BOOKS
Reviewed

The Second Half of Jurisprudence: The Study of Administrative Decisionmaking

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DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY. By Kenneth Culp Davis. Baton Rouge, La.: Louisiana State University Press. 1969. xii + 233 pages. $8.50.

We need a new jurisprudence that will encompass all of justice, not just the easy half of it.
—Kenneth Culp Davis[1]

At the beginning of the past decade, law professors dealt almost exclusively with the formalized, traditional areas of the law, and their students passively accepted the daily diet of dull, largely irrelevant cases and statutes. Both student and teacher sought to achieve what each believed to be an easily identified, objective goal: to develop a "lawyer." I was then a professor of administrative law at the Berkeley campus of the University of California. The administrative law courses and their attendant source materials at that time focused on formal appellate decisions dealing with judicial review, permissible delegation of power, standing for appeal, ripeness, exhaustion of administrative remedies, and other highly structured subjects considered the proper concerns of lawyers, professors, and students.

Liberated from the cloisters of the university by one year of practicing administrative law and six years of manufacturing it, I have concluded that my students were deprived of a complete education in this subject area; they were exposed to only the narrowest part of the administrative process. After much reflection on how administrative law should be taught, I have concluded that the principal subject matter should be the process of agency and executive decisionmaking that produces administrative action—or inaction. It would be necessary to illuminate this process with the relevant doctrines of political science, public administration, constitutional law, and jurisprudence, as well as the traditional administrative law materials. I confess all this at the beginning, so that the reader can discount my views about Professor Davis' book in light of my personal experiences and beliefs.

Few people who have read Professor Kenneth Culp Davis' book, *Dis-*

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1. P. 233 (emphasis in original).

cretionary Justice: A Preliminary Inquiry, will be surprised that I consider it the most important work in the field of administrative law in some time. I am prejudiced, of course, for Davis reaches a conclusion nearly identical to my own—that scholars and students of administrative law have spent 90 percent of their time studying 10 percent of the relevant subject matter. I am not just lamenting the failure of law schools to explore adequately the substantive areas of law with which administrative agencies deal. These can be handled—and in some schools are being handled—by courses in government regulation of business, or by even more specialized courses, such as communications law, air law, and trade law. I am saying that the administrative process of agency decisionmaking (as distinguished from the legal procedures for review of these decisions) is largely being ignored in American law schools. Rather than seeking methods for improving the administrative process to avoid unsound, unfair, and arbitrary decisions, scholars have focused almost exclusively on the role of the courts in supervising and reviewing agency action.

As most students of public administration know, the power over substantive decisions often lies with the person in control of the decisionmaking procedure. Who determines what cases and proposed rules an agency will hear? What criteria, if any, do the anonymous staff members use in making their decisions? Out of each 100 formal complaints, license renewal applications, and other legal actions brought to the Federal Communications Commission, I estimate that no more than five ever reach the seven Commissioners for resolution. A thorough study of administrative law cannot ignore how those five are selected and what happens to the other 95 actions. Far worse, however, is the fact that perhaps only one in two hundred of the cases decided by the Commissioners is ever appealed to the courts. Even this one case is probably not representative; certain types of Commission decisions are not reached through the adversary process and are, therefore, seldom appealed, while other types of cases are almost always appealed. The casebooks and textbooks that law students read in studying the administrative system are compiled from this small number of unrepresentative cases. Law school courses, designed to prepare the administrative practitioner and scholar, consequently focus attention on a minute, relatively unimportant aspect of the administrative process.

This selective education has significant long-range effects. The research of young legal scholars is greatly influenced by the established scope of a subject, so legal resources are channeled into the areas of the administrative process that traditionally have been deemed worthy of study. To lead the way into a new area of study requires initiative and foresight possessed by too few people. Similarly, the lawyers who have studied traditional administrative law are far better prepared, and therefore far more likely, to write

briefs challenging agency actions than to prepare documents useful to the agency decisionmakers. These decisions to challenge the action will probably be made with little regard for the comparative importance of the two courses of action or for their relative chances for success. Such decisions have a significant influence on the resultant configuration of the legal system. A young man applying for an exemption as a conscientious objector may realize that judicial review of his local draft board's decision affords him some protection against arbitrary action. But the ability to prevent or minimize the arbitrary action in the first place would surely be more valuable to him. It is upon the "other" aspects of the administrative process, agency decisionmaking in the first instance rather than subsequent judicial supervision, that Davis would have us concentrate our attention.[2]

I. The Problem of Administrative Discretion

Professor Davis' study of "discretionary justice" focuses on the relationship between the government, acting through its appointed agents, and its citizens, who in theory have ultimate control over the government. His goal is to explore means by which official injustice can be reduced and the administration of justice can be improved.[3] His study covers government decisionmaking both in executive departments and administrative agencies.[4] The book does not focus exclusively on the federal government or the larger, more familiar agencies. For Davis the process of justice dispensed by police, prosecutors, and welfare authorities is as important a subject of inquiry as that of the major independent regulatory Commissions.[5]

Davis' major thesis is that the discretion given government decisionmakers too often produces injustice. According to him, discretionary decisionmaking, "where rules and principles provide little or no guidance, where emotions of deciding officers may affect what they do, where political or other favoritism may influence decisions, and where the imperfections of human nature are often reflected in the choices made,"[6] does not provide the equal justice upon which our system prides itself. Administrative discretion is often glorified with such metaphors as the lifeblood of the administrative process, while its abuse is termed the greatest vice of the administrative process.

To combat the dangers of excessive discretion, Davis proposes that administrative action be more effectively circumscribed by principles, rules, and standards that can provide guidelines for decisionmaking. Such limitations on discretion are necessary "because rules make for even handedness,

2. P. 216.
3. Pp. 5–6.
4. P. 6.
5. Pp. 9–12.
6. P. v.

because creation of rules is relatively unemotional, and because decision-makers seldom err in the direction of excessive rigidity when individualization is needed."[7] Davis does not suggest, however, that all discretion could or should be eliminated. He recognizes that a smooth-functioning legal system must allow administrators substantial discretion to shape results of action to the unique facts and circumstances of a particular case. He argues that all discretion should be identified and closely scrutinized to determine if it is really necessary. The discretion remaining after this pruning process should be closely controlled; in Davis' terms, it should be "confined, structured, and checked . . . ."[8]

Traditional legal institutions do, of course, provide some "control" of discretion. Judicial review is one method of checking discretion; legislative "oversight" and review of policy decisions is another. When the legislature provides guidelines in delegating authority to agencies, it is confining and structuring administrative action. In Davis' view these traditional approaches to the control of discretion are not enough. They can, at best, provide only marginal improvement to a system that is now less than tolerable. The greatest restraints on discretion must come from administrators themselves, through rules that make vague standards more precise.[9]

This faith that agency rules can restrain agency discretion is the foundation of Davis' suggested solution to the problem of administrative injustice. In reference to efforts to improve justice and eliminate arbitrary decisions, Davis writes: "Over the centuries, the main answer has been to build a system of rules and principles to guide decisions in individual cases."[10] As the vehicle for production of these rules, Davis favors the present, formalized rulemaking process: The agency proposes adoption of a rule, gives notice of the possible adoption of the rule, invites comments from all interested parties, and then acts to adopt or reject the rule based on the comments.[11] This process—legislative in nature—binds the governmental agency and the regulated parties to act within the limitations imposed as though these were statutory directives. Davis describes this process as "one of the greatest inventions of modern government."[12]

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7. *Id.*

8. P. 26. Davis uses these terms throughout the book. *See, e.g.*, Pp. 52, 97, 142, 188. Justice Cardozo, in a typically colorful phrase, wrote of the need for controlling administrative discretion by holding it "canalized within banks that keep it from overflowing." Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (Cardozo, J., concurring). Davis suggests that "[T]he degree of discretionary power [should be] commensurate with the need for discretionary power . . . ." P. 16.

9. Professor Davis would extend the judicially imposed "nondelegation doctrine" to say that, if the legislature did not set precise guidelines concurrent with the delegation of regulatory power, the courts would require the administrative body to set up standards and safeguards within a reasonable time after its creation. Pp. 220–21. *See also* Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713 (1969); Zamin, *Administrative Control of Administrative Action*, 57 CALIF. L. REV. 866 (1969).

10. P. 215.

11. *See* 5 U.S.C. § 1003 (1964).

12. P. 65. *See generally* Reich, *The Law of the Planned Society*, 75 YALE L.J. 1227 (1966).

In brief, Davis proposes that agencies eliminate most administrative injustice through a two-step process: The agency first must define its purposes and circumscribe its power to rid itself of unnecessary discretion, then it must adopt and use specific, publicized decisionmaking criteria to regularize and organize the discretion that remains. Both steps require the adoption of precise rules and standards that are best formulated through the rulemaking process. Since this limitation and control of discretion is to be accomplished mainly through rulemaking, lengthy adjudication and formal proceedings can be eliminated in many cases. This reliance on informal decisionmaking, however, creates the possibility of secretive governmental action. Davis recognizes that, unless the structure of both rulemaking and informal decisionmaking allows for openness and public participation, the victory over injustice cannot be achieved. Therefore, in his discussion of the prevention of the arbitrary use of needed discretion, he places great emphasis on the openness of the entire process.[13]

Though small, this book is crammed with innovative ideas. Davis devotes one chapter to the demolition of the archaic "rule of law" and "nondelegation" doctrines;[14] he discusses the proper role of government lawyers on appeal and the ethics of raising technical defenses such as standing and timeliness;[15] and he demonstrates the meaninglessness of the legalistic "right-privilege" distinction.[16] The book is at its best, and most readable, however, when advancing its central thesis by fitting concrete examples into the overall conceptual scheme. Some examples of the discretionary decisions Davis discusses are the discretion of the police in arresting,[17] the prosecutor in initiating action,[18] the judge in sentencing,[19] and the welfare official in dispensing government largess.[20] He concludes that much injustice could be eliminated by reducing the unrestrained and unnecessary discretion of such government decisionmakers.

Critics of the government's performance in business regulation have realized that government action must be guided by precise rules and standards to produce efficient regulation and facilitate compliance. Davis, of course, agrees, but his study goes beyond government regulation of business. He argues that the administrative decisions made by policemen in

13. *See* pp. 97–141. *See also* Rosenblum, *Low Visibility Decision-Making by Administrative Agencies: The Problem of Radio Spectrum Allocation*, 18 AD. L. REV. 19 (1965). For my own thoughts on the need for an open atmosphere in decisionmaking see American Tel. & Tel. Co., 9 F.C.C.2d 30, 142–45 (1967) (concurring opinion). The courts also have recognized that FCC procedures must be open to be valid. *See, e.g.*, Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959).

14. Ch. II.

15. Pp. 157–61.

16. Pp. 172–87.

17. Pp. 80–96.

18. Ch. VII.

19. Pp. 133–41.

20. Pp. 180–87.

the street also deserve study. The evil to be avoided in decisions to arrest, as in other decisions, is "selective enforcement"—the different treatment of identical cases with no legitimate reason. Justice should not only be procedurally fair, but as rational, consistent, and evenhanded as possible. Davis suggests that any injustice that may result from a policeman's decisions to arrest, although different from the injustice and inefficiency of some regulatory agency decisions, is a symptom of an identical, larger problem—the inequities that flow from discretionary governmental action.[21]

II. Administrative Discretion in Practice: The Case of the FCC

Perhaps as important as Davis' novel thesis and discussion is his reason for writing the book: a plea to students, professors, and scholars to build upon his incomplete discussion and tentative conclusions. He has subtitled his work *A Preliminary Inquiry*, and he urges all people engaged in the study of law to expand his work on the study of discretion in the administration of justice in the United States. It is my opinion—and hope—that Professor Davis will succeed in creating enough interest in the subject to generate the extensive research and intensive thought that administrative decisionmaking deserves. He has demonstrated that discretion can be adequately studied, and he indicates enough "preliminary" ideas to keep many scholars busy for some time.[22]

As Professor Davis' book purports to be an invitation to begin further study of discretion, I have taken him at his word and offer a few observations about the discretion of the Federal Communications Commission, the administrative decisionmaking body with which I am most familiar. Perhaps this is the best way of giving some insight into the scope, direction, and meaning of Davis' work. Of course, a thorough analysis of the FCC's use of discretion is a topic better treated in a book than a book review. I will confine my discussion here to the development of guidelines for regulation by the Commission of federal licensees and regulated utilities. I will first describe the present rules and standards, and then consider those procedures—rulemaking, adjudication, and others—that might be most appropriate for the development of more equitable regulatory guidelines.

A. *Existing Rules and Guidelines*

The rules and standards governing decisionmaking by the federal independent regulatory agencies allow a great deal of discretion that weakens

21. Pp. 162–72.

22. Professor Davis gives the following description of his purposes: "Although this essay does advance a number of proposals designed to improve our system of discretionary justice, I regard such proposals as incidental to my main purposes, which are (1) to dispel the virtually universal impression that discretionary justice is too elusive for study, (2) to open up problems that seem susceptible of further research and thinking, and (3) to formulate a framework for further study." P. vii. *See* pp. 232–33.

the regulatory system and results in injustice to the regulated parties and the public.[23] Professor Davis, in attempting to direct research into this neglected area of administrative law, implies that the standards limiting the discretion of the major agencies are relatively precise compared to those applied to the more informal administrative decisionmakers such as the police and welfare authorities.[24] Leaving such comparisons to others, I can only say that the regulatory guidelines of the FCC are not nearly precise enough to produce satisfactory results for either the public or the regulated entities.

The FCC is charged by Congress with the duty of regulating three distinct portions of the nation's communications system: the electromagnetic, or radio, spectrum ("spectrum management"); the interstate communications common carriers; and radio and television broadcasters.[25] In each of these areas precise guidelines for regulatory decisionmaking are lacking. Congress in effect has given the FCC power to regulate in any manner that is neither immoral nor publicly conceded by the Commission to be against the "public interest."[26] As occasionally indicated in my dissents, even these modest standards are abused from time to time by an agency pleased to operate devoid of any guidelines—either from Congress or self-imposed—that might inhibit its effective industry representation.

In each area of Commission responsibility, regulatory performance could be improved by restricting discretion. The FCC staff and the parties that appear before the Commission would have more specific knowledge of what is required of them in the regulatory scheme, and the regulated industries would operate more efficiently by knowing more about what the Commission's regulatory policies were designed to accomplish. The disparity between the need for precise, publicized regulatory guidelines and existing FCC regulatory practice is too great. To provide justice and fairness to the regulated parties, and to increase industry efficiency and public service, this gap must be reduced.

The FCC is responsible for the guidance of some 7500 licensed radio and television stations, hundreds of common carriers, and perhaps 3.2 million licensed transmitters in the portable transmitter ("land mobile") personal communications service.[27] Obviously, the Commission cannot deal personally with each licensee to fit its regulation to his individual needs and desires. The FCC must promulgate industry-wide rules, allowing specific waivers where appropriate. Far too often it has failed to adopt rules, or it has adopted rules that are so ambiguous, complex, and devoid of ob-

23. *See generally* H. FRIENDLY, THE FEDERAL ADMINISTRATIVE AGENCIES: THE NEED FOR BETTER DEFINITION OF STANDARDS (1962); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION (1965).
24. P. 222.
25. *See* Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.* (1964).
26. This statutory standard is discussed in note 34 *infra.*
27. FCC, 35TH ANN. REP. 29, 78, 201 (1969).

vious rationale as to be worse than no rules, or it has adopted precise rules and then proceeded to waive virtually every application of them. This has resulted in a loss of regulatory impact, a hardship upon the regulated parties, and a loss of industry efficiency. The commission has proven unable to regulate satisfactorily in the interest of private concerns, let alone the public interest.

In addition to the direct regulatory effect, more specific rules and standards could serve to lessen the risk of corruption, pressure, and bias in the regulatory process. When an agency dispenses government largess of the magnitude of a multimillion-dollar radio or television license, the possibility of favorable treatment for influential parties always exists.[28] Were the actions of Commission subordinates more closely constrained and their discretion more limited, this possibility could be substantially reduced.[29]

1. *Spectrum management.*

The Commission is the manager of a valuable resource—the nation's radio spectrum (or range of "frequencies").[30] In this capacity, it formulates a system of priorities to determine what portion of the spectrum should be devoted to a particular use, and allocates this assigned spectrum between potential users of equal priority. The present performance of the FCC in managing this resource is, putting it most charitably, unsatisfactory to almost everyone concerned.

In describing elsewhere the current "crisis in spectrum management," I suggested that a large part of the problem resulted from the inadequate system of decisionmaking used by the Commission.[31] No clearly articulated criteria exist upon which intelligent decisions can be based. The only spectrum management guidelines contained in the Communications Act require the FCC to "encourage the larger and more effective use of radio in the public interest,"[32] to "provide a fair, efficient, and equitable distribution of radio,"[33] and to determine "whether the public interest, convenience, and necessity will be served by the granting of" spectrum rights to the applicant.[34] This vague language covers up Congress' failure to formulate mean-

28. During the late fifties the FCC was involved in a scandal over the dispensing of television licenses. This incident resulted in the indictment of one Commissioner and the embarrassment of several others. *See* B. SCHWARTZ, THE PROFESSOR AND THE COMMISSIONS (1959).

29. Judge Henry Friendly has written: "It is hardly coincidence that the two commissions believed to have been most subjected to pressure, the FCC and the CAB, are agencies which have conspicuously failed to define the standards governing their decisions." H. FRIENDLY, *supra* note 22, at 23.

30. For a more complete discussion of the FCC's regulatory efforts in this area see Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 LAW & CONTEMP. PROB. 505 (1970).

31. *Id.* at 516–18, 528–31.

32. 47 U.S.C. § 303(g) (1964).

33. 47 U.S.C. § 307(b) (1964).

34. 47 U.S.C. § 309(a) (1964). Application of the concept of "public interest" to radio regulation was suggested by Secretary of Commerce Herbert Hoover in the radio conferences of 1922–25.

ingful statutory criteria for allocation of the spectrum. One critic of the Commission's performance characterized the statutory standards as "somewhere between a charade and criminal fraud."[35] While sympathetic with the frustration created by the confusion in spectrum management, I am not sure that Congress should be blamed.[36] Congress cannot be expected to be thoroughly familiar with the technical intricacies and practical problems of spectrum management. The formulation of precise guidelines upon which to base allocation decisions is a far more difficult task than imagined by some, and a comprehensive statutory spectrum allocation plan would result in undesirably rigid spectrum management.

The difficulty in formulating guidelines is illustrated by the fact that the two criteria often cited as the primary goals of allocation decisions—minimum interference and maximum utilization of the spectrum—are inherently inconsistent. The problem of spectrum management is to fulfill as much demand for spectrum as possible within levels of interference acceptable to most users. It is for this balancing that guidelines are needed. The task of balancing, however, has traditionally been approached as a problem of "engineering." But engineering—I trust we lawyers can agree—is only a tool to implement fundamental economic, social, and legal decisions. I believe that the major difficulty in developing regulatory guidelines in this field is a conceptual one: We have persisted in discussing in technical terms a problem that is primarily one of economic scarcity.[37]

Another difficulty in formulating guidelines for spectrum management decisions is that a statutory determination of priorities would be insufficient. For example, Congress might decide that broadcasting is of higher priority than mobile radio, either because a larger number of people might benefit

He said: "The ether is a public medium, and its use must be for public benefit. The use of a radio channel is justified only if there is public benefit. . . . The greatest public interest must be the deciding factor." PROCEEDINGS OF THE FOURTH NATIONAL RADIO CONFERENCE 7–8 (1925).

The phrase "public interest, convenience, and necessity" was taken from early public utility statutes. One commentator has said that the phrase ". . . means about as little as any phrase that the drafters of the Act could have used and still comply with the constitutional requirement that there be some standard to guide the administrative wisdom of the licensing authority." Caldwell, *The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927*, 1 AIR L. REV. 295, 296 (1930). *See also* PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, FINAL REPORT, ch. 8, at 21–22 (1968). *But see* p. 48.

35. Jones, *Use and Regulation of the Radio Spectrum: Report on a Conference*, 1968 WASH. U.L.Q. 71, 83, *quoting* Meckling, *Management of the Frequency Spectrum*, 1968 WASH. U.L.Q. 26. For another criticism of the "public interest" standard see Reich, *supra* note 12, at 1238–40.

36. This also is the position taken by Professor Davis throughout his book. *See* note 40 *infra*. Another distinguished administrative law scholar, Professor Louis L. Jaffe, disagrees. He has said: "Basic reform is not a matter of technique or expertise. It calls for a redistribution of power; only the legislative and the executive branches can hammer out the resolution of major power conflicts. Those, for example, who lecture the FCC are, for the most part, directing their exhortations to the wrong audience." Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319, 324 (1964).

37. *See* Meckling, *supra* note 35, at 28. *See also* TELECOMMUNICATION SCIENCE PANEL OF THE COMMERCE TECHNICAL ADVISORY BOARD, U.S. DEP'T OF COMMERCE, ELECTROMAGNETIC SPECTRUM UTILIZATION—THE SILENT CRISIS: A REPORT ON TELECOMMUNICATION SCIENCE AND THE FEDERAL GOVERNMENT 35–37 (1966); Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1 (1959); Levin, *The Radio Spectrum Resource*, 11 J. LAW & ECON. 433 (1968).

from the allocation of more spectrum to broadcasting or it might decide nonbroadcast public allocations (police and fire) are to be favored over nonbroadcast private allocations (private mobile radio).[38] Such determinations cannot produce a rational allocation policy because they neglect a key consideration—a marginal analysis of the benefits of the spectrum use.

"Marginal analysis" means that the value of additional spectrum to a given use must be considered "at the margin"; that is, the Commission must compare all competing uses and establish the public value that is gained by giving an additioinal amount of spectrum space to one rather than to the others. Consider, for example, the case of a decision whether to allocate a given additional amount of spectrum to either a private firm for mobile radio use or to a new AM radio station. The small private business with the aid of mobile radio might be able to provide cheaper, more efficient service to the public—the degree of cost reduction depending upon the availability and cost of substitutes for spectrum. Likewise, the proposed AM station will provide benefits to the public; the total benefits will depend upon the existing number and diversity of AM stations. In such a situation, it might well be that the allocation of spectrum to the private use rather than to the AM station is of greater value to the public, even though public broadcasting should undoubtedly rank as a higher absolute priority. The crucial point is that the appropriate criterion for the decision is the comparative value to the public of an additional unit of spectrum given to each use rather than the absolute importance of the incompatible uses.

The formulation of decisionmaking criteria that facilitate this comparative benefit approach will be a tremendously difficult task. It will require time, thought, and resources that the FCC does not have and the Congress has been reluctant in the past to give. That does not mean we must be content with the lack of precision and predictability inherent in our present standardless system. Professor Davis advocates extending the "nondelegation" theory to require the agency receiving the delegation to implement precise rules and standards as soon as possible.[39] If the FCC were to undertake such an effort, it might be possible to solve some of the spectrum-allocation problems. Congress can help by providing reasonably detailed procedural requirements and broad guidelines indicating legislative intent, especially if these guidelines are updated frequently as Congress engages in legislative "oversight."[40] The FCC, however, must bear the burden of

38. A unique study recently presented to the FCC attempted to ascertain the value to society of a specific spectrum use. Robert R. Nathan Associates, The Social and Economic Benefits of Television Broadcasting (April 29, 1969) (unpublished manuscript on file with the FCC). The report estimated that television imposed a societal cost of $8 billion annually and provided a societal benefit of from $19 billion to $97 billion annually, leaving surplus benefits of $11 billion to $89 billion annually. *Id.* at 22–50. This result was disputed in Webbink, *How Not to Measure the Value of a Scarce Resource: The Land-Mobile Controversy*, 22 FED. COMM. B.J. 101 (1969).

39. Pp. 57–59, 220–21.

40. Professor Davis writes: ". . . I think that legislative bodies usually do about as much as

developing precision and rationality in the spectrum-allocation system. The Commission, which has the responsibility for the day-to-day decisions involving spectrum use, is the logical entity to be concerned with developing guidelines governing these decisions. It must try to develop rules and standards—based on more than engineering considerations—that will produce a reasoned choice between applicants and eliminate most of the discretion and potential for abuse in the present system.

2. *Common carrier regulation.*

The FCC's decisionmaking activities in the field of common carrier communications are typical of public utility regulation by state or federal public service commissions. Included within this part of the Commission's regulatory power are interstate telephone utilities, the telegraph system, the American-based international communications carriers, the new international and domestic communications satellite programs, and participating companies and many additional communications common carriers. In this regulatory activity the Commission has substantial discretion whether to act at all, what procedures to adopt, and what final actions to take. Judicial review is often pro forma, and great deference is given to the agency's presumed expertise in the field. This tends only to reinforce the Commission's free exercise of discretion.

The FCC's primary responsibility in the public utility field is the regulation of the nation's interstate common carrier services—principally AT&T, operator of the Bell System. A major part of this regulation is the complex determination of a fair rate of return on capital for the monopoly carriers. Other aspects of the regulation include decisions as to adequate public service, tariff practices, and authorizations to build facilities. The statutory guidelines for these difficult regulatory decisions are as vague and imprecise as the "guidelines" for spectrum management. The Communications Act allows carriers to provide interconnection, to establish routes and charges, and to establish facilities when the Commission "finds such action necessary or desirable in the public interest,"[41] requires that the carriers' "charges, practices, classifications, and regulations" be "just and rea-

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they reasonably can do in specifying the limits on delegated power, but they are often deficient in failing to provide further clarification after experience provides a foundation for it, and they are almost always flagrantly deficient in failing to correct the administrative assumption of discretionary power which is illegal or of doubtful legality." P. 55. *See* note 36 *supra.*

An example of constructive oversight by the Congress is its criticism of the fairness doctrine. The Special Subcommittee on Investigations of the House Committee on Interstate and Foreign Commerce recognized that the FCC's policy standards and interpretation of the fairness doctrine are excessively vague. It recommended that the Commission engage in a comprehensive rulemaking proceeding to clarify the doctrine. SPECIAL SUBCOMM. ON INVESTIGATIONS OF THE HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, THE FAIRNESS DOCTRINE AND RELATED ISSUES, H.R. REP. No. 257, 91st Cong., 1st Sess. 49–51 (1969).

41. 47 U.S.C. § 201(a) (1964).

sonable,"[42] and compels a carrier, before beginning construction of a new facility, to obtain a certificate from the Commission attesting that the "public convenience and necessity" requires such construction.[43] Unfortunately, the Commission has failed to clarify these vague guidelines by adopting precise standards of its own. As in the spectrum management area, standardless action and discretion are the primary characteristics of decisionmaking.

Staff procedures. One important area of Commission discretion that has largely escaped attention from the observers of the FCC is the role assigned the Commission staff in common carrier proceedings.[44] It is axiomatic that an administrative agency's staff has substantial power in channeling and influencing the agency's actions. This is most true in those areas, such as common carrier regulation, where the questions for consideration are complex and the creation of meaningful alternative solutions requires significant resources of knowledge and experience. The nominal decisionmakers of the Commission, the seven Commissioners, are unable to accumulate the requisite expertise in all areas of communications policy. Applying the principles of Parkinson's Law,[45] they attempt to master the simpler matters and rely upon the staff for the more important, more complex decisions. Therefore, the Commission's discretion in designing procedures for the utilization of its staff can have a significant impact on its regulatory decisions. Different procedural formats would change the way problems are presented to the Commission, and would accordingly change what the Commission promulgates. Yet there are few statutory or administrative guidelines to direct the Commission in structuring these important procedures.

The Commission, applying its interpretation of the Administrative Procedure Act, treats ratemaking[46] as rulemaking.[47] Normal procedural safeguards, such as separating the investigating or litigating personnel from the decisionmaking personnel, are thought to be unnecessary.[48] The Com-

42. 47 U.S.C. § 201(b) (1964). *See also* 47 U.S.C. § 202(a) (1964) (prohibiting common carriers from "unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services").

43. 47 U.S.C. § 214(a) (1964).

44. There have been a few articles that discuss this problem. *See generally* Auerbach, *The Controversy Over the Role of the FCC's Common Carrier Bureau in Rate Cases*, 1966 ABA PUBLIC UTILITY SECTION 6; Davis, *Advocating and Deciding in Rate Cases*, 1966 ABA PUBLIC UTILITY SECTION 25; Comment, *Separation of Functions in the Federal Communications Commission: The AT&T Rate Case*, 14 S.D.L. REV. 358 (1969).

45. *See* C.N. PARKINSON, PARKINSON'S LAW, ch. 1 (1957).

46. The term "Ratemaking" includes the following: (1) proceedings to set the level of overall rates of return, (2) proceedings on questions of discriminatory rates and rate levels among services, and (3) proceedings on allegations of unlawful tariff provisions for particular services.

47. Under the Administrative Procedure Act (APA), " 'rule making' means agency process for formulation, amendment, or repeal of a rule." And a rule "includes the approval or prescription for the future of rates." 5 U.S.C. § 1001(c) (1964).

48. The provisions requiring mandatory procedural safeguards to separate the staff from the decisionmakers in adjudicative proceedings contain an exception for "proceedings involving the va-

mission persists in believing that its staff can fairly collect evidence and data on the carriers' rates and practices, recommend the initiation of a formal hearing on the lawfulness of these rates and practices, serve as advocates in the hearing proceedings, present witnesses and evidence, cross-examine witnesses of the other parties and rebut their evidence, advise the examiner on important rulings on evidence, prepare a recommended decision for the Commissioners to read before oral argument, and then draft the final decision and advise the Commissioners ex parte on their final decision—all in the staff's role as insurer of a full hearing record and neutral adviser to the full Commission. The staff is ordered "*not* to be an advocate of a preconceived position or to take a conventional adversary position."[49]

This nonadversary posture by the Commission's staff might be acceptable in a true rulemaking situation, where proposals are evaluated on the basis of written pleadings with occasional oral statements to the full Commission. Ratemaking, unlike normal rulemaking, requires the filing of briefs and a full evidentiary record, with testimony and cross-examination. To place the staff in other than a true adversary role before the hearing examiner and the full Commission is to deny the Commissioners the benefit of a complete record. To force the Commission to rely for neutral advice upon the staff members who have served in a quasi-prosecutorial role during the hearing process is to deny the Commission impartial counsel. In its attempt to be both prosecutor and legal adviser, the Commission staff fails to be either.[50]

I believe that the Commission's decisionmaking is generally improved by the adversary process. In ratemaking a part of the staff could serve as counsel for the consumer interest and another staff group could serve as

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lidity or application of rates, facilities, or practices of public utilities or carriers . . . ." 5 U.S.C. § 1004(c) (1964). *But see* 47 U.S.C. §§ 409(c)(1), (d) (1964) which seems to require such separation in FCC proceedings. The Commission's interpretation of this provision, and the structure of Commission procedures, have twice been upheld by the courts. American Trucking Assn's v. FCC, 377 F.2d 121, 133 (D.C. Cir.), *cert. denied*, 386 U.S. 943 (1966); Wilson & Co. v. United States, 335 F.2d 788, 796–97 (7th Cir. 1964), *cert. denied*, 380 U.S. 951 (1965). *But cf.* Wong Yang Sung v. McGrath, 339 U.S. 33 (1950); Morgan v. United States, 304 U.S. 1 (1938); United States v. Abilene & S.R.R., 265 U.S. 274 (1924); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962); Comment, *supra* note 44, at 365–70.

49. American Tel. & Tel. Co., 2 F.C.C.2d 142, 146 (1965). Not surprisingly, the telephone company objected to these practices. American Tel. & Tel. Co., 2 F.C.C.2d 877 (1966). The separate opinions of Commissioner Kenneth Cox and Commissioner Lee Loevinger provide an excellent debate over this practice. *Id.* at 148, 152. The procedure was affirmed by the Commission in its interim decision and order, American Tel. & Tel. Co., 9 F.C.C.2d 30, 36–37 (1967), and criticized in my concurring statement, *id.* at 122, 141–45.

50. *See* American Tel. & Tel. Co., 9 F.C.C.2d 30, 122, 143 (1967) (Johnson, Comm'r, concurring).

Scholars have often noted the need for structural changes to improve regulatory performance, and among the changes usually suggested is the improvement of the adversary process. *See* Elman, *A Note on Administrative Adjudication*, 74 YALE L.J. 652 (1965); Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 931 (1960); Minow, *Suggestions for Improvement of the Administrative Process*, 15 AD. L. REV. 146 (1963). *But see* Friendly, *A Look at the Federal Administrative Agencies*, 60 COLUM. L. REV. 429 (1960); Kinter, *The Current Ordeal of the Administrative Process: In Reply to Mr. Hector*, 69 YALE L.J. 965 (1960).

neutral adviser to the Commission. This would provide greater procedural fairness to the parties.[51] Since staff advocates who are inhibited by their desire to remain "neutral advisers" might develop an incomplete record or might fail adequately to represent the public interest, an adversary process would also be of greater benefit to the Commissioners and the public. The institution of such an adversary role for the staff is well within the power of the Commission, but the Commission has promulgated few rules and standards for the utilization of its staff, apparently preferring to retain complete discretion in dealing with each separate case.[52]

Rate of return. The FCC determination of the rate of return to be earned by a public utility is a classic example of administrative discretion without guidelines. In regulation of the telephone companies, for example, the Commission usually treats the determination of a rate of return as a matter to be decided in informal, closed-door meetings attended by the Commissioners, the Commission staff, and AT&T. After secret negotiations, some accommodation is reached, and Bell files new tariffs reflecting the compromise. This procedure was upheld against public protest in its only court test.[53]

In 1965 the Commission abandoned this procedure, instigating a formal rate-of-return proceeding that resulted two years later in a determination that a permissible rate of return for Bell was in the 7.0 to 7.5 percent range.[54] In 1969 the Commission returned to an informal "continuous surveillance" procedure and rejected a petition of the City of New York that

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51. I recognize, of course, that the law probably does not require the separation of staff functions. *See* notes 47–48 *supra*. However, due process considerations might require invalidation of previous rulings and existing statutes. In either case, the need for the appearance of fairness suggests that the FCC should go beyond the legal requirements and adopt more equitable staff procedures. *See* Hannah v. Larche, 363 U.S. 420, 442 (1960); Amos Treat & Co. v. SEC, 306 F.2d 260, 267 (D.C. Cir. 1962); Jarrott v. Scrivener, 225 F. Supp. 827, 834 (D.D.C. 1964). The legislative history of the APA makes it clear that the standards of the Act are only "an outline of minimum essential rights and procedures." S. Doc. No. 248, 79th Cong., 2d Sess. 250 (1946). And, furthermore, the history indicates that in certain "accusatory" cases involving "sharply controverted factual issues," the minimum protection of the parties provided by the APA will not be adequate. *Id.* at 262. *See also* Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); RECOMMENDATION No. 19 OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, S. Doc. No. 24, 88th Cong., 1st Sess. 50 (1963), *quoted in* 2 F.C.C.2d 142, 171–72 (1965) (Loevinger, Comm'r, dissenting).

52. One of the few informal rules concerning staff procedures is the legalistic one that ratemaking must be treated as rulemaking whenever the decision is prospective in effect, even though it may result in substantial changes in costs, revenues, and services for the carriers. Under Commission practice, ratemaking becomes "adjudicatory" only when a complaint alleges past damages from rates that were excessive or discriminatory, or from tariffs that were unlawful. It seems irrational to me to allow the procedures for decisionmaking to depend on the mere presence or absence of an allegation of past damages.

This reliance upon a demand for damages in the instigating complaint might appear to control Commission discretion. But a guideline that is totally unreasonable, that was not formulated in accordance with established procedures, that has never been formally enunciated as a rule, and that is applied in an uneven manner does not really restrict discretion. Such a rule gives only a facade of structure and precision. The Commission may still act in an arbitrary, unjust manner; and even if the parties are aware of this they can do little.

53. Public Util. Comm'n v. United States, 356 F.2d 236 (9th Cir.), *cert. denied*, 385 U.S. 816 (1966).

54. American Tel. & Tel. Co., 9 F.C.C.2d 30 (1967).

sought participation in the proceeding.[55] As a result of these informal negotiations Bell filed tariffs that the Commission acknowledged would allow Bell to earn in excess of the formally determined 7.0 to 7.5 percent range. The only Commission action was a press release (drafted in collaboration with AT&T) announcing the forthcoming tariffs.[56] The Commission denied petitions for suspension of the tariffs and for a hearing.[57] No one appealed this Commission-Bell decision; in fact, the Commission took the position that no appeal of the press release was possible since there had been no "agency action."[58]

The setting of interstate telephone rates affects millions of consumers, yet the FCC has concluded that it has the discretion to raise the allowed rate of return to the company in an informal proceeding without hearing from parties other than Bell, without adopting formal guidelines for decision, and without writing an opinion defending its decision. Moreover, according to the agency's view, aggrieved parties have no recourse to the courts to object to this discretionary decision.[59]

Common carrier competition. One of the most pressing problems facing the Commission in the common-carrier field concerns the role of competition in telecommunications. This involves determination of the appropriate manner for regulation of monopoly carriers when they enter competitive markets or when competitors are allowed to enter traditionally monopolistic markets. The Commission must confront the possibility that its regulated monopoly carriers are engaging in anti-competitive practices such as predatory pricing or cross-subsidization between monopolized services and services provided in competitive markets. The Commission's experience in its Telpak proceedings,[60] in matters concerning the supply of CATV facilities,[61] in its investigation of the telegraph industry,[62] and in its examination of the telecommunications equipment supply industry[63] suggests that regulated monopolies do engage in practices designed to frustrate competitive entry.

55. Letter from FCC to Mrs. Bess Myerson Grant, FCC 69–995 (Sept. 17, 1969).
56. Rate Reduction for Long-Distance Calls, 21 F.C.C.2d 654 (1969).
57. American Tel. & Tel. Co., 20 F.C.C.2d 886 (1970).
58. *Id.* at 889.
59. On July 9, 1970 the United States Court of Appeals for the District of Columbia reversed a Civil Aeronautics Board (CAB) decision on airline fares. According to the opinion, the procedure applied by the CAB "fences the public out of the rate-making process and tends to frustrate judicial review." Moss v. CAB, No. 23,627, at 3 (D.C. Cir., July 9, 1970). The FCC "continuous surveillance procedure" is nearly identical to the CAB procedure rejected in *Moss*, and is thus susceptible to a similar attack.
60. Telpak, 37 F.C.C. 1111, *aff'g* 38 F.C.C. 370 (1964); A.T.&T. and Western Union Private Lines Cases, 34 F.C.C. 217 (1962).
61. Manatee Cablevision, Inc., 22 F.C.C.2d 841 (1970); Section 214 Certificates, 21 F.C.C.2d 307; TeleCable Corp. 19 F.C.C.2d 574 (1969); Better T.V., Inc., 17 F.C.C.2d 367 (1969); National Community Television Ass'n, 6 F.C.C.2d 860 (1967); General Tel. Sys., 6 F.C.C.2d 434 (1967); Associated Bell Sys. Cos., 5 F.C.C.2d 357 (1966); California Water & Tel. Co., 5 F.C.C.2d 229 (1966).
62. TELEPHONE AND TELEGRAPH COMMITTEES, FCC, REPORT IN THE DOMESTIC TELEGRAPH INVESTIGATION, FCC Docket No. 14,650, (April 29, 1966).
63. Carterfone, 13 F.C.C.2d 420 (1968).

Unfortunately, the Commission has been unwilling to establish workable standards for evaluating pricing and other practices by its regulated companies in markets where these companies face competition. The Commission now has three options. First, it can continue to abstain from regulation altogether, viewing the problem as insubstantial or inappropriate for detailed regulation. Second, it can attempt to evaluate particular tariffs or practices of the monopolists to prevent below-cost pricing designed to discourage competitive entry, an alternative that would require precise decisionmaking criteria. Finally, it can separate competitive markets from monopoly markets by barring regulated companies from expanding into competitive markets and barring competitive companies from entering monopoly markets. In its standardless discretion, the Commission has exercised each of these options at different times.[64]

Separations. A difficult area in the regulation of the telephone utilities is the separation of federal and state authority. The FCC's jurisdiction over

64. In its regulation of the supply of CATV facilities to independent CATV firms by the Bell System, the Commission usually abstains from evaluating complaints of discrimination and anticompetitive practices. A general evaluation of the rates was begun in a consolidated hearing, but no substantive action has been taken. *See* California Water & Tel. Co., 22 F.C.C.2d 10, 586 (1970); Southern Bell Tel. & Tel. Co., 16 F.C.C.2d 491, 497 (1969); National Community Television Ass'n, 6 F.C.C.2d 860 (1967); General Tel. Sys., 6 F.C.C.2d 434 (1967); Associated Bell Sys. Cos., 5 F.C.C.2d 357 (1967); California Water & Tel. Co., 5 F.C.C.2d 229 (1966).

In one Bell case the Commission attempted to evaluate specific allegations of anticompetitive practices, but no general evaluation of tariffs and practices has been undertaken. Better T.V., Inc., 17 F.C.C.2d 367 (1969).

The Commission is also studying specific practices and rates for the provision of specialized bulk communications services, and practices concerning the use of telecommunications equipment in the communications network. *See* American Tel. & Tel. Co., 18 F.C.C.2d 761 (1969). *See also* COMPUTER SCIENCE AND ENGINEERING BOARD, NATIONAL ACADEMY OF SCIENCES, THE COMMON CARRIER USER: INTERCONNECTIONS AREA (1970). In the Commission's inquiry into the relationship of communications and computers, its tentative decision was to abstain from the regulation of certain areas—for example, privacy issues and data processing rates—and to establish guidelines for conduct in other areas—such as the entry of regulated companies into data communications. Tentative Decision and Notice of Proposed Rulemaking, FCC Docket No. 15,971, 35 Fed. Reg. 5822 (April 9, 1970). An alternative to abstention or establishment of guidelines, that of barring certain activities by regulated companies, is illustrated by the FCC's order forbidding telephone companies from retailing CATV service in their own exchange areas. Section 214 Certificates, 21 F.C.C.2d 307 (1970). *See* United States v. Western Elec. Co., 1956 Trade Cases ¶ 68,246 (consent decree barring Bell from providing services in certain noncommunications areas) (filed Jan. 24, 1956 D.N.J.); Report and Order and Notice of Proposed Rulemaking, 22 F.C.C.2d 86 (1970) (FCC's suggestion that AT&T be prevented from engaging in cross-subsidization between monopoly public message and specialized communication services). Commission action in restricting competition and competitive response raises the specter of minimum rate regulation, which has been roundly criticized in professional journals and task force evaluations of utility regulation. *See, e.g.*, Task Force Report on Antitrust Policy (Neal Report), *reprinted in* 115 CONG. REC. 13,890 (May 27, 1969); Task Force Report on Productivity and Competition (Stigler Report), *reprinted in* 115 CONG. REC. 15,932 (June 16, 1969); Posner, *Natural Monopoly and Its Regulation*, 21 STAN. L. REV. 548 (1969); Posner, *Comment*, 22 STAN. L. REV. 540 (1970). *But see* Comanor, *Comment, id.* at 510; Shepherd, *Comment, id.* at 529; Swidler, *Comment, id.* at 519.

The Commission's discretion does not end with choosing its course of action. Within any of the options, the Commission must make other important procedural decisions concerning the market for the particular industry. For example, since the competitive telecommunications markets are expanding rapidly and new companies developing quickly, the timing of the Commission's decisions may be as important as their substance. Anticompetitive practices remain until a formal Commission decision forbids them, so some parties benefit greatly from delay. Yet the Commission has almost complete discretion in the timing of the decisions, and procedures are susceptible to delay.

telephone regulation is limited to the interstate and foreign portion of that service.[65] The remainder is left for regulation by the states. Because of our integrated, national communications network, drawing jurisdictional boundaries between the state commissions and the FCC is extremely difficult. There are no rules clearly delineating the separate responsibilities of the FCC and the state agencies. Cooperation between the regulatory bodies is sporadic, and the FCC's definition of "interstate and foreign" seems to be whatever the Commission needs to obtain jurisdiction over a particular case it wishes to hear.

The "separations" are effectively meaningless. State and federal decisions both affect the total communications network. For example, local service problems are as important to interstate callers as to local callers, yet the FCC has left the matter of local exchange service almost entirely to state and local regulatory authorities.[66] The Commission's decision not to intervene is not based upon lack of jurisdiction, lack of concern for local service, or a belief that state and local authorities are doing an adequate job. Rather, it is based upon unwritten tradition and practical politics. This abstention doctrine lacks any guidelines for a determination of when, why, and where the Commission should act.

3. *Regulation of broadcast performance.*

Congress has delegated to the FCC responsibility to regulate the broadcasting industry in the "public interest."[67] In theory, no sales of stations are to be allowed, nor renewals of licenses granted, until the Commission makes an affirmative finding that the public interest compels the action. Obviously, decisionmaking based upon such a broad standard as "public interest" is not possible without the development of regulatory guidelines. Congress, in delegating responsibility bounded only by this broad standard, must have expected the Commission to formulate more precise rules and standards, but for a variety of reasons, the Commission has failed to do so. Instead, the FCC has permitted broadcast irresponsibility to run rampant under its imprimatur and protection. The Commission's failure to decide and announce what is expected of broadcasters is in large part responsible for the wretched service received by the public[68]

65. 47 U.S.C. § 221(b) (1964).

66. A single exception is the recent informal FCC investigation of the telephone service system. The Commission has taken no action, although apparently the data submitted indicates that the system is substandard. *See* Lydon, *F.C.C. Phone Study Finds Service Here Worst in U.S.*, N.Y. Times, April 27, 1970, at 1, col. 2 (daily ed.).

67. *See* notes 32–34 *supra* and accompanying text. For a discussion of the FCC's delegated responsibility in broadcast regulation see H. FRIENDLY, *supra* note 23, at 53–73.

68. *See, e.g.*, Lamar Life Broadcasting Co., 14 F.C.C.2d 431 (1968), 38 F.C.C. 1143 (1965) (original grant and renewal hearing of a station that engaged in blatantly racist programming); Herman C. Hall, 11 F.C.C.2d 344 (1968) (a station that candidly proposed to program no news or public affairs broadcasts); Accomack-Northhampton Broadcasting Co., 8 F.C.C.2d 357 (1967) (a station that proposed 33 minutes of commercials per hour two or three days a week); ITT–ABC

Not only has the public suffered from the Commission's scandalous regulatory performance, but also the broadcasting industry itself. Every industry requires minimal technical and ethical standards of good business conduct. Yet the FCC has permitted a licensee with no commitment to the development of the industry to profit from trafficking in licenses,[69] has renewed the license of a station accused of defrauding advertisers while under probation for similar offenses,[70] and has paid little serious attention to the enforcement of technical standards.[71] The FCC has failed to enforce performance standards to benefit the public interest,[72] and it has not enforced standards to promote the industry interest. Its decisionmaking process seems devoid of guidelines or patterns of decision, save the FCC's desire to please the party immediately visible.

Two instances of the Commission's discretionary regulation of broadcasters deserve elaboration. The first is the performance of the Commission in granting license renewals to broadcasters. There are no substantive requirements for renewal except for the vague and unenforced requirement that a licensee's performance be "substantially attuned to meeting the needs and interests of its area."[73] Except for this vague, undefined "standard," the Commission has refused to establish substantive threshold requirements for renewal of the broadcast license. Some Commissioners and most broadcasters believe that *any* standards are impossible, undesirable, unwise, unnecessary, and possibly unconstitutional. The second example of discretionary regulation by the Commission is its recent effort to identify "obscenity" and eradicate it from the airwaves. Although its performance on renewal standards for wealthy broadcasters has been pathetic, its vengeance has been vigorous against the small, community-supported stations whose abundant public service programming occasionally includes so-called "indecent" language.[74] All the while, the criteria for deciding what is "ob-

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Merger, 7 F.C.C.2d 245 (1966) (where station ownership patterns had been challenged by the Antitrust Division of the Department of Justice).

69. *See* SPECIAL INVESTIGATIONS SUBCOMM. OF THE HOUSE INTERSTATE AND FOREIGN COMMERCE COMM., TRAFFICKING IN BROADCAST STATION LICENSES AND CONSTRUCTION PERMITS, H.R. REP. No. 256, 91st Cong., 1st Sess. (1969).

70. Star Stations of Indiana, Inc., 19 F.C.C.2d 991 (1969). The FCC subsequently raised the permissible dollar amount of fraud from the $6000 limit in *Star* to $41,000. WKKO, Inc., 24 F.C.C.2d 889 (1970).

71. *See, e.g.*, Court House Broadcasting Co., 21 F.C.C.2d 729 (1970); WKRZ, Inc., 20 F.C.C.2d 594 (1969); WKRZ, Inc., 20 F.C.C.2d 588 (1969); Olivia T. Rennekamp, 20 F.C.C.2d 542 (1969).

72. *But see* Comment, *The Swinging Pendulum—Conflict of Interest in Renewal of Broadcast Licenses*, 65 NW. U.L. REV. 63, 65–70 (1970).

73. Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 22 F.C.C.2d 424, 425 (1970). Professor Hyman Goldin believes that the prime weakness of the "policy statement" is the absence of specific standards for judging broadcast performance. Goldin, *"Spare the Golden Goose"—The Aftermath of WHDH in FCC License Renewal Policy*, 83 HARV. L. REV. 1014, 1825–36 (1970).

74. *See, e.g.*, Eastern Educ. Radio WUHY–FM, 24 F.C.C.2d 408 (1970); Jack Straw Memorial Foundation, 21 F.C.C.2d 833, *reconsidered*, 24 F.C.C.2d 266 (1970); United Fed'n of Teachers, 17 F.C.C.2d 204 (1969); Pacifica Foundation, 36 F.C.C. 147 (1964).

scene" or "indecent"[75] under Commission decisions, the standards by which broadcasters will be selected for prosecution and the guidelines for determining penalties have remained vague or nonexistent. Some of the speech that the FCC attempts to suppress has political overtones, which makes this a particularly frightening example of the injustice that can flow from discretionary action.

Renewal standards. The license of each broadcaster must be renewed by the FCC every three years. In separate statements accompanying nearly every majority action on license renewal applications, Commissioner Kenneth A. Cox and I have contended that the Commission has an obligation to develop some standards of broadcast performance to guide the licensees and to uphold the public interest. We have tried to develop statistical criteria that will permit a quantitative judgment of the programming record of the broadcasters.[76] The Commission nevertheless consistently renews these licenses with virtually no inquiry into the performance of the licensees, and the majority has not attempted to provide even the most minimal and basic standards by which to judge the performance of the licensees.[77] In my opinion, one of the principal reasons why programming is often so unresponsive to local community needs and interests is this failure by the FCC to develop renewal criteria. The Commission's failure is also unfair to the few licensees who are held to some "standards" at renewal time[78] but have no forewarning of the content of those standards. Uncertainty as to how the FCC will apply its unbridled discretion at renewal time induces broadcasters to avoid controversial programming, and in the absence of announced standards, the Commission is able to regulate by innuendos and veiled threats.

This uncertainty is not the result of ignorance or oversight; several people have recognized the problem and offered solutions. For example, in 1962 Judge Henry J. Friendly proposed that the Commission specify broad but exact program norms, secure promises from licensees that they will meet these requirements, make the promises conditions of the renewal

75. "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both." 18 U.S.C. § 1464 (1964).

76. *See, e.g.*, Renewals of Standard Broadcast and Television Licenses, 21 F.C.C.2d 35 (1969) (District of Columbia, Maryland, Virginia and West Virginia); Renewals of Standard Broadcast and Television Licenses, 18 F.C.C.2d 268, 269 (1969) (New York); Broadcasting in America and the FCC's License Renewal Process: An Oklahoma Case Study, 14 F.C.C.2d 1 (1968); Renewal of Standard Broadcast and Television Licenses, 11 F.C.C.2d 809, 810 (1968) (Iowa and Missouri); Renewal of Standard Broadcast Licenses, 7 F.C.C.2d 122, 130 (1967) (Florida).

77. *See* Jaffe, *The Scandal of TV Licensing*, HARPERS, Sept. 1957, at 71; Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655 (1959); Comment, *The Wasteland Revisited: A Modest Attack Upon the FCC's Category System*, 17 U.C.L.A.L. REV. 868 (1970).

78. Professor Goldin has written: "Adoption and implementation of program standards would benefit incumbent broadcasters, potential applicants, and the public." Goldin, *supra* note 73, at 1026. According to Goldin, all broadcasters would be better off if they had "firm ground rules in common." *Id.* at 1026–27.

of the license, and use cease and desist orders, revocation, and nonrenewal to compel compliance.[79]

The Commission often speaks of its concern with the quality, responsiveness, and responsibility of programming in general, and much of its regulatory scheme recognizes a need for news, public affairs, and local programming. On several occasions the Commission has promulgated rules or policies that seemed to place affirmative programming obligation on broadcasters.[80] In 1961, the Commission attempted to develop a single guideline for license renewal. It warned that any station whose performance during the past three years had deviated substantially from the promises in its prior renewal application would not have its license renewed unless it could satisfactorily explain its action in a hearing before the FCC.[81] Despite occasional nods toward the "promise versus performance" standard, and despite much rhetoric over the need for better programming, the Commission has never enforced this simple policy. All assurances by licensees that their poor past performance will not be repeated, or even that their promises are too wishful and unrealistic, are quickly accepted by the Commission and past transgressions are forgiven. Licensees, with no incentive to upgrade their programming, either ignore the policy altogether or make easily fulfilled promises.

Each time Commissioner Cox and I issue a study of renewal standards,[82] the broadcasting industry charges that we are attempting censorship by substituting our judgment for the programming decisions of broadcasters. The FCC is prohibited from censorship of broadcasters,[83] and we have personally expressed our distaste for all forms of censorship many times.[84] We do not undertake the renewal studies with the idea that any given program, subject matter, ideology, or mix of program ideas is either best or the mini-

79. H. FRIENDLY, *supra* note 23, at 72–73.

80. *See, e.g.*, Editorializing by Broadcast Licenses, 13 F.C.C. 515 (1949); Commission Policy on Programming, 20 P & F RADIO REG. 1901 (1960); Broadcast Applicants: Ascertainment of Community Needs, 33 Fed. Reg. 12113 (Aug. 26, 1968); Ascertainment of Community Problems by Broadcast Applicants, 34 Fed. Reg. 20282 (Dec. 24, 1969); FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCAST LICENSEES (the "Bluebook"), *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING 125 (F. Kahn ed. 1968).

In the "Bluebook" the Commission set forth some basic program standards: "In issuing and in renewing the licenses of broadcast stations the Commission proposes to give particular consideration to four program service factors relevant to the public interest. These are: (1) the carrying of sustaining programs, including network sustaining programs, with particular reference to the retention by licensees of a proper discretion and responsibility for maintaining a well-balanced program structure; (2) the carrying of local live programs; (3) the carrying of programs devoted to the discussion of public issues, and (4) the elimination of advertising excesses." FCC, PUBLIC SERVICE RESPONSIBILITY OF BROADCASTING LICENSEES, *reprinted in* DOCUMENTS OF AMERICAN BROADCASTING, *supra* at 198.

81. 31 F.C.C. 85 (1961). The station involved in the case was not punished, because the policy was to apply prospectively.

82. *See* note 76 *supra*.

83. 47 U.S.C. § 326 (1964).

84. *See, e.g.*, N. JOHNSON, HOW TO TALK BACK TO YOUR TELEVISION SET 79–96 (1970); Columbia Broadcasting System, 20 F.C.C.2d 143 (1969); Columbia Broadcasting System, 18 F.C.C.2d 124, 140, 142 (1969); United Fed'n of Teachers, 17 F.C.C.2d 204, 210 (1969).

mum required for a license renewal. We are merely seeking objective guidelines to judge the job that a broadcaster has done in serving his community in order to decide if he deserves a license for another three-year period. We are seeking objective standards that will enable the FCC and the public to rank the performance of comparable stations. If the broadcaster is to continue as a "trustee" of public property, he must be accessible to the community and reasonably responsive to its needs and wishes. He must be willing to motivate and inspire the public, as well as to entertain it. He must practice journalism that, while it is free, serves the community that supports it. To be responsible, a broadcaster in modern society needs to televise more than network reruns and old movies interspersed with countless appeals to the viewers' pocketbooks. The basic purpose of our study of renewal standards thus is to promulgate guidelines with which the FCC can objectively ascertain how well the broadcasters have served the "public interest." This is the duty charged to the Commission by Congress[85] and can hardly be labeled "censorship."

The legislative history of the Communications Act and congressional pronouncements about the Commission, regulation, and broadcasting make it clear that consideration of a broadcaster's programming performance is part of the FCC's duty to regulate in the public interest.[86] The Commission has failed in its responsibility to renew the licenses of only those broadcasters it affirmatively finds to have operated in the public interest. Its failure is shown by the fact that, despite over 40 years of FCC regulation, the sense of responsibility and level of performance of the broadcasting industry is no better than that of any other business. Without performance criteria based on community needs, broadcast programming is left to the judgment of the heavy-handed, industry-oriented FCC. The discretion to renew a license or not based only on personal whim is destructive of free press and free speech and will most likely lead to further deterioration in the quality of programming. I hope that the Commission, consistent with its own promise to deny renewal to those licensees with less than "minimal" performance,[87] will establish standards by which the level of performance can be measured meaningfully.

Obscenity. Because the Commission's crusade against "obscenity" on

85. *See* notes 32–34 *supra* and accompanying text.

86. *See* Barrow, *The Attainment of Balanced Program Service in Television*, 52 VA. L. REV. 633 (1966); Rosenbloom, *Authority of the Federal Communications Commission*, in FREEDOM AND RESPONSIBILITY IN BROADCASTING 96 (J. Coons ed. 1961). In the *Commission Policy on Programming*, the FCC wrote: "[W]e do not intend to guide the licensee along the path of programming; on the contrary the licensee must find his own path with the guidance of those whom his signal is to serve. We will thus steer clear of the bans of censorship without disregarding the public's vital interest." 20 P & F RADIO REG. 1901, 1915 (1960). The Supreme Court, upholding the constitutionality of the Commission's fairness doctrine, tacitly approved the FCC's concern with program content. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 400 (1969).

87. *See* note 73 *supra*.

the airwaves is so intertwined with the first amendment, it is an especially fruitful area in which to study the Commission's efforts at limiting discreion. The exercise of discretion in regulating speech has always been subject to the most careful scrutiny by our courts. No governmental agency can invoke statutory prohibitions that are so broad or vague that no man can reasonably foretell when, or with what force, the agency will strike. A primary fear of the courts is that such discretion will permit selective enforcement of the law based on the content of the speech.[88] Vague statutes giving unnecessary discretion to the enforcer and not putting the "offender" on notice have also been held unconstitutional on due process grounds.[89] Requiring a person to act at his peril, where the rules and standards being applied to him are not clear, has a "chilling effect" that diminishes basic freedoms and encourages conformity.[90] Furthermore, broad discretionary regulations may be unacceptable under the first amendment doctrine of "overbreadth." First amendment rights are too important to be circumscribed by overinclusive laws that restrict the rights of speech of many to censor a few.[91]

Because of the importance of precise guidelines in regulation involving first amendment rights, one would expect the FCC to make special efforts to limit its discretion where freedom of speech and press is concerned.Yet the FCC's few statutory and administrative guidelines are so vague as to be almost meaningless. The Communications Act prohibits the Commission from censoring radio communication,[92] but the statutory prohibition of "obscenity" in broadcasting is imposed elsewhere; section 1464 of the Crim-

88. According to the Supreme Court, a scheme of regulation that grants public officials excessive discretion to permit certain forms of expression and block others, "readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure [and] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview." Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940). *See also* Staub v. City of Baxley, 355 U.S. 313, 322 (1958); Kunz v. New York, 340 U.S. 290, 293–94 (1951); Niemotko v. Maryland, 340 U.S. 268, 271 (1951).

89. A unanimous Court, per Stewart, J., struck down on grounds of vagueness a statute requiring employees to swear that they had never lent their "aid, support, advice, counsel, or influence to the Communist Party." Cramp v. Board of Public Instruction, 368 U.S. 278, 279 (1961). The Court found that the case ". . . demonstrably falls within the compass of those decisions of the Court which hold that '. . . a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.' " *Id.*, at 287. *See, e.g.*,Thornhill v. Alabama, 310 U.S. 88 (1940); Champlin Ref. Co. v. Corporation Comm'n, 286 U.S. 210 (1932); Connally v. General Construction Co., 269 U.S. 385 (1926). *See generally* Amsterdam, *The Void for Vagueness Doctrine*, 109 U. PA. L. REV. 67 (1960), *reprinted in* SELECTED ESSAYS IN CONSTITUTIONAL LAW 560 (1963).

90. Mr. Justice Black has written: "[A] statute broad enough to support infringement of speech . . . necessarily leaves all persons to guess just what the law really means to cover, and fear of a wrong guess inevitably leads people to forego the very rights the Constitution sought to protect above all others." Barenblatt v. United States, 360 U.S. 109, 137 (1959) (dissenting opinion).

91. *See, e.g.*, Zwickler v. Koota, 389 U.S. 241, 249–50 (1967); Walker v. City of Birmingham, 388 U.S. 307 (1967); Freedman v. Maryland, 380 U.S. 51 (1965); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952). *See generally*, Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808, 828–30 (1969).

92. 47 U.S.C. § 326 (1964).

inal Code provides that "[w]hoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."[93] In addition to this criminal sanction, the Communications Act permits the revocation of a broadcast license,[94] provides for issuance of a cease and desist order,[95] and permits the imposition of a fine or forfeiture[96]—all for the violation of this section of the criminal law.[97] The Commission has made no effort to adopt clarifying rules and standards of conduct in the application of these powerful sanctions to broadcasters.[98] Instead, the Commission has sought to formulate general principles in "test cases." Using the talisman of "indecent language" in the criminal statute,[99] the Commission has asserted its right to regulate the content of broadcast speech by finding "swear words" to be "patently offensive by contemporary community standards" and possessed of "no redeeming social value."[100] I do not feel that the Commission can constitutionally engage in such censorship under its excessively broad and vague statutory mandate.[101] Furthermore, I think it is highly undesirable for the Government ever to become an arbiter of taste or language.

Although I feel that the statutory authority under which the Commission acts is unconstitutional and I question the wisdom of Commission action in this area, a more interesting problem for purposes of this discussion is that of determining the standards for Commission action—assuming that it can act and chooses to do so. It seems to me that if the Commission is to act at all in the first amendment area it must adopt precise and clear guidelines for the broadcasting industry to follow. It must define terms such as

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93. 18 U.S.C. § 1464 (1964).

94. 47 U.S.C. § 312(a)(6). The Communications Act permits the suspension of a radio operator's license for obscene or profane transmissions. 47 U.S.C. § 303(m)(1)(D) (1964).

95. 47 U.S.C. § 312(b) (1964).

96. 47 U.S.C. § 503(b)(1)(E) (1964).

97. These sections all contain the essential element that a violation of the statute, 18 U.S.C. 1464 (1964), must occur before the Commission's sanctions may be invoked. Yet no court has ever decided who must make the initial finding that this criminal statute has been violated. It is conceivable that only a court—in a formal criminal proceeding—may make this initial determination. If so, the Commission cannot take punitive action until a court has reached such a verdict. *Cf.* Freedman v. Maryland, 380 U.S. 51 (1965).

98. There are general, imprecise rules in the area of non-broadcast radio services that prohibit "obscenity." The Commission rules contain prohibitions against the use of "obscene, indecent or profane words, language, or meaning." *See* 47 C.F.R. §§ 1367, 97.119, 95.83(a)(3) (1969).

99. The Commission presumably recognized that, under the Supreme Court's "obscenity" standard, swear words and even "four-letter words" cannot necessarily be prohibited or punished. *See* Memoirs v. Massachusetts, 383 U.S. 413 (1965); Jacobellis v. Ohio, 378 U.S. 184 (1964); Roth v. United States, 354 U.S. 476 (1957). They must also have realized that a "profanity" standard is both unconstitutional and unworkable. *See* Duncan v. United States, 48 F.2d 128 (9th Cir. 1931); Note, *Blasphemy*, 70 COLUM. L. REV. 694 (1970). The question of whether the "indecent" standard means anything apart from the other standards was discussed, but not resolved, in *Gagliardo v. United States*, 366 F.2d 720, 725–26 (9th Cir. 1966).

100. Eastern Educ. Radio WUHY–FM, 24 F.C.C.2d 408 (1970).

101. Statutes with similarly vague descriptions of "indecent" speech have been overturned by the courts. *See, e.g.*, Interstate Circuit, Inc. v. Dallas, 390 U.S. 676 (1968); Holmby Prods., Inc. v. Vaughn, 350 U.S. 870 (1954) (per curiam); Williams v. District of Columbia, 419 F.2d 638 (D.C. Cir. 1969) (en banc).

"indecent" so that there is as little uncertainty as possible. Only if precise standards are formulated, and discretion strictly limited, is there any chance that injustice can be prevented and the Commission's action found constitutional.

In *Joseph Burstyn, Inc. v. Wilson*,[102] the Supreme Court invalidated a New York statute banning "sacrilegious" motion pictures. The Court there said:

> This is far from the kind of narrow exception to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful orthodoxies. . . . [I]t is enough to point out that the state has no legitimate interest in protecting any or all religions from views distasteful to them . . . .[103]

If "sacrilegious" is subject to the dangers of overbroad interpretation, what then of "indecent"? By seeking to root out indecency without attempting even a "broad and all-inclusive definition" of "indecent," the FCC can do no more than censor arbitrarily that which a majority of the Commissioners finds objectionable. The FCC has the benefit of neither judicial precedent, administrative decisions, congressional guidance, nor scholarly thought to help in the formation of doctrine, and it has made no effort to prescribe its actions by defining the standards of permissible free speech for broadcast communications. This, in my view, permits intolerable discretion.

B. *Regulation Through Rulemaking*

Professor Davis believes that much of the injustice and irrationality in administrative decisionmaking could be eliminated if the administrative agencies would use rulemaking procedures to limit their discretion.[104] Since Congress is unable, or at least unwilling, to enact strict standards to control the exercise of an agency's delegated power, the limiting of discretion must be done by the agency's rules. Rulemaking that answers a hypothetical question serves the same purpose as adjudication,[105] and by letting interested parties participate it is procedurally more fair. As the above discussion of FCC rules and standards indicates, I agree with Professor Davis that the absence of decisionmaking guidelines and the resulting excessive

102. 343 U.S. 495 (1952).
103. *Id.* at 504–05 (footnotes omitted).
104. *See* text accompanying notes 9–12 *supra*.
105. Pp. 59–64. Professor Davis writes: "*An adjudicatory opinion can never say anything that cannot be said as well or better in a rule.*" P. 64 (emphasis in original). Much has been written in legal literature comparing rulemaking with adjudication. *See, e.g.*, Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965).

discretion and arbitrariness create injustice. I agree, in general, that the rulemaking process can do much to confine and structure discretion and prevent arbitrariness, and that it is usually superior to adjudication, producing sounder results and procedural equity. The practice of rulemaking, however, is often quite different from its theory.[106]

In practice, rulemaking is often less efficient than adjudication. It is procedurally more cumbersome, consumes more agency resources, and is more susceptible to delaying tactics by the parties. The Commission is often unable to employ rulemaking because the announcement of contemplated action would bring such pressure upon the agency as to stall the results for years. It might well be argued in such cases that whenever external pressure is such that the Commission cannot act directly, it should not act. Such an argument assumes that the pressure brought on the agency is representative of the public will or interest, that it is confined to the formal rulemaking proceeding, and that all parties are equally able to influence the action. Such assumptions are false. Furthermore, the theory that rulemaking can replace adjudication ignores the Commission's ability to subvert the purposes of the procedure when it wishes. For example, policy statements can be used to achieve the same results as rulemaking but with none of the procedural safeguards.[107] The Commission can also announce its intention to adopt proposed rules on an interim basis while formal rulemaking is pending, thereby enacting the rules immediately without following the formal requirements.[108]

The most glaring failure of rulemaking lies not in the theory of the procedure but in the lack of equality of resources available to the interested parties. Rulemaking theory assumes that all parties with an interest in a case will submit comments presenting their views in an intelligent manner, and that the Commission, presented with all sides of the issue, will weigh the arguments and facts and arrive at a reasoned conclusion.[109] Often, however, only one side of the issue is heard by the Commission. Industry domination of the rulemaking process makes the hearings a farce. Through manipulation, delay, and pressure, the powerful regulated interests use rulemaking to their advantage. They have the resources and legal talent to make the outcome of the process a foregone conclusion. The views of

106. *See* L. JAFFE, *supra* note 23, at 49–51.

107. *See* 5 U.S.C. § 1003(a) (1964); Reconsideration of Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants, 24 F.C.C.2d 383, 386 (1970) (Johnson, Comm'r, dissenting).

108. *See, e.g.*, Notice of Proposed Rulemaking and Notice of Inquiry, FCC Docket No. 18,397, 15 F.C.C.2d 517 (1968).

109. "The sound operation of the federal administrative rulemaking system demands that all relevant interests and viewpoints be considered prior to the formulation and promulgation of its product." Bonfield, *Representation for the Poor in Federal Rulemaking*, 67 MICH. L. REV. 511 (1969). *See also* Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970).

the poor, the minorities, the elderly, the young, and the average citizen are seldom heard in Commission rulemaking proceedings.

In theory, the Commission staff represents the "public interest," but it has proven itself unable to do so. It is practically impossible for the staff to perceive the public interest and to articulate it skillfully when its only professional contacts are with industry representatives and nearly all the arguments it hears daily are industry-oriented. A further problem is that staff members oriented toward the public interest get very little reward in the long run. The Commission serves as a training ground for the regulated industries, and there is a generally understood scenario for staff members who desire an important, well-paying job when they leave the Commission. Moreover, it is exceedingly difficult for the members of any single institution to play simultaneously the roles of advocate and impartial judge. As a result, in almost all rulemakings before the Commission, only one view is presented. This breakdown of the adversary process is apparent in the Commission's decisions.[110]

Two examples should illustrate the problem. Prior to 1969, the Commission's rules provided for a 90-day period preceding the renewal of a station's license during which the public could file petitions. The industry requested the Commission to reduce this period to 75 days. After a formal rulemaking, in which all interested parties were invited to file comments, the FCC decided that the period should be 60 days.[111] The decision was not a reasoned result based upon a complete record; the losing party—the public—was scarcely represented. Of course, the public was theoretically given an opportunity to participate; as expected, however, the public lost important procedural rights by default.

Our Notice of Proposed Rule Making in that proceeding was released on March 20, 1969. We asked that comments be filed by April 11, 1969, and reply comments by April 18, 1969. These deadlines gave interested parties wishing to comment on our proposed rule only 22 days in which to find out about it and draft comments—no easy task for any group without a Washington lawyer to collect Commission documents, scan them for material, and notify clients of the need for submission of views. The response was typical of rulemaking proceedings before the Commission. In support of our pro-industry rule, the Commission received comments from a vast

110. The problem of industry "capture" is neither new nor limited to the FCC. James M. Landis documented the phenomenon in his famous report to President Kennedy on the status of all administrative agencies. SENATE COMM. ON THE JUDICIARY, 86TH CONG., 2D SESS., REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT (Comm. Print 1960). In a recent case involving the Civil Aeronautics Board, Judge J. Skelly Wright succinctly phrased the problem: "This appeal presents the recurring question which has plagued regulation of industry: whether the regulatory agency is unduly oriented toward the interest of the industry it is designed to regulate, rather than the public interest it is designed to protect." Moss v. CAB, No. 23,627, at 2 (D.C. Cir., July 9, 1970).

111. Broadcast License Renewal Applications, 20 F.C.C.2d 191 (1969).

aggregation of industry wealth and power—comments on behalf of 166 broadcast stations, the three major networks, and one Washington, D.C. law firm with numerous broadcast clients. In the public's behalf, the rule was opposed by only two groups: the United Church of Christ (filing a six-page document) and the National Citizens Committee for Broadcasting (filing a one-page, three-paragraph letter).[112]

Another example of the enormous advantage possessed by industry interests in FCC rulemaking is the Commission's efforts to secure a limit on broadcast commercials. In 1963 the Commission proposed to adopt as a rule the commercialization limit in the National Association of Broadcaster's advertising code—a very generous 16 to 18 minutes per hour.[113] To this modest Commission effort, the industry responded with force. Comments on the rule were filed by approximately 350 broadcasters, the national and state trade associations, business groups, members of Congress, communications lawyers, and two listener groups. All but two broadcasters and the two listener groups opposed the rule.[114] As if this were not enough, the broadcasters went to Congress and got a bill from the House of Representatives,[115] by a vote of 317 to 43,[116] forbidding the FCC to enact any limitation on commercials—even a limitation already part of the industry code. Not surprisingly, the FCC capitulated even before the vote in the House took place.[117]

Underrepresentation of the public has been the norm at the FCC for decades. Day after day the Commission is bombarded by sophisticated legal and policy arguments from the industry, and virtually nothing from the public. We pretend that the FCC functions in a quasi-judicial capacity; we give lip service to the notion that truth will usually emerge from the confrontation of opposing views before a neutral tribunal. I do not dispute this concept; I do not find it archaic as do some, but I am distressed by what I do observe in practice. What happens at the FCC—and no doubt at most other administrative agencies—is far from the theory contemplated by the advocates of the adversary process. The public interest is scarcely represented at all.[118] If rulemaking is to yield decisions based on a fair presenta-

112. *Id.* at 195–200 (Johnson, Comm'r, dissenting).
113. Notice of Proposed Rulemaking, FCC Docket No. 15,083 (May 15, 1963).
114. Advertising on Standard, FM, and Television Broadcast Stations, 36 F.C.C. 45, 46 (1964).
115. H.R. 8316, 88th Cong., 1st Sess. (1963).
116. 110 CONG. REC. 3909–10 (1964).
117. Advertising on Standard, FM and Television Broadcast Stations, 36 F.C.C. 45 (1964).
118. An interesting discussion has emerged recently over the duty of the private attorney to represent the "public interest" both in volunteer, *pro bono* work and also in the counseling of his private clients. *See, e.g.*, Symposium, *Inside Washington Law: The Roles and Responsibilities of the Washington Lawyer*, 38 GEO. WASH. L. REV. 527 (1970). The latter role of the lawyer—counseling clients to influence activity in the public interest—is the most controversial, and the most important. One famous public advocate, Louis Brandeis, practiced for awhile as a private railroad attorney. It has been said that he used his "judicial temperament" during that practice to influence his clients in ways that benefited the public. *See* Levy, *The Lawyer as Judge: Brandeis' View of the Legal Profession*, 22 OKLA. L. REV. 374 (1969). Former FCC Commissioner Leo Loevinger has written: "At

tion of each issue, a procedure must be adopted to ensure relatively equal inputs from all interested parties. Despite the attractiveness of the theory, the rulemaking procedure does not currently work that way.

III. Conclusion

> The standard set up by the statute is not a rule of law; it is rather a way of life. Life in all its fullness must supply the answer to the riddle.
> —Justice Benjamin N. Cardozo[119]

A few decades from now, law students studying administrative law may be amazed to learn that in the middle of the 20th century the subject did not concern itself with the decisionmaking process of administrators. Future law school courses will undoubtedly focus primarily on this aspect of administrative procedure—including the role of discretion. Professor Davis' book is the first work in this emerging area of the law. As the first, it suffers from the shortcomings inherent in all pioneering work. It does not have available a foundation of prior scholarly work upon which to draw. It is necessarily sketchy and incomplete in certain areas—principally those in which empirical research is lacking. At times it makes too strong a case for the central thesis, emphasizing theory more than actual practices. I feel we must consider reforms of certain procedures, such as the representation of the public in rulemaking, before we unquestioningly adopt a theory by which to restructure the present system. Nevertheless, this book is among the most important I have ever read in the field of administrative law. It is likely to begin a new subject in the law schools, a new legal speciality, new casebooks, new hornbooks, and even a new key-number from West Publishing Company.

Professor Davis has shown those of us in the field of administrative law the extent to which our own thinking is provincial. He has shown many of us who have spent a good deal of our lives dealing with those visible areas

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his best, the Washington lawyer serves as a corporate conscience; in business, as in personal conduct, the counsel of conscience is usually more lofty and effective in its demands than the threats of public prosecutor." Loevinger, *A Washington Lawyer Tells What It's Like*, 38 Geo. Wash. L. Rev. 531, 544–45 (1970).

The way to encourage or compel professional conduct of this kind by private attorneys is a problem addressed by many authors. Public advocate Ralph Nader places the blame on law schools for failing to "articulate a theory and practice of just deployment of legal manpower." Nader, *Crumbling of the Old Order: Law Schools and Law Firms*, New Republic, Oct. 11, 1969, at 20–21. *But see* Auerbach, *Some Comments on Mr. Nader's Views*, 54 Minn. L. Rev. 503, 504 (1970). Nader has also suggested that questions of unethical conduct are raised where an attorney defends a company whose actions have violated the public interest. *Id. But cf.* Macaulay, *Law Schools and the World Outside Their Doors: Notes on the Margins of "Professional Training in the Public Interest,"* 54 Va. L. Rev. 617, 626 (1968). One scholar has suggested that the ABA Canons may even *compel* greater representation of the public by private attorneys. *See, e.g.*, O'Donnell, *Group Legal Services and the Code of Professional Responsibility: The Challenge to the Bar to Provide Adequate Legal Services*, Res Ipsa Loquitur, Summer 1970, at 9.

119. Welch v. Helvering, 290 U.S. 111, 115 (1933).

of lesser importance that a crucial and demanding area of research and teaching was waiting to be tapped. For revealing our errors, Professor Davis will be repudiated by some, and undoubtedly ignored by many. But I believe we are all in his debt for giving us a glimpse of the future of administrative law. We can repay this debt by reading his book; or, more important, by efforts and research toward an improved understanding of how the administrative process can be made to yield a better quality of justice.[120]

120. I have discussed only a few areas of FCC discretion; many others also deserve study. In the hope that others will find the subject of administrative decisionmaking interesting, I would like to list a few additional areas of discretionary FCC action that I feel are in need of examination: (1) the approval of the transfer and sale of broadcast licenses; (2) the application of the fairness doctrine to specific sets of facts (the definition of "current controversial issue of public importance," the choice of the person to represent the opposing side of an issue, and the determination of whether a station has adequately covered both sides of an issue); (3) the determination of discriminatory employment practices; (4) the imposition of fines and forfeitures, and the relationship between the amount levied and the violation; (5) the choice between alternative forms of technological development (*e.g.*, cable versus satellite for transatlantic communications); (6) the decision whether to investigate a complaint; (7) the waiver of technical and ownership rules; and (8) the decision of which cases the Commission will hear and at what time. The Commission has few, if any, rules or guidelines limiting it's discretion in deciding each of these issues. Although many of the decisions involved are basically procedural, they can and do influence substantive decisions regarding federal communications policy.