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## COMMENTARIES

### THE FCC AND REGULATORY DUPLICATION: A CASE OF OVERKILL?

*Robert E. Lee\**

#### I. Introduction

The President of the United States recently said, "A Government big enough to give us everything we want is a Government big enough to take from us everything we have."<sup>1</sup> The ominous Orwellian caveat implicit in such a statement is a response not so much to any evil designs of governmental regulators, but to a history of good intentions. Although federal laws were once commands to only a few, stemming from a limited constitutional power grant, they are now promises to the many, written by the Legislature, endorsed by the Executive, upheld by the judiciary, and given to the bureaucrats to enforce. These promises range from good education, to old age security, to equality of races, to competent broadcasting. With each successive promise, the gears of enforcement grow more complex. And with each new gear, industry comes under more restraint.

Due in large part to an unequaled abundance of material resources and a productive spirit fostered by the free enterprise system, Americans enjoy the greatest freedoms and highest standard of living in the world. However, this productive capability can be strangled by the very government created to protect it. Those legislative promises are becoming harder and harder to keep. Since the mid-1930's, they have led to more governmental intervention into private industry. Many controls multiply; each rule is a foundation for new rules. Congress rarely imposes time limits on its laws or provides for periodic review; and even when it is acknowledged that changes are warranted, procedural delays often result in obsolete rules remaining in force for years. Perhaps it is time to re-evaluate the premise of government intervention and regulation.

The fundamental issue approached by the current administration's call for deregulation is a jurisprudential one: To what extent can the desire for free enterprise be balanced against social values and goals? On the one hand, the administration seems to indicate that progress toward desirable social goals is facilitated by free play in the market—that if the free market base is destroyed by overregulation, further potential for growth is also destroyed. On the other hand, the desire for immediate improvements leads others to believe that a planned society, with its inherent rules and regulations, is needed.

A case study of this philosophical tug of war exists in the broadcasting industry. Although regulation here has to contend with the unique factor of the first amendment, control of the industry has followed the basic pattern of increased intervention which has marked other industries in the last half century.

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\* Commissioner, Federal Communications Commission.

The author acknowledges the research done by Jerald N. Fritz, Notre Dame Law School Class of 1976, under the supervision of Miss Marjorie S. Reed, in preparation of this article.

<sup>1</sup> Address by President Gerald Ford, 63d Annual Meeting of the United States Chamber of Commerce, Apr. 28, 1975.

The Federal Communications Commission has grown from the airwaves "traffic cop" of the 1920's to an arbiter of industry disputes and an overseer of various forms of content. Moreover, the Government has not been content to leave this industry under the watchful eye of just one agency within the legislative branch. The judicial and executive branches and other agencies within the legislative branch itself have become involved with broadcasting policy and broadcasting industry regulation. To what extent is there duplication of policymaking and regulatory jurisdiction and to what extent is it justified? Is there room for combination, coordination, or elimination? Can there be a balance between a free market in broadcasting and the goals of government? The focus of this article is a review of the regulatory structure to determine the scope of broadcast regulation, to identify areas of overlap, and to examine the social benefits and problems created.

## II. FCC's Regulatory Role

In discussing agency regulation and its general relation to Congress,<sup>2</sup> it is useful albeit simplistic to distinguish between two broad kinds of regulation. First, there are regulations designed to deal with the competitive performance within such industries as transportation, finance, and common carrier communications. This type of regulation controls rates, the right to serve specific markets, and competitive practices. Its purpose is to prescribe limits to free competition and to provide substitutes for the controls and protections that usually are associated with free competition. A second type of regulation is concerned with such social issues as occupational safety, consumer product safety, and the environment. This kind of regulation is generally of more recent origin, but is becoming increasingly more influential.

The Federal Communications Commission performs both types of regulation. It has broad authority pursuant to Title II of the Communications Act of 1934, as amended,<sup>3</sup> to determine the nature of competition among communications common carriers and to limit it. To ensure adequate facilities and to prevent monopolistic abuses, it regulates rates, services, and construction of common carrier lines. In effect, it creates a monopoly and then regulates it.

Pursuant to Title III, the FCC has jurisdiction over all interstate and foreign channels of radio communication. The basis for this jurisdiction is the scarcity of radio channels and the need to prevent interference among users.<sup>4</sup> Unlike its jurisdiction over common carriers, the Commission is not directly con-

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2 See generally A. KOHLMEIER, *THE REGULATORS* (1969).

3 47 U.S.C. § 201 *et seq.* (1970).

4 It is important to note that the Commission derived its licensing authority from the scarcity principle. Since there were a limited number of frequencies to allocate, some standard had to be developed. Choosing the vague standard of the public interest, Congress gave the FCC extremely broad powers of regulatory control. A question arises then as to the jurisdiction of the Commission once technology develops means to increase sources for electronic media input into the discussion forum. There is no provision in the Communications Act of 1934, as amended, for this contingency. See COMM. FOR ECON. DEV. REPORT, *BROADCASTING AND CABLE TELEVISION: POLICIES FOR DIVERSITY AND CHANGE* 13 (1975) [hereinafter cited as CED REPORT]. See also B. GELLER, *THE FAIRNESS DOCTRINE IN BROADCASTING: PROBLEMS AND SUGGESTED COURSES OF ACTION* (1973) (Rand Corporation Study).

cerned with regulating competition, and it does not have authority to order construction for any particular purpose or to regulate rates or revenues of noncommon carriers. Instead, the Commission is to classify stations, prescribe services performed by classes, assign frequencies among the classes,<sup>5</sup> and license stations. It also prescribes technical standards for radio facilities to minimize interference and maximize the utilization of the spectrum. Competing demands for frequencies are among the Commission's most pressing problems, but with the advance of technology, the use of higher frequencies in the spectrum has become available. In addition, the advent of cable television may alleviate this problem to some degree.<sup>6</sup>

In developing regulations for CATV systems, the Commission has looked to both Title II and Title III of the Communications Act for guidance. The result is a hybrid system of regulation which incorporates concepts from both sections of the Act. For example, the Commission now requires public access channels in some markets to further the local service objectives of § 307(b) of the Act. And concepts from § 202(a) are utilized by the Commission to require that these channels be made available on a nondiscriminatory basis and that any rates be nondiscriminatory.

With a large majority of stations licensed for private use pursuant to Title III, the Commission continues to play a policing role to prevent interference by one station of another on the same or adjacent frequencies. Once it has allocated frequencies for a particular type of private user, such as the Business Radio Service, the Commission's primary concerns are whether an individual applicant belongs in that class, whether the applicant meets the applicable technical requirements, and whether the frequency sought is available.

The Commission's broadcasting regulations, however, have developed around social concerns as well as allocation and interference considerations.<sup>7</sup> The broadcast station licensee is viewed as a "trustee" whose private benefit is ancillary to the primary function of serving the public. The Commission has broad power

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5 The Communications Act provided for a division of the radio spectrum, one part to be controlled by the executive branch and used for governmental purposes, the other to be controlled by the legislative branch through the FCC for nongovernmental purposes. 47 U.S.C. § 305 (1970). The Act does not, however, split the spectrum into definite proportions. The task of dividing use falls on a negotiating committee within the Interdepartment Radio Advisory Committee (IRAC). The National Table of Frequency Allocations is the result of the negotiations and is a dynamic instrument for allowing change. Although a cursory look at the allocation chart shows roughly one-third of the frequencies go to the Government, one-third to private parties, and the remainder shared between the two, in reality the shared space can be preempted by the Government at any time. For a useful summary of the spectrum breakdown, see OFFICE OF TELECOMMUNICATIONS POLICY REPORT, *THE RADIO FREQUENCY SPECTRUM: UNITED STATES USE AND MANAGEMENT* (1973).

6 The term "cable" is often used interchangeably with other terms to denote the multichannel capacity of the coaxial cable: cable TV, CATV (community antenna television), broadband distribution systems, and coaxial communications. Because of the multichannel capability, cable has been viewed as a means to eliminate the concept that frequencies are a "scarce commodity." See CED REPORT, *supra* note 4, at 13. See also GELLER, *supra* note 4.

7 An interesting question is raised as to why broadcasting was required to meet these additional criteria. Why should not competing claims to frequencies be given out on a first-come, first-served basis? The practical reason appears to be that because recordation or registration was not required of the first licensees in the early 1920's, some system had to be devised to allocate the frequencies among competing claimants. The question is then posed as to whether the allocated function is not better left to the courts to be effected on an ad hoc basis rather than to a formalistic set of regulations.

to define standards of conduct and service through rulemaking and policymaking. It also has the power to enforce its own rules through forfeiture or license revocation, and, as an adjudicator choosing between competing applicants or balancing competing claims, it has broad power to refine its policies. Its governing standard is the public interest, an amorphous and evolving concept.

The FCC has developed a broad power potential. Using the public interest standard of the Act, the Commission has expanded its control into advertising, political broadcasting, and general program fairness.<sup>8</sup> In addition, pressure from the public and congressional leaders for a decrease in sex and violence in programs has led to a "jawboning" atmosphere where industry leaders are "persuaded" by the Commission to impose self-regulation.<sup>9</sup> Proposals for a percentage of time for types of programming have been proposed, but the Commission has never formally adopted them.<sup>10</sup> At present, the Commission reviews a licensee's proposals and determines whether they serve the public interest. The end result looks to many like control of program content.<sup>11</sup>

### III. Reforms

#### A. Philosophical Considerations

On a broad level, governmental regulatory reform must begin with an examination of interagency and intergovernmental duplication of functions.

It is a Madisonian concept that, "[W]here the whole power of one department of the government is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted."<sup>12</sup> This idea lies at the core of the separation of powers doctrine. As a protection against tyranny, it has been discussed by political philosophers from Plato to Locke to Jefferson. Its practical application was dramatized most recently in the Watergate controversy. The concept of separation of powers is based on a desire to prohibit any one branch from attaining too uncontrolled a power. The doctrine seems to have been designed to function on a broad level—each branch retaining some control over the others.

Violation of the doctrine may occur not only by use of one branch's entire

8 See GELLER, *supra* note 4.

9 To illustrate, Senator Pastore, chairman of the Senate Communications Subcommittee, made his position against sex and violence on programs well known. This in turn seems to have provided the impetus for FCC Chairman Wiley's conferences with the major TV networks to discuss the issue. The result was the "Family Viewing Hour" concept adopted "voluntarily" by the National Association of Broadcasters. Some claim that this, however, was a response to fear of congressional legislation. See BROADCASTING MAGAZINE, Feb. 10, 1975, at 31.

10 In a Notice of Inquiry, Broadcast Renewal Applicant, Docket No. 19715, 27 F.C.C.2d 580, 582-83 (1971), the FCC proposed to apply a statistical means of measuring substantial news, public affairs, and local programming performances in comparative renewal cases. However, it disclaimed any intention to delineate percentage performance standards in other programming areas. Former Commissioner Nicholas Johnson later proposed minimum programming standards in a dissent to renewals of several broadcast licenses. *In re* Renewals of Broadcast Licenses for Arkansas, Louisiana and Mississippi, 1973, 42 F.C.C.2d 3 (1973).

11 "The 1934 Act did not authorize such content regulation. The licensing process has become a programming process in which the Commission should not become too deeply involved." Interview with Rosel Hyde, former Chairman, Federal Communications Commission, in Washington, D.C., July 1975 [hereinafter cited as Hyde Interview].

12 THE FEDERALIST No. 47, at 268 (Scott ed. 1894) (J. Madison).

power by an official of another, but also by a blending of powers. In 1881 Justice Miller stated:

[T]he persons entrusted with power in any one of these branches shall not be permitted to encroach upon the powers confided to the others, but that each shall by law of its creation be limited to the exercise of the powers appropriate to its own department and no other . . .<sup>13</sup>

On an agency level, the "blending of powers" takes on an added complexity. Not only is an agency vested with powers of each branch but, because of the nature of interdependent industries, agencies may overlap and combine their power.

However, the Constitution itself does not maintain the executive, legislative and judicial branches in airtight compartments. Appreciating that time and growth would affect organizational requirements, the Constitution's framers created the potential for executive departments,<sup>14</sup> for example, but did not establish specific offices. The legislative branch also is allowed flexibility in delegation of its power. Congress, in creating the agencies, vested them with the powers of each branch. The FCC, for example, is a rulemaking body, performing legislative functions; an adjudicatory body, ruling on license applications; an enforcer and advisor, issuing fines or forfeitures and providing commentary to new legislation. By centralizing all three functions within an agency, Congress has created a powerful force.<sup>15</sup> In addition, many industries, because of the complexities of society and industrial structure, fall within the jurisdiction of several agencies. In fact it would be virtually impossible to create agencies that did not in some way overlap in subject matter jurisdictions.<sup>16</sup> Thus there are both practical and constitutional reasons why this blending has occurred.

Although there does not seem to be a separation of powers on the administrative level, one should not assume there is no restraint. Justice Miller's fear of blended power is not totally warranted. A type of check and balance does exist, albeit in a crude form. Review from a free press, congressional oversight, judicial appeals, and the Office of Management and Budget keep the agencies from expanding too rapidly.

In terms of a philosophical overview of the agency structure, the nature of industrial society combined with constitutional flexibility has led to a blending of agency power. This blending has the potential to centralize power, to circumvent the separation of powers, and, as a byproduct, to overregulate the industries involved. Some existing checks on the agency level, however crude, may offset some potential for power abuse. But the byproduct of duplicative effort must still be addressed. It is important to note here that a jurisdictional overlap does not necessarily indicate a wasteful duplication of effort. "[R]eform

<sup>13</sup> *Kilbourn v. Thompson*, 103 U.S. 168, 191 (1881).

<sup>14</sup> U.S. CONST. art. II, § 2.

<sup>15</sup> Kohlmeier posits that agencies constitute a fourth branch of government acting autonomously because of a loss of congressional interest after the agency has been created and the consumer-voter placated. KOHLMEIER, *supra* note 2, at 53-55.

<sup>16</sup> For example, both the FCC and Federal Trade Commission (FTC) are concerned with TV advertising, although each approaches the subject from a different perspective.

for the purpose of jurisdictional neatness has no practical benefit."<sup>17</sup> If, however, there is an "overkill" situation where a particular agency is being stymied, then there may be some benefit in reassessing how much regulation is needed.

The problem is drawing the line between healthy input from different sources and inefficient meddling by one agency in another's province. Although competent government demands well-informed decisions, the practical ramifications of parallel action on an interbranch or an interagency level are seen as increased costs of government—paying two salaries for one job; increases in paperwork; duplicate and possibly contradictory rules; and the immersion of private enterprises in a quagmire of red tape.

### B. Intraagency Concerns

Calls for regulatory reform of the Federal Communications Commission's broadcast regulations from broadcasters, academics, and some legislators cover a wide range of topics. They include: easing requirements for ascertaining community needs at license renewal time;<sup>18</sup> longer periods between renewal dates;<sup>19</sup> elimination of judicial functions of the Commission;<sup>20</sup> and elimination of content or programming control powers held by the Commission.<sup>21</sup>

Heeding this call, the Commission has created a Re-regulation Task Force to provide for continuing study of the broadcast rules. "To date the work of the Task Force has resulted in the simplification or elimination of nearly 300 rules."<sup>22</sup> In addition, the Commission has reevaluated the requirements which an AM radio station must meet in order to increase power, change frequency, or engage

17 Interview with Glen O. Robinson, Commissioner, Federal Communications Commission, in Washington, D.C., July 1975 [hereinafter cited Robinson Interview].

18 At present, licensees of broadcast facilities are required to file extensive community ascertainment studies to prove their programming serves the public interest. The ascertainment requirement evolved from a narrative statement showing how community problems were discovered to new guidelines involving detailed listing and analysis. This requirement has recently been altered for television applicants to require continuous evaluation rather than concentrated efforts within six months of the renewal application. The requirement may be eased somewhat, in that the requirement of a compositional study may be dropped and small stations may be exempted from record keeping duties. See Notice of Proposed Rulemaking, Ascertainment of Community Problems by Broadcast Applicants, FCC 75-540, Docket No. 19715 (May 6, 1975).

19 At present some 125 Representatives and 20 Senators have sponsored or cosponsored license renewal bills in the 94th Congress. Nearly all provide for lengthening the renewal period from three to five years.

20 The Committee for Economic Development, a private research organization whose purpose is to produce studies on critical issues, recommended a transfer of FCC judicial functions to a new "communications court" similar to the United States Tax Court, but within the executive branch. The recommendation is intended to allow the Commission to concentrate on policymaking by removing its adjudication power. See CED REPORT, *supra* note 4, at 82. However, because the Communications Act requires the FCC to make the ultimate decisions in many adjudicatory matters, this separation would require extensive changes in the Commission's responsibilities.

21 Efforts to eliminate § 315 of the Communications Act of 1934 along with the fairness doctrine have been proposed by Senator William Proxmire in S. 2, 94th Cong., 2d Sess. (1975) and Representative Robert Drinan in H.R. 2189, 94th Cong., 2d Sess. (1975). A bill which does that and also eliminates other specific restraints on the broadcasting industry has been introduced by Senator Roman Hruska in S. 1178, 94th Cong., 2d Sess. (1975) and duplicated by Representative Charles Thone in H.R. 4928, 94th Cong., 2d Sess. (1975). See also GELLER, *supra* note 4.

22 Address by Abbott Washburn, Commr., FCC New York State Broadcasters, July 15, 1975.

in nighttime operation.<sup>23</sup> A new radio renewal short form is also under consideration which, if adopted, may alleviate some burdensome paperwork.<sup>24</sup>

However, agency re-regulation requires balancing. If the FCC eliminates too many of its controls, it is accused by community interest groups and Congress of industry protection. On the other hand, too much control stifles the productive industry. Again, the basic question is the degree to which government should regulate the broadcasting industry. Once this question has been answered, the next question is whether the present regulations are appropriate or necessary to accomplish the overall goals.

### C. Interagency Duplication

In addition to reviewing the necessity for particular regulations within the FCC, a review of the regulations must also consider interagency overlap. For example, advertising is of concern to both the FCC and the Federal Trade Commission. The FCC has asserted some jurisdiction over advertising within the context of the public interest standard. A station which allows false, misleading, or excessive advertising is not deemed to be operating in the public interest.<sup>25</sup>

The FTC, however, is concerned with unfair practices in the entire area of commerce. Created in 1915 pursuant to the Federal Trade Commission Act of 1914,<sup>26</sup> the FTC is charged with prohibiting through regulations and cease and desist orders the use in commerce of "unfair methods of competition" and "unfair or deceptive acts or practices."

The FTC has interpreted its responsibility to include prevention of deceptive advertising and has become the arbiter of everything from cereals to liver pills.<sup>27</sup> The FTC deals with the truth of specific advertisements, but has no authority to revoke a broadcast license because of deceptive advertisements. It may, however, order a licensee to cease and desist from broadcasting particular advertisements. If its cease and desist orders are violated, the court may order civil penalties up to \$10,000.

Despite some jurisdictional overlap between the FTC and the FCC, there has not been much duplication of effort by the two agencies. The FCC is a licensing entity whose primary concern is the overall performance by the licensee. The FTC has a specific objective with regard to one segment of programming.

There have been times, however, when there has been duplication of effort by the FTC and the FCC. The 1967 decision by the FCC to apply the fairness doctrine<sup>28</sup> to cigarette advertisements was an example of such duplication.<sup>29</sup>

23 See AM Broadcast Station Assignment Standards FCC 75-769, Docket No. 20265 (June 27, 1975).

24 See Revision of FCC Form 303, Application for Renewal of Broadcast Station License, and Certain Rules Relating Thereto, FCC 75-375, Docket No. 20419 (Apr. 1, 1975).

25 47 U.S.C. § 312(a) (1970).

26 15 U.S.C. §§ 41-51 (1970).

27 KOHLMEIER, *supra* note 2, at 252.

28 The fairness doctrine is an ad hoc set of rules, regulations and Commission-court decisions requiring a station to present all sides of a controversial issue of public importance. See Fairness Doctrine, 30 R.R.2d 1261 (1974).

29 See Television Station WCBS-TV, 8 F.C.C.2d 381 (1968) (letter from the FCC concerning fairness doctrine applicability to cigarette advertising).



Using its broad powers to require that licensees operate within the public interest, the FCC conducted inquiries and received reports from many sources. The FTC was doing the same research, although its approaches stemmed from a different congressional mandate. The situation is rare, however, that both agencies are working independently on the same project with the same end in mind. Instead, there may be cooperative efforts to deal with problems that concern both agencies. For example, the FCC Chairman recently sent a letter to the FTC asking for aid in dealing with the problems of "hypoing" and "double-billing."<sup>30</sup> The FCC, in attempting to persuade the FTC to use its broader jurisdictional base over unfair competitive practices by broadcast and print media to correct the abuses, was attempting to eliminate a defense used by broadcasters that newspapers engage in the practice consistently. The letter was an effort at coordination to avoid duplication. The "FTC will probably not be looking much at broadcast stations and any duplication of effort will be *de minimus*."<sup>31</sup>

In addition to cooperating to avoid redundant regulatory effort, the FCC may consider facts discovered by other agencies in reaching its conclusions in rulemaking and adjudicatory proceedings. To illustrate, the FCC may use the factual determinations made by the FTC on a double-billing problem rather than make an independent study of the same problem. The FCC is not normally an adversary with other agencies. Therefore, any study made should retain an objective point of view. An independent study should be made, however, if one agency did not thoroughly research a particular aspect of an issue ancillary to its own objectives but which is crucial to another agency.

Other duplications of function between the FCC and other legislative regulatory agencies are negligible and stem from the same type of jurisdictional overlap. To eliminate those would yield nothing substantial.

#### D. Interbranch Duplication

In addition to overlap among administrative agencies, there may also be overlap among branches of government.

In analyzing such overlap, the crucial question is this: When does a jurisdictional overlap necessitated by a constitutional separation of powers become a functional overlap involving duplicative, wasteful effort? A second question is to what extent may one branch begin controlling the other branch's jurisdiction?

##### 1. Duplication by the Judicial Branch

The judicial branch is responsible for reviewing those agency decisions

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30 Letter from Richard E. Wiley, Chairman of the FCC, to Lewis A. Engman, Chairman of the FTC, May 13, 1975.

"Hypoing" is the term used for the enhancing of survey ratings by special advertising promotions or special programs just before the period when rating services are scheduled to complete area surveys.

"Double-billing" refers to the practices of fraudulently shifting costs of local advertising to National advertisers, which are ultimately reflected in consumer prices.

31 See Robinson Interview, *supra* note 17.

appealed to the courts. The scope of review is defined by Congress and, with regard to FCC decisions, is limited. The courts may review FCC decisions to ensure the decisions are not arbitrary, capricious, contrary to law, or unsupported by substantial evidence. The courts may not, however, make independent factual determinations.

Although the judicial branch has an indirect effect on the regulatory framework by interpreting the law under which the FCC operates, this involves no more duplication of effort than any other area where the judiciary intervenes.

"The judiciary is all pervasive. . . . To some extent, every time they review an agency decision, whether it is FCC, FTC, or Justice, there is a duplication. It is not a duplication of effort though, but a different function altogether. It is a reviewing function. It is certainly not wasteful duplication if you are committed to the process of judicial review."<sup>32</sup>

## 2. Duplication by the Executive Branch

The executive branch is technically the enforcer of the Government's laws and advisor to the Legislature. It has become, however, increasingly involved in the day-to-day regulation of private industry. The transportation, health care, energy, banking, and communications industries are but samples of businesses affected in some way by the executive branch.

Aside from the role of advisors to the President on policy-related matters, the Executive Offices provide the President with the means to enforce emergency procedures in the national interest. The regulatory functions of these Offices are becoming increasingly apparent. While the FCC may regulate directly by creating rules and imposing penalties for violations, the executive branch's power exists on three subtle levels. First, there is the power of the purse—control of the budget with which to exert crude power over agencies. Second, there is the threat of legislative proposals. If nothing else, this appears to force agencies to consider the long-range effect of their policies. Third, and most difficult to objectively analyze, are the forces of political give and take. This "power" can appear in a broad or narrow issue. For example, the Justice Department can selectively enforce the antitrust laws at the direction of a particular administration.<sup>33</sup>

On a more personal level, the Executive exerts a subtle control of agency regulators. It is usual for Presidents to appoint people of their own political party to certain agencies. The Communications Act provides some limit to the allowable number of persons from the same political party, but this does not prevent appointing those with compatible philosophical views. Regulators lack lifetime tenure and must look to the White House for reappointment at the end of their terms. They may also have political ambitions which influence their judgments

<sup>32</sup> *Id.*

<sup>33</sup> The Justice Department initiated suits against the three major television networks during the Nixon administration. Subsequent charges that the suits were trumped up by Nixon as punishment led the court to dismiss them without prejudice. The suits have been refiled. *See United States v. American Broadcasting Co.*, Civil No. 72-821 (C.D. Cal., filed Apr. 14, 1972); *United States v. Columbia Broadcasting Sys.*, Civil No. 72-820 (C.D. Cal., filed Apr. 14, 1972); *United States v. National Broadcasting Co.*, Civil No. 72-819 (C.D. Cal., filed Apr. 14, 1972).

and, as a practical matter, may limit their actual independence from the Executive or Congress.

Although agency appointees may not be experts when appointed, they presumably gain an expertise during their tenure which ends the Chief Executive's input. Few Presidents have accepted that theory without reservation, however; and no President has willingly conceded that consumer protection and industry regulation are beyond his power. With his power to recommend legislation, the President may influence regulatory matters. A number of Presidents have addressed Congress to this end, and they have spoken directly to the regulators, both openly and secretly.<sup>34</sup> The frequency, nature, and purpose of those talks vary with the purpose and interest of each President. Nonetheless, regulators are not bound by the Executive will; his power derives solely from his ability to reappoint the regulators.<sup>35</sup>

The President, as Chief Executive, derives his jurisdiction from the constitutional mandate to faithfully execute the laws.<sup>36</sup> In so doing, he has the power to establish Executive Offices and appoint department heads.<sup>37</sup> Because telecommunications is an all pervasive phenomenon, each Cabinet Office has various frequencies allocated to it and each has responsibilities for operating them.<sup>38</sup>

In searching to eliminate governmental duplication between branches, one must again distinguish between jurisdictional overlap and actual effort duplication. Furthermore, although both the FCC and an Executive Office seem to be working in the same area, because of the frequency allocation between government and nongovernment interests, each may be addressing a different problem. Although most of the Cabinet departments have telecommunications offices having authority over their own frequencies, this does not pose a jurisdictional overlap or potential for duplication.

However, when an executive department enters the realm of nongovernmental frequency regulation, serious, though not insoluble, questions of propriety are raised.

#### *a. Duplication by the Executive Branch—The Justice Department*

The Justice Department, although not a direct regulatory agency, has a profound effect on communications matters. Its antitrust suits pending against the three major networks and its involvement in the FCC's cross-ownership rule-making proceedings concerning broadcasting vis-a-vis cable and newspapers, give the Justice Department a formidable influence. The concepts which lie at the base of antitrust laws also come within the confines of "public interest." The

<sup>34</sup> See KOHLMEIER, *supra* note 2, at 37.

<sup>35</sup> Removal of commissioners once appointed may be done only for good cause. Thus, the President's power is limited in that regard. See R. GUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONERS* 464 (1972). "Cause" includes malfeasance in office, misconduct, neglect of duty and incompetence. These are usually specified in regulatory statutes. While the Communications Act of 1934 does not list causes, they are believed to be the same. *Id.*

<sup>36</sup> U.S. CONST. art. II.

<sup>37</sup> *Id.* § 2.

<sup>38</sup> For a complete list of assigned frequencies, see OFFICE OF TELECOMMUNICATIONS POLICY REPORT, *A SUMMARY OF THE FEDERAL GOVERNMENT'S USE OF THE RADIO FREQUENCY SPECTRUM* (1973).

Justice Department has advocated application of antitrust "concepts" at renewal time, and has filed petitions to deny several renewal applications where the applicant has other media interests in the same area. The FCC, however, has consistently refused to apply antitrust "concepts" to ownership patterns consistent with its rules where there has been no specific violation of the laws.<sup>39</sup> It has left the application of "concepts" to rulemaking proceedings. In determining its long-range policies in areas such as media clusters,<sup>40</sup> multiple and cross-ownership restrictions,<sup>41</sup> the FCC considers antitrust doctrines and seeks advice from interested parties. In many of these proceedings, the Justice Department has advocated regulatory restrictions which would be more stringent than the antitrust laws.

Some suggest that, since the Justice Department is not a rulemaking body, it should do its enforcing in court rather than in agency proceedings. However, "[h]aving the role of advisor and enforcer, it would be rather strange to say Justice could only enforce the laws in court. They may find there is a better 'pay off' to head some of these things off at the agency level."<sup>42</sup> However, the Justice Department is becoming increasingly involved with actual policy formation at the FCC, advocating a national antitrust policy that goes beyond preventing violation of the antitrust laws. Any action which results in less than maximum competition is deemed against this policy. The FCC's position is that antitrust is only one element of the public interest and must be evaluated within that total framework.<sup>43</sup> Further, it believes the Justice Department's advocacy of a national antitrust policy which goes beyond articulated law should be questioned. The result of this conflict between the Justice Department and the FCC has been a power struggle over who will make FCC policy.<sup>44</sup> Although the Commission accepts the comments of the Justice Department, it should not give them greater dignity than those of other interested parties.

The duplication of effort between Justice and the FCC thus stems from both an overlap in jurisdiction and a struggle over authority. It would seem that the Justice Department may be overstepping its authority in attempting to formulate FCC policy. Although comments during rulemaking may be appropriate, participation in adjudicative proceedings for the purpose of advocating policy changes on an ad hoc basis may be inappropriate. Its comments are valued as another voice in the discussion, but it is not primarily a policy-forming body. Rather, it

39 See *Columbus Broadcasting Coalition of Mass Media, Inc. v. FCC*, 492 F.2d 656 (D.C. Cir. 1974); *Stone v. FCC*, 466 F.2d 316 (D.C. Cir. 1972); *Hale v. FCC*, 425 F.2d 556 (D.C. Cir. 1970); *In re Chronicle Broadcasting Co.*, 40 F.C.C. 775 (1973).

40 See Notice of Proposed Rulemaking, Multiple Ownership of Standard, FM, and Television Broadcast Stations, FCC 75-840, Docket No. 20548 (July 16, 1975).

41 The Commission has recently adopted new rules restricting the ownership of broadcasting facilities and newspapers in the same geographical location. See Second Report and Order, Docket No. 18110, Multiple Ownership, 50 F.C.C.2d 1046 (1975). Earlier it adopted rules limiting the number of stations which could be commonly owned or controlled in the same market. First Report and Order, Docket 18110, 22 F.C.C.2d 306 (1970).

42 See Robinson Interview, *supra* note 17.

43 See note 40 *supra*.

44 An interesting facet to this power struggle concerns the appeal of the cross-ownership rules adopted in 18110. Pursuant to § 402(a) of the Communications Act, the Justice Department is an automatic party to all appeals from FCC orders except those concerning license applications. However, since Justice filed the petition for review, it is in essence on both sides of the fence raising the issue of propriety.

is an enforcer of congressional mandates. "Perhaps the Justice Department can do with a small lesson in self-restraint."<sup>45</sup>

In terms of litigation, the Department of Justice is the representative of the Commission in all legal matters except licensing proceedings. However, the Commission maintains its own legal staff, expert in its field, which is perhaps the FCC's more logical representative. The FCC ". . . should handle its own litigation. It would be more efficient and I think we have primary jurisdiction."<sup>46</sup>

### *b. Duplication by the Executive Branch—the Executive Offices*

The second organizational level of the executive branch is the Executive Offices. At this level, the Office of Management and Budget (OMB) and the Office of Telecommunications Policy (OTP) are of primary concern.

A primary function of OMB is to advise the President on agency projects so that congressional appropriations may be expended in as economical a manner as possible. OMB is conceived as the executive check and balance on the bureaucratic level of Government. FCC forms are subject to OMB approval. OMB also reviews FCC budget proposals. Since the bounds of the FCC are controlled by its monetary allocation, OMB exerts a significant influence over the Commission.<sup>47</sup>

More direct duplication of effort from the Executive Offices comes from the Office of Telecommunications Policy.

Over the years the President has had many advisory committees regarding communications. The primary concern has been the government's use of its own allocated frequencies. After World War II, the Office of the President had a telecommunications advisor on the White House staff, whose main responsibility was to oversee military communications. During the Eisenhower administration, the advisory functions were shifted to the Office of Defense Mobilization (ODM) in the Defense Department. ODM was to coordinate Government telecommunications activity and report to the National Security Council. ODM was then merged with the Federal Civil Defense Administration to form the Office of Civil and Defense Mobilization (OCDM). In 1958, OCDM's Director established a Special Advisory Committee on Telecommunications, which recommended an Executive Office to make policy and handle the Presidential communications duties.<sup>48</sup>

In 1962, President Kennedy created the position of Director of Telecommunications Management in the Office of Emergency Planning.<sup>49</sup> The Director was to advise the President on communications, to coordinate communications activities of the executive branch, to assign radio frequencies to government agencies, to encourage utilization of the radio spectrum by the federal govern-

45 See Hyde Interview, *supra* note 11.

46 Interview with Richard E. Wiley, Chairman, Federal Communications Commission, in Washington, D.C., July 1975 [hereinafter cited as Wiley Interview].

47 With designs of making the FCC more responsive to Congress than the President, Representative Macdonald has introduced a bill which would require the FCC to submit budget requests directly to Congress. See H.R. 8014, 94th Cong., 2d Sess. (1975).

48 See CED REPORT, *supra* note 4, at 86.

49 Exec. Order No. 10,995, 3 C.F.R. § 535 (1964).

ment in the public interest, and to implement national policy in the development of space satellites for international communications services.<sup>50</sup> Since the Communications Act had provided for dividing frequency control between the FCC and the Executive, the Executive Order did not impinge on the FCC's jurisdiction over nongovernmental uses of radio. "Nothing contained in this order shall be deemed to impair any existing authority or jurisdiction of the Federal Communications Commission."<sup>51</sup>

Congress created a jurisdictional overlap between the future OTP and FCC in 1962 with the Communications Satellite Act.<sup>52</sup> Although the FCC had authority over the satellites similar to its authority over common carriers such as telephone and telegraph, the President was given the task of promoting and coordinating satellite communications. This task was delegated to the newly created office. Concerned with the slow development of satellite communications, President Johnson in 1967 commissioned the Rostow Task Force on communications policy.<sup>53</sup> Its final report recommended a stronger, more capable, and better funded body able to coordinate telecommunications offices in the federal government, as well as changes in broadcasting and cable in the nongovernmental realm.<sup>54</sup> Although President Johnson did not act on the report, in 1970 President Nixon in effect adopted the recommendations of the task force. In Reorganization Plan No. 1 of 1970, President Nixon set up the Office of Telecommunications Policy.<sup>55</sup>

The functions of OTP as set out in the Executive order were similar to those articulated in 1962, but with the significant addition of the goal to "[d]evelop and set forth plans, policies, and programs with respect to telecommunications that will promote the public interest . . . ."<sup>56</sup> Although the order maintained that FCC jurisdiction would not be impaired, the authority given is sufficiently broad to encompass any matter within FCC's realm.<sup>57</sup> This does not necessarily damage FCC jurisdiction, but does permit OTP to engage in the same policy inquiries. Based on this broad jurisdictional authority, OTP has not only performed traditional Executive Office functions of making recommendations concerning government use of the spectrum, but has also involved itself in regulatory concerns which do not involve spectrum use.<sup>58</sup>

The crucial question discussing the role of OTP, aside from a jurisdictional overlap and duplication of effort, is whether a concentration of control in the Executive deprives the FCC of its power to act in a nonpartisan manner, free of Presidential direction. The one word answer is: "possibly."

50 See Barrow, *OTP and FCC: Role of the Presidency and the Independent Agency in Communication*, 43 U. CIN. L. REV. 291, 306 (1974).

51 See note 49 *supra*.

52 47 U.S.C. §§ 701-44 (1970).

53 MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING RECOMMENDATIONS RELATIVE TO WORLD COMMUNICATIONS, H.R. Doc. No. 157, 90th Cong., 1st Sess. (1967).

54 PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT ch. 7 (1968).

55 Exec. Order No. 11,556, 3 C.F.R. § 548 (1971).

56 *Id.* § 2(b).

57 See Barrow, *supra* note 50, at 308.

58 A cabinet committee appointed by President Nixon and chaired by OTP Director Whitehead issued a report dealing with cable TV in such areas as common carrier status, equal opportunities, fairness doctrine, and origination of programming. See CABINET COMM. ON CABLE COMMUNICATIONS, CABLE, REPORT TO THE PRESIDENT (1974).

The overlap between OTP and FCC stems basically from the President's need to be informed on all national matters, not just those of the Government. Thus, the communications issue must be viewed on two levels. First, on a technical level, the executive should have complete authority over the Government's use of its share of the spectrum. The FCC should control the nongovernmental allocation. Second, on a policy level, each branch may have input into the other but final policy decisions are within the mandate of each. For example, OTP may make recommendations in a rulemaking proceeding before the FCC, but the Commission has the final decision. In that instance OTP is acting as the advisor to the President on proposed legislation of which the President must be informed. It is on this second level that the potential for duplication of effort takes place. However, duplication of effort here may not be detrimental in itself. "Duplication in the legislative area is *beneficial* in terms of public debate and airing of different views . . . it goes more to separating the functions of government than blending those functions."<sup>59</sup> It is healthy in a democratic government to have a variety of inputs into public debate. Each branch approaches the problems from a different perspective. "The support studies that OTP provides are the kind of work that we [FCC] don't generate internally and you can't get it out of the industry comments. . . . It is another input in the Commission's deliberations. By and large their input is pretty respectable."<sup>60</sup>

OTP's main function is to advise the President. But in the early 1970's it stirred controversy by encroaching on the regulatory authority of the FCC in issuing what some saw as threats to both commercial and noncommercial broadcasters.<sup>61</sup> OTP's Director, in an Indianapolis speech, was highly critical of the attitudes and practices of the news media. The media viewed the address as a threat to their independence. This deviation from OTP's stated purpose tended to obscure the valuable coordinating work being performed by the office.<sup>62</sup>

OTP claims it has been rather selective in participating in rulemaking proceedings, but OTP's involvement in the formation of cable rules may be viewed as commenting on day-to-day regulation rather than long-range policies. In 1971, the Director of OTP was instrumental in bringing broadcasters, cable owners, and copyright interests together to agree on the new cable rules. Indications at the time were that there was considerable pressure exerted by OTP to reach a "consensus agreement."<sup>63</sup> Was the advisory role to the President on "broad policy matters" enough to justify this type of action by OTP? Perhaps not. But it should be said that there was no other body left to work out a solution. The FCC had tried previously but had failed.

The functions of OTP vis-a-vis the FCC have developed quite rapidly. Once a small Presidential advisory Office, OTP is now a source of substantial

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59 Interview with Thomas Keller, Acting General Counsel, Office of Telecommunications Policy, in Washington, D.C., July 1975 (emphasis added).

60 See Robinson Interview, *supra* note 17.

61 See BROADCASTING MAGAZINE, Sept. 17, 1973, at 16-17. The criticism of OTP was initiated in response to a speech made by Clay T. Whitehead, then director of OTP. See Address of Clay T. Whitehead, Director, Office of Telecommunications Policy, Executive Office of the President, Sigma Delta Chi Luncheon, Indianapolis Chapter, Dec. 18, 1972.

62 See CED REPORT, *supra* note 4, at 87.

63 See BROADCASTING MAGAZINE, Nov. 8, 1971, at 16-17.

political power. The FCC's Office of Plans and Policies, responsible for long-range goals, has been duplicated by OTP. However, the duplication is not arbitrary. There is no overkill, for the FCC has no monopoly on proper attitudes toward regulation. Further, there is a constitutional mandate that the President use vital resources in the national interest, and there is a statutory separation of the spectrum. The Senate Commerce Committee has noted the need for an office to negotiate spectrum use, to represent the nation in international telecommunications agreements, and to promote a viable industry undergoing technical changes.<sup>64</sup> However, the Committee does not appear to have contemplated White House concentration of policymaking power with regard to the program service of commercial and public broadcasters, and the equal opportunities and fairness doctrines.<sup>65</sup>

Drawing the line on how much OTP should intrude on the legislative process of the FCC is difficult. From the Commission's point of view, "The FCC has to fulfill its statutory jurisdiction. OTP can make input over here but they cannot determine for us our policy. They propose, we dispose. They can file in our dockets but they certainly can't end up telling us what to do."<sup>66</sup> OTP must respect the separation of powers among the executive branch, the FCC, Congress, and the courts. But as a White House advisory Office, it should continue to examine the Government's use of the spectrum and provide expertise to the President.

In the end, a practical question must be addressed. Assuming there is some duplication of effort that is unjustifiable even on a jurisdictional overlap basis, how much is saved by eliminating it? One source maintains that eliminating control by the executive branch is beneficial since it eliminates any possibility for media control by the President and guards against politicization of the Government's regulation of the media.<sup>67</sup> However, "eliminating the OTP advice function and overlap with FCC would not scratch the surface of eliminating bureaucracy. They would always have a function of advising the President. So there isn't a lot of resource savings to be had."<sup>68</sup> Thus, to the extent there is a jurisdictional overlap and a fear of executive dominance, there may be reason to limit the OTP's scope of involvement. As far as effort duplication is concerned, some is necessitated by the division of government. That which is not necessitated should be eliminated.

#### IV. Conclusion

There is compelling simplicity in the notion of unifying all government agencies with a common denominator under one roof. It conjures dreams of organization, simplicity, and efficiency. However, the idea assumes the false premise that the Government has one point of view. In reality the multifaceted

64 See *Hearings Before the Senate Commerce Comm.*, 91st Cong., 1st Sess., sers. 91-93, at 45-50 (1969).

65 See Barrow, *supra* note 50, at 307.

66 See Wiley Interview, *supra* note 45.

67 See Barrow, *supra* note 50, at 323.

68 See Robinson Interview, *supra* note 17.



nature of the broadcasting industry and the constitutional limits imposed to ensure a democratic way of life work to disintegrate the commonness of that denominator.

Duplication of government functions exists in jurisdictional definitions; it in turn creates practical overlaps in effort. If one is committed to a tripartite government, one must accept some duplication. However, government bureaucracy begets more of the same. Thus, to avoid being overrun by the controls of government and the consequent costs, one must limit either the scope of jurisdiction, the offices administering it, or both. There is need for coordination of efforts such as the FTC/FCC approach to double-billing; a need for combination of personnel working in the same area, as in cable regulation; and a need for elimination of particular rules which serve no one and generate nothing but paper. Bureaucrats must learn self-restraint in regulation lest one day they find no one to regulate but each other.