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Remarks of Kathleen Q. Abernathy  
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Thank you very much, Randy. I am very pleased to have the opportunity to participate in this awards luncheon and to pay tribute to outstanding public servants. I have been fortunate to work at the FCC, first at the staff level and now as a political appointee. And I also had extensive contact with the FCC and other government agencies while working in the private sector. So I know first-hand the kinds of critical contributions public servants make to our society. I would like to share some of my thoughts about public service and how they intersect with my views on administrative law.

Public service is a noble calling and in my experience has drawn some of the best and brightest to government. Many who have pursued opportunities in the public sector share a simple

desire to do right by the American people. Public service for many professionals entails financial sacrifice, but the rewards can be rich in other respects. While I have enjoyed being an advocate for companies in the private sector, that really compare with the fulfillment that comes from working on behalf of the public interest.

Collectively, public servants possess a wealth of knowledge and expertise that forms the backbone of the administrative state. Especially at an independent agency like the FCC — where there is a need for economic, legal, and engineering know-how — our staff has remarkably broad and deep expertise. A primary function of an independent agency is to use this knowledge base to make impartial, informed judgments that are insulated as much as possible from political forces.

At the same time, our administrative agencies merge this apolitical expertise with presidentially appointed leadership. My job as a commissioner is to implement the law set forth in the

Communications Act, but, inevitably, public officials are called upon to exercise discretion and to fall back on a guiding regulatory philosophy. Having presidential appointees lead administrative agencies ensures a degree of accountability to the public, although not in the direct sense, because we can't be voted out of office. The accountability comes from the fact that our decisions collectively influence the public's perception of how well the Administration is doing. A president accordingly tends to fill agency posts with officials who share his or her core ideological preferences. This helps ensure that agencies will make decisions not only based on their embedded knowledge base, but also in a manner that reflects the public's choice of executive leadership.

Another benefit of combining career public servants and political appointees is that it provides an opportunity to infuse an agency with fresh ideas and perspectives. In between my first stint at the FCC as a staff member and my return as a commissioner, I worked for a variety of businesses in the communications sector. These experiences gave me a far better appreciation of the practical

exigencies of the business world than I could have gained while working at the FCC. In fact, I strongly believe that my private sector experience provides a critical framework for reviewing issues, because I have a heightened sense of how regulations are likely to be implemented in the real world and the limits of what government can hope to accomplish. And when a regulated entity makes arguments about compliance costs, I am better equipped to distinguish legitimate gripes from whining. I also have a keen appreciation of how debilitating delay can be for market participants. I have often said that, when I was in the private sector, I sometimes preferred an adverse decision to no decision at all, since I could alter my business plan to adapt to unfavorable rules, while delay produced paralyzing uncertainty. But without the dedicated career staff who provide history and context to the proceedings, my business experience would be of little value.

In short, government agencies need a strong base of career employees with detailed and diverse expertise, and they also need political leadership that can provide an ideological rudder.

I also thought I would say a few words about my own ideological approach, particularly given your focus on administrative law and scholarship.

Based on my experiences in government and the private sector, and based on my study of the economic and legal literature, I developed a set of core principles to guide my decisionmaking at the FCC. I published these principles in the *Federal Communications Law Journal*, and the article is available on my website, so I'll provide only a brief overview of some of my key points.

As I mentioned already, as a commissioner at an independent agency, my primary responsibility is to faithfully implement the statutory mandates set forth in the Communications Act. I take this responsibility very seriously, and I try very hard to avoid substituting my own preferences for Congress's judgment when the law provides clear directives. I also believe that it is critical for an agency to be conservative and avoid overreaching when it interprets its governing statute, because — as the FCC's own

experience demonstrates — courts of appeals will not hesitate to strike down our decisions. Court reversals can have devastating consequences for the companies that built business plans around rules later vacated. For example, after Congress enacted the Telecommunications Act of 1996, the FCC’s local competition rules were reversed by the Supreme Court, and the rules adopted on remand were then vacated by the D.C. Circuit Court of Appeals. Our third effort, to which I dissented in part, is back before the D.C. Circuit once again. So we still do not have judicially sustained rules on which carriers can rely. That is not good government.

Another key principle reflects the fact that, many times, Congress does not provide a specific blueprint, but instead commits important policy matters to an agency’s discretion. In such cases, my strong preference is to rely on market forces in lieu of prescriptive regulation. It may seem strange for a regulator to want less regulation. But I believe that experience makes crystal clear that regulators, no matter how smart or dedicated, cannot

possibly allocate resources as efficiently or promote consumer welfare as effectively as fully functioning markets. This is particularly true in a rapidly changing technological environment, such as we have today. Congress had the wisdom to codify this principle when it enacted the 1996 Telecom Act: The preamble of the Act, backed by a number of new substantive and procedural provisions, requires the FCC to construct a procompetitive, deregulatory framework to the greatest extent possible. Thus, whether one is a career public servant or a political appointee, it is important to bear in mind that a good regulator does not always promote additional regulation. To the contrary, where competition can supplant prescriptive mandates, regulators should look for ways to minimize regulatory oversight. As Fred Kahn has put it, we must find ways to “let go,” and the public will reap the benefits.

In spite of my general preference for deregulation, I recognize that there are a number of situations where regulatory intervention in the marketplace is necessary. *First*, where

structural impediments prevent competition from emerging in the first place, regulators must intervene to enable its development. Thus, the FCC continues to mandate the unbundling of local telephone companies' infrastructure, although it is fair to debate precisely *how much* unbundling is required to facilitate meaningful competition. *Second*, regulators must continue to enforce public policy choices that have nothing to do with competition, such as the congressional mandate to promote the universal availability of affordable telephone service. *Third*, regulators must ensure that competitors do not impose externalities on one another or on consumers. For example, while the FCC has wisely refrained from imposing common carrier regulators on wireless carriers, we must stringently enforce rules to prevent harmful interference.

In conclusion, I want to reiterate my respect and admiration for public servants, to whom our country owes an enormous debt of gratitude. Our agencies have exemplary career officials and able political leadership and are better off for having both. In my



own experiences in both capacities, it has been my pleasure and privilege to serve, and I offer my hearty congratulations to today's award recipients. Thank you very much.