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Congress and the Federal Communications Commission: The Continuing Contest for Power

by HARRY M. SHOOSHAN III*

and

ERWIN G. KRASNOW**

I

Introduction

Since its inception in 1934, the Federal Communications Commission (FCC) has been charged with regulating interstate communications to promote the public interest.1 With that broad grant of power, Congress created an agency independent of the three branches of government - the executive, legislative or judiciary - to solve problems Congress was either not suited or not politically prepared to handle.2

Over the years, however, the FCC's independent status has been subtly transformed to a level of abject dependency on its relationship with Congress. In the last six years, particularly, a new system of checks and balances on the FCC's decision-making power has emerged. In addition to the traditional tools of oversight,3 Congress has increasingly resorted to statutory

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3. Congressional influence on FCC policymaking has assumed many forms, including statutory changes, budgetary limitations, the spur of investigations, continuing oversight by multiple committees, the Senate's confirmation process, and pressure by individual members of Congress. For a more extensive discussion, see E. Krasnow, L. Longley & H. Terry, THE POLITICS OF BROADCAST REGULATION, 87-132 (3d ed. 1982); see also Krasnow & Shooshan, Congressional Oversight: The Ninety-Second Congress and the Federal Communications Commission, 26 FED. COMM. BAR J. 81
moratoriums, as well as periodic authorizations and riders to appropriation bills, to block or reverse an unusually large number of major FCC decisions. As a result, the FCC is now subject to more rigorous congressional control and its ability to function as an independent agency has been called into question.

It has been suggested that the FCC and other independent agencies, such as the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC), were never independent in the first place. William Cary, who once headed the SEC, aptly described the FCC and other independent agencies as "stepchildren whose custody is contested by both Congress and the Executive, but without very much affection from either one." Since these agencies are not part of any executive department, they must function without the political protection of the President or a cabinet officer. They also lack any effective means of appealing for popular support. As a result, members of Congress have little fear of political reprisal when interacting with these defenseless agencies.

Former FCC Chairman Newton Minow distinctly recalls that shortly after his appointment, he called upon House Speaker Sam Rayburn. "Mr. Sam" put his arm around the new chairman and said, "Just remember one thing, son. Your agency is an arm of the Congress. You belong to us. Remember that, and you'll be all right." The Speaker went on to warn him to expect a lot of trouble and pressure in his new job. However, as Minow recalls, "What he did not tell me was that most of the pressure would come from the Congress itself."

While the above anecdote suggests that a power struggle between the FCC and Congress was inevitable, the last six years have demonstrated that the way the game is played has

(1973). The influence of Congressional staff members cannot be overlooked. Staff members of relevant Congressional committees maintain a close liaison with the FCC and often impart committee members' views and expectations to the Commission and FCC staff members. A 1975 Senate study found that staff communications with agency personnel was the technique most frequently used by Congress in overseeing the operation of regulatory agencies. See COMMITTEE ON GOVT. OPERATIONS, 95TH CONG., 1ST SESS., STUDY ON FEDERAL REGULATION 81 (Comm. Print 1977).

4. See infra text accompanying notes 13 & 14.


6. Id.

changed. Traditionally, if parties lost their cases before the FCC, they filed an appeal with the courts. If that route failed, the parties could seek remedial legislation from Congress. Today parties frequently take their cases directly to Capitol Hill, often before the FCC has completed its proceedings, and, in some cases, before the issue has been formally presented to the FCC.

Whether the present relationship between Congress and the FCC is viewed as more effective oversight, or as unwarranted interference, those whose interests are affected by FCC regulation must understand what these recent changes signify. On major telecommunications matters, we may now have 535 "Commissioners" to reckon with, not five.

II

Legislative Vetoes and Moratoriums

Over the last decade, Congress has frequently passed special and narrow legislation to override specific initiatives taken by various regulatory agencies. Until recently, the FCC generally escaped such action even though it made a number of highly controversial decisions. For example, in the late 1960s, the FCC's decisions to open up domestic telephone equipment and long distance markets to competition were carefully reviewed by Congress, as a result of criticisms by AT&T and the Communications Workers of America. These decisions, however, were never vetoed or reversed by Congress. Similarly, the FCC's decisions to deregulate cable television and radio

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were highly controversial, but did not precipitate congressional intervention.\textsuperscript{13}

In 1983, however, Congress twice used the threat of legislation to reverse FCC decisions before those decisions had been finally adopted. The House of Representatives passed legislation which reversed the FCC’s telephone access charge proposal and prohibited the Commission from imposing a monthly two dollar “customer access line charge” (CALC) on residential customers and a six dollar CALC on business users. \textsuperscript{14} The House also passed a bill which imposed a six-month moratorium on the FCC’s efforts to revise its restrictions on television networks operating in the syndication market\textsuperscript{15} — the so-called financial interest/syndication rules.\textsuperscript{16}

Ultimately, neither bill was enacted because the FCC retreated from its own decisions in the wake of strenuous congressional opposition. As a result of these threats, the FCC (1) delayed imposing any end user charges on residential and small business customers for eighteen months, and eventually scaled back its proposed access charge to a phased-in plan of one dollar in 1985 and a second dollar in 1986,\textsuperscript{17} and (2) “backburnered” its efforts to reform the financial interest/syndication rules.\textsuperscript{18}

In both instances, the “losers” at the FCC built successful coalitions on Capitol Hill and thwarted the FCC’s initiative, while the “winners” (the telephone industry and the television networks, respectively) proved ineffective in defending their regulatory gains.

The initial “losers” in the telephone rate fight were mostly

\textsuperscript{13} See, e.g., Cable Television Regulation Oversight: Hearings before the Subcomm. on Communications of the House Comm. on Interstate and Foreign Commerce Comm. 94th Cong., 2d Sess. (1976).
\textsuperscript{18} Letter from Mark S. Fowler to Senator Ted Stevens (Nov. 16, 1983) (Informing Senators of FCC’s decision not to modify 47 CFR § 73.558(j)(7)(i), (ii)).
consumer groups who were later joined by state regulators and organized labor in urging key legislators to block the Commission's access charge plan and prevent an increase in telephone rates. Similarly, the "losers" in the financial interest/syndication rules found themselves allied with a strategic group of forces. This legislative drama was produced and directed by the Motion Picture Association of America (MPAA), a group representing the major studios, many of which are also large syndicators. As the action intensified, independent television station owners joined the MPAA out of fear that the supply of syndicated programming on which they rely would be threatened by increased network control. In both fights, the "losers" became "winners" when Congress threatened to enact special legislation designed to "veto" the Commission's decision.

The moratorium has been an attractive legislative tool for politicians who find themselves in the middle of a heated controversy. This tool offers relative political safety because supporters can argue that they are not taking sides on the merits (which, of course, they are) but rather are seeking a fuller consideration of the issue. Since a moratorium has the effect of preserving the status quo, it places a heavy burden on those parties who support change to demonstrate that the prevailing rules are "broke" and need fixing. Even the threat of such legislation has substantive consequences on the FCC. While this form of legislative duress is not new, the 98th Congress was the first to use it to block rulemakings by the FCC.

III
Periodic Authorization

Today, the FCC faces more rigorous supervision than it did in the past because it has lost its status as a permanently authorized agency.\footnote{See infra text accompanying note 31.} Historically, most federal programs were permanently authorized; at the end of World War II nearly 95 percent of the federal budget was under permanent authorization.\footnote{Improving Congressional Control over the Budget: A Compendium of Materials, Senate Comm. on Gov't Operations, Subcomm. on Budgetary, Management and Expenditures, 93rd Cong., 2d Sess. 262 (1973).} A permanent authorization usually has no fixed term and does not refer to any specific fiscal year. Moreover, it usually contains no dollar limitations, authorizing "such sums as may be
necessary."\textsuperscript{21} Annual control over a permanently authorized agency's budget, and often over its substantive decisions, rests with the appropriations committees.\textsuperscript{22}

In the 1970s, Congress shifted an increasing number of agencies from permanent to annual or multi-year (i.e., two to five year) authorizations.\textsuperscript{23} Approximately half of the federal budget remains subject to permanent authorization.\textsuperscript{24} This change in the nature of authorizations reflects the proliferation of subcommittees and the growth of congressional staff. As Congress developed more expertise, the legislative committees and their subcommittees wanted to exercise tighter control over agencies and programs within their jurisdictions. Furthermore, since the use of annual authorizations reduces the time available for consideration by the appropriations committees, it virtually insures that the legislative committees will retain primary oversight and policy responsibility. While the constraints on the appropriations process are less severe with multi-year authorizations, the need for Congress to authorize an agency on a periodic basis nonetheless strengthens the oversight power of legislative committees.\textsuperscript{25} With regard to the FCC authorization, the Senate and House Commerce Committees are the legislative committees which have gained additional power.

Eliminating the FCC's permanent authorization was initially suggested in 1978 with the first proposed "rewrite" of the Communications Act.\textsuperscript{26} Representative James T. Broyhill (R., N.C.), the ranking Republican member of the House Energy and Commerce Committee, subsequently proposed a three-year authorization for the FCC.\textsuperscript{27} Later, his approach was endorsed in legislation backed by a coalition of key Senate Republican

\textsuperscript{21} U.S. LIBRARY OF CONGRESS, CONGRESSIONAL RESEARCH SERVICE, MANUAL ON THE FEDERAL BUDGET PROCESS 35 (1982).
\textsuperscript{22} HOUSE BUDGET COMM., 95TH CONG., 1ST SESS., CONGRESSIONAL CONTROL OF THE BUDGET 19 (Comm. Print 1977).
\textsuperscript{23} Id. at 22-24.
\textsuperscript{24} Id. at 19.
\textsuperscript{26} H.R. 13015, 95th Cong., 2d Sess., 124 CONG. REC. 16,729 (1978).
\textsuperscript{27} H.R. 1801, 97th Cong., 1st Sess., 127 CONG. REC. 2105 (1981).
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leaders. One of the Senate co-sponsors, Bob Packwood (R., Ore.), made it clear that he was proposing the change to enable the Commerce Committee, which he chaired, to monitor the Commission's activities more closely.

Spurred by their Republican colleagues' interest in reform, House Democrats introduced legislation to require periodic authorization of the FCC. Concerned about substantive policy as well as budget matters, both Republican and Democratic members of Congress tried to keep the FCC on a tighter rein. Neither the Senate bill nor the House bill passed. However, a rider to the Budget Reconciliation Act of 1981 replaced the FCC's permanent authorization with a two-year authorization.

The shift to biennial authorizations not only strengthened the oversight roles of the House and Senate Commerce Committees, but also created an attractive legislative vehicle for changing the Communications Act every two years. Because an authorization bill has its own momentum, this legislative vehicle has been used successfully to make amendments to the Communications Act which otherwise would be much more difficult to enact on their own.

The FCC Authorization Act of 1983 demonstrated that Congress would not hesitate to use its new power. The legislation contained twelve substantive provisions, including prohibitions on the Corporation for Public Broadcasting's funding of National Public Radio, relaxation of the regional concentration of ownership rules for certain broadcast stations which made changes in technical facilities to improve service and bans on obscene messages made available over "Dial-A-Porn" telephone services.

The provision which may have the greatest impact was an amendment that established a national policy "to encourage

29. Id.
31. Congress used the Budget Reconciliation Act to mandate several other changes at the FCC. Congress created the position of Managing Director, required an expanded annual report to the Congress and ordered the FCC to complete its revisions to the Uniform System of Accounts used by telephone companies.
33. Id.
the provision of new technologies and services to the public."\textsuperscript{34} Through this provision, Congress created a statutory presumption that any new technology or service is in the public interest,\textsuperscript{35} and required the FCC to make a public interest determination as to any new technology or service within one year after a petition or application is filed.\textsuperscript{36}

In 1985, the FCC authorization was incorporated into the Consolidated Omnibus Budget Reconciliation Act of 1985, and was finally passed in 1986.\textsuperscript{37} In this instance, Congress approved the FCC's reauthorization for two years without adding any substantive provisions. However, an effort to bar UHF/VHF swaps between commercial and non-commercial broadcasters was narrowly defeated in the Senate Commerce Committee markup.

It is clear that by requiring biennial authorizations, Congress created another pressure point to enhance its control over FCC decision-making. As a result, the Commission's independence has been considerably reduced.

\section*{IV
Appropriations: Riders and Reports}

Perhaps more vividly than any other form of influence, the appropriations process underscores the myth of the FCC's independent status. Through its hold on the FCC's purse strings — a power shared with the Office of Management and Budget which reviews the agency's budget — Congress can control not only the total amount of money allocated to the FCC, but also the purposes for which funds may be used. The impact of the 97th, 98th and 99th Congresses on FCC policymaking was even more significant because of changes in the traditional use of the appropriations process to oversee the FCC.

A common form of congressional control over regulatory agencies is for the appropriations committees to incorporate policy directives and restrictions in the official reports accompanying appropriations bills. When Congress shifted from a

\begin{footnotesize}
\textsuperscript{35} Id.
\textsuperscript{36} Id.
\end{footnotesize}
line item to a "lump-sum" agency budget approach, this practice became especially prevalent as a means of securing congressional control over specific programs and expenditures. Although their committee reports are not law, the appropriations committees expect that the reports will be regarded as if they were, and because the FCC wants to protect future funding for its operations, it usually fulfills the committees' expectations.

The typical report accompanying an appropriations bill contains numerous "do's and dont's" which amount to informal directives for an agency on how to spend its money. A classic example of how the appropriations process can be used to pressure the FCC was seen in 1974. In that year the House Appropriations Committee warned the FCC to report back to Congress by year's end on its plans for dealing with the effects of televised violence and sexually explicit material on children. Indicating displeasure with what it saw as the FCC's dereliction of duty, the Appropriations Committee stated that it was "reluctant to take punitive action to require the Commission to heed the views of the Congress, and to carry out its responsibilities," but added that "if this is what is required to achieve the desired objectives, such action may be considered." This stern warning led to the FCC's controversial role in promoting the ill-fated "family-viewing hour."

Similarly, in 1983, a congressional appropriations bill report urged the FCC to expedite the processing of applications for low-power television stations. Low-power television was, at that time, a new service for which the FCC had begun to accept applications two years earlier. When the FCC authorized this

41. Id.
42. Under pressure from the Chairman of the FCC, the major television networks and the National Association of Broadcasters voluntarily agreed to program the first hour of "prime time" with fare that was suitable for all members of the family, including young children. The controversy arose over what some parties saw as censorship by the FCC in formulating policy. See Writers Guild of America, West, Inc. v. FCC, 423 F. Supp. 1064 (C.D. Cal. 1976), vacated and rem'd, 609 F.2d 355 (9th Cir. 1979), cert. denied, 449 U.S. 824 (1980). See also G. COWAN, SEE NO EVIL: THE BACKSTAGE BATTLE OVER SEX AND VIOLENCE ON TELEVISION (1980).
new service, it had given seemingly little or no thought to how the thousands of applications would be processed. As the backlog increased, congressional pressure began to build, especially from Senate Democrats who charged that the Republican-controlled FCC might be dragging its feet in order to protect existing broadcasters from competition, while at the same time extolling the virtues of deregulation and "marketplace forces" as support for deregulation.44

Historically, the appropriations committees have been reluctant to use the committee reports which accompany appropriation bills to make broad policy statements. In the 98th Congress, however, a Senate Appropriations Committee report reiterated congressional support for the FCC's political broadcasting rules, and warned the FCC not to weaken or eliminate the rules in any way.45 The Committee's intent was to head off FCC rulemakings aimed at removing the personal attack and political editorial rules and at modifying the general Fairness Doctrine. However, the FCC issued a controversial report on the Fairness Doctrine in which it determined that continued enforcement raised serious constitutional questions.46 Although, as a matter of law, a committee report does not have the same force and effect as a statutory restriction, the FCC abandoned its effort to repeal the rules when faced with this congressional pressure.

Congress can also attach provisos to an appropriations bill which limit expenditures, prohibit expenditures for certain purposes, or require expenditures for particular activities. Such provisos have the force of law and legally require the FCC to follow the congressional directive. However, provisos and other statutory limitations can create problems because of House and Senate rules which prohibit the inclusion of legislation in appropriation bills.47 The rules were intended to protect and preserve the oversight jurisdiction of legislative or substantive committees. Therefore, any appropriations bill with a leg-

45. See supra note 43.
islative provision is subject to a point of order on the Senate or House floor. 48

Often there is a fine line between telling a federal agency how it should spend its funds and establishing new law or policy. Consequently, these parliamentary rules have generated a substantial body of interpretation and precedent. Despite these rules, Congress has used riders to make policy on issues ranging from prayer in schools to gay rights. 49

The 98th Congress used an appropriations bill rider to block the FCC's liberalization of its television group ownership rules. 50 The FCC originally decided to increase the maximum number of stations allowed by one owner from seven to twelve and to "sunset" or eliminate its group ownership rules altogether in 1990. 51 Even before the FCC had the opportunity to act on petitions for reconsideration of its original decision, opponents took their case to Congress. The attack was led by the Motion Picture Association of America (MPAA), a minor participant in the FCC's rulemaking proceeding, but one which was concerned that the new rule would increase the power of the three commercial television networks.

Immediate criticism of the FCC's action came from Senator Pete Wilson (R-Cal.), whose state is home to most of the MPAA's members, and from Congressman Timothy Wirth (D-Colo.), Chairman of the House Telecommunications Subcommittee. Senator Wilson attached a rider to the Supplemental Appropriations Bill, which prohibited the FCC from changing its ownership rules until April 1, 1985 or sixty days after the FCC's reconsideration of the decision, whichever was later. 52 Despite the fact that FCC Chairman Mark Fowler agreed to withhold action, 53 as he had done with access charges and the financial interest/syndication rules, the House adopted the Senate-passed measure in the closing days of the 98th Congress. 54 The FCC's proposed decision had, in effect, been ve-

48. See supra note 47.
51. Amendment of Section 73.3555, Report and Order, 100 F.C.C.2d 18, para. 5 (1984).
52. See supra note 50.
53. See supra note 18.
toed by Congress even before its final adoption by the agency.

In December, 1984, the FCC modified its original decision by eliminating the "sunset" provision, introducing incentives which reward minority ownership and adding a limitation on the audience reach of a group's stations. Senator Wilson, who helped negotiate the amended rule, hailed the FCC's action as an enlightened compromise, while Commissioner James Quello said the FCC had been hit by an "absolute steamroller." 

In the closing days of the 99th Congress, the Senate attached several riders to the catch-all continuing resolution (the regulation which keeps the federal government running in the absence of final action on a number of appropriation bills). One such rider directed the FCC to consider alternatives to repealing the Fairness Doctrine and then report to Congress. The language reflected a compromise with the broadcast industry which had lobbied against a stronger amendment. That particular amendment would have forced the FCC to reconsider its controversial Fairness Doctrine Report. Another rider effectively barred the FCC for one year from considering the swaps of commercial VHF for noncommercial UHF frequencies. Given a second bite at the FCC's funding apple, Senate opponents of such swaps succeeded in 1986 where they had failed in 1985.

V

Implications of the Changing Relationship

The increasing use of these forms of legislative "redress" has clearly reduced the FCC's independence. To the extent that this intervention by Congress on policy matters reflects a legislative consensus, it is a necessary concomitant of a democratic system. On the other hand, it is much more troubling when the

55. Amendment of Section 73.3555, Memorandum Opinion and Order, 100 F.C.C.2d 74, para. 3 (1985).
58. Id. See also Conference Report to Accompany H.R. J. Res. 738 H.R. REP. No. 1005, 99th Cong., 2d Sess. at 431 (1986) (The report states, "It is the intent of the conferees that the Federal Communication Commission shall not change the regulation concerning the Fairness Doctrine without submitting the required report to Congress on this matter.").
59. See supra note 55.
threat of veto is in the hands of a few legislators who have influence over the FCC, but who do not represent majority views in the Congress. Whenever a minority of the Congress is successful in micro-managing the decisions of the FCC, the constitutional process is undermined. Newton Minow pointed out that "it is easy — very easy — to confuse the voice of one Congressman, or one Congressional committee, with the voice of Congress." More recently, in a farewell address to the Federal Communications Bar Association, Commissioner Robert E. Lee observed:

Every Commissioner is tested in his or her early days by requests for special attention. Many times these requests are legitimate; they seek redress for unreasonable delay or bureaucratic red tape. Of course, one must respond. But if special favors are granted, the requests never stop and one finds 505 bosses calling the tune.61

Behind-the-scenes "lobbying" by Congressmen can also subvert the safeguards for comments and public participation mandated by Congress in the Administrative Procedure Act.62 Such private contacts with FCC Commissioners by individual Representatives and Senators, which are instigated by parties with vested interests, have the effect of denying administrative fairness. These contacts can have the same debilitating effects on FCC independence as requests by Congressional staffers for drafts of FCC decisions before they have been finally and formally adopted. As a result of an increasing number of off-the-record contacts, the courts may well be called upon to reverse administrative action which has been "improperly influenced" by covert legislative pressure.63

The "behind closed doors" approach should be contrasted with attempts by individual members of Congress to influence FCC decision-making by means of on-the-record contacts. Thus, while Commissioner Quello labeled as "preposterous" the charge that the Commission permitted political pressures to "infest" its must-carry proceeding (the adoption of new cable television "must-carry" rules), he openly acknowledged that he was impressed by the unprecedented on-the-record Congres-

60. Minow, supra note 7, at 35.
sional support for some form of must-carry rules: "It was the very first time that I can recall in my 12-1/2 years on the Commission that I saw a letter requesting Commission action signed by every member, Republican and Democrat, of the House Communications Subcommittee." This overt political pressure, taken to the extreme, can also undermine the regulatory process if the agency in question is perceived as a political "punching-bag."

Lacking clear legislative guidance in the Communications Act as to the definition of the "public interest," the FCC is more vulnerable than most independent regulatory agencies to pressures from individual members of Congress. Indeed, almost every major decision of the Fowler FCC bears the fingerprints (or heavy footprints) of one or more influential Congressmen and Senators. One reason for this unprecedented involvement by the Hill is that Chairman Fowler, unlike his predecessors, was outspoken in the pursuit of deregulation and during his tenure, became personally identified with many of the most controversial initiatives of the FCC.

Perceived as an ideologue and plagued by early failures to keep the Hill adequately informed as to his agenda, Fowler learned Sam Rayburn's definition of "independence" the hard way—but he did learn. He created a special Congressional liaison position in his own office and substantially upgraded the Commission's Congressional and Public Affairs Office. Fowler also spent more time making personal contacts to brief key lawmakers on Capitol Hill in advance of important FCC decisions.

Soon after the 100th Congress convened, Mark Fowler announced his intention to leave the FCC after the longest tenure as chairman in the agency's history. Some observers speculated that his decision to leave well before the end of the Reagan administration was motivated, in part, by a desire to avoid what were likely to be bitter reconfirmation hearings in the Senate for a new term. Fowler's successor as chairman, Dennis Patrick, inherits the same policy controversies and institutional challenges his predecessor faced. Patrick's success as chairman will depend on how effectively he resolves those controversies.

and meets those challenges. His challenge will be to preserve the important policies of the Fowler years (most of which he strongly supported) while, at the same time, restoring some of the FCC's independence from unwarranted Congressional interference.

In the years ahead, the real challenge for the FCC will be to learn from the lessons of its past and not overreact to the Hill. The first tests will come early in the 100th Congress when Congress reacts to a number of controversial issues: the court's remand of the Fairness Doctrine and the minority preference proceedings, the fall-out over the final must-carry rules, the increases in telephone customer access charges and the continuing turmoil caused by the deregulation of AT&T. These tests will be even tougher for the FCC now that the Senate is in Democratic hands for the first time in six years. The outcome will have a lot to say about the future of the FCC as an "independent" agency.
