

The Relationship Between the Federal Communications Commission,
Congress and The Executive Branch; The Contentious Decision Process

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I'm pleased and honored to be your visiting lecturer today. I'm thoroughly enjoying the friendship and hospitality extended by your prestigious communications and law schools. I can really relax and appreciate your hospitality more, because my alma mater, Michigan State University, doesn't happen to be on your football schedule – national championship teams are not known for football field hospitality – not to be confused with good sportsmanship – after you knocked out your opponent. The Michigan State team is a good “spoiler” but our last national championship was 33 years ago! So congratulations and thanks for making it possible for me to gloat. “I lectured at the last year's National Championship school and they treated me like a communications champ.”

So, I'm really glad to be here. Of course, as a fugitive from the actuarial law of averages, I should be glad to be anywhere. I have outlived my normal life expectancy by twelve years – a source of annoyance to some in Washington. I'm also grateful that my fourth FCC re-appointment campaign platform of “I still have 75% of my marbles – a good norm in Washington and delusions of adequacy” received such widespread favorable recognition. I was even honored by my own University, but with sardonic conditions. (ad lib)

The subject matters today of relationships between the FCC, Congress and the administration are particularly appropriate for me because I was subjected to the longest senate confirmation hearing in all regulatory history with eight days on and off the stand in 1974. I was manufactured into a controversial appointee because I came from the broadcasting industry.

Broadcasting and cable at that time were responsible for about 75% of the FCC controversial issues. In fact, I later learned that republican congressional leader and my strong supporter, Jerry Ford, had to actually pound on President Nixon's desk to get me nominated. I was informed that President Nixon stated he did not need a controversial "industry" appointment when he was being confronted with Watergate.

I was vindicated years later in 1991 when undergoing my fourth confirmation hearing. It lasted 12½ minutes which was heralded as the shortest in regulatory hearings. The opening remarks of the confirming senator, communications subcommittee chairman (and World War II hero) Dan Inouye assured a fast favorable hearing. He opened the hearing with the following from the congressional record:

Senator Inouye: "I believe it is interesting to note at this stage that the first time Mr. Quello appeared before this committee, it was the beginning of seven hearings. If I'm not mistaken 18 years ago your nomination process required seven hearings. Is that correct?"

Quello: "I do not know about seven hearings. It was 8 days on and off. My World War II combat experience came in very handy."

Senator Inouye: "Now I think we are going to finish this in about 15 minutes. It is apparent to this committee the extent to which you have gained a fabulous reputation as being a great Commissioner, and it is my pleasure to call upon you, Mr. Quello."

I'm grateful that all four of my confirmations were further vindicated by numerous laudatory editorials, complimentary letters from government leaders and distinguished lifetime

achievement awards. They include inductions into both the Broadcasting and Cable Hall of Fame and the Radio Hall of Fame.

Also, after surviving confirmation hearings, commissioners are subjected to 3 or 4 oversights per year.) My humorous but earnest advice to the new commissioners is “add your over-oversight senators and congressmen to the Fourth Commandment. You will find that it is a good idea to honor them.”

Enough for extraneous expositions, now for the real nitty gritty of relationship between the FCC, Congress and the Executive Branch.

Initially, I received an ominous warning when seeking an FCC commission from a longtime friend and from someone I later called my congressional Godfather, John Dingell.

When I first told him about seeking an FCC Commissionership he growled “Jim, why do you want the damn job. You will be beat-up by Congress and overruled by the Courts.” Of course, big John either as a Democratic Communications Committee Chairman or as Committee ranking democrat frequently made that a self-fulfilling prophecy – fortunately not against me. So the FCC does get beat up by Congress from time to time, but fortunately, most of the FCC decisions are sustained in court. After 20 years on the commission, I told Big John that it wasn’t all bad being a regulatory “kissee” rather than “kissor.”

I believe current Chairman Bill Kennard’s some-time beleaguered congressional relationships are particularly relevant to the subject matter of this lecture. Chairman Bill, a good friend, called me for advice several times after being inducted in office. He was under attack not only from Republican Communications Committee Chairman but also from ranking democratic leaders former chairman, John Dingell in the House and Fritz Hollings, in the senate.

At that time, I again advised him to remember the FCC is an arm of Congress not a member of the executive branch. I suggested he keep congressional leaders informed of his actions. I again reminded him that the FCC is an independent agency commissioned to implement congressional legislation not the non-legislated policies or directives from high ranking members of the executive branch whether Democratic or Republican.

In reply to a request by Electronic Media magazine, early in his chairmanship, I was quoted "Chairman Kennard is a thoroughly decent man politically between a rock and a hard place. He owes his appointment as FCC chairman to Vice President Al Gore and former Chairman Reed Hundt. But he must remember he owes his confirmation, appropriation and very existence to Congress." The FCC was established by congress and is expected to act as an independent "arm of congress."

The principal regulatory charge of the FCC is to assure that communications companies serve the overall public interest, a term that most frequently applied to broadcasting but also to other communication entities like telephone, satellites and cable television systems.

One of the basic questions is "How do you *define* public interest? The congress enacted the Communications Act in 1934 and required licensees to operate their broadcast stations in the public interest. The phrase was deliberately obtuse so that Congress and the FCC could flexibly interpret and apply it to the many facets of broadcast and other communications regulations as they developed.

However, the obtuse nature and broad application of the public interest standard must not be misused as a subterfuge for government control of the media. In my opinion there have been too many attempts in the past three years, and particularly the last two years I served on the Commission, to control and micro-manage TV programming under the guise of serving the

public interest. TV has developed into the most influential and pervasive news and information media in the nation. As such, it is entitled to full First Amendment rights. But this is a contentious subject meriting full treatment in a book or separate speech.

Over the years, I have asked legal experts at the FCC for their definitions of the “public interest.” These have varied according to individual philosophy and theory. A communications legal wag once stated it is anything the FCC majority decides it is.

I believe the late Walter Lippman defined it years ago in practical terms albeit with no legal authentication. He said “The public interest is what people would do if they thought clearly, decided rationally and acted disinterestedly.” This definition provides both a goal worth striving for and an objective which few are wise enough to attain.

In the final analysis, the term “public interest” serves as a general overall guide. It is subject to varied interpretation and for that reason it is a source of perennial uncertainty to regulated industries. I once defined it, in perhaps oversimplistic terms as it applied to the telephone and cable industry’s “The best service to the most people at the most reasonable cost.” Their key active word is “reasonable.”

The function and jurisdiction of the FCC as an independent regulatory agency has been defined and guided by the Constitution, the governing statute and the Communications Act.

Under the Communications Act, the FCC was established as an “arm of Congress.” Simply, that means Congress has given the FCC broad statutory guidelines like the aforementioned “public interest” standard to guide their action, but Congress effectively relies on the expertise and judgment of a majority of FCC Commissioners to fill in the blanks. That means effectuating, writing and supervising the detailed rules that forms the regulatory framework that applies to the telecommunications industry.

This obviously gives the FCC power that far exceeds its relatively diminutive size. An agency numbering fewer than 2500 people is responsible for regulating the telephone, television, radio, satellite and wireless industries that account for ^{about} about 10 percent of the Gross National Product.

For this reason, William F. Buckley Jr. once stated that the FCC chairman and the Commission wield greater economic power than all the courts put together. That somewhat overstates FCC power. After all the appellate courts do review FCC decisions but the impact and ramifications of some FCC decisions are awesome and worrisome to conscientious commissioners.

As a counterbalance to FCC power, the Senate and House exercise oversight authority and thereby make certain that all regulatory agency officials maintain a becoming humility.

The numerous inquiries from oversight and special study or investigative committees are a regulatory fact of life. The questioning is ethical, intense and detailed. In fact, when I was a chairman, I humorously said it would only be a matter of time before all Commissioners would be called upon to respond to the following outlandish question in a congressional oversight inquiry. "Is there anything known only to you that could possibly be used to embarrass, discredit or impeach you? Please state and remember you are under oath."

I've often been asked in my 23½ years at the commission what is the most important function or the biggest problem facing Commissioners. Overall, I would say decision-making.

FCC decisions have a tremendous impact on industries they regulate, on mergers, on stock price and on the public at large. Industry lobbying at the FCC is predictably intense. Most telecommunications companies are big and even comparatively minor decisions involve millions of dollars to the affected parties.

One of the legal foibles of communications litigation is that you have FCC lawyers opposing distinguished alumni making two to four times more money. So, if an FCC lawyer displays effective brilliance, he or she receive offers they can't refuse from law offices or communications industries. Fortunately, the FCC has a number of bright lawyers dedicated to public service so overall government public interest is well represented.

I'm not a lawyer, so my approach to regulation and decision-making was more journalistic than legalistic. My bottom line was the basic, and difficult, search for truth and common sense. I do believe it adds to my perspective that in most cases I'm the only commissioner that had a bottom line profit responsibility for an industry. For me the first and foremost consideration is which action best serves the overall public interest. Where do reason, justice and common sense predominate. Which decision scores the most points legally, ethically and morally?

Finally, the day comes when the reading, listening, analyzing and agonizing are over and you as a commissioner, come to the decision. You then prepare for the inevitable aftermath. Promptly and predictably after the decision, FCC is criticized and accused by losing parties.

First, the losing parties immediately charge the commission with not serving the public interest. Anytime you oppose their private economic interests for whatever reasons, you are not serving the public interests. Frequently the commissioners' qualifications, motives and integrity are impugned and judgment denounced. Needless to say, self serving impugning of FCC motives is counter-productive and usually ignored.

The losing parties then generate as much public opposition as possible. They damn you in Congress, in the press, and among organizations and friends sympathetic to their cause or viewpoints. Well paid hired guns known as lobbyists apply pressure.

Next are legal petitions for reconsideration and finally, the decision is appealed in court . . . these are perfectly legal and ethical resources. As a commissioner or chairman I never considered it a personal affront for industries to exercise their full legal options, as I would have done in their place. I often told attorneys and industry executives to take the full legal recourse and save themselves the expense and resentment caused by generating a public relation-lobbying campaign.

As a government official, I believe that old saying “if you can’t stand the heat, stay of the kitchen.” But some of the aggressive hired guns try to burn the kitchen itself down.

However, after a few years on the Commission, I knew what to expect in contested proceedings and the process did not bother me. You get to the point of rejecting the Washington slogan of “Don’t get mad, get even.” Except for squaring the record for gross inequities or distortions, getting even is petty and not worth the inner turmoil.

My service at the hectic-paced FCC has been the most fascinating and productive experience of my professional career.

Just look at what happened to communications advances since April 30, 1974 the date I started as an FCC Commissioner. These advances are now in effect and many more are coming onstream.

There was only one long distance company; now they are over 500. Three television broadcast networks have become seven and the Internet came out of nowhere to become the most important communications development of this decade.

Personal computers were just introduced and there was no thought then that they would become a dazzling new communications device. The cable industry was in its infancy in 1974. Mobile phones were in their infancy. HDTV and digital broadcasting had not been introduced

and direct broadcasts from satellite not yet developed. There were no superstations, no HBO, CNN, ESPN, Showtime, CNBC, Fox News, Nickelodean, Discovery or History channels. VCRs had not yet been introduced. Congress had no idea of granting FCC auction authority. No one ever contemplated a government agency would raise over 24 billion dollars for the U.S. Treasury (Incidentally, the FCC finally received auction authority from Congress when I was chairman and the auction process and initial spectrum allocations were established under my chairmanship).

All of these communications advances are commonplace today and they have impacted the world of communications with the most revolutionary communications advancement in recent history. More dramatic changes are now being developed like -- the move from analog to digital broadcasts and broad band, high speed data and voice transmission, and most dramatic, the oncoming convergence of all telecommunications services with computerization.

It is generally known that I believe government should help industries to achieve advance communications goals by working with industry in a progressive spirit of mutual cooperation to encourage growth and innovation with minimal government. It is interesting to note that both congress and the Administration have proclaimed that "the era of big government is over."

I may now be committing heresy or labeled a visionary somewhat like Disney's Preston Padden, months ago, by predicting that some day the Congress and the FCC may have to actually provide inducements to preserve free over-the-air TV available to all the public. I can foresee a time when free over-the-air TV may be confined to news, public affairs and emergency bulletins with sports, big movies and popular series scrambled and offered on a pay basis. This would be necessitated to enable TV broadcasting, particularly the expensively programmed networks, to compete with the dual income (subscriber fees plus advertising) of competing services like cable,

satellite and even Internet. Then too, the transition from analogue to digital will be a long, ~~costly~~ ^{evolutionary} project for broadcasters.

Eventually broadcasters may have to explore all the possible profit capabilities of digital multiplexing to assure a fully programmed free channel available to everyone. The great majority of the public are already paying some kind of subscription fees for program services and fees have been established as an accepted fact of life. However, Congress and the FCC have the challenge of assuring ^{general} the public of the availability of free over-the-air news and information.

During my 23½ years at the FCC my general approach to communications policy was pro-free enterprise and pro-competitive with practical guidelines. Again, I believe progress can best be achieved with a constructive government attitude that provides incentives for growth and improvements in service and products for the public.

We should reserve adversary proceedings for major disagreements or egregious violations. In return, we should expect that telecommunications companies, because of their great impact on the American way of life, maintain a strong sense of social consciousness.

I believe all branches of government realize that broadcast licenses, and for that matter all businesses and corporations have inherent responsibilities to the public. In America, a working democracy, all corporations exist by the will of the people. It behooves all corporations acting in their own self interest to conduct themselves with a keen sense of social consciousness not only economic purpose.

I believe the free enterprise and corporate system really works in America, but I agree with those who said it was not ordained by God. In a democracy, any economic or social system can be legally altered by the people at the polls.

Remember that even in autocratic governments an aroused public can change the social and political order to demand a reasonable distribution of wealth. Remember that the proletariat executed the Czar's family in Russia.

So, the people – the public, the Congress and FCC representatives, have a right to expect reasonable benefits, enlightened management, fair treatment and reasonable distribution of wealth for the public good. The great majority of American telecommunications, cable and broadcasting corporations have reasonably fulfilled most of these expectations by providing the American people with the best communications services in the world and their employees with a high standard of living. One of our highest government priorities must be to preserve America's markets and our preeminent position in world communications to maintain healthy progressive industries with gainfully employed Americans. The American telecommunications, broadcast and cable system, warts and all, is the best and most imitated system in the world.

In summary, industry and government officials including the Congress, the FCC and the Administration ^{and the same applies to the Canadian counterparts} must work together in a progressive spirit of mutual cooperation to maintain and expand our communications leaderships ^{and Canadian} so that Americans continue to be the best informed, most gainfully employed and best served people on the planet.

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