REORGANIZATION OF THE FCC

HEARINGS

BEFORE THE

COMMUNICATIONS SUBCOMMITTEE

OF THE

COMMITTEE ON COMMERCE

UNITED STATES SENATE

EIGHTY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 2034

A BILL TO AMEND THE COMMUNICATIONS ACT OF 1934, AS AMENDED, IN ORDER TO EXPEDITE AND IMPROVE THE ADMINISTRATIVE PROCESS BY AUTHORIZING THE FEDERAL COMMUNICATIONS COMMISSION TO DELEGATE FUNCTIONS IN ADJUDICATORY CASES, REPEALING THE REVIEW STAFF PROVISIONS, AND REVISING RELATED PROVISIONS

AND

REORGANIZATION PLAN NO. 2—FEDERAL COMMUNICATIONS COMMISSION

MAY 23 AND JUNE 28, 1961

Printed for the use of the Committee on Commerce

U.S. GOVERNMENT PRINTING OFFICE
71816 WASHINGTON : 1961

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REORGANIZATION PLAN NO. 2—FEDERAL COMMUNICATIONS COMMISSION

Letters, telegrams, etc.:

REORGANIZATION OF THE FCC

WEDNESDAY, JUNE 28, 1961

U.S. SENATE,
SUBCOMMITTEE ON COMMUNICATIONS
OF THE COMMITTEE ON COMMERCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 357, Old Senate Office Building, Hon. John O. Pastore (chairman of the subcommittee) presiding.

Senator PASTORE. It is now 10 o'clock. This meeting will come to order.

This is a hearing on S. 2034, a bill designed to expedite and implement the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repeal the review staff provisions of the Communications Act, and modify certain related provisions that are affected thereby.

You will recall that on May 23, 1961, this subcommittee held a 1-day hearing to receive information and views on FCC Reorganization Plan No. 2 which would assist the committee in formulating a position on the plan. It was apparent before too long that there was a definite division of opinion within the Commission with respect to the meaning and legality of the reorganization plan. However, as the hearing progressed the differences appeared to narrow and at my suggestion the Commission was urged to meet as soon as possible and resolve their differences and submit a legislative proposal that would bring about the desirable objectives of the reorganization plan in which all members could agree.

I want to commend the individual Commissioners for their cooperative attitude in that they did sit down, thrash out their individual views, and submitted a proposal on which they all could agree.

I was particularly impressed with the Chairman's letter that accompanied the Commission's proposal in which he said:

> * * * As a result of your request we have had some good discussions on the best way to solve our organizational problems.
>
> I must point out that this "consensus bill" is acceptable in most respects to each Commissioner. However, it represents many compromises here and was achieved in that spirit.
>
> If this were an individual matter, several Commissioners, I am sure, would prefer slightly different versions of some of the provisions, but it does offer a basis for beginning and we hope it contributes to successful procedural reforms.

I hope that the spirit of compromise and the willingness of give-and-take demonstrated by the Commission in arriving at a policy judg-

NOTE.—Staff counsel assigned to this hearing, Nicholas Zapple.

ment leading to the submission of this legislation will continue. There is no reason why it cannot.

I am convinced that the bill herein being considered will generally give the FCC the flexibility as well as increase its efficiency and cut back on the heavy backlog of cases and policy that have a way of weighing down an administrative agency such as the FCC.

(S. 2034 follows:)

[S. 2034, 87th Cong., 1st sess.]

A BILL To amend the Communications Act of 1934, as amended, in order to expedite and improve the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repealing the review staff provisions, and revising related provisions

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 5 of the Communications Act of 1934, as amended, is hereby repealed.

SEC. 2. Subsection (d) of section 5 of the Communications Act of 1934, as amended, is amended to read as follows:

"(c)(1) When necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, the Commission may, by rule or order, delegate any of its functions to a panel of commissioners, an individual commissioner, an employee board, or an individual employee, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter, and may at any time amend, modify, or rescind any such rule or order. Nothing in this subsection shall modify the provisions of section 7(a) of the Administrative Procedure Act.

"(2) Any order, decision, or report made or other action taken, pursuant to any such delegation, unless reviewed as provided in subsection (3), shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

"(3) Any person aggrieved by any such order, decision, or report may file an application for review by the Commission within such time and in such manner as the Commission shall prescribe. The Commission shall have authority on its own initiative to order any matters delegated under subsection (1) before it for review on such conditions as it shall prescribe and shall make such orders therein, consistent with law, as shall be appropriate.

"(4) In passing upon applications for review, the Commission may grant, in whole or in part, or deny such applications without specifying any reasons therefor. No such application for review shall rely on questions of fact or law upon which the individual Commissioner, panel of Commissioners, employee board, or individual employee, has been afforded no opportunity to pass.

"(5) If the Commission grants the application for review, it may affirm, modify, or set aside the order, decision, or report made, or other action taken in accordance with section 405.

"(6) The filing of an application for review shall be a condition precedent to judicial review of any order, decision, or report made or other action taken. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all applications for review filed in any case.

"(7) The secretary and seal of the Commission shall be the secretary and seal of each panel of the Commission, each individual Commissioner, and each employee board or individual employee exercising functions delegated pursuant to subsection (1) of this section."

SEC. 3. Section 405 of the Communications Act of 1934, as amended, is hereby amended to read as follows:

"After a decision, order, or requirement has been made in any proceeding by the Commission or designated authority within the Commission under section 5(c)(1), any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing only to the authority making the decision, order, or requirement; and it shall be lawful for such authority, whether it be the Commission or other authority designated under section 5(c)(1), in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from

complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission, or designated authority within the Commission, has been afforded no opportunity to pass. The Commission, or designated authority within the Commission, shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish. The time within which a petition for review must be filed in a proceeding to which section 402 (a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed with the Commission in any case, but any decision, order, or requirement made after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order."

SEC. 4. Section 409 (a), (b), (c), and (d) of the Communications Act of 1934, as amended, are amended to read as follows:

"(a) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing by the Commission, the hearing shall be conducted in accordance with the provisions of the Administrative Procedure Act and such other rules as the Commission may prescribe not inconsistent therewith.

"(b) In such cases any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to such initial, tentative, or recommended decision, which shall be passed upon by the Commission or the authority to whom the matter may have been delegated under section 5(c)(1).

"(c) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing by the Commission, no person except to the extent required for the disposition of ex parte matters as authorized by law, shall directly or indirectly make any presentation respecting such case to the hearing officer, unless upon notice and opportunity for all parties to participate: *Provided*, That a Commissioner conducting the hearing shall be permitted to consult with his assistants and to participate, without restriction because of his conduct of the hearing, with the Commission upon review of the case or any other matter: *Provided further*, That examiners shall be permitted to consult with other examiners on questions of law. No person except to the extent required for the disposition of ex parte matters as authorized by law, and except for officers, employees or agents of the Commission not engaged in the performance of investigative or prosecuting functions for the Commission in such case or a factually related case, shall directly or indirectly make any presentation respecting such case to the Commission or designated authority within the Commission, unless upon notice and opportunity for all parties to participate.

"(d) To the extent that the foregoing provisions of this section and section 5(c)(4) are in conflict with the provsions of the Administrative Procedure Act, such provisions of this section and section 5(c)(4) shall be held to supersede and modify the provisions of the Act."

SEC. 5. Notwithstanding the foregoing provisions of this Act, the second sentence of subsection (b) of section 409 of the Communications Act of 1934 (which relates to the filing of exceptions and the presentation of oral argument), as in force at the time of the enactment of this Act, shall continue to be applicable with respect to any case of adjudication (as defined in the Administrative Procedure Act) set for hearing by the Federal Communications Commission by a notice of hearing issued prior to the date of the enactment of this Act.

The first witnesses of course will be the Chairman of the Commission, Mr. Newton N. Minow, and the individual Commissioners of the Commission.

In the last meeting we had with the Commission on the reorganization plan we had a discussion involving the repeal of the section concerning the review staff. During that discussion a question came up with reference to the position of the Commission in the last Congress on this matter.

I want to mention that Commissioner Hyde who testified for the Commission did an excellent job in reconciling the views between the members of the bar association and the Commission on this section and that the bill that was finally reported out, S. 1738, was a compromise even though it was more limited than most of the Commissioners desired.

Mr. Minow, we will be very happy to hear from you this morning.

STATEMENT OF NEWTON N. MINOW, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION; ACCOMPANIED BY COMMISSIONERS ROSEL H. HYDE, ROBERT T. BARTLEY, ROBERT E. LEE, T. A. M. CRAVEN, AND JOHN S. CROSS; AND ALSO ACCOMPANIED BY MAX D. PAGLIN, GENERAL COUNSEL, AND HENRY GELLER, ASSOCIATE GENERAL COUNSEL

Mr. MINOW. May I begin first by thanking you on behalf of the Commission and personally for the encouragement and leadership which you gave us at our last meeting.

As a result of your urging we were able, in the spirit that you mentioned, to come up with a suggestion, and we are indebted and grateful to you for sparking us to move in that direction.

The views which follow can be said to be consensus views. By that I mean, as referred to in the letter which you read, the Commissioners, as a matter of individual preference, adhere to the positions which they took on Reorganization Plan No. 2 of 1961, which as you know is similar in purpose to S. 2034. But we have unanimously agreed to the submission of these views in order to give the committee the benefit of their combined or consensus judgment. I will try to present here what I think are the highlights of that judgment.

First, we wholeheartedly support the objectives of the bill. The Commission clearly needs more flexibility on procedural matters. At the present time all seven Commissioners must hear oral argument in every adjudicatory case. This means that the Commissioners' time is preempted by such questions as the revocation of a fishing boat ship station license or the most routine aural broadcast matters. And, the oral argument is just the part of the iceberg above the water: It takes much more time to study the issues, decide the case, and review the decision prepared. Let me expand on that for a moment. The Commission is designed to be a deliberative body. That is its strength and its experience. But that strength becomes a weakness when the full Commission is required to take up every routine matter, or the Commission cannot cease being a deliberative body just because the matter is routine. As a consequence, we tend to spend almost as much time on such routine matters as we do on the much more important issues coming before us.

S. 2034 would change that. The proscription against delegating in adjudicatory cases would be eliminated, and the Commission would

be able to delegate review of such cases to panels of Commissioners or employee boards. Applications for review of the decisions of the panel or board could be denied by the Commission without giving reasons. We heartily endorse this statutory scheme. It would expedite the decisional process and thus cut down on the administrative lag. Equally important, it would permit us to concentrate on major matters of policy and planning.

Let me emphasize that last point. We are not going to delegate the development of policy or major legal doctrines to an employee board or even a panel of Commissioners. We have not done so in the rulemaking field, where we have long had power to delegate, and we will not do so with any new authority given us. But we must be free to concentrate on such urgent problems as space satellite communications and TV allocations.

Let me digress. Commissioner Craven, who is carrying the heavy load of the Commission on space satellite communications, will have to be sitting with us in deciding on some of the really most routine matters and be interrupted to take a open call on a really vital matter where he should be free to spend more of his time and energy.

This is the kind of thing we face on a day-to-day basis.

We want this flexibility not to avoid our job but for the very opposite reason—so that we can do the job that should and must be done by the Commissioners.

I cannot now tell you what cases we would hear or which ones we would delegate—or what delegated cases would go to a panel of Commissioners as against an employee board. These would be judgments for the full Commission. All I can do is assure you that we would proceed very carefully in developing our delegation procedures.

Senator PASTORE. Which would naturally mean that if you had a matter that was considered to be quite important because it affected the public interest in a larger measure than just a routine matter, it might well be that the full Commission would adhere to the present practice of hearing the matter as an entire Board.

Mr. MINOW. Exactly. I can assure you of that.

Senator PASTORE. Then if you got to some point where the case—and every case is important that comes before the FCC because you have rights of people involved, whether it involves one person or involves a thousand people, it is always a precious matter insofar as that individual is concerned—but in order to expedite your work you would function just as we do in the Congress.

We have subcommittees to whom a responsibility is delegated and that subcommittee usually reports to the full committee, and the full committee takes the recommendation within its discretion or hears the matter as a full committee, and that is what you propose to do in order to alleviate this backlog.

Mr. MINOW. I think the analogy, Mr. Chairman, is an excellent one. This is precisely the thing we have in mind.

Senator PASTORE. So no one need have any fear here that this is becoming a scheme or a gimmick in order to avoid responsibility. It is merely a procedure by which this responsibility can be better met in order to accomplish the public purpose?

Mr. MINOW. Exactly, sir.

Turning to the bill, S. 2034 provides, in 409(b), that a party shall be permitted to file exceptions, which must be passed upon by the Commission or the authority to whom the matters have been delegated under section 5(c)(1). The consensus of the Commission is that a party should have a right to obtain some administrative review of an examiner's initial decision. This is the general pattern in the Federal courts, where a party can obtain review of a trial court's decision in the court of appeals. He cannot require the appeals court en banc to hear such an appeal, nor can he, as a matter of right, obtain oral argument in every case.

So, also, we agree that the Commission should be given the authority to use panels or, since we are in the administrative field, employee boards and to act without oral argument in those few instances where it is appropriate to do so. But we would afford the right to administrative review.

We do not think such mandatory review will result in clogging the Commission's processes, if—and I emphasize this—the Commission is given full discretion with respect to delegations and oral argument. If the appeal involves routine matters, it can be heard by a panel or employee board. If it is totally lacking in substance, it could be quickly resolved on the pleadings. Any application for discretionary review of the panel's or board's decision could be promptly determined, after consideration of the staff's analysis and recommendation.

We would not expect such applications to add a new factor of delay, since we would hope that, for the most part, the decisions made in these delegated routine cases would be correct and thus the application could be quickly acted upon. For these reasons, we feel that the procedure in S. 2034 will greatly benefit the Commission, without diminishing in any substantial way the parties' rights to full and fair administrative process.

Senator PASTORE. But it does preserve the right of the litigant to bring his matter to the attention of the full Commission by way of an exception.

Mr. MINOW. That is right, Mr. Chairman.

Senator PASTORE. And then whether or not the exception will be delegated for review by the Commission depends upon the action of the Commission as a whole?

Mr. MINOW. That is right, Mr. Chairman.

Senator PASTORE. But it is the procedure by which the litigant, who feels that he has been aggrieved, either by an examiner or by a panel or by a group of Commissioners to whom the responsibility was originally delegated, he at least has a right to bring that matter to the attention of the full Commission by way of an exception.

Mr. MINOW. That is right. There may be certain categories of cases which we may, pursuant to the authority in one bill delegate to an employee board to decide, with no right to apply to the Commission for review of the decision of the employee board. That is in the House bill H.R. 7856, that I will come to. That is not in the S. 2034. I want to discuss with you a little later some revisions that have been made on the House side, so that the committee will understand the various differences in this.

Senator PASTORE. Are those revisions acceptable to you?

Mr. MINOW. They just happened yesterday, Mr. Chairman, and I don't know the Commission's views—I could give you my own views. We haven't had a chance——

Senator PASTORE. We will refine that as we go on, Mr. Minow, because this is what I expect to accomplish today: After we have heard this matter fully and we have heard all the parties concerned on this matter, I expect to take it up immediately with the other members of the subcommittee and report it to the full committee and see if we can't get a bill on the floor of the Senate as soon as possible in order to accomplish this objective. And any refinements that are acceptable to the Commission, and should be discussed here, we would appreciate very much hearing about them, because when we get out of here today we expect to have an agreement on a whole bill.

Mr. MINOW. Thank you, Mr. Chairman. That is exactly what we would like to try to do.

Unlike Reorganization Plan No. 2 of 1961, S. 2034 makes no provision for the transfer of assignment functions from the Commission to the Chairman. We agree that no revision of existing law is needed in this respect. The Commission has already delegated to the Chairman a great deal of authority in this area and undoubtedly would delegate further authority to assign staff personnel to hear adjudicatory cases or handle other matters, should S. 2034 become the law.

For the Chairman, after all, is the agency's chief executive officer, with the duty—and I quote from section 5(a) of the act—

generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission.

But the Commission feels that such assignment authority should stem from the Commission and not the statute. In this way a future Chairman will be bound to act fairly in his assignments. While it is true that other checks on abuse of such authority would exist under a statutory scheme bestowing assignment powers upon the Chairman, such as rescission of the delegation and consideration of the matter by the full Commission, such checks are more cumbersome and do not, we think, carry the same psychological weight.

The Commission strongly endorses the first section of S. 2034, which would repeal the provisions of 5(c), relating to the review staff. Under the present provisions, the review staff, even though it has no other functions than to assist the Commission in adjudicatory cases, cannot make any recommendations to the Commission.

This restriction is, we believe, not applicable to the opinion-writing staff of any other Federal regulatory agency. It is both wasteful and inefficient, for it deprives the Commission of the full assistance of which this review staff is capable.

Further, it requires the Commission to pursue a cumbersome, two-step process in disposing of interlocutory matters. Because the review staff cannot make recommendations, it must first receive instructions from the Commission on all interlocutory matters, no matter how simple or routine, and then return again with a draft opinion and order for the Commission's approval.

This is an obvious waste of the Commission's and the staff's time. Many, indeed most, of these matters could be disposed of at one meeting by permitting the staff to attach a draft recommended order. The

new discretion given by the bill would thus be used to eliminate the present inefficient method of handling interlocutory matters.

This would represent a substantial saving in time and energy for the Commission: In 1960 the full Commission was called upon to dispose of 363 interlocutory motions.

The repeal of these unduly restrictive provisions should thus contribute to speedier action, without in any way depriving parties of any rights. On the contrary, the safeguards of section 5(c) of the Administrative Procedure Act and section 409(c) of the Communications Act would be applicable.

After study, we have concluded that the provision in 409(c) with respect to ex parte presentations and staff separation of functions can be clarified by the substitution of the following language:

(c)(1) The provisions of section 5(c) of the Administrative Procedure Act shall apply in determining applications for initial Commission licenses.

(c)(2) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for hearing by the Commission, no party to such a proceeding, or person acting on behalf of such party, except to the extent required for the disposition of ex parte matters as authorized by law, shall directly or indirectly make any presentation respecting such case to the hearing officers or officers, or, upon review, to the Commission or other designated authority within the Commission, unless upon notice and opportunity for all parties to participate; provided that provisions of this subsection (2) shall not apply to Commission officers, employees, or agents in any proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers.

The provisions of the first subsection would return the Commission to the salutary standards of the Administrative Procedure Act, under which almost all the other major Federal regulatory agencies now operate. This means that a hearing officer will be precluded from consulting any person or party on any fact in issue but will be free to consult with other examiners or appropriate members of the Commission's staff on legal or technical questions.

For the reasons set out in the Attorney General's Manual on the Administrative Procedure Act, pages 54 and 55, we think this standard, which governs the conduct of hearing officers in the other agencies, should also be controlling in the case of the FCC. Permitting full and free discussion of the nonfactual issues should result in improving the quality of initial decisions and in expediting their preparation.

The separation-of-functions provision would also be that laid down in the Administrative Procedure Act, namely, whether the staff person has engaged in investigative or prosecuting functions "in that or a factually related case."

This is the proposal in S. 2034, and we wholeheartedly endorse it, for it is directed squarely to the fairness problem involved. It makes no sense, and is wasteful, to cut off the Commission in an adjudicatory case from the valuable assistance of its staff, such as its general counsel or chief engineer, where these officers have had no investigative or prosecutory connection with the case.

Senator PASTORE. For the purpose of clarifying the record and reducing it to a simple example, could you, Mr. Minow, at this point give us an example of how you are encumbered by the present system and how these two new sections will relieve it?

Give us an example for the purpose of the Members of the Congress who will have to understand the record.

Mr. MINOW. Let us suppose that we have a hearing case in the broadcast field and a question has come up which is a technical engineering question relating to the interference between two stations. Under the present law we cannot turn to our chief engineer and his technical staff and say to him, "What do you think about it? Here is the evidence that has been taken in the proceeding. Would you take a look at it and tell us what you think the interference really amounts to?"

As it is now, we are precluded from doing that. We cannot use our own experts, despite the fact that that chief engineer will have had nothing whatever to do with the investigation or prosecution of that particular case. He is as much of a stranger to it as we are but we cannot call upon him for an expert judgment. This is a total waste.

Senator PASTORE. Even though ultimately you will not follow his recommendation? You cannot consult with him under the law?

Mr. MINOW. Exactly.

Senator PASTORE. And somebody there who is an expert in your department, who has——

Mr. MINOW. He sits there mute. He does not even come to our hearing agenda meetings. He is precluded by law and we send him out of the room. When I first arrived there, being unaware of this, I sometimes called upon him and asked, "What do you think of this; you are an engineer?"

I have been told that I cannot ask him. I am not aware of any other regulatory agency that has to operate presently with such a restriction.

Senator PASTORE. I wonder what kind of laws the Congress would produce if we were shackled in the same way.

Mr. MINOW. The provision in subsection (1) would extend the application of 5(c) to initial license proceedings. But otherwise, the Commission would be placed in the same position as the other agencies. It could rely on the general law developed in case precedents under the Administrative Procedure Act, and any amendment to that act would be equally applicable to the Commission. We think such an overall scheme is preferable to the piecemeal, ad hoc approach of the present 409(c).

The second part of 409(c) would bar any party to a proceeding, or any person acting on behalf of a party, from making ex parte presentations to the hearing officer or, on review, to the Commission or other designated authority.

Senator PASTORE. Give us an example of how that presently works.

Mr. MINOW. The Congress of course is familiar with the problems of the Commission in recent years in the field of ex parte contacts. When an agency like ours is simultaneously in the business of judging cases, passing rules, and administering a large agency, sometimes the line gets very unclear as to what is a proper contact and what is not.

So what we want is clarity, so that, by legislation, there won't be any room for doubt.

This particular part that we are talking about means that any party or person acting for a party who wants to tell a hearing examiner or the Commission something about a case once it is in hear-

ing can only do so after he has notified all the other parties and they have a chance to be present and to be heard.

Senator PASTORE. How does that affect the Members of Congress?

The reason I raised the question, I am not quarreling with you; I think the record ought to be clear with regard to that because that will be one of the questions raised—does that preclude a Congressman from writing to a Commissioner and asking what the status of a case might be?

Mr. MINOW. No, sir. We are very clear on that. It does not in any way. Only if a Congressman were acting in behalf of a party and going to the merits of the case in hearing, then this proscription would apply.

Senator PASTORE. Or if you were making a recommendation which touched upon the evidence which might lead to a decision being made, then he is actually becoming a party to the matter; is that correct?

Mr. MINOW. A party is a technical term, but certainly he is getting into the——

Senator PASTORE. He is getting into the merits of the case?

Mr. MINOW. That is right.

Senator PASTORE. And in that instance, whatever he says or whatever he recommends, has to be made part of the record?

Mr. MINOW. Exactly. I want to make this clear. Because we are an agency of the Congress, if the Congress could not ask us what the status of a case is, how would you ever know when we were doing our job? So we very carefully draw a line and I want to be clear on it for the record, and my colleagues can correct me if I am wrong——

Senator MCGEE. Let the record show those are refreshing words.

Mr. MINOW (continuing). That any inquiry as to the status of a case we regard as wholly proper.

Is there any disagreement on that?

(No response.)

Senator PASTORE. If a constituent of mine wrote to me and said, "I have a matter pending before the FCC, it has been down there now for 6 months, and this means the public interest, it means service to the public, and it means dollars to me as well, I don't know what the delay is and I wish you would find out for me," would it be all right for me to take a copy of that letter, photostat it, and send it to you and ask you, "What gives here?"

Mr. MINOW. That would not be a presentation going to the merits of the case.

Senator THURMOND. Let me go a step further, when you get through.

Mr. MINOW. I think we are clear on that. That would be a perfectly appropriate and proper matter for Congress to ask us.

Senator PASTORE. But if A and B were contestants in the case and I wrote you and said, "A is a wonderful fellow and you ought to give him every possible consideration," then I am getting into the adjudication of an issue between two individuals. In that case I am becoming a party; is that correct?

Mr. MINOW. Exactly.

Senator THURMOND. Right now I want to propound this question.

Suppose, for instance, I have in mind one city in my State, one

of the biggest cities we have, which has only one television station, and the other is a small station and does not amount to much. There is a movement among the people there to obtain an additional station somewhere. Suppose, as I understand, the mayor, the city council and the people generally want another station; they demand another station.

Am I precluded as a Senator from expressing to you my opinion of what is in the public interest to the people of that city?

Mr. MINOW. Not at all, Senator.

Senator THURMOND. Even if it should affect the present stations that may be opposing the license and the applicant who desires a new station there in order to give the people more service?

Mr. MINOW. Not at all, Senator.

Senator THURMOND. Is there any reason why I cannot express to you, as a Senator, my opinion at any time on any matter before your Commission so long as it is out in the open and it is on the record and everybody sees it, as I see it, as to what is in the best interests of the people of my State?

Mr. MINOW. In response to the latter there is no question whatever. In such a case, even in a hearing case—even in a hearing case——

Senator THURMOND. How is that?

Mr. MINOW. Even in a hearing case where there is a contest between parties, we would take your letter and make it a part of the public docket. Our decision in a hearing case would have to be based strictly on the hearing record.

Senator THURMOND. My only interest would be to express my opinion——

Mr. MINOW. Right.

Senator THURMOND (continuing). As to what is for the best interests of the people of my State.

Mr. MINOW. Right.

Senator THURMOND. I would have no interest between the two individuals. However, my calling some people might cause you to feel, or some member of the Commission, that I am interested in helping some individual because I expressed an opinion that might affect the individuals.

How are you going to differentiate there?

I would like to be clear as to that.

Mr. MINOW. Let me try to take that specific example. The whole problem of allocation of TV channels we regard under the Administrative Procedure Act as being a rulemaking, not an adjudicatory, case. This is a matter where we want to hear from many people, including people in Congress and in the Senate.

We would take comments in such a matter and put them in the public record.

Carrying it a step further, if we got into a contest as to who should be the licensee of a second channel, let's say, and it got into a contest between competing applicants, then we could not take a presentation to prefer this fellow over that fellow unless the other fellow's lawyer or he were present and had a chance to participate and give his answer. But the difference is the difference between rulemaking and adjudication.

Sometimes this gets very fuzzy. There is a recent decision in the Court of Appeals, the *Sangamon Valley* case, which has applied the same kind of rules to some kinds of rulemaking. This is a case where the Commission was going to move a channel from one city to another.

The court said in such a matter there were valuable rights involved, of different people, and that in such matter it was not proper to have ex parte presentation by the interested parties. So, sometimes the line is not clear. That is one of the reasons we want to have the legislation, so that there won't be any doubt about it.

Senator PASTORE. Can I give you the benefit of an example, Mr. Minow?

In other words, I can tell you that I think we ought to have a third channel in Rhode Island—in Providence?

Mr. MINOW. Right.

Senator PASTORE. But the minute I begin to tell you who should get that, then I become a party to it and I have to give notice to everybody who is interested in it?

Mr. MINOW. That is exactly right.

Senator PASTORE. Whether I am a Congressman or not. Is that an example?

Mr. MINOW. That is a clear example.

Senator THURMOND. On that example right there, the Senator from Rhode Island, then, could not be unjustly accused of trying to use influence even if he did recommend one over the other, because if he knew the character of the men or something of that kind, so long as he put it on the record, and they all had a chance to see it?

Mr. MINOW. Yes, sir.

Senator PASTORE. And give notice to everybody?

Senator THURMOND. And there is no undercover dealing.

Mr. MINOW. Yes, sir; we have had, my colleagues tell me, in the past, some instances where members of the Congress and Senate have actually come down and appeared before the Commission, orally, in a proceeding in favor of one party or another.

There have been instances like that.

As long as it is in the open on the record it is perfectly proper and appropriate.

Senator THURMOND. My own interest will only be to try to give the people the best service. At the same time, it is a pretty close point because, in trying to do that, sometimes, somebody might misconstrue the situation.

That is the reason I wanted your interpretation of this matter.

Mr. MINOW. I hope that we have been clear on it. Sometimes, as I say, in view of the court's recent decision, we are not sure ourselves. I have to tell you that honestly. But as long as the thing is on the record there can never be any question. It is only when it gets off the record that we are in the doubtful area.

Senator PASTORE. All right, Mr. Minow, you may proceed.

Mr. MINOW. We were talking about the second part of 409(c). We regard this provision as preferable both to the present language of (c)(2), couched in terms of presentation or preparation of the case, and the proposed language of S. 2034, which excludes all persons.

As the committee knows, many members of the public send letters

to the Commission with respect to pending hearing cases. Such letters are routinely acknowledged, placed in the public docket, and not considered in the decision of the case.

It would, we think, be inappropriate to use statutory language so broad as to cover a class of persons whose activities are harmless and who, by their nature, will remain ignorant of the proscription. We think the proposed language, "party or person acting on behalf of such party," goes to the heart of the problem, as opposed to any person as a blanket proscription.

We have included an exemption for "proceedings involving the validity of rates, facilities, or practice of public utilities or carriers." This continues the exemption in 5(c) of the Administrative Procedure Act, and is made necessary by the provision of section 409(d). In assessing the necessity for the exemption, it must be kept in mind that rate proceedings often involve issues of the validity of past rates as well as the prescription of future rate, and thus may be both adjudicatory and rulemaking in nature.

We have restated the compelling policy reasons behind the exemption in our recent comments on H.R. 14, 87th Congress, 1st session, and with the committee's permission, we would appreciate their inclusion in the record. They are attached as an appendix to this statement.

May I repeat that the Commission deeply appreciates the committee's interest, as evidenced at the May 23 hearings on plan No. 2, and its decision to hold hearings so promptly on S. 2034. We recognize this as indicating the committee's great desire to aid the Commission in the important tasks before it. We will cooperate in every way to facilitate the passage of much needed legislation along the lines of S. 2034.

I want to make clear that so far as my individual views are concerned—and I think the other Commissioners would agree as to their own individual views—I would adhere to the position I took on Reorganization Plan No. 2. That means that I favor a provision that would make review of an initial decision discretionary rather than mandatory.

That does not mean for a moment that I would not favor S. 2034. I think it is a good bill, that it would be of great help to us, and I would enthusiastically welcome its passage. I think a bill with a discretionary review provision is simply better and, if I had my "druthers," I would prefer it.

Mr. Chairman, I should like to add for the committee some of the most recent developments on the House side.

Senator PASTORE. Before you do that, I have two questions submitted to me that I think ought to complete the record on this last part of your statement.

Isn't it a fact that, because of the peculiar relationship to the Commission with the common carriers, which requires a continuous contact and informal conferences, that it is extremely difficult at times to divorce matters that are raised in the informal conferences with those that may be involved in other proceedings pending before the Commission?

Would this provision restrict this relationship?

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Mr. MINOW. I think not, Mr. Chairman. This is the present law, really. You see, ratemaking under the Administrative Procedure Act has always been regarded as a legislative rather than an adjudicatory function. The only problem you get into is when you are talking about a mixture of past rates and future rates. About future rates there has never been any argument. This has always been regarded as something similar to passing a law, where you could talk to anybody.

When you are talking about past rates then you get into the adjudicatory field where you are acting like a judge and you decide it only on the record.

We feel, and our views are expressed in detail in the attachment here, that we only have one common carrier staff. They are our experts. If we cannot talk to them it is going to be impossible for us to do our work. The questions in these cases are highly technical. We are constantly reviewing the carriers' rates, telephone, or telegraph, and with the revolution in communications, we are getting into new things like telpak, wats. Unless we are permitted to use our experts we cannot do the job.

Senator PASTORE. Mr. Zapple suggested a further question.

Will you ask it?

Mr. ZAPPLE. What about the situation where in these informal conferences the representatives of the common carriers, discussing with your common carrier staff certain facts and statistics, may pour over into an adjudicatory proceeding that is pending.

How do you distinguish that? Are they violating this particular principle?

Mr. MINOW. No, it is perfectly proper to communicate those facts to the staff and we welcome it, otherwise we do not know what is going on.

Mr. ZAPPLE. I wanted to clarify that for 9(c).

Mr. MINOW. But not to the Commissioner if he is dealing with a pending rate case.

Mr. ZAPPLE. Let's assume one step further.

You have various information conferences with common carriers, that is, the Commissioners themselves. Let's assume that at one of those informal conferences data developed or discussion is had with reference to some subject matter which may pour over into an adjudicatory proceeding.

Will this provision which you are now suggesting bar that?

Mr. MINOW. It does not do so any more than the existing law does. All it does is continue——

Mr. ZAPPLE. As long as they are not directly discussing the adjudicatory proceeding?

Mr. MINOW. That is right. Issues in a pending case.

Mr. ZAPPLE. I wanted to clear that up.

Senator PASTORE. Now you may discuss the other portion.

Mr. MINOW. What I read you, Mr. Chairman, is a statement which the full Commission approved on S. 2034. Since we approved it, a new bill, H.R. 7856, has been introduced by Chairman Harris in the House and will, I am informed, be presented today to the full membership of the House Committee on Interstate and Foreign Commerce.

This bill is very similar to S. 2034, but it does contain some sub-

stantive differences, and I think it would be helpful to the committee if I indicated here what the differences are——

Senator PASTORE. All right.

Mr. MINOW (continuing). And stated some views on them.

In section 5(d)(1), H.R. 7856, provides that a rule or order delegating a matter can be rescinded only by vote of a majority of the members of the Commission, then holding office.

In S. 2034, on the other hand, the rule or order could be rescinded by a vote of the majority of the members then participating.

I can only give my own views here, Mr. Chairman, because we have not even had a chance to consult on this. It just happened yesterday. But, my colleagues, I hope you will please chip in with your views on this.

I would say, with respect to this first one, that the minor change in H.R. 7856 is perfectly acceptable, as far as I am concerned.

Is there any objection to that?

Senator PASTORE. In other words, the difference is between the majority of those present and the constitutional majority?

Mr. MINOW. That is right.

Senator PASTORE. How do the members of the Commission feel on this? Which one would you prefer?

Is there a variance here?

Mr. HYDE. I am satisfied with the bill that the committee has under consideration here.

Senator PASTORE. S. 2034?

Mr. HYDE. Right, sir.

(The appendix referred to follows:)

APPENDIX

COMMENTS OF FCC ON H.R. 14 AS IT APPLIES TO RATE PROCEEDINGS

Our concern with the provisions of section 10(a) may be summarized as follows:

Historically, the prescription and approval of rates, regulations, classifications, and practices of public utilities and common carriers have been regarded and treated as a legislative function and not as an adjudicatory function. Without going into the historical evolution and application of this concept, it is sufficient to note that this concept was incorporated into and preserved by the Administrative Procedure Act which classified proceedings involving the prescription and approval of rates for the future as rulemaking proceedings. Section 10(a) of the bill would substantially alter this concept of the rulemaking proceeding by requiring that the same administrative procedures be applied thereto as are applicable in an adjudicatory proceeding. It is our opinion that a change of this kind is unnecessary and will not serve the public interest in the establishment and maintenance of just, reasonable, and nondiscriminatory rates, regulations, classifications, and practices of common carriers.

Also, there must be considered the practical aspects of what is required for effective regulation of an industry having the size, growth characteristics, and complexities of the common carrier communications industry.

It is neither practical nor possible for the members of the Commission itself, without the aid of staff analysis and recommendations, to make the complicated and difficult determinations that are involved in ratemaking proceedings solely on the basis of the evidentiary record and arguments advanced by the parties. While the record constitutes the exclusive basis for decision, it is nevertheless necessary to bring to bear upon that record expert and specialized knowledge of many background ramifications of the ratemaking problem. This requires an intimate knowledge of the industry's organization, structure, operations, and policies, its facilities, operating practices, rate structures, technological developments—developments present and prospective—and other such information.

To facilitate this objective, the Commission maintains a staff of technical experts who, through continuous daily contact with all aspects of the industry, are available to consult with and advise the Commission with regard to all of its ratemaking functions. In formal ratemaking proceedings, it is also the responsibility of this same staff to participate therein in order to insure that a full and complete record is made so that the ingredients essential to the prescription and approval of rates for the future are fully developed and that the contentions advanced by the parties are thoroughly examined.

To isolate the Commission from its staff of experts at the decisional level would tend to sterilize and hamper the ratemaking processes. The only alternative would, of course, lie in the Commission maintaining two separate staffs—one to advise and consult with, and the other to participate as a party to the proceeding—but both of whom would be required to be equally well informed and expert in the particular ratemaking field. This certainly would complicate and burden the organizational structure of the Commission. The existing problem of recruiting and training qualified personnel who are knowledgeable and skilled in the common carrier communications field is a difficult problem to meet under the existing regulatory scheme. To staff the apparatus of two such organizations in order to implement H.R. 14 would require substantial additions to our common carrier budget, inasmuch as it would be impossible to fractionalize the existing staff without cripping its effectiveness.

Moreover on the basis of our regulatory experience, it does not appear that any formal charge or complaint of a substantial nature has been made against the existing statutory scheme or ratemaking contained in the Communications Act of 1934. In view of the absence of any claim that the existing processes have been abused or not fairly applied, there would appear to be no valid reason for applying to legislative-type matters, such as ratemaking, the rules of procedure applicable to adjudication.

For the foregoing reasons we are strongly opposed to the enactment of section 10(a) of this bill. The judicialization of procedures proposed by this section would not, as I see it, serve the public interest. On the contrary, enactment of section 10(a) of this bill could only serve to add to the length and expense of proceeding, without bringing about any demonstrable benefits.

Senator PASTORE. How do the rest of you feel?

Mr. Lee?

Mr. LEE. I have no problem, Senator, with the system.

eSnator PASTORE. Mr. Craven?

Mr. CRAVEN. I have no problem with the existing bill.

Senator PASTORE. Mr. Bartley?

Mr. BARTLEY. I think there may be merit in having the constitutional majority authorized to repeal a delegation.

Senator PASTORE. Do you have a strong feeling on it?

Mr. BARTLEY. I think that—I frankly think that we won't do it otherwise. I think we wouldn't take advantage of a couple of members in Europe on an international conference. So I doubt if we would do it anyway. I think the constitutional majority would be agreeable to me.

Senator PASTORE. Mr. Hyde?

Mr. HYDE. I have given my position, Senator.

Senator PASTORE. Mr. Cross?

Mr. CROSS. I could't care less. Either one is all right with me.

Mr. MINOW. It makes no difference to me.

Senator PASTORE. Now the next one.

Mr. MINOW. The most important in the two bills is in the provision of H.R. 7856 that the Commission may, by rule or order, limit the right to file applications for review of delegated decisions——

Senator PASTORE. Where are you now, Mr. Minow?

Mr. MINOW. This is 5(d) (4) of the House bill.

Senator THURMOND. What page?

Senator PASTORE. Page 3.

Mr. MINOW. I would regard this as the most important difference between the two bills. In the House bill it says that the Commission may, by rule or order, limit the right to file applications for review of delegated decisions in adjudicatory cases to proceedings involving issues of general communications importance.

This provision is taken from the Interstate Commerce Act, 49 U.S.C., section 17(6). In my opinion it is an excellent addition to the delegation scheme. Under it the Commission could, if it determined that a case was of the most routine nature, delegate the matter to a panel or an employee board, with the provision that no application for review of the decision of the panel or employee board would be permitted.

This is an idea that developed on the House side. We haven't discussed it yet ourselves. I personally think it is a very good idea, because in certain categories of cases which on their face do not involve any issue of general importance, we would expedite matters greatly if we would say that the three-man panel from the Commission is going to be it, and that you can go to court if you want to get review, rather than go from the panel to the full Commission and then to court.

We could decide that a certain kind of case just wasn't important enough to subject it to the additional process of going to all seven.

Let's take the shrimpboat case. We have a case which under present law ties up the seven of us, and our staffs, listening to whether an individual radio operator on a shrimpboat should have his license suspended for 30 or 60 days. We might conclude that that case is the kind of thing that should be decided by a panel of three Commissioners, and that their decision, as far as the Commission is concerned, would be final. And if the fellow didn't think that the decision was correct he could go from there to court, rather than going to the full seven of us.

Senator PASTORE. When the Commission makes that decision as a body, is that subject to a hearing on the part of the public? When you make the rule, ex parte, would you determine what is important or not? Does anybody have the right to intervene and say, "I think you are wrong on this?"

Mr. MINOW. No. What we would probably do, I would think, would be to have one of our regular rulemaking proceedings and invite comments before issuing any general rule in this area.

Senator PASTORE. They would have the right under this view to announce it?

Mr. MINOW. Yes. It may be that the Commission would want to do this on a case-by-case basis rather than set up a category in advance. I can only say to you, this is the kind of thing that we are going to do slowly because the Commission as a whole will make the judgment.

Senator PASTORE. Let's face it. Anything that is of a routine matter that you don't anticipate, or has the experience been that you get into an oral argument and you get into an exception being filed. Usually when a case is of a routine matter and the panel makes a decision, or an employee board would make a decision, haven't you found from experience that the parties feel that they have had their day in court and that is the end? Or does it go up?

Mr. MINOW. Mr. Chairman, you would be surprised. Sometimes there is a great premium just on delay. Sometimes a party may figure I am going to lose, but so what, I will keep it going for 3 or 4 more years and keep them off the air or get on the air, as the case may be in the broadcast field. So sometimes there may not even be a hope of winning. It is just a matter of going on.

Senator PASTORE. I would be very much interested in what the bar representative has to say on this section here when his time comes.

Mr. MINOW. Perhaps the other Commissioners—we haven't talked about this ourselves—would like to comment.

Senator PASTORE. I would rather not canvass them on this. This is rather involved and we would get into this again. I would like to get the comments on the other side to see what they have to say.

I would assume that the Commissioners would not object to this because it gives them an authority that they can use their judgment later on.

Mr. MINOW. The Interstate Commerce Commission found that it had a real need for this and it was very useful, I was told.

Senator PASTORE. This is merely a copy of their law?

Mr. MINOW. Yes. This was adopted from the Interstate Commerce Act.

Senator PASTORE. I would be interested in knowing how the members of the bar feel. The ultimate decision would have to be with the Congress as to whether we take it or leave it. A matter of this kind might have to go into conference.

Mr. MINOW. Another big change is that the House bill would revise section 409(c) along the lines that I urged in the statement I read, Mr. Chairman, that is, the Commission would return to the separation of functions provision of the Administrative Procedure Act, but with the important difference that these provisions would be applicable to initial license proceedings before the Commission. We, of course, wholeheartedly endorse this.

Senator PASTORE. How much different is this from——

Mr. MINOW. I don't think there is a change in substance. It is really a different way of saying the same thing. I think the House language is a better refinement. I don't think the purpose is any different at all.

Senator PASTORE. All right. I will instruct the staff to consider the House language.

Mr. MINOW. We have talked about the rate matter. I think those are the essential differences, Mr. Chairman. If there are any other questions we would be pleased to try to answer them.

Senator PASTORE. I want to congratulate you. As far as I am concerned, I have none. If my colleagues do, it is their turn now.

Mr. Thurmond?

Senator THURMOND. I don't think I have any additional questions. I think the procedure here, the manner in which we are proceeding by legislation, is preferable. I think under Senator Pastore's bill a great many matters here have been ironed out that would be more satisfactory to the Congress and your Commission, too.

Mr. MINOW. Senator, before you arrived I said, and I want to repeat on behalf of all the Commissioners, how grateful we are to this Committee for encouraging us to come up with some consensus of

views. We regard this Committee's leadership as being extremely helpful to us. We have managed to agree, and we are very grateful for the encouragement. Our objectives have always been the same.

Senator PASTORE. Mr. McGee?

Senator MCGEE. I have no questions. I think maybe one observation might be in order, Mr. Chairman, and that is that the new House bill is welcomed. It closely parallels the Senate bill. I think this is both a substantive and a significant shift.

Senator PASTORE. I made the statement before you had an opportunity to get here, Mr. McGee, that as far as I am concerned—and I think I have the cooperation of my subcommittee members—what we propose to do is to refine this as we go along today, and maybe agree, so far as the subcommittee is concerned, on a bill today.

Mr. MINOW. That would be wonderful.

There is only one thing I would add for the record, Mr. Chairman. Commissioner Ford, who carried a great part of the laboring oar in getting a bill together, unfortunately had a longstanding commitment out of the city today and couldn't be here. I want the record to show that he has been extraordinarly helpful to the full Commission.

Senator PASTORE. Mr. Ford, in the opinion of the chairman of this subcommittee, is a fine public servant.

Are there any further observations that any members of the Commission would like to make?

If not, will you please step aside and we will hear the other witnesses.

(The document referred to follows:)

S. 2034—SECTION-BY-SECTION ANALYSIS

(1) Section 1 would repeal the provisions of section 5(c) of the Communications Act, relating to the review staff. Under these provisions, the review staff, even though it has no other functions than assist the Commission in adjudicatory cases, is nevertheless precluded from making any recommendations to the Commission. This restriction is wasteful and inefficient, since it deprives the Commission of the full assistance of which this review staff is capable, and requires the two-step procedure of instructions and draft order even as to the most routine interlocutory matters. The repeal of these unduly restrictive provisions should contribute to speedier action, without depriving parties of any rights in view of the continuing safeguards of section 409(c) of the Communications Act and section 5(c) of the Administrative Procedure Act.

(2) Section 2 would permit the Commission to delegate any of its functions, including those in adjudicatory cases, to a panel of Commissioners, or individual Commissioners or employees, or an employee board (with the exception that adjudicatory hearings could only be conducted by one of the three authorities specified in section 7(a) of the Administrative Procedure Act). The decision of the authority to whom the matter was delegated could then be reviewed, in whole or in part, by the Commission, either upon its own initiative or upon an application for review filed by a person aggrieved by the decision, but the Commission could deny such application without assigning any reasons therefor. The filing of an application for review is made a condition precedent to judicial review of a delegated decision; and the application cannot rely on questions of fact or law upon which the delegated authority has been afforded no opportunity to pass. In this way, the case will be presented to the Commission (and if the application is denied, to the courts) with a ruling on every issue, and the Commission will have an opportunity to review the decision before the matter goes before the courts.

These provisions will give the Commission much needed authority, now withheld under present section 5(d)(1), to employ panels of Commissioners or employee boards to pass on adjudicatory cases. Under the present law, it is necessary for the full Commission to hear every adjudicatory case, including such matters as fishing boat suspensions or the most routine aural broadcast cases. With the new authority the Commission will be able to concentrate on the im-

portant cases involving major policy or legal issues, and the hearing of all cases by some authority within the agency should be substantially expedited.

(3) Section 3 would revise section 405, relating to petitions for rehearing, so as to reflect the above-described statutory scheme. As revised, the section would permit an aggrieved party to file a petition for rehearing only to the authority making the decision, that is, to the Commission, if it made the decision, or to the designated authority under the new 5(c))(1), if it issued the decision.

(4) Section 4 would make extensive revisions in section 409, which contains general provisions relating to adjudicatory proceedings. First, it specifies in subsection (a) that the hearing shall be conducted in accordance with the provisions of the Administrative Procedure Act and such other rules as the Commission may prescribe not inconsistent therewith. This latter provision is intended to make clear that the Commission, in its discretion, may adopt hearing safeguards even more stringent than those specified in the Administrative Procedure Act. Further, subsection (a) amends the present 409(a) by permitting one or more Commissioners to conduct the hearing, in accordance with the provisions of 7(a) of the Administrative Procedure Act.

Second, subsection (b) would retain the right of a party to file exception, which must be passed upon by the Commissioner or a designated authority within the Commission (e.g., a panel of Commissioners or employee board) ; it would eliminate the other provisions of 409(b) as unnecessary in view of the provisions of section 8 of the Administrative Procedure Act.

Further, it would change the existing law by making oral argument discretionary rather than mandatory. This does not mean that oral argument will no longer be available. On the contrary, it is expected that this valuable procedure would still be greatly employed by the Commission or the panels or employee boards. But the Commission would now have the discretion not to allow such argument in those instances where in its judgment it would serve no useful purpose, as for example in the case of a frivolous appeal or one having no merit or designed largely to gain delay. Every other major Federal regulatory agency presently has such discretion ; clearly, the Commission should be given similar flexibility.

Third, the provisions of subsection (c) relating to ex parte presentations and separation of functions would be changed as follows :

(*i*) Any person, and not just those who have participated in the presentation or preparation for presentation of the case, would be enjoined from making ex parte presentations to the hearing officer or the Commission or designated authority within the Commission. This would extend the present salutory provision.

(*ii*) Examiners would be permitted to consult with other examiners on questions of law. Full and free discussion among the Commission's examiners of the legal issues in their cases should result in improving the quality of initial decisions and in expediting their preparation. Significantly, examiners in other agencies are governed by the standard in section 5(c) of the Administrative Procedure Act and thus are free to consult among themselves on questions of law ; there is clearly no reason for proscribing such consultation in the case of the examiners of this one agency.

(*iii*) Where a Commissioner conducts the hearing, he may freely consult with his assistants (see sec. 4(f)(2), and may participate in Commission discussion of the case or any other matter having similar or related issues without any restriction because of the fact that he was the hearing officer in the particular case. This provision is in line with the last sentence of section 5(c) of the Administrative Procedure Act and is intended to make clear that a Commissioner conducting a hearing may continue to participate in all Commission activities and to hear staff presentations in any matter, without raising the claim that an "indirect" ex parte presentation has been made to him.

(*iv*) There would be eliminated the provisions in present section 409(c) (2) and (3) proscribing in adjudicatory cases any staff contact with the Commission by the offices of General Counsel, the Chief Engineer, or Chief Accountant. Instead, only staff persons who had engaged in the performance of investigative or prosecuting functions in the case or a factually related one would be precluded from participating in the intra-Commission discussions leading to the issuance of the decision. This is the standard set out in section 5(c) of the Administrative Procedure Act, and, being directed squarely to the fairness problem involved, it is obviously the correct one. Virtually all the major administrative agencies have functioned well under it. There is thus every reason to permit the Com-

mission to return to it. For it is clearly wasteful to cut off the Commission in an adjudicatory case from the valuable assistance of its chief legal and engineering officers, where these officers have had no investigative or prosecutory connection with the case (or a factually related one).

Finally, subsection (d) provides that to the extent the foregoing provisions or those of the new section 5(c)(4) conflict with the provisions of the Administrative Procedure Act, the latter are superseded. This is made necessary by the statement in section 12 of the Administrative Procedure Act that no subsequent legislation shall be deemed to supersede the provisions of the act "except to the extent that such legislation shall do so expressly." This legislation clearly goes beyond the Administrative Procedure Act in two respects:

(*i*) The Administrative Procedure Act, in section 5(c), exempts initial licensing proceedings from the separation of functions provision; section 409(c) would include such proceedings in its reference to "any case of adjudication (as defined in the Administrative Procedure Act)." See section 2(d) of the Administrative Procedure Act.

(*ii*) The restriction in section 5(c) of the Administrative Procedure Act on ex parte consultation by a hearing officer is limited to "any fact in issue"; the new section 409(c) would extend the limitation to questions of law also (with the proviso that the examiner could consult with another examiner on such questions).

Section 409(b) would also appear to go beyond the provisions of section 8 of the Administrative Procedure Act by bestowing on the parties the right to file exceptions to the initial decision. Finally, it has been argued that a ruling on the merits of every pleading filed in the case is required under sections 6(d) and 8(b) of the Administrative Procedure Act. Whatever the validity of this argument, section 409(d) of the bill, by its explicit reference to the new section 5(c)(4) which authorizes denial without assigning reasons, of the application for review of a delegated decision, obviates any question on this score.

5. Section 5 provides that all cases set for hearing by the Commission prior to the date of enactment shall continue to be governed by the second sentence of the present section 409(b). This means that in such cases the Commission must hear oral argument upon the request of the parties.

Senator PASTORE. Mr. Booth.

STATEMENT OF ROBERT M. BOOTH, JR., PRESIDENT OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION

Mr. BOOTH. Gentlemen, we appreciate the opportunity to appear before you. I have prepared a written statement which contains the rather carefully thought out views of our association. I would like to read that and implement as I go along, if I may.

Senator PASTORE. All right, sir.

Mr. BOOTH. I am Robert N. Booth, Jr., an attorney engaged in the practice of law in Washington, D.C., with offices at 1735 DeSales Street NW. I appear as president of the Federal Communications Bar Association, an association composed of some 500 attorneys, most of whom specialize in practice before the Federal Communications Commission.

My appearance in support of the objectives and many of the provisions of S. 2034 has been authorized by appropriate resolution approved unanimously by the executive committee of the association.

As the representative of the Federal Communications Bar Association, I testified before this subcommittee in opposition to Reorganization Plan No. 2 of 1961 which, by modification of a number of provisions of the Communications Act of 1934, as amended, sought to provide for greater efficiency in the dispatch of the business of the Federal Communications Commission. The association recommended that changes in the act be made only by Congress after full and com-

plete hearings. I concluded my testimony with the following statement:

> The association stands ready, willing, and able to assist the President, the Congress, and the Commission in achieving the objectives of Reorganization Plan No. 2 by appropriate legislation.

S. 2034 proposes to achieve the objectives of Reorganization Plan No. 2 by the legislative process, and is directed primarily to the manner in which adjudicatory proceedings would be conducted.

Section 409(c) of the Communications Act now provides that the full Commission must consider exceptions, here oral argument, and issue a final decision in every adjudicatory case upon request of any of the parties. In testimony in hearings on Reorganization Plan No. 2, a number of the Commissioners stated that many of the adjudicatory cases the full Commission is required to hear involve relatively unimportant and routing matters and that, as a result, they are unable to concentrate on the important cases involving major policy or legal issues. The association concurs in their views.

The solution proposed in S. 2034 is to permit delegation of the review of initial decisions, orders, and other actions of hearing examiners to a panel of Commissioners, an individual Commissioner, an employee board or an individual employee.

The association supports the proposal to authorize the Commission to delegate the review of an initial decision, order or action of a hearing examiner provided the delegatee or delegatees are the same persons who, under section 7(a) of the Administrative Procedure Act, may conduct adjudicatory hearings.

The Administrative Procedure Act contemplates that a hearing examiner shall possess unusual and superior qualifications, ability, and experience. To permit a review of a hearing examiner's actions and decisions by a person with less ability and experience and fewer qualifications would effectively destroy the hearing examiner system and defeat the basic objectives of this bill.

We think it would be wrong, Mr. Chairman, to permit an employee of the Commission who was a recent graduate from law school and has never practiced law to be the person who passes upon the review of a decision or an order of a hearing examiner who has held that post for 20 years. And yet we are afraid that unless this limitation is written into the language of the act, that this may happen.

I might say that part of our concern with this bill is that we still don't know how it would be implemented by the Commission.

This is pointed out by way of illustration of our concern.

The association recommends that the same principle be applied to the delegation of reviews of other orders, reports and actions in both adjudicatory and nonadjudicatory matters. There should be the right of review and the review should be conducted by a person or persons having greater experience and responsibility. For example, if an individual Commissioner should conduct an adjudicatory hearing, the review should not be made by one or more employees of the Commission but by a division of the Commission or the full Commission.

The association recommended in its comments on Reorganization Plan No. 2 that the right of at least one administrative review be retained and that exceptions be permitted after the issuance of an initial decision. We are very pleased that S. 2034 contains such provisions.

Senator Pastore. Going back to the two previous paragraphs, Mr. Booth, how would you correct this bill to accomplish your objectives?

Mr. Booth. I think that there can be——

Senator Pastore. How are you going to write the qualifications of an individual in a bill to hear a matter?

You may have a very brilliant fellow who comes out of law school who may have more commonsense and judgment than a fellow who has been around for 20 years. That has happened in your life and my life before.

Mr. Booth. Then he can be appointed a hearing examiner, or be appointed to a position which is specified in the APA, section 7(a) and section 11. All we are saying is that the review should be conducted by those persons who are authorized to preside at the hearings initially; or by persons of superior qualifications.

In other words, section 7(a) of the Administrative Procedure Act sets forth or lists the persons who may preside or conduct adjudicatory hearings.

Senator Pastore. Do you say that the provisions of this particular bill repeals that part of the Administrative Procedure Act?

Mr. Booth. Not insofar as the conducting of the hearings is concerned.

But we say that there is a void in this bill as to who is going to conduct the review.

Senator Pastore. Mustn't that individual, who is chosen by the Commission, meet the requirements of the Administrative Procedure Act?

Mr. Booth. No, sir, not under the legislation before you here.

Senator Pastore. Then you take the position that insofar as that is concerned, we broaden out the Administrative Procedure Act?

Mr. Booth. No, sir. I say that you make your bill here more specific, to make it clear that the person or persons conducting the review are the persons named in section 7(a) of the Administrative Procedure Act.

Senator Pastore. Section 7(a):

> There shall preside at the taking of evidence one or more bodies comprising the agency or one or more examiners as provided in this Act, but nothing in this Act seemed to supercede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for or designated pursuant to statute. The functions of all presiding officers and officers participating in decisions in conformity with Section 8 shall be conducted in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified and upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer the agency shall determine the matter is part of the record and the decision in the case.

Is Mr. Minow in the room?

Mr. Geller. No, sir, he has gone.

Senator Pastore. Is his assistant here?

Mr. Geller. Mr. Geller is here.

Senator Pastore. What comment have you to make on this?

Mr. Geller. We would oppose what he has just suggested. We have no objection whatsoever to specifying that the employee boards be given the dignity even above that of the examiner.

If the committee wants to introduce a new section we would cooperate in drafting it, which says that these members who sit in review of initial decisions shall have no other duties inconsistent with

the duties to review initial decisions, shall be independent the way examiners are and shall be given a grade at a very high salary such as GS–17, we would welcome that. What we don't want, however, is to restrict it just to examiners, because we might want to select a person to sit on the employee board from the staff to make it the best possible person. If it were restricted to examiners we could only choose from the examiner corps who should sit on this employee board.

We do not object to the objective that Mr. Booth has mentioned. That we are in complete accord with. What we would like, however, is to have freedom to select the very best employees. We are willing to make them independent, we are willing to give them a higher salary, to go down any line at all for independence, and we would welcome a provision along that line.

Mr. BOOTH. Later on in my statement, Mr. Chairman, I suggest that the bar and the Commission confer with members of the committee staff in an attempt to work out language such as Mr. Geller has just suggested here. And I think it would be very worthwhile, because again I would like to emphasize——

Senator PASTORE. I go along with that idea, Mr. Booth, and we will try it at 2 o'clock today, if it is agreeable, on this one condition: That nothing be agreed upon that will constrict this. If you are going to get into qualifications of the individuals to hear these matters, that is perfectly proper and I think it is acceptable to this committee. But if this is going to be an attempt to constrict this to a specific category of people, then I am afraid we are defeating the very objective of the bill.

As I understand you, Mr. Booth, what you want here is that someone equally as qualified, or better qualified than a hearing officer, be included in this group to whom this function will be delegated?

Mr. BOOTH. That is right.

Senator PASTORE. You are going to the qualifications?

Mr. BOOTH. Yes, sir. We think that perhaps it can best be achieved, and simply achieved, by simply saying that the persons conducting the review shall be the same as those named in 7(a) of the APA.

My thought, and the thought of some of our members, was that the hearing examiner corps could have some of the real oldtimers, the real experienced examiners, be designated to these special duties of passing upon review of the newer examiners.

In other words, you would have sort of two groups of hearing examiners. We think that can be done within the present framework of 7(a) without complicating the statutes.

Senator PASTORE. From where you sit that is all right. But after all from where we sit in the Congress, you are getting into duplication here. We have got to keep the taxpayers' expense down, too. I go along with the idea. I don't care who hears it, provided he is qualified. But this idea that somebody else has got to stand over someone else's shoulder who is being well paid to do a job to make sure that he is doing it right, that is two people doing one man's job and the Congress doesn't like that too much.

Mr. BOOTH. That isn't what I had in mind. I don't like it as a taxpayer, either.

Senator PASTORE. The point is this: You have raised a good point, that these people who hear this should be well qualified for the job. That is our responsibility to see that that objective is carried out. But I don't think that you have to have an oldtime hearing officer look over the work of another man who is qualified to do it to make sure that he did it properly.

Mr. BOOTH. It may be true. That was the thinking that we had after the discussions we have had.

Senator PASTORE. Because you still have a right to file an exception here and go before the full Commission?

Mr. BOOTH. No, we don't have the right to go before the full Commission under S. 2034. We have the right to go some place, but we don't know whether it is to the full Commission or to a person or board to which the review of the exceptions will be delegated.

Senator PASTORE. You heard what Mr. Minow had to say. I asked him the question specifically, if the exception that is filed goes before the whole Commission, and he answered in the affirmative.

Mr. BOOTH. I did not understand the basis of his answer, because if that is so, you are right back to what we have now. What you are doing is providing intermediate steps. You are complicating the processes rather than simplifying it.

Senator PASTORE. All right. May I get a comment from the Commission on that again?

Mr. GELLER. What happens, Mr. Chairman, is that when exceptions are filed there is a right to get review of those exceptions.

The full Commission may decide to review it itself, or may delegate it to a panel of Commissioners or an employee board. But there is no right to have those exceptions passed upon by the full Commission.

After the decision of the panel or the employee board in S. 2034 there is a right to apply for review to the Commission of the decision of the employee board or the panel. That application for review can be granted or denied in the discretion of the Commission without specifying reasons.

That is the scheme in S. 2034.

Senator PASTORE. Doesn't that give you the day before the whole Commission on the review?

Mr. BOOTH. Surely it does. That is the reason we are supporting this.

We concur in that objective. We think it is a good one.

Senator PASTORE. I am not quarreling with you. I am trying to define this. We are going to get this job done, Mr. Booth.

Mr. BOOTH. I understand. We are very thankful it is going to be done.

Section 4 of S. 2034 would amend section 409 of the Communications Act to eliminate the right of oral argument and make it discretionary. The importance of oral argument long has been recognized by the courts and by some of the Commissioners who testified in the hearings before this Subcommittee on Reorganization Plan No. 2 and before a Subcommittee of the House Interstate and Foreign Commerce Committee on H.R. 7333. Oral argument occupies only an insignificant percentage of the time required for an adjudicatory hearing, affords the reviewing officer or officers the opportunity to ask

questions, and promotes confidence and respect in administrative decisions because the parties know that their views have been heard and carefully considered. The association recommends that the right of oral argument be retained.

The Legislative Oversight Subcommittee of the House Interstate and Foreign Commerce Committee, in a report issued on January 3, 1959, under the hearing "Individual Responsibility of Commissioners for Commission Decisions," made the following recommendation:[1]

> The subcommittee has been impressed with the need for change in the practices followed by some commissions of letting the commission staff rather than individual commissioners assume responsibility for the preparation of commission decisions and opinions. It is the view of the subcommittee that inconsistencies in commission decisions over the years are traceable to a considerable extent to the failure of following the practice of having the commission, or the majority of the commission, designate individual commissioners to assume responsibility for the preparation of the decisions or opinions of the commission, or the majority of the commission. It is the view of the subcommittee that this practice, which is traditional with the courts and which has been followed by some commissions, should be adopted by all commissions. It is the hope of the subcommittee that this change will produce a sense of personal responsibility of individual commissioners for the decisions and opinions of the commission and will avoid the practice of having commission staffs assume the burden of reconciling inconsistent decisions reached by the commissions.

A similar recommendation is contained in the President's message which transmitted Reorganization Plan No. 2 of 1961 to the Congress. The President said that:

> Section 3 of the plan also abolishes the "review staff" together with the functions established by section 5(c) of the Communications Act of 1934 (66 Stat. 712), as amended. They can be better performed by the Commissioners themselves, with such assistance as they may desire from persons they deem appropriately qualified.

The association concurs in these recommendations and urges that they be adopted in this legislation. We recognize that some of the Commissioners are not attorneys and that some of the Commissioners have opposed similar suggestions in the past. However, some of the Commissioners, I understand, have supported similar suggestions.

However, if additional qualified and experienced legal assistants are assigned to each Commissioner, we are confident that the quality of the decisions and opinions will be greatly improved and expedited.

We think, Mr. Chairman, that this is a serious matter and an important matter which should be further studied. I think that the views of the Commissioners themselves should be obtained on this particular recommendation because, as I see it, it is tied up with the overall picture and problem as to how these cases are going to be handled in a way which will produce the objectives of this bill. Unless these procedures are understood now, and clearly defined, I personally fear that many of the objectives of this bill will not be achieved.

Section 1 of S. 2034 proposes to repeal section 5(c) of the Communications Act and to abolish the review staff. One of the principal criticisms of the present statute is that the review staff has been forbidden to submit recommendations and drafts of orders on interlocutory matters.

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[1] H. Rept. 2711, 85th Cong., 2d sess., report of the Special Subcommittee on Legislative Oversight of the Committee on Interstate and Foreign Commerce, p. 41.

Chairman Minow pointed out this morning that they had 363 separate interlocutory matters before the Commission last year. You may recall that, in the hearings on S. 1739, in 1959, the bar and the Commission jointly combined in recommending that the review staff be permitted to submit recommendations on interlocutory matters. All through these hearings, Mr. Chairman, the complaint of the Commission has been the time spent on interlocutory matters and not on the actual adjudication of cases. If you review the testimony before the various committees in the last few weeks, you will find that generally where the Commission's witnesses have testified concerning the need for recommendations, in each case it comes back down to the interlocutory matters.

Under the procedures now being considered, some of which have recently been adopted by the Commission, many of the interlocutory matters would be delegates to the hearing examiners, thereby making study by the review staff unnecessary. Under the procedures recommended in this statement, hearing examiners, other than the one who presided at the hearing, could consider exceptions to an initial decision and prepare a final decision in cases delegated to them. In such instances, the review staff would be unnecessary.

If the recommendation of the President that the Commissioners be responsible for the preparation of final decisions and orders which they review is adopted, the work should be performed by the Commissioner's own assistants and staff. These changes would eliminate the necessity for a review staff.

The association supports the proposal to abolish the review staff, provided its duties and personnel are reassigned as the association has recommended. If the Commission is authorized to abolish the review staff but actually keeps it substantially intact, we fear that the basic objectives of S. 2034 would not be achieved unless the present prohibition of ex parte contracts and recommendations concerning final decisions is retained. A return to the practices and procedures which led to the McFarland Act amendments in 1952 must not be permitted.

As I see S. 2034, and the companion House bill, we are going right back to the situation which existed prior to the McFarland Act amendments. There are many undesirable features in the McFarland Act amendments, partly as a result of the interpretation placed upon the legislation by the courts, but that doesn't mean that all of the McFarland Act amendments were no good. And, in effect, I think what you are doing, in adopting S. 2034 in the form in which it is, you are wiping out most of the McFarland Act amendments after many, many months of consideration by Congress. I don't think we should do it in such quick fashion unless we know what we are going to have to replace them.

Senator PASTORE. What makes you say "such a quick fashion"? We have been hassling with this for years. I have been in the Congress 11 years now and I have been hassling with it all the time I have been here. I don't see where the action is so quick.

Mr. BOOTH. By "quick fashion" the proposals in both H.R. 7333 and S. 2034 have not been the subject of legislation before, to the best of my knowledge. These are new proposals; these are more far-reaching than proposals which have been submitted in the past.

Senator PASTORE. They will never be the subject of legislation until such time as we have enacted them into law.

Mr. BOOTH. That is correct.

Senator PASTORE. The Commission, on an admonition given by me, has gone back and considered this very, very thoroughly, and not only was there a lot of thought given to Reorganization Plan No. 2—and I think myself Reorganization Plan No. 2 was actually defeated for the reason that the procedures that were being followed, by doing it by reorganization rather than by legislation, was seriously considered by the Congress and No. 2, deciding to delegate this authority to the Chairman, that was opposed by the industry, and I think in a large measure accounted for the defeat of the plan. On my admonition they went back and studied this and came up with this recommendation.

I wouldn't say that this is being speedily done. It may be a little too speedy for you, but not from where I sit. I think we have delayed this a little too long.

Mr. BOOTH. Perhaps the use of the word "quick" was not wise. We think that it is desirable to know just how the legislation will work before it is adopted, rather than to say we will adopt the rules after the act——

Senator PASTORE. I am a lawyer myself and I suppose you could call in 10 lawyers and each will give you a different interpretation. That is not uncommon. Depending upon what side of the issue you happen to be on, I suppose you could begin to find flaws in many statutes, and that is the way this is going to develop. That is the way the refinement is going to take place.

I am a little surprised at your presentation here today. You say you agree with the objectives, but so far you haven't agreed with one line of the bill.

I don't think there is any part of the bill with which you agree. Am I right or wrong? Outside of the objectives?

Mr. BOOTH. I respectfully disagree with you, sir.

Senator PASTORE. You point out to me the parts of this bill that you agree with.

Mr. BOOTH. We agree with the proposal—let me get the bill—the bill starts off in section 1 with the proposal to abolish the review staff in section 5(c) of the Communications Act.

Senator PASTORE. Do you agree with that?

Mr. BOOTH. We say that we agree with the abolishment of the review staff, provided there is another method set up for handling the work now handled by the review staff, and we are making specific recommendations as to how the present work of the review staff should be handled. The proposal in the bill is twofold. First, to delegate much of the work now handled by the review staff to employee or employee boards, and we say that that is fine, provided the employee or employee boards are those persons with qualifications equal or superior to those of the original hearing examiner.

Senator PASTORE. All right. On that score I said that we had set a date at 2 o'clock this afternoon where you can sit down pursuant to your suggestion and get that ironed out. Let's get the next one.

Mr. BOOTH. We have also said about section 5(c) and abolishment of the review staff that we have no objections to recommendations to

the Commission on interlocutory matters by other employees of the Commission who haven't worked on the case. But we are saying in effect that we do not want the return to the practice prior to the McFarland Act amendments where employees or employee boards could recommend the disposition of adjudicatory cases. In other words, the final decision.

We see nothing in S. 2034 or the Commission's explanation of the bill which insures us that we are not going to return to the situation which existed prior to the McFarland Act amendments.

Senator PASTORE. In other words, you would still retain the prohibition on the part of these employees to make a recommendation to the Commission?

Mr. BOOTH. Yes.

Senator PASTORE. Why?

Mr. BOOTH. On the final disposition, unless the employees are members of the Commissioner's own staff for which he is responsible.

Senator PASTORE. What difference does it make as a legal proposition who makes the recommendation? Isn't the important thing who follows the recommendation?

Mr. BOOTH. Yes.

Senator PASTORE. A lot of people recommend a lot of things to me, maybe a thousand a day, but I don't follow them all. I use my own mind and my own judgment. If it is up to the Commission to make the final determination, what difference does it really make who makes the determination? Isn't it better for everybody concerned that people who have views submit views?

Mr. BOOTH. Apparently the Congress thought not——

Senator PASTORE. I know, but we are changing it. I think Congress was wrong when it adopted that procedure. Now you tell me where it was right. That is the reason why we are here. We are here to change something.

Mr. BOOTH. The situation which existed prior to the McFarland Act amendments for some years was one which I might say can be described as the tail wagging the dog. Many of the bar and many of the industry people felt that the review staff, the staff which was then the review staff, was the one which was actually deciding the cases. They were meeting before the Commission, they were arguing the merits of the cases, they were participating in the discussions which led to the Commission's ultimate conclusions.

We on the outside had no idea of what was told, what was being said. You must consider in many of these cases that the Commission itself in practically all the Commission cases, the Commission staff itself was a party to an adjudicatory hearing.

In broadcast cases the hearing division of the Commission's Broadcast Bureau has an attorney present at practically every hearing session. He prepares proposed findings; he prepares exceptions; he participates in pleadings on the interlocutory matters; he participates in oral argument before the full Commission. This is under the McFarland Act amendments, and we feel that that does give the Commission the expertise which it needs from its staff.

Senator PASTORE. It is an awful reflection on Commissioners. I mean if they can't accept a recommendation and then use their own judgment because they are going to be influenced to do the wrong

thing if somebody gives a recommendation, I can't subscribe that we are in a democracy appointing the right people to be Commissioners.

If an administrator is prevented from accepting a recommendation from me because he might be influenced in making a wrong decision, I ought not to be in the Congress.

Mr. BOOTH. Yes and no. You are talking about legislative matters and judicial——

Senator PASTORE. We are talking about the Congress, intellectual integrity, and honesty. Isn't that all that is involved here? A Commissioner who has a final determination to be made must make it in the public interest. In order to do that he must be intellectual and honest, and morally honest. If he is influenced to do the wrong thing because somebody else can't make a recommendation to him, then I don't think he is a man of high caliber.

Mr. BOOTH. I don't think that is the point here. The point here, and the point which has been made by the Commission in these hearings on Reorganization Plan No. 2 and the resulting legislation, is that they are so overburdened that they cannot take care of all the matters before them properly and efficiently. They have to rely upon staff reports and reviews and recommendations.

We simply say that rather than have one staff make recommendations to, say, seven Commissioners as to how a particular case should be disposed of, we think that those recommendations should be made by their assistants, by their legal assistants and engineering assistants who are hired for that purpose, and who are under the control and supervision of the Commissioner.

It doesn't reflect upon their ability or integrity in any way. It is a matter of trying to provide a workable means of handling the work and to get the individual views of the Commission.

Senator PASTORE. All right, Mr. Booth.

Mr. BOOTH. I am returning to my statement on page 7, sir.

S. 2034 would repeal section 409(c) of the Communications Act and would permit the Commission to consult with its key employees, such as the General Counsel and Chief Engineer, in certain instances in adjudicatory cases.

The association recommends that the present prohibitions be retained. I have been directed to report that this is the only recommendation of the association which was not unanimously approved by our executive committee.

I would like to explain, if I could, sir. Some of the members of our executive committee felt that the Commission should be permitted to consult with its General Counsel. It happens that one of our members is a former general counsel of the commission. But the illustration which Commissioner Minow set forth or stated this morning about calling in his chief engineer to say whether to rely upon one engineer's presentations or recommendations or another's is an example which I gave in the hearings on H.R. 7333 to illustrate why we feel that such communications should be made only on the record of the recommendation because we don't know the basis for recommendations as to engineering or technical matters.

In other words, the chief engineer or the staff of the Commission may be going on a wrong premise or assumption which could be pointed out very easily if the parties to the proceeding knew the basis

of his recommendation. Each of the Commissioners has an engineering assistant who now can make recommendations on this. And by having each of the Commissioners rely upon this engineering assistance you are getting a composite view and the possibility of error is far less.

Again we go back to the basic concept that the Commission's own staff should properly be able to make recommendations.

We recognize the desirability of the Commission obtaining expert advice but believe it should be obtained only after notice to all interested parties. Therefore, the association continues to oppose all ex parte communications in adjudicatory cases except on interlocutory matters. However, we support the proposal in section 4(c) of S. 2034 to permit the hearing examiners to consult with other hearing examiners on questions of law. We think that is a good proposal.

The members of the association's committee on legislation and executive committee have devoted many hours in the last few weeks to study of various proposals for improvement of the efficiency and operation of the Federal Communications Commission. The solutions are not simple. We believe that S. 2034 can and should be clarified and strengthened.

I do not mean to brag here but I must say that I have prepared a draft of a bill intending to incorporate most all of the provisions of S. 2034, as well as the additions recommended in this statement. Mr. Percy H. Russell, chairman of the committee on legislation and former president of our association, and members of his committee also have worked on drafts of possible revisions. Although our drafts do require considerable clarification and polishing, I am certain they contain provisions which will be of help and interest to the Commission and this committee.

I respectfully suggest that we hold a conference which you have already stated would be held.

Irrespective of what changes are made in the Communications Act, there must be close cooperation between the Commission and the bar in developing the specific rules of practice and procedure necessary to implement the changes. Cooperation between the association and the Commission has been quite close for some years. We usually have been able to understand the others' views and problems and to arrive at mutually acceptable solutions. The association stands ready, willing, and able to work with the Commission in formulating rules of practice and procedure which will achieve the objectives of the legislation under consideration.

Adoption of the procedures proposed in S. 2034 and by the association in this hearing undoubtedly will increase the efficiency of the Commission and improve the quality of decisions in hearing cases. However, many other changes in practices and procedures must be made by the Commission if the current backlog of work is to be reduced and its efficiency improved to any significant extent.

As I testified in the hearing before this committee on Reorganization Plan No. 2, four ad hoc committees were established a year and a half ago to study ways of improving and expediting the handling of broadcast applications. The committees were composed of members of our association and the Commission's staff, and consulting engineers practicing before the Commission.

To date, few, if any, of the many important recommendations have been adopted. Once again, the association stands ready, willing and able to work with the Commission in formulating rules of practice and procedure which will greatly improve the efficiency of the Commission.

We appreciate the opportunity to appear before this committee on this most important proposal.

Senator PASTORE. You are going to make a copy of that draft available to us?

Mr. BOOTH. I had intended to, and attached it to my statement, but after spending 2 or 3 hours with Mr. Russell yesterday, and having it beat down pretty well, I became so ashamed of it that I want to rework it before I submit it.

I must say that it is my first experience in trying to draft legislation. I finally realized what the problems are.

Senator PASTORE. It is not easy.

Mr. BOOTH. I would like to make one more statement, if I could, please, sir.

You asked Commissioner Minow about H.R. 7856. I saw a copy of that bill for the first time when I walked in the hearing room this morning. I am not prepared to discuss it in any detail. However, my first impression in listening to the chairman's comments is that we believe that there should be a right of review at some stage of delegated matters.

As I understand H.R. 7856, it doesn't contain that. We would like to look at it pretty carefully if we could.

Senator PASTORE. I think you should. I think you should because that could raise some serious questions.

Thank you very much, Mr. Booth.

Mr. BOOTH. Thank you, sir.

Senator PASTORE. Mr. Leonard Marks?

STATEMENT OF LEONARD MARKS

Mr. MARKS. Senator Pastore, this is my second effort on this subject. I appreciate the opportunity.

I am not going to comment on the major provisions of S. 2034, with the exception of section 2, which I would like to talk about in terms of a specific recommendation.

Before giving you the specific recommendation I would like to introduce my recommendation by saying we are all concerned with the problems of delay which have beset the Federal Communications Commission and other administrative agencies over the years.

As you have indicated, Senator Pastore, we have been wrestling with this problem now for quite a long time. We hope that this may be the solution.

When you analyze the problem of delay at the Commission, it takes on two aspects: One, what takes up the time of the Commissioners? Included in this category, are there matters which can be delegated?

Secondly, what are the administrative processes, and can they be streamlined so that we can expedite the consideration? Let's take up the first category first.

What does take up the time of the average Commissioner?

I was fortunate enough to have spent 5 years as a member of the Commission staff, and I have practiced continually as an attorney before the Commission ever since 1946, so I speak from considerable knowledge.

Each week the Commission acts on a very substantial volume of uncontested applications in the broadcast, special safety, and common-carrier field.

Speaking now just on the broadcast subjects these applications consist of, shall a station be given permission to increase its power from 250 watts to a thousand watts?

Shall a station be permitted to move from site A to site B?

Shall a station be transferred from Mr. Jones to Mr. Smith?

These are typical illustrations of the uncontested nature of the applications.

When one of these applications is filed with the Commission, it is thoroughly reviewed by members of the staff. It is examined by engineers, it is examined by lawyers, and accountants. When they finish their reports and recommend that there are no problems, the Commission has no alternative but to put its stamp of approval on it. It becomes a routine matter. And yet this type of application takes up, in my opinion, fully half of the Commissioner's workweek.

It takes up his time primarily because people involved in these uncontested cases are concerned about the action and the amount of time. They come to Washington, they insist on seeing the Commissioners, and I believe it is the responsibility of the Commission to see them. And they discuss their cases.

Eventually it gets to the point of staff recommendation, and I say there is no reason for the Commission to do anything but approve it.

The report is mimeographed, it is distributed to all the Commissioners, their assistants, and once a week or twice a week the Commission sits en banc and a member of the staff gets up and reports on these cases.

The time of the Commissioner is taken up in seeing the applicant or persons associated with the applicant. The time of the Commissioner is taken up in reading the report. The time of the Commissioner is taken up in acting on the matter, even though it is uncontested.

I have no way of telling you whether this is half of the Commission's workload or a greater or lesser percentage. But I do know that it takes up a considerable amount of time.

Senator PASTORE. On that question, would that proviso on page 3 of the House bill—do you have it?

Mr. MARKS. I don't have the House bill before me.

Senator PASTORE (reading):

Provided,

That the Commission, by published rule or by order may limit the right to file applications under this subsection for review of orders, decisions, reports or actions of panels in case of adjudication.

Would that apply to the situation?

Mr. MARKS. No, sir, that is only on adjudicatory matters. I am talking about the matters that have not reached the contested stage.

Senator PASTORE. I see.

Mr. MARKS. It is my recommendation that you take section 2, S. 2034, in C(1), and enlarge it by providing—you now say that the

Commission can delegate any of its functions to an individual employee.

I would like you to include in that a specific new job called an administrator, a man, either appointed by the members of the Commission, responsible to it, or appointed by the President, subject to confirmation of the Senate, as you may in your wisdom decide, but the Administrator would be charged with the responsibility of acting on all uncontested applications, and his actions would be subject to review by the Commission if the Commission wanted to review them. But I assure you that it would take away the substantial amount of work that I have described, it would not be necessary for the Commission to review these cases, and it would expedite the consideration of the Commission's business. That is the second category.

There is frequently a lapse of several weeks after the staff acts on its study before it gets to the Commission.

If the Commission does not meet on a particular Wednesday because they are involved in a field trip, or testifying before a congressional committee, the matter just goes over for another week.

Senator PASTORE. Under this proposed legislation why can't the Commission do it anyway by delegating that authority to one Commissioner to hear all uncontested cases?

Mr. MARKS. They could do it tomorrow. They don't even need this legislation. But experience has shown, Senator Pastore, that unless there is a compulsion or a mandate, it is not being done. Perhaps in light of the consideration which has been given to the subject of delay the Commission, on its own, will now do this.

Senator PASTORE. But you do admit with me, obviating their job because we dislike to get new jobs every time we get a new problem, you will admit this, that there is sufficient authority under existing law, even without the help of S. 2034, for the Commission to delegate that function under existing law to one of its Commissioners or an employee who is presently occupied in that capacity to make these decisions?

Mr. MARKS. There is not any doubt about it. They could do it tomorrow morning.

I have had the privilege of being associated with the Federal Communications Bar Association as president. Two years ago in a very serious effort to do something about the problem of delay, as Mr. Booth has pointed out, I appointed ad hoc committees, members of the bar, members of the Commission staff, engineers, accountants, lawyers, and we worked long and hard and detailed studies were made as to how to expedite.

I don't know why these reports, which were a cooperative effort, have received no attention. But, based upon experience, I tell you that even the most constructive suggestions are frequently lost along the way, and it requires an amendment in legislation or a mandate in your report.

I have enough respect for the Commissioners themselves to say to you that if your committee, in its wisdom, included in your report the suggestion that I have just made, I feel that something might be done.

But I, personally, would rather see it inserted in legislation, with a directive to the Commission that they shall delegate, either to an

individual Commissioner, an administrator, call him what you wish, the functions that I have described. And I believe that we will have solved a great deal of the problem in contested matters.

Senator PASTORE. In uncontested matters?

Mr. MARKS. In uncontested matters.

But we will also have helped ourselves in contested cases, because to the extent that you take away from the Commission, let us say, half of their workload, they thereby can devote more time to the more serious business of a Commissioner, the adjudicatory cases, the legislative problem.

As I view the Commission, its functions should be an appeals board and a policy-determining board.

It should act on all appeals from hearing examiners. It should act on all legislative matters. And there is plenty to do in that field to keep it busy.

It need not act on the uncontested matters. If it sets the policy guidelines, it is a simple administrative function for one Commissioner, an administrator, or a staff official to decide these uncontested cases.

And that is the substance of my testimony, sir.

Senator PASTORE. Thank you very much.

Is there anyone else here who would like to testify on this bill?

(No response.)

Senator PASTORE. There is a statement by CBS, and it will be inserted in the record.

(The statement referred to follows:)

COLUMBIA BROADCASTING SYSTEM, INC.,
Washington, D.C., June 28, 1961.

Hon. JOHN O. PASTORE,
Chairman, Subcommittee on Communications, Commerce Committee, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This is with reference to S. 2034 which has been referred to the Senate Commerce Committee and with respect to which hearings before the Subcommittee on Communications have been scheduled for June 28, 1961. Columbia Broadcasting System, Inc., is submitting to you herewith its views with respect to S. 2034 and requests that they be incorporated in and made a part of the record of the hearings on the bill.

ELIMINATION OF THE REVIEW STAFF

Section 1 of S. 2034 would repeal subsection (c) of section 5 of the Communications Act, thus eliminating the special review staff created by that subsection.

In June 1959, in commenting on various bills to amend the Communications Act then pending before your subcommittee, CBS supported S. 1738, which would have expanded the functions of the review staff. In addition, we suggested, as a more desirable alternative, the repeal of section 5(c) in its entirety, and in connection therewith stated:[1]

"We agree with Commissioner Ford that it [section 5(c) of the act] is unduly restrictive and is unnecessary, and that section 5(c) of the Administrative Procedure Act contains all the safeguards required. If section 5(c) of the Communications Act were repealed, the Commission could retain or abolish its review staff, as it saw fit, and would be free to consult with, and seek help from, any members of its staff, except those engaged in investigative or prosecuting functions in this particular case or a factually related case. Such a situa-

[1] Letter of Columbia Broadcasting System, Inc., to Hon. John O. Pastore, chairman, Subcommittee on Communications, dated June 19, 1959, pp. 4, 5.

tion would add most substantially to the efficiency of the Commission and to the dispatch with which it disposes of pending cases."

We support section 1 of S. 2034.

THE CREATION OF AN AUTHORITY TO REVIEW

As we understand S. 2034, apart from the elimination of the review staff, its primary purpose is to permit the creation of a review body within the Commission, empowered to hear appeals from the initial decisions of hearing officers in cases of adjudication, thus relieving the Commission itself from sitting en banc in every such case.

In implementation of this purpose, S. 2034 proposes to amend section 5(d) of the act by providing for Commission delegation of its functions to a panel of Commissioners, an individual Commissioner, an employee board, or an individual employee. Any order or decision or other action taken pursuant to any such delegation, unless reviewed by the Commission, is to be treated as final. The Commission may on its own initiative review any such delegated matter and any person aggrieved may file an application for review by the Commission. In passing on an application for review, the Commission need not specify its reasons for granting or denying such application for review. Finally, the filing of an application for review is a prerequisite to judicial review.

The amendments to sections 405 and 409 of the act, also proposed in S. 2034, are in further implementation of this purpose—the creation of an intermediate body of review below the level of the Commission. We support this purpose. With the changes suggested herein, we believe it will relieve the Commission from the burden of devoting an undue amount of time and effort, without impairing unduly the right of the parties concerned to a prompt, fair, and full consideration of their cases.

CLARIFICATION OF PROPOSED SUBSECTION 5(c)(1)

Proposed subsection 5(c)(1) would authorize the Commission to delegate any of its functions to an individual or group within the Commission, including functions with respect to hearings. This would appear to encompass the appointment of hearing examiners or individual Commissioners to sit as hearing officers and issue initial decisions in cases of adjudication.[2]

We believe that unless that subsection is classified there may be some confusion as to the scope of other provisions of S. 2034.

For example, section 3 of the bill would amend section 405 of the act so as to permit petitions for rehearing to the Commission "or other authority designated under section 5(c)(1)." Under the aforesaid interpretation, this would mean that petitions for rehearing of an examiners' initial decision must be filed with the examiner. This is a unique application of the rehearing process which has never heretofore been contemplated by the act. Rehearing has always been before the Commission, the reviewing authority. Similarly, proposed section 409(b) would permit any party to a proceeding to file exceptions to an initial decision, to be passed upon by the Commission or the authority delegated under section 5(c)(1). Again, under the aforesaid interpretation, exceptions to a hearing examiner's decision would be filed with it. This would serve no useful purpose.

To clarify the apparent intent and to avoid those interpretations, it is suggested that, in lieu of the sentence "Nothing in this subsection shall modify the provisions of section 7(a) of the Administrative Procedure Act," the following be substituted:

"The authority designated under the provisions of this subsection shall not include persons designated to preside at the taking of evidence in cases of adjudication pursuant to section 7(a) of the Administrative Procedure Act."

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[2] Proposed subsec. 5(c)(1) also states that nothing therein "shall modify the provisions of sec. 7(a) of the Administrative Procedure Act." The latter provides that there shall preside at the hearing (1) the agency, (2) one or more agency members, or (3) one or more examiners appointed as provided in the APA. Thus, it would appear that the quoted statement merely limits the class from which appointments of hearing officers may be made under proposed subsec. 5(c)(1).

APPLICATIONS FOR REVIEW

Proposed subsection 5(c)(4) of S. 2034 leaves to the discretion of the Commission whether or not to grant an application for review of an order, decision, or report issued under a delegation of authority. Thus, a majority of the Commission must vote for review before an aggrieved party is entitled to be heard by the Commission.

We note that Reorganization Plan No. 2 of 1961 dealing with the FCC, as well as H.R. 7333 on the same subject, provides that the vote of a majority of the Commission less one is all that is needed to bring a matter before the full Commission for review. In the hearings held with respect to that plan and that bill before the Subcommittee on Executive and Legislative Reorganization of the House Committee on Government Operations and the Special Subcommittee on Regulatory Agencies of the House Interstate and Foreign Commerce Committee, respectively, there appeared to be no dissent to such proposal, which is paralleled on the procedure before the U.S. Supreme Court wherein a majority of that Court less one is all that is required for the grant of a petition for writ of certiorari.

We, too, believe that permitting three Commissioners, or a majority less one, to require review by the full Commission is necessary to assure adequate protection to aggrieved parties. Accordingly, we recommended that the following be inserted after the first sentence in proposed subsection 5(c)(4):

"A vote of a majority less one of the members of the Commission then holding office shall be sufficient for grant of any such application for review."

Proposed subsection 5(c)(6) provides that the filing with the Commission of an application for review from an order, decision, or report of the authority designated pursuant to subsection 5(c)(1) shall be a condition precedent to judicial review. Thus an applicant or other aggrieved party would be required to take two appeals if a review authority is designated by the Commission—one to such authority, and the other to the full Commission—before he may seek judicial relief. This introduces a new element of delay in the administrative process.

While there may be reasons for affording the Commission an opportunity to review the action of its designated review authority upon appeal by one of the parties (proposed subsec. 5(c)(3) authorizes the Commission to review any delegated matters on its own initiative), at the least the attendant delay should be minimized. In view of the fact that the Commission would be permitted to grant or deny applications for review without specifying reasons for its actions, it would not seem inappropriate to require the Commission to act with expedition on application for review.

We recommend, therefore, that there be added to proposed subsection 5(c)(4) the following:

"The Commission shall act on each application for review within 60 days from the filing thereof."

PETITIONS FOR REHEARING

Section 3 of S. 2034 amends section 405 by permitting petitions for rehearing of decisions or orders of the authority delegated under subsection 5(c)(1) to be filed with that body in the same circumstances and under the same conditions as petitions for rehearing by the Commission of its decisions or orders are presently permitted. While this, too, could lead to delay in the ultimate resolution of a case, so long as the filing for rehearing is permissive and generally not a condition precedent to judicial review, we do not believe it inappropriate to permit this procedure. It would allow the parties to bring to the attention of the designated authority matters which it may have overlooked, thus precluding the necessity of the grant of an application for review.

However, there is an apparent omission in the proposed section, perhaps inadvertent, which, in our view, should be corrected. It provides that in any case where a petition for rehearing relates to an instrument of authorization granted without a hearing, the Commission shall take action thereon within 90 days of the filing of the petition. This is in accordance with present law. But proposed section 405 does not impose the same requirement on the authority designated under subsection 5(c)(1) with respect to petitions for rehearing filed with it. It would appear that the considerations which impelled Congress to impose the 90-day requirement on the Commission apply equally to actions by the designated authority on petitions for rehearing relating to the instruments of authorization granted without a hearing.

We suggest, accordingly, that the words "or designated authority within the Commission" be inserted immediately following the words "the Commission" in the proviso clause in proposed section 405 so that it would read as follows: "*Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission or designated authority within the Commission shall take such action within ninety days of such petition."

THE EXTENT OF REVIEW

Present section 409(b) of the act provides that in every case of adjudication which has been designated for hearing, the Commission shall permit the filing of exceptions by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order or requirement. As amended by section 4 of S. 2034, the right to file exceptions before the review authority designated under subsection 5(c)(1), or, if none is designated, before the Commission, is retained. However, there would be no right to oral argument before either group and, apparently, no statutory right to file exceptions with the Commission should it act favorably on an application for review of a decision of the designated authority.[3]

One of the purposes of S. 2034 is to relieve the full Commission of the burden of studying the exceptions, hearing oral argument, and writing a decision in every case of adjudication, however minor, and however it may appear on initial examination that the hearing officers' decision was correct. Hence the proposal that the Commission be authorized to set up an intermediate appellate group composed of Commission staff members or perhaps, in more important cases, a panel of Commissioners. As indicated, we support such a proposal.

However, there is no requirement in S. 2034 that an intermediate appellate authority be designated by the Commission. As to cases with respect to which no such authority is created, aggrieved parties would, under proposed subsection 409(b), have the right only to file exceptions. The right to oral argument before the Commission would be gone. We believe that right should be retained. It would impose no undue burden on the Commission. It could clearly control the number of cases which it would be required to review. It could reserve such review only for the most important or complex cases. In those cases, the Commission would be required to study the exceptions in any event. The additional time required to hear oral argument would be relatively minimal.

The right to oral argument is an important right generally recognized in judicial proceedings when substantive questions are involved. It is not only essential to the parties; it would be of invaluable assistance to the Commission.

Analogy to the discretionary aspect of the right of review by the full Commission to U.S. Supreme Court procedure has often been cited as justification for making review by the Commission discretionary. But it should be noted that when that Court grants a petition for certiorari or review, it generally affords the right to file briefs and to oral argument. We think the same procedure should be followed here.

For the same reasons, we think that the right to oral argument before the authority delegated by the Commission should be assured in the act, Since, presumably, passing on appeals from initial decisions would be the sole or primary function of that authority, expenditure of the time required to hear oral argument can hardly be unduly burdensome on it. Further, with considerably less experience than the Commission in these matters, the opportunity to hear oral argument and to question counsel with respect to what may be a complex and lengthy record should be invaluable to such authority. We believe oral argument here is essential to assure a full and fair hearing to the parties.

Finally, although as the act would be amended by S. 2034, review by the full Commission or an order or other action by its delegated authority is discretionary with the Commission, we are of the opinion that when the Commission does decide to exercise its discretion in favor of review, the right to file exceptions and to oral argument should be afforded interested parties. As we have indicated, these are important rights. They make more meaningful the Commission's decisions in the more important cases it elects to review.

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[3] While it can be contended that sec. 5(b) of the APA affords the right to file exceptions should the Commission exercise its authority to review, that section may not be applicable in the event S. 2034 in its present form becomes law. Subsec. 4(d) of S. 2034 provides that the provisions of the APA shall be superseded to the extent that they are in conflict with secs. 5(c)(4) and 409(b) as proposed in S. 2034.

Consistent with the above, we recommend that proposed section 409(b) be amended to read as follows:

"(b) In such cases any party to the proceeding shall be permitted to file exceptions and memoranda in support thereof to such initial, tentative or recommended decision, which shall be passed upon by the Commission or the authority to whom the matter may have been delegated under section 5(c)(1). The Commission or such authority, as the case may be, shall upon request hear oral argument on such exceptions. In any case which the Commission has decided to review under section 5(c)(3), the Commission shall permit the filing of exceptions or memoranda by any party to the proceeding and shall upon request hear oral argument thereon."

OFF-THE-RECORD PRESENTATIONS IN CASES OF ADJUDICATION

Present subsection 409(c)(2) provides that in any case of adjudication no person who has participated in the presentation or preparation for presentation of a case before a hearing officer, and no member of the Office of the General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant, shall directly or indirectly make any additional presentation respecting such case, unless upon notice and opportunity for all parties to participate. In its proposed amendment to subsection 409(c), S. 2034 would substitute the requirement that no person except for officers, employees or agents of the Commission not engaged in the performance of investigative or prosecution functions for the Commission in such case or a factually related case, shall make any such additional presentation. We are in agreement that that portion of section 409(c)(2) which prohibits the Commission from seeking advice from the Office of General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant, serves no useful purpose where members of those offices have not participated in the presentation of the case. In fact, it appears to deprive the Commission of the opportunity to benefit from the considerable expertise, of the Commission's staff. We agree that that portion of section 409(c)(2) should be deleted.

However, we are not clear that Commission personnel, such as the attorneys of the Broadcast Bureau who represent the Commission and the public in a hearing, are engaged, in "investigative or prosecuting" functions. It is the present practice of the Commission's hearing attorneys to file its exceptions, motions, etc., on the record and to serve copies on the other parties to the proceedings so that they may have an opportunity to reply. This practice should continue. We are concerned that a participating Commission attorney in a comparative hearing, for example, will not be considered as performing a "prosecuting or investigative" function. It may then be contended that such attorney need not make his proposals or recommendations on the record.

We suggest, therefore, that the following be added at the end of proposed subsection 409(c):

"Attorneys or other personnel assigned by the Commission to participate in the presentation or preparation for presentation of a case shall be deemed to be engaged in the performance of investigative or prosecuting functions for the Commission in such case, or in a factually related case, within the meaning of this subsection."

We note that subsection 409(c) as proposed in S. 2034 modified somewhat the provision of present subsection 409(c)(3) which provides that no person engaged in the performance of investigative or prosecuting functions for the commission, or in any litigation before any court in any case arising under the act, shall advise, consult, or participate in any case of adjudication designated for hearing, except as witness or counsel in public proceedings. We believe that that provision is broader than is necessary to protect the parties in a hearing and in part negates what S. 2034 would do in eliminating the requirement that the Commission may not seek advice from the Office of General Counsel, which office handles litigation for the Commission and performs most of its prosecuting functions, as well as many of its investigative functions. Thus we support proposed subsection 409(c), which would limit the disqualification to participate off the record in an adjudicatory case to Commission personnel engaged in the performance of investigative or prosecuting functions for the Commission with respect to that case, or in factually related cases. This would then be consistent with section 5(c) of the Administrative Procedure Act.

We wish to express our thanks to the subcommittee for this opportunity to submit our views with respect to S. 2034.

Respectfully submitted.

THOMAS K. FISHER,
Vice President and General Counsel.
LEON R. BROOKS,
Assistant General Attorney.

Senator PASTORE. There being no further witnesses, we will adjourn, subject to the further call of the Chair.

Thank you very much for coming.

(The comments from the Government agencies follow:)

COMPTROLLER GENERAL OF THE UNITED STATES,
Washington, June 22, 1961.

B–113531.
B–134573.

Hon. WARREN G. MAGNUSON,
Chairman, Committee on Commerce,
U.S. Senate.

DEAR MR. CHAIRMAN: Your letter of June 9, 1961, acknowledged June 12, transmitted a copy of S. 2034, entitled "A bill to amend the Communications Act of 1934, as amended, in order to expedite and improve the administrative process by authorizing the Federal Communications Commission to delegate functions in adjudicatory cases, repealing the review staff provisions, and revising related provisions," and requested our comments thereon.

Other than the explanation which was made a part of the record at the time S. 2034 was introduced, we have no information as to the necessity for or desirability of further amending the Communications Act of 1934, as amended, as proposed by S. 2034 and, since the provisions of the bill would not affect the functions of our Office, we have no comments with respect to its merits or recommendations regarding its enactment.

Sincerely yours,

JOSEPH CAMPBELL,
Comptroller General of the United States.

(The following communications were subsequently received for the record:)

WRITTEN STATEMENT OF AMERICAN BROADCASTING CO. WITH RESPECT TO S. 2034

S. 2034 represents an important and needed effort by the Congress, the Federal Communications Commission, and the communications industry to revise and improve the authority of the Commission to deal expenditiously with matters falling within the scope of its responsibility. American Broadcasting Co. supports S. 2034 and the concept it embodies. It offers the following comments, for consideration by your committee, on three aspects of the bill.

(1) The nature and status of the reviewing authority that could be established for the review of adjudicatory action is, we believe, a point of sufficient importance to warrant more explicit treatment than it now receives in the text of S. 2034.

In order to relieve the Commissioners of the obligation to consider exceptions, hear oral orgument, and render a decision in each adjudicatory matter, the Commission would be authorized to provide for such review before an authority composed of a panel of the Commission, an individual Commissioner, an employee board, or an individual employee, rather than the Commission itself (S. 2034, sec. 2). For adjudicatory matters handled in this fashion the Commission would retain the discretion, on petition, to review the action of the panel or board. It could grant or deny in whole or in part an application for review without specifying reasons therefor (sec. 2). It would also have discretion on its own initiative to order such a matter before the Commission for review (sec. 2).

Included among the functions of a reviewing group could be the responsibility for handling appeals from interlocutory rulings (in addition to its responsibilities

resulting from initial decisions of individual examiners). The handling of interlocutory matters in this fashion would in itself relieve greatly the demands upon the Commission.

S. 2034 as it now reads does not, however, contain specific requirements concerning the selection, makeup, qualifications, and status of the contemplated reviewing authority. Most of the detail in these areas can and should be left to the discretion of the Commission. We suggest, however, that the reviewing authority should, by statute, not only consist of personnel of competence; it should also have a status independent of other Commission staff and subject only to Commission review. It should perform the review function on a regular and continuing basis.

Under the present language of S. 2034, the Commission could, for example, select review groups on an ad hoc basis from among its staff personnel. If this procedure were followed, those members of the Commission's staff who by reason of experience and competence would be qualified for such a function would also have other important duties; in a sense these other duties would represent their primary obligations. Therefore ad hoc staff groups designated from time to time to sit as review boards in particular matters would face particular difficulty in endeavoring to accord the kind of detailed, expeditious, and judicial treatment that is to be expected in an adjudicatory matter involving exceptions, oral argument, and the necessity for preparation of a decision ruling upon the substantial matters involved.

It is not entirely clear whether a reviewing authority composed of one or more Commissioners together with staff personnel would also be possible under the present language of S. 2034. If such a board were established, this, too, would present certain practical difficulties. The difficulty of the employee members of the board being completely independent and voting against one or more of the Commissioners—perhaps even dissenting from a view taken by one of the Commissioners—in a contested proceeding cannot be overlooked. An ad hoc review board for a particular case or group of cases consisting of examiners who on a rotation basis pass upon the decisions of each other—which would be possible under the present language of S. 2034—would present equally difficult practical problems. And the use of a panel composed only of Commissioners as the reviewing authority might well thwart in substantial measure the very purposes of the proposed legislation by requiring extensive time of the Commissioners for the review of individual cases that could justifiably be delegated to a review group of employees.

For these reasons we believe that any reviewing authority for adjudicatory matters such as that contemplated in S. 2034 should be established on a regular basis to act as an intermediate review group. It should consist of persons with outstanding qualifications, should be provided with personnel and facilities adequate to make it possible to perform the review function effectively, i.e., to pass upon and dispose in an expert and judicial fashion of exceptions, appeals from interlocutory rulings, and such other matters relating to adjudicatory matters as may be entrusted to it, and prepare the necessary decisions. (As we read the language of S. 2034 the requirement that the reviewing authority pass upon exceptions and memorandums in support thereof is subject to the requirements of section 8(b) of the Administrative Procedure Act, and decisions rendered by the reviewing group must accord with those requirements. In order to remove any possible doubt on this score, it may be well to treat this point explicitly in whatever report accompanies S. 2034.)

S. 2034 as it is now drafted would permit establishment of a reviewing authority such as we have described, and this may well be what the Commission and Congress have in mind. However, S. 2034 would not require that the group be established on this basis. We believe that the basic requirement for a separate, highly competent group for the review of adjudicatory matters, independent of other examiners and Commission staff, with their actions subject only to Commission review, is of sufficient importance to be included in the legislation itself. As we read S. 2034, such a group would (and we believe should) be subject to the proposed provisions of section 409(c) dealing with ex parte representations.

Accordingly, we suggest that language be added to the proposed section 5(c)(1) of the Communications Act (sec. 2 of S. 2034) providing that the members of any reviewing authority designated to perform the review function in adjudicatory proceedings shall be so designated on a permanent basis, shall possess special competence and experience at least comparable to that of examiners to perform the function involved, and shall perform no other duties inconsistent with performance of the review function in adjudicatory proceedings.

(2) S. 2034 as presently worded would not require grant by the Commission of an application for review in any specified categories of cases. Under the proposed section 5(c) (3) and (4) any person aggrieved by the action of the reviewing authority may file such an application with the Commission, but the application would be directed to the discretion of the Commission and could be granted or denied by the Commission, in whole or in part, "without specifying any reasons therefor." We believe this to be a reasonable approach in many types of cases. We also believe, however, that in certain types of cases a greater measure of consideration by the Commission can and should be assured applicants consistent with the accomplishment of the purposes of the proposed legislation.

Specifically, we believe that an applicant should be entitled as of right to ultimate substantive review by the Commission of the matters involved when it is proposed—

(1) to deny an application for renewal of an existing authorization;

(2) to deny an application for consent to transfer control of a licensee or to assignment of a license;

(3) to deny an application for construction permit or license (other than applications for auxiliary or subsidiary authority of a minor nature as specified by the Commission) on grounds other than—

(*a*) a comparison of competing applicants, or

(*b*) a comparison of competing States or communities under section 307(b), or

(*c*) a failure to comply with basic engineering requirements to be specified by the Commission.

This would leave applications for Commission review of the action of a reviewing authority subject completely to Commission discretion in many cases involving selection between competing applicants, as well as all interlocutory matters. As such it would accomplish in large measure the purpose of the proposed legislation.

We are aware of the stated intention of the Commission to accord Commission review in cases involving policy or major legal doctrine. However, even in cases not involving new policy or major legal doctrine such as, for example, one proposing the denial of an application for renewal of license, the effect can be a matter of major importance not only to the applicant but also to the community involved. Similar effects could flow from a refusal to grant an assignment or transfer application. And even in the case of an applicant for authorization to construct and operate a new station, a refusal to grant on grounds, for example, of character disqualification would involve a most serious judgment that could adversely affect the applicant in his business and other activities even more seriously than many types of criminal convictions. For these reasons we believe that on balance proposed action of the type that we have indicated should as a matter of statute entitle the applicant to ultimate substantive review of his case by the Commission.

(3) We believe it of particular importance that oral argument, as well as the opportunity for the filing of exceptions and supporting memorandums, be assured in adjudicatory matters before the reviewing authority, and before the Commission if it decides to consider a case. Section 4 of S. 2034 does not provide for oral argument before either the Commission or the reviewing authority. Moreover, it is not even clear that exceptions may be filed before the Commission when it decides to review the action of the intermediate reviewing authority.

As indicated, ABC supports the purpose and concept of S. 2034. In calling the above matters to your attention, it is in the hope that our comments will contribute to an even more effective legislative effort.

Respectfully submitted.

AMERICAN BROADCASTING CO.
By MORTIMER WEINBACH,
JAMES A. MCKENNA, Jr.,
JOSEPH M. KITTNER,
McKENNA & WILKINSON,
Its Attorneys.

JULY 5, 1961.

NATIONAL ASSOCIATION OF BROADCASTERS,
Washington, D.C., June 14, 1961.

Re H.R. 7333.

Hon. OREN HARRIS,
Chairman, Special Subcommittee on Regulatory Agencies, Committee on Interstate and Foreign Commerce, House of Representatives, Washington, D.C.

DEAR MR. CHAIRMAN: On behalf of the National Association of Broadcasters, I respectfully request that this letter be made a part of the hearing record on the above as an expression of the views of the board of directors of this association.

This bill proposes revisions in the procedures of the Federal Communications Commission. The same broad objective of improved efficiency was included under Reorganization Plan No. 2, submitted to the Congress on April 27 by the President, and by S. 2034 now pending before the Senate Commerce Committee.

With this broad objective we are in accord, as we have indicated previously in a statement of position filed in the record on the President's proposal. We reaffirm our feeling that this subject should be dealt with by legislation action rather than by Executive order.

The two pending legislative proposals (H.R. 7333 and S. 2034) have been carefully reviewed, and we are pleased to note that the delegatory features of Reorganization Plan No. 2, which met with very wide objection, have not been carried forward in this proposed legislation.

S. 2034, according to our understanding, represents the "consensus" view of the FCC, and has been submitted to your subcommittee by the Commission in its report on H.R. 7333. This is the agency most affected, and its members should be most knowledgeable of its procedural needs. In our view, it presents a workable and acceptable plan.

Sincerely,

LEROY COLLINS, *President.*

(Whereupon, at 11:42 a.m., the subcommittee was adjourned, subject to the further call of the Chair.)

REORGANIZATION PLAN NO. 2—FCC

TUESDAY, MAY 23, 1961

U.S. SENATE,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON COMMUNICATIONS,
Washington, D.C.

The subcommittee was called to order, pursuant to notice at 10:05 a.m., in room 5110, New Senate Office Building, by the Honorable John O. Pastore (chairman of the subcommittee) presiding.

Senator PASTORE. The meeting will come to order.

This is a hearing on Reorganization Plan No. 2 of 1961 which provides for the reorganization of the Federal Communications Commission.

Under the procedures of the Senate, the Senate Government Operations Committee is the legislative committee which passes on reorganization plans submitted by the President pursuant to the Reorganization Act of 1949, as amended. Plan No. 2, affecting the Federal Communications Commission, was submitted on this basis. However, basic legislation affecting the FCC is processed by the Senate Commerce Committee.

The hearing, commencing today, will be advisory in nature and is designed to assist the Senate Commerce Committee in formulating a position in determining what recommendations, if any, should be made with respect to the reorganization plan.

As everyone knows, this committee has been concerned with regard to the backlog of cases that have been accumulating at the FCC during the past number of years. The inability of the Commission to resolve certain problems, as well as the split amongst the membership on key policy questions, needs no emphasis from me at this time.

The committee, therefore, is anxious to hear the views of the members of the Commission, as well as other interested parties on this plan, and whether it will give the Commission the flexibility that will increase its efficiency and cut back on the heavy backlog of cases.

In spite of the fact that a reorganization plan can be modified or amended, I am hopeful that those who feel that the plan is inadequate will submit specific suggestions that can lead to the desirable objectives of the plan.

The first witness today is James Landis, special assistant to the President; to be followed by Mr. Newton N. Minow, Chairman of the Federal Communications Commission, and the individual members of the Commission who have separate views. The third witness will be Mr. Robert M. Booth, Jr., president of the Federal Communications Bar Association; and the fourth witness will be Mr. Leonard Marks, attorney and former president of the Federal Communications Bar Association.

At the conclusion of the hearing today, we will reconvene in this room on Friday, May 26, at which time Dr. Edward T. Bowles, professor at the Massachusetts Institute of Technology, and who, as chairman of a special advisory group prepared a report for this committee regarding allocations; and Mr. Nugent Sharp, a consulting radio engineer, Washington, D.C.

If Mr. James Landis is ready, so are we. We would like to have you come forward and give us your observations and your impressions and essentially the need for this reorganization plan as recommended by the President of the United States.

Mr. Landis.

STATEMENT OF JAMES M. LANDIS, SPECIAL ASSISTANT TO THE PRESIDENT, WASHINGTON, D.C.

Mr. LANDIS. Mr. Chairman, members of the committee:

The purpose of this reorganization plan is essentially simple. Its purpose is to expedite the dispatch of business before the Federal Communications Commission and nothing else but that.

In going through the reorganization plan, which consists of three sections, I trust you will allow me to explain them section by section.

The first section provides authority to delegate matters before the FCC and I would like to explain that for a moment. Under section 5(d) of the Communications Act, authority is provided under the present law to delegate any functions of the Commission other than an adjudicatory function.

From any decision made by, shall I say, delegatees, an appeal can be taken to the Commission but the Commission can determine whether or not it will hear that appeal.

Consequently, all that this section does is to authorize delegation in adjudicatory matters. Delegation with regard to rulemaking, with regard to any other function of the Commission, is already authorized by the Communications Act.

The theory of allowing delegation in adjudicatory matters is that many matters of that nature that come before the Commission can be disposed of at a lower level rather than requiring a hearing before the Commission en banc.

However, safeguards are written into this section. The first safeguard is that nothing in this section will affect the provisions of the Administrative Procedure Act. Those provisions are contained in section 7(a) of that act which provides that in adjudicatory matters, if there is any delegation, that delegation must be to a hearing examiner appointed in accordance with that act. This plan does not contravene that in any particular. It provides that the provisions of section 7(a) shall not be disturbed and that if there is any delegation in the adjudicatory matters, that delegation must be to a hearing examiner.

The plan, however, does change certain provisions of the Communications Act. The Communications Act is distinguished from other basic statutes governing other communications like the SEC, or the Federal Trade Commission, or the Interstate Commerce Commission, giving a litigant the right to appeal to the Commission plus a right to oral argument.

Those rights can be abused. Not only can they be abused, but they can be protracted in such a way as to take up the time of the Commission on matters that should not take up the time of the Commission en banc.

Now this plan abolishes that function of the Commision, that function that requires it to have a mandatory review of any decisions of a hearing examiner and entertain oral argument at the request of the litagee. Instead of that it provides that the Commission has a discretionary review. It can determine on its own motion or on the request of a litigant whether or not it will choose to review a decision below based upon considerations that, I should assume, go to the importance of the case, the question of whether or not the decision is in accordance with earlier precedence, whether the decision is a novel one or otherwise.

At the same time, the plan provides that the Commission must review in any situation where a minority of the Commission requests review. The theory of the plan in that connection is to provide and maintain the bipartisan concept of our independent Commissions.

Senator PASTORE. You used the word "minority."

Mr. LANDIS. Yes, I used the word "minority," and in my mind, I mean the majority less one.

Senator PASTORE. Less one?

Mr. LANDIS. Less one. And if the minority demands in any case that review should be had of a hearing examiner's decision, that review must be granted.

Senator PASTORE. Always preserving the right of review by the court.

Mr. LANDIS. This has no effect upon judicial review whatever. The provisions of judicial review as they exist are maintained; there is no effort to cut off any judicial review of any kind.

Senator PASTORE. Mr. Landis, in your investigation and study of the backlog situation in the Federal Communications Commission, what conclusions did you reach with respect to the practical effect that the right of oral argument has in piling up a backlog rather than dissolving it?

Mr. LANDIS. I would say this, Mr. Chairman, that oral argument consumes a considerable amount of time. The reason for oral argument consuming so much time is the fact of the problem of intervention in many of these cases before the Federal Communications Commission. It isn't as if you have two parties, one party has 20 minutes, and the other party has 20 minutes or 30 minutes. It is the fact that there are so many intervenors that come into these cases, that you may easily spend a day, 2 days, in oral argument. I don't think, however, that it is, and I would like to say this, it isn't the oral argument that is the important thing, it is the necessity for decision by the Commission en banc. That takes up an enormous amount of time. The problem of decision is a matter that essentially takes up time. The members of the Communications Commission are conscientious people, they have to study a record, they have to study briefs, and they have to come to a conclusion on many issues that really can well be determined down below. If they simply had to determine whether or not to review a case, that would be a much easier determination for them to make.

Senator PASTORE. I would hope during the progress of the hearing, that the Commission would spell out the number of cases that are pending before it now where an oral argument has been requested and they haven't gotten around to it. Let me ask you a further question.

Could this minority, that you have already explained, in the event that it decided to entertain a review on a matter that was called to its attention by one of the litagee parties, entertain an oral argument?

Mr. LANDIS. Oh, yes; yes, indeed.

Senator PASTORE. In other words, the oral argument is not abolished. What you are spelling out here is something more or less by comparison to a writ of certiorari before the Supreme Court as to whether or not the case will be entertained?

Mr. LANDIS. This is exactly the model upon which this plan is based.

Senator PASTORE. You say that if it is a matter that it feels is of such great importance that the decision made either by a Commission or several Commissioners or an agency or hearing officer should be one subject to review because it involves a request that is of great moment, then in that particular case, three members of the Commission could actually force an oral argument, force a hearing before the Commissioners, and as a prelude even to an appeal being taken to the courts.

Mr. LANDIS. That is true.

I might observe also that under the reorganization plan, it would be possible for the Commission to decide that it will divide itself into a number of panels, panels with regard to broadcasting, with regard to common carriers, with regard to safety and the like, and that it could, if it chose, provide an appeal to a panel. This plan does not force anything down the Commission's throat. It provides authority for the Commission to make itself flexible.

Senator PASTORE. I wonder sometimes how effective even a senatorial committee would be if we had to hear all matters before a full committee. We divide ourselves into subcommittees.

Mr. LANDIS. Yes.

Senator PASTORE. And we do that quite often in order to expedite the business of a committee. As a matter of fact you are appearing now before a subcommittee.

Mr. LANDIS. That is exactly the theory.

Senator PASTORE. What you are suggesting under the plan is this: Under existing law, insofar as adjudicatory matters are concerned, that they be included as well; that the Commission delegate the power to the Chairman to assign a number of Commissioners, or even one Commissioner to hear a matter, rather than having the whole body hear it; and once the matter is heard and decided, if three members of the Commission feel that it should be further reviewed, it could be reviewed before the full Commission.

Mr. LANDIS. That is quite correct.

Senator PASTORE. Let me ask you another question.

If this is so simple then, why include it in the reorganization plan? Why not make it a matter of amending the existing communications law?

Mr. LANDIS. I don't know what the answer to that is, except that this is perhaps a convenient way——

Senator PASTORE. Would it shock more sensitivities if it were done that way?

Mr. LANDIS. I don't think so.

Senator PASTORE. I am looking now at the practical result of what we are trying to achieve here, because I have been reading the newspaper reports of your appearance before the House committee. Of course, all these matters usually come before the standing committees of the House and the Senate that have to do with communication matters. Reorganization plans, of course, go before a different committee, that maybe hasn't concerned itself so much in detail with the intimacies of the problems involved in communications. And, a strong argument is being made that possibly it would be more effective and more expeditious and more to the liking of Congress if this were done through the other route. Insofar as you are concerned, if this were accommodated through an amendment of existing Commission's law, you would have no objection to it.

Mr. LANDIS. My only concern is the ultimate objective, Mr. Chairman. If it is done one way or the other——

Senator PASTORE. I hope this dispels the argument that you are trying to make yourself a seer in this, because I don't see it at all.

Mr. LANDIS. I have no intention along that score.

I might observe two other points that are in the reorganization plan: One, is that if the Commission——

Senator PASTORE. Are you through with section 1 of the plan, Mr. Landis?

Mr. LANDIS. Yes; I think so.

Senator PASTORE. Now, I think we ought to open it to questions on section 1, if there are any questions. I think we ought to take this step by step.

Mr. LANDIS. Thank you.

Senator PASTORE. I have asked all the questions I care to. Senator Scott?

Senator SCOTT. Mr. Chairman, I would rather defer my questions until the end, if I may, because I arrived a few minutes late.

Senator PASTORE. Senator Monroney?

Senator MONRONEY. Not at this time.

Senator PASTORE. Senator Yarborough?

Senator YARBOROUGH. None at this time. I think some I might have asked have been clarified and cleared up completely by the chairman.

Senator PASTORE. All right, you may proceed to section 2, Mr. Landis.

Mr. LANDIS. Section 2 provides that if the Commission decides to make a delegation to a panel, to single Commissioners, to hearing examiners, that the deployment of the Commission personnel and the hearing examiner personnel will be under the control of the Chairman. Somebody has to do that job of deployment and the section is based upon the theory that a flexible power should be there. In other words, if you have one panel that is tremendously busy, and another panel that is not too busy, that the Chairman could use the manpower of that Commission to the best advantage of the Commission. I think

that section has been criticized as giving too much power to the Chairman. I can't see it that way. I can't conceive of a Chairman really abusing his power. If he does, there are at least two safeguards, one, that the Commission at any time may rescind any delegation that it has made.

Secondly, that the minority of the Commission can always force a decision en banc.

I would also observe that a Chairman of the Commission in order to be a true Chairman of the Commission, should normally command a majority of the Commission.

Senator PASTORE. Is it contemplated that any authority to be exercised by the Chairman under section 2 would be other than administrative authority?

Mr. LANDIS. Purely administrative in the sense of assigning personnel to particular functions that the Commission itself, not the Chairman——

Senator PASTORE. In other words, he couldn't make any substantive situations and exclude other Commissioners. This would merely be the delegation of authority, that is, the distribution of the delegated authority that comes to him from the Commissioners themselves under section 1?

Mr. LANDIS. That is right. That is completely right.

Senator PASTORE. Well, our chairman does that every day of the week.

Senator SCOTT. Mr. Chairman, may I ask one question for clarification here.

Senator PASTORE. Yes.

Senator SCOTT. Do I understand, Mr. Landis, that in your review of these Commissions, you have found no instance where the Chairman has exceeded or abused his power?

Mr. LANDIS. No; I have not found any instance of that.

Senator SCOTT. I understood you to say it is inconceivable that a chairman of a commission would abuse his power. Having been in Washington 19 years, sir, I just wondered whether that is exactly what you meant.

Mr. LANDIS. Well, I said if it were conceivable.

Senator SCOTT. Yes, sir.

Mr. LANDIS. Then you have these safeguards in there. I don't know, I mean I go back over my knowledge of administrative commissions and I can't recall any instance where a Chairman has really tried to abuse his power. I think it is a very improper thing.

Senator SCOTT. Thank you.

Senator PASTORE. Mr. Zapple has just called a situation to my attention here, and I think it is quite apropos that we resolve it at this moment.

This is an excerpt from a letter that is addressed to me under date of May 11 from the Federal Trial Examiners Conference of Washington, D.C., and signed by Henry S. Sharp, president, and it says:

> We have no doubt that it was intended and contemplated by both the President's message and the implementing Reorganization Plan that the delegation of functions to agency employee boards should occur only in areas where there is no statutory requirement for a hearing before a hearing examiner as provided in the Administrative Procedures Act.
>
> However, the proposed reorganization plan as presently drawn is not so limited.

I understand you are familiar with this statement?

Mr. LANDIS. I would say this, I don't see how this reorganization plan affects the situation one way or the other. The responsibility of the hearing examiners is maintained exactly as it is under the present law. There is no change with regard to that.

Senator PASTORE. Now, let me ask you again, as I asked you in section 1. If it is decided that it would be more, well, let me use the word affectation, to bring about this result by amending the present law rather than doing it by the procedure of the reorganization plan: what is your observation as to that?

Mr. LANDIS. Well, I would say this, I mean the reorganization plan is proposed to suggest an objective that should be reached.

Senator PASTORE. Well, it goes beyond that. You see the reorganization plan, as you well know, means that unless it is rejected by the Congress within a certain number of days it becomes the fundamental substantive law and that there is no deviation. You either take it or leave it, and there may be some parts of this that might be more acceptable and palatable than other parts. There may be some parts of it that might be insignificant, on the other hand, very highly controversial.

I am merely questioning you as to whether or not you are in a position of wanting all or nothing, or whether or not you felt that if Congress felt that there are some parts of it that are much more needed from a way of bringing about this solution of backlog that we have, that it could be done through changing existing law. As a matter of fact, that contention has been made not only by some Members of Congress, but made by some Commissioners as well, as you well know.

I am not suggesting that we are going to do that, but I am merely trying to clarify the record in that regard.

Mr. LANDIS. Well, I would say this, Mr. Chairman, that the fundamental objective is expediting the dispatch of business. The reorganization plan is aimed at that objective. Now I cannot, I have tried conscientiously to see whether there is anything fundamentally objectionable in this reorganization plan. I have listened to testimony that has been given against it and I am frank to say, I can't see anything that is objectionable here.

It may be that legislation rather than a reorganization plan might be a little more desirable in the sense that it can be amended and individual viewpoints can be given their proper weight, but the plan is a very simple plan. There is nothing involved about it. There is nothing hidden about it and it seems to me that as a reorganization plan, it is the kind of thing that was authorized under the Reorganization Act of 1949.

Senator PASTORE. May I ask you another question.

You have already stated that insofar as the right to delegate is concerned, it is already in existing law with the exception of adjudicatory proceedings.

Mr. LANDIS. That is right.

Senator PASTORE. Now considering section 2 in that same respect, would you say that the power, if delegated to the Chairman, to carry out these administrative functions of which we are talking is already in the Communications Act, with the exception of adjudicatory proceedings?

Mr. LANDIS. I think so. It is a difficult question to answer. The language of the Communications Act on that score is—let me quote that language. It is to be found in section 5(a) where the Chairman is authorized, and I quote:

> Generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission.

Now, I can't assert that that authorizes him to distribute the personnel with regard to the delegation of the other functions other than the adjudicatory functions.

Senator PASTORE. That has never been raised?

Mr. LANDIS. It has not, but I would assume that it is the kind of thing that he would do pursuant to the authority that is vested in there.

Senator PASTORE. Did you want to say anything further on section 2, sir?

Mr. LANDIS. No; I would like to go to section 3.

Senator PASTORE. Before you do, I was going to ask if the members have any question?

All right, sir, now you may go to section 3.

Mr. LANDIS. Section 3(a) abolishes a provision of the 1952 amendments to the Communications Act. The 1952 amendments provided for a staff review section and unfortunately, I think very unfortunately, they provided that the staff review section, which in substance was to be an advisory section to the Commission, a section that would examine the records and summarize the records of cases before them, should not make any recommendations to the Commission.

Now that seems to me wrong. If you have confidential clerks, confidential secretaries that you want to have examine certain material before you, I think you should be entitled to get their views as to what that material means. Now here there is a prohibition against that and in abolishing this section, it does not mean that these confidential clerks, the staff review section will be simply wiped out of existence. It will continue to remain in existence in the form in which the Commission feels that a review staff of that type can be made most valuable to the Commission.

It may be a staff such as the Securities Exchange Commission has at the moment, an opinion writing section, which is not inhibited by the prohibitions that are contained in the Communications Act, or it may, if the Commission feels that it be better, be a staff that is broken up in the sense that they are allocated to different Commissioners. Personally I prefer the latter, but that is a matter of pure preference on my part.

Senator PASTORE. Judge Landis, section 3 bothers me more than the other two sections and let me give you my thinking with regard to this.

It has been said, and I think rightfully so, at least it has not been disputed, that the Commission, as such, in one year resolves more litigation involving property than is resolved by a judge of a district court in a lifetime. This accentuates the point that I am trying to express that all these matters are very, very important matters, and in many instances involve a considerable amount of money.

We have a Commission of seven people on the Communications Commission and for obvious reasons they are not all skilled in the law

and can't be skilled in the law because there are certain engineering problems that are involved, technological problems, and we need engineers on that Commission as well as we need lawyers.

Now, if you are going to leave the responsibility of writing a legal opinion to a Commissioner who is not learned in the law, and that is subject to review by a court of appeal, then aren't we taking a bigger chance here of delaying the situation rather than expediting it?

What is your answer to that?

Mr. LANDIS. Well, I can see that there might be some slight delay in there, but I think it would be compensated by, shall I say, greater authority in the opinions themselves, greater concern with them. I think if an individual Commissioner has the responsibility of putting his own name to an opinion rather than having the opinion simply issued anonymously from the Commission as a whole, that we will get better opinions.

I think one of the criticisms of the Federal Communications Commission is that there is not a uniformity of opinions, that in the field of licenses there are too many different precedents from which you can choose and that the law has not crystallized in that field.

Senator PASTORE. The same argument has been made of our Supreme Court but we are not prepared to change that.

Mr. LANDIS. I realize that, too.

Senator PASTORE. I was thinking in this regard and I think that this exchange is good becaues that is the purpose for which we are here, and I could be wrong about this.

You have made a very, very thorough study of this whole field, but what is wrong with having an opinion writing section that would be subservient to the Commission as such, that would review the record, would write an opinion, and make a recommendation and submit it to the Commission for its final approval?

Mr. LANDIS. There is nothing here, Mr. Chairman, which prevents the reorganization of the section along that line. What does prevent it is the existing act at the moment because this opinion writing section, this staff review section at the moment cannot make recommendations to the Commission. It can only carry out whatever decisions the Commission itself makes.

Senator PASTORE. Do you expect to give the Chairman any added authority other than he now enjoys under this section?

Mr. LANDIS. Not at all.

Senator PASTORE. Not at all?

Mr. LANDIS. Not at all.

Senator PASTORE. Do I understand you correctly, in that the only objection you have to the existing situation which you are trying to cure by section 3 is to give to the staff review section the right to make recommendations on the record?

Mr. LANDIS. That is right; just simply freedom of judgment.

Senator PASTORE. Senator Scott?

Senator SCOTT. I assume that you had an important part in preparing this Reorganization Plan No. 2?

Mr. LANDIS. Oh, yes.

Senator SCOTT. May I inquire as to whether the plan has been discussed with all of the members of the Federal Communications Commission?

Mr. LANDIS. I submitted the plan to the Chairman of the Commission and the Chairman of the Commission in turn submitted the plan to his colleagues. I understand that it was discussed at some length by the various Commissioners. In fact, I had some very interesting correspondence with one of the Commissioners dealing with his objections to the plan.

I appreciate his criticisms and I think it could be fairly said that it was discussed; yes.

Senator SCOTT. Do you know whether the plan has the approval of the other Commissioners in addition to the one with whom you discussed it?

Mr. LANDIS. I understand, Senator, that the plan has the approval of three of the Commissioners. I would not say that it has the disapproval, because the other Commissioners can speak for themselves, but it certainly has the disapproval of one or two of the four; and the others, I think, express some agreement with, we will say, 50 or 60 percent of the plan, but have some disagreement with the balance.

Senator SCOTT. Before I go into some questions on section 2, I would like to have you comment on an item I read in the paper, made at the request of the President, that the independent regulatory agencies, set up by the Congress, keep the President advised at certain intervals, I think regular intervals, of what they are doing.

If I am right about this, does the request of the White House that the Commissioners keep him advised, in your opinion, interfere with the independence of the regulatory agencies?

Mr. LANDIS. I don't think so. I think the President, as Chief Executive of this Nation, has a duty under the Constitution of this Nation to see that the laws are executed.

As I see it, he has the complete right to inquire of anybody who has the responsibility in that connection of saying, "What are you doing? Are you keeping up with the business before you?"

Senator SCOTT. I am very hesitant, as you can understand, to discuss law with a dean of a law school, but your statement that the President has the responsibility to see that the laws are faithfully executed would not, of course, put any responsibility into the hands of the President in regard to the process of arriving at a decision by the Supreme Court, would it?

Mr. LANDIS. No; and not by any of the independent agencies either.

Senator SCOTT. You have anticipated me. Not by any of the independent regulatory agencies?

Mr. LANDIS. None.

Senator SCOTT. Therefore, you do not agree then with my concern that, when the independent agencies are notified that the President is watching them and wishes a report from time to time, that this does not in any way run the risk of putting into the mind of the Commissioners, as they contemplate their decisions, this more than errant thought, "What will the President think of this?" You don't fear any of that at all?

Mr. LANDIS. No, I don't fear that. Let me take an analogy.

Senator SCOTT. I am just wondering why the White House wants to be informed regularly unless it is in effect interfering with the judicious or quasi-judicious process of the Commission?

I am a man of the Legislature. I have never been an executive, and I am concerned by the freedom of the Legislature and the independence of these agencies.

Mr. LANDIS. Let me take an analogy, Senator. For example, you have created here the Administrative Office of the U.S. Courts. Now, that Office pays attention to the disposition of business, not whether it is decided for Joe Doakes or John Doe, but whether or not it takes 2 or 3 years or so to get these matters to trial. I can't conceive that the Administrative Office in any way affects the exact disposition of business in favor of one side or the other.

I think this is simply an inquiry to determine how are you handling your dockets. Are you getting the business dispatched?

Senator SCOTT. There is quite a distinction in the analogy you present. The Administrative Office of the Courts has no connection whatsoever with the process of thinking in which his employers, the judges, indulge. But if the Commission, which does exercise quasi-judicious or judicious functions, has to make a report from time to time to the Executive, notwithstanding its being an independent agency, this report is made by the people who have to make the decision and not by some clerk of the courts who says in July, "We tried '*x*' number of cases."

Mr. LANDIS. I should assume that kind of report can be made by the secretary of the Commission; simply a report of business being done.

Senator SCOTT. Why would the White House want to know something which is normally within the jurisdiction of the congressional committees? I can conceive of the Federal Communications Commission being called on by this committee to come up here and from time to time to give testimony as to the state of the docket generally.

I cannot conceive that they could be called up here and be required to report regularly on exactly who is holding a hearing in a given place. But it does appear to me that this whole procedure, the whole series of reorganization plans, is designed to minimize the independence of the regulatory agencies and to give a process of reporting and accounting to the executive department for the purpose of weakening the independence of these agencies. I know you disagree with that.

Mr. LANDIS. I devoutly disagree with you on that.

Senator SCOTT. Whenever I see a philosophy succeed another philosophy in Washington, and I have seen it happen four times around here, I sometimes think there is a tendency to shortcut the law and forget that it is a government of laws and not a government of men. A tendency, perhaps, to expedite in the interest of a philosophy rather than to accord with the congressional intent in creating a situation by statute.

Now, I have this in mind in this case in section 2. The power of the Chairman of the Commission is strongly increased here. I am referring to testimony that will be given later by one of the Commissioners, because it is better stated here than I can state it, but, as I read section 2, and as has been pointed out in this memo, the Chairman apparently could assign a Commissioner, against his will, to perform any work of whatever character which a member of the staff could be assigned under the delegation of authority in section 1 of this plan. This could include assigning a Commissioner to preside

at a protracted hearing in a distant section of the country, to get him out of the way, writing many of the final decisions for the Commission, or writing summaries of minor applications.

The Chairman would also appear to have a power to remove a Commissioner, or work assigned to him by the Commission, and substitute other Commissioners or Commission personnel more to his liking.

Now I realize, Dean Landis, that you have complete confidence in all of the chairmen in all of these commissions because you said you are sure they wouldn't abuse their functions. I commend you, sir, for your human trust and confidence in people which I cannot entirely share. I do believe that even if I trusted all chairmen of all commissions, past, present, and future, I would still want the law to protect me rather than my confidence in the assumed, complete lack of bias on the part of a chairman or a commissioner.

Now if in fact, no matter how good the chairman may be, he may, under your plan, do that which he could not now do, namely, get a balky commissioner out of town and send him to San Francisco for a 6-month hearing. And, he could assign another commissioner to hear a matter which might have political or philosophical implications. Are you not building into the law, through this plan, a chance to maintain a philosophy rather than the normal process of adjudication of matters before the commission?

Now if you ever heard a more complicated question than that, I don't know.

Mr. LANDIS. Let me try and answer that, Senator.

You see, my trust is in the commissions, not the chairmen.

Senator SCOTT. My trust is in the law.

Mr. LANDIS. Well, my trust is where the Congress has placed it, namely, in the commissions, and I think the statement that you have quoted is an exaggerated statement because the entire thrust of delegation, the entire scope of the delegation, is not in the hands of the Chairman, it is in the hands of the Commission. And the Commission can put whatever safeguards around that delegation that it chooses. I think it is comparable to what you have in the congressional committees.

The committee is in control and the Commission is completely in control here and they can vest a small amount of power or a large amount of power in their Chairman. It isn't the Chairman that you are trying to build up, it is the Commission that you are trying to build up.

Senator SCOTT. As I read, Dean Landis, section 2, it says:

> There are hereby transferred from the Commission to the Chairman of the Commission the functions of the Commission with respect to the assignment of Commission personnel, including Commissioners, to perform such functions as may have been delegated by the Commission to Commission personnel, including Commissioners, pursuant to section 1 of this reorganization plan.

Now, aren't you thereby transferring to the chairman the power of assignment of personnel heretofore existing in the Commission?

Mr. LANDIS. Provided there has been a delegation under section 1.

Senator SCOTT. I wasn't born yesterday. Obviously you achieve the delegation of power because you control a majority of the Commission. Then you say, having achieved the delegation of power, the

power comes from the Commission. That is precisely what Hitler said when he was elected Chancellor of Germany. "My power came from the people."

You see, I fear that sort of thing. Now you are saying that this is done by delegation, but the delegation is done by the power of a transient majority, at least I hope it is transient, and then having so delegated, you say with equal piety, but this is only done by the Chairman who now has this great new authority because the Commission gave it to him. Heck, the Commission is so set up as to make darn sure it has got to give it to him. That is what I am getting at.

Mr. LANDIS. You see, Senator, you are correct in the fact that the majority normally rules in any republic or democratic state, but, here in this plan, there is a built in safeguard for the minority, that the minority can always bring any matter to the attention of the Commission in full. Now that is——

Senator PASTORE. Will the Senator yield at this point.

If I may make an observation, I want to ask the distinguished Senator from Pennsylvania a question.

Senator SCOTT. Yes.

Senator PASTORE. While four of these men arbitrarily and capriciously send one of their members into exile, where does he expect this committee to be, asleep?

Senator SCOTT. I would say, first of all, to my distinguished chairman, his reasoning is always cogent, that first, I do not agree with the analogy that Dean Landis has made with this committee. I have great respect for the chairman of this subcommittee, and for the chairman of the committee. I do not recognize that either of them can send me to San Francisco for protracted hearings and if either of them tried it, there might be a difference of opinion resulting. Therefore, I am again attacking one of your analogies. I think this committee would be very alert if it knew what was going on, but I also think that having watched delegated power, and a Commissioner, whose term is about to expire is sent to San Francisco, the Commissioner himself might not report to this committee that the Chairman of the Commission has decided that he himself is going to hear a particular case, and the errant or dissident Commissioner is so far away, that there is not much he can or would want to do about it, so I don't think the analogy is exactly the same. I will say this, if Senator Pastore wants me to go to San Francisco to hold a hearing, I will go. I want him to know I don't make the analogy personally, but I don't think anybody can send me against my will.

Senator PASTORE. No; all I am saying is that you have to take this in the proper complexion. We have seven distinguished people who are on that Commission. They are all individualists in their own rights, sometimes I am afraid maybe too individualistic. That is why 1 week we march up the hill 4 to 3 and next week we march down 4 to 3. After all individualism is good. Now it is true that certain administrative functions are being delegated to the Chairman and it only takes a vote of four, maybe four Democrats or four Republicans, as the situation happens to be. But we still do have a Congress of the United States. Of course, we are going to get ourselves into a cloak and dagger situation if we send somebody to Siberia to hear a Federal Communications case, so he won't be around to vote on some

other matter. Of course, I can't perceive of that very easily, but I think that Dean Landis is trying to make a point here that these men have to behave within the sphere of the law. The law is going to be supervised by the President of the United States, who has that responsibility under the Constitution, and we are a watchdog committee here to watch them also. My experience has been that every time something happens down at the Commission, that one of the Commissioners doesn't like, they usually call up their Senator.

Senator SCOTT. Now, Dean Landis, I am again referring to testimony which will be given later, maybe it is the only chance I will have to ask you the question. It will be said in one of these memos, that the only protection members of the Commission would have from a vindictive Chairman would be to refuse to use any of the authority granted by the plan to delegate functions. This may not be possible since section 3 of plan No. 2 abolishes the review staff and its functions. This raises the question whether it abolishes the last sentence of specification C of the Communications Act which prevents any employee who is not a member of the review staff, from performing any of the duties and functions to be performed by it, except the legal engineering and personal secretary of each Commissioner. Does the plan then, by abolishing the review staff and its functions, require Commissioners and their three assistants, to prepare all of the final decisions which may be assigned to them by the Chairman? It appears to me that it does. Do you think it does?

Mr. LANDIS. I don't think it does at all because the Commission on its own motion can employ any number of people to perform these functions. What section 3 does, and that is all it does, it takes away the, shall I say, the hamstringing of the review section that was inserted in the 1952 amendment. And that is all, nothing more.

Senator SCOTT. Would the Chairman, under this change, have the power to invade the private offices of the Commissioner and assign to his personal staff any delegated function under section 1 of the plan, such as perhaps to assist another Commissioner in delegated work?

Mr. LANDIS. I don't think so.

Senator SCOTT. Then you don't think the Chairman——

Mr. LANDIS. Because the assignment is only pursuant to a delegation under section 1.

Senator SCOTT. You don't think then that the Chairman could direct employees presently assigned to another Commissioner to do work at the Chairman's direction?

Mr. LANDIS. I can't conceive of a published resolution, and the delegation must be done by a published resolution or order, that would authorize a chairman to invade the employees of the Commissioner. I just can't conceive of a thing like that.

Senator SCOTT. You cannot conceive, Dean Landis, of a chairman, once given this power, who might wish to assign a delegate in a ticklish case to one who agrees with his philosophy to another Commissioner, rather than one who does not?

Mr. LANDIS. I can conceive of that.

Senator SCOTT. You can conceive of that?

Mr. LANDIS. Yes.

Senator SCOTT. I believe it does happen.

Mr. LANDIS. I can conceive of that, there is no question about that, that that might happen. However, the safeguard is always there, that it can be brought up before the full Commission.

Senator SCOTT. But then if it is brought up before the full Commission, it appears before the full Commission in this fashion, that the Chairman has assigned Commissioner "A" because he knows Commissioner "A" agrees with him, and Commissioner "B" doesn't like it, and he brings it up to the full Commission, where he is promptly outvoted four to three. What this does is to increase the bickering or unhappiness among the Commission members. But the evil deed, if it is an evil deed, has been done. The philosophy of the Chairman has been promoted through a concurring member of the Commission; has it not?

Mr. LANDIS. Well, that is true. However, I would assume that in this matter of delegation, there wouldn't be a delegation of an individual case. There would be a delegation of a category of cases. A panel would be constituted dealing with broadcasting and you would assign two men or three men to that panel and they would handle the broadcasting cases as they came along. I think that the safeguard in here requiring a published order or rule is such that it would make a delegation of a particular case to a particular Commissioner stick out like a sore thumb and I don't believe it would happen.

Senator SCOTT. You would rely then on some impact of public opinion, I suppose?

Mr. LANDIS. One has to.

Senator SCOTT. If there were an attempt to transfer a particularly touchy or controversial case to someone whose views were pretty well known in that area.

Mr. LANDIS. I think so.

Senator SCOTT. Do you believe, as I do, that transferring of function or of assignment of personnel including Commissioners from the Commissioner to the Chairman, would increase the power of the Chairman with a corresponding decrease in the power and responsibilities of the other members of the Commission?

Mr. LANDIS. You know, I don't think so. I think quite the contrary. I think that this method of delegation and of, shall I put it, in the vernacular, of putting individual Commissioners on the spot, increases their responsibility and I think the more responsibility you throw on people, the greater they grow and I really think that, that this will make service on the Commission——

Senator SCOTT. And the more unwanted responsibility you throw on a reluctant Commissioner, the greater he grows too in his anger but does he grow otherwise?

Mr. LANDIS. I think generally speaking, these Commissioners, and I am not speaking of the present group, I am speaking of Commissioners as a whole——

Senator SCOTT. I am not either.

Mr. LANDIS. They like to do a good job.

Senator SCOTT. They like what?

Mr. LANDIS. They like to do a good job.

Senator SCOTT. I am sure of that.

Mr. LANDIS. And I think they rise to responsibilities as you put them on.

Senator SCOTT. You think as they decrease their independence, their pride grows in their work?

Mr. LANDIS. I think so.

Senator SCOTT. That is all I have to say. It seems like a good exit line.

Senator PASTORE. Dean, there are seven members of the Federal Communications Commission. Do you know the historical reason for seven?

Mr. LANDIS. No, I don't, Mr. Chairman.

Senator PASTORE. How many are on the SEC?

Mr. LANDIS. Five.

Senator PASTORE. Do you know the historical reason for that?

Mr. LANDIS. I should, I really should.

Senator PASTORE. I mean, I am not trying to trap you.

Mr. LANDIS. I really should know that.

Senator PASTORE. The question I raise is this: Why do we have to have seven men meet at one time to decide one question, and object to utilizing them to better advantages in sections, if you are going to have such a large Commission? That is the question I have always asked myself. The President of the United States is one individual who has tremendous power, not only under the Constitution, but he is the only man in the United States who can order the dropping of the atomic bomb. Of course, it is a different situation, but we have to rely on that one individual to make that decision. Now it is true we want to maintain a bipartisan aspect of this agency, there is no question about it. But usually when it is carried out, it is usually in a group of three, sometimes no more than five. Here we have seven on the Communications Commission. I was wondering what the historical reason was for the seven?

Mr. LANDIS. That I don't know.

Senator PASTORE. We have five on Atomic Energy Commission, and I think there, I am not quite sure, but I think that the Chairman has tremendous administrative powers too. At least, especially before the Congress for the whole Commission. I was wondering why we had seven?

Mr. LANDIS. Well, you have 3 on the Federal Maritime Board, you have 11 on the Interstate Commerce Commission, and the Interstate Commerce Commission, under the authority of the Congress, divides itself into panels of 3 apiece.

Senator PASTORE. We have five, I understand, on the Federal Power Commission as well?

Mr. LANDIS. Yes, five on Power Commission.

Senator PASTORE. Seven on this.

Mr. LANDIS. Yes. There is no set pattern for the number of people that you have. I forget how many you have——

Senator PASTORE. Is it your considered opinion that if the power granted to the Chairman to delegate various Commissioners to hear adjudicatory matters, and this power were exercised judiciously and in the public interest, without the subterfuge of removing from the scene an individual who might have a fixed opinion on some other case to follow on, but if this power were exercised in the public interest and judiciously so, is it your argument that this would expedite the functioning of the body in adjudicating cases more rapidly if several Commissioners could be assigned to one as a group to hear

a case as against the compulsion of have them all there to hear the matter at one time?

Mr. LANDIS. That is my definite belief.

Senator PASTORE. Is that the reason behind this suggestion?

Mr. LANDIS. That is exactly the reason behind it.

Senator PASTORE. Is there any other reason behind this suggestion?

Mr. LANDIS. Not that I know of.

Senator PASTORE. Senator Monroney.

Senator MONRONEY. Dean Landis, in section 1, I would like to ask if the power of all of the Commissioners sitting together to delegate authority or to invest sections or panels of the Commissioners, or of the staff, to handle functions now requiring the full Commission of seven—the power to invest also carries the power to divest this authority by a vote of the Commission, a majority vote?

Mr. LANDIS. I am not quite certain that I understood.

Senator MONRONEY. It says that the Commission shall have the authority to delegate——

Mr. LANDIS. Yes.

Senator MONRONEY. By public rule or order, any of its functions to a division of the Commission and individual Commissioners, to a hearing examiner, employee, or employee board, including the functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work.

You have the power to give it to them. What I am asking is: Do the majority of the Commission always have the right to withdraw?

Mr. LANDIS. Oh, certainly. There is no question.

Senator MONRONEY. This is obvious, so the idea of any dictatorship being established is phony as a $3 bill, because any morning four Commissioners assembling can withdraw any function that has been assigned?

Mr. LANDIS. That is certainly true.

Senator PASTORE. Will the Senator yield on that point?

Senator MONRONEY. Yes.

Senator PASTORE. Now you have very wisely set up this minority arrangement by which a matter can be reviewed. Now the argument is being made by Mr. Scott, and I think it carries some weight, that after all you have a bipartisan commission in its form of 4 to 3. You might have a situation where the four Democrats and the four Republicans might gang up on the minority—

Senator SCOTT. Three.

Senator PASTORE. Depending on who had the majority, they might gang up on the minority in situations where certain philosophical questions were going to come before the Commission, and assign these cases in such a capricious or arbitrary way that you couldn't put your finger on it; but in a very cute and subtle way the same result was being accomplished.

Do you have any objection in withdrawing this delegated authority in the same way that you can compel a review? In other words, you can delegate it by four, you would need four to delegate the authority; but you can withdraw it by a minority, that is, the majority minus one, in order to insure, you see, against this partisan situation where four of one party could actually delegate the authority, and then it would require the four to withdraw it. It might

be harder to withdraw it than to grant it, if there were some ulterior motive involved.

In order to promote public interest and rely on integrity of these members, what would be wrong in stipulating that the power would have to be granted by the majority, but it could be withdrawn by the minority with that same majority minus the one?

Mr. LANDIS. Of course, that is a stronger safeguard than is involved in the plan.

Senator PASTORE. Would you have any objection to that?

Mr. LANDIS. No; I don't think so.

Senator PASTORE. Do you see where the public interest would in any way be injured? Do you see that where the expeditious conduct or the performance of the functions of the Commission would in any way be deterred with that arrangement?

Mr. LANDIS. I don't see any; no, I wouldn't.

I would say from my experience, Mr. Chairman, that partisan considerations play a very small part in the determination of these matters.

Senator PASTORE. I realize that, and I back it up.

The question has been raised here, and I understand that one of the Commissioners has raised this question in the matters that have been presented to Mr. Scott, and if I were a minority member of the Commission, chances are I, too, might be apprehensive of the fact that it only takes the majority, or all of one political faith, to delegate this power, and then even though some injustice was being done to us, the minority group, we couldn't withdraw it. It would have to be withdrawn by the same people who granted it, and they might have granted the authority for the same reason that they don't want it withdrawn.

Now under that situation, why shouldn't it be permissible for the other three, who have to stand the scrutiny of the executive department, and have to stand the scrutiny of this body, to have the authority to withdraw that if it were being arbitrarily exercised?

Mr. LANDIS. I can't answer you. I mean, it strikes me that if you have a situation of that nature occurring in any Commission, where you have a fundamental split, not on a particular case but on a basic philosophy, of 4 to 3, and the four really tried to dictate, I would like to see a safeguard in there.

Senator PASTORE. It would be a protection of the minority. You have already adopted that procedure yourself in ordering a review.

Mr. LANDIS. Yes, sir.

Senator PASTORE. So it is no innovation on my part in making the suggestion, but I thought that it might make it more palatable and might protect the public interest a little better if we did put a stipulation in to that effect.

Senator SCOTT. If the chairman will yield.

Mr. LANDIS. It is a very interesting suggestion.

Senator SCOTT. I think it is a very fair suggestion, because it counters—that counters the very objection that I had, the fear, as you say, that having conferred the authority, the same group which conferred it might be reluctant to withdraw it.

Senator PASTORE. I am sorry for the interruption. It came to me at this moment and I didn't want to forget it.

Senator MONRONEY. That is all right.

Section B, as I read it, would make it possible for any such delegation of authority or function to be called before the full Commission by this minority of three, therefore the full Commission would revert, would it not, to its present status quo, in deciding whether to leave the panel with the business or whether to vote that it should be the business of the full Commission?

Senator PASTORE. Not so. You see that minority would only have the authority to call it in for review on the substance of the decision, not as to who should be delegated to hear the case.

Senator MONRONEY. As I read it, functions would mean—and that is what I understood Dean Landis to say—would mean any of the powers delegated herein.

And section B, apart from section 1, provides for this minority of three to always call it before the Commission for review, and that would mean review of whether—the way I read it—it was wise to leave it with panel 1, panel 2, or panel 3, or if it is a matter that should come before the full Commission.

Mr. LANDIS. Any matter can be called before the full Commission by a group of three.

Senator MONRONEY. And the group of three calling it before the full Commission, you have it back where it is now. The Commission can say, we will throw it back to panel 1, or we want the full seven Commissioners to handle it. If it is a highly controversial case, the odds are that the majority would welcome to have the full panel there to satisfy the public feeling in this matter, would they not?

Mr. LANDIS. I can say that if the situation would arise, that we will say panel 3 would not be trusted, why, any matter that came before panel 3, the three Commissioners would say, "Well no, we want a full hearing on that"; and the results would be that you would change that delegation.

Senator MONRONEY. The full Commission would decide whether they wanted a full Commission hearing by the three minority members.

Mr. LANDIS. They must have a full hearing on the motion of three.

Senator MONRONEY. They wouldn't necessarily have to go to the full case; it would be the assignment of the case they would be reviewing at that point, and yet their decision could then be to assign the case if the majority and minority felt it was of importance enough, to come before the full Commission at that point by a majority vote, just the same as a decision on the case would require a majority vote.

Mr. LANDIS. You see the theory of this is very much like the theory of the granting of a writ of certiorari by the Supreme Court of the United States. That writ is formally granted by four members of that nine-member Court who wish to have the matter reviewed. Sometimes I understand that even three members, if even three members want the matter reviewed, the Court will review it.

Here it isn't a matter of discretion; it is a matter of right, that the three men—in the case of FCC; two men in the case of the SEC—could demand and insist that the matter be reviewed by the full Commission.

Senator PASTORE. I am afraid very much that what Senator Monroney is saying is that any three men can throw it before the whole Commission at any time. It is true. But after all, the Senator from Rhode Island likes to write a law at the time we hold the hearings.

That has always been my desire and ambition in previous instances, and if there seems to be an objection here on the question of this authority and how you can rescind it, and there is no objection on anybody's part, that we reduce this to three rather than four, then I don't see why we shouldn't settle it that way and get on with our work.

Now it is true, the chances are you can accomplish it, as Mr. Monroney suggests, but if this procedure which you have suggested, of putting the matter before the whole Commission on review, can be adopted in allowing three members of the Commission to withdraw any delegated authority, and no one seems to object to it, and if that will quell the disturbance or the doubt in the mind of this particular Commissioner who has raised the point of being sent into exile, then I think that we ought to more or less compromise and get on with our work. That is the only reason why I made the suggestion.

Senator SCOTT. If I may, just to keep the record straight, I would never refer to San Francisco, the Queen of Cities, as exile. It is one we all love.

Mr. LANDIS. You know, Senator, I was thinking when you were speaking of San Francisco, that I would like to be sent there.

Senator MONRONEY. I am sure the Commissioners are not going to have any hearings at Alcatraz; and if word comes that there is to be an important vote of the full Commission, they would even pay their own airline passage back to Friendship to vote. There is no way you can keep him in exile. They may be enjoying the tortures of the Queen City of the Pacific, but they can still return and they can't be kept away from a meeting; so I think this charge is eyewash. I can't buy it, and I think it is thrown in there to confuse rather than to enlighten.

Senator SCOTT. I am afraid it is hogwash to assume that what I said was eyewash.

Senator MONRONEY. You didn't say it; you were quoting some testimony. I certainly wouldn't say anything about what the distinguished Senator from Pennsylvania said.

Senator SCOTT. I understand.

Senator PASTORE. Now that we have had our little debate here, Senator, any further questions? Senator Monroney?

Senator MONRONEY. The review staff in section 3 that is abolished would be supplanted by what review body?

Mr. LANDIS. I don't think they would really be supplanted, Senator; I think they would stay there, but they would not have the restrictions on them which they have under the Communications Act now of not being able to recommend what they think should be done with any particular case that they have reviewed. I think the history of this section is fundamentally due to the fact that at one time the bar, Federal Communications bar, thought that the staff controlled the Commission too much, and they wanted to correct that situation. And——

Senator MONRONEY. Would you speak up.

Mr. LANDIS. For that reason, the amendment was passed in this form.

Now it is silly to think of a staff controlling a Commission. I mean, you have to have Commissioners that control themselves, but they need help and they need aid, and they need suggestions from the staff

that they employ. Now to hamstring the staff and say you mustn't make a suggestion, seems wrong, and all this section does is remove that element.

Senator MONRONEY. One other question, and then I will conclude my questions.

Does the Chief Justice of the Supreme Court now have the right to assign individual Justices the cases that come to the Supreme Court for their opinions?

Mr. LANDIS. That is the practice, as I understand it. I know it was the practice some 25 years ago, and I am sure it is still.

Senator MONRONEY. Not assigned by the full Court, but by the Chief Justice exercising administrative function?

Mr. LANDIS. That isn't true in all courts. I happen to know in the New York Court of Appeals, they go by rotation. But that is just a custom in the one court, and not the custom elsewhere.

Senator MONRONEY. Would you put into the record the numbers, the types of cases approaching minutiæ that require the full Commission's consideration and decision?

Mr. LANDIS. Yes, I will be glad to do that.

Senator MONRONEY. As I understand it, there are a great many functions which any reasonable person, you could say, could be handled by staff or by panels, not approaching the large important assignments of licenses for television broadcasting, and things of that kind?

Mr. LANDIS. There are many small matters, and I would be glad to list them.

Senator MONRONEY. Is it your idea that the purpose of this is to be able to more quickly dispose of these small items where there is no great contest and no great transcendent importance as to who the licensee may be for a major television station granted?

Mr. LANDIS. That is the theory.

Senator MONRONEY. Thank you, sir.

Senator PASTORE. Senator Thurmond.

Senator THURMOND. Mr. Chairman, I would like to associate myself with the suggestion made by the distinguished Chairman.

Dean Landis, I did not get to hear all of your testimony. I am just wondering if you would tell us under this proposed reorganization plan what additional powers, specifically, are vested in the Chairman and what specific powers are divested of the Commissioners?

Mr. LANDIS. There is only one power that is vested in the Chairman by this reorganization plan, and that is in the event that the Commission chooses to delegate a group of cases, we will say, to a panel——

Senator THURMOND. Just a minute. I can hardly hear you.

Mr. LANDIS. That is if the Commission would form itself in panels or provide that an individual Commissioner should be assigned a group of cases. The only power is that the Chairman can say, "Commissioner Doakes will take this calendar this time this week, or this month, and Commissioner Jones will take this calendar next month," and the like. It is a simple power of, as I say, purely deployment of existing personnel, and that is all.

Senator THURMOND. Under your construction of this plan, does the Chairman deploy the personnel or does the full Commission do that?

Mr. LANDIS. Well, the Chairman deploys, not the full Commission.

Senator THURMOND. The Chairman deploys the personnel?

Mr. LANDIS. Yes, in accordance with whatever delegation the Commission has authorized.

Senator THURMOND. In other words, the majority of the Commission can authorize the Chairman to deploy all the personnel?

Mr. LANDIS. Deploy all the personnel.

Senator THURMOND. Choose the personnel?

Mr. LANDIS. Choose the personnel that will handle the adjudicatory matters.

Senator PASTORE. Will the Senator yield at this time?

He can do that now under existing law.

Mr. LANDIS. I think he has that power.

Senator PASTORE. Your argument is that on this reorganization in carrying out the reorganization of the Commission under existing law, that power could not be delegated without this reorganization plan by the Commissioners to the Chairman to supervise the hiring of help?

Mr. LANDIS. Oh, yes; yes, indeed.

Senator THURMOND. This doesn't automatically place that responsibility upon the Chairman? It has to be delegated by the Commission?

Mr. LANDIS. Yes, before he can act.

Senator THURMOND. Thank you, very much.

Senator PASTORE. Senator Yarborough.

Senator YARBOROUGH. I have only one observation. I have been intrigued by the Chairman's question why seven seems to have been a magical number since antiquity. There are seven days of the week, seven wonders of the ancient world, seven hills of Rome and miles of people now who think if two ivory cubes come up with the combination of the number seven, that would be the best in the world.

I think it most likely that there were seven Greek heroes in Greek mythology who went out to take Thebes and reform Thebes.

Perhaps this seven-man Commission might have a task somewhat like that and might have its precedent in the committees of public safety of the revolution where they were often composed of seven men. Maybe the Congress thought this Commission could act as a committee of public safety for the people in their interest.

I have no further observation.

Senator PASTORE. Doesn't the Dean want to comment on that recitation of mythology and history?

Mr. LANDIS. I just say, Mr. Chairman, the next time I play I would like to come up with a seven.

Senator PASTORE. Senator Hartke.

Senator HARTKE. Dean, I am sorry I was late, too.

I would like to ask one question, and I suppose this authority to delegate, of course, does repose in the Chairman with the idea that he will exercise it with great discretion and ability. But the extension of authority goes down to the fact that a menial clerk of the lowest rank could make a determination upon the authority of the Commission Chairman, isn't that right?

Mr. LANDIS. No, it isn't. I have to correct you on that.

The authority to delegate any function of the Commission is already vested in the Commission except for an adjudicatory function. The authority to delegate an adjudicatory function is controlled by

section 7(a) of the Administrative Procedure Act, and if that is delegated, it must be delegated to a hearing examiner appointed in accordance with the terms of that act.

Senator HARTKE. Yes, I understand.

Mr. LANDIS. So this is not a question of authorizing the Commission to delegate menial laborers or anything of that nature. This is really delegating the adjudicatory function.

Senator HARTKE. But as I read this in section 1, it says, "It functions, too, in permitting the other parts," it says, "or an employee."

Mr. LANDIS. That is right.

Senator HARTKE. What functions would be delegated to the employee, for example?

Mr. LANDIS. I don't believe there can be—well, I would say this: This plan does decrease the authority that is presently possessed under section 5(d) of the Communications Act, and it may be that certain functions which the Commission chooses to delegate, both under that section and under this section, could be handled either way, under the plan or under the act. I don't think it increases the authority to do so, but it makes it easier to perhaps create employee boards to handle certain functions that are not required to be handled under the Administrative Procedure Act by hearing examiners, the way in which the Interstate Commerce Commission has employed employee boards. I don't believe the FCC has ever done that. But it may be that they will learn something as to new procedure.

Senator PASTORE. Dean, I think Mr. Hartke is referring to section 1, which reads:

A hearing examiner or an employee.

Mr. LANDIS. That is right.

Senator PASTORE. Now his point is, is this law broad enough to authorize the Commissioners to grant this authority to the Chairman and the Chairman could very foolishly—if he did it, of course—take and have someone that is not proficient, any employee, even a very—well, I don't want to use any words because I don't want to deprecate anybody's job—but take any person who has a menial task to perform in that Department, could the Chairman arbitrarily assign him to hear a case of an adjudicatory—I know he wouldn't, but I mean, he could under the law, couldn't he?

Mr. LANDIS. No; not because of the proviso that is in here.

Senator PASTORE. That is what Mr. Hartke wants you to do.

Senator HARTKE. Let's take a matter not of an adjudicatory nature; let's come back to a lot of these other things which could really affect the operation. I mean, do you want to give this down to mail clerks? Couldn't it, theoretically, under this?

Mr. LANDIS. Theoretically, the Commission can do that under existing law. If you turn, as I said, to section 5(d) of the Communications Act, 5(d)(1), it says:

Except as provided in section 409—

which covers the adjudicatory matters—

the Commission may, when necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, by order assign or refer any portion of its work, business, or functions to an individual Commissioner or Commissioners or to a board composed of one or more employees of the Commission, to be designated by such order for action thereon.

It is tremendously broad authority that they have today under the Communications Act.

Now, this confirms that authority, but provides that, if the delegation is made under this plan, there are certain safeguards which are not even present under the Communications Act today.

Senator HARTKE. Thank you.

Senator PASTORE. All right, Dean——

Senator MONRONEY. Could I ask one more question?

In line with that, the proviso in section 1, that the Administrative Procedure Act shall apply, you have a very definite set of rules for hearing officers and their procedures, and their right to disqualify or their direction to disqualify if they are personally interested, written into this, so it would protect against the assignment of important cases to those not qualified to hear it, would it not?

Senator PASTORE. That is right.

Mr. LANDIS. Even as against unimportant cases; they have to go before hearing examiners.

Senator HARTKE. Mr. Chairman, may I please?

This in fact does not—this is an extension, however, of section 5(d)(1), is it not, and applies to an employee rather than an employee board?

Mr. LANDIS. Well, it is under section 4(d). The board can be composed of one employee, as the act is written.

Senator HARTKE. But the idea of a board, even of a Commission member, implies there is some thought given to the designation of somebody of responsibility?

Mr. LANDIS. Yes.

Senator HARTKE. And this is relieved really by this provision, is it not?

Mr. LANDIS. Yes. I would say that, under the literal interpretation of that, you could go a little further, but I can't——

Senator HARTKE. Is there any purpose in including the extension to an employee?

Mr. LANDIS. There is no purpose whatever.

Senator PASTORE. In other words, are you saying now, if we deleted the word "employee" from section 1 of the reorganization plan, that it would cause it no violence?

Mr. LANDIS. None.

Senator PASTORE. Here we are. We are in position to drop.

Any further questions?

Senator HARTKE. No.

Senator PASTORE. Thank you very much, Dean.

Now, will the Commission please come forward.

Let me say, as boards go, I have never seen a more handsome group of men who have been matched together than that which presents itself here today.

All right, Mr. Minow, I think you may proceed.

STATEMENT OF HON. NEWTON N. MINOW, CHAIRMAN OF THE FEDERAL COMMUNICATIONS COMMISSION; ACCOMPANIED BY COMMISSIONER ROSEL H. HYDE, COMMISSIONER ROBERT T. BARTLEY, COMMISSIONER ROBERT E. LEE, COMMISSIONER T. A. M. CRAVEN, COMMISSIONER FREDERICK W. FORD, AND COMMISSIONER JOHN S. CROSS, FEDERAL COMMUNICATIONS COMMISSION

Mr. MINOW. First, on behalf of all the Commission, let me thank you and the members of the committee for having us here today. We appreciate your great interest in this very important problem.

I might just digress a moment. Senator Yarborough asked why there were seven Commissioners. I had suggested that at one time we might change the name of the Commission, in view of our history, to the "seven untouchables." Since the reorganization it has occurred to me it should be perhaps the six untouchables and the one unmentionable, because so much has to do with the role of the Chairman.

But I would say to you, all of you, that I take all this discussion impersonally, and in that spirit I will hope to testify about it today.

You talk about "Mr. Chairman" as being any chairman, because our relationships, and I am sure my colleagues would confirm, have all been extremely cordial and congenial in the Commission thus far.

Now I have a statement, Mr. Chairman, which I should like to read, if that is agreeable.

Senator PASTORE. All right, sir.

Mr. MINOW. I would like to take up each section of the Reorganization Act. What I will read is my own personal view; it does not reflect the view of anyone else.

Senator PASTORE. We realize that, and will hear each of the Commissioners who cares to be heard.

Mr. MINOW. Section 1: This section gives the agency much needed flexibility in handling its caseload. At the present time, the Commission must hear oral argument and pass on the exceptions in every adjudicatory case (see sections 5(d)(1), 409(b) of the Communications Act of 1934, as amended, 47 U.S.C. 5(d)(1), 409(b)).

We are, as I understand, the only administrative agency under this. This is a problem unique to the Federal Communications Commission.

Senator PASTORE. Are you going to explain in your statement exactly what that does in creating a backlog or in resolving it?

Mr. MINOW. Yes, sir; I hope to give some examples.

Even in the nonadjudicatory case, where it may delegate its functions, the full Commission must then permit and pass upon an application for review (see sec. 5(d)(2)).

In view of these restrictions, it is difficult, if not impossible, to alleviate the administrative lag or backlog, concerning which the Congress is so familiar. (See, e.g., H. Rept. 2238, 86th Cong., 2d. sess., pp. 1-2.)

Equally important, the Commissioners' time is so much taken with deciding routine cases that the consideration of major matters of policy and planning necessarily suffers.

Reorganization Plan No. 2 would end this unfortunate situation. It would give the agency the discretion to handle each matter as it deserved. For example, when a petition for discretionary review of an examiner's initial decision in an adjudicatory case is filed, there would be the following possibilities:

(1) Where the Commission—or at least five Commissioners—after examination of the petition, determines that the case involves no new important policy or legal consideration nor any significant factual error or departure from established policy or law, it will simply deny the petition, thus making the examiner's decision final and appealable to the courts. This, I submit, is wholly sensible. For it is a waste of the time and energies of the parties, the agency, and, in effect, the public to insist that the administrative process continue before the full Commission for another year or so, only to end with the same result and for the same reasons and findings. (See S. Rept., 168, 87th Cong., 1st sess., pp. 7–9.)

Senator PASTORE. You are saying it takes at least five, but three could decide to put it before the whole Commission.

Mr. MINOW. Exactly.

(2) If the Commission concludes that the case, although involving routine principles, does raise a serious question of factual error on some significant findings or a departure from established law or policy, review is of course called for. Where the facility or license at issue is a relatively unimportant one—as for example might be the case in many of the thousands of applications filed each year in the safety and special services field—the Commission could delegate such review to a board composed of specialized employees having no other duties. Any alleged error of this board would then be subject to discretionary review by the Commission. But if, as I would hope, the board had corrected the factual errors, if any, and reached a proper decision, the petition for discretionary review would be denied—by the vote of a majority plus one—and again the case would be ripe for review by the courts.

Senator MONRONEY. Do you mean five again?

Mr. MINOW. Three. In other words, if any three wanted to bring it up, it would be before the full Commission.

(3) Where the significant factual error or departure from established policy or law occurs in a case involving a valuable facility, the Commission might assign the case to a panel of three Commissioners. I would think that there would be included in this group a number of the standard broadcast and FM cases heard either on issues of comparative qualifications, allocation under section 307(b), interference, rules compliance or the like. Many of the common carrier adjudicatory proceedings—and I have an appendix attached listing those—could be heard by panels as could operator license cases of more than routine nature. Here again there would be discretionary review of the panel's decision by the full Commission, upon the vote of any three Commissioners.

(4) Finally, where the case raises important matters of policy or law, the full Commission would of course entertain the appeal. Fur-

ther, I would expect that large, multiparty comparative television channels to major cities or proceedings to revoke or deny renewal of a broadcast station license would in most instances be considered and decided by the full Commission.

Where the Commission grants the petition for discretionary review, exceptions will be permitted, either to the employee board, the division of Commissioners, or the full Commission. See section 8(b) of the Administrative Procedure Act, (5 U.S.C. 1007(b)).

Oral argument would be allowed in every instance where it would serve a useful purpose. To hold such argument where it would serve no useful purpose—where, for example, the issues are few and clearly grasped from the pleadings—would be unjustified.

The test of any procedure in any given case must be whether it serves a public purpose: If it does, it will be utilized; if it does not, private parties or their counsel have no legitimate complaint in its rejection. Of course, in the cases heard by the Commission because of their important policy connotations, oral argument would continue to be the rule.

Similarly, in the nonadjudicatory case, the Commission could now deny, without assigning reasons, the petition for discretionary review, and thus make the delegated decision its final action. I have set out in appendix B a few examples in just one field where such power would aid the Commission in the prompt dispatch of its business.

The foregoing observations as to the possible application of the plan are necessarily tentative at this time. Further, I have not described all the procedural possibilities available under the plan, and could not do so. For, obviously, such procedures and applications will be gradually and carefully developed by the full Commission over the next few years.

I emphasize that. Whatever course we take would have to be decided by all of us. I could not embark on any of these examples I have given you without the concurrence of the Commission.

What the plan has done is to remove the present straitjacket, in order to enable the Commission to concentrate on important matters and to cut down the administrative lag. If we fail to make full use of this flexibility, the fault will be ours. But if the flexibility is withheld, I do not believe Congress can fairly continue much of its criticism of the administrative process.

It may be urged that the Commission will not review decisions containing factual errors or important policy questions. I do not think we will let a decision containing a significant factual error slip by, provided the petition for discretionary review calls it to our attention. But if we do, the courts will catch the error and remand the case to the Commission.

As to the important policy question, I assure you that neither I nor my colleague serve the Commission to duck important issues.

To let an examiner or an employee board be the final word on the development of important policy would be incongruous and incredible. But it is just as incongruous—although unfortunately not incredible—that this Commission, which is faced with urgent problems in space satellite communications, TV allocations, and a host of other matters, must set aside almost a full hour to hear, and necessarily additional time to decide, whether the ship station license for a coastal fishing boat should be revoked or suspended for 3 or 6 months.

Senator PASTORE. And that is a matter of right on the part——

Mr. MINOW. There is nothing we can do. Under the present statute and plan of our procedure, Mr. Chairman, we must entertain all cases requesting oral argument.

I have set out in appendix C a list of the cases heard by the Commission in the last quarter of 1960. To give but one example of the effect of the plan, on the first day of argument in that quarter, October 13, 1960, the Commission heard argument on the following four cases, totaling 260 minutes or roughly 4½ hours:

1. Springfield, Ill., deintermixture proceeding—in re amendment of section 3.606, table of assignments, television broadcast stations (Springfield, Ill.-St. Louis, Mo.), and proceedings pursuant to remand in *Sangamon Valley Television Corp.* v. *United States and FCC, et al.* There were 120 minutes consumed in oral argument.

2. Patterson, La., ship radio revocation proceeding—in re Patterson Shrimp Co., Inc., in a show-cause proceeding why there should not be revoked the license for radio station WC–3826 aboard the vessel *Howard Rochel* at Patterson, La. Forty minutes were consumed in oral argument.

3. Proceeding in re application of James J. Williams for a construction permit for a new standard broadcast station at Williamsburg, Va. Forty minutes were consumed in oral argument.

4. Proceeding in re applications of Herbert T. Graham and Triad Television Corp. for construction permits for a new standard broadcast station at Lansing, Mich. Sixty minutes consumed in oral argument.

Senator PASTORE. Let me ask you, under the law, must you have a quorum present to hear oral argument?

Mr. MINOW. Yes, sir.

Senator PASTORE. If you have four members can you proceed?

Mr. MINOW. Yes, sir.

Senator PASTORE. What was the experience in these four cases; how many commissioners were there?

Mr. MINOW. This was prior to my arrival.

Mr. FORD. Usually all Commissioners are there. Sometimes one will be out of town, sometimes two, in the case when Commissioners Hyde and Craven were in Europe at an important international conference.

Senator PASTORE. Is it fair for us to assume in these four cases which have been given as an example, that the seven were there?

Mr. FORD. Normally you can assume that the seven were there.

Mr. MINOW. I would emphasize: It isn't just the time taken in oral argument; such time is the part of the iceberg that is above the water, the rest of it then is making a decision and agreeing on an opinion. There may be dissents, indeed, when there are seven people there often are. So the time is not just the time spent listening to oral argument, it is the fact that all seven of us must hear every case, regardless of its importance or its lack of importance.

Senator PASTORE. I know, but if you had, let's say, a score of these cases, all piling one up behind the other, and then you had some important matters that were following, you have to take them in their turn, otherwise you get some complaint on the part of the litigants, because insofar as they are concerned, their matter is most important

to them, no matter how trivial you think it is by comparison. The fact of the matter is, I am trying to find out if that is what causes the backlog, not so much of how long it takes, but what it does do to all the other cases backing up.

Mr. MINOW. That is right. We have a number waiting for assignments for oral argument.

Senator PASTORE. That is what I want this record to show, what the experience has been for the last few years. How many cases are piling up. If you are keeping abreast, I don't think we have too much of a problem.

Mr. MINOW. I will be glad to submit for the record a table prepared by the staff which will give you a full rundown.

Senator PASTORE. Yes, I would like to know what this does to the whole panorama of the calendar.

Mr. MINOW. I will submit that for the record, Mr. Chairman.

Now, to take up that, to give you an example of how, if this plan were in effect, we would operate differently. The Commission would undoubtedly have heard the argument in the first case, the Springfield, Ill., deintermixture proceeding, since the proceeding involved important and unusual policy and factual matters.

But in the next case, the question whether the ship station's license of a shrimp boat should be revoked did not involve any novel question whatever: Certainly any employee board could have disposed of the factual issues raised. And, just as clearly, a division of the Commission—or perhaps an employee board—could have dealt with the two following cases involving routine issues as to applications for standard broadcast facilities. (Indeed, the time of the full Commission was essentially wasted in case No. 3 because the voluntary dismissal of one of the competing applications a month after the argument rendered the comparative issues moot.)

If either the panels or the board erred, such error could be corrected by the Commission on petition for discretionary review. Again, any three could bring it to the full Commission.

I think this example day, which would be multiplied many times in view of the roughly 50 cases in which oral argument was heard last year, illustrates the benefits the Commission would derive from its new found flexibility under the plan.

Section 2: This section provides that the Chairman shall assign the personnel, including Commissioners—

to perform such functions as may have been delegated by the Commission to Commission personnel, including Commissioners, pursuant to section 1 * * *.

This provision is thus a housekeeping one: It is necessary that someone decide the makeup of the panels and boards and be responsible for the equitable and efficient allocation of such assignments.

As the President pointed out in his special message of April 13, 1961, that "someone" should be the Chairman—the agency's chief managerial officer. And, indeed, the act presently designates the Chairman as—

the chief executive officer * * * (with the) duty * * * generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission.

That is section 5(a).

Some of my colleagues have informed me, and I will inform you, of their opposition to this provision. They have stated that while they know that I would not abuse the power so bestowed, and I in turn have assured them that any assignments made would be on a rotational basis as far as practicable, I would just as soon have that in the law, as far as that is concerned, in principle the provision——

Senator PASTORE. Let me get that straight. You mean in the reorganization plan that was submitted you would be perfectly willing to have an insertion in there that the assignment of these adjudicatory cases should be made in rotation as far as practicable?

Mr. MINOW. I am conscious, Mr. Chairman, of the point Senator Scott raises. I would be perfectly agreeable to having a provision that assignments of Commissioners, be made, on a rotational basis.

For example, the Administrative Procedure Act today requires that hearing examiners are to be assigned on a rotational basis. The way we do it at the FCC today is we delegate to our chief hearing examiner the power to assign hearing examiners to cases. He does it on a rotational basis, bearing in mind that occasionally workload problems arise; but insofar as practicable it is done on a strictly rotational basis.

Senator PASTORE. Now we understand ourselves that in the delegation of this authority under section 1, the majority of the Commissioners could so stipulate in delegating the authority, but you would give the added protection of writing it in the law.

Mr. MINOW. I would be perfectly agreeable to that. I wanted to mention whatever delegation was made would be made by the Commission. They could so stipulate in our own rule or order.

Senator PASTORE. You would prefer to have it written in the law?

Mr. MINOW. I would go further. I would just as soon be on the record. I don't care whatever, and I so told the House committee the other day, about making assignments to Commissioners. I am giving you my personal view on that.

Senator PASTORE. Say it again.

Mr. MINOW. Section 2 now says, as you recall, "including Commissioners." Now that is fine; but I would say, as far as I personally am concerned, that I don't care about such assignment authority, because I have learned that if you want to operate well in a seven-man commission, you must command the cooperation of your colleagues or there is no point in trying to serve.

Senator PASTORE. I missed the point of what you would suggest.

Mr. MINOW. I have no objection to eliminating the words "including Commissioners" in section 2 of the plan.

Senator MONRONEY. The Commission would then assign the Commissioners rather than the Chairman?

Mr. MINOW. Right. The other alternative would be for the Commissioners just to not delegate to me, as Chairman, any authority to assign Commissioners. All this is up to the Commission to decide, not up to me. If the Commission decides, if they don't want to delegate to the Chairman the power to assign Commissioners to any task, they can do so.

Senator PASTORE. How would you bring it about then? How would you get your authorities to have two Commissioners?

Mr. MINOW. It would have to be if my colleagues so gave it to me. This is under section 2. Suppose the reorganization plan went into effect. Unless the Commission itself, then, took action pursuant to this plan giving the Chairman certain powers and certain delegation, nothing would happen.

Senator PASTORE. That is true, but we are talking here in terms of four ganging upon the three. Now, I am not saying it is going to happen, but it is possible. Now, how would you obviate that? The question was raised by Mr. Scott.

Mr. MINOW. I would go along with your suggestion earlier during Dean Landis' testimony to have the three be able to cancel out a delegation.

Senator PASTORE. In other words, unless you could get five members, you would not be interested in carrying this thing out too well because you would not have the cooperation of the Commission?

Mr. MINOW. My point is this, Mr. Chairman: I support this plan particularly because I want to do the job. We have to get on with our work. We are behind, but I am not saying for a moment, and I so told the House committee, that this is the only way that it can be done. What we have been asked to do is comment on the President's plan. I believe it is a good plan. I am for it. I support it. But I am not saying that this is the only way, in view of the expressions here, that we could accomplish the same result.

Senator PASTORE. All right.

Senator SCOTT. If the chairman would yield.

Senator PASTORE. Yes.

Senator SCOTT. I would like to comment that this certainly would seem to me to be an improvement, and to some degree would obviate the fear which I know some Commissioners have because of the phrase "including Commissioners."

It seems to be derogatory to their independence and some reflection on them as a Commission. I think the Chairman's suggestion is an excellent one.

We have to speak always in the future. We have no reference to any present Commissioner.

Senator PASTORE. Do you feel then that, if we excluded the words "including Commissioners," then the remaining part would have sufficient body to authorize you or authorize the Commissioners to delegate the authority to you and delegate it in such a way that two Commissioners could be assigned to hear a case?

Mr. MINOW. I think it could, but it would be dependent on what the specific language of the delegation of the Commission was.

Senator PASTORE. I even go beyond that. I am afraid whether or not you might have a vacuum in substantive law that would give to the Commissioners the authority to hear something, where it has to be heard now by seven, by the full Commission.

I mean, where would the two Commissioners get their authority, once delegated to them, by the whole Commission to hear a case and adjudicate it?

Mr. MINOW. Well, they would get it under—you are assuming the plan passed—they would get it under section 1.

Senator PASTORE. Under section 1 that reads "Functions to a Division of the Commission." You would leave out the words "an individual Commissioner."

Mr. MINOW. Right. I would be perfectly agreeable to that.

Senator PASTORE. Right.

Mr. MINOW. There has been so much confusion about the plan. We could, today, delegate our rulemaking functions to a single Commissioner, or a panel of Commissioners; and in my opinion very often our rulemaking functions are much more important than our adjudicatory functions. We could set up a panel to hold a rulemaking on vital allocations matter. My point is that we have been entrusted with this in the law for years and years and years, and that gives you an indication of how we would operate under the plan. Our future action would be reflected in our past action on delegations, where we have kept critical responsibility within the Commission and not delegate it capriciously to staff people.

Senator PASTORE. Well, now, the next question that I ask is this. I am wondering if we are not talking too quickly here. We do allow one hearing officer to hear an adjudicatory case. Now, what is wrong with allowing one Commissioner to hear it?

Mr. MINOW. This, at one point, Mr. Chairman, was the practice. Some of my colleagues have sat in that capacity in years past, and they can tell you about their experiences in that. It would seem to me to be unwise to assign individual Commissioners to long protracted cases, because we would then lose the benefit of their participation on important matters where we have to make policy judgments.

Senator PASTORE. In other words, your point is that anything that might be considered important enough to assign a Commissioner, it would be important enough to have two?

Mr. MINOW. This would be my view. Take this week, I can give you a practical example of what I mean. We are confronted now with something far transcending, it seems to me, our normal hearing work—namely, this whole problem of space satellite communications. We have to make some judgments and some decisions now on private enterprise participating in this whole field so important to the future. But we sit there, very often immobilized, listening to these arguments which are of no national importance whatever. They are, of course, important to the people involved. My point is they could get just as good justice and informed action by having either panels or employee boards, but we have got to be freed of this redtape we are in now, where we cannot tend to the important business.

Senator PASTORE. It makes a lot of sense to me. I guess that is why we are here.

Now, on this question of breaking for our lunch hour, what is the pleasure of my colleagues? I thought it might be a good point to stop here now and come back at 2 o'clock.

We have been sitting here since 10. We will recess now until 2 o'clock.

Before doing so, I would like at this time to make the following a part of the hearing record:

Letter dated May 18, 1961, to Hon. John L. McClellan from Robert E. Lee, Commissioner, Federal Communications Commission;

Letter dated May 18, 1961, to Hon. Warren G. Magnuson from Louis J. Appell, Jr., president, Susquehanna Broadcasting Co., 53 N. Duke St., York, Pa.;

Letter dated May 18, 1961, to Hon. Warren G. Magnuson from Philip K. Eberly, sales manager, WSBA Radio, P.O. Box 910, York, Pa.;

Letter dated May 17, 1961, to Hon. Warren G. Magnuson from J. S. Sinclair, president, Rhode Island Broadcasters' Association, Providence, R.I.;

Letter dated May 19, 1961, to Hon. John O. Pastore from Luther R. Strittmatter, sales manager, WARM Broadcasting Co., Inc., Bowman Bldg., Scranton, Pa.;

Letter dated May 19, 1961, to Hon. John O. Pastore from Arthur W. Carlson, general manager, radio division, Susquehanna Broadcasting Co., P.O. Box 910, York, Pa.;

Letter dated May 16, 1961, to Hon. John O. Pastore from Tim Elliot, president, Providence Radio, Inc., Crown Hotel, Providence, R.I.;

Letter dated May 17, 1961, to Hon. John O. Pastore from J. S. Sinclair, president, Rhode Island Broadcasters' Association, Providence, R.I.;

Letter dated May 16, 1961, to Hon. Warren G. Magnuson from John S. Booth, president, Chambersburg Broadcasting Co., Chambersburg, Pa.;

Letter dated May 11, 1961, to Hon. John O. Pastore from Henry S. Sahm, president, the Federal Trial Examiners Conference, Washington, D.C.;

Letter dated May 15, 1961, to Hon. Warren G. Magnuson from Nugent S. Sharp, consulting radio engineer, 501 13th Street NW., Washington, D.C.;

An editorial from the Providence Evening Bulletin, dated May 15, 1961;

An editorial from the New York Times dated May 21, 1961; and

Two radio editorials from WICE, dated May 16 and May 21, 1961.

(The letters and editorials follow:)

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., May 18, 1961.

Hon. JOHN L. MCCLELLAN,
U.S. Senate, Washington, D.C.

DEAR SENATOR MCCLELLAN: This will acknowledge the receipt of your letter of May 3, 1961, in which you afforded me the opportunity to submit my views on Reorganization Plan No. 2 of 1961.

I am opposed to Reorganization Plan No. 2 of 1961. Although I agree with some of the fundamental objectives of the plan, I feel that these objectives can be attained better through amendment of the Communications Act following legislative hearings. In this connection, I have reference to the area that would give the Commission a greater amount of latitude in handling its internal administrative procedures.

I am afraid that section 1 of the plan now before you would leave us in a never-never land insofar as our hearing procedures are concerned. This is not to say that I am unwilling to delegate functions because I have acquiesced in such delegations in the past and I am willing to delegate more functions in the future. I am uncertain, however, just what effect section 1 of the plan will have on the existing provisions of section 409 of the Communications Act of 1934, as amended, and section 7(a) of the Administrative Procedure Act.

My primary concern arises out of section 2 of the reorganization plan. This, it seems to me, strikes at the basic philosophy underlying the structure of the Communications Act. As you know, this section withdraws from the Commission the function of assigning personnel and makes an absolute grant of this function to the Chairman. There are no exceptions to this grant of authority. The Chairman's word would be absolute to the point that he would have au-

thority to assign all Commission personnel, including Commissioners and the personal staff of the several Commissioners.

In my study of the proposal before you, I reviewed the hearings on Reorganization Plan No. 11 of 1950. The latter plan bears some similarity to the Reorganization Plan No. 2 of 1961, although it did not seem to go as far as the current reorganization plan appears to do.

In reviewing the 1950 hearing record, I was particularly impressed with the testimony of former Senator Edwin C. Johnson of Colorado in opposition to the plan. His testimony is set forth in the transcript of "Hearings before the Committee on Expenditures in the Executive Department, U.S. Senate, 81st Congress, 2d session, on Senate Resolusions 253, 254, 255, and 256," which were held on April, 25, and 26, 1950. I feel that the following quotation from his testimony (transcript p. 16) is apropos:

"It is the long-established congressional policy that regulatory agencies must be independent and directly responsible to Congress.

"The necessity of maintaining the independency of regulatory bodies was discussed during the Senate debate in 1938 on the Government departments reorganization bill, a legislative culmination of a professional study of Government and how to reorganize it. In that debate former Senator Champ Clark, of Missouri, one of the Senate's greatest students of parliamentary history, now one of our really great judges on the Federal bench, pointed out that the 'principal functions of such commissions as the Interstate Commerce Commission, the Federal Trade Commission, and the Communications Commission are as agencies of the legislative branch of the Government and as extensions of the legislative power' and that 'the important function which has been conferred on such commissions is the ascertainment of particular facts in order to carry out a policy of Congress enunciated in a statute' and 'they are legislative rather than executive or administrative in character.'

"Many of these statements are direct quotes of Mr. Clark.

"Senator Barkley, the then majority leader and now our distinguished Vice President, stated during the debate that he 'would not approve any measure which provided for a one-man Interstate Commerce Commission, or a one-man Communications Commission, or a one-man Federal Trade Commission, or a one-man Power Commission, because those commissions are agencies set up by Congress in the performance of the duty of Congress to regulate commerce among the States.'

"Senator Barkley, now our Vice President, said:

"They are quasi-judical and quasi-legislative. They are quite different from a commission which is created merely to aid the President in determining how he shall perform his executive duty of appointing people to office, in the way of testing their qualifications (for instance, the Civil Service Commission). One is an executive function, the others are legislative and judicial, and the only reason why the Interstate Commerce Commission was set up, and why the Federal Trade Commission, and the Power Commission, and the Communications Commission, were set up under the authority to regulate commerce among the States and with foreign governments, was the knowledge that Congress itself could not do that.

"But plan No. 7 does just exactly what Vice President Barkley said he would never approve. It makes the ICC a one-man agency, just as plans Nos. 8, 9 and 11 make one-man agencies of the Trade, Power, and Communications Commissions."

I am certain that Senator Johnson would view the reorganization plan before you as being equally repugnant.

At this point I would like to digress for a moment to make it abundantly clear that I have no concern that the current Chairman would in any way abuse any delegated power, whether that power was delegated to him by the Commission or by the law. On the contrary, the Chairman has indicated a very understanding desire to work as a team with the full Commission. Laws, however, are not made for men but for the public interest and, in my opinion, the approval of section 2 of Reorganization Plan No. 2 of 1961 would open this door to wide abuse on the part of an ambitious or an unscrupulous Chairman. A concrete example or two will demonstrate my concern.

The Chairman could assign me to duties away from the Commission's offices for an extended period and thereby affect the result of a decision on an important policy question.

He could assign members of my personal staff to duties which would deprive me of their services during periods when they would be required to assist me in analyzing highly technical engineering and legal matters.

He could assign me to a special project, such as for example the subscription television case, that would take all of my time to the detriment of my other work.

Through the assignment of staff personnel to special projects, he could achieve a predetermined result insofar as a staff recommendation is concerned. In this connection, the psychological effect on the staff of making one Commissioner so much more powerful than the others cannot be ignored. The staff will be quick to recognize who is supreme and will react accordingly. They would be less than human if they did not.

These are the practical difficulties I have with Reorganization Plan No. 2 of 1961.

As indicated, the Commission has delegated certain of its functions in the past and it is in the process of delegating other functions.

In the safety and special radio services filed the Commission processes thousands of applications annually. Authority to grant these applications is delegated (pursuant to section 5(d)(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 155 (d)(i)) to the chief of the safety and special radio bureau. We have made similar delegations to the bureau chief in the common carrier field. We have also delegated certain functions in the telephone and telegraph field to a committee of Commissioners.

Recently, we delegated certain authority to the chief hearing examiner to enlarge the issues in hearing cases. This official also possesses other delegations of authority over adjudicatory matters.

We recently instructed the staff to prepare a document for publication in the Federal Register concerning a delegation of authority to the Chief of the Broadcast Bureau. When adopted, this delegation will authorize the Chief of this Bureau to grant uncontested applications for AM, FM, and TV stations that meet certain criteria. I cite these examples solely to indicate that we are attempting, within the framework of the present act, to free ourselves from time-consuming duties so that we can devote more time to matters of broad communications policy.

Through these delegations and others that we can make and with a greater degree of latitude that could be achieved through minor modifications of the present act, I am certain that we can achieve the basic objective of Reorganization Plan No. 2 without destroying the bipartisan independent nature of the Commission—without making it a one-man agency subservient to the Executive.

Should you require anything further I would be most happy to oblige. I am taking the liberty of providing Senator Pastore of the Senate Commerce Committee with a copy of this letter.

Sincerely,

ROBERT E. LEE, *Commissioner.*

SUSQUEHANNA BROADCASTING CO.,
York, Pa., May 18, 1961.

Hon. WARREN MAGNUSON,
Senate Office Building,
Washington, D.C.

DEAR SENATOR MAGNUSON: I am writing you with regard to agency Reorganization Plan No. 2, as it applies to the Federal Communications Commission.

It is my feeling that the functions and responsibility of this agency are too broad and complex to allow for one-man rule. More particularly, it appears that the impetuosity and inexperience Commissioner Minow has exhibited to date bode ill for an arrangement such as proposed by this plan.

Therefore, I urge that you vote to veto this proposal. I also think that your active opposition to this measure would benefit the entire broadcasting industry.

Sincerely,

LOUIS J. APPELL, Jr., *President.*

RADIO WSBA,
York, Pa., May 18, 2961.

Hon. WARREN MAGNUSON,
Senate Office Building,
Washington, D.C.

MY DEAR SENATOR: We strongly urge that you vote to veto Reorganization Plan No. 2, covering the FCC. In our opinion, it would not be good for the country to give the FCC Chairman absolute control over the seven-man FCC. We think that when you search your mind and heart on this matter, you will agree with us and vote to veto the Reorganization Plan No. 2.

Thank you for your considerate attention in this matter.

Sincerely,

PHILIP K. EBERLY, *Sales Manager.*

SCRANTON, PA., *May 19, 1961.*

Hon. SENATOR PASTORE,
U.S. Senate, Washington, D.C.

DEAR MR. PASTORE: I feel that the matter of Reorganization Plan No. 2, which will come before the Senate soon, is of such great importance to the broadcasting industry that it requires your thorough consideration.

We in the broadcasting industry are convinced that this plan, giving the Chairman of the Federal Communications Commission almost dictatorial power over the Commission, cannot possibly be of any benefit.

We, therefore, ask your help in defeating this bill.

Yours very truly,

WARM BROADCASTING CO., INC.,
LUTHER R. STRITTMATTER, *Sales Manager.*

RADIO WSBA,
York, Pa., May 19, 1961.

Hon. JOHN PASTORE,
Senate Office Building, Washington, D.C.

DEAR SENATOR PASTORE: With the great and continuing growth of the broadcast industry, it is reasonable that the agency regulating the industry, the Federal Communications Commission, may be the subject of organizational refinements. The Reorganization Plan No. 2, now before Congress, is obviously an attempt to improve the organization of the FCC.

The adoption of this plan, however well-intended it may be, could only result in the concentration of extreme power in the hands of one man, the Chairman of the FCC. Under this plan the chairman would, in effect, be a one-man Commission. Such a concentration of power is inherently far more dangerous than any problems created by the current system of organization.

I am sure that I echo the sentiments of a majority of broadcasters when I suggest that you, and the other members of Congress, thoroughly examine Reorganization Plan No. 2. After a thorough examination, I am sure you will agree that a congressional veto is necessary to avoid placing a complete control of the Federal Communications Commission in the hands of one man.

Respectfully,

ARTHUR W. CARLSON,
General Manager—Radio Division,
Susquehanna Broadcasting Co.

PROVIDENCE RADIO INC.,
Providence, R.I., May 16, 1961.

Hon. JOHN O. PASTORE,
U.S. Senate, Washington, D.C.

DEAR JOHN: You have asked the Rhode Island Broadcasters individually to express their opinion of the administration's Reorganization Plan No. 2 as it would affect the FCC.

Separately, you have reecived a statement of opposition to the plan from the Rhode Island Broadcasters Association. WICE Radio, and the undersigned personally, endorse the association's opposition to this plan.

Certainly at a time when broadcasting is threatened with large-scale Government interference with the freedoms it has traditionally enjoyed, the intro-

duction of this reorganization plan is inopportune. Since many broadcasters sense a real imminence of Federal censorship, the vesting of immense powers in the hands of an FCC Chairman would appear to be an inherently dangerous move.

Many thoughtful individuals and organizations, including the Federal Communications Commission Bar Association, have opposed this plan and I urge you and your colleagues to rely on such expert opinions.

In advance, thank you for your customary, thoughtful and open-minded attention to this expression of opinion.

With best personal wishes.

Cordially,

TIM ELLIOT, *President.*

THE OUTLET CO.,
Providence, R.I., May 17, 1961.

Senator JOHN O. PASTORE,
Senate Office Building, Washington, D.C.

DEAR SENATOR PASTORE: Representatives of the Rhode Island Broadcasters have discussed the administration's Reorganization Plan No. 2 of 1961, concerning the FCC.

The members of the Rhode Island Broadcasters' Association recognize that one of the prime purposes of this measure is to increase the flexibility of the FCC and to expedite its various actions. However, we feel that the granting of virtual total power to any Chairman and in effect eliminating the checks and balances, the prestige and experience of the other six members, could succeed in destroying the entire intent and purpose of the FCC as it was originally established by the Congress in 1934.

In our opinion, the discretionary review procedure does not provide adequate safeguards for all parties to a Commission action. It is written in such a way that a situation could arise where a hearing before the full Commission could easily be denied. In its present form, the plan gives any Chairman such powers, that conceivably a Commissioner who would render a decision unfavorable to the Chairman's desires would simply be bypassed in the future; or the assignment could be delegated to another Commissioner for a more acceptable decision.

If it were the original intent of the Congress that each of the seven Commissioners should have an equal voice in the Commission's procedures and actions, and that the decision be based upon a true and free majority of opinions, then Reorganization Plan No. 2 would defeat that purpose.

Recognizing the need for greater flexibility in the handling of the business before the Commission, we believe there is sufficient ability and experience within the FCC, the broadcasting industry, the National Association of Broadcasters, and the FCC Bar Association to present an adequate plan for such revision which would not circumvent the basic intent of existing regulations.

Sincerely yours,

J. S. SINCLAIR,
President, Rhode Island Broadcasters' Association.

CHAMBERSBURG BROADCASTING CO.,
Chambersburg, Pa., May 16, 1961.

Senator WARREN G. MAGNUSON,
Senate Office Building, Washington, D.C.

DEAR SENATOR MAGNUSON: I have just read the Reorganization Plan No. 2 of 1961. As you know, this deals with the Federal Communications Commission. May I say that I am in accord that some changes might be helpful at the Commission. However, the same could be said of any body or organization in or out of Government.

The powers that are proposed for the Chairman of the Federal Communications Commission are too broad. No case has been made which would warrant such extraordinary powers being given one man or a seven-man Commission.

It is true that the FCC has not always moved as expeditiously as some both in and out of Congress have thought they should. However, the decisions they have faced are not so easily solved as I am sure the new Chairman will learn as he gains a practical knowledge of these problems.

If I understand the Reorganization Plan No. 2 correctly, it in effect reduces the number of Commissioners to one. The other six being relegated to the position of Assistant Commissioners. Further, by the power conveyed, the Chairman of the Commission, by delegation of powers to Commissioners and staff members who agree with his beliefs, achieve domination of the agency in a manner never envisioned by Congress when the Federal Communications Commission was created.

As one vitally interested in broadcasting and the operation of a democratic system of government, I earnestly solicit your support of my position in this matter.

Sincerely,

JOHN S. BOOTH, *President.*

THE FEDERAL TRIAL EXAMINERS CONFERENCE,
Washington, D.C., May 11, 1961.

Senator JOHN O. PASTORE,
Chairman, Subcommittee on Communications, Senate Interstate and Foreign Commerce Committee, New Senate Office Building, Washington, D.C.

MY DEAR SENATOR: On behalf of the Federal Trial Examiners Conference, a professional organization which includes hearing examiners in every regulatory agency and department conducting quasi-judicial proceedings under the Administrative Procedure Act, I should like respectfully to call your attention to a latent ambiguity in section 1 of the President's Reorganization Plan No. 2 (1961) relating to the Federal Communications Commission which we understand will be considered at a hearing before your honorable subcommittee on May 23, 1961.

Section 1 provides in part as follows:

"Authority to delegate: (a) In addition to its existing authority, the Federal Communications Commission, hereinafter referred to as the 'Commission', shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matter; provided, however, that nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act (60 Stat. 241), as amended."

Section 2 vests the above authority in the Chairman of the Commission. Read together these two provisions would appear to authorize the Chairman to delegate the function of "determining" or "ordering" to "an employee or employee board" so as to interpose between the hearing examiner and the Commission an unnecessary, costly, and time-consuming intermediate review which would have the effect of unduly lengthening total processing and increasing its cost and complexity rather than shortening and simplifying proceedings and thereby reducing litigation expense which was one of the primary purposes for which the reorganization plan was designed. Thus, although in section 3 the plan proposes to abolish the functions of the review staff, nevertheless the way has been left open for assignment of a review function to individual employees or an employee board.

In reaching this conclusion we have not overlooked the proviso which states "that nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act." However, a careful reading of section 7(a) indicates that it pertains only to the hearing process, not to the process of "ordering" or "determining." Thus, the proviso as drafted, merely insures that no one except duly qualified hearing examiners, the Commission itself, one of its members or a statutory employee board may hear a proceeding. There is no similar prohibition against a nonstatutory or statutory employee board "determining" or "ordering" a final decision in a proceeding in which a hearing has previously been held by a hearing examiner.

We assume that the reorganization plan was designed to implement the recommendation made in the President's special message on regulatory agencies, submitted to the Congress on April 13, 1961, which stated in part as follows:

"The remedy is a far wider range of delegations to smaller panels of agency members, or to agency employee boards, and to give their decisions and those of the hearing examiners a considerable degree of finality, conserving the full agency membership for issues of true moment."

We have no doubt that it was intended and contemplated by both the President's message and the implementing reorganization plan that the delegation of functions to agency employee boards should occur only in areas where there is no statutory requirement for a hearing before a hearing examiner, as provided in the Administrative Procedure Act. However, the proposed reorganization plan, as presently drawn, is not so limited.

In view of the foregoing there appears to be a vital need for clarifying this matter at the forthcoming hearing on May 23 before your subcommittee. It is respectfully requested that this letter be made a part of the record of the forthcoming hearing. If our organization can be of any assistance to your subcommittee in connection with its consideration of this matter, we will be happy to oblige.

Thank you for your consideration of this matter.

Sincerely yours,

HENRY S. SAHM, *President.*

WASHINGTON, D.C., *May 15, 1961.*

Senator WARREN G. MAGNUSON,
U.S. Senate, Washington, D.C.

DEAR SENATOR MAGNUSON: President Kennedy and FCC Chairman Minow have expressed much hope that evils in the field of broadcasting can be cured through adoption of Reorganization Plan No. 2.

Although there are evils in the broadcasting business, the hope of legislating them out of existence appears to involve the packing of the FCC and censoring of program content. These effects, to my mind, are worse than the disease the plan seeks to correct.

As a broadcast consulting engineer and an ex-employee of the FCC, I strongly urge you to lead the fight to veto Reorganization Plan No. 2.

Sincerely,

NUGENT S. SHARP, *Consulting Radio Engineer.*

[From the Providence Evening Bulletin, May 15, 1961]

THE NEW FCC CHAIRMAN WILL BE WORTH WATCHING

Harsh criticism of the programs offered on television is nothing new. It has come from many sources and has been inspired by many different motives.

But never before has a Chairman of the Federal Communications Agency stood up before a session of the National Association of Broadcasters and delivered a blistering denunciation of television's practices and product.

Newton W. Minow performed this interesting exercise the other day. The new chairman of the FCC obviously has stepped into his job with the conviction that television is badly flawed, with some clearcut opinions on where the flaws lie, and with the determination to see to it that corrections are brought to pass.

He condemned the repetition of violence, sadism, murder, and gangsterism. He deplored sameness and sterility. He complaind against the stream of commercials, "many screaming, cajoling, and offending." But most of all, he criticized the telecasters for their slavish obeisance to the rating systems.

"If parents, teachers, and ministers conducted their responsibilities by following the ratings," Mr. Minow said, "children would have a steady diet of ice cream, school holidays, and no Sunday school."

Television has a great potential, Mr. Minow declared. At times, it has demonstrated how good it can be, he added, citing a list of exceptional programs. But its general level is low, he said, and "I am not convinced that the people's taste is as low as you assume."

The basis of the whole broadcasting industry, Mr. Minow reminded his audience, is that the airwaves belong to the people and that the broadcasters are licensed to use those airwaves only so long as they serve the public interest. "The people own the air," he said. "They own it in prime evening time as they do at 6 o'clock Sunday morning. For every hour that the people give you—you owe them something. I intend to see that your debt is paid with service."

Public control over the airwaves is maintained by a Federal licensing system. The FCC is the governmental agency empowered to issue the licenses. Every 3 years, the licenses come up for renewal. Almost invariably, the FCC practice in the past has been to grant the renewals automatically.

This has been one of the great weaknesses in the FCC licensing system. It is a practice which Mr. Minow proposes to change.

He warned the broadcasters that when their renewals come up he intends to compare their promises with their performance.

"When a renewal is set down for hearing," he said, "Intend—wherever possible—to hold a well-advertised public hearing right in the community you have promised to serve. I want the people who own the air and the homes that television enters to tell you and the FCC what's been going on * * *. I hope that these hearings will arouse no little interest."

As Jack Benny would say—well.

The new chairman of the FCC quite obviously has entered upon his new job with a lot of ideas, a lot of gumption, a very large broom, and a determination to do a lot of sweeping. This is one performance that television viewers will watch with interest.

A Radio Editorial From WICE, May 16, 1961

Seldom have newspaper readers seen more glaring examples of pocketbook journalism than during the past week.

The bait that brought the Nation's editors snapping to the surface was a talk in which a new member of the Kennedy administration called television programs a "vast wasteland." This, of course, is a generalization with which many thoughtful people will heartily disagree.

No sooner were the words out, however, than they splashed across front pages from coast to coast. So eager were the newspapers to leap at this new chance to knife a competitor, they pressed far beyond the limits of fair reporting.

Here in Rhode Island, for example, one minor local columnist openly agitated his readers to prepare dossiers and demand public hearings when the State's two TV stations come up for license renewal.

Ignoring the admirable efforts of these stations to program for all segments of the public, this columnist is attempting to manufacture a situation in which two responsible broadcasters could be deprived of their freedom to operate facilities in which they've invested millions of dollars on behalf of the public.

Two days later, the same paper was back again complaining about a TV network's plan to increase station break time from 30 to 40 seconds. Here the paper's motives were so close to the surface, you could hear the cash register jingling. If commercial time on TV can somehow be cut down, there'll be more money for newspaper advertising, the editorial said between its lines.

Happily, there were a few examples of newspaper statesmanship in last week's TV controversy. David Lawrence, writing in the Newport Daily News and the New York Herald Tribune, warned that the Government blast at TV may herald a Federal attempt to take over broadcasting. This he decried as an abridgment of free speech.

Unfortunately, many publishers won't realize until too late that the broadcasting crackdown which they are promoting can eventually lead to Federal intervention in all areas of communication. Freedom of the press is only as safe as freedom of all media.

A Radio Editorial From WICE, May 21, 1961

A few Madison Avenue agencies jumped on the bandwagon last week when a Government official called TV programing "a vast wasteland."

In their irritation over occasional highhanded tactics by TV networks, advertising people shouldn't fall into the trap that lies hidden for them in the present controversy over broadcasting.

The demand for Government control of programing is merely a branch of a stream of thought that favors abolition of both free and uncensored broadcasting and advertising as well.

This stream of thought, like an underground river, pops to the surface every so often. It's most often found on college faculties, among self-styled intellectuals and liberals and is a mainstream of Socialist doctrine. Most recently it's been expressed in books like the "Waste Makers" and "The Hidden Persuaders." Many well-meaning Americans tag along with it because its arguments sound so reasonable and uplifting.

These people argue that advertising is an evil parasite in our economy. They would destroy it, along with brand names and every other vestige of our prosperous private-enterprise system.

There should be no mistaking the intellectual kinship between the supporters of this philosophy and those who want the Government to control broadcast programing. They are at least first cousins, if not full blood brothers.

Hostility to advertising is often found among Government leaders. Recently a panel of officials who deal with broadcasting was asked if any one of them had "slept with the first amendment recently." To this, one panel member replied: "I don't see anything in the first amendment about advertising."

Both advertising and broadcasting are essential to the continued growth of our American-style economy. Freedom of one is closely related to freedom of the other. If one suffers, they both do.

This is the reason advertising people should rally to the side of broadcasting in its opposition to censorship.

[From the New York Times, May 21, 1961]

TV'S COUNTER-ASSAULT

The counter-assault on Newton N. Minow, new Chairman of the Federal Communications Commission, has begun.

Because of his forthright indictment of much of television as a "wasteland," lobbyists of the broadcasting industry are now determined to thwart the long-overdue reorganization of his agency's operating procedures. Their objective is deplorable. The consequences of an FCC hamstrung by delay and redtape have been painfully evident in constant scandals and flagrant cynicism toward enlightened trusteeship of the air waves.

The broadcasters appear to have found support from some Democrats in Congress who claim to be piqued over the reorganization method chosen by the Kennedy administration. The plan for revising the FCC becomes automatically effective late next month unless either house of Congress disapproves. There is nothing new about this method; it has been followed in other reorganization plans many times before; but some members of Congress are now demanding specific legislation. If the previous fate of substantive legislation affecting the FCC is a criterion, the Commission would continue to languish in the status quo that the broadcasters have found so comfortable.

Neither hunger for revenge nor political pique are sufficient reasons to sacrifice the public's stake in a competent FCC. The spectacle of seven members of the commission solemnly voting more than 100 times in a single day on different matters, many of them minor, is not to be condoned. The reorganization plan would enable the Chairman to reassign the workload within the Commission, relegate specific problems to smaller panels, and relieve the full Commission of much routine.

Extracting order out of chaos cannot be accomplished without putting someone in charge of the job. Mr. Minow, who, incidentally, would on important matters still be subject to the restraining vote of his colleagues on the Commission, has shown the energy and fearlessness that are required. That clearly explains the industry's opposition to the reorganization proposal.

(Thereupon, at 12 m. the committee recessed to reconvene at 2 p.m. the same day.)

AFTERNOON SESSION

Senator PASTORE. All right, it is now 2 o'clock. Mr. Minow, you may proceed.

Mr. MINOW. Mr. Chairman, I was discussing section 2 of the plan and I will resume my statement.

Some of my colleagues have informed me of their opposition to this provision. They have stated that, while they know that I would not abuse the power so bestowed—and I in turn have assured them that any assignments made would be on a rotational basis as far as practicable—in principle the provision shifts the agency from an independent bipartisan commission to an administrator within the

executive branch; that it puts the Commissioners' time and energies completely at the disposal of the Chairman, and that it is open to abuse in that it permits the deliberate selection by a Chairman of Commissioners with predisposed ideas on certain subjects to sit on the panels. I respect the position of my colleagues, but I believe that their reservations are without foundation.

First, under section 1, it is the Commission, not the Chairman, which has the complete control over whether a matter should be delegated. If, for example, my six colleagues thought the present system was ideal, they could vote to retain that system. I think that would be a mistake, but it certainly shows that it is the Commission which is in control of this entire delegation matter. Suppose, further, that a Chairman did abuse his assignment powers, by either overburdening Commissioners or making assignments with a view to obtaining a certain outcome. The short answer is the Commission, which can vote to reconsider any action it takes, would simply reverse its delegation and take up the matters itself. Thus, as a practical matter, the Chairman must act fairly or the Commission will, in effect, withdraw his power to act in this area. In view of these considerations, the agency cannot be converted by this minor housekeeping provision.

Second, the President was at pains to preserve the bipartisan nature of the agency. The plan specifically provides—

> in order to maintain the fundamental bipartisan concept explicit in the basic statute creating the Commission, for mandatory review of any such decision, report, or certification upon the vote of a majority of the Commissioners less one member.

For this reason also, it would be senseless for the Chairman to abuse his assignment powers: By a vote of three Commissioners, his colleagues could, and would, bring the case to the full Commission.

In short, this provision does not more than vest in the chief executive officer the responsibility for work assignments requiring "continuous and flexible handling," from the President's transmittal message. By its own order, the SEC, on January 16, 1961, announced that, in the preparation of formal decisions, "cases will be assigned by the Chairman to individual members of the Commission"; and several of the Federal courts of appeal have vested the power in the chief judge to assign the judges comprising the panels. Many similar examples could be given. The fact that such power is vested by order of the agency or court rather than by an executive plan is no distinction. For, as shown, the Commission has ample authority to deal immediately and effectively with any possible abuses.

Section 3: This provision abolishes the review staff, together with the functions established by section 5(c) of the Communications Act. Section 5(c) provides that the Commission must establish a "review staff" to aid it in the preparation of opinions in adjudicatory cases and that that staff may make no recommendations. Here again the agency lacks needed flexibility. Congressional recommendations—see, for example, House Report 2238, 86th Congress, 2d session, pages 19, 24–25; House Report 2711, 85th Congress, 2d session, page 11—the President's message of April 13, 1961, and the administrative trend favor the practice of making individual agency members responsible for the preparation of the agency decisions. Four important agencies—three since the beginning of this year—have adopted this prac-

tice. But the Commission is handicapped in revising its decisional processes because of the rigid requirements of section 5(c). With the abolition of the review staff required by 5(c), the Commission will be able to devise the procedure which, in its view, will best deal with such factors as the need for prompt dispatch of business, the desirability of personal responsibility for the preparation of a decision, and the relative handicap of some Commissioners having no legal or similar background usually thought necessary for decisionwriting.

Senator PASTORE. That is just the point I make; the handicap of some Commissioners having no legal or similar background usually necessary for decisionwriting. You were here when I put the question to Dean Landis. What do you have to say on the observation I made—principally, the composition of your Commission of necessity must be one that attracts people of various talents, not all of them in the legal field, and legal opinion is something that has to be written with a certain amount of legal art in order that on appeal to the courts it won't be found wanting.

Now, how would that work out?

Mr. MINOW. What I would personally favor, Mr. Chairman, is an idea that was advanced by the House Interstate and Foreign Commerce Committee last year. That is that we have a technical staff, which would be largely composed of the people presently in the review staff, and they woud be available to assist the Commissioners and particularly the Commissioner having the supervisory power over the opinion. I would believe very flatly that it would be impossible for each of us to write all our own opinions. We cannot under the present workload we have. We sometimes vote over 100 times each week. It would be foolhardy for us to attempt individually to write each opinion.

Senator PASTORE. How does it work now? A matter comes before you on an oral argument, let's say, and you take it under advisement. Now, I suppose the task is assigned to this review staff to look over the record and make a decision and to write an opinion. Now, are they instructed before they do this? In other words, you sit as the Supreme Court sits and you delegate to them the responsibility of writing a decision?

Mr. MINOW. Right. My predecessor, Chairman Ford, had started a procedure which I have followed. I find it highly desirable. That is, after we finish argument, we then meet as a Commission and if we can agree, decide right then and there what instructions we should give to the review staff.

In other words, we reach a decision in a comparative case saying we find in favor of "A," and to draft an opinion along the following theory. Then the review staff comes back to us with a draft and we each review it and make changes and suggestions and try to see if we can hit on a common consensus in language which will later be approved and become the Commission's decision.

Senator Pastore. What is wrong with that system?

Mr. MINOW. What is wrong is that presently 5(c) is very restrictive in that it is impossible for us to ask the recommendations of that staff. Now since I am——

Senator PASTORE. Why do they need recommendations, you are the people who heard the case.

Mr. MINOW. Sometimes, being new, I forget it myself; I may turn to one of the staff members and say, "Now, you have spent hours with that record, what do you think about that particular point? He will say, Mr. Chairman, I can't——

Senator PASTORE. Is that the only restrictiveness? If that is the only thing, that to me would be very, very simple. I would merely either delete the section that forbids them to make a recommendation or add the authority to allow them to make a recommendation. You can either take it or leave it.

Mr. MINOW. I would favor the first.

Senator PASTORE. I wonder what the historical reason is. Does anybody here know?

Mr. HYDE. Mr. Chairman, this provision of law was written in the statute in the 1952 amendments. You may recall last year the Commission was here asking for legislation that would give this review staff greater flexibility, particularly with respect to the handling of interlocutory matters. You may recall we had quite a lively discussion on the matter. In the past, the members of the bar have urged that this review staff should only make digests, and review matters; that in order to make sure that the Commission gives its own opinion and makes the decision, it should not be advised by the review staff.

Senator PASTORE. That is the reason why it got in there?

Mr. HYDE. It got there in the 1952 amendments.

Mr. FORD. I was in the review section before this 5(c) was enacted into law. We would prepare the decisions and sometimes a Commissioner would say, how did I vote on this. He would forget for a moment perhaps what his record was. The review staff knows that very well, and they could tell him, Well, Mr. Commissioner, in the last five cases, your position has been this. This recalls to his memory what his position is on a principle of communications law and permits him then to remain consistent. And during that period of about 3 years, I don't think the court of appeals reversed the Commission once because the staff was there available to advise the Commission on any matter involving the record and, in addition to that, as Commissioner Hyde pointed out in interlocutory matters, the staff can on simple pleading matters, bring in a proposed order. But they can't do that now. It has to come to the Commission, we have to discuss a highly technical point and on occasion, sometimes, the nonlegal members of the Commission outvote legal members on matters of procedure. Whereas if the staff could come in and say this is the procedure we have followed and give their reasons, it would save probably sometimes two to three weeks in interlocutory matters.

Mr. MINOW. I want to second that because that is the end of my statement. The interlocutory business was the biggest shock to me.

Senator PASTORE. The reorganization plan which has been submitted and over which we are now holding hearings in an advisory capacity, may I respectfully suggest that you give me a draft bill on this review staff and I will introduce it.

Mr. MINOW. Thank you.

Senator PASTORE. We will have hearings and find out if we can't expedite this, irrespective of reorganization plan, because everybody here seems to be in accord and this would be in the public interest and allow these men to express their opinion. You don't have to accept

it, and if that is the case, I would like to hear from the members of the Federal bar to see why it doesn't operate in the public interests just to muzzle people who are proficient in a particular field.

Mr. MINOW. Thank you, sir.

I just have one more paragraph and I will finish this, which has to do with this interlocutory problem.

Furthermore, the Commission will no longer have to pursue the cumbercome, wasteful two-step process in disposing of interlocutory matters. Because the review staff is prohibited from making any recommendations, it must first receive instructions from the Commission on all interlocutory matters, no matter how simple or routine, and then return again with a draft opinion and order for the Commission's approval. This is an obvious waste of the Commission's and the staff's time. Many, indeed most, of these matter could be disposed of at one meeting by permitting the staff to attach a draft recommended order. The new discretion given by the reorganization plan would thus be used to eliminate the present inefficient method of handling interlocutory matters. This would represent a substantial saving in time and energy for the Commission. In 1960 the full Commission was called upon to dispose of 363 interlocutory motions.

(Appendixes to Mr. Minow's statement follow:)

APPENDIX A

List of common carrier adjudicatory proceedings heard by full Commission in recent years which might well have been considered by a panel of Commissioners or perhaps employee review board:

Docket No. 11833: Application of William J. Therkildsen. New application, comparative hearings.
Docket No. 11184: Appication of Radio Order Service, Inc. Request of extension of construction permit on failure to timely construct station.
Docket No. 11695: Application of Southwestern Bell Telephone Co. Section 221(a) acquisition case.
Docket No. 11393: Application of Blackhills Video Co. New application, comparative hearing.
Docket No. 11500: Application of Bell Telephone Co. of Pa. Protest hearing.
Docket Nos. 11883 and 11884: Application of Collier Electric Co. et al. New application, comparative hearing.
Docket Nos. 12155 to 12159, incl.: Applications of Benjamin H. Warner, Jr., et al. New applications, comparative hearing.
Docket No. 11878: Application of J. B. Wathen. Protest hearing.
Docket No. 12191: Application of Radio Dispatch Service. License renewal hearing.
Docket No. 11878: Application of J. B. Wathen. Protest hearing.
Docket Nos. 11268 thru 11270 incl. and 11375 thru 11388, incl.: Applications of Wisconsin Telephone Co. et al. Protest hearing.
Docket Nos. 12682 and 12683: Applications of Texas Two-Way Communications. Protest hearing.
Docket No. 13201: Applications of Ruth and Seymour Chervinski et al. New applications, comparative hearing.
Docket No. 11932: Application of New Jersey Exchanges, Inc. Protest hearing.
Docket Nos. 12627, 12628, 12631, 12632: Applications of Robert C. Crabb et al. New applications, comparative hearing.
Docket No. 13174: Application of Thomas R. Poor. Protest hearing.

APPENDIX B

Illustrative examples of forfeiture cases in the safety and special radio services field, which were required to be reviewed by the Commission en banc pursuant to section 5(d)(2) of the Communications Act:

1. Vessel *Esso Raleigh* and master thereof incurred forfeitures of $500 and $100, respectively, under section 507 of the Communications Act. After applications for relief, Safety and Special Radio Services Bureau mitigated fines to $50 and $10, respectively. There was a request for review by Commission under section 5(d) (2), and the Commission affirmed the staff action.

2. Vessel *Niagara* and master thereof incurred forfeitures of $1,500 and $100, respectively, under section 507 of the act. After applications for relief, Bureau mitigated fines to $100 and $10, respectively. Upon request for review by Commission under section 5(d), Commission affirmed staff's action.

3. Vessel *Ziegiest* incurred forfeitures of $500 under title III, part II, of the act. After application for relief, Bureau mitigated to $100. There followed a request for review by Commission under section 5(d) of the act, and the Commission affirmance of the staff action.

4. Vessel *Janet Quinn* and master thereof incurred forfeitures of $1,000 and $200, respectively, under title III, part II, of act. After applications for relief, Bureau mitigated forfeitures to $150 and $20, respectively. Upon request for review by Commission under section 5(d), Commission affirmed staff action.

5. Vessel *Cavalier II* and master thereof incurred forfeitures of $500 and $100, respectively, under title III, part II, of the act. After application for relief, Bureau mitigated to $100 and $50, respectively. Commission affirmed staff action upon request for review by Commission under section 5(d).

APPENDIX C

CASES IN WHICH COMMISSION HEARD ORAL ARGUMENT IN THE LAST QUARTER OF 1960

October 13, 1960, Docket Nos. 11747 and 12936

Springfield, Ill., deintermixture proceeding: In re amendment of section 3.606, Table of Assignments, Television Broadcast Stations (Springfield, Ill.-St. Louis, Mo.), and proceedings pursuant to remand in *Sangamon Valley Television Corp.* v. *United States and FCC, et al.* (120 minutes consumed in oral argument).

October 13, 1960, Docket No. 13150

Patterson, La., ship radio revocation proceeding: In re Patterson Shrimp Co., Inc., in a show-cause proceeding why there should not be revoked the license for Radio Station WC–3826 aboard the vessel *Howard Rochel* at Patterson, La. (40 minutes consumed in oral argument).

October 13, 1960, Docket No. 13262

Proceeding in re applications of James J. Williams for construction permits for a new standard broadcast station at Williamsburg, Va. (40 minutes consumed in oral argument).

October 13, 1960, Docket Nos. 12826 and 12942

Proceeding in re applications of Herbert T. Graham and Triad Television Corp. for construction permits for a new standard broadcast station at Lansing, Mich. (60 minutes consumed in oral argument).

October 14, 1960, Docket No. 13331

In re application of Edward E. Urner and Bryan J. Coleman, doing business as Cal-Coast Broadcasters, for a construction permit for a new standard broadcast station at Santa Maria, Calif. (60 minutes consumed in oral argument).

November 4, 1960, Dockets Nos. 12229 and 12230

Proceeding in re applications of Walter G. Allen and Marshall County Broadcasting Co., for construction permits for new standard broadcast stations at Huntsville, Ala. and Arab, Ala., respectively (60 minutes consumed in oral argument).

November 4, 1960, Docket Nos. 12315 and 12316

Sheffield, Ala., standard broadcast proceeding: In re applications of Iralee W. Benus, trading as Sheffield Broadcasting Co., and J. B. Falt, Jr. for a new standard broadcast station at Sheffield, Ala. (60 minutes consumed in oral argument).

November 4, 1960, Docket No. 12318

San Bernardino, Calif., FM proceeding: In re application of Richard C. Simonton, doing business as Telemusic Co., for a construction permit, for a class B FM station at San Bernardino, Calif. (60 minutes consumed in oral argument).

December 15, 1960, Docket No. 13300

Proceeding in re application of Coast Ventura Co. for modification of construction permit of station KVEN–FM operating on channel 264 (100.7 megacycles) at Ventura, Calif. (60 minutes consumed in oral argument).

December 15, 1960, Docket No. 13274

Grand Rapids, Mich., TV proceeding: In re application of WOOD Broadcasting, Inc., to change the transmitter site of WOOD–TV, Grand Rapids, Mich. (60 minutes consumed in oral argument).

December 15, 1960, Dockets Nos. 12657 and 12658

Portland, Oreg., TV proceeding: In re applications of Fisher Broadcasting Co. and Tribune Publishing Co. for construction permits for new television broadcast stations at Portland, Oreg. (60 minutes consumed in oral argument).

December 15, 1960, Docket Nos. 12788, 12792 and 12797

Golden Valley, Minn., AM proceeding: In re applications of Charles J. Lanphier; Joe Gratz, trading as Minnesota Radio Co.; and Eider C. Strangland for construction permits for new standard broadcast stations in Golden Valley, Minn., Hopkins-Edina, Minn., and Sheldon, Iowa (80 minutes consumed in oral argument).

December 16, 1960, Docket Nos. 12885, 12886 and 12887

Proceeding in re applications of James B. Tharpe and Joseph L. Rosenmiller, Jr., doing business as Madison County Broadcasters; Charles H. Norman, John Karoly, and George J. Moran, doing business as Tri-Cities Broadcasting Co.; and East Side Broadcasting Co., for construction permits for a new standard broadcast station at Granite City, Ill. (80 minutes consumed in oral argument).

December 16, 1960, Docket No. 13000

Savannah, Ga., AM proceeding: In re application of WJIV, Inc., for a construction permit to increase power of standard broadcasting station WJIV, Savannah, Ga. (40 minutes consumed in oral argument).

Now, Mr. Chairman, the balance of my statement consists of appendixes. I would like to also submit a table showing our workload which you asked about this morning, but I can tell you very quickly a couple of significant figures. At the beginning of 1960, we had pending at various stages in television hearings, 82 different cases.

At the end of 1960, we had 84, so we are just about holding our own on the television side.

But in the AM radio broadcasting cases, at the beginning of the year, there were 220 pending in hearing; at the end of the year there were 413. Now not all of those may necessarily reach us for oral argument, but that shows almost twice as many at the end of the year as there were in the beginning.

In the FM field at the beginning of the year 24 pending, at the end of 1960, there were 51. In the common carrier field, there were 47 pending at the beginning of the year, 64 at the end of the year. This shows that we are not, despite all our best efforts, significantly cutting into the backlog. We are at best holding our own or falling behind.

Now, there are a number of technical legal points which some of my colleagues will raise. I have prepared another memorandum; rather

than burden the subcommittee I should like your permission to insert it.

Senator PASTORE. Without objection, so ordered.

Mr. MINOW. I would then proceed however you wish, Mr. Chairman.

(The document follows:)

FURTHER COMMENTS ON REORGANIZATION PLAN NO. 2 OF 1961 OF NEWTON N. MINOW, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION

A. SECTION 1

1. Section 1(a) of the plan does change section 409(a) of the Communications Act by permitting a Commissioner or panel of Commissioners to conduct an adjudicatory hearing (cf. sec. 7(a) of the Administrative Procedure Act). The question is raised whether sections 409(c) (1), (2) would be applicable to hearings conducted by a Commissioner or a number of Commissioners. I think the broad provision of section 409(c)(2), referring to any adjudicatory "case before an examiner or examiners or the Commission" would be held to include Commissioners. But even were the contrary the case, this would not leave any gap in the law. For, the courts have long construed the requirement of a hearing that it be a fair hearing, and specifically that ex parte presentations are barred. See, e.g., *Morgan* v. *United States*, 298 U.S. 468, 480; *Morgan* v. *United States*, 304 U.S. 1, 19–20; *Ohio Bell Telephone Co.* v. *P.U.C.*, 301 U.S. 292, 304; *Tumey* v. *Ohio*, 273 U.S. 510, 522. So whatever the application of 409(c) (1), (2), ex parte contacts would be precluded.

2. It has been suggested that the plan violates section 5(a)(4) of the Reorganization Act by authorizing the following: (i) delegations in adjudicatory matters; (ii) the assignment by the Chairman of Commission personnel in delegated matters; and (iii) the provision for discretionary review only from delegated decisions, including the examiners' initial decisions. It is true that these provisions are all changes in the existing law. But that is not the test of their legality under section 5(a)(4). Reorganization plans usually change existing law since otherwise there would be little reason for them. The test is whether the agency has been authorized to exercise any function which it did not previously have. If all that is involved is existing functions of the agency, they may be transferred, delegated, consolidated, coordinated, or abolished (sec. 3). The three listed matters are thus clearly permissible under the Reorganization Act:

(i) The agency now has the function of deciding adjudicatory cases (sec. 409); under section 3(5) of the Reorganization Act, that function can be delegated, and that is what the plan does in section 1. Of course, this changes existing law, but it does not change it by giving the agency any new function. On the contrary, it changes the law in accordance with one of the "main purposes" of the Reorganization Act, which "is to make it possible for top officials to delegate routine functions which are vested in them by law in such manner as to prevent delegation" (H. Rept. 23, on Reorganization Act of 1949, 81st Cong., 1st sess., p. 7).

(ii) The agency now has the function of assigning personnel to panels, employee boards, etc. That function is transferred to the Chairman as to any matters which may be delegated to him by the Commission pursuant to section 1 of the plan (sec. 3(3) of the Reorganization Act). Thus, the plan again changes the law only as Congress authorized—by transferring or consolidating an existing function.

(iii) The function of the Commission with respect to hearing oral argument or passing on exceptions (sec. 409(b) of the Communications Act) is abolished (sec. 3(2) of the Reorganization Act). The function of making final decisions might then be delegated to examiners, where the Commission declines discretionary review. That again is clearly permitted (sec. 3(5)). In short, the agency presently has the function of making final decisions; the plan changes the manner in which that function is to be exercised by the proper exercise of abolition and delegation. That does not, however, give the agency any new function; it is still just making final decisions (either by the Commission or by delegation).

I think an appropriate analogy would be to a parent congressional committee delegating or transferring its assigned existing functions between the various subcommittees or their respective chairmen.

(3) It has been suggested that section 8 of the Administrative Procedure Act grants parties the right to a review by the agency of an initial decision. This suggestion is negated by the statutory language, which simply specifies the procedure when and if the agency grants review. Nowhere in the section does it provide: "The agency shall permit review of the initial decision * * *" Surely, this basic provision would have been set forth in explicit terms, had Congress so intended. Compare, for example, the explicit requirement in section 409(b) of the Communications Act (enacted in 1934) that "* * * *the Commission shall permit* the filing of exceptions to such initial decision." [Emphasis supplied.] Further, the legislative history of section 8 is to the contrary (H. Rept. 1980, 79th Cong., 2d sess.; S. Doc. 248, p. 273):

"* * * agency rules must prescribe a reasonable time for appeals from initial examiners' decisions. *Where the agency determines to review such a case*, it should, so far as possible, specify the issues of law, fact, or discretion for review with particularity." [Emphasis supplied.]

(4) It is also argued that section 6(d) of the Administrative Procedure Act would require the Commission to review and set forth its reasons for the denial of a petition for discretionary review of delegated actions under section 1 of the plan. But section 6(d) provides that notice of denial "shall be accompanied by a simple statement of procedural or other grounds," except "* * * where the denial is self-explanatory." Denial of the petition for discretionary review would be "self-explanatory," since it would inform "the party of all he would otherwise be entitled to have stated" (S. Doc. 248, 79th Cong., 2d sess., p. 206)—namely, that his petition did not fall within the criteria set out in the Commission's general rule for granting petitions for discretionary review (similar in principle to rule 19 of the Rules of the Supreme Court of the United States). In any event, the Commission would fully satisfy 6(d) by stating the "procedural ground" for denial: "Petition for discretionary review denied for failure to meet any of the grounds set out in rule —." (See S. Doc. 248, pp. 227, 268, 287, note 14, 363.)

Nor does section 8(b) of the Administrative Procedure Act require that the Commission give reasons when it denies the petition for discretionary review. For, 8(b) is applicable only "upon agency review" of the initial decision, and the petition for discretionary review is not agency review. On the contrary, it is the prerequisite to determine whether there will be agency review.

(5) It is suggested that section 405 of the Communications Act requires the Commission to give reasons when passing on petitions for reconsideration of delegated actions. But section 405, which does require that a "concise statement of the reasons" for the denial of a petition for rehearing be set forth, is applicable only to decisions made by the Commission. Requests to review delegated decisions are governed by section 5(d)(2) of the Communications Act. This section states that an aggrieved party "* * *may file an application for review by the Commission [of any delegated decision] * * * and every such application shall be passed upon by the Commission." It goes on to provide that, "*If the Commission grants the application*, it *may* affirm, modify, or set aside such order, decision, report, or action, or may order a rehearing * * * under section 405." [Emphasis supplied.] This language would thus appear to call for purely discretionary, not mandatory, review by the Commission.

(6) It is suggested that under section 1 of the plan, the Commission could not delegate its review functions to a board or panel. This argument is apparently premised on the provision in 1(b) that "the Commission shall retain a discretionary right to review the action of any such division * * *, hearing examiner, employee, or employee board." But this provision means only that the Commission must pass on the pettion for discretionary review; it cannot delegate that function. Once the Commission decides that a petition for discretionary review of an initial decision should be granted, it can then delegate the decisional or review function under 1(a) (subject again to retaining a discretionary right to review the decision of the panel or board).

(7) Concern has been expressed that the plan might require examiners to perform duties "inconsistent with their duties and responsibilities as examiners." (Section 11 of the Administrative Procedure Act.) But the plan does not supersede any provision of the Administrative Procedure Act, and is not intended to do so. Thus, section 11 is still applicable and would preclude such an assignment. Under the plan the Commission would employ examiners exactly as they are now employed; the only difference is that their decision could

then be made the final decision of the agency (section 1(c)), if the Commission declined review.

(8) Concern has also been expressed that the requirement of a "published order" in section 1(a) would somehow impose an undue burden on the Commission in making delegations. But as each case comes before the Commission on petition for discretionary review, the Commission could simply issue a brief, published order, granting (or denying) the petition and making the appropriate delegation if any. I do not perceive how this would constitute any burden on the agency.

B. SECTION 2

(9) It is suggested that section 2 of the plan gives the Chairman the power to assign any delegated function under section 1 to a Commissioner, and thus require him to perform any work of whatever character to which a member of the staff could be assigned under section 1. This contention is based upon a fundamental misconception as to the plan. It is the Commission, not the Chairman, which determines the type of body or individual to whom a particular matter shall be delegated; and only then does the Chairman decide who shall serve on the body or be that individual. For example, if the Commission decides that case X shall be heard by an employee board, the Chairman then assigns the employees to serve on the board—but he can select only employees, not Commissioners. And if the opposite example were the case (a panel of Commissioners instead of an employee board), the Chairman could assign only Commissioners.

10. It is also argued that the plan would place the delegations previously made by the Commission under 5(d)(1) within the control of the Chairman, and that if he abused his deployment of personnel powers under section 2, the Commission's only choice would be to cancel the delegations, an impossible choice since it would mean halting application processing, even in the safety services. I do not see why, in the above unlikely circumstances, the Commission could not cancel just those delegations as to which abuses had developed, leaving the routine processing delegations unimpaired. But the entire argument is based on another fundamental misconception of the plan: The plan does not place existing delegations under the Chairman's control. Section 1(a) reads: "In addition to its existing authority [to delegate] * * *." And, section 2 transfers to the Chairman "the functions of the Commission with respect to the assignment of Commission personnel, including Commissioners, to perform such functions as may have been delegated by the Commission to Commission personnel, including Commissioners, *pursuant to section 1 of this reorganization plan.*" [Emphasis supplied.] Thus, the Chairman's assignment functions would be wholly inapplicable to the existing delegations made pursuant to 5(d)(1) rather than section 1 of the plan. As a practical matter, the vast bulk of these delegations can only be performed by the chiefs of the functional bureaus (Broadcast Bureau, Safety and Special Services, Common Carrier, Field Engineering, and Monitoring).

11. It is also urged that the Chairman could give work assignments to a Commissioner's own assistants. But the plan does not in any way affect the provision of section 4(f)(2) of the Communications Act, to the effect that such assistants "shall perform such duties as [each] Commissioner shall direct." This provision and section 2 of the plan must be read in pari materia: the sole possible construction, I submit, is that such "personnel" assistants (S. Rept. No. 44, 82d Cong., 1st sess., p. 4) could have only the duties prescribed or directed by their respective Commissioner.

C. SECTION 3

12. It is argued that the plan, by abolishing the review staff and its functions, requires Commissioners and their three assistants to prepare all of the final decisions. This argument is premised on the last sentence of section 5(c) of the Communication Act, which provides that "the Commission shall not permit any employee who is not a member of the review staff to perform the duties and functions which are to be performed by the review staff; but this shall not be construed to limit the duties and functions which any assistant or secretary * * * may perform for the Commissioner by whom he was appointed." This sentence would have no vitality whatever, should the plan go into effect. For a provision which depends for its vitality upon the existence of a review staff and the performance by the staff of its functions—both of which have been abolished—must fall of its own weight and is no longer meaningful.

FEDERAL COMMUNICATIONS COMMISSION

Tables showing nonhearing and hearing application workload in the TV, AM, FM, and translator services for the last 5 years, 1956–60

[New and major changes]

TV NONHEARING

	1956	1957	1958	1959	1960
Start of year	65	91	134	117	99
New received	+255	311	239	183	160
Returned to processing	+10	12	10	14	14
Disposed of	−207	243	187	175	146
Designated for hearing	−32	37	79	40	40
Pending, end of year	91	134	117	99	87

TV HEARING

Start of year	119	92	57	90	82
Designated for hearing	+32	37	[1] 83	[2] 47	40
Disposed of	−59	72	50	55	38
Pending	92	57	90	82	84

AM NONHEARING

Start of year	374	428	507	673	1,165
New received	+609	664	610	1,077	800
Returned to processing	+62	47	33	83	21
Disposed of	−475	498	327	420	303
Designated for hearing	−142	184	150	228	399
Pending, end of year	428	507	673	1,165	1,284

AM HEARING

Start of year	104	145	139	170	220
Designated for hearing	+142	134	150	229	[3] 400
Disposed of	−101	140	119	179	207
Pending	145	139	170	220	413

FM NONHEARING

Start of year	12	21	34	70	94
New received	+133	166	309	416	546
Returned to processing	----------	----------	2	9	6
Disposed of	−124	153	250	377	469
Designated for hearing	----------	----------	25	24	51
Pending	21	34	70	94	126

FM HEARING

Start of year	----------	1	1	18	24
Designated for hearing	[4] +1	----------	25	24	[5] 52
Disposed of	----------	----------	8	18	25
Pending	1	1	18	24	51

TV TRANSLATORS (INCLUDES BOOSTERS AND REPEATERS)

Start of year	[6]	[6]	52	41	36
Received	----------	----------	+132	193	128
Returned to processing	----------	----------	+5	2	----------
Disposed of	----------	----------	−141	198	137
Designated for hearing	----------	----------	−7	2	----------
Pending	----------	----------	41	36	27

[1] Includes 4 applications remanded to hearing.
[2] Includes 7 applications remanded to hearing.
[3] Includes 1 application remanded to hearing.
[4] Combination AM–FM docket case included in AM nonhearing designation for hearing.
[5] Combination AM–FM docket case included in AM nonhearing designation for hearing, reason for discrepancy between nonhearing and hearing "designated for hearing" figure.
[6] Activity in this service has developed only recently; therefore, no statistics are available for 1956 and 1957.

NOTE.—Statistics on the hearing workload in this category are not kept separately because of the small workload involved, however, there are 7 applications pending in hearing status.

Common carrier cases

	Fiscal year				
	1956	1957	1958	1959	1960
Start of year	39	45	34	30	47
Received (designated for hearing)	42	30	25	41	45
Disposed of	36	41	29	24	28
Pending end of year	45	34	30	47	64

	Affirmed	Reversed	Modified
Fiscal 1957: July 1, 1956–June 30, 1957:			
Broadcast	49	18	3
Safety and special	4	0	0
Common carrier	6	0	0
Other (FEMB)	1	0	2
Fiscal 1958: July 1, 1957–June 30, 1958:			
Broadcast	72	4	0
Safety and special	2	0	1
Common carrier	4	0	0
Other (FEMB)	4	1	0
Fiscal 1959: July 1, 1958–June 30, 1959:			
Broadcast	63	7	13
Safety and special	11	2	4
Common carrier	0	1	1
Other (FEMB)	1	0	2
Fiscal 1960: July 1, 1959–June 30, 1960:			
Broadcast	67	11	16
Safety and special	20	1	7
Common carrier	1	0	1
Other	0	0	0
Fiscal 1961: 1st 6 months:			
Broadcast	54	4	9
Safety and special	20	2	2
Common carrier	3	0	1
Other	0	0	0

Senator PASTORE. Do I understand, for the record, this is merely for my own convenience, that you are unanimously in accord that something should be done about broadening out this review-staff situation. Is there anyone opposed to that?

Mr. MINOW. We recommended legislation; I think there was not a unanimous position.

You might want to talk.

Mr. BARTLEY. In the 86th Congress there was S. 1738 introduced, I believe, at the request of the Commission. In connection with it, we submitted a report. The amendment is very brief, and I think at this point in the record I might read it. It is only two sentences. It would end up this way:

> The review staff shall perform no duties or functions other than those prescribed by the Commission to assist it in cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing.

There is another sentence:

> It shall make no recommendations concerning the final disposition of any proceeding and any document finally disposing of a proceeding shall be prepared in accordance with the specific directions of the Commission.

Now, with respect to that last paragraph, last sentence, both Commissioner Ford and I dissented to it and our dissents are contained in a report of the Senate Calendar—Report No. 692, Calendar No. 698, of the 86th Congress, 1st session. We can make that available.

The last sentence of this section, I believe, would have a majority opinion of the Commission for deletion today. Certainly I am still

for it. It was more or less of a compromise that resulted from negotiations with the FCC Bar Association.

Senator PASTORE. Does that still retain prohibition against recommending?

Mr. BARTLEY. This sentence would, and I definitely am opposed to this sentence.

Mr. MINOW. So am I.

Mr. FORD. I wanted to repeal 5(c) in its entirety.

Mr. HYDE. Chairman Pastore, the difference is in the degree to which the statute would go in making the opinions and review group eligible to make recommendations. A majority of the Commission recommended that they should have permission to make recommendations in interlocutory matters. We made that recommendation feeling that perhaps that was as much relief as we could get at the time. The other members, who did not disagree with this, would go even further.

Senator PASTORE. Well, for the life of me, I can't understand why you gentlemen would refuse the recommendation of an individual if you are not bound by it. At least you get the benefit of his thinking. You wouldn't have to subscribe to it. Why do you bind your own hands?

Mr. FORD. The law requires us to.

Senator PASTORE. What is that?

Mr. FORD. The law requires us to.

Senator PASTORE. I can't see why you can't be unanimous on removing that binding.

Mr. BARTLEY. I am removing it. I want to make that clear.

Senator PASTORE. Let me ask the question again.

Are you in accord that the prohibition against recommendations should be removed in all cases of adjudicatory proceedings?

Mr. CROSS. No, sir.

Senator PASTORE. Are you opposed?

Mr. CROSS. Yes, sir.

Senator PASTORE. You think the prohibition should be there?

Mr. CROSS. Yes, sir.

Senator PASTORE. Will you give me a reason for it?

Mr. CROSS. I will try, sir. On interlocutory matters, I think it is perfectly proper they should come forward with their recommendations. On matters of substance, I feel that the people that hear the case and make the decision in regard to the case should not have their opinions in any way shaped, or tried to be shaped, by having something come up from the staff in the form of an order granting to A or B.

Senator PASTORE. That isn't very complimentary to the Commissioner, is it, that he is so flexible and so pliable in his thinking that he would be swayed by an inferior officer within his department just because he made a recommendation? I mean I don't think that is very complimentary to you. I mean, what you have actually said to me is, "We don't want the recommendation for fear it might change our mind." That doesn't show a very strong mind, in my book.

Mr. CROSS. It wasn't on that basis, sir, that my thinking revolved. My thinking revolved around the basis of the fact that a Commissioner is a pretty busy fellow and if he has a ready made opinion there, it is kind of handy to take it.

Senator PASTORE. That is true, but after all, it isn't anything that binds you. If we were saying here that you would be bound by the recommendation, you would have a good argument, because you don't want anybody else to usurp the responsibility that is yours. The big argument is made in review of these intricate matters, sometimes it would be of sufficient efficiency and in the public interest and it would expedite matters if they expressed their recommendations according to the record. You can either take it or leave it.

I would assume that every law clerk does that for every judge, but the judge isn't bound by it because the legal opinion and the opinion he gives ultimately has to be his own work. A lot of people in public life have ghostwriters, but that doesn't mean that the man doesn't reedit his speech and write in there as he wants as his own final product.

I don't know. I can't understand it. There may be something else to it that possibly I don't see, but as it stands now, Mr. Cross is the only one opposed to it; is that correct, of the seven members here Mr. Cross is the only one opposed to it?

All right, we will pass on to another matter.

Mr. MINOW. Mr. Chairman, I have concluded my statement.

Senator PASTORE. I am going to ask Mr. Scott first—I realize he came in after—we took it on from where we left off. There wasn't very much to it.

Senator SCOTT. Mr. Chairman, what concerns me more at the moment is that as one of the Commissioners has indeed said, that this plan would abolish section 5(c) of the Communications Act and I am wondering whether if you are going to abolish the Communications Act by it, whether you shouldn't do it by legislative process, by proposing a repeal of it. Isn't it a rather unfortunate way to abolish a part of the act?

Mr. MINOW. Senator Scott, I would only say that we are here today giving our comments on the President's plan. Congress recently extended the reorganization powers, giving the President the authority to submit a plan, and he has done so and we are giving our views on that. I personally support it, I think the same results could be accomplished by legislation and I would certainly not for a moment say this is the only way to accomplish much-needed reform to expedite our processes.

Senator SCOTT. What impresses me is that you certainly should, and I can certainly understand your desire to gain flexibility and to eliminate what might be unnecessary work, but it seems to me it is a rather bad precedent to abolish an entire section under a plan which we must act on in 60 days, and which prevents this committee from giving to it the kind of consideration we would normally want to give to a proposal as sweeping as this.

Well, regarding the discretionary review at the request of the three Commissioners, would not this tend to increase the pressures of the workload on all the Commissioners as they considered the decisions of panels and boards to determine whether or not they should be reviewed by the whole Commission? Doesn't that open up a whole new field of workload?

Mr. MINOW. I know some people feel that way, but I think if we set up a standard of review, and I understand that the Interstate Com-

merce Commission has recently set up certain criteria such as that the case must be one of national transportation importance. Well, we could establish certain ground rules of what kinds of cases we would review and what we would not. And the analogy to the Supreme Court's certiorari practice I think is a good one, because there the Court was running years and years behind in its docket and once it was given this discretionary power, it was able to become current in its workload.

Senator SCOTT. That leads me to the next question. I believe the only criteria which Congress has set up now is the "public interest, convenience, and necessity." Now, would this plan designate this standard? Would it delegate this standard to any of these persons referred to in the plan—employee boards, hearing examiners, and so forth. They would have only that standard to go by; wouldn't they?

Mr. MINOW. In addition, they would have our case precedents and our policies and regulations; yes, sir.

Senator SCOTT. Following up what you said, and I agree with it, but have not as yet formally adopted any formal standards or criteria or policies by which, for example, applications for broadcast stations shall be determined?

Mr. MINOW. Well, we have a number of decisions which have been made through the years which have established certain principles; yes, sir.

Senator SCOTT. You have a body of decisions, but you don't have any rules or overall criteria which you have adopted as a Commission; do you? You rely on the cases?

Mr. MINOW. In the television field, for example, we have an allocations table which certainly guides us in terms of engineering and other principles. And in addition to that, we do have in our application forms and rules certain principles and guidelines which have been established through the years, but I don't think that we have in any one place a written guideline or policy that is all inclusive; no, sir.

Senator SCOTT. Having in mind that all matters are reviewable by the Commission upon the act of at least three Commissioners, wouldn't all disappointed applicants or many disappointed applicants petition for a review upon the ground that the employee board or the Commissioner or the Board of Commissioners, establishes policies? I had in mind without formal determinations of what standards to apply, would not every determination be appealable by dissappointed litigants? Again, let me go to the question of workload.

Mr. MINOW. I was looking over the percentage of reversals of hearing examiners' decisions we had last year; this is part of the appendix that I have submitted for the record. It works out we affirmed I would say five or six times for every time we reversed. So if on review of an initial review we determined that the examiner was correct and that there was no overriding issue of national importance, we could simply decline review; then if the party wanted to, he could go to court. But he would be so doing a year or two earlier than he can under our present system.

Senator SCOTT. How would you feel about having Congress establish standards and criteria and policies with some specificity—I learned the word the other day—so the Commission may intelligibly

delegate the power to determine whether one specific set of facts meets with established criteria? Would you want to give Congress that responsibility?

Mr. MINOW. I think it would be very helpful if you would give us some guidelines on that.

Senator SCOTT. I am not sure it is wise.

Senator PASTORE. When that time comes, I will assign the Senator from Pennsylvania to assume that responsibility.

Senator SCOTT. I just filed a disclaimer.

Now then, I am somewhat worried about the independence of the Commission. If the Chairman is to be given the powers contemplated in the plan, would not this subject some future Chairman to the possibility of influence from the executive department, since the Chairman is responsible for his designation as Chairman by the President?

Mr. MINOW. I know there are some people who feel that is the case. Certainly I have not personally sensed any influences or pressures thus far. I think it really depends upon the particular person.

Senator SCOTT. You would have no fear then that section 2 would tend to vest in the President or the executive a measure of policy control over the Commission?

Mr. MINOW. I think not, sir, largely because the Commission itself could withdraw any power in the Chairman as the Commission saw fit.

Senator SCOTT. Bear in mind that power withdrawal would be, as the chairman has said, somewhat fairer if the power withdrawal could be by three Commissioners.

Mr. MINOW. That would be perfectly agreeable with me; yes, sir.

Senator SCOTT. Suppose the President nominated a man who had no political affiliation, as was done with the Federal Trade Commission.

Now if the President were to do this with respect to the FCC, how would the minority be protected on questions that would have some, let's say, political implications?

Mr. MINOW. Well, that is hard for me to answer because I have not observed, although I have been there a very short time, but I have not observed any political implications or ramifications in any case.

We differ widely, as you know, but we never vote on a party basis that I am aware of. I have been told—I have not been aware of any political problems at the Commission.

Senator SCOTT. My concern is—and it was expressed by the members of the other party at the last session—it was proposed that a person who was designated as an independent, be named to a commission, that it was running afoul of the intent of the act which was meant to provide a majority of four, for the majority party, and a minority for the minority party, in this case, four to three.

It seems to me if the President named an independent, that rather deprives the minority of its full representation.

If at the same time you named an independent as a member of the majority, he might be either asking for a tie or a swing vote and I just suggest that, it seems to me, to be an undesirable policy. I don't want to put you in the position of commenting on what the President might do, I am talking about any President.

Mr. MINOW. The only thing I wanted to say is that, fortunately, we don't have that particular problem at the FCC.

Senator PASTORE. This reorganization plan is in group sections 1, 2 and 3, and the objection to section 1 appears to be that it would make the Chairman more or less a czar. My question to you is this: Considering the fact that what we are actually trying to do in the public interest is to expedite the work of the Comimssion to resolve these cases in the public interest as soon as we possibly can, in what order would you give these three sections, what order of priority would you give them in carrying out that function?

Mr. MINOW. My own personal view would be one and three.

Senator PASTORE. One and three?

Mr. MINOW. Sections 1 and 3.

Senator PASTORE. You mean that merely the authority to assign certain Commissioners to hear cases would expedite it?

Mr. MINOW. No; that is No. 2.

Senator PASTORE. One and three. In other words——

Mr. MINOW. I feel confident that I can work out with my colleagues a basis of assigning the workload. That does not concern me terribly much.

Senator PASTORE. In other words, what we are saying here, is that if we could do something about oral arguments?

Mr. MINOW. Oral arguments and the necessity for all of us participating.

Senator PASTORE. And resolve finally matters that are of not such importance, that are in the public interest?

Mr. MINOW. Right.

Senator PASTORE. It might be important to the individual concerned?

Mr. MINOW. And eliminating the restrictions presently inhibiting our use of the review staff, which is No. 3.

Senator PASTORE. Do you think that would help to expedite?

Mr. MINOW. Yes, sir; particularly in interlocutory matters. This is where we waste a great deal of time.

Senator PASTORE. In other words, your problem does not seem to be that you do not have the hearing officers to hear these cases or the people to hear the cases, the trouble comes after they are heard.

Is that essentially it?

Mr. MINOW. Not entirely. In the AM field, the problem is the delays before we ever get to hearing. There they are stacked up in a bottleneck more because of engineering difficulties than anything else.

As you know, there are now close to 4,000 AM stations.

Senator PASTORE. There is nothing in the Reorganization Act that would cure that?

Mr. MINOW. No; I say that is one of our biggest headaches, but that has nothing to do with the reorganization plan. These two matters, the elimination of the requirement that all of us hear every case and of the restriction on recommendations by the review staff, would be the biggest help, in my opinion.

Senator PASTORE. Now, we have more or less an opinion expressed with reference to section 3. Let's have an opinion on the part of the members as to section 1. I mean let's take it that way.

Mr. Hyde, you first.

Mr. HYDE. Mr. Chairman, section 1 would give the Commission flexibility which I would urge it should have.

What the Commission needs more than anything else is a larger measure of control in the management of its hearing work. I would certainly support that principle. I am concerned, however, when you couple section 1, which would give the Commission this new discretion, with section 2, which gives the Chairman or which transfers from the Commission to the Chairman the function of assigning personnel.

I think that those two together tend to give the Chairman control which he has not had before and tends to conflict with what I think was a basic concept of the Communications Act, namely, that we should have a multibody independent commission.

Earlier today you said that you would be pleased to hear some constructive suggestions and I would offer mine at this time, that is, that you give the Commission this added flexibility and also that you give the Commission the responsibility of assigning its personnel.

I recognize that this would have to be done through a Chairman, but I see no difficulty at all in the agency making the appropriate delegations to the Chairman.

When a Chairman works under a delegation from his fellow Commissioners, you can be sure that he will make his assignments with due regard to their interests and feelings about it. I can tell you this from experience.

Senator PASTORE. In other words, you are satisfied with section 1 and section 3?

Mr. HYDE. I am satisfied with section 1, if you do not couple it with section 3. I would be——

Senator PASTORE. Section 3 or section 2?

Mr. HYDE. Section 2, excuse me. Perhaps I spoke too quickly about section 1. I think that there should be provision in the act for oral argument in those instances where someone who did not hear the evidence would be making the decision.

In other words, I think it is desirable that in any situation where a board or a group is to make the decision, the interested person should have an opportunity to file exceptions and be heard in oral argument. I recognize under section 1——

Senator PASTORE. Would you make that as a matter of right or would you make that as a matter of discretion?

I mean that is the point we have?

Mr. HYDE. I would give them the right to oral argument in those instances where a decision is to be made by someone who did not hear the evidence. But I would not necessarily make that a matter of right before the full Commission.

I am suggesting, sir, that the need for review might very well be adequately satisfied in a panel or a board. I do think it would be helpful to a just disposition of a hearing case.

Senator PASTORE. Now I don't follow you too closely on that. Isn't it the case that in most instances the Commissioners have not heard the evidence?

Mr. HYDE. That is true in most cases; that is true in practically all cases now.

Senator PASTORE. All right, you are saying actually in all cases they should have an oral argument?

Mr. HYDE. I am saying there should be oral argument in any situation where a person who did not hear the evidence or a board who did not hear the evidence would give the final decision.

As I understand it, this reorganization order contemplates that this function of argument might be dispensed with or might be handled by someone other than the Commissioners.

Under the present law, as you know——

Senator PASTORE. Before you get off on that, I did not quite understand it that way. You say that—you mean that the hearing officer who makes his recommendations to the Commission, that that becomes final in the event the Commission does not grant a review, is that what you mean?

Mr. HYDE. Yes, sir. But what I am concerned about more is the situation where a hearing officer has given an initial decision and then in place of a review by the entire Commission, there would be a review by a panel or an employee, perhaps under the reorganization order.

I think in that situation, where you have someone giving his judgment without having heard the evidence, it would be desirable to have the procedure of exceptions and oral argument. I do not think it is necessary that every litigant have the right to oral argument before a quorum of the Commission. I think we could very well determine some classes of cases that need not have that attention.

Senator PASTORE. Do you think that can be done?

Mr. HYDE. I am certain it can be done.

Senator PASTORE. Classes of cases?

Mr. HYDE. Yes, sir.

Senator PASTORE. Do you mean by rule or statute?

Mr. HYDE. It cannot be done under the present law, but I think the statute could be changed to give us the authority to make such a rule.

We discussed renewal license of a shrimp boat this morning. I am not suggesting that this case was not important to this applicant, but if the Commission as a whole felt that their time would better be given to some more important matter, this type of case could be reviewed by a board within the Commission, provided we had legislation that gave us that authority.

Senator PASTORE. In other words, you would set up another agency within the FCC which would be more or less a review board?

Mr. HYDE. What I am concerned about here is this: the reorganization order seems to do away with the function of oral argument before the Commission.

Senator PASTORE. As a matter of right?

Mr. HYDE. As a matter of right.

Senator PASTORE. In other words, when a hearing officer has heard a case and renders a decision, he gives his reasons for it. He states the facts and gives the reasons.

Now I would suppose that in many, many cases, if I were representing a client who wanted to forestall the decision of that application, I would ask for an oral argument.

So I get myself at the bottom of the agenda, and I sit back and wait for weeks and weeks and weeks until they get around to me. Not only does the order not take effect, I mean I am just delaying. I have seen that done before in the courts.

I am not being critical of it; it is being done every day.

Mr. HYDE. Chairman Pastore, the right of oral argument is not the delaying factor that seems to be indicated by this discussion.

Actually, the Commission is in oral argument about 5 hours a month, something like that. We had 57 cases in one year to go through the full process of oral argument before the Commission.

Now I recognize there is a good deal of time given to a case outside of the time that counsel is before you. There is no backlog of cases awaiting action because the Commission has not had time to hear them.

Actually, if you examined the cases, you would find more of them are delayed by the parties than are delayed by lack of time on the part of the Commission.

Senator PASTORE. You mean because the parties are not ready?

Mr. HYDE. Parties are not ready, that is right, sir.

There is no big delay occasioned by inability of the Commission to find time to hold the oral argument.

Now this is not to say that the Commission might not in some instances find more important work to do than to hear the argument in some particular case. It has been mentioned here already that the big delay in FCC processes is not at this point where the Commission hears the argument.

Actually, this order relates mainly, well, exclusively, according to some interpretations, to adjudicatory matters. Adjudicatory matters probably do not constitute 1 percent of the matters involving specific action in our shop. Our bulk licensing and regulating work is done under delegations as of now.

Senator PASTORE. Aren't you actually saying, Commissioner Hyde, that this reorganization plan is absolutely unnecessary?

Mr. HYDE. Yes, sir; I am. However, I would certainly favor the legislation that has been discussed here already that would give the Commission a little more flexibility in the use of its present staff and in the handling of its hearing work.

Senator PASTORE. Now you just heard the Chairman recite a backlog of cases.

Mr. HYDE. This is a backlog of cases, but the main delays on these are first on the processing line before they get to hearing, then in the hearing procedure before the hearing examiner. A case will be—an application for a new broadcast station in the AM field or for a major change in facilities will be on the processing line more than a year before it can be reached for action looking toward the hearing.

I think the rate now is on the order of 14 or 15 months. Then it is designated for hearing. If there are multiple applications, as is frequently the case, the hearing examiner might have it in his charge for 10 months or a year, and then he will make his initial decision.

The hearing examiner's decision is subject to exceptions, and applicant or any litigant in the proceeding has a right to oral argument before the Commission. When the initial decision is issued 30 days are allowed for filing exceptions. Twenty additional days for filing replies to the exceptions and then the matter can be posted for argument before the Commission.

But when you reach this stage you already have invested a lot of time in it. This is the one thing that seems to be of concern in the reorganization order.

Senator PASTORE. Now what is your answer to the trouble?

Mr. HYDE. My answer to it is that this committee should give consideration to changes in the law that would give the Commission greater flexibility and greater discretion in the management of hearing work. I think, too——

Senator PASTORE. Don't go over that too fast. Now what are the recommendations?

Mr. HYDE. Sir, we certainly should be allowed to use our hearing and review staff according to the ways the Commission finds it helpful to use them. I think that you could trust us——

Senator PASTORE. That is section 3 you are talking about?

Mr. HYDE. Yes. I think you can trust us to do that without permitting our judgments to be distorted or influenced by considerations outside the hearing record.

Senator PASTORE. You think that would help, section 3?

Mr. HYDE. I am certain it would help a lot.

Senator PASTORE. Any questions?

Senator MONRONEY. How much of the delay is caused by dilatory pleadings?

Mr. HYDE. It would be most difficult to give an opinion in this area. We have had the feeling in some instances that applications had been filed for purposes of perhaps delaying competition, but in those instances where we have made investigations we have not been able to make a finding that such was the case.

Each applicant, of course, is required to swear in his application that his filing is not for the purposes of delay. You do hear the complaint when you have a contest from one or the other that the opposition is only trying to delay. This is like trying to prove what is in the back of someone's mind.

I would not want to say that the Commission's work or processes are abused to any great extent. We are always endeavoring to prevent abuse and looking into those situations where it might be suggested.

Senator MONRONEY. Would you say that there are very many legal steps that are within the realm of possibilities in the procedures that are overlooked by the eager bar, specialized bar?

Mr. HYDE. Senator Monroney, in previous appearances before this committee we have sometimes urged that Congress has given applicants and licensees rights which enable interested parties procedural rights to defeat substantive policy. For instance, we complained long and loud, as Chairman Pastore will remember, about the protest rule which would permit an existing station to protest a grant of a new station to operate in the same market and as the law originally stood, to require the grant be set aside and a hearing held.

This was modified several times and in the last Congress this provision was abolished. But this is an illustration of a procedural right which did operate to delay the dispatch of the business of the Commission.

I think there are other provisions that might well have been examined for the purpose of determining whether or not the advantages in them are not offset by the disadvantages in the delay which they cause.

Senator MONRONEY. The direct answer to my question is yes, that all technical legal steps that are possible to be taken are taken, even in the 250-watt stations that may be located 500 miles from the protesting station?

Mr. HYDE. Most cases are thoroughly litigated; yes, sir.

Senator MONRONEY. Isn't that what we are talking about?

Mr. HYDE. Yes.

Senator MONRONEY. How do we screen them? These are usually screened earlier for engineering possibilities to avoid conflict, but then it comes up for final hearing and or oral argument, and everything before all seven members of the board?

Mr. HYDE. The point I want to make is that these various procedural rights and the exercises of them are not the thing that we are really dealing with in this reorganization order. The reorganization order deals with this right of oral argument at the stage when a case comes before the entire Commission, and as I mentioned earlier, there were 57 cases that went through this full process before the Commission last year. This obviously was not enough to overwhelm the Commission.

Senator PASTORE. From the time a person asks for an oral argument until the time he gets it, on the average how much time is consumed? Can anyone answer that?

Mr. FORD. I have some statistics here. At the present time there are 15 cases pending that are eligible for oral argument which have not been held. There are two scheduled in June. It is contemplated that 2 will be heard in June of that 15, leaving 13 cases at the end of June that have not been scheduled for oral argument.

Senator MONRONEY. What kind of cases?

Mr. FORD. Adjudicatory cases.

Senator MONRONEY. What kind, TV, 250 watters, or what?

Mr. FORD. All kinds. Not very many TV. Most of them are probably AM radio, maybe some FM radio, maybe operators' licenses, maybe a forfeiture with respect to violation by a small shrimp-boat operator or something of that sort; miscellaneous classes of cases in which they have asked for oral argument and which the law gives them the right to have.

Then there are 6 cases already scheduled in addition to this 15, for the month of June.

Now the cases that are pending, of these cases, most of them the initial decisions were issued in March and April. A very small number of them were issued in February and then there is one that goes back to last August which is quite a complicated case. But that is the backlog that everybody is talking about?

Adjudicatory cases which Dean Landis says are the main thrust of section 1 over and above the delegation of authority we presently have in section 5(d)(1) of the Communications Act.

Senator PASTORE. Now the Commissioner has said you don't consume more than 5 hours a month in oral argument.

Mr. FORD. He told you we handled 57 last year, calendar year of 1960 and the average oral argument would probably run roughly 60 minutes or perhaps a little longer, so that you can on the basis of 57, in the course of a year, 52 weeks a year, you can estimate roughly that maybe not that much time is involved.

Senator PASTORE. Is it your opinion, too, that in this reorganization what we are actually doing is trying to dry up the ocean with a sponge?

Mr. FORD. I don't——

Senator PASTORE. The point I make here is this: We have this tremendous Reorganization Act. I am being told in one breath we don't need it, and in another breath we have no problems at all.

Mr. FORD. No; I was just telling you about the backlog. I think we have problems and I think there are some very good things here we need some help on.

Senator PASTORE. All right, let's hear from—all, right, Mr. Minow.

Mr. MINOW. I was just going to say, Mr. Chairman, the figures on the cases awaiting oral argument are correct but the cases in the pipeline that are going to be coming up to us are increasing rapidly.

As I mentioned, at the beginning of 1960 we had 220 cases in the hearing process at one stage or another in the AM radio field. At the end of 1960 we had 413. Now those cases are not among the 15 awaiting argument, but the point is we are getting more and more and more of them that are coming up to this state.

Senator PASTORE. Now, Mr. Hyde makes this point, that in any case where a hearing has been held by a person differently than the group that would make the ultimate decision that the litigant is entitled to an oral argument. You heard him say that. Now how much does that change the picture?

Mr. MINOW. I certainly don't quarrel entirely with that. It could be argued that there should be an oral argument at some stage. The main point is that I don't think it should be before all seven of us in every case. That is the point I stress. Take cases involving ship station licenses. There could be an oral argument somewhere in our Commission on such cases. We have 1,300 employees. But certainly the seven of us should not have to sit there every time one of these cases comes up.

Senator PASTORE. Who hears the oral arguments now?

Mr. MINOW. First they go to a hearing examiner who hears it in accordance with all of the requirements of the Administrative Procedure Act and then it comes to the seven of us.

Senator PASTORE. Who are these people you are going to have this oral argument before?

Mr. MINOW. If we could have the freedom to decide, we might conclude we should have an employee panel or panel of three Commissioners, or one Commissioner. We would like to have the flexibility to make that judgment ourselves.

Senator PASTORE. Could you do that under this?

Mr. MINOW. Under this reorganization plan, yes, sir.

Senator PASTORE. What section would you do it under?

Mr. MINOW. Section 1.

Senator PASTORE. You would do it under section 1?

Mr. MINOW. Yes, sir, and 2—not necessarily.

Mr. FORD. Just so the record is clear, there is disagreement on that.

Senator PASTORE. Oh, I anticipated that. Just let me ask one question. Is it 4 to 3?

All right, Mr. Bartley, I think we ought to hear from you.

Mr. BARTLEY. I think that the Commission should be given discretion or certain type of authority. However, I would think that it won't save as much as some people think it will for this reason: As a Commissioner, if I receive a petition, although I had nothing to do with the case, I would feel the responsibility of going over that petition just as I would if I were going to have oral argument.

Now the big saving that would come would be in the disposition of it. I would not have to give any reasons. And sometimes these reasons are very difficult to put down in writing. You know it is not important, but to try to put it in writing so as to satisfy the court is very, very difficult. And so while I am all for discretionary authority, I am not as sure as it may appear that it is going to save as much time or work as a lot of people think it is.

My principal problem here is not with the objective but with the way we get there. I am very much afraid that if this goes through under the reorganization plan that we are going to be right in the middle of litigation. I think it is going to be 2, 3, or 4 years before we know what we have been doing in the meantime.

I think the first time we turn down oral argument under this, if it is an important case, that it will start through the courts. It is going to be a good long time before we know what we have and I think that the whole thing, the Reorganization Act itself will be under review.

Senator PASTORE. Let me see if I can tie you down a little bit.

First, you take the position that whatever changes ought to be made should be made in substantive law by bills introduced rather than through the reorganization plan?

Mr. BARTLEY. That is correct.

Senator PASTORE. If legislation were introduced you would not be opposed to section 3 of this reorganization plan. In other words, a bill instead of a reorganization plan.

Mr. BARTLEY. I would want it to say section 5(c) is abolished.

Senator PASTORE. Let's take section 1, the substance of section 1. Do you agree that under the provisions of the plan you could within the Commission set up a group of two or three to hear oral arguments?

Mr. BARTLEY. Yes, sir; or a board.

Senator PASTORE. Or a board?

Mr. BARTLEY. Yes, sir.

Senator PASTORE. You feel you could carry out that function?

Mr. BARTLEY. Yes, sir.

Senator PASTORE. You are opposed to the substance of section 2?

Mr. BARTLEY. This is my problem, and to be specific, I have a statement that I will file later, but no need to say anything, because we are getting most of it on the record here.

Senator PASTORE. Do my colleagues mind if I make a canvass of all the members before they answer questions here, just so we can get this thing down?

Mr. BARTLEY. You are going to come to section 2 later.

Senator PASTORE. You are opposed to section 2?

Mr. BARTLEY. Yes; but I would like to explain why.

Senator PASTORE. All right, go ahead.

Mr. BARTLEY. I think the key to the whole thing is that under our act as contrasted with the Interstate Commerce Commission, that

the President designates the Chairman and he serves only at his pleasure. This to me is and has been for many, many years, this is nothing new with me, I think probably as early as 1932, 1933, and 1934, when Dean Landis and I were both working on bills over in the same committee, we may have had differences of opinion back then.

Now I have seen it operate. I have been at it since that time, both outside the Commission and inside this Commission, on the staff of the ICC and on the staff of the FCC, and staff of the SEC, I can't say that legally this transfer is any authority, because it isn't legally. But I have seen the influence relegated there.

That is all I have to say about that.

Senator PASTORE. I think I get the point that you are trying to make. Whether I agree or disagree with you is another thing. But I get the point.

Now, Mr. Craven, tell me first if you are in accord on section 3?

Mr. CRAVEN. Yes; I am in full accord with section 3.

Senator PASTORE. How do you feel about section 1?

Mr. CRAVEN. I support our Chairman.

Senator PASTORE. On that?

Mr. CRAVEN. Yes, sir.

Senator PASTORE. How about section 2?

Mr. CRAVEN. Section 2, I support him in that, too.

Senator PASTORE. Well now, this is quite refreshing. Now will you tell us why?

Mr. CRAVEN. I have no fears whatsoever with respect to the independence of our agency. I have no fears of the Chairman becoming so dominant over the Commission, and the Commissioners being so weak as to allow him to do it. I think we have full flexibility under section 1 to delegate what powers we want and to take them back if he doesn't carry them out correctly.

Senator PASTORE. Do you feel that it would expedite the work of the Commission?

Mr. CRAVEN. Yes.

I want to bring out one point. I spent a lot of my time before oral argument in studying the exceptions and the briefs in support of the exceptions and that takes a lot of time. I feel that if we have too many oral arguments I will be doing that and nothing else.

Senator PASTORE. You mean apart from the fact that you sit there and devote maybe 5 hours a month, you have to do a lot of homework, too?

Mr. CRAVEN. I do some homework, too. That is necessary to understand the case.

Senator PASTORE. How do you feel about giving more flexibility to the review staff? Do you feel that would cut down your homework?

Mr. CRAVEN. It is liable to do one thing. I have only one lawyer; I am not a lawyer myself. I would like to be able to ask the review staff certain questions with respect to matters of law and get their advice.

Senator PASTORE. As it stands, you endorse the reorganization plan in all three sections?

Mr. CRAVEN. I endorse the objectives. I am not a lawyer and inasmuch as there have been some questions about the legality of the proposal, I will not pass on that phase.

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Senator PASTORE. I realize that.

Mr. CRAVEN. I also will state I also approve the legislative route. I think the President had full authority granted him by the Congress to submit this plan.

Senator PASTORE. Thank you very much.

Let's go to Mr. Cross.

Mr. CROSS. Mr. Chairman, I personally support the reorganization plan. I have a statement which, with your permission, I will file or I can read or whatever you want me to do with it.

Senator PASTORE. I wish you would file it. As a matter of fact, I read with great interest the letter you sent in to Mr. McClellan and I applaud you for it.

Now, you took the position that you have some doubts about section 3?

Mr. CROSS. Yes, sir.

Senator PASTORE. On this matter of making recommendations. Now how do you feel about sections 1 and 2?

Mr. CROSS. I have no fear, and I would like to say to you and your colleagues, sir, with all the sincerity that I command, I am just as strong as anybody could possibly be for an independent Commission and I see nothing in this that would in any way interfere with my beliefs in that regard.

Senator PASTORE. That doesn't mean that you endorse every line and every sentence, but in substance you agree with the spirit of the reorganization plan that was submitted?

Mr. CROSS. I do, sir.

Senator SCOTT. May I ask Commissioner Cross a question?

Senator PASTORE. Yes.

Senator SCOTT. Mr. Commissioner Cross, I understand section 2 would authorize the Chairman, without consultation with other members, to choose and decide on personnel as he might see fit to process the matters which have been delegated. Is that all right with you?

Mr. CROSS. Well, sir, first he has to get the delegation. When these cases are ripe for hearing they come before us and the issues are approved by us and as I see it and as I read the reorganization plan, at that time we could delegate either to have that case heard by an examiner or by a Commissioner or a panel of Commissioners or the whole Commission, whatever we decided that we should do.

Now, having given that delegation, suppose we say we gave it to a delegation of three Commissioners, then and only then could the Chairman designate by name what Commissioners those would be.

Now those Commissioners, if they were designated to hear the case, they would render a decision, and then if the minority, the majority less one, didn't like that, they could appeal it to the full Commission and the full Commission would hear it, must hear it.

So I think this idea of the Chairman will get only such powers as the Commission grants to him and there is no way that I can see that he can usurp any power unless the Commission just abdicates.

Senator SCOTT. Insofar as new delegations are concerned, wouldn't you and other Commissioners be placed in a position of either accepting the Chairman's assignment of personnel or refusing to agree to the delegations? Wouldn't that be either acquiescing in the wishes of the Chairman or voting to deprive the agency of any vacancies that might be in the proposed delegation?

Mr. CROSS. Not necessarily; no, sir.

Senator SCOTT. How would you escape from that dilemma?

Mr. CROSS. As I just said. Suppose, for instance, the Chairman said that we will designate this one for one Commissioner, and I just didn't like that way of doing it. I didn't think that was quite right, so I would object to that. And if I could get the majority of the Commission to go along with me, why, we wouldn't do it that way. And if I had sufficient reason I think that I could convince my colleagues in this regard.

On the other hand, if I didn't have sufficient reasons, then possibly my reasons weren't strong enough to obtain in any event.

Senator SCOTT. Could I ask Commissioner Hyde if he would comment on that, since I was quoting him.

Mr. HYDE. Senator Scott, I believe we oversimplify a situation when we speak of revoking or rescinding an individual delegation. Actually, if we are going to get any increased efficiency out of the power to delegate, a Commission would find it necessary to delegate whole classes of work at a time. We do this now. The larger amount of the processing of individual applications in all three bureaus is now done by delegation to the bureau chiefs.

If under this new reorganization order and there is some question as to whether the delegation would relate only to adjudicatory matters or whether the Chairman would have authority to assign personnel to matters already delegated, let's assume that there is an individual case where the Commission is unhappy with the assignment of the personnel assigned. In that situation, we would have to, it seems to me, revoke the whole broad delegation in order to get at the one case.

I think it is apparent from this that the right to ask a review or to reconsider the delegation gives you very limited control of delegations in individual cases. In other words, you would be up against the proposition of having to cancel out a broad delegation of a lot of work in order to get your viewpoint considered in the individual case.

Senator SCOTT. The Administrative Procedure Act, sections 4 and 5, provides for the conduct of the Commission's business and with particular reference to hearing examiners. Doesn't this plan change or modify the Administrative Procedure Act?

Mr. HYDE. The reorganization order declares on its face that it does not, but I think there are some very serious legal questions as to whether or not it doesn't undertake to modify the application of the Administrative Procedure Act.

Senator SCOTT. It appears to me on the face of it to modify the Administrative Procedure Act when we look at sections 4 and 5 of the act.

Section 12 of the same act provides, and I am quoting:

> No subsequent legislation shall be held to supersede or modify the provisions of this act except to the extent that such legislation shall do so expressly.

Therefore, regardless of what the plan says, if in fact it modifies the Administrative Procedure Act without saying so, then it is in violation of the Administrative Procedure Act?

Mr. HYDE. Some of the members—Commissioner Bartley has mentioned his concern about litigation arising from the application of the reorganization order. I certainly have some doubts as to the results that we will get. I fear that we will have confusion.

Senator PASTORE. Now will the Senator yield so I might finish the canvass?

Mr. Lee?

Mr. LEE. Mr. Chairman, like Commissioner Craven, I am not a lawyer. I thought I could rely on my fellow lawyers on the Commission, but I find they disagree, too. I am against the three sections as written.

Senator PASTORE. All three?

Mr. LEE. Yes.

Senator PASTORE. Why? Let's take section 1. What is there objectionable to that?

Mr. LEE. Section 1. I would have a very strong objection to the elimination of the right of oral argument. Now I say that because fundamentally I don't think you are talking about a substantial workload burden in the Commission. We have allocated to the practitioners before the bar generally 20 minutes a side. This I find, personally, very helpful on the presentation of the case. It is probably harder to write something that will take 20 minutes than it is to write something you can do in an hour. I find this capsule presentation is very helpful and, as a matter of right, I think they are entitled to it.

Now we have heard——

Senator PASTORE. You don't care what kind of case it is?

Mr. LEE. I haven't seen any cases that we have had so far that have been useless.

For example, there has been some comment about the shrimpboat case. We did have a case on the license revocation of a fellow who was a shrimpboat fisherman. Well, my answer to that is that he is entitled to that appearance before the men who make the decisions just as much as the fellow who might lose his $20 million license; and further, that very case could be a precedent-making ease that might not even be apparent to us until we have the oral argument, and could conceivably affect the whole shrimp industry and whole fishing industry.

I don't think the practitioners ask for oral argument for the sake of oral argument. They don't have any particular desire to appear before us without at least the appearance of a case. We can cross-examine them quite vigorously and I don't think that they just do this willy-nilly, and I do feel that, as one Commissioner, this oral argument to me is a great help and I don't find it burdensome.

Senator PASTORE. How about 2?

Mr. LEE. On 2, of course, my concern there is with the assignment of personnel. I feel that this would be so difficult, of course, it would be so difficult for us to undo in the event of abuse that it could lead to the kind of authority that I don't think we would want to have in one man.

I have been very happy with Chairman Minow. He is a real delight to work with and I know that he would never abuse any privilege. I have been very strong for delegating to the Chairman, and I am prepared to do more delegating on my own when I know a simple four can undelegate it at some time, not only for matters of abuse but perhaps where circumstances may change.

I do have this feeling: you have asked for some constructive suggestions; I have been sitting here all day and several days thinking of

what could be constructive and what occurs to me is that I wish the President would pull this plan back, refer it to the FCC for their comments, like we do on many pieces of legislation, and I would make a wager that we would come up with something that would have the full support of the Commission.

Senator PASTORE. Why does the President have to withdraw it? Why don't you come up with something that is constructive anyway? I have been waiting for it for 10 years. You have been at it for 10 years. I haven't seen it yet.

I beg you gentlemen to come in any time, to come in with a suggestion that this will expedite. I leaned over backwards. I went to the floor of the Senate and fought for it. Now after all we are either going to take the position here there is nothing wrong down there and nothing we can do to help the situation, or there has to be something done. Now, whatever it is, I don't think that the President is so jealous of the authorship of this reorganization plan of his that he wouldn't take a substitute that were better. I don't think he wants to do anything to hurt these parties in pursuing their rights under the law. I don't think he wants to deny anybody the right to be heard before the Commission. I think what the President is concerned about is the fact that here we have this terrific backlog of cases and something ought to be done about it. And we have seven fine gentlemen who are being paid a very adequate compensation yearly like the rest of us on this side who have a job to do and we want to do it.

Now if you have a suggestion, I don't see why the President has to withdraw this thing and let you fellows look over it for a couple of months. If you have an idea, express it, put it down in writing and I will put it in. I have been saying that for years, and I am not being critical. But you have to do something.

You fellows can't walk out of here feeling you came up here and you killed the reorganization plan. If the reorganization plan isn't the answer, then what is the answer? We ought to have an answer for the people of this country.

I am not satisfied that things down there have been going along as expeditiously. Now I am not saying it is your fault. You may have your hands tied. There is Mr. Craven with all his problems in the technical features of this phase of the work, saying he has to spend a lot of homework in reading exceptions and doing this. Now if there is some way of doing this, maybe you can free the whole seven by appointing a smaller group, break yourselves into subcommittees. If you haven't got the authority, ask us for the authority. But please. let's do something.

Mr. MINOW. We will do so, sir.

With respect to Commissioner Craven, this makes the point exactly. Here Commissioner Craven has been carrying the load for the Commission in a lot of ways in this space satellite field. It is pointless for him to have to sit with the other six of us all the time on every single case.

Senator PASTORE. That is right.

I remember a short while ago we had a hearing here on the booster problem. We had a terrific hearing and I must say at this time that I think it was through the urgence on the part of this Committee that something was done.

Now we had a lot of those people in the western part of the country who couldn't receive a picture, a good picture, unless they had boosters. And after we got through, this is what they came up with: a little piece of machinery like this (indicating) that solved the whole problem.

We talked about it for days and days and days, and finally Mr. Zapple and I had to go out there and look, and finally we got you people to go out there and look, and then you agreed with us. And we finally passed a law, and something was done about it.

I say, let's get things done. I mean, if you keep splitting and everybody keeps exercising his own individuality and he won't compromise, and he won't reach a conclusion. We would never pass legislation in the Senate if somebody didn't give in a little bit somewhere. And somewhere along the lines you gentlemen ought to come up with an answer, one answer, not seven different answers.

I mean, after all, this is not a debating society; this is an agency of the Government to do a piece of work.

Senator SCOTT. Mr. Chairman, I agree generally with what you have said. I just think that I understand what some of the Commissioners are getting at. It is that they only have 60 days here, and that it would be more helpful if they had had an opportunity for consultation.

Whether it has taken 10 years or not, there may be things here that ought not to be done in 60 days.

Senator PASTORE. I am not advocating that, as a matter of fact this matter is not before this committee as a matter of jurisdiction, only here as an advisory matter.

This is to be decided by the operations committee.

Now I am not here vouching for this reorganization plan. I cannot stop the President of the United States and neither can you or anybody else from sending up a reorganization plan. That is the law. The Congress gave the President the right to send up a reorganization plan and the Congress is the one that said, within 60 days, unless we reject it, it becomes a law.

We passed the law. It is our law. Now I say this, that if we cannot get the reorganization plan through, and if the reorganization plan is not the answer, then let's get the answer.

I have suggested here two or three times today, that the FCC draft legislation and I will be willing to introduce it.

Mr. LEE. I might say, Mr. Chairman, that you have always been very helpful to the Commission and I know that every time we need a friend, we generally have one. We do have a legislative program. We have suggested a number of things that we think will be helpful.

My reaction to this is, knowing the Commission as I do, I feel that if we had a few weeks perhaps to comment on it, as we do on a piece of legislation, we could have compromised these areas and perhaps it would not be necessary for us to be here.

Senator PASTORE. Well, I would hope, whether it passes or not, and of course, I cannot say, but I do say this—that if it does not pass, if it does not become the law, I would hope that this would not be a victory that would deny Mr. Minow the czarship of the Commission, as has been said around the country in some places.

I don't think anybody is trying to be a czar of anything. It is a hard job and it is a responsible job and the more responsibility you

assume, the more work you have to do and he has to do it in the public interest. And if he does not do it in the public interest, not only will he come before this committee, he will have to answer to the Attorney General of the United States.

Senator SCOTT. He is pretty busy right now.

Senator PASTORE. He will find time for this, too.

Mr. LEE. We have a study underway examining this whole problem of delegation, sir, within our statutory form. I am sure there will be——

Senator PASTORE. Let me ask you on section 3, what do you think on section 3?

Mr. LEE. On section 3 I earlier indicated, by my silence, that I would have no problem with it.

Senator PASTORE. Accepting it?

Mr. LEE. Before accepting the abolishment of the review staff, I would like to know what is going to replace it before I do that and I would like to make this point: On the review staff it is a very difficult one to explain. But in the decisional process, after we hear this oral argument, this review staff is sitting here much as we are here, they all have their pencils out and there is a great deal of debate that goes on among the Commissioners and while, at some point you can see an end result coming out, the reasons for the end result may vary from Commissioner to Commissioner.

And I myself have been amazed at the ability of these men to draft an opinion, and by the way, I think I was told that we have done very well in court in the last several years, so they must be expert draftsmen, I think we lost 7 out of 32—Fred has the figures here—that they are able to write a document that we pretty much can accept in the majority, even though there might be little specifics here and there where we might disagree.

Now then I feel, as one of the nonlawyers of the Commission, that if we had to individually prepare each decision, it might very well be, human beings being what they are, that we would have to watch each other so closely so that we would not be bound by precedents.

For example, the others might have to watch me, they might have to watch me very closely, because I might try to surround them with the UHF concept over a period of a number of decisions, and I think it is very likely that you would have a number of concurring opinions, and dissenting opinions.

Now I am not closing my eyes to section 3, but when I look at the proposed substitute, this is something that I would prefer to make a judgment on at that time.

Senator PASTORE. All right. Now we come to Mr. Ford.

Mr. LEE. May I insert a short statement? It is the same one I gave in the House.

Senator PASTORE. Yes, sir.

Mr. CROSS. I have one, too.

Senator PASTORE. Without objection, all statements can be placed in the record.

We are just trying to recapitulate here.

(The statements referred to follow:)

FEDERAL COMMUNICATIONS COMMISSION,
Washington, D.C., May 4, 1961.

Hon. JOHN L. MCCLELLAN,
Chairman, Committee on Government Operations,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: Responsive to your letter of May 3 with respect to Reorganization Plan No. 2 transmitted by the President on April 27, 1961, it is my opinion that the plan should be rejected.

The Constitution places the regulation of commerce in the Congress. Section 2 of the proposed plan could be employed, I believe, to shift the regulation of interstate and foreign communications for an independent commission to the executive branch of our Government. Whether this power would be exercised is not the question.

The proposed plan raises in my mind the basic question whether we are to have communications regulated by a bipartisan independent commission or by an administrator. I have grave doubt that the bipartisan nature of the Commission can be effectively preserved by the mere opportunity for a majority less one to require review of a delegated action. I perceive the possibilty would be created for reducing the function of the six other Commissioners to almost that of scribes.

This is not to say that the Communications Act of 1934, as amended, does not need the attention of Congress. Required procedures are such that much of our time is spent in spinning our wheels in "undue process." Some of the objectives of the plan are most desirable. I believe, however, the objectives should be accomplished through direct legislative amendment.

Sincerely yours,

ROBERT T. BARTLEY, *Commissioner.*

STATEMENT OF ROSEL H. HYDE, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION, RE REORGANIZATION PLAN NO. 2 OF 1961, MAY 16, 1961

The Federal Communications Commission which was created in 1934 is the successor to the Federal Radio Commission which was created by Congress in 1927, to perform certain regulatory and licensing functions with respect to the use of radio, and especially to exercise broad policymaking authority which Congress delegated to it as an independent agency of Government. The considerations which persuaded Congress to establish a nonpartisan independent Commission are succinctly stated in the following excerpt from the report of the Senate Committee on Interstate Commerce, May 6, 1926, 69th Congress, 1st session, report 772:

"After the consideration of the facts given your committee at the hearings the committee decided that the importance of radio and particularly the probable influence it will develop to be in the social, political, and economic life of the American people, and the many new and complex problems its administration presents, demand that Congress establish an entirely independent body to take charge of the regulation of radio communication in all its forms.

"The exercise of this power is fraught with such great possibilities that it should not be entrusted to any one man nor to any administrative department of the Government. This regulatory power should be as free from political influence or arbitrary control as possible."

These considerations are valid today. What has happened since 1926 gives them even greater significance. Television is just one of the new services developed since 1926, and its potential is still not by any means fully appreciated. We are on the threshold of the development of space communications techniques which are expected to give worldwide dimensions to matters previously thought of in terms of national or continental interest. During the existence of the Federal Radio Commission and the Federal Communications Commission, there have been many Commissioners appointed with varied educational and experience qualifications who have contributed to the functioning of the agency. Some of them have been interested in one form of communications more than another. All, in my judgment, have contributed through exchange of viewpoints and development of particular interests to a balancing of relevant factors in the development of communications policy.

I believe that this approach to regulation and to development of communications policy, adopted by Congress in 1927 and reaffirmed by Congress in 1934, would be overruled if Reorganization Plan No. 2 of 1961 is permitted to become operative. I believe that implementation of the plan would, in effect, shift the regulation of interstate and foreign communications and the development of policy from an independent, commission type of agency to a single administrator under the aegis of an executive overseer, although still maintaining the form of an independent commission.

The stated purpose of plan No. 2 is to provide greater flexibility in the handling of business before the Commission, permitting its disposition at different levels so as better to promote its efficient dipsosition. This is not a new concept. The Commission is now authorized by section 5(d) of the Communications Act to delegate matters not involving hearings to an individual Commissioner, to Commissioners, or to bodies composed of one or more employees. Extensive use has been made of this power to delegate. The great bulk of the Commission's examining, regulating, and licensing functions are now performed under delegations from the Commission. During the month of April just past, more than 32,000 authorizations were issued under delegated power by the Safety and Special Radio Services Bureau. Other bureaus are likewise authorized to dispose of a tremendous load of casework not involving hearings.

The reorganization plan would add matters involving hearings to those which may be delegated for final disposition. At the same time, and I think very significantly, it places the delegations previously made by the Commission, as such, and those now proposed to be made, within the control of the Chairman. In providing for the delegation of hearing work for final disposition, the plan also undertakes to abolish the legal right of oral argument before the Commission provided for in section 309(b) of the Communications Act.

Under Reorganization Plan No. 2, section 1, authority to delegate is treated in terms of a grant to the Commission. But this grant must, of course, be considered in connection with section 2, which provides for the transfer from the Commission, to the Chairman of the Commission, the functions of the Commission with respect to the assignment of Commission personnel, including Commissioners, to perform such functions as may have been delegated by the Commission to Commission personnel, including Commissioners, pursuant to section 1 of this reorganization plan.

Section 2 would authorize the Chairman, without consultation with other members, to choose and assign personnel, as he might see fit, to process the matters which have been delegated. The great bulk of the Commission's workload, having been placed under delegations, the Chairman would be in position to control the disposition of the same. The only choice left to other Commissioners would be to cancel the delegations, an impossible choice, because it would mean halting application processing which, in turn, could have unfortunate results, particularly in the safety services.

Insofar as new delegations are concerned, the individual Commissioners could be placed in the position of either accepting the Chairman's assignment of personnel or refusing to agree to delegations. This means acquiesce in the wishes of the Chairman, or vote to deprive the Agency of any advantages that might be in the proposed delegation.

I would respectfull suggest that, rather than accept Reorganization Plan No. 2, that Congress give consideration to legislation granting the Commission greater flexibility in the management of its hearing work. I am certain this could be accomplished without bringing about the profound changes in the organization and the relationship of the Commission to Congress inherent in the reorganization plan.

STATEMENT OF FREDERICK W. FORD, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION, ON REORGANIZATION PLAN NO. 2 OF 1961

I. INTRODUCTION

My name is Frederick W. Ford. I have been a member of the Commission since 1957 and served as its Chairman for almost a year. I also served on the staff of the Commission in the opinion writing section, now called the review section, and later as chief of its hearing division from early 1947 until late 1953. I appear here today to present my personal views on Reorganization Plan No. 2 of 1961, providing for reorganization in the Federal Communications Commission.

I am in agreement with the President's stated objectives, in submitting plan No. 2, to provide "* * * for greater flexibility in the handling of the business before the Commission, permitting its disposition at different levels so as better to promote its efficient dispatch," and of relieving "* * * the Commissioners from the necessity of dealing with many matters of lesser importance and thus conserve their time for the consideration of major matters of policy and planning."

I am also in agreement with the House Committee on Government Operations in its Report No. 195, 87th Congress, 1st session, recommending extension of the Reorganization Act of 1949, when it stated at page 2 that, "Criticisms have been made and the Committee has been concerned with the tendency of the Executive to draft reorganization plans in general terms so that the full scope of the reorganization is not always readily apparent from the contents of the plans as presented." This statement is particularly true of the plan now before you. It will be necessary, therefore, for me to analyze in some detail the provisions of plan No. 2 in an effort to assist the committee in reaching a conclusion on its merits.

In order to understand the effect of this plan, it is desirable to review the present statutory authority of the Commission and its Chairman, and compare that authority with the delegations contained in the plan and the power given to the Chairman. This will also aid in understanding the functions which are abolished. In this way I hope to be of the greatest assistance to the committee.

II. PRESENT AUTHORITY OF THE COMMISSION

The authority of the Commission has been delineated after years of study and hearings by this and other committees. The sections of the law which I believe bear on Reorganization Plan No. 2 are summarized in the following narrative.

Section 5(d)(1)[1] of the Communications Act of 1934, as amended, hereinafter referred to as Communications Act, provides for delegations of authority except in adjudicatory cases for which provision is made in section 409.[2]

Section 5(d)(1) authorizes the Commission when necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, by order to assign or refer any portion of its work, business or functions to an individual commissioner or commissioners or to a board composed of one or more employees of the Commission to be designated by such order for action thereon, and may at any time amend, modify, or rescind any such order. It further provides that any action taken under such order unless appealed shall have the same effect as if done by the Commission and may be enforced in the same way.

Section 5(d)(2)[3] provides for an appeal from such action to the Commission which shall be passed upon by the Commission and if granted it may affirm, modify, or set aside such action or order a rehearing in accordance with section 405.[4]

Section 405 provides that any person aggrieved by any decision, order, or requirement of the Commission may petition for rehearing within 30 days from public notice of the action complained of and specifically requires the Commission to enter an order "* * * with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropriate." In this connection the provisions of section 6(d)[5] of the Administrative Procedure Act should be considered in which the requirement is made that prompt notice of denials be given of any written application, petition, or other request by an interested person in any agency proceeding. Except where it affirms a prior denial or is self-explanatory, the notice must contain a simple statement of procedural or other grounds therefor.

Section 409 contains provisions relating to cases of adjudication designated for hearing. It provides that the Commission en banc or an examiner, provided for in section 11 of the Administrative Procedure Act, shall conduct the hearing; that the officer or officers conducting the hearing shall file an initial decision (except where he is unavailable or the Commission for good reasons orders the record certified to it); that the Commission shall permit the filing of exceptions to such initial decisions and hear oral argument on such exceptions

[1] See app. 1 for full text of sec. 5(d)(1).
[2] See app. 2 for appropriate subsections of sec. 409.
[3] See app. 1 for full text of sec. 5(d)(2).
[4] See app. 3 for full text of sec. 405.
[5] See app. 6 for full text of sec. 6(d).

before entry of a final order or decision; and that all decisions including the initial decision become a part of the record and shall "* * * include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues of fact, law, or discretion, presented on the record; * * *" There follows in other subsections restrictions on examiners, certain ex parte contacts, separation of staff according to function, provisions as to witnesses, etc. It is well to add here that section 11 of the Administrative Procedure Act provides for the appointment and assignment of examiners. In addition, it expressly provides that examiners shall "* * * perform no duties inconsistent with their duties and responsibilities as examiners."

It should also be noted that the 1952 amendments to the Communications Act, amended section 409 [6] in such a way as to eliminate the authority of individual commissioners to preside at the taking of evidence in adjudicatory proceedings. This amendment specifically referred to the Administrative Procedure Act in section 409(d) [7] as required by section 12 of that act in making this and other modifications, including that in section 7(a) of the Administrative Procedure Act. This latter section authorizes one or more commissioners to preside at the taking of evidence in an adjudicatory proceeding.

Section 5(a) [8] of the Communications Act provides that the "* * * chairman shall be the chief executive officer of the Commission." It assigns certain duties to him including, * * * generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission." The executive responsibility of the Chairman with respect to the internal affairs of the Commission is further defined in Administrative Order No. 11. [9]

Section 4(f)(1)[10] gives the Commission the authority to appoint such employees as are necessary in the exercise of its functions and section 4(f)(2)[11] authorizes each Commissioner to appoint a legal assistant, an engineering assistant, and a secretary, each of whom shall perform such duties as such Commissioner shall direct.

Section 4(i) [12] gives the Commission broad authority to make rules and regulations and issue orders not inconsistent with the act which are necessary in the execution of its functions.

Section 4(j) [13] authorizes the Commission to conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.

In part O of its published rules, the Commission has set forth the functions of its bureaus and major staff offices. It also has set forth certain delegations of final authority to them. From an examination of these regulations, it can be seen that the Commission has assigned all of its personnel to the various work, business and functions of the Commission, but has retained the function of voting on all actions for which final authority has not been delegated. These retained functions include instructions to the staff through the Chairman, the formation of policy, hearing oral argument, and deciding adjudicatory cases, adoption of rules and regulations, and the like.

We conduct our business at the regular weekly meeting. At this time all business for which final authority has not been delegated is presented by the staff on one of 12 agendas classified according to the major workload of the Commission. We also have numerous special meetings at which major matters are considered in greater detail, hold oral arguments, hearings en banc, etc. It is in this way that our work is organized and the Commission exercises its functions.

III. PROPOSED AUTHORITY OF THE COMMISSION

Before beginning my discussion of the plan and some of the modifications it makes in present law, I would like briefly to summarize plan No. 2.

Section 1(a)[14] of the plan grants to the Commission in addition to its existing authority to delegate "the authority to delegate, by published order or rule, any

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[6] See app. 2 for text of sec. 409 before 1952 amendment.
[7] See app. 2 for full text of 409(d).
[8] See app. 1 for full text of sec. 5(a).
[9] See app. 8 for full text of Administrative Order No. 11.
[10] See app. 7 for full text of sec. 4(f)(1).
[11] See app. 7 for full text of sec. 4(f)(2).
[12] See app. 7 for full text of sec. 4(i).
[13] See app. 7 for full text of sec. 4(j).
[14] See app. 4 for full text of Reorganization Plan No. 2 of 1961.

of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting, or otherwise acting as to any work, business, or matters; * * *." This section then contains two provisos the first to the effect that nothing in the plan shall supersede section 7(a)[15] of the Administrative Procedure Act authorizing the agency or one or more members of the body comprising the agency or examiners to preside at the taking of testimony. The second proviso in accordance with subsection (b) abolishes the function of the Commission with respect to the filing of exceptions to decisions of hearing examiners and the function of hearing oral arguments on such exceptions before the entry of any final decision as set forth in section 409(b)[16] of the Communications Act.

Section 1(b) requires the Commission to retain a discretionary right of review of delegated actions on its own initiative, by a vote of three members, or, upon petition by a party or intervenor of actions taken under delegated authority within such time and in such manner as the Commission may by rule prescribe.

Section 1(c) provides that if discretionary review is declined or no review is sought within the time specified by the Commission, then the delegated action shall be deemed the action of the Commission for all purposes.

Section 2 of the plan transfers to the Chairman the functions of the Commission with respect to the assignment of Commission personnel, including Commissioners, to perform such functions as may have been delegated by the Commission to Commission personnel, including Commissioners, pursuant to section 1 of the reorganization plan.

Section 3 abolishes the review staff and its functions created by section 5(c)[17] of the Communications Act.

IV. DISCUSSION

Section 5(d)(1) of the Communications Act grants broad powers to the Commission to delegate any of its functions except those relating to cases of adjudication as defined in the Administrative Procedure Act which are specifically provided for in section 409 of the Communications Act. This power of delegation is to be exercised when it meets the statutory standard "* * * when necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business * * *." Section 1(a) of plan No. 2 appears to include all of the authority in section 5(d)(1) and in addition to include cases of adjudication for which special provision is made in section 409 by the use of the words "any of its functions" without any standard and without any reservation except section 7(a) of the Administrative Procedure Act relating to presiding officers[18] and the discretionary right of review mentioned in section 1(b) of plan No. 2. In fact, it specifically includes functions with respect to hearing, determining, ordering, or certifying as to "any work, business, or matter." This language appears at first to give the Commission authority to drastically alter its present procedures under section 409 and 405. The Commission would apparently be enabled to delegate to a panel of Commissioners or a board of employees authority to review initial decisions and rule on petitions for reconsideration unless the review provisions of section 5(d)(2) are held to apply to delegations under plan No. 2. This would not seem to be the case because it is limited by its terms to "such delegations" meaning those in section 5(d)(1). Moreover, those supporting the plan make no contention that the authority in the plan merges with that in the Communications Act. In fact, they state the intention is to the contrary.

One other impediment might prevent the Commission from delegating review functions without affirmative legislation. It has been stated that the Administrative Procedure Act does not entitle one to an appeal from an initial decision. However, at page 83 of the Attorney General's Manual on the Administrative Procedure Act issued in 1947 when Justice Clark was Attorney General, in

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[15] See app. 5 for full text of sec. 7(a) of the Administrative Procedure Act.
[16] See app. 2 for full text of sec. 409(b).
[17] See app. 1 for full text of sec. 5 (c).
[18] I do not believe it could be seriously contended that the statement in plan No. 2 "* * * that nothing herein contained shall be deemed to supersede the provisions of sec. 7(a) of the Administrative Procedure Act" by inference could be construed as a modification of other sections of that act, especially since those who support plan No. 2 state that there is no intention to modify that act in any way; and, in addition, there is some question as to whether a reorganization plan could modify a purely procedural statute.

commenting on section 8(a) of the Administrative Procedure Act, it is stated: "Parties may appeal from the hearing officer's initial decision to the agency, which must thereupon itself consider and decide the case." In addition, section 6(d) of that act provides for prompt notice to be given of the denial of requests by interested parties in any agency proceeding and unless it affirms a prior denial or is self-explanatory, it is to be accompanied by a simple statement of procedural or other grounds.

The report of the House Committee on the Judiciary to accompany S. 7, which became the Administrative Procedure Act, indicated in commenting on this section that the ruling on a request should state the actual grounds for the denial and be sufficient to apprise a party of the basis for it. Since a panel of Commissioners or a board of employees could be an "agency" under section 2 of the Administrative Procedure Act, I was hopeful that the Commission would be able to delegate all of its functions in adjudicatory cases of a routine nature if it so desired. However, what section 1(a) gives, section 1(b) takes away in stating that the "Commission shall retain a discretionary right of review * * * upon its own initiative or upon petition of a party * * *." Thus, if the Attorney General's Manual is correct and the Commission must retain the discretionary right of review under plan No. 2 on petition, it would seem that we will have to permit either proposed findings or exceptions to delegated actions and decide the cases ourselves under the Administrative Procedure Act. Moreover, section 6(d) of the Administrative Procedure Act would require the Commission to review and set forth the reasons for our denial of a review of delegated actions under section 1 of plan No. 2 and section 405 of the Communications Act would require the same thing concerning delegated actions under section 5(d)(1) of that act even if 5(d)(2) is held to permit us to refuse to consider the merits in "passing upon" an application for review of actions under 5(d)(1). This procedure in itself will require substantial review of the merits and result in little saving of time.

At the same time section 1(b) of plan No. 2 gives back what section 1(a) abolished with respect to exceptions and oral argument and yet probably prevents a delegation of those restored functions.

Section 1(a) abolishes the function of the Commission in accordance with section 1(b) with respect to the filing of exceptions to "decisions" of hearing examiners and of hearing oral argument on such exceptions provided by section 409(b) of the Communications Act. Section 1(b) of plan No. 2 provides that the discretionary right of review retained by the Commission with respect to its delegated functions shall be within such time and in such manner as the Commission shall by rule prescribe. Even though the function of oral argument is abolished, the Commission could by rule prescribe[19] exceptions and oral argument among other things as the manner of review, but since it is to be retained by the Commission, that method of review probably could not be delegated.

The language of section 1(a) of the plan would appear to permit the delegation of any function to hearing examiners. Section 11 of the Administrative Procedure Act provides that examiners "* * * shall perform no duties inconsistent with their duties and responsibilities as examiners." The Commission, therefore, has no function of making other assignments to them, but is by this language expressly prohibited from doing so. The provisions of the Reorganization Act of 1949 (5 U.S.C. 133z–3(a)(4)) states that no reorganization plan shall provide for or have the effect or "authorizing any agency to exercise any function which is not expressly authorized by law at the time the plan is transmitted to the Congress; * * *." It should be made clear, therefore, if this plan is to become effective, that it does not affect the independence of hearing examiners nor permit the Chairman under section 2 to modify the method of their assignment provided in section 11 of the Administrative Procedure Act.

In granting authority to delegate, plan No. 2 states "by published rule or order" whereas section 5(d)(1) of the Communications Act merely uses the word "order" leaving to the Commission the determination of when they should be published. Section 3 of the Administrative Procedure Act provides for publication of delegations of final authority and other matters such as procedure, etc. This requirement of publication in plan No. 2 would appear to be much broader. In some way it should be made clear that the requirement of

[19] See sec. 8(b) of the Administrative Procedure Act for additional authority to permit exceptions to initial decisions (app. 9).

publication does not go to every minor delegation not covered by the Administrative Procedure Act or we may find ourselves with a very stringent limitation in issuing instructions to our staff if the plan becomes effective.

I think it is clear from the foregoing that section 1 would not bring about a reorganization in the usual sense. Rather, its primary objective is the elimination of procedural rights given to litigants before the Commission under the 1952 amendments to the Communications Act. I have mentioned various problems that the plan presents, but I am sure many others will arise in its operation which are not obvious to me now.

The Commission, the Communications Bar, and the Congress all recognize that much could be done to improve on the 1952 amendments. Public Law 752, passed last year, was intended as a step in this direction. The Commission has adopted legislative proposals this year which we feel would bring further improvement. However, all of these proposals, as well as the 1952 amendments, become law only after extensive hearings and much revision representing the best efforts of all who will be affected.

Since sections 1 and 3 of this plan, to the extent that they represent anything new, are only incidentally concerned with internal agency organization and are essentially an overhaul of the procedure governing the manner in which parties are to have their cases heard and decided, I believe that it would be far more appropriate to consider these measures in the normal course of the legislative process rather than as a reorganization plan to be adopted or rejected by the Congress within 60 days. In this way, there would be far greater opportunity to consider the pros and cons, to keep what is good and reject the rest.

I would now like to turn to section 2 of plan No. 2. This section appears to give the Chairman the power to assign any delegated function under section 1 to a Commissioner. I have already pointed out that most of our work is delegated. Thus, the Chairman apparently could assign a Commissioner against his will to perform any work of whatever character to which a member of the staff could be assigned under the delegation of authority in section 1 of the plan. This could include assigning a Commissioner to preside at a protracted hearing in a distant section of the country to get him out of the way, writing many of the final decisions for the Commission or writing summaries of minor applications. The Chairman would also appear to have the power to remove a Commissioner from work assigned to him by the Commission and substitute others Commissioners or Commission personnel more to his liking.

The only protection members of the Commission would have from a vindictive Chairman would be to refuse to use any of the authority granted by this plan to delegate functions. This may not be possible, since section 3 of plan No. 2 abolishes the review staff and its functions. This raises a question in my mind of whether it abolishes the last sentence of section 5(c) of the Communications Act, which prevents any employee who is not a member of the review staff from performing any of the duties and functions to be performed by it except the legal, engineering, and personal secretary of each Commissioner. Does the plan, by abolishing the review staff and its functions, require commissioners and their three assistants to prepare all of the final decisions which may be assigned to them by the Chairman? It would appear that it does. Would the Chairman have the power to invade the private office of a Commissioner and assign his personal staff to any delegated function under section 1 of the plan such as perhaps to assist another Commissioner in delegated work? It would appear so, because Reorganization Plan No. 11 of 1950 excepted that personnel [20] but no similar provision is contained in plan No. 2.

If the Chairman assigns a task to my personal secretary who has been with me many years and I assign her to other work, such as assisting me with this statement, which assignment takes priority, mine or his?

It may be contended that there are safeguards against such action by a Chairman because the Commission could rescind a delegation under plan No. 2 and redelegate it under section 5(d)(1) of the act. This is true except perhaps for the writing of final decisions or unless four Commissioners wanted to punish another Commissioner. It may also be contended that the assignment of Commissioners and staff by the Chairman could only be to the same class of work usually performed by them, but I find no such limitation in the language of plan No. 2.

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[20] See app. 10 for text of Reorganization Plan No. 11 of 1950.

It should be noted that the present Commission is very compatible but there have been times in the past, I am told, when one Commissioner would not speak to another.

I do not believe that any of these various possibilities for unfair treatment would take place, but with section 2 in effect they could. The mere fact that this power would exist would be a substantial deterrent to using the authority provided by this plan. To the extent that the authority would be used all Commissioners would be aware of the power and its possible exercise by a willful Chairman.

This power would permit the Chairman to select a Commissioner with predisposed ideas on certain subjects to write selected decisions opening the way for internal dissension. This has apparently been the case in some courts which did not use a form of rotating judges. More importantly, I feel, that notwithstanding the analogy to the judiciary which could be drawn, that the proposed system might well provoke suspicion and criticism which, however unwarranted or misconceived, would tend to impair respect for the integrity of our processes.

In any multiheaded agency such as ours there must be some directing head, particularly in our quasi-judicial work, just as there is in courts. In this connection it should be noted, that the Chairman already exercises substantial power in the employment, assignment, and promotion of personnel by virtue of section 5(a) of the Communications Act and Administrative Order No. 11.

I know of few instances in which the chief judge of a court, however, is given plenary authority over work assignments to his brother judges aside from a rule of court which can be altered by the court in case of abuse. In fact, the Congress has provided by law that assignments are to be made as the court directs (28 U.S.C. 46). Moreover, since only a part of our work is of a quasi-judicial nature, it would be possible to so overburden a Commissioner with this type of assignment as to curtail his performance of other important duties.

It is my belief that the principal power of the Chairman is the sympathy we all have with him in his assignment to one of the most difficult jobs in Washington—he is always on the firing line—but in addition, he controls a staff of 1,200 people, whereas a Commissioner has only 5 or 6. When documents of some length are prepared under the Chairman's direction, it is almost impossible to alter the course set by them because of the sheer volume and pressure of work.

Turning to the final section of the plan—the abolition of the review staff. This is a step with which I am in at least partial agreement. On several occasions I have advocated the repeal of section 5(c) on the ground that it was unduly restrictive and that adherence by the agency to the provisions of section 5 of the Administrative Procedure Act would provide all of the safeguards required.

As indicated above, I believe that abolishing the review staff and functions instead of a repeal of section 5(c) may have the effect of requiring Commissioners and their small staffs to write all final decisions personally. As you know I am opposed to the requirement that decisions be prepared and signed under the name of the several Commissioners on a routine basis, as I indicated in my testimony before the House Interstate and Foreign Commerce Committee in March 1960. I must say, however, that if we were relieved of preparing decisions in routine cases, the burden of this work could possible be carried without resort to a diffuse institutional type opinion-writing process, and I mean by that seven opinion-writing sections instead of one. I have in mind that our examiners hear and prepare an average of about 10 cases a year; that hearing cases occupy considerably less than half of a Commissioner's already crowded days; that 60 cases a year after exceptions and oral argument should be issued by the Commission; and that unless there is a substantial increase in the number of Commissioners our present membership would become hopelessly bogged down in the judicialization of our work. On the other hand, if we could delegate the routine cases, it is my belief that Commissioners who are lawyers could, with help, prepare their own decisions in important cases. I was hopeful that this plan would permit this course of action, but I do not believe it possible for the reasons I have stated.

The preparation of an opinion of a judicial nature is, as you know, one of the highest forms of art in the legal profession. How decision writing is to be accomplished by nonlawyers on our Commission I do not know, unless they rely on someone else. This, of course, would defeat the object of the requirement. Yet we need nonlawyer members such as engineers and businessmen, to take the lead in many important areas of our regulatory work.

V. CONCLUSION

My own view is that Reorganization Plan No. 2 of 1961 should be rejected because it threatens to impair the status of the agency as an independent body of seven coequal members; because it is unlikely to achieve its objective of "more economical and expeditious administration; * * *" and because it attempts in the name of reorganization to alter radically the procedural rights of litigants before the Commission, an undertaking far more appropriate for legislative consideration by the Congress than for Executive action pursuant to the Reorganization Act.

On the constructive side, if plan No. 2 is rejected, I am hopeful that the Congress will consider putting the Commission in a position to adopt rules that would enable us to establish a Board of Hearing Appeals composed of high-grade employees, who would handle all oral arguments on exceptions to examiner's decisions assigned to them by the Commission. If, however, the Commission desired, it should be able to assign a case or other work to a panel of Commissioners or retain important cases for hearing by the full Commission. In any case in which the Board or a panel issued a final decision with which three Commissioners did not agree the matter could be ordered before the full Commission on their own motion, but not by petition of a party. The system should work very much like the Board of Immigration Appeals in the Department of Justice. Thus, the routine cases would be weeded out and the Commission would only be occupied with cases of some importance.

APPENDIX 1

COMMUNICATIONS ACT OF 1934, AS AMENDED

SEC. 5. (a) The member of the Commission designated by the President as chairman shall be the chief executive officer of the Commission. It shall be his duty to preside at all meetings and sessions of the Commission, to represent the Commission in all matters relating to legislation and legislative reports, except that any commissioner may present his own or minority views or supplemental reports, to represent the Commission in all matters requiring conferences or communications with other governmental officers, departments or agencies, and generally to coordinate and organize the work of the Commission in such manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission. In the case of a vacancy in the office of the chairman of the Commission, or the absence or inability of the chairman to serve, the Commission may temporarily designate one of its members to act as chairman until the cause or circumstance requiring such designation shall have been eliminated or corrected.

(b) Within six months after the enactment of the Communications Act Amendments, 1952, and from time to time thereafter as the Commission may find necessary, the Commission shall organize its staff into (1) integrated bureaus, to function on the basis of the Commission's principal workload operations, and (2) such other divisional organizations as the Commission may deem necessary. Each such integrated bureau shall include such legal, engineering, accounting, administrative, clerical, and other personnel as the Commission may determine to be necessary to perform its functions.

(c) The Commission shall establish a special staff of employees, hereinafter in this Act referred to as the "review staff," which shall consist of such legal, engineering, accounting, and other personnel as the Commission deems necessary. The review staff shall be directly responsible to the Commission and shall not be made a part of any bureau or divisional organization of the Commission. Its work shall not be supervised or directed by any employee of the Commission other than a member of the review staff whom the Commission may designate as the head of such staff. The review staff shall perform no duties or functions other than to assist the Commission, in cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing, by preparing a summary of the evidence presented at any such hearing, by preparing, after an initial decision but prior to oral argument, a compilation of the facts material to the exceptions and replies thereto filed by the parties, and by preparing for the Commission or any member or members thereof, without recommendations and in accordance with specific directions from the Commission or such member or members, memoranda, opinions, decisions, and orders. The Commission shall not permit any employee who is not a member of the

review staff to perform the duties and functions which are to be performed by the review staff; but this shall not be construed to limit the duties and functions which any assistant or secretary appointed pursuant to section 4(f)(2) may perform for the commissioner by whom he was appointed.

(d)(1) Except as provided in section 409, the Commission may, when necessary to the proper functioning of the Commission and the prompt and orderly conduct of its business, by order assign or refer any portion of its work, business, or functions to an individual commissioner or commissioners or to a board composed of one or more employees of the Commission, to be designated by such order for action thereon, and may at any time amend, modify, or rescind any such order of assignment or reference. Any order, decision, or report made, or other action taken, pursuant to any such order of assignment or reference shall, unless reviewed pursuant to paragraph (2), have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other action of the Commission.

(2) Any person aggrieved by any such order, decision, or report may file an application for review by the Commission, within such time and in such form as the Commission shall prescribe, and every such application shall be passed upon by the Commission. If the Commission grants the application, it may affirm, modify, or set aside such order, decision, report, or action, or may order a rehearing upon such order, decision, report or action under section 405. * * *

APPENDIX 2

COMMUNICATIONS ACT OF 1934, AS AMENDED

SEC. 409. (*a*) In every case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, the hearing shall be conducted by the Commission or by one or more examiners provided for in section 11 of the Administrative Procedure Act, designated by the Commission.

(*b*) The officer or officers conducting a hearing to which subsection (a) applies shall prepare and file an initial decision, except where the hearing officer becomes unavailable to the Commission or where the Commission finds upon the record that due and timely execution of its functions imperatively and unavoidably require that the record be certified to the Commission for initial or final decision. In all such cases the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order, or requirement. All decisions, including the initial decision, shall become a part of the record and shall include a statement of (1) findings and conclusions, as well as the basis therefor, upon all material issues of fact, law, or discretion, presented on the record; and (2) the appropriate decision, order, or requirement.

(*c*)(1) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no examiner conducting or participating in the conduct of such hearing shall, except to the extent required for the disposition of ex parte matters as authorized by law, consult any person (except another examiner participating in the conduct of such hearing) on any fact or question of law in issue, unless upon notice and opportunity for all parties to participate. In the performance of his duties, no such examiner shall be responsible to or subject to the supervision or direction of any person engaged in the performance of investigative, prosecutory, or other functions for the Commission or any other agency of the Government. No examiner conducting or participating in the conduct of any such hearing shall advise or consult with the Commission or any member or employee of the Commission (except another examiner participating in the conduct of such hearing) with respect to the initial decision in the case or with respect to exceptions taken to the findings, rulings, or recommendations made in such case.

(2) In any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, no person who has participated in the presentation or preparation for presentation of such case before an examiner or examiners or the Commission, and no member of the Office of the General Counsel, the Office of the Chief Engineer, or the Office of the Chief Accountant shall (except to the extent required for the disposition of ex parte matters as authorized by law) directly or indirectly make any additional

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presentation respecting such case, unless upon notice and opportunity for all parties to participate.

(3) No person or persons engaged in the performance of investigative or prosecuting functions for the Commission, or in any litigation before any court in any case arising under this Act, shall advise, consult, or participate in any case of adjudication (as defined in the Administrative Procedure Act) which has been designated for a hearing by the Commission, except as a witness or counsel in public proceedings.

(*d*) To the extent that the foregoing provisions of this section are in conflict with provisions of the Administrative Procedure Act, such provisions of this section shall be held to supersede and modify the provisions of the Act.[94]

Appendix 3

Communications Act of 1934, as Amended

Sec. 405. After a decision, order, or requirement has been made by the Commission in any proceeding, any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for rehearing; and it shall be lawful for the Commission, in its discretion, to grant such a rehearing if sufficient reason therefor be made to appear. Petitions for rehearing must be filed within thirty days from the date upon which public notice is given of any decision, order, or requirement complained of. No such application shall excuse any person from complying with or obeying any decision, order, or requirement of the Commission, or operate in any manner to stay or postpone the enforcement thereof, without the special order of the Commission. The filing of a petition for rehearing shall not be a condition precedent to judicial review of any such decision, order, or requirement, except where the party seeking such review (1) was not a party to the proceedings resulting in such decision, order, or requirement, or (2) relies on questions of fact or law upon which the Commission has been afforded no opportunity to pass. The Commission shall enter an order, with a concise statement of the reasons therefor, denying a petition for rehearing or granting such petition, in whole or in part, and ordering such further proceedings as may be appropiate: *Provided*, That in any case where such petition relates to an instrument of authorization granted without a hearing, the Commission shall take such action within ninety days of the filing of such petition. Rehearings shall be governed by such general rules as the Commission may establish, except that no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission believes should have been taken in the original proceeding shall be taken on any rehearing. The time within which a petition for review must be filed in a proceeding to which section 402(a) applies, or within which an appeal must be taken under section 402(b), shall be computed from the date upon which public notice is given of orders disposing of all petitions for rehearing filed in any case, but any decision, order, or requirement made after such rehearing reversing, changing, or modifying the original order shall be subject to the same provisions with respect to rehearing as an original order.

Appendix 4

Reorganization Plan No. 2 of 1961

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, April 27, 1961, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949, as amended.

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[94] The Communications Act Amendments, 1952, substituted subsections (a), (b), (c), and (d) to read as above, for subsection (a). [This subsection formerly read as follows:

"Sec. 409. (a) any member or examiner of the Commission, or the director of any division when duly designated by the Commission for such purpose, may hold hearings, sign and issue subpenas, administer oaths, examine witnesses, and receive evidence at any place in the United States designated by the Commission; except that in the administration of title III an examiner may not be authorized to exercise such powers with respect to a matter involving (1) a change of policy by the Commission, (2) the revocation of a station license, (3) new devices or developments in radio, or (4) a new kind of use of frequencies. In all cases heard by an examiner the Commission shall hear oral arguments on request of either party."

FEDERAL COMMUNICATIONS COMMISSION

SECTION 1, *Authority to delegate.* (*a*) In addition to its existing authority, the Federal Communications Commission, hereinafter referred to as the "Commission", shall have the authority to delegate, by published order or rule, any of its functions to a division of the Commission, an individual Commissioner, a hearing examiner, or an employee or employee board, including functions with respect to hearing, determining, ordering, certifying, reporting or otherwise acting as to any work, business, or matter; *provided, however*, that nothing herein contained shall be deemed to supersede the provisions of section 7(a) of the Administrative Procedure Act (60 Stat. 241), as amended, and provided, further, that in accordance with the provisions of subsection (b) of this section the functions of the Commission with respect to the filing of exceptions to decisions of hearing examiners and the function of hearing oral arguments on such exceptions before the entry of any final decision, order or requirement as set forth in subsection (b) of section 409 of the Communications Act of 1934, as amended (66 Stat. 721), are hereby abolished.

(*b*) With respect to the delegation of any of its functions, as provided in subsection (a) of this section, the Commission shall retain a discretionary right to review the action of any such division of the Commission, individual Commissioner, hearing examiner, employee or employee board, upon its own initiative or upon petition of a party to or an intervenor in such action, within such time and in such manner as the Commission shall by rule prescribe, *provided, however*, that the vote of a majority of the Commission less one member thereof shall be sufficient to bring any such action before the Commission for review.

(*c*) Should the right to exercise such discretionary review be declined, or should no such review be sought within the time stated in the rules promulgated by the Commission, then the action of any such division of the Commission, individual Commissioner, hearing examiner, employee or employee board, shall, for all purposes, including appeal or review thereof, be deemed to be the action of the Commission.

SEC. 2. *Transfer of functions to the Chairman.* There are hereby transferred from the Commission to the Chairman of the Commission the functions of the Commission with respect to the assignment of Commission personnel, including Commissioners, to perform such functions as may have been delegated by the Commission to Commission personnel, including Commissioners, pursuant to section 1 of this reorganization plan.

SEC. 3. *Review staff.* The review staff, created by section 5(c) of the Communications Act of 1934, as amended (66 Stat. 712), together with its functions, is hereby abolished. The employees of such staff may be assigned as the Commission may designate.

APPENDIX 5

ADMINISTRATIVE PROCEDURE ACT

SEC. 7. In hearings which section 4 or 5 requires to be conducted pursuant to this section—

(a) PRESIDING OFFICERS.—There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this Act; but nothing in this Act shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute. The functions of all presiding officers and of officers participating in decisions in conformity with section 8 shall be conduced in an impartial manner. Any such officer may at any time withdraw if he deems himself disqualified; and, upon the filing in good faith of a timely and sufficient affidavit of personal bias or disqualification of any such officer, the agency shall determine the matter as a part of the record and decision in the case. * * *

APPENDIX 6

ADMINISTRATIVE PROCEDURE ACT

SEC. 6(d) DENIALS.—Prompt notice shall be given of the denial in whole or in part of any written application, petition, or other request of any interested person made in connection with any agency proceeding. Except in affirming a prior denial or where the denial is self-explanatory, such notice shall be accompanied by a simple statement of procedural or other grounds.

APPENDIX 7

COMMUNICATIONS ACT OF 1934, AS AMENDED

SEC. 4. (f) (1) The Commission shall have authority, subject to the provisions of the civil-service laws and the Classification Act of 1949, as amended, to appoint such officers, engineers, accountants, attorneys, inspectors, examiners, and other employees as are necessary in the exercise of its functions.

(2) Without regard to the civil-service laws, but subject to the Classification Act of 1949, each commissioner may appoint a legal assistant, an engineering assistant, and a secretary, each of whom shall perform such duties as such commissioner shall direct. In addition, the chairman of the Commission may appoint, without regard to the civil-service laws, but subject to the Classification Act of 1949, an administrative assistant who shall perform such duties as the chairman shall direct. * * *

(i) The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions.

(j) The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice. No commissioner shall participate in any hearing or proceeding in which he has a pecuniary interest. Any party may appear before the Commission and be heard in person or by attorney. Every vote and official act of the Commission shall be entered of record, and its proceedings shall be public upon the request of any party interested. The Commission is authorized to withhold publication of records or proceedings containing secret information affecting the national defense. * * *

ADMINISTRATIVE ORDER NO. 11

ORDER DEFINING THE EXECUTIVE RESPONSIBILITY OF THE CHAIRMAN WITH RESPECT TO THE INTERNAL AFFAIRS OF THE COMMISSION

At a session of the Federal Communications Commission held at its offices in Washington, D.C., on the 25th day of April 1956:

In accordance with section 5(a) of the Communications Act of 1934, as amended, which reads, in part:

"The member of the Commission designated by the President as Chairman shall be the chief executive officer of the Commission. It shall be his duty to preside at all meetings and sessions of the Commission, to represent the Commission in all matters relating to legislation and legislative reports except that any commissioner may present his own minority views or supplemental reports, to represent the Commission in all matter requiring conferences or communications with other governmental officers, departments or agencies, and generally to coordinate and organize the work of the Commission in such a manner as to promote prompt and efficient disposition of all matters within the jurisdiction of the Commission."

the executive responsibility and authority of the Chairman with respect to the internal affairs of the Commission are hereby defined.

A. *In internal matters of a fairly routine character.* As to these, the Chairman takes final action, need not report specifically thereon to the Commission,

but from time to time advises the Commission in general of such actions taken. Illustrations of this type of matter are:

1. procurement and disposition of office space;
2. setting of priorities in use of service facilities;
3. classification of positions up to and including GS–14;
4. approval of individual personnel actions affecting employees up to and including grade GS–9 or its equivalent, except involuntary separations and actions affecting personnel employed in the immediate offices of Commissioners;
5. approval of minor and non-substantive changes in operating procedure, except changes which involve the protective provisions of the Communications Act or of the Administrative Procedure Act; and
6. promulgation of manuals and other procedural instructions with respect to administrative matters.

B. *In internal matters of a non-routine character which do not involve policy determinations.* As to these, the Chairman takes final action but specifically advises the Commission of each action taken. Illustrations of this type of matter are:

1. making of work assignments to the staff of a substantial and unusual nature;
2. establishment of personnel ceiling or staffing schedules;
3. installation or revision of statistical or reporting systems for administrative purposes;
4. approval of individual personnel actions affecting employees in grades GS–10 through 14 or their equivalent, except involuntary separations and all actions affecting personnel employed in the immediate offices of Commissioners. Only those actions which affect grade, permanent assignment, and professional qualifications are reported to the Commission on a case-by-case basis;
5. approval of minor changes in organization within a bureau or staff office; and
6. approval of major changes in procedure except changes of a substantive nature or which involve the protective provisions of the Communications Act or the Administrative Procedure Act.

C. *In internal matters of an important character or which involve policy determinations.* As to these, the Chairman develops proposals for presentation to the Commission. All matters of this nature originating with the staff or other Commissioners are addressed to the Commission through the Chairman: Illustrations of this type of matter are:

1. approval of budgetary requests to be submitted to the Bureau of the Budget;
2. allotment of funds among purposes, bureaus, and offices;
3. promulgation of formal personnel policies;
4. approval of extraordinary assignments of personnel (e.g. details outside the agency);
5. approval of major changes in organization within a bureau or staff office and all changes affecting two or more bureaus or staff offices;
6. approval of changes in procedure of a substantive nature or which affect the protective features of the Communications Act or the Administrative Procedure Act;
7. approval of all involuntary separations of personnel; and
8. approval of actions affecting personnel at the grade GS–14 level and above, except those actions affecting personnel employed in the immediate offices of Commissioners.

D. *With respect to the personnel in Commissioner's offices.* The individual Commissioners control appointments to and separations from such positions except that all such actions will be taken only after consultation with the Chairman or his designated representative to assure conformance with budget limitations, civil service regulations, and similar requirements.

E. *With respect to supervision of staff.* On behalf of the Commission and pursuant to section 5(a) of the Act, the Chairman has responsibility and authority to supervise the staff of the Commission in its day-to-day activities. This authority does not involve in any way the content of policy recommendations or the Commission's adjudicatory decisions.

F. *Authority to delegate.* To the extent he finds necessary or desirable the Chairman may delegate to appropriate officials performance of duties covered by this order.

G. Nothing in this order shall be interpreted to confer upon the Chairman any authority inconsistent with any laws, rules, or regulations governing personnel administration or other management matters.

H. This order rescinds and supersedes Administrative Order No. 8, dated June 2, 1949.

FEDERAL COMMUNICATIONS COMMISSION,
MARY JANE MORRIS, *Secretary.*

APPENDIX 9

ADMINISTRATIVE PROCEDURE ACT

SEC. 8. (b) SUBMITTALS AND DECISIONS.—Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

APPENDIX 10

REORGANIZATION PLAN NO. 11 OF 1950

Prepared by the President and transmitted to the Senate and the House of Representatives in Congress assembled, March 13, 1950, pursuant to the provisions of the Reorganization Act of 1949, approved June 20, 1949.

FEDERAL COMMUNICATIONS COMMISSION

SECTION 1. *Transfer of functions to the Chairman.*—(a) Subject to the provisions of subsection (b) of this section, there are hereby transferred from the Federal Communications Commission, hereinafter referred to as the Commission, to the Chairman of the Commission, hereinafter referred to as the Chairman, the executive and administrative functions of the Commission, including functions of the Commission with respect to (1) the appointment and supervision of personnel employed under the Commission, (2) the distribution of business among such personnel and among administrative units of the Commission, and (3) the use and expenditure of funds.

(b) (1) In carrying out any of his functions under the provisions of this section the Chairman shall be governed by general policies of the Commission and by such regulatory decisions, findings, and determinations as the Commission may by law be authorized to make.

(2) The appointment by the Chairman of the heads of major administrative units under the Commission shall be subject to the approval of the Commission.

(3) Personnel employed regularly and full time in the immediate offices of commissioners other than the Chairman shall not be affected by the provisions of this reorganization plan.

(4) There are hereby reserved to the Commission its functions with respect to revising budget estimates and with respect to determining upon the distribution of appropriated funds according to major programs and purposes.

SEC. 2. *Performance of transferred functions.*—The Chairman may from time to time make such provisions as he shall deem appropriate authorizing the performance by any officer, employee, or administrative unit under his jurisdiction of any function transferred to the Chairman by the provisions of this reorganization plan.

CALENDAR NO. 698

[86th Cong., 1st sess., Senate Rept. No. 692]

REDEFINING DUTIES OF FCC REVIEW STAFF

The Committee on Interstate and Foreign Commerce, to whom was referred the bill (S. 1738) to amend section 5(c) of the Communications Act of 1934, as amended, to redefine the duties and functions of the review staff, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

PURPOSE

The purpose of S. 1738 is to amend section 5(c) of the Communications Act of 1934 to redefine the duties and functions of the Federal Communications Commission's review staff, so as to permit the Commission greater discretion in the utilization of that staff.

This bill was introduced by the chairman of your committee at the request of the Federal Communications Commission. Full and complete hearings were held by the Subcommittee on Communications at which all interested parties were afforded an opportunity to present their views.

GENERAL STATEMENT

Under the provisions of section 5(b) of the Communication Act, the Commission review staff is prohibited from performing any duties or functions other than assisting in preparing a summary of the evidence presented in cases of adjudication, and by preparing, after an initial decision but prior to oral argument, a compilation of the facts relative to the exception and replies thereto, filed by the parties, and by preparing for the Commission, without recommendation, and in accordance with special directions, memoranda, opinions, decisions or orders. The restrictive language of section 5(c), prohibits the review staff from advising and recommending to the Commission the disposition of interlocutory matters. The proposals herein provided would allow the Commission greater flexibility in making use of the review staff by deleting from section 5(c) the fourth sentence which defines narrowly the duties and functions of the review staff, and substitutes the following language:

"The review staff shall perform no duties or functions other than those prescribed by the Commission to assist it, in cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing. It shall make no recommendations concerning the final disposition of any proceeding, and any document finally disposing of a proceeding shall be prepared in accordance with the specific directions of the Commission."

The proposed legislation specifically contains a prohibition against recommendations by the review staff concerning the final disposition of any proceedings and requires that documents finally disposing of a proceeding shall be prepared in accordance with the specific directions of the Commission. Thus, for example, whether a particular application is to be granted or denied, or which application of two or more competing ones is to be granted are questions, the answers to which will be continued to be made by the Commission without recommendation from the review staff. As to those matters handled by the review staff and which do not involve a final disposition of a case, this legislation would permit the Commission to have the advice of the review staff. Your committee feels that in this way the numerous interlocutory petitions that the Commission is called upon to process can be disposed of more efficiently and with greater expediency.

The provisions of this legislation would also permit the Commission to more fully utilize the review staff as, for example, in the preparation of legal and factual analysis for the Commission by assisting in all adjudicatory matters being processed through the review staff.

In addition to expediting the disposition of adjudicatory cases by permitting the professional review staff to assist the Commission more fully than at present on these matters which do not involve final disposition, this legislation will have the further benefit of allowing the Commission to concentrate their attention on the important questions of policy, law and fact coming before them.

The Commission has been criticized for delays encountered in the final disposition of adjudicatory proceedings. Many reasons have been given, among them the restrictive use of this professional review staff. Your committee hopes that

the enactment of this bill will increase the decisional efforts of the Commission and result in speedy action in adjudicatory proceedings. The public deserves and is entitled to speedier action on these applications. Your committee feels that the enactment of this legislation should help in that direction.

AGENCY COMMENTS

The comment of the Federal Communications Commission is as follows:

"COMMENTS OF THE FEDERAL COMMUNICATIONS COMMISSION ON S. 1738

"The purpose of the proposed amendment to section 5(c) of the Communications Act is to afford the Commission greater discretion in the utilization of the review staff provided for by that section. This would be accomplished without allowing recommendations to be made concerning the final disposition of any adjudicatory proceeding, for final decisions in adjudicatory matters would continue to be prepared in accordance with the specific directions of the Commission. The suggested changes to 5(c) would be accomplished by deleting the fourth sentence of the present section and substituting the proposed new language.

"The principal advantage of the amendment would be to expedite the disposition of adjudicatory cases by permitting the professional staff of Opinions and Review to assist the Commission more fully than at present on those matters which do not involve final disposition thus allowing the Commissioners to concentrate their attention on the important questions of policy, law and fact coming before them. This would be accomplished by permitting the review staff to advise the Commission on the disposition of interlocutory matters and to prepare legal and factual analyses for the Commission's assistance in all adjudicatory matters. In connection with the changes affecting interlocutory questions, it is believed that the amendment would be administratively beneficial by contributing to the more expeditious handling of these matters.

"Adopted: April 3, 1959."

"STATEMENT OF COMMISSIONER ROBERT T. BARTLEY

"In my opinion, the Commission's proposal to amend section 5(c) of the Communications Act of 1934 would still limit the assistance of the review staff to a far greater degree than is either necessary or desirable. It should be borne in mind that this staff has the sole function of assisting the Commission in adjudicatory cases and that it is directly responsible to the Commissioners—it does not investigate, it does not prosecute. To deprive the Commission of the full assistance of which this staff is capable is both wasteful and inefficient. To permit this staff to assist the Commission fully in its decisional process would not in any way deprive any party to a case of any inherent right and could contribute to speedier action.

"Therefore, I do not agree with the second sentence of the Commission's proposed bill."

"STATEMENT OF COMMISSIONER FREDERICK W. FORD

"I believe that section 5(c) is unduly restrictive, unnecessary, and should be repealed. Section 5(c) of the Administrative Procedure Act relating to the separation of functions of the staff, contains all of the safeguards required."

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934, AS AMENDED

ORGANIZATION AND FUNCTIONING OF THE COMMISSION

"SEC. 5. (a) * * *

"(b) * * *

"(c) The Commission shall establish a special staff of employees, hereinafter in this Act referred to as the 'review staff,' which shall consist of such legal, engineering, accounting, and other personnel as the Commission deems necessary. * * * [The review staff shall perform no duties or functions other than to assist the Commission, in cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing, by preparing a summary of the evidence presented at any such hearing, by preparing, after an initial decision but prior to oral argument, a compilation of the facts material to the exceptions and replies thereto filed by the parties, and by preparing for the Commission or any member or members thereof, without recommendations and in accordance with specific directions from the Commission or such member or members, memoranda, opinions, decisions, and orders.] *The review staff shall perform no duties or functions other than those prescribed by the Commission to assist it, in cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing. It shall make no recommendations concerning the final disposition of any proceeding, and any document finally disposing of a proceeding shall be prepared in accordance with the specific directions of the Commission.* The Commission shall not permit any employee who is not a member of the review staff to perform the duties and functions which are to be performed by the review staff; but this shall not be construed to limit the duties and functions which any assistant or secretary appointed pursuant to section 4(f)(2) may perform for the commissioner by whom he was appointed."

[S. 1738, 86tr Cong., 1st sess.]

A BILL To amend section 5(c) of the Communications Act of 1934, as amended, to redefine the duties and functions of the review staff.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (c) of section 5 of the Communications Act of 1934, as amended (47 U.S.C. 155 (c)), is amended by striking out the fourth sentence thereof and inserting in lieu thereof the following two sentences: "The review staff shall perform no duties or functions other than those prescribed by the Commission to assist it, in cases of adjudication (as defined in the Administrative Procedure Act) which have been designated for hearing. It shall make no recommendations concerning the final disposition of any proceeding, and any document finally disposing of a proceeding shall be prepared in accordance with the specific directions of the Commission."

STATEMENT OF JOHN S. CROSS, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION ON THE PRESIDENT'S REORGANIZATION PLAN NO. 2 OF 1961

I personally support the reorganization plan. While I am not a lawyer, I just don't see the grave bugaboos under the bed that others, including some of my colleagues, apparently see in this plan. First off, I would point out that in the 3 years that I have been a member of the Federal Communications Commission I have never known of even one adjudicatory case that was decided on strictly party lines. The Commission just does not operate that way.

Moreover, the Commission, in my opinion, could well use the flexibility provided in Reorganization Plan No. 2 to speed up its processes. In fact, we ourselves have recommended changes in the Communications Act to permit panels of Commissioners to hear adjudicatory cases which now must be heard by the full Commission en blanc. In my opinion we have more due processes than any other regulatory agency and we have just about reached the point where we have so much due processes that we are too busy to work. For instance, in adjudicatory cases we must meet as a full Commission, even to decide interlocutory matters.

Unless the Commission were willing to abdicate its responsibilities to the Chairman, I see no way for the Chairman to usurp such responsibilities under the proposed reorganization plan. At the present time, when cases are ripe for hearing, they are designated by the Commission for hearing on specific issues approved by the Commission. At that time the Commission could, under the proposed reorganization plan, announce by published order that this particular hearing would be held by an examiner, a single Commissioner, a panel of several Commissioners, or the full Commission—whatever the Commission wants to do in this specific case.

Suppose in this specific case the Commission decided that they would have a panel of three Commissioners hear the case. Then—and only then—could the Chairman designate by name which three Commissioners would be assigned to the panel. Moreover, once these three Commissioners rendered a decision, any three Commissioners (a majority less one) could compel a review of that decision by the full Commission. Under these circumstances it appears to me that the threat, if any, in regard to the Commission's independence appears pretty farfetched and, even so, is offset by the proviso that any three Commissioners (a majority less one) can assure review by the full Commission of any action taken under the delegated authority. Then, too, there is always recourse to the courts which is in no way disturbed by the reorganization plan.

From what I have gathered in listening to the testimony and the questions before this and other congressional committees thus far and in reading the separate views of my colleagues, there appears to be some misunderstanding of section 1 of the plan, that is the section giving the Commission authority to delegate. This section, as I read it, merely gives the Commission the authority to delegate—it does not say that it must delegate. Again, as I read it, the Commission under this section could continue to operate just as it does now if it chose to do so. On the other hand, if it chose not to hear oral argument or to relieve the full Commission from hearing oral argument on exceptions and delegate this to a Commissioner or a panel of Commissioners, it would have the authority under section 1 to do so. It is my understanding that it is this proviso which the bar association opposes, and it is easy to understsand why they would oppose it because this is taking away some of the due processes which I understand were put there at the express instigation of the lawyers. Don't get me wrong—I have many friends and acquaintances among the legal profession and I have great respect for that profession but, as I told the Federal Communications Bar Association some time ago, asking them to assist the Commission in cutting out some of the redtape that goes under the name of due process is like asking the butcher to cut out the red meat department and sell only poultry and fish.

Every since I became a Commissioner, and even previously during the years I was dealing with communications matters before becoming a member of the Commission, one of the most bitter complaints against the FCC was the seemingly interminable length of time it took to get a decision out of it. That complaint still exists today and, although our processes have speeded up some from what they were when I first became a Commissioner, there is still considerable room for improvement, in my opinion. Yet, when concrete suggestions are made to cut down on the very things that contribute to our considerable backlog, such as are made in the reorganization plan before us, we get a hue and cry from various sources, which in substance says, "For mercy's sake, don't do it this way—do it some other way." I would point out to you again that we ourselves at the Commission, as recently as this year, recommended changes in the Communications Act which would permit a panel of Commissioners to hear adjudicatory cases just as they can now hear other cases under the existing statute. Do you think for 1 minute that the bar association is going to be any less opposed to our sugestions just because it came from the Commission? I doubt it very much.

On first reading the plan, I had some doubts about the wisdom of abolishing our review staff. My doubts in this regard were due to my fears that such abolition would not only slow down our overall output markedly, but would also result in opinions and orders which were not as solidly based as our opinions and orders are now. Our opinions and orders are issued on the basis of the majority vote, and the individuals comprising the majority often arrive at their decisions for different reasons. Accordingly, welding these separate views into one majority opinion and order takes expert draftsmanship and detailed knowledge of the record.

If the Commissioners take on this job, I feel reasonably sure they will do it well, but the extra burden thus placed on them is almost certain to be reflected in less overall output. Moreover, it is only natural to expect that a Commissioner, charged with writing the opinion on a certain case about which he has firm convictions (multiple ownership, trafficking, technical violations, excessive spot announcements, monopoly, antitrust, etc.), may tend to weave his own views into the document. This can lead either to excessive rewriting when the majority reads his efforts or to numerous separate opinions concurring in the result—all of which are time consuming. In addition, with seven Commissioners writing opinions, there is a possibility that they will not always have the time for the extensive research necessary to base their opinions as solidly on past precedent as the review-staff now does, since that staff is comprised of experts who spend full time in this field and do nothing else.

I realize only too well that the sentiment outside the Commission is overwhelmingly in favor of having the Commissioners write their opinions and the tide may well be too strong to buck. However, it must be remembered that we are not a judicial body in the true sense of the word but are quasi-judicial, quasi-administrative, and quasi-legislative; so the rules that apply to us should be designed to fit our unique operations rather than having us conform to rules designed for general application, or for others, regardless of how they fit us. For example, the wide range of the Commission's activities makes it highly desirable to have engineers, accountants, broadcasters, communicators, and lawyers as members of the Commission instead of having only lawyers, which means that under a strict interpretation of the Reorganization Plan there will be non-lawyers writing legal opinions. Moreover, despite any notions to the contrary, Commissioners are extremly busy people and handle a great amount of business moneywise as well as volumewise. (I have heard it said that a Commissioner handles more business moneywise in a year than the average Federal judge handles in a lifetime.) Accordingly, for these reasons, and primarily in the interest of more production and consequently less backlog, I would prefer to see us retain the review staff. However, I believe that my fears in this regard can be overcome within the framework of the reorganization plan, i.e., a Commissioner who is assigned a particular case would avail himself of the review staff (or the same people under a different name, if desired) who would write up the case in draft form with the assistance of the Commissioner's legal assistant. Then the Commissioner would review the draft in detail, correct it as he deemed necessary, sign it, and submit it to his colleagues for approval. It is my understanding that this procedure, while not exactly in accordance with a strict interpretation of the President's reorganization plan, would not violate it. Actually, I think this procedure would not reduce our overall output materially and would strengthen our opinions and orders because it is only reasonable to assume that any Commissioner who was personally signing an opinion and order would take considerable care to insure its correctness in every respect. Moreover, I feel reasonably certain that, by its own internal procedures, the Commission can adopt this type of procedure under the reorganization plan. Consequently, on this basis I am prepared to accept the abolition of the review staff.

In sum, I personally support the President's reorganization plan for the Federal Communications Commission. I hasten to point out, however, that the views I have expressed here are my own personal views and should not be considered as being the views of the Commission.

STATEMENT OF ROBERT E. LEE, COMMISSIONER, FEDERAL COMMUNICATIONS COMMISSION, ON REORGANIZATION PLAN NO. 2 OF 1961, BEFORE THE SENATE COMMERCE COMMITTEE, MAY 23, 1961

I am opposed to Reorganization Plan No. 2 of 1961. Although I agree with some of the fundamental objectives of the plan, I feel that these objectives can be attained better through amendment of the Communications Act following legislative hearings. In this connection, I have reference to the area that would give the Commission a greater amount of latitude in handling its internal administrative procedures.

I am afraid that section 1 of the plan now before you would leave us in a never-never land insofar as our hearing procedures are concerned. This is not to say that I am unwilling to delegate functions, because I have acquiesced in

such delegations in the past and I am willing to delegate more functions in the future. I am uncertain, however, just what effect section 1 of the plan will have on the existing provisions of section 409 of the Communications Act of 1934, as amended.

My primary concern arises out of section 2 of the reorganization plan. This, it seems to me, strikes at the basic philosophy underlying the structure of the Communications Act. As you know, this section withdraws from the Commission the function of assigning personnel and makes an absolute grant of this function to the Chairman. There are no exceptions to this grant of authority. The Chairman's word would be absolute to the point that he would have authority to assign all Commission personnel, including Commissioners and the personal staff of the several Commissioners.

In my study of the proposal before you, I reviewed the hearings on Reorganization Plan No. 11 of 1950. The latter plan bears some similarity to Reorganization Plan No. 2 of 1961, although it did not seem to go as far as the current reorganization plan appears to do.

In reviewing the 1950 hearing record, I was particularly impressed with the testimony of former Senator Edwin C. Johnson of Colorado in opposition to the plan. His testimony is set forth in the transcript of "Hearings Before the Committee on Expenditures in the Executive Department, U.S. Senate, 81st Congress, second session, on S. Res. 253, 254, 255, and 256," which were held on April 24, 25, and 26, 1950. I feel that the following quotation from his testimony (transcript, p. 16) is apropos:

"It is the long-established congressional policy that regulatory agencies must be independent and directly responsible to Congress.

"The necessity of maintaining the independency of regulatory bodies was discussed during the Senate debate in 1938 on the Government departments reorganization bill, a legislative culmination of a professional study of Government and how to reorganize it. In that debate former Senator Champ Clark, of Missouri, one of the Senate's greatest students of parliamentary history, now one of our really great judges on the Federal bench, pointed out that the 'principal functions of such commissions as the Interstate Commerce Commission, the Federal Trade Commission, and the Communications Commission are as agencies of the legislative branch of the Government and as extensions of the legislative power' and that 'the important function which has been conferred on such commissions is the ascertainment of particular facts in order to carry out a policy of Congress enunciated in a statute' and 'they are legislative rather than executive or administrative in character.'

"Many of these statements are direct quotes of Mr. Clark.

"Senator Barkley, the then majority leader and now our distinguished Vice President, stated during the debate that he—

" 'would not approve any measure which provided for a one-man Interstate Commerce Commission, or a one-man Communications Commission, or a one-man Federal Trade Commission, or a one-man Power Commission, because those commissions are agencies set up by Congress in the performance of the duty of Congress to regulate commerce among the States.'

"Senator Barkley, now our Vice President, said:

" 'They are quasi-judicial and quasi-legislative. They are quite different from a commission which is created merely to aid the President in determining how he shall perform his executive duty of appointing people to office, in the way of testing their qualifications (for instance, the Civil Service Commission). One is an executive function, the others are legislative and judicial, and the only reason why the Interstate Commerce Commission was set up, and why the Federal Trade Commission, and the Power Commission, and the Communications Commission, were set up under the authority to regulate commerce among the States and with foreign governments, was the knowledge that Congress itself could not do that.'

"But plan No. 7 does just exactly what Vice President Barkley said he would never approve. It makes the ICC a one-man agency, just as plans Nos. 8, 9, and 11 make one-man agencies of the Trade, Power, and Communications Commissions."

I am certain that Senator Johnson would view the reorganization plan before you as being equally repugnant.

At this point I would like to digress for a monent to make it abundantly clear that I have no concern that the current Chairman would in any way abuse any delegated power, whether that power was delegated to him by the

Commission or by the law. On the contrary, the Chairman has indicated a very understanding desire to work as a team with the full Commission. Laws, however, are not made for men but for the public interest and, in my opinion, the approval of section 2 of Reorganization Plan No. 2 of 1961 would open this door to wide abuse on the part of an ambitious or an unscrupulous Chairman. A concrete example or two will demonstrate my concern.

The Chairman could assign me to duties away from the Commission's offices for an extended period and thereby affect the result of a decision on an important policy question.

He could assign members of my personal staff to duties which would deprive me of their services during periods when they would be required to assist me in analyzing highly technical engineering and legal matters.

He could assign me to a special project, such as for example the subscription television case, that would take all of my time to the detriment of my other work.

Through the assignment of staff personnel to special projects, he could achieve a predetermined result insofar as a staff recommendation is concerned. In this connection, the psychological affect on the staff of making one Commissioner so much more powerful than the others cannot be ignored. The staff will be quick to recognize who is supreme and will react accordingly. They would be less than human if they did not.

These are the practical difficulties I have with Reorganization Plan No. 2 of 1961.

I appreciate the opportunity to express my opinion on this matter and should you require anything further I would be most happy to oblige.

Senator PASTORE. It is almost 3:30. I have two other very important witnesses I would like to hear, and I think we have the record pretty complete on how the Commission feels.

Mr. FORD. Mr. Chairman, I think I should tell you that maybe out of the hundreds of decisions the Commission reaches in the course of a year—there is only a handful of 4 to 3 decisions—that the Commission's actions in 90 percent of the cases are unanimous and that it is only in these controversial matters that come to you that you find these strong differences of opinion and I would not want you to think that the Comimssion is not much more compatible than would appear when we come up here with our strong views on these controversial issues.

Senator PASTORE. I am delighted to hear it.

Mr. FORD. Now in addition to that, the Commission did develop a legislative program preparatory to this present session of Congress.

One of those was a bill permitting us to resolve ourselves into panels and accomplish some of the things that are contemplated here.

Some of us wanted to abolish section 5(c), which is one of the things that is done here, only I find myself in disagreement with all three sections, not because of the objectives of those sections, but because of the complications of our law as it is presently written and the vagueness and indefiniteness of what happens. How much of our law still remains? How much of it is gone? These are questions that this reorganization plan does not settle.

Now I hear the testimony on it in which they construe one section to mean one thing, and then they use a different principle for another so that the same section means something else.

I think this very controversy indicates that this plan is just not going to accomplish what its authors desire it to accomplish as far as the objectives are concerned, I think, you will find that most of the Commissioners are very much in favor of them.

We do disagree on whether or not this particular plan will do those things which we hope that the Congress will do for us.

Now as to section 1, we have substantially all of the authority in section 5(d)(1) right now that this section gives us, with the exception of adjudicatory matters. However, just running through it rather quickly, it says, "By published order or rule these delegations."

Now, this bothers me a little bit because it may mean that all of our little minor delegations have to be by published rule?

We are having a meeting and we delegate a man to do something that is not within his job description.

Do we have to publish an order?

This bothers me a little bit whether or not that is a necessity. Under 5(d)(1), only the word "order" is used.

Now, section 3 of the Administrative Procedure Act prescribes when you publish an order of delegation, but this would seem to indicate that all of these orders have to be published and it seems to me to be a little restrictive.

This section also contains the words "hearing examiner." We can delegate any functions to a hearing examiner under this section 1(a).

The Administrative Procedure Act in section 11 says we cannot. The proponents say that this plan does not modify the Administrative Procedure Act. So my question is, if you were writing a bill here, would you include hearing examiners in our authority to delegate anything at all to them?

Section 3(4), I think it is, of the Reorganization Act says you cannot add any new function in a reorganization plan.

Senator PASTORE. Let me interrupt you for a moment.

What is delegated to an officer now under existing law?

Mr. FORD. Only the duty of holding adjudicatory hearings under the Administrative Procedure Act, and section 11 says we can delegate no authority to them or no duties to them inconsistent with those duties.

But this plan says we can delegate any function to them.

Senator PASTORE. I thought section 1 applied only to adjudicatory hearings?

Mr. FORD. No, sir; across the board, this incorporates everything presently in section 5(d)(1) and in addition adds "adjudicatory matters."

Now this section abolishes the right to oral argument under 409(b).

Yet in section 1(b) it says that we can hold this discretionary review in any manner that the Commission by rule prescribes, so it takes it away in 1(a) and gives it back to us in 1(b), and we can hold the oral arguments, but it raises a question in my mind, can we delegate authority for a panel to hold oral argument if this is a personal right to the Commission, that we must retain. So while section 1(a) abolishes any oral argument, section 1(b) gives it back to the Commission itself, and the Commission retains this discretionary right of review. Does that give us authority to delegate that function to a panel? And that is a question that I don't think his plan answers.

In addition to that, it seems to me—I am with Commissioner Hyde—that at some stage of the proceeding, the right of oral argument and to enter your objections to initial decision should be preserved. I get to that because section 1 of the Administrative Procedure Act defines agency to mean authority. There may be several authorities within an agency. So that so long as there is review by an agency, meaning an authority, it doesn't necessarily have to be the

full Commission. If we had an employee board at one level to hear the routine cases, or panel of Commissioners to hear more important cases, or in the big cases, for the full Commission to hear it, then it would seem to me that we would have the flexibility required to handle this workload.

Now when we tell you that there is a—that we don't have much of a backlog in hearing cases, that doesn't mean that maybe one of those cases won't require me to spend the best part of a day to get ready for that oral argument. Moreover, I have the burden of thinking about that argument instead of thinking about the broad policies of the Commission and trying to do some constructive work. Therefore, I would like to spend my time on the very important case that has some national significance in this industry rather than on the routine case, no matter how important it may be to the people involved in it, that being better handled by experts who are spending their full time and who in fact are writing those decisions and digging into the record and getting in to it and have that competence.

Senator PASTORE. Well, what do you suggest?

Mr. FORD. In the last paragraph of my statement, I have a suggestion. I had hoped to have something ready for you today in the form of legislation, but I just couldn't get it ready.

Senator PASTORE. I don't expect formal legislation, but I want the expression of your idea and you can give us that now; can't you?

Mr. FORD. I have substantially given it to you, sir, in permitting us, giving us the authority to delegate adjudicatory functions and delegate the oral argument to one, an employee board, or a panel of Commissioners, or retain it for the full Commission on a discretionary basis.

Senator PASTORE. Do you feel the reorganization plan as such doesn't give you that authority?

Mr. FORD. I do not think so.

Senator PASTORE. You don't think that authority is presently in existing law?

Mr. FORD. Now, sir, I do not think so.

Senator PASTORE. You do agree with the idea that a person ought to have a right to oral argument as a matter of right, but that in order to expedite the work, the Commission should have the authority to delegate that to a smaller group?

Mr. FORD. Right.

Senator PASTORE. Who is going to decide who the group shall be?

Mr. FORD. I don't think there is any question but what the Chairman is going to do that, whether you put it in law or we delegate it. I have attached in my statement Administrative Order No. 11 which indicates the extent to which the Commission has delegated authority to the Chairman; for instance, he has the final authority to employ everybody up to a grade 14 in the Commission. He has ample authority to manage the affairs of the Commission in an executive capacity, and as Commissioner Hyde said, if we grant him that, and it is abused, then of course we can pull it back.

Now, we have gotten into a considerable number of legal arguments on discretionary right of review. I think that the Commission is going to have to ultimately, unless we get some additional authority of what this plan gives us, is going to have to write out its final conclusions

in every case either through section 405 of our act, or section 6(d) or section 8(a) of the Administrative Procedure Act. Someplace along the line, we are going to have to write those reasons out because of the WLOX case in which the court has in fact—they said they want to see what our reasoning is so they can review it. Now if we delegated that to a board, then we would have a discretionary right of review to reach down and pull that case up if we didn't recognize it as being an important case in the first place and then subsequently came to the conclusion that it was.

And for that reason, the three minority member's authority to order a case up to the full Commission for full review, I think is an excellent idea. But I don't think that authorizing three members to withdraw an authority is going to be the answer. And the reason I don't believe that is the case is because in the abolition of section 5(c), the only thing you abolish is the staff and the duties. The last sentence of that section says that no one except a legal assistant, engineering assistant, or secretary appointed under the provisions of section 4(f)(2) can assist the Commissioner in one of these adjudicatory cases.

Now, since that is in the law, there is a very grave question in my mind, if you abolish the function and abolish the duties and don't abolish those three people, whether or not it wouldn't be construed they would be the only three that could help you. This would in fact place on each Commissioner the burden of dividing up these cases and writing the final decisions themselves with only three people to help them.

I know the argument is made that if the duties and functions are abolished then the whole section is gone, but I think there can be a considerable amount of debate on that, and I am convinced myself that it isn't.

Now with respect to the transfer of functions to the Chairman, there has been considerable discussion here that the Commission would really control that by its delegation to a body specified in section 1(a). But I find nothing in section 1(a) that would be authority to put a condition on a delegation by the Commission. A delegation would be a rule or a published order, whereas this would be the law and under section 2, the law gives the Chairman of the Commission power to substitute, in my view, a board of employees, one Commissioner for another Commissioner, and so on. To me the Commission could not by regulation thwart the provisions of the law in section 2. Now I know there are other opinions that this isn't the case, because you have heard them here today, but it seems to me that this is something that the plan does not make clear and this is one of the reasons I am against that part.

It isn't the fact, as I stated at the outset, that the objectives of this thing are not good which causes me to object to it. We have drafted legislation and tried to accomplish some of the same things—and they haven't gotten here—and one of the reasons is that if they were going to be done in this plan and it were to be adopted, there was no point in us sending up legislation to conflict with the plan at the present time.

As to the review staff, section 5(c) of the Administrative Procedure Act provides for separation of functions. As I understand it, that section is applicable to all the independent agencies in Washington

except the Commission. We are the only ones that have this special section which restricts our assistants over and above the provisions of the Administrative Procedure Act and as far as I am concerned, having been in that section and knowing the lack of influence that the review section had on the Commission, it would seem to me that—and as a matter of fact at the time this 5(c) was passed, the review staff had been separated out and was directly under the Commission and took their instructions directly from the Commission and no one else.

So I thought it was useless at the time—I think it is useless now—and I think it would be quite a step forward if 5(c) were actually repealed outright. Then we wouldn't get into the question of whether or not only my legal assistant or engineering assistant, could assist me in the drafting of a final decision.

There are a number of things that were discussed this morning. There is one other thing that I have a little question about. Now when 409 was adopted it provided for the filing of exceptions, oral argument and so on. When that was adopted, I believe, there was a specific reference to section 12 of the Administrative Procedure Act, in accordance with the terms of that act, in section 409(d) so that 409 did in effect modify the Administrative Procedure Act.

Now, if you go back and authorize here the delegation of any function to a Commissioner, which he can do under section 7(a) of the Administrative Procedure Act, aren't you again modifying the modification of the Administrative Procedure Act and then don't you have to mention the Administrative Procedure Act in that modification? This just occurred to me, it is not in my memorandum and I am afraid there are many other things in here that have not occurred to me that will arise in practical application of Reorganization Plan No. 2 that will cause us an endless amount of trouble.

Thank you.

Senator PASTORE. Well, let me say this: I mean if you analyze everything that you seven gentlemen said, substantively I don't think you are too far apart.

Mr. MINOW. I think that is right, Mr. Chairman.

Senator PASTORE. I have listened to you all and I think you all recognize the fact that there must be some delegation of authority. You recognize the fact that seven men shouldn't be sitting there as a group, that they ought to break up in sections, there is a little bit of a divergence of opinion here as to whether or not there ought to be a mandatory oral argument or whether oral argument ought to be had in the case where the individual who renders the decision did not hear it in the first place. You agree there that a smaller group could hear it and that in itself isn't the real cause of delay.

Then we get down to this view section, and with the exception of Mr. Cross, who is willing to live with it, you are all inclined to agree that there is no harm in giving them a little more latitude in making recommendations on a take-it-or-leave-it basis.

Mr. CROSS. In interlocutory matter I am strong for it.

Senator PASTORE. I realize that. Of course, insofar as the reorganization plan, is concerned, we have to make a recommendation to the committee that has jurisdiction over it. I am not going to say what we are going to do and I don't know what they are going to do;

no matter what happens, it strikes me we ought to get our heads together and get something done that will not only streamline and protect the rights of these people but get some of this business done.

Mr. MINOW. Mr. Chairman, I know I can speak unanimously on this for the Commission: We are very grateful to this committee for the session today because I think it has been very constructive in illuminating our problems and to show you that we are, as a group, substantively together on what we want to accomplish. Many of our differences are legal, on legal points and technicalities, but I think our objectives are common and we appreciate the interest and spirit of the subcommittee today.

Senator SCOTT. Mr. Chairman, would the Chairman entertain a request to all the members of the Commission that they get together and submit their own suggestions as to what they believe could be accomplished by legislation to expedite, facilitate, and improve the operation of the Commission?

Senator PASTORE. I would rather not do that precisely. I will amend your suggestion in this respect, and of course this has no bearing on what we are going to do on the President's reorganization plan and the recommendations that we will make to the committee that has jurisdiction over it. But I have been reading about how the House feels and I have been listening to you gentlemen today, and I don't know what is going to happen to this, but I do say this—rather than each one expressing his view, because then we will have to sift it out again, and you are going to have seven different points of view, I think what they ought to do is agree among themselves, because substantially I don't think they are too far apart. But they ought to compromise their little differences among themselves and come up with one plan on each one of these sections.

Senator SCOTT. That is what I was driving at. I may not have stated it properly, but I agree with the Chairman.

Mr. MINOW. With the individual dissents——

Senator PASTORE. I don't think there will be any, I think myself they can agree on something. I don't want to invite any dissents from this group, because they will stampede me with dissents.

Mr. MINOW. Another name for our Commission is the "Seven Dissenters."

Are there any other questions?

Senator PASTORE. No; thank you very much.

Mr. FORD. May I submit my statement?

Senator PASTORE. Yes, sir; all statements have been inserted in the record in their entirety.

Senator PASTORE. All right, gentlemen. We are ready now for Mr. R. M. Booth, Jr.

It is a pleasure to have you here, Mr. Booth.

STATEMENT OF ROBERT M. BOOTH, JR., PRESIDENT OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION

Mr. BOOTH. I appreciate the opportunity to appear.

Senator PASTORE. We will listen to you any any way you want to present your case.

Mr. BOOTH. Mr. Chairman, members of the committee, I have prepared a written statement. I can either read it if you would care to——

Senator PASTORE. No, I think it would be better, if it suits your purpose, to have it introduced in the record and you can give us a resume of the points.

Now, we have been listening to this all day and know pretty much what our problem is here. The points we are interested in and position you want to state.

Mr. BOOTH. That will be entirely desirable.

(Mr. Booth's prepared statement follows:)

STATEMENT OF ROBERT M. BOOTH, JR., PRESIDENT OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION

I am Robert M. Booth, Jr., an attorney engaged in the practice of law in Washington, D.C., with offices at 1735 DeSales Street, NW. I appear as president of the Federal Communications Bar Association, an association composed of some 500 attorneys, most of whom specialize in practice before the Federal Communications Commission.

My appearance in opposition to Reorganization Plan No. 2 of 1961 has been authorized by appropriate resolution approved unanimously by the executive committee of the association.

At the outset, I should like to emphasize that the Federal Communications Bar Association supports an improvement in the efficiency and procedures of the Federal Communications Commission. The association long has been concerned with undue delays in the processes of the Commission and has worked with the Congress, the Commission, and their staffs in efforts to expedite work of the Commission. For example, the association has participated in a large number of congressional hearings over the past 25 years on communications and procedural proposals. When the Commission a few years ago revised part I of its rules relating to practices and procedures, the association actively assisted in the drafting of the rules. A year and a half ago, the association created four ad hoc committees to study the Commission's practices and procedures in the processing of broadcast applications. The committees were composed of attorneys, consulting engineers and members of the Commission's staff. To date, only a very few of the minor recommendations contained in the committee reports have been adopted by the Commission.

For more than 34 years, Congress has guided and supervised the communications facilities and services in this country, first through the Radio Act of 1927 and currently through the Communications Act of 1934 and its amendments. The Federal Communications Bar Association urges that Congress continue its guidance and supervision; however, Reorganization Plan No. 2 of 1961, for all practical purposes, would shift most of the responsibility for such guidance and supervision from Congress to the executive branch of our Government.

The association's opposition to Reorganization Plan No. 2 may be briefly summarized as follows:

1. The right to a full and complete hearing would be abolished by elimination of the right of review upon request of an interested party.
2. Elimination of procedural rights including the right of review would materially increase the workload of the United States Court of Appeals for the District of Columbia.
3. The plan is so vague and indefinite that procedures which might or would be followed cannot be determined.
4. The concept of a bipartisan Commission might be destroyed.
5. Most of the desired and worthwhile objectives can be achieved under present provisions of the Communications Act of 1934, as amended, and the Administrative Procedure Act.

Hearings before the Commission fall generally into two classes, adjudicatory and rule making. Adjudicatory hearings are held on applications for new stations, applications for modifications of facilities of existing stations, applications for renewal of licenses, show cause orders and revocations. Section 409(b) of the Communications Act now provides that following the issuance of an initial decision:

"* * * the Commission shall permit the filing of exceptions to such initial decision by any party to the proceeding and shall, upon request, hear oral argument on such exceptions before the entry of any final decision, order, or requirement."

The reorganization plan would abolish the right to file exceptions to an initial decision, the right of oral argument before the Commission, and the right of review and decision by the Commission. In substitution of the right of an administrative appeal, section 1(b) of the plan merely would afford a party the right to petition the Commission for review which would be granted only if a majority of the Commission, less one member thereof agrees to accept the appeal. Not even the United States Court of Appeals for the District of Columbia may refuse to accept appeals from decisions of the Commission it does not care to consider.

The filing of exceptions to an initial decision is provided for by section 8(b) of the Administrative Procedure Act and section 409(b) of the Communications Act and has proven extremely effective, particularly since the enactment of section 8(b) of the Administrative Procedure Act which requires that "The record shall show the ruling upon each such finding, conclusion, or exception presented."

The importance of oral argument long has been recognized by the courts and by most, if not all, administrative agencies. The right of oral argument affords the administrator the opportunity to ask questions and promotes confidence and respect in administrative decisions because the parties know that their views have been heard and carefully considered.

The Federal Communications Bar Association urges as strongly as possible the retention of at least one administrative appeal to the Commission in adjudicatory cases by submission of exceptions and the presentation of oral argument. Section 409(b) of the Communications Act and its procedures and safeguards were adopted by Congress after extensive deliberation and should not be abolished as proposed in Reorganization Plan No. 2.

The necessity for the right of administrative appeal in rulemaking proceedings is equally important.

Section 402(b) of the Communications Act provides that appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in all adjudicatory hearings. The court is required to accept and consider all such appeals. Only a small percentage of adjudicatory hearings before the Commission ever reach the court. One reason is because the administrative appeal and review now provided by section 409(b) of the Communications Act correct most errors in initial decisions. Should the plan be adopted and an administrative review denied, the parties to an adjudicatory hearing would have no alternative but to appeal to the court for the correction of errors in an initial decision. The end result would be to shift the workload from the Commission to the court.

Elimination of the right of at least one review by the Commission of initial decisions and rulemaking orders will not materially reduce the workload of the Commission or materially expedite the final disposition of cases. Only a relatively small percentage of a Commissioner's time is devoted to such matters. At the present time, in adjudicatory cases, the Commissioners receive a report from the review staff summarizing the facts and exceptions to the initial decision, hear oral argument which is limited to 20 minutes per party, and then vote to instruct the review staff to prepare the final decision. Oral argument seldom is held in the rulemaking cases.

The latest annual report of the Office of Administrative Procedure, on page 40, shows that the Federal Communications Commission was not overburdened during the 1959 fiscal year by the right of litigants to obtain review of initial decisions in adjudicatory proceedings. Fiscal year 1960 has not yet ended, so no later report is available. In fiscal year 1959, the report shows that 197 hearing cases were terminated. In 32, the Commission entered decisions on the merits after initial decisions had been released. That is only slightly more than one every 2 weeks. In 47 cases, the initial decisions became final without appeal and review. In 82 instances, there were defaults, consents, withdrawals, settlements, or other forms of termination agreements. There was some other form of final disposition in 36 cases.

In fiscal year 1958, on the other hand, a much larger percentage of initial decisions in adjudicatory cases were reviewed by the Commission. Out of 111 such cases disposed of during the year, 81 were decided by the Commission after review of the initial decision. In 7 instances, initial decisions of examiners became final without review, and 23 cases were disposed of by defaults, consents,

withdrawals, settlements, or other forms of agreement. These figures demonstrate that the Commission has been able to improve its efficiency in handling adjudicatory matters without taking shortcuts and without depriving parties of their basic right to a full and complete hearing.

The association's executive, legislative, and practice and procedure committees have studied Reorganization Plan No. 2 in detail in the 3 weeks since it was forwarded to Congress. The more we study the plan, the more confused we become. We have no idea as to how the plan would operate or what rules and procedures the Commission would adopt. In effect, the plan gives the Commission a blank check without imposing ceilings or limitations.

There is no need for following the blank-check procedure. The Communications Act now provides ample authority for the Commission to improve its procedures. Substantial improvement has been made in the past year and further improvements are expected momentarily.

The principal delays in the processes of the Commission have arisen from the Commission's own procedures. As previously noted, our association initiated and participated in a comprehensive study of the Commission's handling of broadcast applications and submitted reports containing specific recommendations which have not yet been adopted. The association stands ready to assist in further studies. Should the plan be adopted, improvements in the Commission's processes and procedures would depend entirely upon the rules adopted. The Commission already has ample authority to adopt the rules necessary to bring about the required improvements.

The legislative history of the Communications Act establishes that Congress intended to establish a bipartisan board of seven Commissioners with equal responsibilities in the exercise of the Commission's functions, except for the special duties of the Chairman as set forth in section 5(a). With this limited exception, no Commissioner was given a position superior to that of others in the carrying out of the Commission's work. The right of the Chairman in his sole discretion to determine the particular personnel, including Commissioners, to carry out delegated functions, is one of considerable, not negligible, importance. It could be determinative of the decision of the Commission in particular cases. The right to designate personnel becomes particularly critical in view of the plan's express provision that the decision of the delegatee would be final in every instance, subject only to a discretionary review by the Commission.

At present, all Commissioners have an equal voice with the Chairman in the designation of personnel to carry out the responsibilities and functions of the Commission. All should have an equal voice in the determination of Commission policy, particularly in these days of expanding technology of communications. This equality would be lost to a very large extent under the plan.

Some of the association's members have serious doubts as to the legality of the plan. The filing of exceptions in adjudicatory proceedings is provided for by section 409(b) of the Communications Act and by section 8(b) of the Administrative Procedure Act. Section 12 of the Administrative Procedure Act provides:

"* * * No subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly * * *."

Reorganization Plan No. 2 does refer to section 7(a) of the Administrative Procedure Act, which provides for petitions for review to the court of appeals, but does not mention section 8(b). Question has been raised as to whether the Reorganization Act of 1949 provides for such a general and sweeping plan.

The association has not had time in the 3 short weeks since the plan was submitted to Congress to study thoroughly the question of legality. We do not say that the plan is illegal but merely point out the possibility to illustrate the need for careful study and consideration by Congress.

As previously noted, the plan provides for divisions or boards of Commissioners. The plan also would abolish the review staff provided for by section 5(c) of the Communications Act, and would assign the staff's functions to the Commissioners. There may be considerable merit to each of these proposals. The association recommends that any such changes be considered in the form of proposals to amend the Communications Act. The work of Congress should not be set aside without most careful and thorough consideration by Congress after appropriate hearings.

There is no doubt but that the Commission's procedures can be improved so as to "relieve the Commissioners from the necessity of dealing with many matters of lesser importance and thus conserve their time for the consideration of major matters of policy and planning," which is the objective stated by President Kennedy. The Federal Communications Bar Association most firmly believes the stated objective can and should be achieved within the framework of the Communications Act and the Administrative Procedure Act. The association stands ready, willing, and able to assist the President, the Congress, and the Commission in achieving the objectives of Reorganization Plan No. 2 by appropriate legislation.

The association appreciates the opportunity to appear before this Committee and stands ready to assist in any way possible.

Mr. BOOTH. First of all I would like to say that I don't think the bar association is very far apart from the Commission; we have the same basic objectives. We have been concerned about the delays and the long processings of the Commission. Commissioner Hyde told you of the processing of the broadcast application, particularly AM applications. An application filed now first receives a very brief study by the staff to make sure that all of the information are required by the application form has been submitted.

Then the application for a year to 18 months sits before anything else is done on it. This is because of the workload of the Commission.

After that year to 18 months, then the application is brought up for study, and a recommendation made to the Commission either to grant it or designate it for hearing. We did have a procedure which was abolished by the Communications Act amendments of 1960 which was the so-called McFarland letter under section 309 of the act. That has been abolished. That helps speed up the processes considerably.

Now, the bar association has been concerned, very much concerned about these delays. A year and a half ago, Mr. Marks, who was then president, set up a series of committees, four ad hoc committees, to study the processing of broadcast applications. Those committees were made up of attorneys, members of our association, consulting engineers, and members of LAS, and consulting engineers, and members of the Commission staff. The Commission assisted us in this study and made their records available to us and their personnel available to us. Those reports were submitted. But what has happened to them now I honestly don't know, because practically none of the recommendations of those reports have been adopted.

Senator PASTORE. What is your idea of the cause of delay of 18 months or a vear from the time an application is filed up and until anything really happens?

Mr. BOOTH. There are two things.

First of all, of course, is the tremendous number of applications filed.

The second thing is the bottleneck created by two different actions of the Commission, one was the amendment of its rules to permit class IV, 250-watt, full-time stations to increase their time power to 1,000 watts without at the same time providing a corresponding amendment of its rules which would make the processing of those applications simple, rapid, without getting into the hearing process.

Chairman Minow mentioned that the number of cases in hearing status now has increased from about 200 to 400. I submit that about half of that increase or more arises from these class IV applications.

Now, I don't want to be critical of the Commission, I am trying to answer your question.

Senator PASTORE. State a fact.

Mr. BOOTH. In the last few weeks they have done a lot to help remove that bottleneck. They first amended their rules to say that the 10 percent standard of interference would not apply in such cases. That wasn't enough to break the logjam, so then they came out with a statement last week or 2 weeks ago that they would process these applications in a group. This is something we had recommended and urged. This I think will help tremendously in working out this backlog.

There are some 900 to 1,000 of these class IV stations, most all of them have applications pending to increase power.

The other action of the Commission which helped produce this backlog of work was the opening up of a number of the Canadian and Mexican channels for use daytime in this country. The channels had been frozen from the standpoint of consideration of new applications while the NARBA negotiations were on and Mexican negotiations were on.

When those negotiations were completed the Commission said, "We will consider applications for new stations on these frequencies."

Now, I refer specifically to 940 kilocycles and 1550 kilocycles and the minute the Commission made that announcement, the flood came. And they weren't prepared to handle them.

I think that is one of the problems which they have there.

So that we basically feel that there is much which can be done still to expedite action at the Commission. For example, in the hearing case, once a case is designated for hearing the interlocutory matters which have been referred to often involve requests to add or modify the issues. Sometimes the issues aren't framed so we as attorneys understand them. Sometimes we as attorneys find facts which weren't available to us at the outset, and we think that another issue should be added.

Sometimes we think there are issues in there which have no business being in there, and I think of one case that I had in which I knew at the outset what the answer was going to be. I spent 2½ years in hearing on it and I came out with a grant. All it cost my client was a delay and money and I don't want to get money that way and I know the other attorneys don't.

It is the kind of case which should never have been set for hearing, but we couldn't present it to the Commission. These are the things which I think the bar can help on. We stand ready to help.

Now, with respect to hearing cases in the framing of issues, the Commission has recently delegated some of its authority to the chief hearing examiner to pass upon motions to enlarge issues. This I think is going to expedite matters considerably and remove much of this interlocutory load from the Commission. That is an example of the type of change which can be made under their present form of operation without the need of the Reorganization Act.

Now, our association's objection to this reorganization plan is basically fivefold. And in this, I am expressing the views of our association and if I didn't believe in them myself, I don't think I would be telling them here.

Number one, the right to a full and complete hearing, would be abolished by elimination of right of review upon the request of an

interested party. We believe that there should be one right somewhere to review. The suggestion has been made that perhaps this might be done by a board of employees. Maybe it could be done by a board of superexaminers. Maybe it can be done by a panel. Some cases should go to the full Commission. There are many cases that don't need to.

Let me give you an example that I have in mind. Say an application for a new station causes interference to an existing station. That existing station is entitled to a hearing under the doctrine of the Supreme Court in the KOA case. Everybody knows what the outcome is going to be before you start, or at least I think we usually know. But at least that station is entitled to a hearing on the interference; it is a modification of its license. Perhaps that is the kind of case that doesn't have to go to the full Commission.

On the shrimp-boat case, on the other hand, if I was that shrimp-boat operator, I would sure want the Commission to hear it.

We believe that there should be one right of review somewhere to correct a mistake, if they occur, and they occur. Examiners are human beings. We think there should be one right of review with the right of oral argument and we are willing to work with Congress and work with the Commission in trying to devise the actual forum for that review.

The second thing we are concerned about is that the elimination of at least one right of administrative review would increase tremendously the workload of the U.S. Court of Appeals for the District of Columbia circuit. We would have no place to go but to the court. And when we get to court, I am certain that if we felt there were errors in the initial decision, errors of carelessness you might say, or omission or commission, we would plead the *Saginaw Broadcasting Co.* case.

Senator PASTORE. Are you actually saying, Mr. Booth, if you remove mandatory right of an oral argument, you might run into more cases being appealed to the courts?

Mr. BOOTH. Yes, sir. I think this should be considered. In other words, you have to consider the whole thing together, taking the workload away one place and pile it up someplace else; and you meet yourself coming back and I don't think the public is benefited by it.

Senator PASTORE. What about this argument that the right of oral argument is being abused for the purposes of delay?

Mr. BOOTH. I heard Dean Landis this morning say that these oral arguments were prolonged for a day and sometimes 2 days by the intervenors in the cases. I must respectfully disagree with him, sir. Intervenors in cases before the Commission are the exception rather than the rule. And I do not believe that there are many cases which really get to hearing, and then up to oral argument, which are continued only for delay. You do have the case of an existing station which says, "I don't want to lose 5 percent of my coverage on this side of me because there is another application on the other side that is going to chop off 10 percent; and you start whittling me away and pretty soon I will be down to nothing." I think they have the right to be heard and I don't consider that to be delay. There undoubtedly were delays under protest procedure under section 309(c) which was abolished last year, but I again submit that many of those delays

arose not from a basic legislation, but from the interpretation of the courts.

Our third objection to this plan is so vague and indefinite that procedures which might or would be followed cannot be determined.

I think every one of the speakers here today pointed up that fact.

The fourth is one that our association made in 1950 in response to Reorganization Plan No. 11, and that is the concept of a bipartisan Commission might be destroyed, and that comes from the manner in which the Chairman might exercise his power and the right of the President to fill vacancies, to designate the Chairman.

I personally believe that, if the Chairman were selected by the Commission, that I again as an individual would not be too concerned over this particular problem.

Fifth, most of the desired and worthwhile objectives can be achieved under present——

Senator PASTORE. I would like to pursue that a little bit. Why are we suspicious of the President of the United States, regardless of whether he is a Republican or a Democrat?

Do you think the President of the United States is going to humble himself and humble the prestige of his office by trying to exert influence on an agency of that kind because he has authority to appoint the Chairman?

Mr. BOOTH. Certainly not; and that is not logic, sir.

Do you have problems in which the Congress apparently felt it was desirable to have a bipartisan Commission?

Now that goes back to the old Radio Act, as I understand it.

Senator PASTORE. But you as a lawyer know they have never split on political lines.

Mr. BOOTH. They have not yet, but they might.

Senator PASTORE. It has been a long time, hasn't it?

Mr. BOOTH. Let me give you an example and, believe me, I have thought about it, too.

You have section 315 which deals with political broadcasts. Now, if they are going to split on political lines, I would say that would probably be the first place. But if there is a purpose in the basic legislation for having a bipartisan Commission, I think that we should continue it or within the framework as intended by the Congress.

Senator PASTORE. I think that is something a little different.

I quite agree with that, I think you ought to have a bi-partisan Commission so you can get an intermixture of this philosophy, whatever it happens to be. On communications, I don't know, but at least it has a part to play; it might be fairer to do it that way.

But this argument that because the President selects the Chairman of the Commission we ought not to trust him with too much power, now, somehow, that runs in between the lines. It is a little bit hidden and obscure, but that is the argument that is being developed here.

Mr. BOOTH. We can argue this, I am certain, for some time and not reach an agreement on it, Mr. Chairman, and I don't mean to be facetious, but I do point out that that is one of the concerns which the association had in 1950.

Senator PASTORE. Do you seriously feel that if a commission of seven strong-minded men delegates to the Chairman, after deciding

that the matter should be heard by three commissioners, I know of no other way to decide who the three should be, than to have one individual do it.

Now, who else is going to do it but the Chairman? If you are going to let seven men decide who the three are going to be, I don't think they are ever going to reach a decision.

Mr. BOOTH. We feel, and I, myself, and some of those who have worked with me in this study feel, that if the members of the Commission were to sit—for example, a panel were selected by rotation or by lot—as is done in the courts, that would be probably all right, but we should have some system of selection, rather than just an arbitrary selection. That is the concern which some of our members have had on the method of selection.

Our fifth point is that most of the desired and worthwhile objectives can be achieved under present provisions of the Communications Act and the Administrative Procedure Act.

We are more than willing to work with the Congress and the Commission. We just basically feel that, in a plan of this sort, there are so many problems presented that you just cannot pick them all out and we are fearful that the result might be chaos.

Some of our members believe very firmly that this reorganization plan will run into litigation, that the proposal to abolish 409(b) of the Communications Act violates section 8(b) of the Communications Act.

I just don't know what the answer is. The reason we point it out is we think that is the type of study which should be made and, if there are doubts, it should be spelled out in legislative history and in the actual legislation enacted rather than to leave it open to challenge in the courts as would be the case here.

That, sir, completes the comments I had. If I can have the prepared statement incorporated in the record?

Senator PASTORE. Yes, sir; that has already been ordered, Mr. Booth. We are grateful to you and thank you for coming.

My last witness is Leonard Marks.

I hope I can hear you, Leonard Marks, before we have a vote. The bell has rung and I wonder how long you are going to be.

Mr. MARKS. Five minutes.

Senator PASTORE. Have you a prepared statement?

Mr. MARKS. No, Senator Pastore, and I will be very brief.

STATEMENT OF LEONARD MARKS, ATTORNEY AND FORMER PRESIDENT OF THE FEDERAL COMMUNICATIONS BAR ASSOCIATION, WASHINGTON, D.C.

Mr. MARKS. I support the objectives of the Reorganization Plan No. 2, and I also support the criticisms that it is indefinite and has sufficiently confusing provisions not to be practical. However, I want to adopt the statement that you made during the course of the hearing, Senator Pastore, when you asked whether we are not trying to empty the ocean with a spoon; and I think we are.

There are two fundamental categories of work that the Commissioner performs, and I have listened throughout the entire presentation here and I have heard a discussion only of the adjudicatory

phase, as though that consumed the greatest amount of the Commission's attention. It does not, sir.

You heard Commissioner Ford say that on 90 percent of the cases the Commission was unanimous. I am sure that in arriving at that statistic he was considering the uncontested cases. Now if you look at the Commission's workload, they meet regularly every week to consider routine applications: a change in a transmitter location, from site A to site B; the transfer of a radio station from the present owners to new owners; an increase in power.

In those routine cases there are no parties whose interests are being affected adversely. The staff has made a complete study. Reports are prepared. They are mimeographed in great number, distributed to all the Commissioners. The Commissioners spend a great deal of their time studying these reports and then they listen at Commission meetings to a member of the staff summarize what is in the printed record, and they routinely say, "Application granted."

This, sir, takes up 90 percent of the average Commissioner's time, this adjudicatory case that you have heard about, which occupies 5 hours——

Senator PASTORE. Mr. Marks, I don't want to do you any injustice. That was the bell for a vote. Could you come back Friday?

Mr. MARKS. I will be glad to, sir; or I can submit this in some sort of memorandum if it would be of greater assistance.

Senator PASTORE. Either submit it in the form of a memorandum or—I don't want to feel I am not giving you an opportunity to be heard. I want to listen to you and anything you have to say. I don't even want to confine you to 5 minutes, but submit it for the record and if you feel you want to be heard, get in touch with Mr. Zapple, and he will put you on first on Friday.

Mr. MARKS. Perhaps Friday morning will be better if you are sitting anyway, but I would like to get this before you and answer questions.

Senator PASTORE. You try to be up here around 11 o'clock.

Mr. MARKS. Thank you.

Senator PASTORE. The committee will be in recess until 10 o'clock on Friday.

(Whereupon, at 4: 05 p.m., the subcommittee was recessed, to reconvene, at 10 a.m., Friday, May 26, 1961.)

(The following communications were subsequently submitted for the record:)

STATEMENT OF SENATOR FRANCIS CASE ON SENATE RESOLUTION 142, A RESOLUTION DISAPPROVING REORGANIZATION PLAN NO. 2 OF 1961, RELATING TO THE FEDERAL COMMUNICATIONS COMMISSION

I am Senator Case of South Dakota.

Mr. Chairman, I appear today in opposition to Reorganization Plan No. 2, which was submitted to the Congress on April 27, 1961, relating to the Federal Communications Commission. This proposal ostensibly provides for greater efficiency in the dispatch of business. It may expedite action, but whether so or not, in my opinion it tends to defeat the fundamental purpose of this agency. This proposal will become effective 60 days from the date of submission unless a majority vote in opposition is adopted in either house.

At the outset, let me say my opposition to Reorganization Plan No. 2 is not prompted by disagreement with the Federal Communication Commission Chairman's recent statement with respect to television programs before the National Association of Broadcasters.

Nevertheless, reorganization proposals should be carefully examined to see whether they will in fact cure the alleged problems they are intended to solve and, more importantly, whether such proposals are consistent with our fundamental concepts.

The plan proposed for the FCC is comprised of three parts:

First, the authority to delegate; second, the transfer of functions to the Chairman; third, abolition of the review staff.

Since the plans must be adopted or rejected in toto, all parts should be carefully considered.

One of the inherent dangers in a broad delegation of powers is that the delegating authority may become isolated or at least inaccessible to the actual operating level. Further, present authority exists in the Federal Communications Commission to make "assignment or referral" (47, sec. 155(d)) to an individual Commissioner or Commissioners or to a board composed of one or more employees of the Commission. Under the plan the Commission has a discretionary right to review actions taken by those to whom authority has been delegated. Three votes, in the case of the Federal Communications Commission, one less than the majority, would be required to bring the action before the Commission for review.

Since the law states that not more than four members of the Commission shall be members of the same party, this provision might appear to pay lipservice to the bipartisan character of the Commission. But in practice there is no such assurance that one member, much less three, will be members of the minority party. Today, for example, there is only one Republican on the Federal Trade Commission. Thus the protection given in the provision is something less than real. The net effect, therefore, would be to tend to transform the Federal Communications Commission, an independent regulatory agency, into an arm of the Executive, which has the authority of appointment, and the designation of Chairman.

Not only does this proposal, plan No. 2, do violence to the concept of bipartisanship and independent, but it runs contrary, also, to a basic procedural concept of review. The plan proposed would deny the right of aggrieved parties to even one administrative review of the presiding officer's initial decision and to present oral argument in this review. Under the present law, any adjudicatory matter is heard by a hearing examiner as established by section 11 of the Administrative Procedure Act and the examiner's decision is subject to review as a matter of right by the full Commission (sec. 409(b)). So, also, all rulemaking or other regulatory actions by subordinates are subject to review as a matter of right (sec. 5(d)(2)).

Under the present law, the Commission may delegate all of its business except the Commission's decisionmaking functions in cases of adjudication (sec. 5(d)(2)). Thus, Reorganization Plan No. 2 in basic effect merely adds to present broad powers the power to delegate the Commission's decisionmaking functions in cases of adjudication. But that destroys any right of review to persons aggrieved. The danger is that the Commission, under the press of its many responsibilities, will not exercise the discretion it has to review these adjudicatory decisions and other important matters. Parties would be forced to depend upon the opinion of any 1 of 15 examiners, 7 individual Commissioners, and an unlimited number of employees or boards of employees to whom their cases might be assigned. I hope the committee will give careful consideration of that fact that it isn't merely to the 7 individual Commissioners that cases might be assigned, but also to any 1 of 15 examiners and to an unlimited number of employees or boards of employees.

An aggrieved party should have at least some automatic right of review by one or more of the Commissioners themselves.

The plan says, in paragraph (d), "with respect to delegation of any of the functions as provided in subsection (a) of this section, the Commission shall retain a discretionary right to review the action of any such individual Commissioner, hearing examiner or employee or employee board upon its own initiative or upon petition of a party to or an intervenor in such action within such time and in such manner as the Commission shall, by rule prescribe, provided, however, that the vote of the majority of the Commission, less one member thereof, shall be sufficient to bring any such action before the Commission for review.

This plan destroys that mandatory review which an aggrieved party feels he has today under section 409. An aggrieved party should at least have some automatic right of review by one or more of the Commissioners themselves. The

Commissioners are charged with the enforcement of the Communications Act and establishment of policy. No serious burden is imposed by demanding or requiring no decision become final until at least one or three Commissioners review the matter, if requested by an aggrieved party, and essential to this right of review should be the right of oral argument before the individual Commission or panel. The benefits of the right to oral argument are well established procedurally and judicially.

I want now to discuss the transfer of functions to the Chairman. Reorganization Plan No. 2 gives the Chairman virtually unlimited discretion in the assignment of cases to agency personnel, including the Commissioners themselves.

The Chairman, under present law, is the chief executive officer of the Commission and in this capacity exercises broad authority on behalf of the Commission. That his authority is not complete is not justification for adding to it.

The role of the FCC demands that its status as lawmaker, judge, and executive should be specially treated. The vast powers granted to the independent agencies were conferred with the intent that these agencies should be neither executive nor legislative, but in fact independent.

Historically the Federal Communications Commission was established in 1934 as a successor to the Federal Radio Commission. The hearings and reports on the legislation passed in the 69th Congress, which resulted in the Radio Commission, support this position. Strong differences of opinion and lengthy hard-fought disputes preceded and followed the 1926 legislation. The report of the Senate Committee on Interstate and Foreign Commerce, Senator C. C. Dill, chairman, in 1926, has special significance in the evaluation of the reorganization proposal plan No. 2.

Senate Report 772, 69th Congress, 1st session, May 6, 1926, at page 2, on the regulation of radio transmission, reads as follows:

"After consideration of the facts given your committee at the hearings, the committee decided that the importance of radio and particularly the probable influence it will develop to be in the social, political, and economic life of the American people, and the many new and complex problems its administration presents, demand that Congress establish an entirely independent body to take charge of the regulation of radio communication in all its forms.

"The exercise of this power is fraught with such great possibilties that it should not be entrusted to any one man nor to any administrative department of the Government. This regulatory power should be as free from political influence or arbitrary control as possible. A commission which would meet only occasionally would gain only a cursory and incomplete knowledge of radio problems. It would necessarily be largely dependent on the administrative authority; namely, the Secretary of Commerce, for expert knowledge it would require.

I was interested in noting the remarks of the then Secretary of Commerce Hoover at the House hearing (cited in minority views of Edwin L. Davis, H. Rept. 464, 69th Cong., 1st ses.).

The minority views, as per page 20, House Report 464: There are the remarks of Mr. Davis, quoting Mr. Hoover:

"The bill as originally introduced provided for the establishment of a national radio commission, consisting of nine members to be appointed by the President * * *.

"When Secretary Hoover appeared before the Committee on the Merchant Marine and Fisheries with respect to said bill during the present session, he declared in part as follows:

"'I have always taken the position that unlimited authority to control the granting of radio privileges was too great a power to be placed in the hands of any one administrative officer and I am glad to see the checks and reviews which are placed upon that power in this bill.'"

President Kennedy's Reorganization Order No. 2 violates the principles so well stated by Mr. Hoover 35 years ago. It places the granting of radio privileges in single administrative officers, either commissioners or examiners as the chairman may designate, and it destroys review as a matter of right by parties feeling aggrieved. In any field that is wrong procedurally, to deny the right of review; in the field of public communications; it is the road to destruction of informed government by the people.

Mr. Hoover went on to say:

"I am opposed to the establishment of any new commissions or the creation of any new offices except in a case of vital necessity. However, after having for several years given this subject very earnest consideration, I have reached

the definite conclusion that the interests of the public and of the various citizens engaged in the radio industry cannot be adequately and efficiently protected without the establishment of a quasi-judicial tribunal to deal with certain phases of the problem."

This Reorganization Plan No. 2 would result in practice in the deterioration of the Commission-type operation, as it would, in all likelihood, result in a one-man agency. Thus, Presidential or executive control would become a reality, and a strengthening of the executive at the expense of the legislative branch. This was neither intended at the time of the establishment of the Federal Communications Commission, nor is it required today.

Furthermore, the unlimited right of assignment by the Chairman violates well established principles of equality of treatment and rotation. For example, under section 11 of the Administrative Procedure Act, examiners must be assigned "in rotation so far as practicable." It is well known that courts adhere to a strict rotation system to assure fairness. Why should not this same fairness and rotation be demanded of administrative agencies? Section 2 of the reorganization plan gives the Chairman too much power in these matters and should not be approved.

STATEMENT FILED BY GOV. LEROY COLLINS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS, ON REORGANIZATION PLAN NO. 2

Mr. Chairman, my name is LeRoy Collins. I am president of the National Association of Broadcasters.

Our principal offices are here in Washington, and our membership consists of 1,755 AM radio, 587 FM radio, and 373 television stations, in addition to the 4 national radio networks and the 3 national television networks. This represents a substantial majority of the Nation's broadcasters.

The ultimate goal and purpose of Reorganization Plan No. 2—which is to increase the efficiency of the Federal Communications Commission—is laudable.

As I understand it, the broad pattern of change, as contemplated by plan No. 2, can be stated as follows:

(1) It removes the now vested right of appeal to the full Commission in adjudicatory cases. Apparently it also is intended that the now vested right to review by the Commission in nonadjudicatory cases similarly will be abolished.

(2) It transfers to the Chairman the function, heretofore reserved to the full Commission, of assigning personnel, including Commissioners, to the performance of various duties.

(3) It abolishes the Office of Opinion and Review, which was created by the Communications Act Amendments of 1952.

How to deal with these matters has concerned the Congress, the Commission, and the regulated industries for many years. While changes in procedures through Executive orders have in certain instances proved feasible, by no means is this always the case.

In my view, and I believe in the judgment of the overwhelming majority of broadcasters throughout the land, prudence and soundness require that remedial action in the present situation be developed through direct legislation by the Congress.

The Communications Act is a complex and comprehensive document—providing for not only vast administrative functions but, more important, for quasi-legislative and quasi-judicial functions as well.

Plan No. 2 affects all these functions. It contemplates changes in the FCC, involving deeply the public interest as well as private interests.

The Chairman and other members of the FCC are required to wear many different hats—I personally think too many. But, be that as it may, the range of their duties should be fixed by law, and should not be subject to enlargement or contraction by Executive order and congressional passive indulgence.

As the Congress is so aware, communications have a vital effect upon the social, political, and economic life of the American people. This has resulted in great interest in electronic transmission by every Congress of the United States since the days of Marconi. To guide the growth of this important facet of our life, the Congress, since 1912, has adopted numerous legislative proposals. For example, we have had the Radio Law of 1912, the Radio Act of 1927, the Communications Act of 1934, the extensive procedural amendments of 1952 and the recent procedural and substantive changes of 1960.

Each of these statutes was designed to resolve new problems in this dynamic industry. Each was the subject of lengthy hearings before the legislative committees prior to enactment.

Broadcasters believe that Congress should give like study and analysis to the problems pointed up by plan No. 2. This would develop full knowledge of all the facts with ample opportunity for debate and amendment.

This is the course we feel should produce the best ultimate action.

There are two ways of approaching needed reform in the regulatory field.

One way is to try to do a repair job by Executive order on the existing structures, seeking to shore up shortcomings short of a fundamental revision of the agency's basic functions.

While some structural changes are contemplated in plan No. 2, essentially it is well within the area of patchwork change.

The other way is to take an entirely fresh look at the agency and— through congressional hearings and legislation—rebuild the basic structure and functions of the agency in a way designed to enable it best to meet the proper regulatory requirements of a changed and changing industry.

For example, under such an approach ways may be found to deal effectively with the growing concern over the possible need for more clearly delineating and separating the purely judicial functions of the FCC from its administrative functions.

We feel that both the executive department and the Congress—as well as broadcasters and the public generally—would be better served by such a broad approach.

We would hope that this course is the one which will be followed, and we stand ready to work with both branches of the Federal Government in developing a plan of reorganization along lines which will assure a more efficient and orderly conduct of the complex functions of the Federal Communications Commission.

I submit, Mr. Chairman, that Reorganization Plan No. 2 should be rejected by the Congress and not allowed to become operative.

NEWPORT, N.H., *May 20, 1961.*

HON. NORRIS COTTON,
Senate Office Building, Washington, D.C.

DEAR SENATOR COTTON: Thank you for your letter of May 17. I appreciate the opportunity which you afford of receiving my views on the proposed presidential reorganization plan for the Federal Communications Commission.

The proposals for its reorganization tend, in our view, toward the creation of a virtual authoritarian body, wholly subservient to the direction of the Chairman, who in turn, appointed by the President, could exercise his direction in any manner desired by the President or by the Chairman himself.

By giving the Chairman the function of assignment of cases there is placed in the hands of this single individual the ability to practically assure himself of desired results by appointment of Commissioners or hearing examiners whose views may be known. We feel that the full Commission should retain its assignment prerogatives.

The present Commissioner, in his address to the recent convention of the National Association of Broadcasters, has by the use of the personal pronoun "I," given an indication of his authoritarian thinking. Most past chairmen have always used "we" when referring to the Commission of which they are Chairman. Mr. Minow seems to feel that the reorganization authority has already been granted—at least that is my reaction to the tenor of his address.

We believe that much needs to be done to improve the programing of the radio industry as a whole. We feel it can best be achieved with balanced action by continuing the functions of the Commission as they have been carried out in the past, and respectfully urge that the reorganization plan be rejected.

Cordially,

CARLSON ENTERPRISES,
W. RICHARD CARLSON, *Co-owner.*

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