

LAW AND CONTEMPORARY PROBLEMS

VOLUME 34

SPRING, 1969

NUMBER 2

FOREWORD

Developments in communications, in addition to directly affecting most citizens and professionally involving engineers, lawyers, and social scientists of all types, are of special importance to anyone with an interest in understanding our national life and the direction it is taking. The editors, impressed with the pace of change in telecommunications, the complexity of the legal and policy issues posed, and the implications of these issues for a democratic society, have attempted to provide in this symposium both a broad appraisal of the impact of telecommunications and studies of many of the specific issues. Part I of the symposium focuses on the technological, social, and political aspects of telecommunications and developments in common carrier regulation. Part II will investigate issues in broadcasting.

The symposium has a futuristic accent, seeking wherever possible to look ahead to the culmination of the communications revolution. Because much of the discussion in both parts of the symposium is directly occasioned by technological change, a survey of the technology and its applications is provided in the first article. However, the actual rate of implementation of technological developments can be expected to fall short of the potential rate because of regulatory constraints, the future scope of which will be dictated in large part by the regulators' perceptions of the urgency of encouraging better, or different, services even at the expense of existing investments of regulated firms. The substance of regulation may thus be influenced by improving understanding of the likely impact of dramatically improved and cheaper communications on such things as population distribution, urban centers, family life, education, minority self-identity, national and local political processes, the performing arts, and youthful mores and behavior. Regulation that confines itself to concern about the economic condition of the regulated industry or that perpetuates simplistic notions of the public interest, as if there were only one public to be served, will clearly not have measured up to its responsibilities. The issue may be no less complex than the matter of how communications can and should influence the competing centrifugal and centripetal forces in our society.

Some of these matters are addressed in an article on the social implications of the communications revolution. Two articles on the subjects of "equal time" requirements and "the fairness doctrine" reflect the surfacing, in legal contexts, of social concern about communications' role in political processes, an issue also raised by occasional, and particularly recent, partisan political attacks on the press and television news coverage. Necessarily these broad concerns must be reckoned in policy making for all public communications media. For example, the politically based preference for diversity of editorial control will influence decisions on such various

subjects as the common carrier status of cable television, joint-operating agreements between newspapers,¹ the multiple ownership of communications media, and first amendment issues.

The most dramatic development in recent years in communications common carrier regulation has been the FCC's decision in 1965 to investigate AT&T rates in the first full-scale telephone rate proceeding since federal regulation began in 1910. The practice of "continuing surveillance," under which the Commission purported to supervise the Bell System's rates informally without hearings, a public record, a written opinion, or disclosed rate-making principles, had previously been relied upon to protect the public interest, and the new proceeding was billed as a step toward improving this regulatory technique.² On its performance in the case so far, the Commission appears to be falling well short of realizing the hopes of 1965 for a new and firmer footing for regulation. While the Commission always claimed to have a basis in principle and ascertained fact for what it settled for in practicing "continuing surveillance," it may now be establishing (particularly in the recent "Phase IB" pronouncement³) that not only was this not so but also that the Commission is incapable, as agencies so often are, of articulating principles useful in the decision of hard cases.

The last seven articles in this part of the symposium provide an extensive overview of the state of common carrier regulation, canvassing some history, most of the outstanding problems, and recent developments. One article takes up an important new departure in regulatory decision making which is perhaps best exemplified to date in the Bell hearings. This new technique, which may contribute to the obsolescence of lawyers, involves the use of sophisticated mathematical models to simulate an industry, and the variables affecting it, for the purpose of predicting the impact of alternative regulatory policies. The futuristic note recurs in the last four articles, which develop the current regulatory issues raised by computers and satellite communications.

The central figure in the symposium is, of course, the FCC, an agency which has never won high marks for its performance. In part, the FCC's indifferent record reflects the difficulty of the jobs it has assumed or been assigned, a matter well documented in the symposium. Moreover, the Commission's business takes in a vast spectrum—from telephone rates to the fairness doctrine, for example—which, while expanding, is already wider than can be encompassed by that expertise which regulatory commissions are thought to possess. In view of the FCC's record and limited capability and of the importance of the issues, serious attention should be given to reorganizing and simplifying—by renewed emphasis on market forces or otherwise—government's mechanisms for dealing with these problems.

February 1, 1970

CLARK C. HAVIGHURST.

¹ See S. 1520, 91st Cong., 2d Sess. (1970) (the proposed "Newspaper Preservation Act," passed by the Senate, Jan. 30, 1970). Cf. *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

² E.g., *American Tel. & Tel. Co.*, 2 F.C.C.2d 173, 177-80 (1965).

³ *American Tel. & Tel. Co.*, 18 F.C.C.2d 761 (1969).