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Constitution Day at the FCC

by

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Monday, September 17, 2007 is Constitution Day in the United States. On that date in 1787, most of the delegates assembled in Philadelphia signed the new charter before adjourning the Constitutional Convention. In 2005, September 17 was made a federal holiday to commemorate the Constitution's adoption.

Upon departing the Convention, Dr. Franklin supposedly was asked by a Mrs. Powell: "Well Doctor, what have we got, a republic or a monarchy?" Franklin responded, "A republic if you can keep it." It is the nature of a democratic republic that the "if you can keep it" question is never settled once and for all. But its preservation must always remain our worthy goal.

Thomas Jefferson, the principal drafter of the Declaration of Independence, was not at the Philadelphia Convention, serving in France at the time. But later he wrote: "Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."

Each of us has a role to play in upholding the Constitution in our own way. Members of Congress and Federal Communications Commissioners take a solemn oath to do so before assuming office. So, on Constitution Day, it is appropriate to consider some of the ways in which communications laws and policies implicate constitutional values, if not explicit constitutional dictates. There is, after all, wisdom in Jefferson's admonition that we not render the written Constitution's protections meaningless by construction.

What I want to do in this brief piece is suggest one important way in which Congress could change the Communications Act of 1934 to bring our basic communications law more in line with our constitutional values. And then I want to address the constitutional implications of some current contentious issues at the FCC. I do not suggest that this discussion by any means exhausts the list of communications law and policy issues with constitutional implications. Rather, I contend that if Congress and the FCC had in mind the constitutional values I will discuss, our nation's communications policies would be sounder, and more consistent with the marketplace realities of our digital age in which communications competition is flourishing.

With respect to statutory reform, there are over 100 places in the Communications Act that direct the FCC to act "in the public interest." A considerable amount of the agency's regulatory activity remains governed by this vague standard. This is a delegation of legislative authority so indeterminate that I have argued it violates the non-delegation doctrine that inheres in separation of powers principles at the core of our tripartite constitutional system.

The FCC was created consistent with the Progressive era ideal that "independent" entities such as the FCC, staffed by "experts," should be given almost boundless discretion to act in the public interest. Senator Clarence Dill, chief sponsor of the 1934 Communications Act, remarked that the public interest standard "covers just about everything." Anyone who has observed the FCC for even a short period of time might say the public interest standard means "whatever three of the five FCC commissioners say it means on any given day."

Justice Felix Frankfurter early on gave the public interest standard an unbounded interpretation, declaring somewhat mysteriously in 1940 in *FCC v. Pottsville Broadcasting Co.* that the standard is "as concrete as the complicated factors for judgment in such a field of delegated authority will permit." Frankfurter, an avid devotee of New Deal regulatory theories, quoted Elihu Root to this effect concerning the new alphabet agencies:

> There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation.

No doubt we have moved far beyond the "old and simple procedure of legislatures and courts" that preceded the New Deal's constitutional revolution. Nevertheless, the Supreme Court has continued to maintain that, in order not to violate fundamental separation of powers principles, congressional delegations must contain an "intelligible principle" to guide the agency acting under the delegated legislative authority. Absent delegations of authority that contain intelligible principles to guide

agencies, it is difficult for the people to hold Congress accountable for the exercise of its legislative responsibilities. While the Court thus far has sanctioned the public interest standard, squaring the standard with the "intelligible principle" requirement is problematic.

In any event, Congress need not wait for Supreme Court jurisprudence to catch up with the Constitution. It should reform our current Communication Act by adopting a new market-oriented regulatory regime that ties regulation to a rigorous competition standard grounded in antitrust-like jurisprudential principles. Explicitly directing the Commission to look to marketplace competition as its lodestar rather than the vague "public interest" would make the regulatory regime conform more closely to constitutional norms.

Turning to the FCC, many of the actions the agency takes or considers implicate free speech and property rights interests intended to be protected by the First and Fifth Amendments. For example, net neutrality mandates that prevent broadband Internet service providers from blocking or discriminating against any content, or which require them to post or send any subscriber content presented to them, likely violate the free speech rights of the ISPs, speakers entitled to First Amendment protections. ISPs are entitled to be free from government compulsion to carry content they would prefer not to carry. It is well-settled that the First Amendment not only restricts the government from censoring speech the speaker wishes to convey; it also restricts the government from compelling speakers to convey speech that they would prefer not to convey or to be associated with messages with which they prefer not to be associated. (This same principle is relevant to the consideration of other FCC proposals, such as those that would mandate that broadcast licensees and other distributors of video programming engage in consumer education announcements that are, in effect, dictated by the government.)

Net neutrality mandates implicate property rights as well to the extent their practical effect is to require broadband ISPs to carry content on terms and conditions other than those they prefer. Net neutrality mandates require ISPs to incur costs expending network and associated resources to provide compelled access to third parties on government-mandated, not market, terms.

It is possible, based on a proper record, that the Commission would have authority to classify (or re-classify, as the case may be) broadband Internet providers as regulated common carriers rather than unregulated information services providers. But having relieved broadband ISPs of the Communications Act's common carrier requirements based on determinations of market competitiveness, it is questionable whether the Commission can now take actions which dictate how the capacity on the ISPs' networks —which, after all, constitute private property— must be used or the terms under which the costs incurred in building and operating those networks may be recovered.

Some of the actions that the Commission is considering with respect to cable operators are particularly insensitive to First Amendment values. For example, imposition of an a la carte mandate that would dictate the manner in which cable operators must

offer their programming fare to consumers, say, by mandating the option of subscribing to individually-priced channels, offends the operators' free speech rights. It is impossible to imagine it would be constitutional for the government to require the Washington Post or Newsweek to unbundle various sections of their newspapers and magazines and offer them on a separately-priced basis. In today's era of media abundance, it is no longer appropriate to think of the free speech rights of cable companies in a way that is fundamentally different than that of newspapers and magazines.

"Must carry" and leased access mandates for digital cable systems implicate the First Amendment just as analog-era must carry mandates did. While the Supreme Court in the 1994 *Turner Broadcasting System v. FCC* decision narrowly upheld the earlier "must carry" requirements against a First Amendment challenge, it acknowledged that the mandates presented a serious free speech issue. Ultimately, the decision upholding the rules rested heavily on the Court's assumption that cable operators exercised "bottleneck control" over video content coming into subscribers' homes. In today's competitive communications marketplace environment, that notion lacks persuasive force, assuming for the sake of argument it ever should have been sufficient to overcome cable operators' First Amendment rights.

And, like net neutrality, must carry and leased access mandates implicate property rights, ever more substantially as the justification for such compelled access regulation weakens and the extent and impact of the compelled access obligation grows. Cable operators have a Fifth Amendment interest in not having the government, absent a compelling interest, commandeer their private networks and turned them over to the use of others. Even in our digital broadband era, capacity is by no means limitless or cost-free. With competition among multiple platforms using different technologies, cable operators —as well as other broadband providers —should remain free to decide how to put their network facilities to the most economic use.

In a similar vein, the FCC's renewed interest in considering whether apartment and building owners should be prohibited from entering into or maintaining exclusive arrangements with broadband providers raises Fifth Amendment red flags. Before the government dictates with whom and under what terms owners of apartments and buildings can contract for access to private property, it ought to have a very compelling interest. If tenants are unsatisfied with the services provided --including not only the vending machines, washing machines, and food service, but also the communications services—won't the tenants move to a property they find more attractive, all things considered? Or does the Commission believe that the apartment and building owners possess monopolistic power, and, if so, that it possesses the authority to compel access based on that determination? Regardless of what one believes about the ultimate disposition of any case challenging the Commission's authority to regulate access to a building owner's property, this is another instance where the constitutional values at stake should point the Commission away from adopting a new pro-regulatory mandate.

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I understand that on the issues discussed above, and more, the existing state of constitutional jurisprudence does not always point clearly to one outcome only. Hazarding predictions on the outcome of Supreme Court decisions in communications cases is not the way I would want to earn my living. But the fundamental values that underlay the Constitution's separations of powers principles, the First Amendment's free speech clause, the Fifth Amendment's property rights clause, and other provisions, do point in clear directions.

Although Constitution Day comes around only once a year in a commemorative sense, every day should be Constitution Day in the halls of Congress and at the FCC. In thinking about the issues they confront, a good place for public policymakers to begin is to ask: "Are there constitutional values at stake, and, if so, which way does honoring those constitutional values point?" Communications policy would rest on sounder ground to the extent this question is asked and answered in proper fashion.

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