ON THE 40th ANNIVERSARY OF THE FEDERAL COMMUNICATIONS COMMISSION

REMARKS BY

DAVID L. BAZELON, CHIEF JUDGE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

FEDERAL COMMUNICATIONS BAR ASSOCIATION DINNER
SHERATON-PARK HOTEL, WASHINGTON, D.C.

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Mr. Porter, Chairman Wiley, Senator Pastore, Ladies and Gentlemen of the Communications Bar:

It is a distinct honor to attend this dinner as a representative of the Judicial Branch, although I doubt very much whether my views on telecommunications law are representative of my circuit, the Federal judiciary as a whole or even of the prevailing sentiment in this room. I do bring you the greetings of my colleagues on the United States Court of Appeals for the District of Columbia Circuit and their congratulations to the FCC and the Communications bar for your 40 years of service to the nation. As you know our Court at present is the sole forum for appeals from FCC licensing decisions and this has brought us into contact with many of you here tonight. This has always been a friendly relationship but not always one of perfect agreement. It is like the Arkansas moonshiner, who had been convicted numerous times and was once again before the Court. The judge told the culprit sternly, "Before passing sentence, I want to tell you that you and your sons have given this Court more trouble than anyone else in the whole State of Arkansas. Have you anything to say?" The old fellow thought a moment and said, "Well, Judge, I just want to say that we haven't given you any more trouble than you've given us."

Much of the criticism of the FCC over the past 40 years is not really directed at the Commission so much as it is directed toward the next to impossible task the Commission was required to execute. Given no standards for decision and only the broadest outline of a regulatory mandate, the Commission was ordered to license and regulate the infant

telecommunications industry "in the public interest, convenience and necessity." Not the most simple task ever devised by the mind of man! So it is a tribute to the Commission and the Communications bar that the problems we face today are problems of affluence, the problems of having survived the basic test of whether a workable order can be attained and of now being confronted with the much tougher, intractible choices of where to go from here. Upon the resolution of these problems depends not the existence of a high quality telecommunications system but rather its increasing perfection. We deal with such problems out of our sense of higher challenge, not out of our sense of basic order.

In short, we are now confronted in telecommunications law with the problems of the second generation. The first generation has erected a telecommunications system unparalleled in the world, a system whose technological achievements and entertainment and educational capacity boggles the mind. The second generation must stand in recognition of the accomplishments of the first generation. But we would do well to temper our respect with a healthy critical response. Our posture reminds me of the overdone but instructive story of the pilot who comes over the intercom to inform the passengers that he has some good news and some bad news. The good news is that they have just broken all speed records for passenger aircraft and they are presently travelling at a phenomenal rate of speed. Now for the bad news: "We don't know where we are!" We have made gigantic technological advances in the telecommunications but we either don't know where we are or, if we do, some of us don't want to go there.

My main concern with "where we are" at present relates to the First Amendment and the current FCC regulatory structure. Our traditional First Amendment faith has been that by encouraging the widest possible unrestricted expression of views, we would produce more diversity of ideas than if the government chose who should speak and on what subjects. However, as the first generation erected a workable system of telecommunications law -- bringing order out of the chaos of the twenties -- this traditional faith was displaced by a feeling that the power of certain speakers was such that they should be required to present more than their own view of public events and human achievement. In short, the immense power represented by television communication placed our traditional view of the First Amendment under severe pressure. Under this pressure, courts and the FCC moved away from traditional First Amendment concepts to accommodate government attempts to control the power of television. In the very few minutes I have here this evening, I cannot fully explore the various aspects of this power, except to say that much has been written about it. All the resulting rhetoric, however, does not convince me that we even now fully comprehend the impact of television on our lives.

The power of television is commensurate -- and I do not think I exaggerate in the least -- with the power to produce atomic energy and the power to modify human conduct by use of bio-behavioral controls. I recently had occasion to address my old friends, the American Psychiatric Association, concerning the perils of bio-behavioral controls. I did not

speak to them about the blessings that will emerge from the use of bio-behavioral controls. And I do not speak tonight about the blessings that will emerge from the use of television as a human communications tool. The blessings are, I think, self-evident to those engaged in broadcasting and in bio-behavioral research. It is the perils of these new forms of wizardry which, I fear, will be overlooked in the excitement to exploit new discoveries. Thus it is that the potential evils of the power of television require great sensitivity on the part of the programming executives and their clients, the advertisers. And from a diligent inquiry into the potential evils of television can come the conception of media responsibility which will ultimately save the First Amendment from the pressures which threaten it today.

As lawyers, we know that there are always some understandable, if not legitimate, pressures on the traditional view of the First Amendment. In the field of broadcasting, these pressures have been, as I have indicated, partially successful in altering the traditional view of the First Amendment. Such pressures in the broadcast field are not specious. They represent serious concerns to which in most circumstances the government would feel duty-bound to respond. I think that many of us as members of the bench and bar would be willing to walk more than an extra mile to resist those pressures and to uphold the traditional view of the First Amendment. But one may question whether your clients, the broadcasters, are not making such resistance more difficult. And one may also ask whether the communications bar is aware of this fact and is getting the message through to the broadcast media.

I am aware of and do not relish the "raised eyebrow" or "chilling effect" form of media regulation. I do not mean by my statement tonight to contribute to that kind of regulation. The broadcast media surely must strenuously resist all government attempts to interfere with their wide legitimate discretion. But on the other hand, they must also have the strength to admit their shortcomings, their abuse of the immense power of television for the private profit of a few, to the serious detriment of the nation at large. The broadcast media know -- or should know -- when their programming is simply and only mass appeal pabulum designed to titillate a sufficiently large majority to enable the broadcasters to sell the most advertising. They know when they are presenting only one side of a major public issue, when they are shading the facts to present their own point of view, and when they are ignoring the concerns of the community. They know the impact of their programs on children, they know about the marketing of human emotions and of the prurient interest in violence and sex. They know when they subvert the professionalism of their own news teams in order to reach the demographic audiences which will attract advertisers. They know that wide exposure of subjects ranging from the names of rape victims to the private grief of a mother on the death of her son constitute unconscionable invasions of privacy. And, they know when they are over-commercializing their programming to amortize the inflated cost of the broadcast license. In sum, I think they know the times they may have prostituted the tremendous potential of television as a human communication tool. They know this and they know what should be done about it. The programming executives and their advertiser clients must stop their single-minded purpose to achieve higher ratings, more advertising and greater profits, and stop to consider what greater

purposes television should serve. And they must do it soon if we are to preserve our First Amendment values for telecommunications.

These subjects I have mentioned are not without controversy. And there is more than one possible good faith response to the problems they represent. Those of us who are willing to walk more than that extra mile -- and maybe even another mile beyond -- to resist the pressures on traditional First Amendment values realize that these many problems are complex and difficult beyond neat solutions. The First Amendment protects the broadcast media when they seek to formulate a response to these problems -- but this protection is seriously jeopardized when the power of the media is abused.

(No. 73-1057 (Slip opin. issued 10/4/74, DC Circuit)

The pressures I have discussed have produced a regulatory scheme for telecommunications which is inconsistent with traditional First Amendment doctrine in some respects. The task for the bench and bar, and indeed the Congress, is to begin the long overdue process of reconciling First Amendment doctrine and telecommunications regulation in a manner which preserves both the traditions of free speech and the purposes of the Federal Communications Act. I have recently made an heroic, but I suspect insignificant, attempt in my concurring opinion in Citizens Committee to Save WEFM to begin this process of reconciliation. Future attempts at reconciliation will proceed in the "gray areas" of the First Amendment, those areas which are not clearly within First Amendment protection or not clearly without that protection. Of course, the broadcast media should resist encroachments on First Amendment freedoms in these gray areas. But I would be less than honest if I did not state that their success in this fight will depend in no small part on their ability to demonstrate their sensitivity to the public interest.

I have the greatest hopes for their success. I approach the task of reconciliation with much cause for optimism.

In the limited time I have tonight, I was only able to broadly sketch the outline of my ideas on the First Amendment and telecommunications. My discussion is therefore necessarily incomplete and more unqualified than I would like. I have, for example, not mentioned several subjects of particular interest to me, including the much analyzed assertion that the scarcity of broadcast frequencies justifies a different First Amendment regime. Neither have I mentioned perhaps a more interesting issue: how can we expect a commercial enterprise to forego profits in service of the public good? But the sponsors of this affair have sternly warned me about my time limitation. They are concerned with this audience's attention span, and the limitations thereof. At first this concern puzzled me. How could such high-priced legal talent have a short attention span? But I then learned that there would be more than one cocktail party before and during this dinner. If I don't miss my guess, methinks there will be more after this dinner. So I shall release you without delay.

I would not, however, want to leave you without noting that the Commission and the industry it regulates give us much reason for pride as we count our blessings instead of our problems. The critical mind which is so essential to all our professions sometimes blinds us to the progress we have made. Occasions like this are an appropriate time to recall <u>that</u> progress and, indeed, to congratulate

the Commission and the telecommunications industry for the success that that progress represents.

Thank you for inviting me to speak tonight and I wish you another 40 years as exciting and eventful -- and even as profitable -- as the last 40.