ARTICLE SUBMITTED TO TV/RADIO AGE
BY FCC COMMISSIONER JAMES H. QUELLO March 4, 1977

"A common sense resort to usual and practical sources of information takes the place of archaic and technical application of rules of evidence, and an informed and expert tribunal renders its decisions with an eye that looks forward to results rather than backwards to precedent and to the leading case. Substantial justice remains a higher aim for our civilization than technical legalism."

FRANKLIN DELANO ROOSEVELT, 1940

Regulatory agencies, including the Federal Communications Commission, have come a long way since 1940. The quest for "substantial justice" as President Roosevelt characterized it is all too often frustrated by the need to thread a tortuous path through the courts. Regulation by complaint and litigation seems to be the norm as we wend our way through the processes of rulemaking, review, reconsideration, appeal and then into the courts for more full courses of panoply, persuasion and precedent. Perhaps it's time to pause for a long look at where we are, how we got there and where we're going.

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I should point out that I am not a lawyer and, therefore, what follows is not intended to be a scholarly legal treatise with the necessary complement of confusing citations and ambiguous Latin phrases. Instead, it is intended to be an appeal for a common sense approach to making and implementing federal communications policy.

The fact is that we seem to be in the process of developing rapidly into a litigious society. We expect the same instant gratification from our legal system that we have come to expect from the drug counter and the showroom. We want constantly restyled justice-as-we-see-it served up daily with

our breakfast cereal. If there are those who disagree with our individual view of what is just and reasonable, they are wrong. Worse, they are venal, avaricious, conspiratorial and, in all probability, either communist or fascist.

In many law schools, the future lawyers of this country are being taught that the way to settle a dispute is to, first, institute a law suit or to file complaints or petitions asking that the processes of some particular federal or state agency be set in motion to correct some alleged error.

The constitution of our great country gives every citizen the right to petition his government. Certainly, the right to our "day in court" in the sense of defending our rights and airing our grievances is fundamental to our society. I doubt, however, that this familiar phrase should be taken as literally as it seems to be today. The fact is the courts and the regulatory bodies are overloaded and ill equipped to deal with mass contentiousness and millions of individual complaints. A glance at the backlogs in many courts and agencies forces the conclusion that the demand for justice far exceeds the supply. A few weeks ago, for example, the Washington Post carried a front-page story headlined: "An Agency in Shambles". The agency featured was the Equal Employment Opportunity Commission which is laboring under a backlog of nearly 130,000 discrimination complaints. The General Accounting Office estimates that a complainant now has one chance in 33 of having his charge settled successfully in the year in which he files it.

My purpose in describing this state of affairs is not to heap abuse upon the EEOC. My purpose instead is to point out that there's a limit to the federal government's capacity to respond even under the assumption that

complaints are legitimate and grievances are real. Sheer volume can frustrate the search for justice and soon the point is reached where the system gives the appearance of gross nonresponsiveness. The fuses blow and the machinery grinds to a virtual halt. In the words of a disgruntled young lawyer at the EEOC: "It is an unbelievable morass. The morale is bad. There's no leadership. The field staff is incompetent and we're riddled with empty positions. I'm going to leave. I'm fed up. I can't stand it anymore." And the bottom line of all of this is a large degree of dissatisfaction and distrust of our governmental agencies.

Often, of course, once a complaint finally clears an administrative agency, it is then dumped into a court. The court then must devote its resources to consider the agency's action regarding the complaint and bring it to some kind of judicial resolution. Each allegation, presumably, should have been dealt with by the agency and the court's function is supposed to be to determine if there was legal error in the agency's processes and decision. The temptation to deal, again, with the policies and the facts in dispute, however, often proves irresistible to many courts.

There are many instances where the courts of appeals must deal with complaints which initially were almost totally devoid of substance. A recent Newsweek article noted that "Appellate judges estimate that 80 per cent of all appeals are frivolous." Again, however, regardless of its lack of merit, each appeal requires expenditure of time, effort and funds by all parties before it can finally be resolved or dismissed.

That Newsweek article also pointed up the trend in "telling it to the judge". The article asserts that reformers who become frustrated with the ponderousness of the legislative process have sought and found ways around it.

They have "discovered that major social changes can often be wrought far more quickly by the judiciary." One must wonder, however, whether the judiciary is the proper vehicle for social change or whether that role is more properly fulfilled by our elected officials through the legislative process, ponderous though it may be.

Again, quoting Newsweek: "The mounting influence of law and lawyers on modern American life constitutes one of the great unnoticed revolutions in U. S. history; the ever-increasing willingness, even eagerness, on the part of elected officials and private citizens to let the courts settle matters that were once settled by legislatures, executives, parents, teachers - or chance." The article concludes by warning that "....if Americans want to prevent their system of government from being changed in a fundamental manner, they will have to find ways in which to prevent every buck from being passed to a judge and every problem from being turned over to a lawyer. The U. S. has created the most sophisticated - and the fairest - legal process in the world. But the burdens are becoming intolerable."

We have all been led to believe that personal participation in government is good; that anything less constitutes apathy. There are many, however, who have failed to distinguish between informed, thoughtful selection of those who represent them (in executive, legislative and judicial roles) and direct intervention in the performance of those responsibilities. The trend might be represented symbolically as gadflies rampant upon a field of confusion and red ink.

Harlan Cleveland, former Assistant Secretary of State and U. S. Ambassador to NATO, refers to this penchant for involvement as the "horizontal society." In an article printed in the Congressional Record late in 1974, Cleveland traced the

history of this development:

> "Man-as-manager had to learn how to manage the complexity which man-as-scientist-and-engineer and man-as-educator were making physically and psychologically possible. In a world of intercontinental conflict, gigantic cities, congested living, and large and fragile systems of all kinds, the traditional modes of leadership, featuring recommendations up and orders down, simply couldn't work very well. Nobody could be fully in charge of anything, and the horizontal society was born."

While conceding that openness in government leads to potential benefits, Cleveland warns of pitfalls, as well: ".....there are costs as well as benefits in more openness. An open meeting is likely to be large. The larger it is, the higher the ratio of emotion to reason, nonsense to commonsense. An open meeting favors simple formulations over complicated ones, certainty over ambiguity, the loud mouth over the reflective private person. An open meeting is more likely to generate confrontation than compromise, liable to result in inaction rather than action."

The Federal Communications Commission will soon have the opportunity to discover, first hand, whether Mr. Cleveland is correct. The Congress has mandated open regulatory agency meetings and, in late March, we will comply. But, I believe that the pitfalls of open meetings equally apply to all the processes by which government regulatory agencies and executive departments carry out their legislatively assigned responsibilities. Will open meetings result in the availability of additional important and critical facts to the decision makers? Will they result in better, more informed and more reliable government decisions? Will they result in alleviating to a substantial degree the distrust of those who must make the decisions? Hopefully, yes, but perhaps not. The voice of the people must be heard, to be sure, but too often that voice is used for subtle advocacy

purposes to represent one faction against another or one economic interest against another.

The "public interest law firm" contributes significantly to our burgeoning litigation. These foundation-funded, tax-exempt organizations have pressed some worthy causes and at times their efforts have resulted in socially beneficial change. However, from my observations to date, many of their pleadings set forth allegations or charges phrased in generalities; many are not supported by sufficient facts; some border on the frivolous and all add to the loads of litigation of the Commission and eventually the courts.

The government, too, has been caught up in the spirit of the times and the Congress now funds the Legal Services Corporation to provide legal services to the poor. At least that's what drafters of the enabling legislation thought was to be the goal. According to a two-part article in Barron's, however, the poverty lawyers are now suing federal agencies with federal money, testifying at regulatory agencies on behalf of "consumers," and engaging in lobbying supported by federal funds. The LSC succeeded the now defunct Legal Services Program of the Office of Economic Opportunity. That program began as an adjunct to the War on Poverty but fell into disrepute for, among other things, encouraging boycotts, rent strikes and picketing. According to the article, poor people - "with ordinary legal problems often were ignored in the push for landmark cases and other issues to bring about social change." The Legal Services Program managed to make do with only $70 million; its replacement is slated to receive $90 million in the next fiscal year. A task force charged with analyzing and justifying appropriations for LSC has concluded that "to carry out its responsibility, the Corporation will require at least $241 million and perhaps in excess of $525 million to provide minimal coverage of attorneys to service the legal needs of

the nation's poor."

The total FCC budget is under $55 million.

Then there is the move - already partially successful - to require federal agencies to provide financial assistance to those who wish to participate in agency proceedings but lack the funds to do so. I'm not qualified to speak for other agencies, but I am painfully aware that the FCC lacks adequate funds to carry out its primary responsibilities of formulating communications policy and enforcing of its own rules. Perhaps American taxpayers are willing to dig deeper in the interest of "opening up" their government. I hope so, because the alternative would seem to be reducing or removing support from existing mandated functions in order to accommodate the trend. And, don't count on cutting the "fat" from the bureaucracy without removing muscle too.

"We want more openness, that's clear," noted Ambassador Cleveland, "But, as the French say,'Il faut vouloir les consequences de ce quon veut'." In one language or another, every child learns the lesson: You must not only want what you want, you must want what it leads to." What is all this leading to? Are we heading toward a massive legal overload in our institutions leaving them unable to carry out their responsibilities? Or, do we lack any notion of where we are really heading in the long run?

Fortunately, there are those within the legal system who have recognized the seriousness of the situation, including the Chief Justice of the United States. Chief Justice Warren Burger is asking for new ways - innovative ways - of dealing with the situation. Many legal scholars are calling for significant changes in our traditional approach in the search for justice. Elimination of juries from all civil trials is one suggested approach. Arbitration is another.

Arbitration, it seems to me, might offer much needed relief for agencies, such as the FCC, which are attempting to deal fairly with the glut of complaints, in one form or another, which are now before us and which are likely to increase. Without invoking the full panoply of formal consideration, it seems likely that a disinterested third party might be able to resolve - or at least narrow - differences between contending parties in a reaonable and expeditious manner.

Under the present system, a great deal of time and effort is expended by the FCC and by contending parties in cases devoid of any legal or factual merit. Many cases are frivolous from conception through disposition. Some overzealous parties - under the guise of representing some significant sector of the public - freely indulge in petitioning against license renewal of broadcasting licensees with the knowledge that - even without merit - such petitions (1) require a costly defense to be mounted by the licensee and (2) result in delay of renewal, in some cases well beyond the normal renewal period. Forearmed with this awareness, citizen groups can promote their own private version of public interest by extracting self-serving concessions from licensees who, presumably, are choosing the least expensive option available to them.

There are other instances where petitioners genuinely feel aggrieved but fail to perceive the difference between an offense subject to legal resolution and a social disagreement. Such persons easily fall victim to the blandishments of those whose only view of justice is that which results from litigation.

Another group of petitioners has grievances which appear real and legally sustainable. Their petitions contain the minimum specificity required and the necessary supporting facts. This group is, in my opinion, being shortchanged -- at least to some extent -- by the strain on the system imposed by the other two.

One of the real problems, then, is to find a means to minimize the burden imposed by the emotional, overzealous and the unsophisticated and to concentrate our attention and resources upon those who have legitimate grievances susceptible to administrative resolution. The solution, of course, is not so easily identified.

The road to the solution, however, must begin with an ordering of priorities and a mechanism for identifying those who legitimately require the assistance of their government in the interest of justice. I suspect that, once the meritorious complainant has been identified, arbitration could go a long way towards resolving problems.

Is there a legal mechanism now available for accomplishing, at least in part, this winnowing process? Yes, there is. It is a time honored concept called "standing". In its simplest form, it means that you cannot seek legal redress against a party whose actions have not adversely affected you. Or, as one member of the Supreme Court views it: "The'gist of the question of standing,' is whether the party seeking relief has 'alleged such a personal stake in the outcome of the controversy as to insure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" Thus, it would seem clear, would it not, that lacking some "personal" stake in the outcome of a dispute, a person lacks standing to start the administrative or judicial wheels in motion? Wrong!

The FCC, for example, has virtually no requirement for "standing" involving broadcasting matters except that a petitioner reside in the area served by the broadcaster complained against. Therefore, anybody who feels aggrieved by what is broadcast, or not broadcast, by the local radio or television station may petition the FCC to deny the broadcaster his privilege to continue in business. That is not to say, of course, that the petition will be granted. It

merely means that the petition will be accepted by the Commission, that each of its allegations will be investigated and considered in some detail by highly trained members of the staff and, ultimately, by the full Commission.

The point is that much valuable time and too many scarce resources are wasted by removing virtually all barriers to the commencement of litigation at the FCC. The potential for harrassment is enormous. In many instances, the petitioner's personal stake in the outome of a proceeding is virtually nil. The fact is that many petitioners seem to be more interested in using the process than in seeking justice. Some seem more interestedin promoting controversy and in exploiting discontent than in correcting problems.

The question of standing before the FCC is considered by many to have been settled by the 1966 landmark case, Office of Communication of the United Church of Christ vs. FCC. The court encouraged the Commission to permit public participation in its processes noting that:

> "...such community organizations as civic associations, professional societies, unions, churches, and educational institutions or associations may well be useful to the Commission. These groups are found in every community; they usually concern themselves with a wide range of community problems and tend to be representative of broad as distinguished from narrow interest, public as distinguished from private or commercial interests."

That particular passage is the most often cited reason for the current FCC policy on standing. It has been interpreted as preventing the Commission from inquiring beyond place-of-residence.

The court said something else, however, in that same case which obviously does permit discretion. That part of the opinion has been studiously overlooked.

It reads as follows:

> "The Commission should be accorded broad discretion in establishing and applying rules for such public participation, including rules for determining which community representatives are to be allowed to participate and how many are reasonably required to give the Commission the assistance it needs in vindicating the public interest." (emphasis added)

The Commission has not established such rules. Instead, we have opted for the path of least resistance and have conferred standing upon virtually anyone who has asked for it where broadcasting is involved. One result is that a climate of intimidation has been fostered in which many broadcasters, for economic reasons alone, will settle with and capitulate to the narrow interests who apply the greatest pressures.

I am in full accord with the Commission's policy of encouraging dialogue between broadcasters and community groups. I am in complete agreement with the Commission's policy requiring broadcasters to systematically ascertain the needs and interests of their communities. However, I am not in agreement with the policy which permits - even encourages - the litigious approach to the solution of community problems which might better be solved at the local level. Litigation at the federal level is simply not the answer to all of the social maladjustments in this nation.

Perhaps with common sense reasoning we could trust each other a little more, listen to each other a little more, and cooperate with each other a little more. Then we may lighten the load and ease the burden with less reliance upon legal technicalities and a greater likelihood of substantial justice for all.