

Remarks by Commissioner James H. Quello

Before The Cato Institute

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I was pleased for a couple of reasons to be asked to come here today to say a few words about the book *Rationales & Rationalizations*. In the first place, it was conceived, edited (and largely written) by Bob Corn-Revere, whom some of you may know was my Legal Advisor and Chief Counsel of the FCC when I was Chairman. In the second place, the book is highly relevant to what is going on at the FCC these days.

Bob came to my staff in 1990 with an inherent cynicism toward big government. We share a distrust of big government and sometimes quoted the saying, "I love my country, but fear my government," as it applied to First Amendment regulation. I have to admit I enjoyed his brilliant, smart-ass approach to over-regulatory government which was similar, but more legally correct and more fully developed, than mine.

He was a delightful, irreverent blast to be around -- and some of our office repartee is better suited to a sassy book (dare I say S and L rated book) than to a relatively discreet Commission speech. I miss him -- I always came to my office wondering what he was up to next. It is apparent that I like and respect the guy.

He, like my other staff associates developed the habit of calling me "boss" -- My prosperous office alumni still call me "boss" even years after they have gone on to economically bigger and better things. Perhaps I should take a minute to tell you or repeat how the "boss" moniker came about. (Describe - - - - -) After that, they all called me "boss" and I lost my infallibility -- lucky for me. Many of my too-open statements or ad libs need a legal filter and I have been blessed by bright, loyal legal advisors.

Bob is a most effective, articulate spokesman for freedom of speech. He is also more of a First Amendment purist than I. This was evident in his disagreement with FCC sanctions and fines imposed on Howard Stern. I think it may be worth repeating here as I have in a speech before the RTNDA, my own opinion and rationale for what some considered a First Amendment intrusion.

I said Howard Stern had and has a First Amendment right to be wrong. He certainly has the right to ridicule government officials. He has the right to be an outrageous smart-ass -- but he doesn't have the right to violate established and Court-tested rules against indecency or obscenity. That's what got talented, raunchy Howard in trouble. Courts have supported time constraints to provide safe harbor for children. The complete details would take an entire speech or book. We have more timely subject to treat today.

Overall, the Corn-Revere/Quello regime accomplished some significant things. During the time Bob was on my staff, we finally eliminated the outdated Financial Interest and Syndication rules, a regulatory relic that blocked network investment in programming and syndication. Bob took my written journalistic sales-oriented piece on the subject and turned it into a legalistic masterpiece that resulted in two 3-0 votes from a District Court overturning the negative FCC 3-2 vote. We also helped the New York Post from going bankrupt by keeping it from being killed by the FCC cross-ownership rules and we worked on eliminating some of the hold-over rules from the Fairness Doctrine -- a doctrine that I thought should have been more appropriately titled, "The Government Intrusion Doctrine."

However, things are different at the pro-regulatory Commission today and that is one reason Bob's book is so timely. I first came to the FCC in 1974 after a career in the broadcast business, and was under the impression that government regulation would decrease once there were more media outlets and more competition. This is particularly true when it comes to regulations that affect freedom of speech. For a long time, that was the way it went, and in the late 1980s, the Court helped us to get rid of the Fairness Doctrine and a number of other very intrusive rules.

Well, all good things come to an end, I guess. There is now more of an interest in controlling speech by some members of the FCC than I can ever remember in my 23 years there. And it comes at a time when there are many more choices in the media marketplace, more diversity and more competition than ever. The "scarcity" argument used to justify regulation no longer exists in the multi-faceted, multi-channel world of today. For example, Chairman Hundt has described his regulatory policy initiatives as a public interest "wish list."

The Chairman and I have been involved in a fairly public disagreement on regulatory issues. Maybe you've heard about it. Contrary to some reports, this is not a personal quarrel. In fact, I lauded his litigation skills, computer expertise and his distinguished legacy of wiring the schools and libraries. Our dispute boils down to basic differences in our philosophies. 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 seems to think of it as a gift to be bestowed by bureaucrats for regulatory good behavior.

Chairman Hundt makes the point that such regulations do not infringe upon free speech because they promote the First Amendment "values" of an informed and educated citizenry. 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." 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 nebulous or created First Amendment "values," then it is time to rethink those values.

Finally, he has called for hearings to consider broadcast journalism, designed, as he put it, to "buttress the protection of TV journalists, to ensure that they go about their business without being chilled by the threat of litigation." Sounds pretty good. But such protection would come at a heavy price.

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 additional quantifiable 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?

Chairman Hundt also said that as we offer broadcasters protection "we should continue to expect the highest standards of integrity from them," and added, "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?" To that I add, "in the eyes of what beholder . . . politically-appointed government regulators?" -- and that includes me. No thank you.

In First Amendment terms, this kind of proposed news protection is a troublesome Quid Pro Quo Checkmate offensive to First Amendment principles -- even if it is the Chairman's honest, well-intentioned belief.

It simply is too dangerous to permit the government to confer First Amendment protection to those with the proper government-approved journalistic ethics.

So, as I said, I think Bob's book is timely, for it goes to the heart of one of the biggest problems we face at the FCC today -- the promulgation and growth of a culture of regulation and government micromanagement -- to the detriment of First Amendment values. With that said, let the discussion begin.