Remarks of Mark J. Prak

The Good Guys, the Bad Guys, & the First Amendment

(with Apologies to Fred Friendly)

Shaftesbury Society Luncheon

Monday, February 2, 2009

John Locke Foundation

Raleigh, North Carolina

(As Prepared for Delivery)

Thank you, Karen, for that kind introduction. It's my pleasure to serve as your guest speaker this afternoon.

My task will be to discuss government efforts to enforce "fairness" in the media of mass communication. It's a topic that I've spent a good deal of time on over the years. I've studied the topic as a student. I've taught college and law students about it. And I've litigated and advised clients about it as a lawyer. So, it may not come as a surprise to you that I have some opinions on the matter. I should note at the outset here, that my opinions on the topics that I will be discussing are just that: they're my opinions. They aren't necessarily shared by my clients or law partners. It's a diverse world, don't you know.

Before I get into my discussion of the Fairness Doctrine, I do feel that I should take just a moment to mention the most pressing issue in television today—the upcoming digital transition. As you may know, the broadcast television industry is scheduled to permanently

change transmission systems from analog to digital on February 17, 2009. That's only two weeks or so hence. It's a change that's been in the works for over 11 years now.

Wilmington, North Carolina, made news last fall when it was the first market in the United States to make the DTV switch.

One of my partners is fond of saying that there are three things with which one should not mess. They are: 1) another man's wife; 2) another man's dog; and 3) another man's TV set. In order to generate $20 billion plus for the U.S. Treasury and free up spectrum for public safety, the government is doing just that. So, now that the deadline is drawing near, folks on Capitol Hill and at the FCC are getting nervous. Very nervous. Congress is considering and likely to pass legislation to move the digital transition date from February 17 to June 12th. Truth be known, the folks running television stations are feeling a bit frustrated right now. You see, Congress changed the law in 2005 to set February 17, 2009 as the date certain for the transition. Now they want to make the date uncertain or at least to push it off a bit. Welcome to Washington!

I'm fairly confident that broadcasters are ready to do their part whether the transition occurs on February 17th or June 12th. The picture quality of the new digital transmission system is fantastic! Particularly for sports and movies. And, I'll offer you a tip in case you are unaware of it. The purest form of television reception you can receive is a free-over-the-air, unprocessed, digital signal delivered over a roof-top antenna and connected to a new high definition TV set. The signal is either all there or not there at all. There's no fuzziness or wavy reception. Signals delivered by satellite, cable or telephone company pay video services are

excellent as well. But, they are processed signals and, as such, their quality is a bit degraded when contrasted with a pure over-the-air digital signal. For the true videophile, only an over-the-air signal will do.

Well, that's enough about the DTV transition. Stay tuned for the outcome of the date change vote this week.

The President wants it and I suspect Congress will oblige him. But, we'll see.

* * *

Let's move on to the topic of government attempts to promote "fairness" in the mass media. If you are old enough, you may remember the Fairness Doctrine. The Doctrine was instituted in 1949 in the early days of radio and ended by the FCC - over 20 years ago - in 1987. The Doctrine required radio and television stations to do two things. First, stations had to seek out and broadcast information about controversial issues of public importance. And second, stations were to give fair and roughly balanced exposure to all points of view on such controversial issues. Policy makers were concerned that because access to broadcasting was artificially limited by the government's licensing system and the scarcity of the radio spectrum, citizens should not be exposed to only one point of view about controversial issues. After all, in those times, it was a tenet of good journalism that news ought to be reported in an objective fashion. It is also true that in the early days of broadcasting, fascism was on the march in Europe and its proponents were using mass media to propagandize and nurture that cause. After the Second World War, the country's fears would turn from fascism to focus on

communism. Nonetheless, since broadcasters receive a quasi-exclusive privilege from the government, they are regarded as public trustees of important societal assets.

Those who favor reinstituting the Fairness Doctrine would make some of the following arguments. It's just good journalism anyway. Debate will be more well-mannered and factual if it is "fair." There will be less overblown rhetoric. It's a modest counter-balance to unbridled editorial discretion by broadcasters. It will create more speech about public issues. Since not everyone can speak on the air, broadcasters should make sure that everything worth saying about controversial issues is said. In short, the Doctrine's proponents believe that the Fairness Doctrine would be a public good by serving what they say is the "purpose" or "spirit" of the First Amendment.

The heyday of the Fairness Doctrine was in the 1960's, and it's fair to say that both Democrats and Republicans employed the doctrine as a blunt political instrument to try to inhibit their ideological competitors. The Kennedy, Johnson and Nixon administrations all attempted to use the Fairness Doctrine to intimidate and harass political opponents. If you are interested in more background on the political history of the Fairness Doctrine, I refer you to Fred Friendly's book *The Good Guys, the Bad Guys, and the First Amendment: Free Speech vs. Fairness in Broadcasting*.[1] Friendly's book, published in 1976, contains interviews with staff members who served in the White House under each of those Presidents and discusses their efforts to employ the Doctrine to their administration's political advantage. And, frankly, there's nothing shocking in all this. It's the history of the world that people in power use power to remain in power and facilitate their own ends. And, if history proves anything, it's that

politicians of all stripes will abuse power. Our founders recognized this. As James Madison said, "whenever there is an interest and a power to do wrong, wrong will generally be done."[2] Those who see virtue as existing on only one side of the political spectrum need to step back a bit and undertake an honest survey of the grand sweep of history.

The Supreme Court upheld the Fairness Doctrine in its 1969 *Red Lion* decision. In *Red Lion*, the Supreme Court said that a radio station in Pennsylvania which aired a syndicated program by a minister who attacked a reporter as "a professional mudslinger" could be compelled to give the individual attacked notice and an opportunity to rebut the attack. The reporter, in turn, had been critical of Barry Goldwater's presidential campaign. Under the rule in effect at the time, calling the reporter a "professional mudslinger" was considered a personal attack and thus required the reporter to be given notice and an opportunity to respond on the air to the attack. The reporter ultimately pressed his case to the Supreme Court and prevailed.

Writing for the court, Justice White asserted:

> "Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish. . . . Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount."[3]

In fashioning its decision, the Court did not regard Congress and the FCC's ability to regulate broadcast speech about controversial issues as absolute. Instead, the Court recognized the fact that broadcasting was continuing to mature as a medium, noting that "given the present state

of commercially acceptable technology"[4] the medium must be regarded as scarce. The Court went on to offer an anchor-ahead to the future, noting: "if the experience with the administration of ... [the Fairness Doctrine, Personal Attack Rule and Political Editorializing Rule] indicates that they have the net effect of reducing rather than enhancing the volume and quality of coverage, there will be time enough to reconsider the constitutional implications."[5]

In 1985, the FCC did just that. During the Reagan administration, the FCC accepted the Supreme Court's invitation to reconsider the efficacy of the Fairness Doctrine. The FCC's study concluded that the Fairness Doctrine created a danger of politically motivated intimidation of broadcasters by government officials.[6] The Commission also determined that broadcasters would avoid airing political opinion and would restrict coverage of some controversial issues in their newscasts rather than subject themselves to FCC proceedings with their attendant legal expenses, liability for fines, and possible license revocation. In short, the Fairness Doctrine Report concluded that the policy's existence lessened the quantity of "diverse views in broadcast programming";[7] inhibited broadcasters from distributing expressions of "unorthodox opinion";[8] put government officials into the "intrusive and constitutionally unfavored role of scrutinizing broadcast content";[9] imposed "unnecessary economic costs on broadcasters in the Commission";[10] and was not necessary given the "increased number and type of information sources."[11]

At the time of the 1985 Fairness Report, Congress was controlled by the Democrats. In anticipation of the repeal of the Doctrine by the Commission, Congress passed the Fairness in Broadcasting Act of 1987, which would have required broadcasters (and cable operators as

well) to abide by the Fairness Doctrine.[12] The Fairness Doctrine has never applied to cable, telephone, satellite or the internet. President Reagan vetoed the bill as inconsistent with the First Amendment.[13] Shortly thereafter, the FCC repealed the Fairness Doctrine.[14] It took a little longer, but a few years later the DC Circuit Court of Appeals compelled the Commission to eliminate the Personal Attack Rule and Political Editorial Rule as well.[15]

Periodically over the last 20 years, legislation has been introduced looking to revive the Fairness Doctrine. After all, it's pretty hard to be against "fairness." From a political point of view, folks on the left of the political spectrum get as fired up about it as some on the right do about "indecent" speech. I'm quite sure that some of the proponents of fairness enjoy tweaking their ideological competitors. Some radio hosts like to "tout" the issue as an impending crisis. But let me share with you why I am opposed to the reintroduction of the Fairness Doctrine and why I think proponents of the Fairness Doctrine would be unwise to insist upon its reinstatement.

Now, I need for you to indulge me in a digression or two here. I want to give you a short course in First Amendment jurisprudence. One of the interesting things about our First Amendment is that we have different standards for different media.[16] The Supreme Court has made clear in numerous cases that differences in the characteristics of media justify differences in the First Amendment standards applicable to them.[17] So, for example, newspapers and other print media would be at one end of a continuum labeled "most free" while other media, such as sound trucks, movies, radio, television, cable television, satellite television, and telephone are judged by different standards. To simplify, government has very little power to

interfere with the content of a print medium. Cable, satellite and the Internet have been treated more like print than broadcasting.[18] Broadcasting has historically been the least "free" of the media.[19] Agencies of government are given more deference when it comes to regulating media other than newspapers.

Our First Amendment jurisprudence has developed in this fashion with the Supreme Court creating different analytical silos for different media. And, I suppose, on balance, this approach has worked reasonably well. But the approach poses its own challenges. And technology is now forcing us to face them. Some of the justifications offered for permitting content regulation of broadcast media have proven a bit stale, and even facile. Over time, technology is creating a convergence of communications systems. Intellectually, this requires academics, lawyers, and judges to search for new rationales to justify old regulatory patterns. And, as I tell my students, technology can be a powerful and disruptive legal force of its own. The internet is forcing all media to re-evaluate how we deliver content to consumers. Today, any citizen with a point of view can speak to the world with very little expense. That wasn't true in 1969.

Of course, the original disruptive technology was the printing press. When Gutenberg published his Bible, the most prevalent political system in the world was kingships. Kings ruled by divine right. The king (or queen) usually had at his right hand a priest who made sure to explain to the people that it was God's will that the king was king. Then Gutenberg's Bible was published and every man was a priest. It didn't take long for folks to start questioning the legitimacy of rule by kings. And, ultimately, modern democracies were born. We have such a

republic here in the United States if, as Ben Franklin once said, we can keep it.[20] And much of our First Amendment jurisprudence has developed as a reaction to abuses promulgated by English kings. Our First Amendment provides, among other things, that "Congress shall make no law abridging . . . freedom of speech or of the press.[21] It has been interpreted to make clear that prior restraints on the publication are anathema. The point is straight-forward. Citizens should be allowed to say what they wish to say but may be held responsible after the fact for harm caused. North Carolina's state constitution makes this plain. "Freedom of speech and of the press are two of the great bulwarks of liberty and shall never be restrined, but every person shall be responsible for their abuse." So says of North Carolina's constitution.[22] So we have tort actions for libel, slander, and invasion of privacy. But when some national newspapers got hold of a classified academic study of our nation's history of military involvement in Vietnam and wanted to publish it, the government went to court, claiming the national security would be compromised by its publication. And, in the Pentagon Papers case, the Supreme Court rejected the proposed prior restraint on speech.[23] The theory is that in an open marketplace of ideas, the people have the right to determine which ideas are true, which ideas are false, or if it's not that simple the people are permitted to make up their own minds as to who has the better of the argument.

Back to the Fairness Doctrine. The Fairness Doctrine was viewed as a modest means of the government putting its thumb on the scale to insure that the American people were not left uninformed about important issues.

At the time the Fairness Doctrine was implemented, radio and television were in their infancy. By 1987, when the Fairness Doctrine was eliminated, radio and television had grown substantially, but cable was just beginning to grow and the internet did not exist. In 2009, of course, the internet is in its ascendency and newspapers are waning.[24] Cable and telephone companies now compete in delivering video, telephone and broadband services. Indeed, one might argue that today newspapers are becoming relatively more scarce than websites. Radio and television continue to be vibrant, but like all other advertising-related businesses are suffering in the current economic downturn.

Since 1987, the internet has come to the fore. What started out as ARPANET, a government program to allow Defense Department employees to communicate with one another has now become a widely-used and rapid world-wide network and information system. And, as we all know, the internet is profoundly affecting existing media businesses. From a jurisprudential point of view, however, the internet is creating some problems with the old analytical silos. Neat and tidy analytical divisions between electronic media and print media are no more. The Supreme Court has indicated that the internet should be judged by a standard of review similar to print, notwithstanding the fact that it's an electronic medium.

In 1996, Congress attempted to impose an indecency rationale on the internet similar to that imposed on broadcasting.[25] The roots of the power Congress was claiming to regulate pornography on the internet was rooted in the same basic logic as the Fairness Doctrine. And the Supreme Court rejected it.[26] Now the Supreme Court did not reject the Fairness Doctrine as applied to the broadcast media, of course. The Court simply said that the regulatory philosophy

underlying the Fairness Doctrine and the system of broadcast regulation did not apply to the internet. So, in today's world of media convergence, all media is electronic and we can expect more arguments about how and whether such media should be regulated. One of the major points that I hope you'll take away from my talk today is that the dispute about the Fairness Doctrine is largely a difference of opinion over the need for freedom of speech versus government control of speech. Speech can either be free or it can be controlled, but it can't be controlled by the government and be free. Speech can be free and possibly unfair or hateful, or controlled and fair and balanced in the eyes of the government.

There are four basic reasons to oppose the reintroduction of the Fairness Doctrine. First, it is fundamentally offensive to the editorial freedom protected by the First Amendment. Second, it didn't work the first time we tried it. Third, the growth and development of the First Amendment since the Doctrine's elimination over 20 years ago would make implementation of a "Fairness Doctrine" unnecessarily complicated. Finally, reimposition of a Fairness Doctrine might yield unintended consequences.

Let me discuss these points in a bit more detail.

The first point is, I think, fairly obvious. The First Amendment says that Congress shall make no law abridging freedom of speech or freedom of the press. There is not much question to my mind that the First Amendment is a restriction on government. It is not a license for the government to regulate private citizens' speech under the guise of promoting the "purpose," or "spirit" of the First Amendment. The First Amendment exists to keep the government out of the business of editorial judgments about what should or shouldn't go into a newspaper or be

broadcast on a radio or television station. One could, I suppose, adopt the point of view that since radio and television were developed subsequent to 1787, that they are simply not covered by the First Amendment. The Supreme Court initially made a misstep of this nature in interpreting the Fourth Amendment when it first held that warrantless wire-tapping of private telephone conversations was not protected by the Fourth Amendment.[27] But the Supreme Court ultimately took an interpretive approach to the Fourth Amendment which requires that a warrant be secured in most cases before wire-tapping a private phone conversation.[28] The problem with this argument is that it proves too much, for at this point, only newspapers existed in 1787 and all of our other current communication technologies post date the First Amendment.

A second reason counseling against reimposition of the Fairness Doctrine is that, in my experience, the Doctrine engendered mostly lifeless debate and actually inhibited coverage of controversial issues. In short, it operated as a prior restraint by inhibiting controversial speech by attaching a price to it that many broadcasters were unwilling to pay. It simply did not work. It did not yield the policy outcomes touted by its proponents. **[Tell Radio Station WHAT story from 1976; Patsy Mink; O.D. Hagedorn]**[29]

The growth of the First Amendment's doctrine prohibiting "forced speech" is another significant jurisprudential problem. In a series of cases that post date *Red Lion*, the Supreme Court has held that government may not compel citizens to speak about political matters in a fashion inconsistent with the citizen's wishes.[30] So, for example, in 1977 the Supreme Court held that a man residing in New Hampshire, could not be compelled to drive a car with a state-

issued license plate proclaiming "live free or die."[31] There would be a problem today with the FCC reading the Communications Act in such a way as to create an unnecessary conflict with a broadcaster's editorial discretion. The same would be true for a congressionally-imposed Fairness Doctrine, though, of course, Congress would be given greater deference than an administrative agency by the Supreme Court.

For the government to compel a broadcaster to speak about a controversial issue of public importance in a way that the broadcaster believes, in the exercise of its good faith editorial judgment, it does not wish to speak, is a different First Amendment problem in 2009 than it was 40 years ago in 1969. It is no answer to say that the broadcaster accepts such a condition as a condition of his license if it is possible for the Commission to achieve its goal in a less restrictive way. This, too, is an area where the law has changed substantially in recent years and our new President, who you will recall has served as a constitutional law professor, understands this, I suspect. One of the tenets of President Obama's announced communications policy is to attempt to employ technology to empower parents to protect their children from exposure to materials regarded as age-inappropriate. The use of filtering technology, ratings systems, lockbox channel selectors and the like, are all examples of how technology may be used to restrict access to materials by persons of tender years. And the Supreme Court has been quite emphatic that where such technologies exist, the government may not opt for a more over-inclusive speech restrictive legal regime.[32] Today we enjoy a much more vibrant and competitive marketplace of ideas than at any time in our history.

At the end of the day, for better or worse, editing is what editors are for. And editorial judgments are better made by broadcasters than by bureaucrats. It really does boil down to a simple question of whether one believes in freedom or government control. As for me, I'll take freedom every time. Freedom is sometimes messy. And, on occasion, we end up with speech that's not very productive and that we may not personally place much value on. Nonetheless, it's not possible to limit freedom without losing it. And, on balance, I would rather deal with some of the speech I don't particularly care for than lose the freedom we currently possess. No one who has been the subject of harsh criticism in the press—whether print or electronic—is without criticism for editorial decisions made by news editors whether print or broadcast. But, as Thomas Jefferson, writing to Dr. James Currie about John Jay's mistreatment by the newspapers of his day, insightfully noted:

"In truth, it is afflicting that a man (John Jay) who has passed his life in serving the public, who has served them in the highest stations with universal approbation and with a purity of conduct which has silenced even party approbrium; who though poor has never permitted himself to make a shilling in the public employ, should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is, however, an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. To the sacrifice of time, labor, fortune, a public servant must count upon adding that of peace of mind and even reputation."[33]

I should also say that I am wary of those who claim that they are only interested in advancing "the spirit" or the "highest values" of the First Amendment. I am wary of such people in the same way that the residents of Troy should have been wary of Greeks bearing gifts. These folks profess to want to make the world a better place, but the better place they have in mind is one that values their own view of order higher than they value freedom for you and me. For example, only last week, some of the same lawyers who are proponents of the Fairness Doctrine filed a petition with the FCC asking the Commission to conduct an inquiry on the topic of so-called "hate speech" in the mass media.[34] Their view is that "hate speech" is on the increase and must be stopped at all costs. Of course, what they regard as "hate speech" is simply speech with which they disagree.

Here's an example of what the petition claims is "hate speech": And I quote here: "And this is all under the Gavin Newsome administration and the Gavin Newsome policy in San Francisco of letting underage illegal alien criminals loose."[35] If that's "hate speech"....well, I think you get my point. There's a serious definitional problem in being able to define speech with which you disagree as "hate speech." According to the petition, the sentience I quoted is "hate speech" because it targets "vulnerable" groups and social institutions; because it alleges what they claim are "false" facts and employs "flawed argumentation" and "divisive language."[36] Those value laden adjectives sound like they just might be "in the eye of the beholder."

Seriously, I'm not making this stuff up. By this standard, this crowd would have a movie like *Gran Torino* and its howlingly funny barbershop scene censored as "hate speech." In fact, I

suspect all of Clint Eastwood's movies would have to be retroactively classified as "hate speech" because Clint's style of dealing with bad guys is...well, how shall I put this?...relatively speaking, impolite.

Let me be clear, I am not an apologist for bad language or racist speech. But, I'd rather suffer through some speech I don't like, than see freedom lost. Like Thomas Jefferson, I don't see how those things can be limited without our freedom being lost, and I'm perfectly content with other methods that are available for dealing with speech we abhor. The Supreme Court has made it quite clear that, absent a true threat, so-called hate speech may not be regulated by government.[37] Let me say that again. Absent a true threat, it's none of the government's business whether somebody writing in the free expression tunnel at NC State University engages in speech that another member of the community may not like. Whether it's an over the top anti-Obama rant or a classless defacing of a memorial to Coach Kay Yow. I would think liberals might appreciate the point. After all, they've been exercising their freedom to attack former president Bush for well over six years now. I have to say that I've been amazed to hear some contend recently that so-called racist "hate speech" against members of a minority race is somehow qualitatively more hurtful than allowing members of the American Nazi Party to parade down a street in Skokie, Illinois, where survivors of German concentration camps were still living with numbers tattooed on their arms. The idea that one group's pain is somehow superior in hurt to another's is not one that I find persuasive.

In any event, the problems presented by governmental efforts to enforce 'fairness" are many. If we are going to let the government second guess editors, we have to ask how would

the government put such a policy into effect? How would such a policy be enforced? What would be defined as controversial issues of public importance? Who will define what the issue is? Who will decide which points of view should be presented? Who will decide who should present the opposing points of view? How much time should be allowed for each opposing view? What time of day should they be broadcast? Should the Fairness Doctrine be applied to all media? To the internet? To cable television? A significant reason counseling against a return to government enforced "fairness" in broadcasting is that in today's media environment, a citizen who wishes to make his or her views known can do so in minutes with world-wide reach and little expense.

Another factor for the latter day proponents of the Fairness Doctrine to consider is the problem of unintended consequences. Sometimes, it's a dangerous thing for those in charge of the government to overreach by pushing too hard. Let me give you an example: the FCC has played an important role in the transition of our country from an old system of cultural apartheid to an integrated society. After the assassinations and riots of 1968, the Commission made a concerted effort to promote equal employment opportunity in the field of broadcasting.[38] But in 1997, the FCC made an ill-advised decision to fine the Lutheran church $25,000 because of a purported lack of candor in discussing why there were no minority employees at the church's classical music station in Missouri.[39] The church had not engaged in any discriminatory conduct or behavior. Instead, the FCC, spurred by interest groups, found that the church's policy of requiring some familiarity with both classical music and Lutheran doctrine to fill a position as a receptionist somehow had the effect of being discriminatory against minority groups. Had the Commission simply issued a letter of warning or a more

modest fine, perhaps nothing would have come of it. But $25,000 is a significant sum of money and the church hired a lawyer to challenge the Commission's EEO rules. Ultimately, in 1998, a reviewing court took issue with the Commission's espoused purpose for its EEO rules, that of influencing the content of programming on the station.[40] The church noted that it didn't rely upon its receptionist for decisions about programming, and the Commission's EEO rules were dealt a serious legal blow.[41]

My point in mentioning this problem is that our First Amendment jurisprudence is not static. And the danger for the interest groups who might like to see the Fairness Doctrine reinstated is that other Commission rules imposing program content obligations on broadcasters could be undercut by a court challenge to a new Fairness Doctrine. The point is simple. Among other things, if one cares about preserving the government's ability to collect $42 million in cost of regulation fees per year from the broadcast industry; compelling broadcasters to broadcast three hours of children's programming each week; requesting the inclusion of closed-captioning and program ratings in their programming and ensuring that broadcasters sell political ads to politicians at discounted rates, perhaps one should think twice about reimposing the Fairness Doctrine. A court challenge to a new Fairness Doctrine could undercut other aspects of the broadcast regulatory system as well. It's no secret that while the *Red Lion* case is good law today, the case contains the seeds for its own review and possible reversal. Proponents of "fairness" would do well to consider the potential unintended consequences of such an effort.

Finally, I am not sure that those who might like to reimpose the Fairness Doctrine as a way of taking a swing at talk radio would like to see websites like The Daily Kos or the Huffington Post subjected to a new and improved Fairness Doctrine requirement for "pop up" ads conveying an 'opposing" view. Seriously, that's been proposed by some offended by internet content. At the end of the day, the Fairness Doctrine was an administrative rule that has outlived its time and any attempt to resurrect it would be fraught with mischief for liberals and conservatives alike. It's simply not possible for the government to effectively edit a newspaper, magazine, radio show, television news program, cable television program, or satellite or telephone delivered video either. As our present economic circumstances demonstrate, the government has enough challenges without trying to take on the roll of editing radio and television.

***

Thank you for your attention.

I'll be happy to take a few questions.

End Notes

1. FRIENDLY, FRED, The Good Guys, the Bad Guys and the First Amendment: Free Speech v. Fairness in Broadcasting (Random House 1976).

2. James Madison quoted in ROBERT A. GOLDWIN, From Parchment to Power: How James Madison Used the Bill of Rights to Save the Constitution 70 (American Enterprise Institute 1997).

3. Red Lion Broad. Co. v. FCC, 395 U.S. 367, 368-390 (1967).

4. Id. at 388.

5. Id. at 392.

6. *In the Matter of Inquiry into Section 73.1910 of the Commission's Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees*, Report, 102 F.C.C. 2d 142, § III.E (1985).

7. Id. at § III.B.

8. Id. at § III.C.

9. Id. at § III.D.

10. Id. at § III.F.

11. Id. at § III.G.

12. Fairness in Broadcasting Act, S. 742 & H.R. 1934, 100th Cong., 1st Sess. (1987).

13. Library of Congress web site, http://www.thomas.gov/cgi-bin/bdquery/D?d100:742:./list/bss/d100SN.lst::|TOM:/bss/100search.html|

14. *In re Complaint of Syracuse Peace Council against Television Station WTVH*, Memorandum Opinion and Order, 2 F.C.C.R. 5043 (1987), aff'd, Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989).

15. Radio-Television News Dir. Ass'n v. FCC, 184 F.3d 872 (D.C. Cir. 1999).

16. See Red Lion Broad. Co, 395 U.S. at 386-87 (citing Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952)).

17. See FCC v. Pacifica Found., 438 U.S. 726 (1978); Red Lion Broad. Co, 395 U.S. at 386-87; Joseph Burstyn Inc., 343 U.S. at 503; Kovacs v. Cooper, 336 U.S. 77 (1949).

18. Reno v. ACLU, 521 U.S. 844, 868-69 (1997).

19. Id. at 865-66.

20. Ben Franklin, as quoted by Dr. James McHenry in 11 The American Historical Review 618 (1906).

21. U.S. CONST. amend. I.

22. N.C. Const. Art. 1, Sec. 14.

23. New York Times Co. v. United States, 403 U.S. 713 (1971).

24. See, e.g., Starr, Paul, "Goodbye to the Age of Newspapers (hello to a new era of Corruption)," The New Republic, March 4, 2009.

25. Communications Decency Act of 1996, Pub. L No. 104-104, 110 Stat. 133 (1996).

26. Reno, 521 U.S. 844.

27. Olmstead v. United States, 277 U.S. 438 (1928).

28. Katz v. United States, 389 U.S. 347 (1967).

29. *In Re Complaint of Rep. Patsy Mink et. al. Against Radio Station WHAR*, Memorandum Opinion and Order, 59 F.C.C. 2d 987 (1976).

30. See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (held that application of Massachusetts' public accommodation law, which prohibited discrimination on basis of sexual orientation, to require plaintiffs to include expressive content to which they objected in their parade violated First Amendment); Wooley v. Maynard, 430 U.S. 705 (1977); Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) (held that First Amendment prohibited union and board of education for requiring teacher to contribute to support of an ideological cause he might oppose as a condition of holding a job as a public school teacher); Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974) (held that Florida statute requiring newspapers to afford free space for political candidate to reply to article attacking the character of that candidate violated First Amendment).

31. Wooley v. Maynard, 430 U.S. 705 (1977).

32. Reno, 521 U.S. at 879.

33. 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954).

34. *In the Matter of Hate Speech in the Media*, Petition for Inquiry Filed on Behalf of the National Hispanic Media Coalition (January 28, 2009).

35. Id. at Appendix A.

36. Id. at 11.

37. See, e.g., Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). See also: National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977).

38. *In the Matter of Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C. 2d 766 (1968); *In the Matter of Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in Their Employment Practices*, Report and Order, 18 F.C.C. 2d 240 (1969).

39. *In Re Applications of the Lutheran Church/Missouri Synod*, Memorandum Opinion and Order, 12 F.C.C. Rcd. 2152 (1997).

40. Lutheran Church-Missouri Synod v. FCC, 141 F.3d 344 (D.C. Cir. 1998).

41. Id. at 356.