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Swallows, Sausages, and the 1996 Act

Daniel B. Phythyon*

In an annual ritual that rivals the swallows' return to Capistrano in regularity, if not longevity, February in Washington is heralded by a flock of commentary on why the Telecommunications Act of 1996 ("1996 Act") is not living up to expectations. It is a privilege to participate in this rite on the 1996 Act's tenth milestone. In keeping with this theme, however, I should also note that this year marks the 191st anniversary of the birth of Otto von Bismarck, who is credited with perhaps the sagest observation ever uttered on the legislative process: "If you like laws and sausages, you should never watch either one being made."¹

The *Federal Communications Law Journal's* ("Journal") invitation to submit an Essay for this occasion referenced my former position as Chief of the Federal Communication Commission's ("FCC") Wireless Telecommunications Bureau. While I do not intend to suggest that the 1996 Act is irrelevant to the wireless industry, it does not loom nearly as large as, say, the Omnibus Budget Reconciliation Act of 1993 ("OBRA"),² which has been far more significant in shaping the growth of the wireless industry. Indeed, many legislative advocates hold up OBRA's light regulatory touch as a model for Congress to follow in establishing a new framework to govern broadband and other modern communications services. Given the topic of this issue of the *Journal*, my time as the head of the FCC's Office of Legislative and Intergovernmental Affairs ("OLIA"), a position I had just assumed when the 1996 Act passed, probably is much more pertinent.

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1. Wikiquote, Otto von Bismarck, http://en.wikiquote.org/wiki/Otto_von_Bismarck (last visited Apr. 3, 2006).

2. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, 107 Stat. 312 (1993).

The Republican Revolution of 1994 generated a number of quite serious proposals to eliminate the FCC, including some recommendations by the Speaker of the House,³ and the FCC was still laboring under that cloud in 1996. When the 1996 Act passed, there was considerable anxiety inside and outside of 1919 M Street in light of the crushing workload that was about to be dumped on the FCC. One of my first tasks as head of OLIA was to shepherd a delegation of bureau chiefs and other senior staff to the Hill for a series of meetings with the key House and Senate staffers who had drafted the bill. Our goal, in part, was to communicate that we would not fumble the handoff—that the FCC was more than up to the job of implementing the legislation.

Our very first meeting on the Hill, however, turned out to be the last for these purposes. The session quickly devolved into a heated debate among the legislative staffers, and it soon became evident that these staff members could not have been farther apart on the intent of a number of important provisions of the new law and how they should be implemented. I left the Hill thinking that if the staffers who were closest to the legislation—all of them smart, capable, and experienced—were in such vehement disagreement on the basics of what Congress had enacted only days before, then what chance did the FCC have to get it right?

Ten years of hotly contested rulemakings, rounds of litigation, and reams of analysis⁴ later, we should simply acknowledge that no one got it right. It is time to be done with our navel gazing on what went wrong, and move ahead to the enactment of new legislation—call it a rewrite, broadband reform, or whatever you like—that can accommodate a telecommunications marketplace that is quite different from the one contemplated by the 1996 Act.

And our chances of producing a more lasting legislative product than the last time around? Not good, as Bismarck's immortal comment suggests. Nonetheless, in the spirit of better sausage-making, I have a few suggestions.

First, let's ban any talk of the "level playing field." Wasn't everyone sick to death of this cliché long before final passage of the 1996 Act? There is no good reason to use it during this next round, especially since what

3. Neil Hickey, *Revolution in Cyberia*, COLUM. JOURNALISM REV., July/Aug. 1995, <http://archives.cjr.org/year/95/4/cyberia.asp>.

4. Perhaps this Issue of the *Journal* can spawn a new drinking game for dissolute law students: the first player reads from the *Journal* aloud, and when an author cites Justice Antonin Scalia's denouncement of the 1996 Act ("[it] is not a model of clarity. It is in many important respects a model of ambiguity or indeed even self-contradiction."), the player takes a drink and passes the *Journal* to his left. *AT&T Corp. v. Iowa Utils. Bd.* 525 U.S. 366, 397 (1999).

industry players actually want is a fair advantage over their competitors.

Not all clichés should be banned, however, because truisms are often true—especially the one about how legislators and regulators can never hope to keep up with the pace of technological developments. In 1996, none of us had a clue of what the market would actually look like today, and our predictions of what the market will look like ten years from now will prove to be no more accurate. Thus, let's find a legislative framework that will allow plenty of room for all of us policy experts to be completely blindsided by new technologies and services and prepare to reform that framework again after a decade or so.

Next, let's not believe our own press releases. Much of the annual bashing of the 1996 Act is surely due to the unrealistic and extravagant claims we made for it. Today, it is difficult to read many of the statements that were made at and around the signing ceremony⁵ without cringing. This time, let's not act like we are curing cancer or building the legislative equivalent of the Taj Mahal.

And whatever vision you may have for the new legislation, do not expect the FCC to take your word on what the law *really* means if it is not clearly spelled out in its provisions or at least in the legislative history. Keep in mind that no one at the FCC will have followed the minutia of the legislative process as closely as the combatants. As a result, the FCC will be blissfully ignorant of the statement Representative Smith made in a private meeting two years earlier, which “proves” your point of view. Furthermore, having Representative Smith repeat this in a letter to the FCC years after enactment will not be helpful either, especially since this is bound to be contradicted by the letter that Representative Jones sends.

Finally, do not mothball your fleet once the new legislation is enacted. Some of the people who worked at MCI are still bemoaning the fact that their bosses beat their swords into plowshares following the passage of the 1996 Act. While no corporate headquarters actually enjoy having to maintain Washington offices, a signing ceremony is the worst time for the bean counters to reduce these perceived drains on the bottom line. The enactment of a telecommunications law is not the end of the war—it is simply the shift of the conflict to a different front. In other words, any savings on legislative lobbying will be quickly eaten up by regulatory and litigation expenses. Besides, a decade later . . .

And with that, I am eagerly anticipating the *Journal's* tenth anniversary rehash of the Broadband Reform Act of 2008.

5. (Don't) See Remarks by President Bill Clinton and Vice President Al Gore at Signing of Telecommunications Reform Act of 1996, FEDERAL NEWS SERVICE (Feb. 9, 1996).

