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The History, Purpose, and Procedures of the Advisory Commission on Electronic Commerce

*Thomas Griffith**

I congratulate the law review on putting together such an impressive collection of speakers to discuss this timely topic. I pay particular homage to Professors Hellerstein and McClure, who I have had the pleasure of hearing address the Advisory Commission on Electronic Commerce (the “Commission”).¹ I am also grateful that Mr. McKeown was here earlier today representing Governor Leavitt, who, as you know, has taken a very active role on the Commission and is one of the more forceful personalities amongst a collection of accomplished people. There is a danger that comes from appearing with such a distinguished group, and I discovered that earlier today. Last April, I had the privilege of speaking at the law school about a much different topic, the then-recently-concluded impeachment trial of the president. I appeared on a panel that included the president’s impeachment counsel Greg Craig, along with Senator Bennett and Representative Cannon. Now here is the danger of appearing with notable people: when I arrived this morning, someone approached me and said, “Mr. Craig, it’s good to see you again.” I do not imagine anyone will mistake my presentation for one delivered by Professors Hellerstein or McClure. In that regard, please beware that there is a caveat to my appearance here. I cannot comment on the substance of proposals before the Commission, nor will you want me to because that is not my expertise. What I can speak to is the history and purpose of the Commission and the procedures under which it operates.

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1. The Commission’s website, <<http://www.ecommercecommission.org>>, contains valuable information about the work of the Commission.

Before I describe the work of the Commission, permit me a personal observation about the similarities between the role that I find myself in now, as the general counsel to the Commission, and the role that I occupied when I came to speak here as Senate legal counsel. As general counsel to the Commission, I am asked to serve a public entity, comprised of people from diverse backgrounds who are engaged in what is essentially an adversarial enterprise that has as its ultimate goal a higher good. The Commission is purposefully diverse. Its members are highly talented. They bring to the Commission viewpoints based on a lifetime of experience dealing with the interests that collide at the intersection of government and commerce. (I cannot say that they have brought to the Commission a lifetime of experience in electronic commerce because they are each more than three years old.) At least one of the roles of the general counsel to a group like that is to teach its members how to operate in a realm where they have a duty towards the collective good. That task is made easier here because of the high quality of the membership of this Commission.

Everyone talks about electronic commerce by noting that we live in an astounding time. We are witnessing the birth of a new form of commerce. That birth is happening at a time when a consensus seems to have emerged over the last quarter century about the role of government and its relationship to commerce. "Consensus" may be a bit strong, but I think we have a better understanding today than we have had at any previous time about the relationship between government and the creation of business activity. I am aware of the danger of hyperbole. Remember the bold predictions made at the end of the nineteenth century that we had discovered everything there was to know about physics; then came relativity and quantum mechanics. I hope that I do not sound quite like that in talking about the relationship between government and business, but I am an optimist. I think we have a pretty good sense today of how government can either nurture or hinder the emergence of new forms of commerce. How we use that knowledge turns on the resolution of significant public policy debates.

In the midst of this convergence between the rise of electronic commerce and the increased understanding we have achieved regarding the relationship between government and commerce comes

the Internet Tax Freedom Act (the “Act”).² A paramount purpose of the Act was to address the concern that unless Congress acted, we might not take advantage of the acquired knowledge about the relationship between taxes and economic activity and might thereby inadvertently harm the emergence of a new industry based largely in the United States. At the core of the Act is a determination that electronic commerce must be protected from special or discriminatory taxes that might stunt its development.

There are four primary features of the Act. First, the Act imposes a three-year moratorium on taxation of Internet access and multiple and discriminatory taxes on electronic commerce.³ Second, the Act expresses the sense of Congress that there must be no national taxation of Internet access or electronic commerce. Third, the Act declares that the Internet must be tariff-free. And fourth, the Act creates the Advisory Commission on Electronic Commerce.⁴ It is this final feature of the Act that is the subject of my remarks.

Advisory commissions have been used by the federal government since the days of George Washington. They are a device that has a long pedigree in the American experience and has been used with increased frequency in the last quarter century. The Congressional Research Service reports that there are thousands of advisory commissions currently in place. The idea behind an advisory commission is that there are some issues that need to take shape as policy proposals by experts who have no direct political accountability. Their proposals are then brought to the politically accountable decision makers.

The idea that there would be a commission or advisory task force that would tackle the difficult issue of the relationship between government and electronic commerce was central to the original proposal made by Representative Cox and Senator Wyden that led to the Act. The original proposal called for an executive branch task force to study the issue. There was a sense that this issue might be beyond the capacity of Congress to approach in the first instance. Significant opposition to locating the task force in the executive branch came from those associated with the National Governors’ Association (the “NGA”). And so the compromise was struck that there would be an advisory commission within the legislative branch.

2. Pub. L. No. 105-277, §§ 1100-1104, 112 Stat. 2681-719 (1998).

3. *See id.* at § 1101(a).

4. *See id.* at § 1102.

According to the drafters of the Act, there were five major issues they confronted regarding the nature and work of the Commission: (1) the composition of the Commission; (2) whether the Commission's recommendation would require a supermajority vote of its members; (3) the scope of the Commission's work; (4) that recommendations of the Commission would be tax and technology neutral; and (5) that any recommendations for Congress would apply to all forms of remote commerce.

For me, the most interesting issue—and this is really the latent political scientist in me coming out—is the composition of the Commission. If you have taken a look at who is on the Commission, I think that Congress did a remarkable job in tapping significant resources to tackle this issue. There are nineteen members of the Commission. Earlier proposals included as many as thirty members. The Act requires that three members be from the executive branch.⁵ There you have an echo of the original Cox and Wyden proposal that the executive branch be charged with the responsibility to look at this issue. Those three representatives are the secretary of commerce, the secretary of the treasury, and the United States trade representative. The Act allows those officials to delegate their responsibilities to others, and, in each case, they have done so.⁶ The secretary of commerce designated the general counsel of the Commerce Department, Mr. Andrew Pincus. The secretary of the treasury designated Mr. Joseph Guttentag, who is the senior advisor to the assistant secretary for tax policy. And the U.S. trade representative designated her general counsel, Mr. Robert Novick.

The Act also requires that there be eight representatives from “state and local government.”⁷ One such representative must be from a state or local government that does not impose a sales tax, and one representative must be from a state that does not impose an income tax.⁸ The state representatives include the following: the chairman, Governor Jim Gilmore of Virginia; Governor Mike Leavitt of Utah; Governor Gary Locke of Washington, which has no income tax; Commissioner Paul Harris, a delegate from the Virginia House of Delegates; and Dean Andal, the chairman of the California Board

5. *See id.* at § 1102(b)(1)(A).

6. *See id.*

7. *See id.* at § 1102(b)(1)(B).

8. *See id.*

of Equalization. The members from local government are as follows: Delna Jones, a county commissioner from Oregon, which has no sales tax; Mayor Ronald Kirk from Dallas, Texas; and Mr. Gene Lebrun, the president of the National Conference of Commissioners on Uniform State Laws.

Then there are the six members with whom you are probably most familiar because the media has focused most of its attention on them. Dubbed the “Business Caucus” by the media, these members come from some of the major private sector interests in electronic commerce: Michael Armstrong, chief executive officer of AT&T; Richard Parsons, president of Time Warner, Inc.; Robert Pittman, president and chief operating officer of America Online; David Pottruck, president and co-chief executive officer of Charles Schwab and Company; John Sidgemore, chief executive officer of UUNet Technologies and the vice-chairman and chief operating officer of MCI WorldCom; and Ted Waitt, president and chief executive officer of Gateway, Inc. Finally, the Commission includes Grover Norquist, president of Americans for Tax Reform and Stanley Sokul, from the Association for Interactive Media.⁹

The Act also designated who was responsible for appointing the members of the Commission.¹⁰ The seats of the three executive branch representatives were designated by statute. The remaining sixteen seats were allocated among the Majority Leader of the Senate, Senator Trent Lott; the Minority Leader of the Senate, Senator Tom Daschle; the Speaker of the House of Representatives, who, at the time the Act was passed, was Newt Gingrich; and, the Minority Leader of the House of Representatives, Representative Richard Gephardt. Senator Lott originally chose James Barksdale, from Netscape, but Mr. Barksdale resigned, and Senator Lott appointed Delna Jones in his stead. Senator Lott also appointed Delegate Harris, Governor Leavitt, Mr. Sidgemore, and Mr. Sokul. Senator Daschle appointed Mr. Armstrong, Mr. Waitt, and Mr. Lebrun. Speaker Gingrich appointed Mr. Andal, Governor Gilmore, Mr. Norquist, Mr. Parsons, and Mr. Pottruck. And finally, Representative Gephardt appointed Mayor Kirk, Governor Locke, and Mr. Pittman.

Composition was the issue of most concern during the negotiations that led to passage of the Act. The final formula was struck

9. *See id.* at § 1102(b)(1)(C).

10. *See id.* at § 1102(b)(1)(C)(i)-(iv).

based largely on a proposal by the NGA, in which the governors' representatives sought a guarantee that there would be representatives from state and local government on the Commission.

Senator Wyden's original proposal required a simple majority of the Commission to make any recommendation to Congress, but the final language of the bill calls for a supermajority of two-thirds of the members serving.¹¹ The NGA sponsored the supermajority voting requirement. Its primary purpose, from the viewpoint of its proponents, is to protect the interests of state and local government. The effect of the provision is that with nineteen members of the Commission, thirteen votes are needed to make a recommendation from the Commission. With seven votes, you can block a recommendation. The scope of work of the Commission was also the subject of discussion and debate. The NGA proposed a more far-ranging agenda for the Commission, but Representative Cox and Senator Wyden insisted on the more narrow scope eventually set forth in the language of the Act.¹²

Finally, there is a single-sentence provision that says, "Any recommendation agreed to by the Commission shall be tax and technologically neutral and applied to all forms of remote commerce."¹³ I suggest to you that those are significant restraints upon the types of recommendations the Commission can make. According to the drafters of the Act, the proponents of this language, who represented the NGA, wanted a guarantee that there would be no safe harbor from taxation for electronic commerce alone in any recommendation made by the Commission. The meaning of this provision will be the focus of significant attention as the Commission prepares its final report to Congress.

The Internet Tax Freedom Act also put into place rules and procedures by which the Commission is to conduct its business.¹⁴ There are statutory rules requiring nine members to form a quorum, fourteen days advance notice of meetings, and, perhaps most signifi-

11. *See id.* at § 1103.

12. *See id.* at § 1102(g).

13. *Id.* at § 1103.

14. The Federal Advisory Committee Act, Pub. L. No. 92-463, §§ 1-15, 86 Stat. 770 (1972), which was passed several years ago to regulate the work of executive branch advisory commissions, does not apply to this Commission, which is a legislative branch entity. But the Commission members have stated their intention to operate by the spirit of the Federal Advisory Committee Act.

cantly, that meetings be open to the public.¹⁵ The Act also grants the Commission authority to create rules by which the Commission operates.¹⁶ The Commission's operating rules forbid proxy voting. The commissioners must be physically present to vote. The Commission has determined that administrative matters can be decided by a simple majority. The Commission has also created subcommittees, realizing that this group would need such structures to move the work of the Commission along. The operating rules require that there be no less than five members on a subcommittee. The rules also call for proportional representation on any subcommittee. There must be at least one representative from the federal government, at least two from state and local government, and at least two from the electronic commerce industry.

Thus far, there have been three meetings of the Commission. The first occurred in Williamsburg, Virginia, in June, 1999. Governor Gilmore was elected chairman, and the charter documents, including the Operating Rules, were approved. The Commission also created a Funding Subcommittee because Congress had failed to provide any federal funds to support the work of the Commission. That is an unusual feature of the Act. The drafters with whom I spoke said that it was their intention that the work of the Commission be funded through gifts and in-kind donations by the interests whose members were represented on the Commission.¹⁷ The Business Caucus interests were willing to make such a contribution, but the Commonwealth of Virginia was the only public entity that offered to donate funds. The commissioners expressed unease about how the public might perceive the work of the Commission if its funding came largely from the private sector. And so, the Commission went to Congress and in December 1999 received an appropriation of \$1.4 million dollars. The Funding Subcommittee was chaired by Michael Armstrong of AT&T. Other members of the subcommittee included Governor Gilmore, Ms. Jones, Mr. Sidgemore, and Mr. Norquist.

There was also a Workplan Subcommittee created at the Williamsburg meeting, which was chaired by Mr. Pottruck of Charles Schwab. That subcommittee grew to be quite large. It included

15. Internet Tax Freedom Act § 1102(f).

16. *See id.* at § 1102(f)(4).

17. *See id.* at § 1102(c).

Governor Gilmore, Mr. Andal, Mr. Guttentag, Mayor Kirk, Mr. Lebrun, Governor Locke, Mr. Norquist, Mr. Sokul, Mr. Armstrong, Mr. Pittman, and Mr. Waitt. The Workplan Subcommittee was charged with the responsibility of coming up with a schedule for the Commission to meet the April 21, 2000, statutory deadline for its report to Congress.¹⁸

There were also presentations made at the Williamsburg meetings. The Commission heard discussions regarding the *Quill* case,¹⁹ the history of the sales tax, the sales tax structure, arguments for and against applying the sales tax to Internet transactions, the impact of sales taxes on electronic commerce, international taxes and tariffs on electronic transactions, the impact of electronic commerce on the U.S. economy, and the susceptibility of electronic commerce to multiple and discriminatory taxation.

In September 1999, the Commission met again in New York City and adopted the Workplan Subcommittee's proposal. The Commission also created a separate Report-Drafting Subcommittee co-chaired by Mr. Pittman and Governor Gilmore. Other members of that subcommittee include Mr. Andal, Ms. Jones, Governor Locke, Mr. Parsons, Mr. Pincus, and Mr. Sokul. Those of us who were involved in the New York City meetings will remember that they were cut short by a hurricane that hit the east coast and required the chairman to return to Virginia to discharge his duties as the Governor.

Shortly before the meeting adjourned, however, Governor Leavitt made a motion that the Commission compile a list of criteria by which to judge the feasibility of any plan to impose sales taxes on interstate electronic transactions and that the Commission solicit proposals responsive to those criteria. That motion carried, and an initial identification of criteria was made. Then the Commission invited interested parties to submit tax plan proposals to be considered at the next Commission meetings to be held at San Francisco in December 1999. Also, at the New York City meetings, the Commission unanimously passed its first resolution supporting the Clinton administration's position on the standstill of tariffs on international electronic commerce.

18. *See id.* at § 1103.

19. *See Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

That finally brings us to the San Francisco meetings. My guess is that if you are here at 2:40 p.m. on a Friday afternoon before a three-day weekend, you probably also watched those proceedings on C-SPAN. I think that those who participated or viewed those meetings will agree that they were the most spirited of the Commission meetings. Presentations were made about international tax and tariff issues from representatives of the European Union and the Clinton administration. Tax plan proposals were received pursuant to Governor Leavitt's New York City motion. The NGA proposal was made by Governor Janklow. The Commission had received thirty-seven proposals, and thirteen of them were selected for presentation at the meeting. There was extensive questioning by the commissioners. It was a lively exchange that demonstrated that the commissioners were prepared, engaged, and articulate. In San Francisco the Commission also received the Report-Drafting Subcommittee's Issues and Options paper, the framework for its final report to Congress.

On March 20 and 21, 2000, the Commission will meet in Dallas, Texas and vote on its report to Congress, which must be delivered to Congress no later than April 21, 2000. Whether the Commission issues its report as a formal recommendation to Congress or as a simple majority proposal, its work will represent an important step in the ongoing political debate over the role of government and its relation to the emerging economy of electronic commerce.

