this is the most well informed nation in history because of TV." And he said that we need "a clear and absolute commitment that government should never reward or punish a broadcaster for the content, point of view or opinions that the broadcaster expresses."

So far, so good. But as if the desire to regulate is an impulse the Chairman just can't resist, he then called upon "Congress or the FCC . . . to hold hearings on the topic of how through regulation we could buttress the protection of TV journalists, to ensure that they go about their business without being chilled by the threat of litigation."

Would all journalists be protected? When government is empowered to decide these questions, it is doubtful. Chairman Hundt said that as we offer such protection, "[W]e should continue to expect the highest standards of integrity from them." He also spoke of the need for journalists to be "fair," and after reminiscing about the Fairness Doctrine, asked, "Wouldn't we all benefit if there were some way to assure the public that news on TV will be impartial and that opinions on TV will be balanced?" In the eyes of what beholder? Reed wasn't practicing communications law at the time, but we've been down that regulatory road before.

Maybe I've been in Washington too long, but I think I smell a quid pro quo approaching. If the meaning of the First Amendment is to be fashioned in FCC and Congressional hearings, it has been my experience that the government hardly ever gives something for nothing. If the Chairman's speech is any clue -- and it is sometimes difficult to penetrate the subtleties of his statements -- then the price of journalistic protection will be the obligation to be "fair" and to have the highest ethics, as those terms are defined by the government represented by the FCC! With friends like this, the First Amendments needs no enemies.

Even as the Chairman was praising broadcast journalism for creating the most informed citizenry in history, he denigrated broadcasters for lacking the "richly developed sense of ethics" of print journalists. In particular, he singled out the Washington Post and the New York Times as having a strong sense of responsibility to the country. I agree with these two examples, but I would add that many broadcasters also embody these ideals. Also, these two newspapers like dozens of others are broadcast licensees in good standing.

A particularly good example is the donation of time by the networks for campaign coverage in the last election. The Chairman thinks it is such a good idea it must be compelled. I simply think it is a good example of corporate citizenship and responsible programming, and a reason why the government should not interfere. It is worth remembering that it was the existence of broadcast regulation that forced the networks to ask the FCC for permission to provide extra campaign coverage in the first place. This is a powerful reason to regulate less, not more, as the Chairman believes.

It simply is too dangerous to permit the government to define First Amendment protection as applying to those with the proper government approved journalistic ethics. It was telling that the Chairman jokingly singled out the New York Times as a particularly good newspaper "with editorials I agree with" after it published a laudatory piece about his term at the FCC. At least I think he was joking. After all, the New York Times is a

notable broadcast licensee. But I find it difficult to separate the Chairman's praise for one news media from his desire for "government [to do] a better job of creating clearer rights and a context for self-regulation in the development of TV journalism." As I said earlier, the First Amendment is a Constitutional guarantee not a gift to be bestowed by politically appointed bureaucrats and that includes me.

Much has been said over the past three and a half years about broadcasters' obligations as public trustees, but what about the obligations of public officials? We, too, are public trustees. As government officials we are sworn to uphold the Constitution, and in that way we are called upon to be guardians of the First Amendment. This calls for an extremely delicate balance and common sense, because as regulators we are also authorized to exercise the power to regulate some speech. How can we do both?

In the past, the Commission walked what reviewing courts have described as a "tightrope" by first being aware when we were treading on dangerous constitutional turf. Most Commissioners also sought to be sensitive to the First Amendment issues in the balance.

This meant regulating speech only when it was clearly authorized by Congress that we do so, and even then regulating only to the extent necessary. It meant acknowledging that emerging multi-channel, multi-faceted technology reduced the need to regulate, and that spectrum scarcity, which was used to justify almost all of our content controls, is now a thing of the past. As a result, we could fulfill our public trust and our commitment to the First Amendment by eliminating the government's detailed review of broadcast programming. The courts have discarded regulatory relics like the Fairness Doctrine and the Financial Interest and Syndication Rules.

It did not mean, as Chairman Hundt repeatedly says, that the FCC serves the public interest or the First Amendment by actively seeking new issues to regulate and describing the endeavor as a public interest "wish list." Nor did it mean that we could ignore the massive development of newer media and the diverse programming that came with it -- such as the development of entire networks devoted to children's programming on cable and the abundance on public television while singling out broadcasters for additional special obligations.

We have entered a new multi-channel, multi-faceted media age in which abundance and diversity -- not scarcity -- are the rule. Now in this intensely competitive communications marketplace, is the time for the FCC to consider imposing fewer regulations on speech content, not more as the Chairman advocates.

The Administration and Congress must have had the massive communications explosion of the past three years in mind when they repeatedly proclaimed that the era of big government is over. Is it over for everyone but the FCC?

So Reed, I respect your drive, litigation expertise, and skillful P.R. spins, but I strongly and respectfully disagree with your own subtle over-regulatory approach to First Amendment "values."

I'm sorry I failed to convince you. With this exposition, I present the case for what I believe is a valid, time honored, court accepted, interpretation of the real value of the First Amendment.

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