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**A TOUGH ACT TO FOLLOW:
THE TELECOMMUNICATIONS ACT OF 1996
AND THE SEPARATION OF POWERS**

By Harold W. Furchtgott-Roth

The tenth anniversary on February 8, 2006, of the widely criticized Telecommunications Act of 1996 comes at a time when Congress is actively considering legislation to replace it. The legislative proposals address many symptoms of industry ailments under current law. But will a new law make any difference?

In his new book, *A Tough Act to Follow: The Telecommunications Act of 1996 and the Separation of Powers* (AEI Press, January 2006), former Federal Communications Commission (FCC) commissioner Harold Furchtgott-Roth answers this question and explores why communications policy has been disembodied from communications law. After carefully examining the FCC's powers to write rules, administer and enforce those rules, and adjudicate disputes under those rules, Furchtgott-Roth concludes that it is the structure of the independent agency rather than problems with a poorly written law that will thwart efforts to improve the situation. The FCC possesses all the powers of government—legislative, executive, and judicial—and no other part of the federal government has control over its activities.

Given the FCC's concentration of powers and broad discretion, "[t]here is little reason to expect a new communications law written in 2006 to be more closely followed than the one in 1996," continues Furchtgott-Roth. "A few words of law will not necessarily dictate the regulation of an industry and rewriting communications law that leads to clear and enforceable rules is not a simple task."

Furchtgott-Roth's findings in *A Tough Act to Follow* have deep repercussions: uncertainty about how a government agency or court will interpret a law corrodes investor confidence. In the late 1990s, investors poured billions of dollars into hundreds of new telecommunications ventures based on plans anchored in FCC rules written under the Telecommunications Act of 1996. Within a few years, many of those rules were overturned by courts or simply changed by the FCC. Many of the new businesses disappeared, and those that

remain are greatly weakened. Even today, many business plans—both for existing and new firms—have been waiting for greater clarity about federal rules from the FCC and the courts. Investors naturally worry that this uncertainty will remain.

Furchtgott-Roth concludes that the problems associated with the FCC are not unique to the agency. Many other government agencies—including the Food and Drug Administration, the Environmental Protection Agency, and the Securities and Exchange Commission—have overly broad powers that give them wide discretion.

Harold Furchtgott-Roth served as a commissioner of the Federal Communications Commission from 1997 to 2001. From 1995 to 1997, he was chief economist of the House Committee on Commerce, where he was one of the principal staff members working on the Telecommunications Act of 1996. He wrote the manuscript for *A Tough Act to Follow* as a visiting fellow at AEI from 2001 to 2003.

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