The Communications Satellite Corporation: Toward a Workable Telecommunications Policy

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THE COMMUNICATIONS SATELLITE CORPORATION: TOWARD A WORKABLE TELECOMMUNICATIONS POLICY

Introduction

In the twenty years following World War II, the volume of communications traffic from the United States to Europe increased by 83,000 per cent.\(^1\) This expansion provided a major impetus for the development of a communications technology superior to that embodied in the three existing methods of international communication: undersea telephone cables, short wave radio broadcasts, and postal services. Today, the zenith of communications technology is represented by communication satellites, orbiting systems which relay telephone, television, and data messages over great distances. These satellites, barely past their technological infancy, already offer substantial economic and technical benefits in comparison with their predecessors in global communications.

The maintenance of efficient international communications is an important factor in the formulation of effective foreign policy and in the exercise of political power. The need for instantaneous dialogue between policy makers in Washington D.C. and American diplomats abroad, as well as the potentially disastrous consequences of delays in communications among state leaders, were apparent to the Kennedy administration and the 87th Congress;\(^2\) both government branches viewed the creation of an integrated communications satellite system as essential.\(^3\) In an effort to continue the technological leadership of the United States in the field of international communications, Congress in 1962 granted a statutory monopoly to the Communications Satellite Corporation (Comsat).\(^4\) In addition to creating a new carrier with special corporate duties, this legislation enabled Comsat as the designated entity of the United States to plan, construct, own, and operate this

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2. *Hearings on S. 2814 and S. 2814, Amendment, Before the Senate Comm. on Commerce 87th Cong., 2d Sess. 152 (1962).*
country's allocated portion of a global communications satellite system. Comsat's uniqueness was not predicated on its role as an official U.S. negotiator in global communications; for years, private common carriers such as American Telephone and Telegraph (AT&T), Western Union International (WUI), International Telephone and Telegraph (IT&T), and RCA Global Communications, Inc. (RCA), had negotiated directly with official representatives of foreign governments on behalf of the United States. Only Comsat, however, was protected as a statutory monopoly.

In the years since its creation in 1962, Comsat has undergone substantial change. This note will survey the evolution of this unusual corporation, focusing particularly on the legislative history of the Communications Satellite Act and the congressional debate concerning whether Comsat should be publicly or privately owned. The survey will also examine the "mysterious retreat" of the private common carriers from 50 percent stock ownership in Comsat, as well as the corporation's role in the creation of the global satellite system called Intelsat. The discussion will demonstrate Comsat's increasing independence and assertiveness. Legislation is now pending which would restructure the statutory scheme of the 1962 Satellite Act. Proponents frequently characterize certain sections of this new legislation as "mere housekeeping measures." Critical evaluation of these sections, however, reveals them to be far more significant than their detractors would allow and indicates that many of these "housekeeping measures" would operate in a manner directly contrary to the public interest. This note will therefore suggest several modifications to the bills now being considered in congressional committees.

**Legislative History**

**Background**

During the second world war and in the cold war years that followed, research and development in missile launch techniques and in the electronic systems involved accelerated substantially. The successful Soviet orbiting of Sputnik on October 4, 1957, convinced even the most reluctant of the world's populace that we had finally entered an

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7. The bills are currently before the Subcommittee on Communications of the Senate Commerce Committee and the Committee on Interstate and Foreign Commerce of the House of Representatives.
age of practical space technology. Particularly rapid progress in the area of electronics foreshadowed an early use of this technology in communications by means of space satellite.

Existing global communications networks in the early 1960s consisted primarily of three AT&T transatlantic cables; a fourth was proposed. Active competition flourished among the primary telegraph carriers, IT&T, RCA and WUI; the demands for international telephone facilities and telex service increased rapidly, and as a result, the number of leased circuits proliferated. It soon became apparent that merely increasing the circuit supply would provide only stopgap treatment of the demand for more communications channels. For example, the proposed cable mentioned above would have added only one hundred and twenty-eight voice-grade circuits to the already insufficient supply. The acceleration of demand and the obvious deficiency in circuit supply made apparent the need for an alternative source of communications circuits. The answer devised and proposed by the Kennedy administration was a publicly-created, privately-owned communications satellite corporation.

Public or Private Ownership?

The corporation, which was created during the period of the greatest sustained industrial growth since World War II, evoked considerable enthusiasm in nearly all segments of American society and was praised as an important part of President Kennedy's new frontier. Nonetheless, the specific form which this entity would take was the subject of controversy, and the solution eventually reached was the product of compromise. Nicholas DeB. Katzenbach delineated three possible ownership alternatives for the proposed satellite corporation in 1962:

13. See J. GALLOWAY, THE POLITICS AND TECHNOLOGY OF SATELLITE COMMUNICATIONS 11, 12 (1972) [hereinafter cited as GALLOWAY]. Galloway discussed the parties to the various compromises and concessions: "Within the Executive branch, the principal departments and agencies responsible for space communications policy, in addition to the President, are the National Aeronautics and Space Agency (NASA), the National Aeronautics and Space Council (NASC), the Office of Telecommunications Policy (OTP), the Defense Department, the Department of Justice, and the Department of State. The Federal Communications Commission, to some degree an independent regulatory commission, has an important part in the policy process. Congressional commit-
The organization of a system, or the United States portion of it, might follow one of three basic forms: first, government ownership, in which private enterprise would be limited to participation under contracts. The Administration did not advocate government ownership because it was felt to be probably unnecessary and not the best way to do this job. Second, private ownership by the existing communications industry only, which would have meant single-company domination [AT&T] of the system. The Administration did not recommend this second alternative for [antitrust] policy reasons . . . . Finally, private ownership, with broad participation by the public in the ownership of the system. This was the concept selected to serve as the basis of proposed legislation. It offers better prospects that the system will be adequately capitalized than if the system were to be a captive project of a single industry; it tends to safeguard against the dangers of single company domination; and it is also fair to the American taxpayer, whose expenditures on government research have made a communications satellite system possible, and who should have an equal opportunity to invest in the system.14

The Federal Communications Commission (FCC) had begun an investigation to determine what type of organization and ownership would be best suited to a satellite communications system as early as

March 1961. The large international common carriers in their first ad
hoc report on May 24, 1961, favored the creation of a limited joint ven-
ture in which only the participants could invest; they hoped to insulate
the existing communications oligopoly from external financial participa-
tion. The aerospace industry, represented by such companies as Gen-
eral Electric and Lockheed Aircraft, requested that their industry also
have an investment option in any satellite venture. Earlier in May
of 1961, the Department of Justice in a statement to the FCC, cau-
tioned that all communications carriers, manufacturers, and sellers must
be allowed to participate in the ownership of any proposed system, im-
plying that a more limited form of ownership would not be consistent
with federal antitrust laws.

The satellite communications system can well be a prime example
of the effective operation of the free enterprise system, and it is,
therefore, of vital importance to the national interest that no single
private concern dominate satellite communications.

Nonetheless, later that month the FCC tentatively concluded that the
joint venture format proposed by the common carriers was the best al-
ternative then in existence. On July 24, 1961, President Kennedy, in
a statement of national policy to the Senate, declared: “private owner-
ship and operation of the U.S. portion of the global system is favored
provided that such ownership and operation meet . . . [certain] policy
requirements.” President Kennedy further indicated in a letter to
Vice-President Johnson and Speaker of the House McCormick that
while the subject of an ownership format was essentially a matter for
private enterprise, it was also of paramount importance to determina-
tions regarding national and international interests and policies. The
president noted that the corporation was a government created monop-
oly and therefore investment should not be limited to a few existing
communications carriers. He indicated that broadly based stock own-
ership was needed to accommodate “potential investors who have equal
rights to own a part of this federally developed enterprise.\textsuperscript{23} Disregarding the president's stock ownership suggestions, three months later, on October 13, 1961, the FCC ad hoc committee's report advocated that the federal government approve a nonprofit organization of United States common carriers, specifying only that it should not be dominated by a single carrier. The carrier to which the report referred was AT&T.\textsuperscript{24} Finally, in February of 1962, President Kennedy sent a message to Congress proposing the Communications Satellite Act of 1962.\textsuperscript{25} The measure was to create a new corporation whose board of directors would include common carriers, public shareholders, and three presidential appointees. Members of Congress responded with a flurry of bills proposing a variety of public and private ownership plans.\textsuperscript{26}

While the public was intoxicated with romantic illusions of planetary harmony deriving from communications satellites, the giant communication carriers were preparing for a powerful lobbying effort. The purpose of this effort was to convince Congress that the nation's share of the international satellite system should be controlled by private enterprise.

Representatives from AT&T, IT&T, RCA, and General Telephone and Electronics, among others, appeared before congressional committee hearings on the proposed Communications Satellite Act of 1962.\textsuperscript{27} Western Union International and the United States Independent Telephone Association submitted written statements.\textsuperscript{28} Groups including the National Association of Manufacturers, United States Chamber of Commerce, Hughes Aircraft, and General Electric lobbied extensively.\textsuperscript{29} Only two groups favored government ownership: the Americans for Democratic Action and the National Telephone Cooperative Association.\textsuperscript{30} Their influence was dwarfed by the enormous corporate push for private ownership.

Communications carriers, in an effort to quell the turmoil surrounding public ownership, pointed out that private control of telecommunications facilities and systems was the rule rather than the exception in the United States. The carriers ignored the striking difference between the technology embodied in their existing facilities and that

\begin{itemize}
  \item 23. Id.
  \item 26. See GALLOWAY, supra note 13, at 52-53.
  \item 27. See id. at 62.
  \item 28. See id. at 52.
  \item 29. See id. at 62.
  \item 30. See id.
\end{itemize}
involved in the new satellite systems. While conventional terrestrial communications systems such as cable and microwave relays have been developed mostly through private financing, communications satellites can be viewed as largely the offspring of federally funded research and development. Thus, the communications carriers were not, in their bid for private ownership, merely seeking to maintain the status quo. They were seeking, by means of political pressure, to reap the benefits of a satellite and launch technology paid for to a great extent by public funds.

A compromise bill was reported to the floor of the House on May 3, 1962, and passed by a vote of 354 to 9. The compromise bill, however, did not meet with such expeditious approval in the Senate, where vigorous committee debates arose concerning the most appropriate form of ownership. The Committee on Aeronautical and Space Sciences, chaired by Senator Robert S. Kerr, co-sponsor, with Senator Warren G. Magnuson, of the administration bill, reported the bill favorably to the floor of the Senate on April 2. The hearings conducted by the committee generally evidenced support of President Kennedy's proposals. Debate continued, as Senator Estes Kefauver and the Americans for Democratic Action urged adoption of an independent federal authority to oversee satellite development. Senator Kefauver

31. See id. at 9, 15.
32. See id. at 55.
33. See id. at 65.
36. Arguments in favor of government ownership centered around the following observations: (1) The Government was operating other special agencies, such as the Atomic Energy Commission and NASA, in which subcontractors were involved; (2) capitalization by the federal government could avoid conflicts of interest; (3) the government would provide equal access for all potential users; (4) the government could ensure better controls of rate schedules and promotional pricing; (5) the federal budget could more easily bear the cost of technical obsolescence, thus lowering the risk that carriers would switch to conventional cable circuits in times of diminished demand; and (6) the government could achieve full coordination of military and civilian programs much more easily than it could under conditions of natural monopoly.

Opponents of federal control articulated the following views: (1) Government control would become a “foot in the door” for similar control of other communication related industries; (2) federal funds in the form of research and development would disrupt the flow of private capital; (3) private companies would be better able than the government to get the needed scientific and engineering talent in a much shorter period of time; (4) private ownership would ensure that the costs of economic development would be placed on the shoulders of those who actually used the system; and (5) although satellites were technically advanced and their use raised complicated foreign policy implications, communications development should, as in the past, be undertaken by the international common carriers, as they could act more expeditiously than the govern-
led the Senate Antitrust and Monopoly Subcommittee, which vigorously opposed private ownership as a violation of antitrust laws and a giveaway of government investment in communications satellite technology.\footnote{GALLOWAY, supra note 13, at 55.} Senators Ralph W. Yarborough and E. L. Bartlett, of the Senate Committee on Commerce, also expressed the minority view:

This corporation [Comsat] would be a Government-created private monopoly. Such legislation is without precedent in the history of the United States. It runs counter to the historical and traditional hostility to private monopoly that has served as a foundation of this country's economic system of competitive free enterprise.

Not only does the committee bill create a private monopoly, it would go even further and bestow on that single private monopoly the benefits of billions of dollars of the taxpayers' money. This legislation, if enacted, likely would constitute the biggest giveaway in the history of the United States.

All the elements necessary for the very existence of an operational satellite communications system have been financed by all the taxpayers of the United States. It is our belief that all these same taxpayers should receive the benefits of the system when it becomes operational. There can be no justification for giving this vast resource that has been financed by the taxpayers away to a small group of stockholders for their private gain. The taxpayers have already paid for their right to share in the returns.\footnote{S. REP. No. 1544, supra note 3, at 49.}

As a result of such opposition, as well as the Kennedy administration suggestions, the compromise bill was eventually altered to allow for share ownership to be divided evenly between class A stock, to be available to the public at large, and class B stock, which could be purchased only by approved communications carriers.\footnote{Id. at 25-27 (statement of President John F. Kennedy).} This bill was referred to the Senate Foreign Relations Committee with instructions to report back to the Senate floor on August 10 for final debate.\footnote{108 CONG. REC. 15,187-88 (1962).} Debate on the Senate floor was heated. Senators Wayne Morse and Estes Kefauver engaged in a four-day filibuster to prevent passage of any private ownership compromise.\footnote{Id. at 16,417.} Comsat supporters broke the procedural stalemate by mustering the two-thirds vote necessary to invoke cloture,\footnote{Senate Manual, S. Doc. No. 1, 93d Cong., 1st Sess. 24-25 (1973).} thus achieving the first such success since 1927. The filibuster was brought to a halt by a vote of sixty-three to twenty-seven,

\begin{thebibliography}{99}
\bibitem{Levin} Levin, Organization and Control of Communications Satellites, 113 U. Pa. L. Rev. 315, 334 (1964) [hereinafter cited as Levin].
\bibitem{Galloway} GALLOWAY, supra note 13, at 55.
\bibitem{S. REP. No. 1544} S. REP. No. 1544, supra note 3, at 49.
\bibitem{Id.} Id. at 25-27 (statement of President John F. Kennedy).
\bibitem{108 CONG. REC.} 108 CONG. REC. 15,187-88 (1962).
\bibitem{Id. at 16,417.} Id. at 16,417.
\end{thebibliography}
with ten members abstaining. The Communications Satellite Act was passed by the Senate on August 17, 1962.

The unique structure of Comsat resulted largely from the fierce legislative controversy over whether the corporation should be publicly or privately owned. While some legislators, principally Senator Kerr of Oklahoma and Representative George P. Miller of California, believed that the biggest communications conglomerates should be granted rights to develop and use the proposed satellite systems, others, joined by various interest groups, argued that private ownership would not insure adequate accountability to the public. The issue was resolved by a familiar congressional vehicle, compromise. The Communications Satellite Corporation was thus a creature of conflicting congressional ideologies. This anomaly in American business will be detailed in the next section of this note.

The Communications Satellite Corporation: “Melding Variegated Interests”

What emerged from the legislative maneuvering described above was a statute establishing a privately-owned communications satellite corporation. This private corporation, Comsat, was to be governed by a board of directors with membership consisting of six public shareholder designees, six communications common carrier representatives, and three members appointed by the president of the United States. There was no direct grant of federal money; the initial capitalization involved the issue of corporate securities. Specific sections in the statute provided for corporate accountability to the president of the United States, the State Department, and the attorney general. The newly established corporation was placed under the regulatory purview of the FCC.

Before surveying Comsat’s development into a full-fledged international and domestic carrier, it is important to reflect on the

43. 108 CONG. REC. 16,417 (1962).
44. Id. at 16,926.
45. See GALLOWAY, supra note 13, at 52.
46. Id. at 56.
47. See generally Schwartz, Comsat, the Carriers, and the Earth Stations: Some Problems with “Melding Variegated Interests,” 76 YALE L.J. 441, 442 & n.5 (1967).
50. See 1973 COMSAT ANN. REP. 100 [hereinafter cited as COMSAT REPORT]. Comsat was advanced $500,000 of the interim line of credit up to $5 million to cover initial costs. Id.
52. Id. §§ 721(c), 734(b), 741.
assumptions and fears of those who commented on the new corporation before it became fully operational in 1965. These comments, written before the successful launch of “Early Bird,” the world's first commercial communications satellite, indicate the expectations of many people in the United States regarding the effect of this statutory monopoly on the new age of space communications. Knowledge of these expectations will be valuable in developing a theoretical framework for use in the final section of this note, which will consider the proposed legislative changes of 1975.

In 1963, Victor G. Rosenblum stated in his article concerning the administrative aspects of the Communications Satellite Act of 1962:

The Satellite Communications Act embodies the effort to establish the broadest possible base of ownership, control, and commitment; to render a vital service to people throughout the world; and to show that the American enterprise system, requiring neither subservience of private business to the Government nor dominance of Government by private business, can thrive on a bona fide partnership of interests.

Others, however, were not so optimistic. Many legislators and observers expressed apprehension about the private enterprise nature of the system, despite the extensive regulatory provisions. The legislation as enacted contained a complex matrix of internal checks and balances which rested upon a number of basic assumptions about the ultimate functioning of Comsat. Samuel Estep, writing for a symposium on Comsat at Northwestern University in 1963 listed these assumptions, which may be summarized as follows: (1) Comsat, like AT&T, was to be an extensive, diversified, nonpolitical, and efficient international telecommunication network. It was to be composed of U.S. carriers and foreign partners. (2) Comsat would be a profit-making corporation, but some of its functions were to be governmental in nature. (3) The corporation would make a substantial long-term profit, although returns would be small at best in the early years. (4) Comsat was to have a space satellite monopoly, but it would foster competition in the manufacture of equipment for its needs. It was to complement the existing international communications systems and could benefit from the expertise of such carriers. (5) Rates were to be integrated with those of the undersea cables in order to avoid a switch to a cheaper

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53. See COMSAT REPORT, supra note 50, at 19.
cable circuit. (6) The corporation, at least for its first few years, was to provide primarily telephone circuits, owing to technological limitations and the priority of telephone use over television use. (7) The system was to operate at maximum capacity so that third world as well as developed nations could afford to use the new satellite circuits. (8) The corporation was to coordinate with existing services and receive a guarantee of heavy usage from the federal government and AT&T. (9) Foreign groups were to be allowed to own as much as twenty percent of the stock. (10) Foreign governmental agencies would want to share in the system. (11) Regional cooperation would be needed in foreign countries, as the placement of earth stations in each country would be economically infeasible.

Estep also listed the following observations: (1) An international body should be formed to oversee satellite telecommunications. (2) The United States might, for foreign policy reasons, subsidize earth stations for underdeveloped third world countries. This assistance could be offered in the form of foreign aid. (3) The corporation could lease circuits to other countries whose transmissions would not involve the United States. Functioning as a communications carrier’s carrier, Comsat would lease channels to the carriers, who would in turn lease them to foreign customers. (4) The corporation should maintain a close working relationship with NASA. The involvement of substantial federal expenditures in the development of Comsat’s facilities should not preclude turning over use of either facilities or knowledge to private enterprise if such action would benefit the most people.

57. International record carriers have an indefeasible right of use considered in their rate base; no such indefeasible right of use is available with satellite circuits. An indefeasible right of use has been defined as a partial equitable interest that can be included for the “used and useful” requirement of FCC rate base determination. See American Tel. & Tel., 37 F.C.C. 1151, 1160 (1964).

58. Television circuits use broad frequency band lengths, and with a limited number of available circuits, telephone transmission was given a priority. See Estep, supra note 55, at 241-42.

59. The initial costs of satellite transmission are greater than costs of existing terrestrial means. To make the system economically viable, the number of voice and data messages must increase tremendously. See id. at 242.

60. One group or nation could purchase the entire 20% and acquire substantial influence. Id. at 243-44.

61. Earth stations are operationally connected with one or more terrestrial systems to transmit signals to the satellite or receive signals from it. See 47 U.S.C. § 702(2) (1970).

62. The International Telecommunications Union, whose function was mainly spectrum regulation, lacked the requisite strength. See Estep, supra note 55, at 246.

63. Assumptions 1, 2, 3, 5, 6, and 7, and observations 3 and 4 have all proved valid. Assumption 4 presents a problem that is discussed infra with section 101 of the proposed amendments. See notes 130-33 & accompanying text infra. Comsat received high usage on its circuits and thus had little need for the guarantees mentioned in as-
The assumptions and observations listed above present an historical framework through which to view the pre-operational Comsat. Estep's analysis did not, however, include a detailed discussion of the potential economic pitfalls that may have led to the Justice Department's antitrust concerns, mentioned earlier in this note.  

Another commentator, Harvey Levin, discussed the specific hazards which would confront free competition in the first year of satellite system operations. His views may be summarized as follows: (1) The corporation could eliminate competition. The act as it was created in 1962 contained no provisions inhibiting the construction of competing systems. This lack of restriction alone, however, did not provide insurance against the possibility of anticompetitive practices such as price fixing. (2) The system could discriminate among potential users. Case law since United States v. Terminal Railroad, decided by the Supreme Court in 1912, had directed that nonowners in a public industry could not be excluded from using that system. Nonetheless, preferential treatment of owners when channel demand on the satellite system exceeded the available supply would be likely to result in foreclosed access. (3) The system could discriminate among potential suppliers. Congress had charged the FCC with maintaining competition in hardware procurement. A major fear of certain interest groups and members of Congress was that a carrier-owner would influence Comsat to purchase hardware from a subsidiary, thus excluding effective competition from unaffiliated suppliers. This danger would be increased if the price of the subsidiary's hardware were inflated. The purchase of overpriced hardware would increase Comsat's usage costs, thereby justifying a rate base hike. (4) The corporation could retard...
technological progress. Congress also feared that common carriers with substantial investments in existing undersea cable and high frequency radio facilities would attempt to protect their investments by retarding new developments which threatened them with obsolescence. AT&T, the largest carrier, had invested significantly in the development of random access satellites. Other carriers on Comsat’s board of directors continued to lease circuits in AT&T’s undersea cables. It would be less expensive in the event of low traffic volume for AT&T to use its wholly owned cables rather than a satellite system in which it was an investor. This practice could have the effect of increasing the other carriers’ unit costs for satellite use, thus providing a negative incentive for future satellite development. (5) Comsat’s pricing policy could discriminate against disadvantaged nations. In order to assure profitable operations, the price the carriers paid Comsat for the leased channels would have to exceed the cost of providing them. If joint costs of developing, building, tracking, and replacing satellites were substantial, however, and average total costs declined, a price that covered short-run, or even long-run incremental costs might not yield revenues adequate to cover the system’s total costs. Studies indicated that average total costs per voice channel would tend to decline indefinitely as the system’s capacity rose. Thus, the cost of launching and using satellites would probably increase with rising channel capacity, but in a less than directly proportionate ratio.

The equal distribution of joint costs or equal apportionment of total costs would jeopardize use of the system by economically disadvantaged nations lacking the resources to build alternative systems. In advanced nations, alternatives to the Comsat system were readily available; potential users would therefore lease the satellite circuits only if they were less expensive than using their existing terrestrial systems.

71. Levin, supra note 36, at 345-49.

72. A random access system requires a low orbit and approximately twenty satellites. This type of system is distinguished from the geo-synchronous system Comsat ultimately chose. This stationary orbit system utilizes three high altitude satellites, situated one over each ocean, at an altitude of 22,300 miles above the equator. They remain stationary in that orbit owing to gravitational forces. Comsat Report, supra note 50, at 17.

73. Levin, supra note 36, at 349-54.

74. Five types of joint cost allocations were suggested: (a) subsidized by the government, with each link charged only for incremental costs; (b) distributed according to the user’s ability to pay; (c) priced to diffuse benefits widely; (d) shared equally among the participating earth stations; (e) apportioned according to the relative size of incremental costs on each line; (f) distributed according to the elasticity of demand for channels on the several links. Id. at 351-53. All of these choices are predicated on the fee recovery method selected by NASA to secure payment from Comsat, as provided in section 201 of the Communications Satellite Act. Id.

75. See, e.g., Levin, supra note 36, at 350 n.112.
If an advanced nation's traffic were diverted elsewhere, the result would be higher average total costs for remaining users.\textsuperscript{76}

The hazards summarized above, in conjunction with Estep's assumptions, have presented a perspective from which to view the subsequent operations of Comsat. The next section of this note will bring into focus the problems that faced the corporation after it began to operate in 1965.

**The Decision for Private Monopoly: Subsequent Ramifications**

**Lingering Concerns**

The passage of time did not allay the fears held by those who had favored public ownership. Five years after the congressional decision to place Comsat in private hands, FCC Commissioner Nicholas Johnson, criticizing the monopolistic practices displayed by Comsat, asked in 1967: "Should we permit the entire universe to be divided up, with Comsat taking the heaven and AT&T taking the earth?"\textsuperscript{77}

A year later, Rosel H. Hyde, Chairman of the Federal Communications Commission, suggested possible conflicts of interest in the operation of the new corporation:

The common carriers which today own more than 45% of the stock of Comsat, have a unique two-fold relationship with it. On the one hand, as owners of stock, they have a financial interest in the success of the company; as nominators of 6 of the 15 directors, they have a fiduciary obligation to insure the success of the company. On the other hand as owners and operators of other means of communication, they are the natural competitors of the company in which they have such large ownership and managerial responsibilities. Finally, since Comsat has a monopoly on the provisions of international satellite communications facilities, the other carriers are its customers. Here again they have a dual and divergent interest. As owners they naturally would like to see prices at a level designed to maximize profits, while as customers they, of course, would like to have prices as low as possible.\textsuperscript{78}

In short, the statutory monopoly created by the Satellite Act not only permitted, but indeed compelled cooperation among the participating carriers.\textsuperscript{79} This cooperation, however, could at any moment have become collusion. The fear of market restriction and avoidance of tech-

\textsuperscript{76} Id. at 353.

\textsuperscript{77} N. Johnson, How To Talk Back To Your Television Set 112 (1967).

\textsuperscript{78} Hyde, The Role of Competition and Monopoly in the Communications Industries, 13 Antitrust Bull. 899, 906 (1968).

\textsuperscript{79} Industries with a few large firms and several small firms are designated as oligopolies with competitive fringe. See L. Doyle, Economics of Business Enterprise 239 (1952).
nological innovation articulated originally by Harvey Levin continued to plague commentators, one of whom complained, "If the industry is oligopolistic with substantial barriers to entry, and if all the major firms have a substantial investment in a preexisting plant, they can delay introduction of the innovation until they have fully recouped their investment in their existing plant."\textsuperscript{80} The most basic "form of ownership" issues raised in 1962 by Senator Kefauver were still being scrutinized. For example, it was noted that "[i]t is equally unlikely that potential competition will be fostered by a structure which contemplates numerous interlocking directorates; creates a backward and forward vertical joint venture; and provides for substantial minority interests by companies which are simultaneously potential suppliers, customers, and competitors.\textsuperscript{81} These continuing expressions of concern have articulated further examples of inherent conflicts within the Communications Satellite Act of 1962. They have illuminated problems which should have received greater public and congressional consideration.

**Need for Detailed Public Reporting**

It is important to recognize that government-created monopolies are subject to alteration by appropriate legislation. Congress should not consider its prior decision for private ownership an irrevocable one. The very gravity of the private ownership decision demands that it be subjected to regular congressional review. The basic properties of monopolies have been characterized as "[t]echnical and administrative inefficiency or slack, unjustified price discrimination, sluggish application of new technology, [and] unresponsiveness to new customer needs and demands . . . ."\textsuperscript{82} These characteristics have not been the rule with Comsat, but it has only been operating for ten years. The president of the United States is required under section 404\textsuperscript{83} of the 1962 act to prepare and submit for congressional approval an annual report on Comsat's activities. Unfortunately, the information contained within these reports predominantly parallels the facts printed in the Comsat corporate report. A more detailed form of analysis would allow Congress to evaluate Comsat's vitality more effectively. The presidentially-appointed members of Comsat's board of directors should maintain an active stance in attaining the release of all corporate information for the president, and ultimately for the American public. The reporting requirement in section 404\textsuperscript{84} of the 1962 act, when read in conjunction

\textsuperscript{80.} Schwartz, *Comsat, the Carriers, and the Earth Stations: Some Problems with "Melding Variegated Interests,"* 76 YALE L.J. 441, 461 (1967).

\textsuperscript{81.} Id. at 464-65.

\textsuperscript{82.} Turner, *The Role of Anti-trust Policy in the Communications Industry,* 13 ANTIRTrust BULL. 873, 878 (1968).


\textsuperscript{84.} Id.
with section 303, which requires that the board include presidential appointees, would seem to require no less. It is this lack of detailed information regarding management decisions that may have caused the once essential common carrier directors to withdraw from Comsat's board.

Comsat was rapidly becoming as large and powerful a corporation as the entities that had formed it. As fiduciaries, the carrier directors had to act in the corporate interest of Comsat. The carrier-assisted statutory monopoly had come of age; it was now to come in direct competition with those it was meant to serve.

**Divestiture: The Mysterious Retreat of the Common Carriers**

The Communications Satellite Act of 1962 provided for the initial issue of only 10 million shares of stock. The issues were priced at twenty dollars per share, and half of the shares were purchased by communications common carriers. The authors of one text note that "[t]he four largest carrier stockholders—AT&T, IT&T, General Telephone and Electronics Corporation, and RCA Communications, Inc.—together held 90.9 percent of the industry segment, and 45.4 percent of the total issue. AT&T, the single largest stockholder, purchased 29 percent of the industry allocation." The remaining five million shares were issued to the public; the issue opened on the New York Stock Exchange trading at forty-six dollars per share. The price rise is attributable to market speculation resulting from fascination with space-related securities.

Although Comsat took two years from the passage of the act to become fully operational, it exhibited a startling growth rate once this point was reached. The original act was conceived by Congress as a protective crib for the infant Comsat, and it was soon viewed with increasing antagonism by the expanding corporation, which felt the occasional need to stray beyond the limits of the legislation. One major excursion occurred in 1966, when Comsat's management made a unilateral policy decision to serve a broad category of supposed authorized users directly rather than to confine its service to the common carriers and serve as a carrier's carrier. Later in that year, the FCC in its "Authorized User Inquiry" failed to authorize Comsat to serve ultimate consumers unless the international carriers had previously denied such

85. *Id.* § 733.
86. *COMSAT REPORT*, *supra* note 50, at 100.
Comsat’s management decision provoked a mysterious retreat by the carriers from their former positions as shareholders and board members in the corporation. In the months following the articulation of the new policy decision, IT&T and other carriers divested themselves of ownership by the sale of their Comsat shares to securities underwriters. It was unclear why the carriers had decided to leave rather than to oppose the decision from their position as class B shareholder representatives on Comsat’s board of directors. One possible explanation is that these carriers lacked sufficient voting power to wage a successful board fight; another is that the divestitures were part of an effort to forestall an antitrust action which the carriers believed the Department of Justice was contemplating. Unfortunately, the public records offered no firm answers. The most substantial evidence on this matter only tentatively suggested the possible reasons behind the carriers’ actions. In a hearing conducted by the Communications Subcommittee of the Senate Commerce Committee two witnesses, the Hon. Rosel H. Hyde, Chairman of the FCC, and Mr. James McCormack, chairman of the board of Comsat, testified before Senators John O. Pastore and Norris Cotton:

Senator COTTON. . . . What is the significance, if any, of the common carriers divesting themselves of this portion of their stock?

Mr. HYDE. I couldn’t add anything to the statements that have been published by certain carriers. One of them at least explained that they were not sympathetic with the policy direction of the corporation and wished to withdraw for that reason. I have no other information.

Senator COTTON. In what respect were they not in sympathy with the policies?

Mr. HYDE. This particular carrier stated in their publicity that since Comsat was undertaking to offer a service direct to customers, that this was contrary to the original intention that Comsat should be a carrier’s carrier. I am only giving what I recall as their statement, not making any comment on that myself.

In addition to Chairman Hyde’s testimony, the following colloquy took place between Senator Cotton and Mr. McCormack:

Senator COTTON. I would like to renew my question now about the reasons that the carrier or carriers objected to the policy of Comsat and disposed of some of their stock.

Mr. MCCORMACK. Senator Cotton, the public record of the carriers’ statements is really all we have to go on, too.

92. Id. at 9.
93. Id.
Acting in the wake of the carrier divestitures, Congress amended the Communications Satellite Act of 1962 to specify that common carrier representation on the board of directors of Comsat was to be determined according to the percentage of stock they collectively owned. The original act had provided for six common carrier directors regardless of the percentage of their stock ownership.94

Three years after the voluntary divestitures, the FCC determined that AT&T was directly competing with Comsat in the domestic satellite field and as a result ordered AT&T to divest itself of all its Comsat holdings.95 The FCC explained:

However, in this field the underlying considerations which motivated Congress to permit and encourage AT&T's ownership in Comsat are no longer controlling. On the contrary, the competitive roles which Comsat and AT&T are assuming in the domestic communications field dictate the need for maximum independence from each other and an arms-length relationship.96

Although the reasons behind the various divestitures may never be fully understood, the final result is evident. Comsat, once 50 percent owned and controlled by the major common carriers, has become a corporation equal in power to the carriers that created it.

Reflection on the legislative hearings preceding the original act further demonstrates the significance of these divestitures. Comsat was a compromise between the extremes of an international carrier joint venture, advocated by the FCC Ad Hoc Committee and originally by Senator Kerr,97 and a publicly-owned corporation, urged by Senator Kefauver and the Americans for Democratic Action. In the process leading to the compromise, Senator Kerr's Committee on Aeronautical and Space Sciences adopted an amendment to the president's bill98 which, in part, deleted language empowering the Department of State to "conduct or supervise" foreign negotiations of the corporation and replaced it with a provision that the department could "advise" the corporation of foreign policy considerations.99 This modification was proposed by Senator Kerr, who favored a consortium of international car-

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95. Establishment of Domestic Communications Satellite Facilities by Nongovernmental Entities, 38 F.C.C.2d 665 (1972). Comsat later organized a wholly owned subsidiary, Comsat General, which was created to own and operate Comsat's domestic satellite interests. It will build and launch four satellites to be used as part of AT&T's domestic system. Communications Satellite Corporation, 42 F.C.C.2d 677-78 (1973).
96. Id. at 679.
97. GALLOWAY, supra note 13, at 52-53. Senator Kerr later compromised and sponsored the administration's bill, with the understanding that he could offer amendments to alter the government's supervisory role. Id.
98. See S. REP. No. 1319, 87th Cong., 2d Sess. 3-4.
riers and anticipated sustained and complete participation of the major carriers in the decision-making processes of the corporation's board of directors.

In general, the foreign policy checks and balances written into the act reflect an acute awareness of the long-established relationship between United States international carriers and telecommunications systems owned by foreign governments. The aggressive stance of the corporation in its attempt at serving the ultimate consumer directly, to the international carriers' potential detriment, was a catalyst in causing the retreat of its early supporters and thus in undermining this long-standing relationship. The same aggressive mode of operation, which has come to characterize the corporation, had a further effect on United States foreign relations during the negotiations between Comsat, as the designated entity of the United States, and the other participating world governments concerning Intelsat, the international space satellite consortium.

Intelsat: Legitimizing the U.S. National Interest in a Global Communications System

"Global communications control, important in the past, today has become indispensable for the exercise of international authority." In October of 1963, the International Telecommunications Union (ITU) met in Geneva to allocate high frequency radio spectrum space. It was at this conference that a plan for an international communications satellite association was first conceived. Nine months later, on July 28, 1964, nineteen nations agreed to establish a global communications union dealing solely with satellites. The United States, possessing major technological advantage, delegated Comsat to serve as its official participant in this system, which was named Intelsat. Evidence of the power wielded by the United States in the

100. GALLOWAY, supra note 13, at 49-50.
102. H. SCHILLER, MASS COMMUNICATIONS AND AMERICAN EMPIRE 127 (1970) [hereinafter cited as SCHILLER].
103. Id. at 131.
104. Agreement Establishing Interim Arrangements for a Global Commercial Communications Satellite System, Aug. 20, 1964, 15 U.S.T. 1705 [hereinafter cited as Interim Arrangements Agreement]. These arrangements included two documents, one known as the "Intergovernmental Agreement," and the other termed the "Special Agreement."
106. SCHILLER, supra note 102, at 136.
formation of Intelsat is demonstrated by the management structure which was adopted. Comsat emerged as the general manager responsible for system design, development, construction, operation, and maintenance. Voting representation was to be determined by a nation's traffic volume, a standard which assured the United States the position of greatest power.

The United States held 61 percent of all stock and voting rights and therefore had veto power over all proposals. Article 9 of the “Special Agreement,” a corollary of the “Intergovernmental Agreement” establishing Intelsat, provided that rates were “to cover amortization of the capital cost of the space segment, an adequate compensation for the use of capital, and the estimated operating, maintenance, and administrative costs of the space segment.” The third world was virtually excluded from the original agreement and the negotiations which preceded it. This fact was verified in a provision of the “Interim Arrangements Agreement,” which declared: “Shares reserved for possible new entrants, no matter how numerous, cannot exceed 17 percent of the total.”

Major conflicts developed over Comsat's power in the area of procurement of satellite components. The corporation had the power to subcontract with itself or any other United States corporation of its choosing. The Europeans were infuriated at this power, as they had made 25 percent of the original contribution and had received only 4 percent of the Intelsat contracts. The growing sentiment against Comsat was expressed effectively by a British delegate who stated: “It is managing agent, with all the importance that results, and, in addition, it has its independent, quite separate interests as a U.S. corporation . . . . To the critical eye Comsat is Lord High Executioner and Lord High Everything Else.”

The delegates of this first meeting required that “Definitive Arrangements” be submitted no later than January 1, 1969. A final accord was reached early in 1971, after much renegotiation. The Swiss Review of World Affairs, analyzing the mood surrounding this reorganization, stated:

107. See GALLOWAY, supra note 13, at 158.
108. COMSAT REPORT, supra note 50, at 72.
109. SCHILLER, supra note 102, at 136. This amount dwindled to 40% in 1973. See COMSAT REPORT, supra note 50, at 72.
110. Interim Arrangements Agreement, supra note 104, at 1752.
111. SCHILLER, supra note 102, at 141.
112. Interview with Dr. Reinhold Steiner, Intelsat negotiator for Switzerland, in Washington, D.C., Aug. 1, 1974 [hereinafter cited as Steiner Interview].
114. Interim Arrangements Agreement, supra note 104, at 1713-14.
Modern telecommunications techniques had reached a stage of development which appeared to offer unlimited future potential. At the same time, the United States occupied a privileged position in Intelsat which, while at one time might have been acceptable, had in the meantime lost its justification. As a result, in the long term a conflict was bound to arise between Washington's understandable efforts to maintain its dominating position and the desire of the other partners for a genuine internationalization of Intelsat.\(^\text{115}\)

A further insight into the dynamics of the negotiations was provided during an interview with one of the foreign representatives. Dr. Reinhold Steiner, recalling his experiences as the Swiss negotiator, characterized the tactical attitudes of the Comsat representatives as "strong-armed and ruthless."\(^\text{116}\) Steiner recalled numerous instances in which the United States took unfair advantage of its technologically superior position by placing complex technical proposals on the desks of foreign delegates only moments before a vote on adoption was to be taken. Using the veiled threat of veto power, the United States pushed agreements through the governing bodies of Intelsat.\(^\text{117}\)

Although the United States could unilaterally control the day-to-day functioning of Intelsat, it could not, because of a provision requiring unanimous approval, dictate the terms of the final agreement. Three years of negotiation preceded the approval of this agreement by the eighty-three member nations. Although on the surface the provisions of the final agreement appeared to reflect substantial decreases in United States voting power, closer analysis revealed no significant erosion. An apparently significant revision embodied in the new agreement provided for a reduction in Comsat's proportionate voting power from 53 percent in 1971 to 38.28 percent in 1974.\(^\text{118}\) The effect of this reduction, however, was for practical purposes nullified by the simultaneous switch from a simple majority provision to a two-thirds requirement for all votes of the governing body.\(^\text{119}\) One revision, however, reflected a successful effort on the part of foreign participants to increase their share of power in Intelsat by reducing Comsat's authority. Under the Definitive Arrangements, the managerial function was shifted over a period of three years from Comsat to an independent director general.\(^\text{120}\)


\(^{116}\) Steiner Interview, supra note 112.

\(^{117}\) *Id.*

\(^{118}\) *COMSAT REPORT*, supra note 50, at 64.

\(^{119}\) *Id.*

Among the major membership of Intelsat, only Comsat was a private corporation. Dr. Steiner explained that this distinction was not welcomed by the foreign participants, who would have preferred to deal with a nationalized agency similar to themselves. In defending its private status, Comsat insisted that its behavior in the international body was uninfluenced by this status. Nevertheless, a recent controversy concerning the interpretation of article 14(d) of the Definitive Agreement has cast doubt on the veracity of Comsat's assertion.

Article 14(d), which allowed Intelsat members to establish regional satellite systems separate from the global network, was viewed by foreign members as being vulnerable to veto only by a two-thirds vote. Comsat, fearful of making concessions to other nations in order to secure a veto, refused to abide by this two-thirds interpretation. Comsat's prior ability to control Intelsat proposals by virtue of its 38.28 percent voting share had been a powerful bargaining tool in its commercial dealings with United States corporations who were potential Intelsat subcontractors. Acting in its corporate self-interest, Comsat enlisted the cooperation of the Department of State in fighting the two-thirds veto requirement. Establishing American leadership in a global communications satellite system was an avowed foreign policy objective of the United States which did not always harmonize with the goal of increasing international peace and understanding: "Leadership in the sense of financial domination [is] incompatible with increasing empathy or relaxing tensions."

Proposed 1974 Amendments to the Satellite Act of 1962

In May of 1974, the Office of Telecommunications Policy (OTP) sent a series of proposals amending the 1962 Communications Satellite Act to Senator Pastore's Communications Subcommittee of the Committee on Commerce and to Representative Stagger's Committee on Interstate and Foreign Commerce. The original goal of these pro-

121. Steiner Interview, supra note 112.
124. Steiner Interview, supra note 112.
125. GALLOWAY, supra note 13, at 121.
126. These proposals were introduced in 1974, but no action was taken at that time. They were reintroduced in the spring of 1975. See S. Doc. No. 1683, 94th Cong., 1st Sess. §§ 101-09 (1975); H.R. Doc. No. 6809, 94th Cong., 1st Sess. §§ 101-09 (1975). The provisions are as follows: In addition to executive branch involvement provided for in section 201 of the original act, the amendment would specifically allow such involvement to cover planning and development of additional satellite systems created pursuant
posals was apparently to make sweeping revisions in the telecommunications policy of the United States. "This wonderful objective," stated Comsat President Dr. Joseph Charyk, "got watered down to a cleanup proposal."\textsuperscript{127} The amendments as a whole have been frequently characterized as housekeeping measures. For example, an official in the FCC's Common Carrier Bureau characterized the amendments as "mere statutory confirmations of the status quo."\textsuperscript{128} Such a description is undoubtedly appropriate for the bulk of the proposed legislation. For example, section 101 of the amendments\textsuperscript{129} would permit United States corporations other than Comsat to participate in specialized international communications satellite systems. This provision would extend executive branch involvement to include planning and development of additional satellite systems created pursuant to any agreement between the United States and foreign nations. Section 101 of the amendments, in light of the prior congressional decision to place Comsat in private hands, would not significantly change the status quo.\textsuperscript{130} It is only logical that Congress would want the executive branch to oversee newly conceived international satellite systems, just as it oversees the Comsat-Intelsat relationship. No one expects the executive

to any agreement between the United States and foreign countries. \textit{Id.} § 101. The amendment would delete section 201(c)(8) from the original act, thus removing Comsat's financial activities from the purview of the FCC. \textit{Id.} § 102. One proposal would amend section 301 of the original act to allow Comsat to be governed by the corporate laws of the jurisdiction in which it is incorporated rather than restricting it to the District of Columbia Business Corporation Act. Another proposal would amend section 303(a) of the original act to delete the requirement for three presidentially-appointed directors on Comsat's board. \textit{Id.} § 104. A further proposal would amend section 304 (a) to permit Comsat to issue stock having par value and amend section 304(b)(2) to eliminate a special class of stock for common carriers and to reduce the permissible amount of shares that can be held by such carriers from 50\% to 5\%. \textit{Id.} § 105. An amendment to section 305 would clarify the policy that Comsat does not have exclusive statutory authority to operate additional systems separate from Intelsat. \textit{Id.} § 106. An additional provision amends section 402, and extends State Department involvement to new international satellite systems developed pursuant to intergovernmental agreements to which the United States is a party. \textit{Id.} § 107. An amendment to section 404 of the original act would effect a grammatical alteration. The final proposal would require the president to report to Congress regarding additional international communications satellite systems. \textit{Id.} § 109.

\textsuperscript{127} Interview with Dr. Joseph Charyk, President of Comsat, in Washington, D.C., Aug. 2, 1974.

\textsuperscript{128} Interview with an FCC Common Carrier Bureau Official, in Washington, D.C., Aug. 6, 1974 [hereinafter cited as Interview with FCC Official]. The interviewee would prefer to remain anonymous.


\textsuperscript{130} \textit{Id.} Congress favored choosing a private entity to participate in Intelsat, the "global system"; therefore, the choice of another private entity in specialized systems presents no apparent conflict.
branch to play a passive role in systems having such an obvious impact on foreign policy. Comsat, however, did not view this amendment as having a "housekeeping" effect and argued as follows:

We believe that abandoning the chosen instrument policy of Congress in favor of a policy that cannot achieve the advantages of the competition it extols serves no real purpose and will defeat the national goals of establishing international satellite systems expeditiously and under arrangements which provide effective and economical service to U.S. users. Consequently, we recommend that all the provisions of H.R. 6809 permitting participation in international communications satellite systems by U.S. entities other than Comsat be deleted, and that the fundamental policy of Congress when it enacted the Satellite Act—namely, that U.S. participation in all international satellite systems be through Comsat—be affirmed.\textsuperscript{131}

What Comsat failed to recognize is that the Communications Satellite Act of 1962 created the "private corporation" to be the United States participant in "the global system,"\textsuperscript{132} it mentions no limitations on ownership of specialized satellites systems or general domestic systems.\textsuperscript{133} Sections 107, 108, and 109 of the amendments\textsuperscript{134} are necessary concomitants to section 101 and are therefore subject to the same analysis.

Section 106,\textsuperscript{135} denying Comsat a statutory monopoly on other international satellite systems, is consistent with this nation's contemporary domestic satellite policy, which encourages increased participation. In this regard, NASA administrator Stephen Doyle, a former OTP counsel, stated that "the revision of Section 305 makes it clear that Comsat is only the chosen instrument for Intelsat, and not for any or all international systems."\textsuperscript{136} It should be noted, however, that section 106 would not preclude Comsat, through its wholly owned subsidiary Comsat General, from monopolizing future international satellite systems on its own, without the benefit of statutory protection.\textsuperscript{137}

\textsuperscript{131} Letter from Dr. Joseph V. Charyk, President of Comsat, to Representative Harley O. Staggers, Chairman of the Committee on Interstate and Foreign Commerce, May 30, 1975.


\textsuperscript{133} Id. § 701(d). The only limitation on the creation of these systems is that they be consistent with the act. For example, specialized systems might be justified by unique governmental needs; general domestic systems could be established if required by the national interest. Id.

\textsuperscript{134} S. 1693, 94th Cong., 1st Sess. 5-6 (1975); H.R. 6809, 94th Cong., 1st Sess. 5-7 (1975).

\textsuperscript{135} S. 1693, 94th Cong., 1st Sess. 4-5 (1975); H.R. 6809, 94th Cong., 1st Sess. 5-7 (1975).

\textsuperscript{136} Interview with Stephen Doyle, NASA Administrator, in Washington, D.C., Aug. 1, 1974.

\textsuperscript{137} See Communications Satellite Corporation, 42 F.C.C.2d 677, 680 (1973). Comsat is authorized to establish Comsat General as a separate corporate entity to which it intends to transfer all of its non-Intelsat activities.
a scheme of open competition, there would be nothing to stop Comsat General from using its own expertise to assume leadership in establishing other systems.

Section 103, which would allow Comsat to be governed by state corporate laws, would have no serious effect on the conduct or character of the corporation's operations. The provision in section 105 for reducing the permissible size of common carrier holdings would have no immediate relevance in light of the aforementioned common carrier divestitures.

Nonetheless, two remaining sections of the proposed legislation are substantially more than housekeeping measures. The first, section 102 would delete the requirement that Comsat receive FCC approval before issuing any debt or equity securities. An official of the FCC Common Carrier Bureau expressed "serious reservations" about the propriety of this proposed change. The present requirement for FCC financial control is unique. Those in favor of removing this requirement point out that the FCC does not exercise similar financial control over other common carriers. These parties claim that the technological and operational uncertainties which originally warranted this departure from normal procedures are no longer present. This argument ignores, however, the facts that Comsat still occupies a unique position and that this situation has not changed. Although there is no hard data to substantiate the various estimates, ranging to $25,000,000,000 of the value of government investment in satellite and missile launcher research and development, it is evident that this investment accrued to Comsat and that no other existing private industry has reaped a comparable windfall. Underscoring Comsat's uniqueness is its status as the entity statutorily chosen by the United States to negotiate with foreign governments through the Intelsat system. In view of the significant benefits and responsibilities bestowed upon Comsat by the United States government, it is not at all unreasonable to require an extra degree of financial scrutiny. This close financial scrutiny has become especially important since the FCC required that Comsat form "a separate corporate subsidiary to engage in all domestic satellite ac-

141. Interview with F.C.C. Official, supra note 128.
142. See, e.g., Memorandum from Clay T. Whitehead, OTP Director, to Representative Carl Albert, Apr. 5, 1974, on file at the Office of Telecommunications Policy.
activities” and in any other ventures not related to Intelsat. The commission subsequently authorized Comsat's major financial investment of up to two hundred million dollars in its wholly-owned domestic subsidiary, Comsat General, but cautioned Comsat in early 1974 not to jeopardize any ability to meet its obligations to Intelsat's global system through so substantial an investment. Comsat’s desire for both international and domestic satellite participation has injected inconsistencies into its own arguments supporting the removal of the FCC’s financial scrutiny. In Comsat's reply in the FCC satellite rate investigation, the corporation stated:

But the Trial Staff cannot deny the risks of an entirely new enterprise with no demonstrated earnings capability, no reasonable way for investors to anticipate the level of earnings eventually to be expected, and no indication as to when, if ever, earnings would reach an adequate level. Nor can the Trial Staff deny the risks flowing from the necessity to operate in a business environment requiring the participation of foreign entities in the INTELSAT system, in which major policy and investment decisions would be group decisions. Nor can the Trial Staff deny the risks and uncertainties inherent in a business with no assured customer base and in which the principal customers are also principal competitors. And the Trial Staff cannot deny the threat of competition from cables and from domestic and regional satellite systems [or microwave].

While Comsat’s argument was intended to distinguish its present situation from that at its inception, the risks which it mentioned above are as relevant to its new domestic subsidiary as they were to the young Comsat over ten years ago. Thus, Comsat itself seems to have presented a cogent argument for continued financial scrutiny.

The corporation's investment of a sizable amount of its assets in Comsat General cannot be discounted as risk-free. If the Comsat General-AT&T domestic satellite system which is now being designed were to be a financial failure owing to any unforeseen risk, what would become of Comsat's stock in its subsidiary? What would be the subsequent effect on Comsat's role regarding its Intelsat commitment? The

148. Id. (emphasis added).
commission "strongly opposes" the repeal of its statutory power to scruti-
iniz Comsat's financial condition. The FCC has stated:

In reviewing the purpose of Section 201(c)(8), it is noted that
Congress sought to assure that Comsat, as the sole entity in the
United States authorized to participate in the ownership of the
global communications satellite system, be financially able to pur-
sue such mission. It is particularly important that this ability be
preserved in view of the recent expansion of Comsat into non-
INTELSAT endeavors, such as domestic and maritime satellites.

In September of 1975, the FCC denied a request by Comsat that
it be permitted to advance its domestic subsidiary, Comsat General,
another forty million dollars, because the commission was not per-
suaded that the advancement would not "impinge upon Comsat's
INTELSAT responsibilities." In refusing to allow this specific ad-
vancement by Comsat to its subsidiary, the FCC in effect assured the
Intelsat members, who by the nature of the Intelsat agreements are

150. Federal Communications Commission, Comments on H.R. 14305, A Bill
To Amend Certain Provisions of the Communications Satellite Act of 1962 4
(1975).
151. Id. at 4-5. The commission's comments relative to section 201(c)(8) of the
Communications Satellite Act of 1962 are set out in full below:

"The Commission strongly opposes the repeal of Section 201(c)(8), a key section
in the regulatory scheme established by the Act. The need for such provision is as com-
pelling now, if not more so, than in the past, since its purpose is to enable ongoing supervi-
sion by the Commission of Comsat's financing to insure consistency with the most ef-
ficient and economical operation of the corporation. As such it is an integral part of
the Commission's responsibility under the Act. . . . In authorizing domestic satellites,
the Commission specifically required the formation by Comsat of a subsidiary, and cited
Section 201(c)(8) in acting to protect the financial integrity of Comsat's participation
in INTELSAT. Review will continue to be important in the future, particularly since
Comsat has indicated that the subsidiary may undertake additional endeavors which may
impact on Comsat's financial status.

"While it is true that the Commission does not now have authority over the financ-
ing of other communications carriers, it must be emphasized that Comsat is the only
such carrier with a monopoly position designated by statute. Moreover, regulatory au-
thority of this sort is not unique. Indeed, Congress specifically stated that Section 201
(c)(8) was based on the statutory provisions giving the Interstate Commerce Commiss-
ion and the Federal Power Commission similar authority.

"In summary, we believe retention of the Commission's regulatory authority over
Comsat's financing is essential to insure benefits to the public in terms of rates and to
protect Comsat's role as the U.S.-designated entity in the INTELSAT system. In addi-
tion it is consistent with the authority generally found necessary in the effective regula-
tion of common carriers and public utilities."

152. It must be noted carefully that section 201(c)(8) provides for commission reg-
ulation only when securities are being issued, funds are being borrowed, or debt is being assumed by Comsat. Communications Satellite Act of 1962, § 201(c)(8), 47 U.S.C.
§ 721(c)(8) (1970). There are no statutory restrictions on the "advancement" of funds as in the instant case. Moreover, there is no indication in the Communications Satellite Act of 1962 that the commission is empowered to regulate Comsat General.

concerned with Comsat's continued financial stability, of careful financial scrutiny by the commission. Without this single monitoring procedure, Comsat would appear to be a statutory monopoly lacking even the slightest regulation. Moreover, Comsat has not shown that FCC scrutiny has ever operated to the detriment of the corporation's lawful business interests. Absent such a showing, this regulation must remain enforced.

The second and final section of the new legislation requiring special attention is section 104, which calls for the removal of the three presidentially-appointed directors from Comsat's board. One commentator suggests that there are two types of roles that the presidentially-appointed directors could fulfill:

The first is that they are to use their presence and voting power within the board to bring influence to bear in the making of decisions affecting the public interest. . . .

The other conception of the government directors' role is that they are to serve primarily—and perhaps exclusively—as a two-way 'window' for the President and other governmental agencies, keeping them informed from the inside of the corporation's activities, and serving to communicate especially the President's views to the board. Unfortunately, not because of the requirement for their existence, but rather by the method of their selection, these appointees have done nothing to distinguish themselves from those regular board members who are concerned solely with the profit and growth aspects of the corporation. Comsat President Dr. Joseph Charyk commented on the intended function of the presidential appointees as follows:

Well, they were intended to watch out for the public interest while still carrying out fiduciary responsibility to stockholders. In practice, however, these appointees have been indistinguishable from the other Board members. We are a chosen instrument and do speak for the United States and present the U.S. image. This extra responsibility requires people like this on the Board who can answer to the Legislative and Executive Branches of the government. They are an asset. I don't think they should be eliminated.

It is not surprising that Dr. Charyk, as president of Comsat, would

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156. Id. at 355-56. The first three directors were Clark Kerr, President of the University of California; George Meany, President of the AFL-CIO; Frederick G. Donner, Chairman of the Board of General Motors.

favor the retention of these appointees, for they give the appearance of representing the public without actually doing so. One official of the FCC Common Carrier Bureau, commenting on this dilemma, explained:

You have a negative result where the general public expects that there is more regulation and control than there is in fact . . . . They may leave sort of an illusion of an independent watchdog when in fact there really isn't very much going on.158

In an article on the Comsat board of directors,159 one author describes the parallel circumstances attending the formation of the Union Pacific Railroad, in which a minority of public directors were also appointed by the president to a corporation created by the federal government. In the Report of the Government Directors of the Union Pacific Railroad for 1882,160 it is noted:

The obvious purpose of the law creating the office of Government director was to secure in the actual and active operation of the company representatives of the large interest held by the Government in the road. It was intended that the Government's representatives should not merely be a medium of communication through whom what had been done might be learned, but that they should have a voice in the direction, having intimate knowledge of its affairs, and keeping themselves thoroughly informed concerning all its transactions and the policy of its administration.161

The public board members of the Union Pacific were excluded from major policy decisions in large part because of their assertiveness.162 These directors were finally eliminated from the board when the railroad went into receivership because it was unable to pay back its loan from the federal government.163 Comsat does not appear to be on the brink of receivership, but the possibility of excluding board members who might act against the corporation's interest must be considered. Such a conflict could arise if a presidential appointee were to support the FCC's findings in the Comsat rate investigation.164 Even assuming these difficulties, the solution to this problem is probably not to be found in complete elimination of the three posts. Dispensing with these positions would foreclose even the possibility of board accountability to the public. The solution lies in finding and appointing people

158. Interview with FCC Official, supra note 128.
159. Schwartz, supra note 155, at 358.
161. Id.
162. See Schwartz, supra note 155, at 359-60.
163. Id.
who will work conscientiously to protect the public trust with which their positions are invested.

Conclusion

This note has attempted to describe the general background and to provide an analysis of United States satellite communications policy embodied as it is in the Comsat concept. It has examined what Comsat was intended to be, what it could have been, and what it has actually become. Certainly none of the original legislators intended Comsat to conduct itself in a manner which would alienate foreign members of Intelsat; nor did they intend a later legislative review of Comsat's function to result in an unambitious amendment proposal which introduces no new ideas and seeks change only through the elimination of a few previously enacted regulations.

This note will now suggest two types of modifications of the Communications Satellite Act of 1962. The first enumerates specific alterations of the proposed amendments, and the second develops a blueprint for a future policy relating to United States representation in Intelsat.

Legislation creating substantial change beneficial to the public interest is still possible. In particular, such legislation should contain, if the present corporate structure is assumed: (1) a clear decision whether the domestic "open skies" policy, which requires a diversity of multiple satellite systems, should apply to United States participants in future international systems; (2) a nomination procedure for presidential board appointees that would insure that experts, charged with upholding the public interest, could gain board membership; (3) a definitive statement of the FCC's role in the financial affairs of both Comsat and its subsidiary, Comsat General; (4) a provision regarding the rate structure of Comsat that would compel the "flow-through" of satellite circuit rate reductions to the ultimate consumer. This requirement would avoid the realization of windfall profits by the "middleman" international common carriers if such a reduction were ordered in the rates of the carriers' carrier.


166. Priority for nomination should be given to those familiar with the area of commercial telecommunications and interested in protecting the consumer. Individuals with this background could be drawn from universities, the Consumer Union, active church groups, labor unions, public interest law firms, newspaper staffs, and the federal Legal Services Administration. Special consideration should be given to attorneys from the antitrust division of the Department of Justice. The nominations should be brought forward by the president and subject to confirmation by the Senate.

167. A "flow-through" would allow the amount of reduction ordered by the FCC in Comsat's rates to be passed on to the ultimate consumer. The Commission has stated
Moreover, Congress should consider the advisability of the following measures: (1) a provision compelling Comsat to subsidize the construction of earth stations for third world nations in underdeveloped parts of the world;\footnote{168} (2) a provision requiring that any domestic system approved must donate the use of a certain number of satellite television circuits to educational television and the Public Broadcasting System.

If, however, Congress were willing to reconsider the more fundamental question of the appropriateness of its grant of a perpetual statutory monopoly regarding representation in Intelsat, it would once again have to consider the public ownership alternative. The debate would certainly be long, bitter, and full of compromise. One procedure Congress might consider would direct that a measure establishing a statutory monopoly of the type currently granted to Comsat contain a provision for automatic expiration of the monopoly at the end of a ten-year period. At this time, a bifurcated legislative hearing would be required concerning the renewal of the monopoly. In the first stage of this hearing, the monopoly holder would be directed to show cause why ownership of the United States' interest in Intelsat should not revert to the federal government. This hearing would be an adversary proceeding, at which other interested parties, including groups favoring public ownership, would present their arguments before Congress. Should the private company fail at this stage of the hearing, ownership would conditionally vest in the United States government, subject to the outcome of the second part of the hearing, which would take place within ninety

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\footnote{168} See Estep, \textit{ supra} note 55, at 246. In 1967, President Johnson presented the case for foreign aid in the form of communications links:

"We support a global system of commercial satellite communications which is available to all nations—large and small, developed and developing—on a nondiscriminatory basis.

"To have access to a satellite in the sky, a nation must have access to a ground station to transmit and receive its messages. There is a danger that smaller nations, unable to finance or utilize expensive ground stations, may become orphans of this technological advance.

"We believe that satellite ground stations should be an essential part of the infrastructure of developing nations. Smaller nations may consider joint planning for a ground station to serve the communications needs of more than one nation in the same geographic area. We will consider technical assistance that will assist their planning effort.

"Developing nations should be encouraged to commence construction of an efficient system of ground stations as soon as possible. When other financing is not available, we will consider financial assistance to emerging nations to build the facilities that will permit them to share in the benefits of a global communications satellite system." H.R. Doc. No. 157, 90th Cong., 1st Sess. 4 (1967).
days. In the second stage of the hearing, all interested companies and those favoring public ownership would be allowed to apply for a grant of the authority to represent the interests of the United States in the global system. Should the original holder succeed at the first stage of the hearing, the burden at the second stage would be placed upon the new entrants to prove that they are better able to occupy this representative position. A company which failed in the first stage of the hearing would enter the second stage with no privileges and would be on an equal footing with all new entrants.

Under this system there are three possible outcomes: a continuation of the status quo, a transfer of the statutory grant to a new company, or a reversion to public ownership with adequate provision for the buyback of the monopoly holder’s capital assets. This plan would eliminate the deleterious effects of legislative inertia which have become so evident in the recent proposals amending the Communications Satellite Act of 1962.169

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169. The opportunity to invest in a profitable communications corporation undeniably benefits a certain portion of the public. The vast majority of Americans, however, are not investors, and their interest in the lowest possible rates is potentially at odds with the profit interest of investors. When private corporations engage in public service enterprises for profit, public benefit is not an inevitable or natural outcome. The public interest in communications common carriers demands efficient, reliable service at the lowest possible rates to the ultimate consumer. It is this principle which must guide present and prospective legislation in the field of satellite communications.

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