



2019

The Shallow State: The Federal Communications Commission and the New Deal


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4 J.L. & Pub. Aff. 403.

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UNIVERSITY *of* PENNSYLVANIA

JOURNAL *of* LAW & PUBLIC AFFAIRS

Vol. 4

May 2019

No. 3

THE SHALLOW STATE: THE FEDERAL COMMUNICATIONS COMMISSION AND THE NEW DEAL

*Daniel R. Ernst**

American lawyers and law professors commonly turn to the New Deal for insights into the law and politics of today's administrative state. Usually, they have looked to agencies created in the 1930s that became the foundation of the postwar political order. Some have celebrated these agencies; others have deplored them as the core of an elitist, antidemocratic Deep State. This Article takes a different tack by studying the Federal Communications Commission (FCC) and its predecessor the Federal Radio Commission (FRC), an agency created before the New Deal. For most of Franklin D. Roosevelt's first two presidential terms, the FCC languished within the "Shallow State," bossed about by patronage-seeking politicians, network lobbyists, and the radio bar. When Roosevelt finally tried to clean up the agency, his success or failure turned on whether the FCC could hire the kind of young, smart, hard-working lawyers who at other agencies had proven themselves to be the "shock troops of the New Deal." Only after James Lawrence Fly, formerly general counsel of the Tennessee Valley Authority, became chairman and hired lawyers like himself did the FCC set sail. It cleaned up its licensing of radio stations and addressed monopoly power in the industry without becoming the tool of an authoritarian president or exceeding its legislative and political mandates.

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INTRODUCTION

Defenders of the presidential administration of Donald J. Trump have sometimes referred to career civil servants as the Deep State, a secret cabal intent on undermining a lawfully elected president. As used by conspiracy theorists on the fringe of American politics, the term often refers only to members of the national security state, who operate beyond the effective oversight of elected officials.¹ Recently, however, its meaning has expanded to encompass civil servants throughout the federal bureaucracy, including government lawyers.² Special Counsel Robert Mueller’s investigation of Russia’s

¹ See Jack Goldsmith, *Paradoxes of the Deep State*, in *CAN IT HAPPEN HERE? AUTHORITARIANISM IN AMERICA* 107-08 (Cass R. Sunstein ed., 2018) (defining the U.S. deep state as “US intelligence and related national security bureaucracies endowed with extraordinary powers of secret intelligence collection (or access to the fruits of that intelligence)”); Michael Crowley, *The Deep State Is Real*, *POLITICO MAG.* (Sept./Oct. 2017), <https://www.politico.com/magazine/story/2017/09/05/deep-state-real-cia-fbi-intelligence-215537> [<https://perma.cc/2HPT-6XKS>] (“Beneath the politics of convenience is the reality that a large segment of the U.S. government really does operate without much transparency or public scrutiny, and has abused its awesome powers in myriad ways.”).

² See Max Fisher, *What Happens When You Fight a ‘Deep State’ That Doesn’t Exist*, *N.Y. TIMES* (Mar. 10, 2017), <https://www.nytimes.com/2017/03/10/world/americas/what-happens-when-you-fight-a-deep-state-that-doesnt-exist.html> [<https://perma.cc/6V82-FQDP>] (noting that the media and many political commentators “have repurposed ‘deep state’ from its formal meaning—a network of civilian and military officials who control or undermine democratically elected governments—to a pejorative meant to accuse civil servants of illegitimacy and political animus”); Rex Huppke, *The Deep State is coming for Trump, and it’s using Republicans!* *CHI. TRIB.* (Apr. 11, 2018), <https://www.chicagotribune.com/news/opinion/huppke/ct-met-trump-rosenstein-cohen-russia-huppke-20180411-story.html> (explaining, sarcastically, that many of the supposed “deep state” actions against the Trump administration are being performed by Republicans); Editorial, *Mueller’s Leak: Deep State Doubles Down On Collusion With Democrats*, *INVESTOR’S BUS. DAILY* (May 1, 2018), <https://www.investors.com/politics/editorials/muellers-leak-deep-state-doubles-down-on->

role in the 2016 election drew the most fire, including President Trump’s characterization of it as “an attack on our country.”³ In response, others have celebrated government lawyers for believing it “crucial for the country that the government operate within the law—even if the president wishes otherwise.”⁴ Thus, the political scientists Steven Levitsky and Daniel Ziblatt have recently counted Department of Justice lawyers among the “guardrails of our constitutional democracy” that have thus far contained President Trump’s authoritarian impulses.⁵

One might expect history to provide some insight into whether government lawyers have undermined or preserved liberal democracy in the United States. And, in fact, American legal historians have not overlooked government lawyers, even though they account for only a small percentage of the legal profession.⁶ The best studied have been the so-called New Deal lawyers, several hundred graduates of elite American law schools who arrived in Washington at the start of Franklin D. Roosevelt’s presidency.⁷ In 1939, a presidential assistant called them “the ‘shock troops’ of the New Deal—the

collusion-with-democrats/ [https://perma.cc/FVF8-L5FX] (arguing that the Mueller investigation is being run by “inside operators at both the Obama Justice Department and the Obama FBI...[to] sabotage Trump’s presidency”); Evan Osnos, *Trump vs. the “Deep State”: How the Administration’s Loyalists Are Quietly Reshaping American Governance*, NEW YORKER (May 21, 2018), <https://www.newyorker.com/magazine/2018/05/21/trump-vs-the-deep-state> [https://perma.cc/2HKK-H5B4] (detailing how the Trump administration views the “deep state” as government “clerks” trying to thwart its initiatives); Julian Zelizer, Opinion, *Trump Uses IG Report to Spread “Deep State” Conspiracy*, CNN (Jun. 16, 2018), <https://www.cnn.com/2018/06/16/opinions/trump-ig-report-deep-state-conspiracy-opinion-zelizer/index.html> [https://perma.cc/J8PR-3P7J] (discussing how the distrust of government institutions has become part of the mainstream political discourse).

³ *Trump Calls Probe by Special Counsel Mueller into Election Meddling ‘an Attack on Our Country,’* PBS NEWSHOUR (Apr. 9, 2018), <https://www.pbs.org/newshour/politics/trump-calls-probe-by-special-counsel-mueller-into-election-meddling-an-attack-on-our-country> [https://perma.cc/HL2M-5C6U].

⁴ Fareed Zakaria, *America’s Deep State — of Law and Lawyers*, WASH. POST (Apr. 20, 2018), <https://fareedzakaria.com/columns/2018/4/20/americas-deep-state-of-law-and-lawyers> [https://perma.cc/L4NY-GFHA].

⁵ See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 1, 177–78, 203 (2018) (noting the resistance that Department of Justice officials have exhibited against authoritarian commands from the president).

⁶ The American Bar Association estimates that one eighth of the American legal profession works in government or the public sector. *Government*, AMERICAN BAR ASS’N, <https://www.americanbar.org/topics/govt/> [https://perma.cc/3CTM-GAKB] (last visited Apr. 14, 2019).

⁷ For the scattered precursors, see Daniel R. Ernst, “*In a Democracy We Should Distribute the Lawyers*”: *The Campaign for a Federal Legal Service, 1933–1945*, 58 AM. J. LEGAL HIST. 4, 8–9 (2018) (discussing the hiring practices of lawyers in the federal government during the early 20th century).

men who really get the tremendous volume of work done that must be done.”⁸ Some legal historians have applauded these men (and women) for restraining capitalism, expanding public investment, protecting workers, and creating a social safety net.⁹ Others have chided them for stopping short of truly transformative measures¹⁰ or for imposing their own modernist values on American society, politics, and constitutional doctrine.¹¹

Because these scholars were trying to understand the political order the New Deal created, they have mostly studied agencies created during the New Deal. They have told us relatively little about so-called old-line agencies, the frequently plodding, often ineffectual, and sometimes corrupt bureaus, boards, and commissions that had little if any place in Roosevelt’s reform agenda. As a result, we know much more about the New Deal origins of the so-called Deep State than the contemporaneous Shallow State, those parts of the federal bureaucracy lacking the ability to develop and implement statutorily promulgated policies over the opposition of partisan actors and regulated interests.¹² As long as critics of the federal bureaucracy have merely harassed

⁸ Letter from James H. Rowe, Jr., to Thomas G. Corcoran (Jan. 1939), in THOMAS G. CORCORAN PAPERS, box 211 (on file with the Manuscript Division, Library of Congress, Washington, DC) [hereinafter CORCORAN PAPERS].

⁹ See generally, Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES (Anthony T. Kronman ed., 2004); JAMES A. GROSS, THE RESHAPING OF THE NATIONAL LABOR RELATIONS BOARD: NATIONAL LABOR POLICY IN TRANSITION, 1937–1947 (1981); LAURA KALMAN, ABE FORTAS: A BIOGRAPHY (1990); PETER H. IRONS, THE NEW DEAL LAWYERS (1982); JOSEPH P. LASH, DEALERS AND DREAMERS: A NEW LOOK AT THE NEW DEAL (1988); WILLIAM LASSER, BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL (2002); JORDAN A. SCHWARZ, THE NEW DEALERS: POWER POLITICS IN THE AGE OF ROOSEVELT 107–245 (1993); JASON SCOTT SMITH, BUILDING NEW DEAL LIBERALISM: THE POLITICAL ECONOMY OF PUBLIC WORKS, 1933–1956 (2006); KAREN M. TANI, STATES OF DEPENDENCY: WELFARE, RIGHTS, AND AMERICAN GOVERNANCE, 1935–1972 (2016). On female lawyers during the New Deal, consult DOROTHY S. SHAWHAN & MARTHA H. SWAIN, LUCY SOMERVILLE HOWORTH: NEW DEAL LAWYER, POLITICIAN, AND FEMINIST FROM THE SOUTH (2006); Karen M. Tani, *Portia’s Deal*, 87 CHICAGO-KENT L. REV. 549–70 (2012) and MARLENE TRESTMAN, FAIR LABOR LAWYER: THE REMARKABLE LIFE OF NEW DEAL ATTORNEY AND SUPREME COURT ADVOCATE BESSIE MARGOLIN (2016).

¹⁰ See generally, JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 158–230 (1976); IRONS, *supra* note 9; CHRISTOPHER L. TOMLINS, THE STATE AND THE UNIONS: LABOR RELATIONS, LAW, AND THE ORGANIZED LABOR MOVEMENT IN AMERICA, 1880–1960 (1985).

¹¹ See generally, G. EDWARD WHITE, *Revisiting the New Deal Legal Generation*, in INTERVENTION AND DETACHMENT: ESSAYS IN LEGAL HISTORY AND JURISPRUDENCE 132–203 (1994).

¹² The National Recovery Administration, which relied on industry to draw up codes of fair competition, has been studied at length, but it employed many elite lawyers. It is less

career civil servants, this oversight was perhaps understandable. Now that the Trump administration has undermined the career civil service by leaving vacancies unfilled, instituting reassignments, and altering personnel procedures, a study of an old-line agency in the New Deal can provide much-needed insight into what Americans might lose if authoritarian assaults on bureaucracy succeed.¹³ The most likely alternative to the Deep State (broadly defined) is not some natural order of freedom but a variety of crony capitalism, with favors distributed to the powerful and burdens visited upon the vulnerable under easily manipulated, ad hoc standards. From this vantage point, government lawyers appear less like the “shock troops” of the New Deal than the defenders of liberal democracy within a burgeoning administrative state.

Because it was an old-line agency for most of the 1930s, only to be New Dealed at the end of the decade, the FCC is an unusually revealing exemplar of the Shallow State. Created as the Federal Radio Commission in 1927 and reestablished with its present name and jurisdiction over telegraphy and telephony in 1934, the FCC had as its principal mission the issuance of licenses to radio stations and the policing of the nation’s airwaves. Quaint as that sounds in the Internet Age, the FCC oversaw a medium that reached into millions of homes, enriched licensees, and gave Roosevelt and other New Dealers a way to circumvent hostile newspaper editors and speak directly to voters. Despite its importance, it became a perennial New Deal problem

instructive a comparison than the old-line agency studied here. *See generally*, KENNETH FINEGOLD & THEDA SKOCPOL, *STATE AND PARTY IN AMERICA’S NEW DEAL* 1 (1995); IRONS, *supra* note 9, at 15–107.

¹³ *See generally* Ben L. Erdreich and Steven L. Katz, *The Federal Merit System Keeps Our Democracy Safe. Trump and the Senate are Killing Its Guardian*, WASH. POST (February 12, 2019), https://www.washingtonpost.com/opinions/the-federal-merit-system-keeps-our-democracy-safe-trump-and-the-senate-are-killing-its-guardian/2019/02/12/d1984726-2f0e-11e9-8ad3-9a5b113ecd3c_story.html?utm_term=.cf06cfd2353a [<https://perma.cc/Y6SQ-FG2F>]; Lisa Rein, *Trump Loyalists at VA Shuffling, Purging Employees Before New Secretary Takes Over*, WASH. POST (Jul. 18, 2018), https://www.washingtonpost.com/politics/trump-loyalists-at-va-shuffling-purging-employees-before-new-secretary-takes-over/2018/07/18/a4462aae-892d-11e8-8aea-86e88ae760d8_story.html?utm_term=.113b780fd848 [<https://perma.cc/P4AQ-SETD>] (“Current and former employees — and now alarmed members of Congress — call the reshuffling [at the Department of Veterans Affairs by the Trump administration] a loyalty purge that is targeting the alleged political sympathies of civil servants whose jobs are, by definition, nonpartisan”); Lorraine Woellert, *Trump Issues Orders Making It Easier to Fire Federal Employees*, POLITICO (May 25, 2018), <https://www.politico.com/story/2018/05/25/trump-federal-employees-unions-civil-servants-609167> [<https://perma.cc/KY5K-ALBB>] (explaining that “a series of executive orders [which aim] to weaken the influence of government unions and make it easier for agencies to fire civil servants” may also “reduce accountability or punish whistleblowers”).

child.¹⁴ Congress saddled it with a seven-member board and granted it sweeping legislative power to act as “public convenience, interest, or necessity” required.¹⁵ Lacking a strong chairperson and an aggressive legal staff to police administrators, it was wracked by “dissension, wrangling, and inefficiency,” harried by patronage-seeking politicians, overawed by the networks, and manipulated by a self-interested, specialized bar.¹⁶

During his first presidential term, Roosevelt never attempted the Herculean feat of cleansing the FCC because congressional demand for its patronage was so great. In his second term, however, Roosevelt finally appointed an honest but ineffectual chair in 1937 and a much more ambitious and successful one in 1939. The former never managed to transform the Law Department into an effective check on administrators, but the latter recruited a platoon of shock troops to revitalize the agency. Together, they minimized external influence, combatted concentration in the industry, and resisted illiberal policies emanating from the president or other members of his administration.

The history of the FCC suggests that without the kind of government lawyers and other career civil servants pilloried today as the Deep State, federal agencies that distribute valuable economic privileges can devolve into a Shallow State, whose officials heed the business interests that best satisfy their partisan needs rather than implement democratically established policies. Lawyers, if formed into an insular, specialized bar, might find their own niche in the swampy ecosystem. But if selected for their legal ability and organized into a demanding and rewarding legal division, lawyers can successfully enforce statutory mandates and limit partisan exercises of discretionary economic power, even when attempted by a president less committed to liberal democracy than was Franklin D. Roosevelt.

I. PATRONAGE-SEEKING CONGRESSMEN

Regularly scheduled radio broadcasts by nonprofit and commercial stations date from 1921 and quickly attained great popularity during the 1920s. A survey in May 1928 tallied 12 million receivers serving 40 million people.¹⁷ As

¹⁴ See, e.g., Doris Fleeson, *M’Ninch Blasts Craven on “Freedom of Radio” Stand*, N.Y. DAILY NEWS, Mar. 2, 1939, at 448 (describing a conflict over censorship between Chairman McNinch and commissioner Craven).

¹⁵ Communications Act of 1934, 48 Stat. 1064, §§4(a), 303 (codified as 47 U.S.C. § 151 et seq.).

¹⁶ See *Wheeler, M’Ninch Favor 3-Member Revamped FCC*, ST. LOUIS POST-DISPATCH, Jan. 25, 1939, at 19 (recounting the statements of Senator Wheeler, who thought that the FCC needed reorganization to provide guidance on questions of licensing, ownership and monopolistic practices).

¹⁷ *Federal Control of Radio Broadcasting*, 39 YALE L. J. 245, 246 n. 1 (1929).

the radio audience expanded, politicians realized that a recipient of a broadcast license would swap favorable news coverage and campaign contributions for a state-created monopoly of a place on the dial. Their first impulse was to hand out radio licenses much like the jobs, contracts, grants, and other benefits that had fueled party machines since Andrew Jackson's day. The job of the national parties' patronage managers was to see that each state party received its share. Following this logic, the federal government sought to award as many licenses as possible to solidify support for the party-in-power across the nation's congressional districts.¹⁸ Particularly in the 1920s, as networks were still forming, politicians were often advocates of localism. Even after the rise of the networks, congressmen who otherwise were disinclined to battle monopolies loudly denounced the radio trusts if networks interfered too much with the programming and advertising revenues of constituents who owned local affiliates.

But radio licenses differed from more traditional forms of patronage in crucial respects. First, the national resource they parceled out, the airwaves, was, in economic parlance, a nonexclusive, rivalrous good. No private party could exclude another from occupying the same location on the radio spectrum without the help of the state, and a grant of the use of a frequency to one applicant foreclosed the use of that part of the dial by another. "We have a problem entirely unlike what you have in the Public Works Administration, where Congressmen and Senators write in regarding a water works project in a locality," explained an FCC lawyer, "because here you have the granting of one precluding the granting of another, and both applicants are quite apt to ask their Congressmen to write a letter about it."¹⁹ Second, a grant of a new or revised license could create interference that harmed licensees in other regions or on neighboring frequencies.²⁰

Although the difference was obvious to any serious student of radio policy, it took an utter breakdown in radio broadcasting to force Congress to act. Soon after the first commercial broadcast in 1920, Commerce Secretary Herbert Hoover attempted to regulate the industry under prewar legislation drafted primarily to meet the needs of ship-to-shore radiotelephony. He managed to impose some order through a series of committees and conferences until 1926, when a federal court decision and an opinion of the U.S. Attorney

¹⁸ Cf. RICHARD L. MCCORMICK, *THE PARTY PERIOD AND PUBLIC POLICY: AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA* 204–12 (1986) (explaining how, during the Jacksonian era and into the 20th century, the federal government distributed resources and benefits to empowered political parties).

¹⁹ Conference of the Attorney General's Committee on Administrative Procedure (Oct. 22, 1939), at 3, 4–5, *in* RECORDS OF THE U.S. DEPARTMENT OF JUSTICE, record group 60, entry 376, box 3 (on file with the National Archives, College Park, MD).

²⁰ MERLE FAINSOLD, LINCOLN GORDON AND JOSEPH C. PALAMOUNTAIN, JR., *GOVERNMENT AND THE AMERICAN ECONOMY* 387 (3d ed. 1959).

General declared that he lacked the statutory authority to limit licensees to specified frequencies, power, and times. Chaos ensued, as new stations appeared overnight, “air pirates” jumped from one frequency to the next, and well-financed stations boosted their power to beggar their neighbors on the dial. All agreed that national legislation was required, but they divided on whether to leave the allocation of the airwaves with the Commerce Department or entrust it to a new agency. A majority of the House of Representatives wanted the job given to an executive department, headed by a political appointee; most Senators thought only an independent commission with a bipartisan membership could provide the national perspective radio policy required.²¹ The Radio Act of 1927 was the awkward result. It created a Federal Radio Commission (FRC) to allocate radio licenses at the public’s convenience, interest, or necessity—a task, it was thought, that could be completed in a year. Thereafter, the licensing power was to pass to Hoover’s Commerce Department. The FRC would survive only as a kind of appellate body, roughly analogous to the Board of Tax Appeals, the predecessor to the today’s U.S. Tax Court. No more than three of the FRC’s five commissioners could be from the same political party, and each was to represent a different zone of the nation. Because each commissioner deferred to the other’s decisions, each was, a Senator charged, “almost a czar” in his own zone.²² Although the statute required licenses to be distributed among the different States and communities as to give fair, efficient, and equitable radio service, the initial distribution favored the Northeast and Midwest.²³ In response, a coalition of southern

²¹ PHILIP T. ROSEN, *THE MODERN STENTORS: RADIO BROADCASTERS AND THE FEDERAL GOVERNMENT* 47-106 (1980); *see also Report of the Standing Committee on Radio Law*, 54 A.B.A. REP. 404, 439-442 (1929) (explaining that the only substantive difference between the House and Senate bills on updating radio regulation was that the House bill “confided the administration of the Act to the Secretary of Commerce, subject to a supervisory or appellate review by a commission,” whereas the Senate “placed the administration of radio entirely and directly in the hands of the Commission”); ROBERT E. CUSHMAN, *THE INDEPENDENT REGULATORY COMMISSIONS* 301-02 (1941) (discussing the “fundamental” disagreement between the House and Senate over radio regulation as being whether it should be overseen by a new independent commission or the executive department).

²² *Nomination of Thad H. Brown to Be a Member of the Federal Radio Commission: Hearing before the Comm. on Interstate Commerce, U.S. Senate*, 72d Cong. 19 (1932) (debating the political nature of Brown’s career and his qualifications to be a commissioner).

²³ *See Radio Act of 1927*, Pub. L. No. 69-632, Ch. 169, 44 Stat. 1162 (1927) (dividing the United States into five zones in § 2, each represented by one commissioner); *see generally*, Mark Goodman & Mark Gring, *The Ideological Fight over Creation of the Federal Radio Commission in 1927*, 26 JOURNALISM HIST. 117-24 (2000) (providing a general history of the ideological conflict over national radio licensing as to whether executive authority or agency independence would govern).

Democrats and western progressive Republicans passed an amendment requiring the FRC to award an equal number of broadcast licenses to each zone and, within a zone, to each state in accordance with its population.²⁴

The act set a maximum duration for licenses of three years but no minimum, thus allowing the FRC to make licenses good for only three months at a time. The short duration eased the commission's initial task of reducing the 733 broadcasters in 1927 to a number more readily accommodated by the available 96 channels. Instead of initiating revocation hearings to reduce a broadcaster's frequency, power, or hours of operation, they could simply let an existing license expire, refuse to renew it or renew it on less desirable terms, and let the applicant try to show that the order was not in the public interest, necessity, or convenience. So great was this tactical advantage that the commission kept the maximum duration of licenses under one year until 1939. The brief duration of the licenses also had consequences for the patronage system. Because broadcasters knew they might lose their license in a negative review by the commission's staff or a challenge from a new applicant, they had ample reason to be solicitous of congressmen whose intervention might save them. Even though the FRC renewed the vast majority of licenses without a hearing, broadcasters constantly complained of the precariousness of their most valuable asset.

Conflict among potential licensees was pervasive and intractable. One divide was between non-profit stations, owned by educational, religious, and labor groups, and commercial broadcasters, eager to shoulder them aside in pursuit of advertising revenue generated by the new radio networks. The nonprofits suffered a major setback in 1928 when the FRC promulgated a comprehensive allocation of the airwaves, General Order 40, assigning them undesirable hours at low power on crowded frequencies. After a few years of declining audiences and dwindling finances, many surrendered their licenses to for-profit rivals in exchange for a few hours' airtime, only to see even this pittance discontinued when stations affiliated with networks then demanded the time slots for their own programming. Nonprofit broadcasters clamored for a statutorily decreed share of the airwaves but were decisively defeated in January 1935, when the FCC opted to continue the pro-commercial policies of the FRC.²⁵

²⁴ These requirements would plague the commission until their repeal in 1936. See *Senate Committee Reports Bill to End Zone System*, HEINL RADIO BUS. LETTER (Jan. 3, 1936) (describing the population equalization text of the Davis amendment and noting that it was a thorn in the side of the FRC and the FCC engineering department); MURRAY EDELMAN, *THE LICENSING OF RADIO SERVICES IN THE UNITED STATES, 1927 TO 1947*, 47-50 (1950) (noting the inherent engineering difficulties the FRC faced in complying with the Davis Amendment and its eventual abolition with a more lax standard for granting radio licenses).

²⁵ See ROSEN, *supra* note 21, at 136-37, 161-71. See generally ROBERT W. MCCHESENEY, *TELECOMMUNICATIONS, MASS MEDIA, AND DEMOCRACY: THE BATTLE FOR THE CONTROL*

An additional complication arose from the need for “clear channel” stations. Even the most powerful “groundwave” signals traveling along the Earth’s surface died out after only 100 miles, leaving remote regions, too thinly settled to support their own stations, unserved. Skywave signals, which bounce off a region of the ionosphere, could reach such areas, but only if no other station broadcasted on the same frequency. In 1928 the FRC granted forty clear channel licenses by forcing other stations to leave the frequencies at sunset, even if based half a continent away.²⁶ The result was another offense against the localism of American politics. A Senator from Ohio, for example, professed not to understand why “a wonderful station” in his state had to stop broadcasting when the sun set in California so that a clear-channel station in San Francisco could broadcast unimpeded. “It is indefensible,” he protested, “that a station in the Eastern part of the country cannot use the time of a station on a Pacific coast.”²⁷ It was particularly so, he might have added, when the policy prevented him from broadcasting to his constituents over the Ohio station.²⁸

“Probably no quasi-judicial body was ever subject to so much congressional pressure as the Federal Radio Commission,” concluded a study in 1932.²⁹ When the FRC required more than the year specified in the Radio Act of 1927 to complete its work, at first Congress extended and appropriated for it only on a temporary basis. The proponents of a permanent commission finally prevailed in December 1929. Even so, commissioners were exceedingly attentive to legislators’ wishes. “Who can . . . disregard the judgment of a United States Senator?” one chairman pleaded at a congressional hearing.³⁰ A Senator’s judgment was even harder to overlook when expressed in person. James Couzens, a liberal Senator from Michigan, was surprised to learn that James

OF U.S. BROADCASTING, 1928-1935 12-37, 210-25 (1993) (describing the struggle of non-profit and educational broadcasting to maintain its existence in the early years of federally regulated broadcasting, and its ultimate failure with the advent of for-profit commercial broadcasting); SUSAN SMULYAN, SELLING RADIO: THE COMMERCIALIZATION OF AMERICAN BROADCASTING, 1920-1934, 130-33, 142-53 (1994) (discussing the failed attempts of nonprofit broadcasters to gain a greater share of radio airwave licensing leading up to the enactment of the 1934 Communications Act).

²⁶ See *Report of the Standing Committee on Radio Law*, 54 A.B.A. REP. 420-22 (1929) (speaking generally about the application of high-band radio frequencies and international broadcasting); *Report of the Standing Committee on Communications*, 53 A.B.A. REP. 373 (1930) (explaining the tradeoff between rural and urban broadcast coverage caused by “duplicated use by regional or local stations”).

²⁷ *Nomination of Thad H. Brown*, *supra* note 22, at 22.

²⁸ *Id.* at 21-22.

²⁹ LAURENCE F. SCHMECKEBIER, THE FEDERAL RADIO COMMISSION: ITS HISTORY, ACTIVITIES AND ORGANIZATION 55 (1932).

³⁰ *Id.*

Watson of Indiana and another Senator personally argued the case for an applicant at a renewal proceeding. Did not the two believe their presence would have “more influence than [that of] an ordinary citizen?” Couzens inquired at a congressional hearing.³¹ “If it would not,” Watson replied, “I have lived in vain.”³²

Radio remained a political football after 1934, when the jurisdiction of the FRC over radio was combined with that of the Interstate Commerce Commission (ICC) over telephony and telegraphy and entrusted to a new, seven-member Federal Communications Commission.³³ The best-connected politicians acquired their influence wholesale, as it were, by placing their own man on the commission or its staff. President Franklin D. Roosevelt needed these “princes and potentates of the party” to get his legislation through Congress and made his appointments to the new commission accordingly.³⁴ The first chairman was Eugene Sykes, a distinguished Mississippi judge (and state Democratic committeeman) who did not even own a radio when he was named to the original FRC. He did have the backing of Senator Pat Harrison, and Harrison had a chit to call in with then-President Calvin Coolidge. Harrison also had a chit with FDR in 1934 and arranged for Sykes to serve as chair until a lame duck congressman from New York could complete his term and replace him. The lame duck, Anning Prall, enjoyed FDR’s blessing not because of his knowledge of the FCC’s affairs, but because his “closest friend” was Senator Robert F. Wagner, a vital ally of the president.³⁵ Norman Case combined prior political experience and patrician ways, thanks to an ancestry dating back to the Mayflower. He had charmed FDR when the two served on the Executive Committee of the Governors Conference of the United States.³⁶ George Henry Payne, a former newspaperman and the FCC’s loudest and loosest cannon, managed to assemble an imposing sheaf of senatorial endorsements, including one from Wagner, in his successful quest for an appointment.³⁷

³¹ *Nomination of Thad H. Brown*, supra note 22, at 32.

³² *Id.*

³³ 81 CONG. REC. 9604 (1937) (Burton Wheeler); 81 CONG. REC. 2336 (1937) (Wallace White).

³⁴ Franklin D. Roosevelt, quoted in ARTHUR M. SCHLESINGER, JR., *THE POLITICS OF UPHEAVAL* 409 (1960).

³⁵ *President Roosevelt Reappoints Commission Chairman Prall for Seven Years; Confirmation Soon*, TELECOMM. REP., May 23, 1935, at 2A.

³⁶ See Brief Sketch of Norman Stanley Case, in RECORDS OF THE FEDERAL COMMUNICATIONS COMMISSION, record group 173, entry 100A, box 10 (on file with the National Archives, College Park, MD) (providing a curriculum vitae of Norman Case) [hereinafter referred to as FCC RECORDS]; *The Reminiscences of Telford Taylor* 375 (1955-1956) (on file with the Columbia Center for Oral History Archives, Butler Library, Columbia University, New York, NY).

³⁷ *G.H. Payne is Dead; FCC Ex-Official*, 68, N.Y. TIMES, Mar. 4, 1945, at 37 (providing an obituary of George Henry Payne, noting that his “tenure on the FCC was ended in mystery”); Confidential Memo re: George Henry Payne (n.d.), in PRESIDENT’S OFFICIAL FILE, number 2001

Hampson Gary was endorsed by the Texas congressional delegation and such other senatorial heavyweights as Arkansas's Joe Robinson, but he received only the one-year appointment when the staggered terms of the new FCC were handed out. As compensation, he was appointed general counsel after his term expired.³⁸ Thad Brown, another carryover from the FRC, had originally been its general counsel, named by Herbert Hoover as a reward for managing his presidential campaign in Ohio in 1932. He became a commissioner in 1933 and served until 1940.³⁹ Even the post of secretary, capable of expediting or delaying proceedings, was a valuable plum. When Iowa's congressional delegation named it as the price of their support for FDR's "Court-packing" plan, the president agreed, even though it was already promised to somebody else.⁴⁰

Rumors of intervention in specific cases by high administration officials circulated widely, but few smoking guns turned up. "There is a great delicacy which cannot be escaped when the White House takes up a radio problem with the Communications Commission," FDR's press secretary explained to a political scientist. "The story is too long and too delicate to write."⁴¹ One tale he might have told began soon after the 1936 general election, when the defeated governor of Michigan, Frank Murphy, asked the White House to find out why the FCC was investigating a proposed sale of a California license to a Detroit businessman who had been a "staunch and

(on file with the Franklin D. Roosevelt Library, Hyde Park, NY) [hereinafter referred to as OF]; *The Reminiscences of Telford Taylor*, *supra* note 36, at 378 (calling "an erratic, lazy, undependable, amusing cuss"); Drew Pearson & Robert S. Allen, *Washington Daily Merry-Go-Round* (Dec. 24, 1938), <https://auislandora.wrlc.org/islandora/object/pearson%3A42304#page/1/mode/1up> [<https://perma.cc/QT3D-PVPG>].

³⁸ *FCC Dismisses Gary as General Counsel: Dempsey is Designated as Successor*, N.Y. TIMES, Oct. 13, 1938, at 17 (noting that Gary was General Counsel at the FCC until he was ousted due to inefficient management); Joe T. Robinson to Franklin D. Roosevelt (Jun. 23, 1937), in CORCORAN PAPERS, *supra* note 8, box 210 (recommending Gary for commissioner to the President); *Spearman Resigns as FCC General Counsel*, TELECOM. REP., Jun. 27, 1935, at 5 (providing Gary received the General Counsel position as compensation for only getting a one-year appointment at the FCC).

³⁹ Brief Sketch of Colonel Thad H. Brown, in FCC RECORDS, *supra* note 36, entry 100A, box 10 (noting Brown's appointment as General Counsel of the FRC).

⁴⁰ *Federal Communications Commission*, 17 FORTUNE 61 (May 1938); SAN FRANCISCO CHRONICLE, Apr. 29, 1937, in CORCORAN PAPERS, *supra* note 8, box 250 (noting that Brown's appointment was the price of the Iowa delegation's support for FDR's court packing plan); *The Reminiscences of Telford Taylor*, *supra* note 36, at 382 (explaining that the secretary of the commission was sometimes a policy-making official on political matters, but not generally); Rodney Dutcher, *The New Deal in Washington*, St. Louis Star & Times, Aug. 6, 1934, at 3.

⁴¹ Letter from Stephen Early to Louis Brownlow (May 19, 1937), in OF, *supra* note 37, number 1059, box 1.

generous friend of the President's and of myself during the recent campaign."⁴² Chairman Sykes explained that the price was remarkably high for a low-power station that served a small part of Beverly Hills and had to shut down every evening to make way for a clear channel licensee. Sykes did not spell out the obvious, that he suspected the "staunch and generous friend" intended to renew the license on more favorable terms and reap a substantial profit.⁴³ Still, after the exchange with the White House, Sykes and two other commissioners approved the sale. Several years later the commission granted the buyer's request to broadcast to most of the Los Angeles basin day and night.⁴⁴

II. THE NETWORKS

A second force besieging the FCC was the broadcast networks. The National Broadcasting Company was the first to be organized, in 1926, by RCA, General Electric, and Westinghouse, whose patent pool permitted them to control much of the radio industry. It maintained two national networks, the Red, which carried popular programming, and the Blue, which offered more sophisticated fare. Under RCA's David Sarnoff, NBC grew rapidly and offered listeners an increasingly diverse schedule of music, drama, comedy, and variety programs. By the end of 1927, NBC owned or had as affiliates some forty-eight stations, including many of the most profitable in the country. As its affiliates grew, so did its revenues. In 1927 an hour on the Red network between 7 and 11 P.M. cost \$3,770; in 1931, \$10,000. In the first half of 1932, NBC received just under \$1 million in advertising from a single customer, the American Tobacco Company.⁴⁵

The Columbia Broadcasting System had a shakier start but found its footing in 1928, when William Paley, the son of an investor, became its president.⁴⁶ Like NBC, CBS acquired stations of its own, including the flagship

⁴² *In re Beverly Hills Broadcasting*, 4 F.C.C. 250-53 (1937) (approving the transfer of Beverly Hills Broadcasting Corporation to George A. Richards); Letter from Frank Murphy to Steve Early (Nov. 17, 1936) (asking that the application of George A. Richards be expedited).

⁴³ Letter from Eugene Sykes to Stephen Early (Nov. 21, 1936) (discussing the reasons for the delay in a broadcast licensing grant due to a disproportionately low buying price).

⁴⁴ Radio Station License, KMPC (Feb. 3, 1940), in FCC RECORDS, *supra* note 36, entry WW-98, box 18 (displaying approved status). FDR also sent emissaries to urge the FCC not to award licenses to supporters of his opponents during the 1936 campaign. See, e.g., RICHARD W. STEELE, PROPAGANDA IN AN OPEN SOCIETY: THE ROOSEVELT ADMINISTRATION AND THE MEDIA, 1933-1941, at 177 n. 34 (1985) (providing examples of where FDR influenced radio licensing).

⁴⁵ ROSEN, *supra* note 21, at 89-91, 116, 118, 158-59.

⁴⁶ Michael J. Socolow, *To Network a Nation: N.B.C., C.B.S. and the Development of National Network Radio in the United States, 1925-1950*, at 82 (2001) (unpublished Ph.D. dissertation, Georgetown University) (on file with the Georgetown University Library).

WABC in New York, but its greatest innovation was a standard contract that barred affiliates from carrying the programs of other networks, guaranteed CBS's advertisers access to listeners in the peak evening hours, and gave the network an option on other time with only four weeks' notice.⁴⁷ Through ownership and affiliation CBS grew rapidly until it had 107 owned or affiliated stations in 1937 to the 104 of NBC, which had adopted a contract much like CBS's.⁴⁸ The two companies' share of radio stations increased from just over 6 percent in 1927 to 41 percent in 1940.⁴⁹ CBS and NBC owned or were affiliated with all but 3 of the 40 clear channel stations in 1931.⁵⁰ They accounted for 58 of the 62 5,000-watt stations in 1935.⁵¹ By then a third network, the Mutual Broadcasting System, had joined them. Owned by two stations (one of them WGN), it eschewed exclusive contracts in favor of the syndication of "The Lone Ranger" and other programs.⁵²

As the networks grew, so did the financial stakes for commercial broadcasting. By 1934, advertising for the entire industry totaled \$72 million.⁵³ Gross revenue exceeded \$86 million in 1935 and was estimated at \$108 million in 1936.⁵⁴ Network stations and affiliates grabbed far more than their share.⁵⁵ In 1938, the 310 unaffiliated stations had an aggregate loss of \$150,000; the 327 affiliated with NBC, CBS, or Mutual had profits of \$9.7 million.⁵⁶

The FRC and FCC abetted the concentration of network power by favoring affiliates when stations competed for the same license or frequency. Now and then a commissioner would make his bias explicit: "What has education contributed to radio?" Harold Lafount demanded in 1931, "[n]ot one thing. What has commercialism contributed? Everything—the lifeblood of the industry."⁵⁷ More common was the tight-lipped approach of Eugene Sykes,

⁴⁷ *Id.* at 82, 85-86 (providing that in addition to acquiring stations, CBS created a groundbreaking standard contract); ROSEN, *supra* note 21 at 148-49 (discussing the standard contract's bar on affiliates); Socolow, *supra* note 46 at 154 (explaining the standard contract's option on other time).

⁴⁸ 81 CONG. REC. 2336 (1937) (Wallace White).

⁴⁹ Robert W. McChesney, *Free Speech and Democracy! Louis G. Caldwell, the American Bar Association and the Debate over the Free Speech Implications of Broadcast Regulation, 1928-1938*, 35 AM. J. LEGAL HIST. 351, 358 (1991) ("[F]rom just over 6 percent"); Socolow, *supra* note 46, at 107 ("41 percent in 1940").

⁵⁰ McChesney, *Free Speech*, *supra* note 49 at 358.

⁵¹ *Id.* at 359.

⁵² Socolow, *supra* note 46, at 101-03; MICHAEL STAMM, *SOUND BUSINESS: NEWSPAPERS, RADIO, AND THE POLITICS OF NEW MEDIA* 71-74 (2011).

⁵³ McChesney, *Free Speech*, *supra* note 49 at 359.

⁵⁴ 81 CONG. REC. 2333 (1937) (Wallace White).

⁵⁵ McChesney, *Free Speech*, *supra* note 49 at 359.

⁵⁶ Socolow, *supra* note 46, 107.

⁵⁷ McChesney, *Free Speech*, *supra* note 49, at 356-57.

who presided over the FRC's first hearings, oversaw the agency's trial examiners, and chaired the FCC's Broadcast Division, a panel of three commissioners: 1) Sykes, 2) a second commissioner serving full-time, and 3) the chairman serving part-time.⁵⁸ From 1934 to 1937 all three commissioners decided applications, subject only to an appeal to the full commission.⁵⁹ "The calm of the deep South pervades his manner, his overheated office, his ideas about radio," *Fortune* reported of Sykes.⁶⁰ "Slight and solemn," with "a voice so soft it almost purrs," Sykes declared broadcasting "one of the cleanest industries in the United States, suh."⁶¹ He made no broad statements of principle in his opinions for the commission but applied the "public convenience, interest, or necessity" standard in an ad hoc and rather opaque way to the case before him.⁶² The only discernible pattern, critics charged, was a tendency to make financial status the decisive factor when choosing among competitors for a frequency. Typically, this favored network affiliates because bankers considered a network contract a valuable asset and were quicker to loan to affiliates than independents.⁶³

Radio lawyers appreciated Sykes's reserved, judicial manner when presiding at hearings, and when he retired from the commission in April 1939, many praised his even-handedness and integrity.⁶⁴ Still, rumors circulated that Sykes was under the influence of CBS vice president Harry Butcher. These rumors gained credibility after what became known as the "Willard Hotel Incident." In 1935 the FCC, acting without a public hearing, awarded a company in Schenectady, New York, a new, high-power license. A Binghamton station then applied for the same license and demanded a

⁵⁸ Louis G. Caldwell, *Regulation of Broadcasting by the Federal Government*, VARIETY RADIO DIRECTORY 1 (1937) at 273; *Couzens Bill May Lay Bare FCC Quarrels*, (Hammond, IN) TIMES (May 4, 1936); Interview of Rosel H. Hyde by Jack Clifton Fortenberry (Aug. 16, 1990) at 74-75, 99 (on file with the Learning Resources Center, Mississippi College, Clinton, MS).

⁵⁹ As the chairman who ended the divisional structure of the FCC in 1937 complained, the two full-time members of the Broadcast Division effectively determined "all of the applications for broadcast stations in the United States, and the other commissioners [had] no say at all about it" in the first instance. *Hearing Considering the Independent Offices Appropriations Bill for 1940: Hearings before the Comm. on Appropriations, House of Representatives*, 76th Cong. 1507 (1939).

⁶⁰ *Federal Communications Commission*, *supra* note 40, at 61.

⁶¹ *Id.*

⁶² The Communications Act of 1934, Section 303, 73rd Cong., June 19, 1934, at 1082, *Statutes at Large* (containing the "public convenience, interest, or necessity" standard); Interview of Rosel H. Hyde, *supra* note 58; 83 CONG. REC. 7567 (1938) (discussing Sykes in his position as commissioner).

⁶³ Socolow, *supra* note 46 at 107.

⁶⁴ Interview of Rosel H. Hyde, *supra* note 58, at 2 (noting that Sykes was respected "because of his judicial demeanor").

hearing.⁶⁵ Cecil Mastin, the manager of the Binghamton station, called upon CBS's Butcher for help, but the network executive begged off. "Columbia has enough worries of its own with seven stations and its network operations," he told Mastin. "If we got involved in the great number of cases concerning the ninety or more Columbia affiliates, we would be like the two wrestlers who got all entangled and one of them in desperation bit what he thought was his opponent's toe, only to find that it was his own." Such scruples did not prevent Butcher from kibitzing with Mastin, however. Mastin explained that he was chairman of either the state or county Republican committee—Butcher couldn't remember which—and that the manager of the Schenectady station was a protégé of Senator Robert F. Wagner and "had the Administration's blessing." Butcher told Mastin that, "if such was the case, he had two or three strikes on him." Still, Mastin persisted and requested a hearing before an examiner in Washington. On the appointed day, September 5, 1935, the hearing went badly for Mastin and his team of experts, a leading radio engineer, two well-regarded radio lawyers, and the manager of another station. "They were all sore," Butcher reported, "because they felt they had been given a dirty deal by the Examiner."⁶⁶

Disheartened and bitter, the team retired to Mastin's room at the Willard Hotel and started drinking heavily. Unknown to them, in an adjoining room were a visiting friend of Chairman Anning Prall and Prall's son, Mortimer, who was to escort the friend to dinner with his father. When the friend went to the closet to retrieve his coat, he heard "loud, boisterous conversation in the adjoining room," including the words "Communications Commission." He called to Mortimer, and the two, crouching in the closet, heard someone say, "Well, Columbia has Harry Butcher down here and they must have him here for some good reason. He knows his way around. He controls Judge Sykes. He can buy the whole damn Commission for \$25,000." Another speaker declared that he was ready to pay twice that sum to retain his frequency. Later, after dinner with his father, Mortimer returned to his listening post and heard

⁶⁵ *Sykes Demands Probe of Bribery Rumors by FCC Group*, HEINL RADIO BUSINESS LETTER, Jan. 14, 1936, at 2–3 (explaining that bribery was suspected as the reason for FCC's awarding of the license to the Schenectady company without a hearing); *FCC Inquiry on "Fixing" Charge Ordered; Investigation by Congress Is Threatened*, BROADCASTING, Jan. 15, 1936, at 51–52 ("The whole controversy grew out of the application of the Knox Broadcasting Co, for a new regional station in Schenectady, N.Y., and the competitive application of WNBK, Binghamton, N.Y., for the same facilities.").

⁶⁶ All verbatim quotes (except Butcher's) are second- or third-party hearsay, recorded in Statement of Mr. Harry C. Butcher Made to Special Agents Louis Loebel and J. B. Shirley of the Federal Bureau of Investigation, Department of Justice, on Jan. 14, 1936, *in OF, supra* note 37, number 1059, box 1. They are generally corroborated by later testimony before the commission. 80 CONG. REC. 2267 (1936).

someone declare that a certain commissioner, identified only as a “long-eared, long-nosed, tight-lipped son of a bitch,” would tell the examiner how to write his report. All familiar with the physiognomy of the FCC commissioners assumed that the speaker could only have been referring to Judge Sykes.⁶⁷



Eugene Octave Sykes (1934)⁶⁸

Mortimer and the friend reported what they had heard to Chairman Prall at dinner that evening. Prall later told Butcher that he did not immediately go to Sykes, because he was convinced that “there was not a word of truth” in

⁶⁷ Statement of Mr. Harry C. Butcher, *supra* note 66; 80 CONG. REC. 2267 (1936).

⁶⁸ This photo was retrieved from New York World-Telegram and the Sun Newspaper Photograph Collection, Prints and Photographs Division, Library of Congress.

the overheard conversations.⁶⁹ Perhaps he believed that, but, if so, why Prall asked the FBI to come to his apartment and begin an investigation that very evening is not at all apparent. Just as obscure was Prall's decision to call off the investigation a few days later.⁷⁰ (Perhaps his colleagues' irritation at "the idea that G-men might be trailing them or that secret dictaphones might be concealed in their offices" was a factor.)⁷¹ December 18 brought another reversal when the commissioners voted to put the FBI back on the case. In January 1937, the G-men reported that they could find nothing to substantiate what had been said during the "drunken brawl" at the Willard.⁷² The commission, on Sykes's motion and after a heated debate, refused to leave matters there and voted to conduct its own investigation.⁷³ This proved just as fruitless, as no one in Mastin's room owned up to the reported words, and Butcher denied ever having "bought or controlled" any commissioners.⁷⁴

Although the Willard Hotel incident ended inconclusively, questions about the networks' influence and conflict among the commissioners persisted. Over the next two years, George Henry Payne, "a somewhat eccentric St. George-in-search-of-a-Dragon," kept the FCC in ill repute with leaks to the press and sensational but unsubstantiated charges that CBS had corrupted one or more of his colleagues.⁷⁵ A contributor to *The Nation*, probably parroting Payne, attributed the odd course of the investigation of the Willard Hotel incident to "squabbles between Sykes and Prall over what looks very much like the spoils."⁷⁶ Rumor had it that the two had cases assigned to their favorite trial examiners whose intermediate reports then reached their preferred outcome, as the FCC's lawyers looked on helplessly.⁷⁷ Charges of capture by the networks thus joined rumors of partisan decision-making to give the FCC a reputation as "the most inefficient and ineffectual institution in Washington."⁷⁸

⁶⁹ Statement of Mr. Harry C. Butcher, *supra* note 66.

⁷⁰ *Id.*

⁷¹ *Sykes Demands Probe of Bribery Rumors by FCC Group*, HEINL RADIO BUSINESS LETTER, Jan. 14, 1936, at 2-3.

⁷² Statement of Mr. Harry C. Butcher, *supra* note 66.

⁷³ *Bribe Rumors Cause Inquiry by Radio Unit*, WASH. POST, Jan. 12, 1936, at 11.

⁷⁴ 80 CONG. REC. 2267 (1936).

⁷⁵ Francis X. Welch, *In the Nation's Capital*, TELEPHONY, Oct. 30, 1937, at 16.

⁷⁶ Paul W. Ward, *Scandal in the Air*, THE NATION, Apr. 24, 1937, at 455.

⁷⁷ *Memorandum on Proposed Reorganization of Federal Communications Commission* (S. 1268) (n.d.), in WALLACE H. WHITE PAPERS, box 64 (on file with the Manuscript Division, Library of Congress, Washington, DC).

⁷⁸ Drew Pearson & Robert S. Allen, *Washington Daily Merry-Go-Round* (Dec. 24, 1938), <https://aislandora.wrlc.org/islandora/object/pearson%3A42304#page/1/mode/1up> [<https://perma.cc/QT3D-PVPG>].

III. THE RADIO BAR

A third force that bedeviled the FCC usually escaped public notice but was a no less persistent challenge to its authority. The radio bar, one FCC general counsel recalled, was “a tightly-knit little empire, with quite a hierarchy.”⁷⁹ At its peak stood Louis Goldsborough Caldwell. Born in the comfortable Chicago suburb of Oak Park in 1891, Caldwell graduated Phi Beta Kappa from Amherst College and with honors from Northwestern University Law School in 1916.⁸⁰ As a young man he succumbed to the fervid progressivism of prewar Chicago: his first political activity was putting up posters for Theodore Roosevelt’s Bull Moose campaign in 1912, and his master’s thesis drew upon economic writing and “the ultimate source of all legal policy, the public,” to develop a test for distinguishing between fair and unfair methods of business competition.⁸¹ So impressed was Northwestern’s dean John Henry Wigmore that he hired the learned and witty, young lawyer as a lecturer for the 1916-17 academic year and planned to appoint him permanently to the faculty.⁸² Jousting with law students paled before the prospect of battlefield heroics, however. After the first semester, Caldwell left for Europe. He served first in the American Field Service Ambulance Corps and then in the French Foreign Legion, earning the Croix de Guerre for his heroism.⁸³

When Caldwell returned to Chicago, he chose a position in the law firm now known as Kirkland & Ellis over Wigmore’s offer of a professorship.⁸⁴ Colonel Robert R. McCormick, publisher of the *Chicago Tribune*, was one of the firm’s most important clients, and when the Colonel added the radio station WGN to his holdings, Caldwell immersed himself in the principles of radio engineering.⁸⁵ He took leave in June 1928 to serve as the first General Counsel of the Federal Radio Commission with the understanding that he would resign after organizing its Law Department and implementing General Order 40, the comprehensive plan to make airwaves safe for high-power, commercial broadcasters. (Not coincidentally, WGN received a 50,000-watt, clear-channel license

⁷⁹ *The Reminiscences of Telford Taylor*, *supra* note 36, at 408.

⁸⁰ WHO’S WHO IN THE NATION’S CAPITAL, 1938–39, at 135 (1938).

⁸¹ *Public Forum of the Federal Bar Association on Administrative Law and Procedure*, 15 J. B. ASS’N D.C. 294 (1945); Louis G. Caldwell, *Unfair Methods of Competition* 7 (1916) (unpublished M.A. thesis, Northwestern University) (on file with the author).

⁸² Letter from John Henry Wigmore to Louis G. Caldwell (Aug. 2, 1916), in JOHN HENRY WIGMORE PAPERS, ser. 17/20, box 156 [hereinafter referred to as WIGMORE PAPERS].

⁸³ WHO’S WHO IN THE NATION’S CAPITAL, *supra* note 80, at 135 (1938).

⁸⁴ Letter from John H. Wigmore to Louis G. Caldwell (Mar. 19, 1919), in WIGMORE PAPERS, *supra* note 82, ser. 17/20, box 41; 3 WHO WAS WHO IN AMERICA, 1951-60, at 131 (1960).

⁸⁵ *Robert Rutherford McCormick*, DICTIONARY OF AMERICAN BIOGRAPHY (1977), <http://link.galegroup.com/apps/doc/BT2310007955/BIC?u=wash43584&sid=BIC&xid=f15d8c03>.

during his tenure.)⁸⁶ After seven months he left to open a Washington office for Kirkland & Ellis and was said to have brought \$50,000 in retainers to the firm.⁸⁷

Caldwell's reputation grew as he delivered a series of masterful summaries of radio engineering, radio legislation, the FRC's policies and procedures in law reviews, congressional testimony, and reports for the ABA's Standing Committee on Communications, which he chaired from 1928 to 1932.⁸⁸ At the 1932 convention he suggested that the ABA's president appoint a Special Committee on Administrative Law to regularize rules of practice and procedure across administrative agencies. To Caldwell's surprise and dismay, the president agreed, appointed him chair, and asked for a report by the next meeting, which, as it happened, convened just after the First Hundred Days of the Roosevelt Administration, with its creation of federal agencies with vast power over American agriculture and industry.⁸⁹ The task Caldwell thought mattered only to administrative lawyers suddenly thrust him into a political maelstrom. He served with increasing discomfort until 1936, when he resigned to organize the Federal Communications Bar Association and become its first president.⁹⁰ He was the *bete noire* of non-profit broadcasters, but even New Dealers respected his ability and integrity and valued his help when Mutual joined with the FCC in battling CBS and NBC later in the decade.⁹¹

As Caldwell's career demonstrated, the ceaseless rounds of applications, frequent hearings, and occasional appeals to the courts made radio law a lucrative practice, centered in Washington, DC. Of the 101 lawyers who appeared

⁸⁶ McChesney, *Free Speech*, supra note 49, at 24–25; STAMM, supra note 52, at 55.

⁸⁷ 3 WHO WAS WHO IN AMERICA, 1951-60, at 131 (1960); Letter from Armstrong Perry to Chester C. Bolton (Aug. 7, 1931), in PAYNE FUND, INC., RECORDS, box 68 (on file with the Western Reserve Historical Society, Cleveland, OH).

⁸⁸ McChesney, *Free Speech*, supra note 49, at 365-66 (1991); Louis G. Caldwell, *Practice and Procedure before the Federal Radio Commission*, 1 J. AIR LAW 144 (1930); Louis G. Caldwell, *Principles Governing the Licensing of Broadcasting Stations*, 79 U. PA. L. REV. 113 (1930); Louis G. Caldwell, *The New Rules and Regulations of the Federal Radio Commission*, 2 J. AIR LAW 66 (1932); Louis G. Caldwell, *Regulation of Broadcasting by the Federal Government*, supra note 58, at 269-303; *Commission on Communications: Hearings before the Comm. Interstate Commerce, U.S. Senate*, 71st Cong., 25–170 (1929); *Report of the Standing Committee on Radio Law*, 54 ABA REP. 404-506 (1929).

⁸⁹ Louis G. Caldwell, *Discussion of McCarran-Sumners Administrative Procedure Bill*, 12 J. BAR ASS'N D.C. 62–63 (1945); ANTHONY J. BADGER, *FDR: THE FIRST HUNDRED DAYS* 63-76, 83-108 (2008) (passage of the Agricultural Adjustment Act and National Industrial Recovery Act).

⁹⁰ 3 WHO WAS WHO IN AMERICA, 1951-60, at 131 (1960); Letter from Monte Appel to Harold M. Stephens (Dec. 21, 1936), in HAROLD M. STEPHENS PAPERS, box 402 (on file with the Manuscript Division, Library of Congress, Washington, D.C.) [hereinafter referred to as STEPHENS PAPERS]; BULL. FED. COMM. BAR ASS'N, Oct. 17, 1936, at 3.

⁹¹ McChesney, *Free Speech*, supra note 49 at 374-77 (1991); Interview of Rosel H. Hyde, supra note 58; Interview of Joseph M. Kittner by author (May 17, 2006) (on file with the author).

before the FRC in the early 1930s, 75 had offices in the nation's capital.⁹² The need for proximity to the Commission lay in the peculiar nature of radio law. With other agencies, lawyers could rely on the “law in the books”—statutes, regulations, and published opinions—to advise clients with tolerable accuracy. At FCC, however, a few statutory provisions and detailed regulations on engineering practices addressed some issues, but the ultimate standard for awarding licenses was, as a general counsel conceded, “a very elastic proposition.”⁹³ The Commission might have revealed its understanding of what “the public interest, convenience or necessity” required by writing opinions with clear and broad statements of policy. It rarely did. Instead, the commissioners juggled a large and shifting number of factors until it found a combination that justified their preferred result.⁹⁴ The technical and financial capacity of applicants; their residence, citizenship, and moral character; the need for local service in a community; interference with existing stations; the content and variety of the programming on the station; a licensee's broadcast of deceptive or excessive advertising; and the extent to which the station followed its announced schedule all might factor in a decision—or they might not. Because the commissioners never established even “an approximate measuring rod,” the public interest, necessity or convenience meant whatever “a majority of the Commission wants it to mean,” Caldwell complained.⁹⁵

In one case, after reciting all the arid details, the Commission pronounces the conclusion of the syllogism: “Now, therefore, the granting of the application will serve public interest, convenience or necessity.” In another case, decided the same week, an equivalent or even more arid lot of details are recited, with a contrary conclusion.⁹⁶

⁹² List of Attorneys Who Have Practiced before the Federal Radio Commission during the Past Two Years (n.d.), in FCC RECORDS, *supra* note 36, entry 100A, box 9; Joy Elmer Morgan, *The New American Plan for Radio*, in A DEBATE HANDBOOK ON RADIO CONTROL AND OPERATION 103, 104 (Bower Aly & Gerald D. Shively eds., 1933); *Lawyer Plays Important Part in Radio Broadcasting*, 16 A.B.A. J. 347 (1930); BULL. FED. COMM. B. ASS'N, Dec. 7, 1936, at 4, 7; *Treasury and Membership*, 4 FED. COMM. B.J. 57 (1939).

⁹³ *Nomination of Thad H. Brown*, *supra* note 22, at 6434.

⁹⁴ James L. Harbaugh, *Radio Broadcasting Station License 95* (1939) (unpublished S.J.D. thesis, Georgetown University) (on file with the Georgetown University Law Library); 81 CONG. REC. 2337 (1937) (Wallace White).

⁹⁵ Louis G. Caldwell, *Federal Communications Commission—Comments on the Report of the Staff of the Attorney General's Committee on Administrative Law*, 8 GEO. WASH. L. REV. 749, 768 (1940).

⁹⁶ Louis G. Caldwell, *Comments on the Procedure of Federal Administrative Tribunals*, 7 GEO. WASH. L. REV. 740, 764 (1939).

Careful students, looking back on the decisions from a considerable distance, claimed to detect some patterns but also much that “savored of the arbitrary” and the “capricious.”⁹⁷

Lawyers at some remove from Washington could not hope to master the inchoate tendencies and unarticulated calculations that moved the commissioners, even with the help of newsletters and trade journals that regularly reported on doings at the FCC. Too much of what lawyers needed to know was too intuitive, unverifiable, or even libelous to appear in print. It could only be acquired through observation or conversation with other radio lawyers over lunch, at bar gatherings, or in the elevators of office buildings. Thus, proximity to the commission or connections with a Washington insider was necessary for a successful radio practice.

The best-informed lawyers had once worked for the commission itself. “Washington has become the happy hunting ground for former members of the FRC legal staff,” complained the editor of a trade journal in 1934.⁹⁸ The biggest game went to the former occupants of one of the FCC’s four statutory positions: general counsel (salaried at \$10,000 during the FRC years and \$9,000 thereafter) and three assistant general counsels (salaried at \$7,500).⁹⁹ Of the nine men who held these posts at the FRC, only one was still a lawyer at the agency in 1936. A second, Thad Brown, had become a commissioner; the other seven were admitted to practice before the FCC. All save one had offices in Washington, and they represented the most powerful companies in the industry. For example, one month in 1933 Duke Patrick was General Counsel; the next he represented CBS as a member of the law firm Hogan & Hartson.¹⁰⁰ “Almost every time

⁹⁷ EDELMAN, *supra* note 24, at 91. In the 1950s, critics of the FCC and other regulatory agencies repeatedly objected to their ad hoc decision-making. The Harvard law professor Louis Jaffe, for example, wrote of the FCC that “[s]tandards are announced only to be ignored, ingeniously explained away, or so occasionally applied that their very application seems a mockery of justice.” Louis Leventhal Jaffe, *The Scandal in TV Licensing*, HARPER’S MAGAZINE 84 (Sept. 1957). See Louis Hector, *Problems of the CAB and the Independent Regulatory Commissions*, 69 YALE L.J. 942 (1960); JOANNA GRISINGER, *THE UNWIELDY AMERICAN STATE: ADMINISTRATIVE POLITICS SINCE THE NEW DEAL* 235–36 (2012). Later reformers hoped to improve the situation by requiring agencies to proceed through rulemaking rather than adjudication. Reuel E. Schiller, *Rulemaking’s Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 ADMIN. L. REV. 1159–61 (2001).

⁹⁸ *Radio’s Legal Racket*, EDUCATION BY RADIO, May 10, 1934, at 19.

⁹⁹ Act of Mar. 4, 1929, 45 Stat. 1559; Communications Act of 1934, 48 Stat. 1064 ‘4f.

¹⁰⁰ WHO’S WHO IN THE NATION’S CAPITAL, *supra* note 80, at 632, 682; Bethuel M. Webster, Jr., *Tentative Plan of Organization and Assignments, Effective May 1, 1929*, Thad H. Brown to Legal Division (Aug. 11, 1930), *The Legal Division and Its Duties*, Press Release (Feb. 15, 1933), all in FCC RECORDS, *supra* note 36, entry 100A, box 9; Mary O’Leson, comp., *A Short History of Radio Regulation* 25 (1941), in FCC RECORDS, *supra* note 36, entry 100A, box 11; *Members of the Association*, BULL. FED. COMM. BAR ASS’N, Dec. 7, 1936, at 4–6.

anybody ceased to occupy a position on or with the Federal Radio Commission he immediately turned up as the representative of the broadcasting companies,” complained Senator Burton K. Wheeler of Montana in 1935. “It is an extremely bad practice, to say the least, for a man to step out of the Federal Radio Commission and then go up before it and appear for private clients.”¹⁰¹

What troubled Wheeler was less the knowledge lawyers took with them than the friends they left behind.¹⁰² “A man who is down there as an attorney gets acquainted with the engineers, gets acquainted with all the help in the office,” the Montanan observed. “He then steps out and represents one particular firm, or one particular broadcasting station, or one particular chain.”¹⁰³ His friends stay in the agency, “and it is only human nature that people he has appointed to office have an interest in him and may, unconsciously perhaps, give him an advantage over other practitioners.”¹⁰⁴

The lawyers left behind might also form a ring. In such cases, a top lawyer at an agency surrounded himself with cronies and ensured that one would replace him when he departed for private practice. In his new role, the left-behind crony did favors for his former boss in exchange for kickbacks. The crony might stay in power for some time or he might groom his own successor and join his former boss in practice. Once established, a ring was exceedingly difficult to root out, because those best positioned to detect it—other lawyers in private practice—were most vulnerable to retaliation if they struck at the ringleader but failed to kill him.

In the 1935 hearings Wheeler observed that, during the early days of the income tax, lawyers who left the Bureau of Internal Revenue got refunds for their clients from the friends and appointees they left behind.¹⁰⁵ In all likelihood, he was referring to The Great Mellon Ring of the 1920s. As soon as he became Solicitor of the Bureau in 1925, Alexander Gregg filled its top legal posts with close associates. Two years later he resigned and established a lucrative tax practice, with clients that included companies owned or controlled by the family of U.S. Treasury Secretary Andrew W. Mellon. Gregg’s assistant Clarence Charest succeeded him as Solicitor. Charest, an FBI investigation found, routinely provided Gregg with special favors and secret information.¹⁰⁶ Although

¹⁰¹ *In the Matter of a Rule to Show Cause Issued to Paul M. Segal and George S. Smith*, 5 FCC Rep. 3, 4-86 n.2 (1937); *Confirmation of Members of the Federal Communications Commission: Hearings Before the Committee on Interstate Commerce, U.S. Senate, 74th Cong.*, 38-39 (1935).

¹⁰² *Id.*

¹⁰³ *Id.* at 123.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 39.

¹⁰⁶ Memorandum from J. Edgar Hoover to Francis J. Wideman, (Feb. 5, 1934) in ROBERT H. JACKSON PAPERS, box 75 (on file with the Manuscript Division, Library of Congress).

thoroughly resented by Washington attorneys, the ring persisted until the change of administrations in 1933, when Charest left to join Gregg's firm.¹⁰⁷

The figure who conjured up The Mellon Ring for Wheeler in the 1935 hearings was Paul D. P. Spearman.¹⁰⁸ "More shrewd than intelligent," in the judgment of a long-serving FCC lawyer, Spearman came to the FRC in 1929 as a friend and political ally of his fellow Mississippian Eugene Sykes.¹⁰⁹ He quickly became Assistant General Counsel and as quickly left to establish a radio practice.¹¹⁰ Through the intercession of Mississippi Senator Hubert Stephens, Spearman returned to the Commission as General Counsel in July 1934.¹¹¹ He promptly repaid the favor by traveling to his home state with Sykes and another FCC lawyer to campaign for Stephens against the demagogue Theodore G. Bilbo in a fiercely contested Democratic primary. Bilbo won and avenged himself by excoriating Sykes during a hearing.¹¹² Sykes and Spearman weathered Bilbo's blows, but Wheeler was alarmed by the revelations and by Spearman's hiring of a former attorney general of Mississippi as his assistant.¹¹³ When Spearman left the agency in 1936 to join ex-Senator Stephens's law firm, he lobbied to have his assistant succeed him as General Counsel, but lost when the Texas congressional delegation successfully backed Hampson Gary.¹¹⁴ The assistant followed Spearman to Stephens's firm a few months later.¹¹⁵ When rumors soon circulated that certain political law firms were demanding tribute from those with business before the Commission, no other group of radio lawyers better answered the description.¹¹⁶

Yet when a scandal broke in the press in early 1937 it involved a different group of former FCC lawyers. On February 10, the FCC reprimanded a young radio lawyer named George S. Smith, an associate of the former Assistant General Counsel Paul M. Segal, for persuading one of the FCC's secretaries to swap an altered set of depositions for one already entered into the Commission's

¹⁰⁷ *Id.*; E. Barrett Prettyman, *The Autobiography of an Obscure Man at Forty*, in E. BARRETT PRETTYMAN PAPERS 241, 243 (on file with the Manuscript Division, Library of Congress).

¹⁰⁸ *Confirmation of Members*, *supra* note 101, at 39.

¹⁰⁹ Interview of Rosel H. Hyde, *supra* note 58; *Confirmation of Members*, *supra* note 101, at 44; Dutcher, *supra* note 40, at 3.

¹¹⁰ *Confirmation of Members*, *supra* note 101, at 36-37.

¹¹¹ *Id.* at 36; *Commission Progresses in Task of Organization*, TELECOM. REP., Oct. 4, 1934, at 15.

¹¹² *Confirmation of Members*, *supra* note 101, at 1-6, 33-36; *Confirmation Inquiry Develops Senators' Opposition to Merger*, TELECOM. REP., Jan. 25, 1935, at 11.

¹¹³ *Confirmation of Members*, *supra* note 101, at 36-37; *Commission Progresses in Task of Organization*, TELECOM. REP., Oct. 4, 1934, at 15.

¹¹⁴ *Spearman Resigns as FCC General Counsel*, TELECOM. REP., Jun. 27, 1935, at 5; *Hampson Gary Named FCC General Counsel*, TELECOM. REP., Jul. 3, 1935, at 4.

¹¹⁵ *Judge Roberson Resigns as FCC Telephone Assistant General Counsel*, TELECOM. REP., Dec. 2, 1935, at 3.

¹¹⁶ Ward, *supra* note 76, at 455.

files.¹¹⁷ The commissioners intended to give the matter no more publicity beyond entering the reprimand in the minutes, but they did not count on one of their colleagues, George Henry Payne, who was away on one of his frequent Florida vacations.¹¹⁸ Payne had a personal interest in the reputation of Smith and Segal, because the two were defending the editor of *Broadcasting* in Payne's libel suit against the trade journal. When he returned, Payne claimed to have more information on the Smith case, demanded the Commission investigate further, and leaked word of Smith's reprimand to the press.¹¹⁹ The widely read columnists Drew Pearson and Robert S. Allen predicted fireworks within the FCC over charges that several lawyers arranged for friendly stenographers to alter documents and filed applications on behalf of dummy companies.¹²⁰ Two days later, the columnists revealed that the FCC had commenced disciplinary proceedings against Segal and Smith,¹²¹ and not long thereafter Payne, acting on his own initiative, ordered the distribution of a press release detailing the charges against them. As Segal and Smith later complained, 1,400 copies of the press release circulated among their clients, radio stations throughout the United States, telegraph companies, telephone companies, members of Congress, press associations, individual newspapers, and lawyers practicing before the FCC.¹²²

Not until October 1937 did the FCC finally commence hearings on the charges, after first disqualifying Payne, over his outraged protest. For the next eight days the other commissioners heard testimony establishing that Segal had directed his female stenographers to sign articles of incorporation that hid the identity of one client and inflated the wealth of another. But rather than disbar the two, the FCC decided in December 1937 that Smith had done nothing wrong and that Segal should be suspended from the roll of attorneys for only two months. Segal's standing, character and integrity were of the highest, the Commission explained, and he had already lost much business, thanks to the cloud under which he had labored since Payne's press release.¹²³

¹¹⁷ *In the Matter of a Rule to Show Cause*, *supra* note 101 at 24-29.

¹¹⁸ *In the Matter of a Rule to Show Cause*, *supra* note 101, at 5; Letter from Anning S. Prall to George S. Smith (Feb. 10, 1937) in RECORDS OF THE SELECT COMMITTEE TO INVESTIGATE THE FEDERAL COMMUNICATIONS COMMISSION (on file with the National Archives) [hereinafter referred to as COX COMMITTEE RECORDS]; Confidential Memo re George Henry Payne, *supra* note 28.

¹¹⁹ *In the Matter of a Rule to Show Cause*, *supra* note 101 at 5-6.

¹²⁰ Drew Pearson & Robert S. Allen, *Washington Daily Merry-Go-Round* (May 17, 1937), <http://hdl.handle.net/1961/2041-17708>.

¹²¹ *Id.*

¹²² *In the Matter of a Rule to Show Cause*, *supra* note 101 at 8.

¹²³ *In the Matter of a Rule to Show Cause*, *supra* note 101 at 19 (1937); *Office Girl Tells How She Aided 4 Radio 'Deals': Stenographer Admits to FCC Signing Dummy Application*, WASH. POST, Oct. 21, 1937, at 2; *Commission Concludes Segal-Smith Disbarment Hearing: Now Turns to Task of Formulating Reorganization*, TELECOM. REP., Oct. 28, 1937, at 2.

The affair was an embarrassment to the radio bar, not least of all because Segal chaired the FCBA's ethics committee.¹²⁴ But it also revealed an embarrassing shortcoming of the Commission itself: its failure to prevent well-connected lawyers from selecting, shaping, or even falsifying the factual record in proceedings before them. FCBA leaders confessed to Payne that "certain men are ruining the profession."¹²⁵ They adopted a canon of ethics for the radio bar, but they could not by their own efforts guarantee the integrity of the Commission's procedures for gathering evidence and finding facts.¹²⁶

IV. THE TRIALS OF A REFORM CHAIRMAN

The FCC might have stayed mired in patronage politics, networks lobbying, and unethical lawyering indefinitely. Congress was unlikely to drain a swamp in which some of its powerful members wallowed happily. The President also benefited from discretely making his wishes known. Further, during his first term Roosevelt had no great policy requiring a meritocratically staffed, efficient, and wieldy FCC. As long as the networks carried his fireside chats, an old-line agency sufficed.

During his second term, however, reforming the FCC struck Roosevelt as good politics. Initially, it allowed him to forestall a potential embarrassing investigation headed by a rival Democrat leading the fight in the Senate to defeat his plan to "pack" the U.S. Supreme Court. It then helped him counter charges that he wanted to use the federal bureaucracy for partisan ends, which were prompted by his executive reorganization bill, his intervention into the Democratic primaries of 1938, and the misuse of federal relief funds in elections that year.¹²⁷ For assistance, he turned to a network of lawyers, economists, and other professionals within his administration. First among these "White House janissaries,"¹²⁸ "palace politicians,"¹²⁹ and "downtown brain-trusters"¹³⁰ was Thomas G. Corcoran, a protégé of the Harvard law professor Felix Frankfurter who since 1935 had been serving informally as FDR's

¹²⁴ *Officers and Committees of the Association*, BULL. FED. COMM. BAR ASS'N, Oct. 17, 1936, at 5.

¹²⁵ *FCC Receives Code of Ethics from Bar Association and Proposal to End Two-Year Rule*, TELECOM. REP., May 6, 1937, at 10.

¹²⁶ *Canons of Ethics of the Federal Communications Bar Association*, 1 FED. COMM. B.J. 5-13 (1937).

¹²⁷ SMITH, *supra* note 9, at 144-148 (2014); KENNETH S. DAVIS, *FDR: INTO THE STORM, 1937-1940*, at 220-23 (1993); SUSAN DUNN, *ROOSEVELT'S PURGE: HOW FDR FOUGHT TO CHANGE THE DEMOCRATIC PARTY* (2010).

¹²⁸ Hugh S. Johnson, *Perhaps Its Spite That Inspires Purge*, PITTSBURGH PRESS, Aug. 25, 1938, at 2.

¹²⁹ Frank R. Kent, *The Great Game of Politics*, HARTFORD COURANT, Dec. 29, 1938, at 2.

¹³⁰ KIPLINGER WASHINGTON LETTER, Aug. 5, 1939 (on file with the New York Public Library).

assistant.¹³¹ Corcoran boasted that his was “a unified command” that “watched the affairs of all the administrative agencies.”¹³² He and his close associate Benjamin V. Cohen served as the New Deal’s principal legislative draftsmen and consultants to agency lawyers across the administration.¹³³

President Roosevelt announced his “Court-packing” plan on February 5, 1937. Within days, Burton Wheeler, who resented Roosevelt for supplanting him as the leading progressive in the Democratic Party, emerged as the leader of the opposition in the Senate.¹³⁴ Wheeler’s most sensational thrust came on March 22, when he read to the Senate Judiciary Committee a letter from Chief Justice Charles Evans Hughes demolishing FDR’s argument that the superannuated justices were behind in their work.¹³⁵ Another sally against the president was Wheeler’s threat, as Chairman of the Senate Interstate Commerce Committee, to investigate the FCC. On February 12, he announced he was drafting a bill to reverse the “very distinct tendency toward monopoly” in the radio industry.¹³⁶ The Senate’s acknowledged expert on radio matters, Wallace H. White, soon joined in. On March 17, the Maine Republican delivered a major address calling for an investigation of the FCC’s role in the trafficking of radio frequencies and the networks’ monopolization of the industry. “The light of publicity” would not fall solely upon the Commission, White warned. “Every Senator knows that the air is full of reports that cases have been decided not alone on the evidence presented and the merits of the issue, but that political pressure has often been exerted, and that it has been determinative in many instances.”¹³⁷

¹³¹ JOSEPH ALSOP & ROBERT KINTNER, *MEN AROUND THE PRESIDENT* (1939); DAVID PLOTKE, *BUILDING A DEMOCRATIC ORDER: RESHAPING AMERICAN LIBERALISM IN THE 1930S AND 1940S* (1996); SIDNEY M. MILKIS, *THE PRESIDENT AND THE PARTIES: THE TRANSFORMATION OF THE AMERICAN PARTY SYSTEM SINCE THE NEW DEAL* 98–124 (1993); BARRY D. KARL, *THE UNEASY STATE: THE UNITED STATES FROM 1915 TO 1945*, at 160–62.

¹³² *Reminiscences of Thomas Gardiner Corcoran* (Jul. 31, 1967), in JAMES LAWRENCE FLY PROJECT 7 (on file with the Columbia Center for Oral History Archives, Butler Library, Columbia University) [hereinafter cited as FLY PROJECT].

¹³³ On the Corcoran-Frankfurter network, see Lash, *supra* note 9, at 109 (“Corcoran...was in touch with Lowenthal...to help him deepen Frankfurter’s beachhead in the New Deal”); Monica Lynne Niznik, *Thomas G. Corcoran: The Public Service of Franklin Roosevelt’s “Tommy the Cork”* 147-50 (1981) (unpublished Ph.D. dissertation, Notre Dame University) (on file with the author); Lasser, *supra* note 9.

¹³⁴ JAMES T. PATTERSON, *CONGRESSIONAL CONSERVATISM AND THE NEW DEAL* 114, 116–17 (1967).

¹³⁵ JEFF SHESOL, *SUPREME POWER: FRANKLIN ROOSEVELT VS. THE SUPREME COURT* 392–401 (2010).

¹³⁶ *Newspapers’ Radio Ownership Is Attacked; Wheeler’s Drafts Bill to Prevent “Monopoly,”* N.Y. TIMES, Feb. 13, 1937, at 11.

¹³⁷ 81 CONG REC. 2336-37 (1937) (WALLACE WHITE); James D. Secrest, *Causes of Friction in the Communications Commission*, 17 CONGRESSIONAL DIG. 298 (1938) (describing White as “the outstanding expert on radio legislation in Congress”).

A Wheeler-led investigation was a most unappealing prospect for the president. “The Administration does not want the smells emanating from [the FCC] traced to their source,” claimed a contributor to *The Nation*.¹³⁸ White held his resolution in abeyance until July 6, the first day of Senate debate on the Court-packing plan. As promptly and unanimously reported out of the Interstate Commerce Committee, it authorized that body to conduct a thorough investigation of the radio industry and the FCC. Although further action awaited its consideration by the Senate’s audit committee, the measure remained a source of great concern. “Scarcely anything pending on Capitol Hill worried the President more than Senator Wallace White’s resolution for a sweeping Senate investigation of the FCC, particularly because this resolution would be handled by the Senate Interstate Commerce Committee, of which Burton K. Wheeler is chairman,” *Business Week* reported. “The President correctly interprets Wheeler’s attitude as one of active dislike for himself.”¹³⁹

One time-tested tactic for forestalling a congressional investigation was to name new appointees to a suspect agency and ask that they be given time to put matters aright. The tactic was particularly likely to succeed if Congress had its own skeletons in the closet. In late May, Roosevelt was handed this opportunity when Commissioner Irvin Stewart unexpectedly declined reappointment.¹⁴⁰ As the Supreme Court fight and a strike wave raged, Roosevelt searched for (in an aide’s words) “a strong man” whose appointment would quell talk on the Hill about a Congressional investigation.¹⁴¹ What was needed, Roosevelt told his son, was someone who would “bring order out of chaos” and, although not Chairman, “give life and direction to the whole Commission.”¹⁴² Then, on July 23, Chairman Prall died at his vacation home in Maine and gave Roosevelt an additional opportunity to quiet what a trade journal called “the storm of censure and criticism” surrounding the FCC.¹⁴³

¹³⁸ Ward, *supra* note 76, at 455.

¹³⁹ 81 CONG. REC. 6785–87, 9604 (1937); *Miscellaneous Hearings: Hearings before the Committee to Audit and Control the Contingent Expenses of the Senate, U.S. Senate 17–20* (1938); *Start FCC Cleanup*, BUSINESS WEEK, Oct. 23, 1937, at 52.

¹⁴⁰ Brief Sketch of Dr. Irvin Stewart (n.d.), in FCC RECORDS, *supra* note 36, entry 100A, box 10; *Stewart Will Not Seek Renomination to FCC; To Direct Committee Study on Using Science Aids for Education*, TELECOM. REP., May 26, 1937, at 2.

¹⁴¹ Letter from Marvin H. McIntyre, Sec. to the President, to Wetmore Hodges, Esq. (Jul. 23, 1937).

¹⁴² Letter from President Franklin D. Roosevelt to James Roosevelt (Jun. 29, 1937), in CORCORAN PAPERS, *supra* note 8.

¹⁴³ *Anning S. Prall, FCC Chairman, Is Dead at 68: Victim of Heart Attack at Summer Home in Maine*, WASH. POST, Jul. 24, 1937, at 4; *Stewart Will Not Seek Renomination to FCC: To Direct Committee Study on Using Science Aids for Education*, TELECOM. REP., May 26, 1937, at 2.

For Stewart's position, he quickly settled on T.A.M. Craven, the Commission's chief engineer.¹⁴⁴ The right chairman was a more difficult choice, but at last Roosevelt settled on Frank R. McNinch, then serving as Chairman of the Federal Power Commission (FPC).¹⁴⁵ The diminutive McNinch, a Presbyterian deacon "much given to such Scriptural injunctions as 'To your tents, O Israel!'" seemed better suited to lead an adult Sunday school class than an agency bullied about by politicians, network executives, and the radio bar.¹⁴⁶ He also suffered from incapacitating bouts of inflammatory colitis.¹⁴⁷ And as McNinch himself acknowledged, he knew little about radio broadcasting or the FCC.¹⁴⁸ Even so, much argued for his appointment. He had demonstrated his political independence by breaking with North Carolina's Democrats over Alfred Smith's presidential candidacy.¹⁴⁹ After Roosevelt made him chairman of the FPC in 1933, he joined in the New Deal's crusade against public utility holding companies by opposing their attempt to monopolize hydroelectric dam sites.¹⁵⁰ McNinch did not want to leave the FPC but acceded to Roosevelt's request with the understanding he would return once he "got things in good order at the FCC."¹⁵¹

"I am sure your colleagues and the public will expect and welcome from you aggressive and fearless leadership," Roosevelt wrote McNinch on the eve of his new chairmanship.¹⁵² McNinch told the press that FDR had given him "a completely free hand" and that "my judgment and my conscience are my only guides."¹⁵³ He made a strong start by ending the Broadcast Division's monopoly over the initial granting of licenses and abolishing three notorious sinecures, held by a cousin of former Senator Hugo Black, the nephew of

¹⁴⁴ *Trio of Possibilities for FCC before President Craven, Gary, and Wheat; Choice Expected Soon*, TELECOM. REP., Jul. 14, 1937, at 2.

¹⁴⁵ *Biggers Picked for FCC*, N.Y. TIMES, Aug. 10, 1937, at 5; Letter from David A. Salmon to Marvin H. McIntyre (Jul. 26, 1937), in OF, *supra* note 37, number 1059, box 1.

¹⁴⁶ James D. Secrest, *Gary, FCC Counsel, Defies Chairman's Demand He Resign*, WASH. POST, Oct. 13, 1938, at 5; WHO'S WHO IN THE NATION'S CAPITAL, *supra* note 80, at 583; W.J. Cash, *Jehovah of the Tar Heels*, 17 AM. MERCURY 312 (1929).

¹⁴⁷ TELECOM. REP., Sept. 20, 1938, at 3 (McNinch hospitalized for colitis).

¹⁴⁸ *Chief Engineer Craven and Federal Power Chairman McNinch Are Appointed to FCC*, TELECOM. REP., Aug. 17, 1937, at 1.

¹⁴⁹ *Frank R. McNinch, Government Aide: Former Chairman of Federal Power and Communications Commissions Dies at 77*, N.Y. TIMES, Apr. 21, 1950, at 23.

¹⁵⁰ WHO'S WHO IN THE NATION'S CAPITAL, *supra* note 80, at 583; *Frank R. McNinch*, *supra* note 149.

¹⁵¹ *Chief Engineer Craven and Federal Power Chairman McNinch Are Appointed to FCC*, TELECOM. REP., Aug. 17, 1937, at 1.

¹⁵² Letter from Franklin D. Roosevelt to Frank R. McNinch (Sept. 17, 1937), in OF, *supra* note 37, number 1059, box 1.

¹⁵³ *Chief Engineer Craven and Federal Power Chairman McNinch Are Appointed to FCC*, TELECOM. REP., Aug. 17, 1937, at 4.

House Majority Leader Sam Rayburn, and a former aide of Postmaster General James A. Farley, the New Deal's chief patronage dispenser.¹⁵⁴

Next McNinch persuaded the commission to record the names and addresses of all who contacted its members about licenses and to note the substance of the communication. Neither trial examiners nor commissioners were to consider the intervention unless the message was made part of the record in a hearing.¹⁵⁵ “Over a period of years there has grown up, like Topsy, the practice of making suggestions, requests or recommendations to members of the Commission or its staff as to matters pending by those not of record as parties in interest,” McNinch explained.¹⁵⁶ Congress had established the FCC as an independent agency with quasi-judicial powers; it now needed congressmen's forbearance to exercise those powers faithfully.¹⁵⁷ But it was not to be; more than a high-minded edict was required to break longstanding congressional expectations.¹⁵⁸

The new chairman's investigations of programming that offended his priggish sensibilities did not help his cause. “It seems we must be protected against Mae West, invaders from Mars, a little profanity in a Pulitzer prize play, too much foreign language, mediocre programs (whatever that means),” Louis Caldwell observed, “and a host of other utterances and programs that might warp our thirteen-year-old minds.”¹⁵⁹ McNinch found particularly offensive a sketch broadcasted on NBC, in which Mae West, playing a bored and concupiscent Eve in the garden of Eden, fed applesauce to a dull and complacent Adam and opened his eyes to her charms. The chairman's censoriousness roiled the commission further, as Payne echoed his outrage and Craven objected to second-guessing the networks.¹⁶⁰

¹⁵⁴ FCC, Press Release (Oct. 14, 1937), in FCC RECORDS, *supra* note 36, entry 100A, box 10; McNinch *Ousts 3 Aids*, WASH. POST, Oct. 15, 1937, at 1. On Farley, see DANIEL SCROOP, MR. DEMOCRAT: JIM FARLEY, THE NEW DEAL AND THE MAKING OF MODERN AMERICAN POLITICS 103 (2006) (describing Farley's use of the patronage system throughout his political career).

¹⁵⁵ FCC Order No. 25 (Nov. 11, 1937) in FCC Records, *supra* note 36, entry 100A, box 10.

¹⁵⁶ FCC Press Release (Nov. 11, 1937), in FCC RECORDS, *supra* note 36, entry 100A, box 10.

¹⁵⁷ *Id.*

¹⁵⁸ *Memorandum on Proposed Reorganization of Federal Communications Commission* (S. 1268) (n.d.), in Wallace H. White Papers, box 64 (on file with the Manuscript Division, Library of Congress, Washington, DC).

¹⁵⁹ Caldwell, *supra* note 95, at 760. Caldwell's “invaders from Mars” was of course a reference to the sensational broadcast of Orson Welles's “War of the Worlds” on October 30, 1938. See Lee Ann Potter, “Jitterbugs” and “Crack-Pots”: *Letters to the FCC about the “War of the Worlds” Broadcast*, 35 PROLOGUE 6 (2003) (giving background on Welles's famous—and haunting—broadcast).

¹⁶⁰ See generally Radio Script, *Chase and Sanborn Hour* (Dec. 12, 1937), in President's Personnel Files, number 5140 (on file with the Franklin D. Roosevelt Library, Hyde Park, NY) (recounting the controversial radio show in question); *New Brawls in the FCC Bring Reports the President May Step in Again*, NEWSWEEK, Mar. 13, 1939, at 42; Statement of T.

Meanwhile, McNinch could not persuade his quarreling commissioners to convene promised hearings on networks' monopolistic practices and newspaper ownership of radio stations. After congressmen renewed their calls for an investigation, Payne went before the House Rules Committee to accuse his fellow commissioners of yielding to "outside pressure."¹⁶¹ He also blasted the radio bar for being "in the habit of commanding rather than asking or pleading."¹⁶² McNinch publicly demanded that Payne produce evidence to back up his charges.¹⁶³ Journalists lumped the "feud-racked Federal Communications Commission" together with the Tennessee Valley Authority (TVA) and the National Bituminous Coal Commission, where unseemly in-fighting was also on public display.¹⁶⁴ "There is not in Washington now and there perhaps has never been a commission which was a more grotesque travesty on Government regulation than the Communications Commission," declared a correspondent for the Scripps-Howard newspaper chain in June 1938.¹⁶⁵

V. THE PURGE

At other agencies, New Dealers used legal divisions to police potentially wayward administrators. At the Agricultural Adjustment Administration (AAA), for example, General Counsel Jerome Frank insisted that food processors not use marketing agreements to mulct the public.¹⁶⁶ Politicians impatient for federal funds railed against the punctiliousness of lawyers at the Public Works Administration, "fellows who come here to get law jobs in the departments and then sit down and look for semicolons and hold up the works."¹⁶⁷ Lawyers at the Social Security Board tried to get local administrators to see the recipients of family support payments as rights-bearers instead of supplicants.¹⁶⁸ At the Bituminous Coal Division of the Department of the Interior, General Counsel Abe Fortas

A. M. Craven taken at Washington D.C. (May 21 to Jun. 28, 1943), at 49–50, in COX COMMITTEE RECORDS, *supra* note 118, Witness Statements, box 2.

¹⁶¹ George Henry Payne, *Is America's Radio Industry Controlled by a Monopoly?* 17 CONGRESSIONAL DIG. 313 (1938).

¹⁶² *Id.*

¹⁶³ *FCC Influenced by Radio Lobby, Payne Charges*, WASH. POST, Jun. 3, 1938, at X3.

¹⁶⁴ *Payne Charges his Colleagues Oppose Investigation of FCC*, WASH. POST, Apr. 14, 1938, at X1.

¹⁶⁵ John T. Flynn, *Is America's Radio Industry Controlled by a Monopoly?* 17 CONGRESSIONAL DIG. 308 (1938).

¹⁶⁶ IRONS, *supra* note 9, at 118–32.

¹⁶⁷ *Shovels Halted by Typewriters, Says La Guardia*, CHI. TRIB., Nov. 19, 1935, at 6. Franklin D. Roosevelt chose Harold Ickes, his Secretary of the Interior, to head the Public Works Administration because he knew of the Progressive Republican's opposition to pork-barrel spending in Chicago. SMITH, *supra* note 9.

¹⁶⁸ TANI, *supra* note 9, at 57–80.

hired a team of able lawyers, including the future federal judge Harold Leventhal, to straighten out the New Deal's coal policy.¹⁶⁹ At the Board of Economic Warfare, lawyers required that contracts for material procured overseas include clauses mandating decent working conditions for laborers.¹⁷⁰

At the start of his chairmanship, McNinch had no such ally in the FCC's Law Department. The general counsel he inherited, Hampson Gary, was "known to be incompetent at the time of his appointment, just another example of political hack placement from which the FCC has suffered."¹⁷¹ Gary's three assistant general counsels were also political appointees. The lawyers below them had mostly acquired their jobs as had their counterparts at other "old line" agencies, through the influence of congressional patronage or promotion from a clerical position once they earned a degree from one of the many law schools in the nation's capital.¹⁷² Many spent most or all of their careers at FCC. Fanny Neyman, the FCC's first female lawyer, for example, had initially come to Washington from Montana to clerk in her Senator's congressional office.¹⁷³ After further legal study at the George Washington University—she was already a graduate of the Silver Bow Law College in Butte—she joined the FRC's legal staff in December 1928 and remained at the commission until 1955.¹⁷⁴ Another long-serving lawyer was Rosel Hyde. A Mormon and a

¹⁶⁹ KALMAN, *supra* note 9, at 68–70.

¹⁷⁰ Daniel R. Ernst, *The Ideal and the Actual in the State: Willard Hurst and the Board of Economic Warfare*, in *TOTAL WAR AND THE LAW: THE AMERICAN HOME FRONT IN WORLD WAR II* 150 (Daniel R. Ernst & Victor Jew, eds., 2002).

¹⁷¹ Letter from Anonymous to Thomas G. Corcoran (Dec. 7, 1938), in *CORCORAN PAPERS*, *supra* note 8, box 250.

¹⁷² Two of the New Deal's first appointments to the FRC suggested the influence of Southern Democrats: a judge of the juvenile court of DeKalb County, Georgia, and the former secretary to Senator Kenneth McKellar (D-TN). Press Release (Jun. 22, 1933), in *FCC RECORDS*, *supra* note 36. An exception to norm was Carl Wheat, appointed at Felix Frankfurter's urging to improve the quality of rate-making in the FCC's telephone division. He was soon forced out. Memorandum of Carl I. Wheat, Telephone Rate Counsel (Jan. 31, 1938), in *CORCORAN PAPERS*, *supra* note 8, box 250; Letter from Carl I. Wheat to Thomas G. Corcoran (May 23, 1938), in *OF*, *supra* note 37, number 1059, box 2; Carl I. Wheat, *The Regulation of Interstate Telephone Rates*, 51 *HARV. L. REV.* 846, 847 (1938). For elsewhere in the federal government, consult ERNST, *In a Democracy We Should Distribute the Lawyers*, *supra* note 7, at 5.

¹⁷³ Transcript of Hearings, Cox Committee, 7338, in *FCC RECORDS*, *supra* note 36, entry 100A, box 24.

¹⁷⁴ *Id.* at 7338-7339; *Report of the 1955 Luncheon Committee*, 15 *FED. COMM. B.J.* 57 (1956). Female agency lawyers at other agencies also tended to stay in government rather than rotate into the private sector because of the difficulty of acquiring clients. Private practice might had been a particularly daunting prospect for Neyman and other women in the FCC's Law Department, as client-getting in the radio bar involved much after-hours socializing. The only woman among the FCBA's charter members was Mabel Walker Willebrandt, a former U.S. assistant attorney general,

Republican, Hyde had come to Washington from Utah in the 1920s to clerk in government agencies while taking undergraduate and law classes at George Washington University.¹⁷⁵ He started at the FRC in 1928 as a disbursing clerk but found the job so undemanding that he volunteered for the general counsel, whose office was next door. He joined the legal staff after passing the bar.¹⁷⁶ Thanks to the civil service status he held from his original appointment as a clerk, he was only demoted and not fired when Democrats took control of the commission in 1933.¹⁷⁷ Even well-pedigreed New Dealers would come to respect him for his intelligence, dedication, and honesty.¹⁷⁸

Such career lawyers performed the FCC's routine legal work well but could scarcely be expected to mount a sustained campaign to clean up the agency. McNinch needed to make a change at the top of the Law Department. He acquired grounds for ousting Gary when his lawyers' missteps resulted in a string of reversals by the U.S. Court of Appeals for the District of Columbia. The most embarrassing was *Saginaw Broadcasting* decided in March 1938.¹⁷⁹ Writing for a three-judge panel, Harold Stephens showed that the FCC commissioners had not carefully read the trial examiner's report, lectured them on the proper way to find facts, scolded them for employing "Star Chamber methods," and urged them to do "justice . . . according to facts and law" rather than "extralegal considerations."¹⁸⁰ A journalist translated: the judges believed that by awarding a license to a member of the Democratic National Committee

who could hold her own in Washington legal circles. BULL. FED. COMM. BAR ASS'N, Dec. 7, 1936, at 4–6; DOROTHY M. BROWN, MABEL WALKER WILLEBRANDT: A STUDY OF POWER, LOYALTY AND LAW 179–228 (1984).

¹⁷⁵ *Hyde Expects no Reversal of Established FCC Policies*, CORPUS CHRISTI CALLER-TIMES, Sept. 21, 1969, at 81.

¹⁷⁶ Interview of Rosel H. Hyde (Mar. 22, 1973), Rosel H. Hyde in INSPIRE RECORDS, box 2 (on file with Special Collections, Hornbake Library, University of Maryland, College Park, MD) [hereinafter referred to as INSPIRE RECORDS].

¹⁷⁷ *Id.* at 2.

¹⁷⁸ Interview of Joseph M. Kittner by author (Sept. 2005) (on file with the author). Harry Truman appointed Hyde to the Commission and Dwight Eisenhower made him chairman but then demoted him after he refused to purge the legal staff of Democrats. Lyndon Johnson later restored him to the chairmanship. Interview of Rosel H. Hyde, *supra* note 176.

¹⁷⁹ *Missouri Broad. Corp. v. Fed. Commc'n Comm.*, 94 F.2d 623 (1937); *Heitmeyer v. Fed. Commc'n Comm.*, 95 F.2d 91 (D.C. Cir. 1937); *Saginaw Broad. Co. v. Fed. Commc'n Comm.*, 96 F.2d 554, 559 (D.C. Cir. 1938); *Tri-State Broad. Co. v. Fed. Commc'n Comm.*, 96 F.2d 564 (D.C. Cir. 1938). Consult Harry P. Warner, *Subjective Judicial Review of the Federal Communications Commission*, 38 MICH. L. REV. 632 (1940).

¹⁸⁰ *Saginaw Broad. Co. v. Fed. Commc'n Comm.* 96 F.2d 554, 559 (D.C. Cir. 1938). Roscoe Pound would quote from Stephens's opinion in a report for the American Bar Association warning against the dangers of "administrative absolutism." *Report of the Special Committee on Administrative Law*, 63 A.B.A. REP. 358, 359 (1938).

against the recommendation of a trial examiner, the FCC had succumbed to “political influence and the like.”¹⁸¹

During the summer of 1938, McNinch tried to dislodge Gary with offers of well-paying jobs elsewhere, but the general counsel would not budge.¹⁸² Finally, in October, after a prolonged absence, McNinch returned to the commission with the votes he needed to mount a purge. A majority of the commissioners fired Gary for “inefficiency and lack of administrative ability” and replaced him with William J. Dempsey, an assistant general counsel at McNinch’s FPC and part of Corcoran’s network of lawyers.¹⁸³ (A dissenting commissioner later testified that Corcoran had called him at home to say that Roosevelt wanted him to vote against Gary and for Dempsey.)¹⁸⁴ Dempsey, in turn, installed as his right hand man, William Koplovitz, a *cum laude* Harvard law graduate and his assistant at FPC.¹⁸⁵

Other changes targeted the agency’s trial examiners, the quasi-judicial officers who presided over hearings and whose recommendations the full commission usually adopted.¹⁸⁶ A researcher for the Attorney General’s Committee on Administrative Procedure concluded that the FCC’s trial examiners reached their conclusions not so much on the facts as on their guess as to the Commission’s probable decision, which mostly turned on which applicant had the best political connections. Some trial examiners were said to favor particular members of the radio bar and let them write their reports.¹⁸⁷ To end such abuses, the FCC, by a 4-3 vote, abolished the trial examiner’s

¹⁸¹ *Newspaper Ownership Is Held No Bar to Broadcast Gains*, BROADCASTING, Apr. 1, 1938, at 22, 66.

¹⁸² *FCC Dismisses Gary as General Counsel*, TELECOM. REP., Oct. 13, 1938, at 2.

¹⁸³ *Id.* Dempsey was not a typical New Deal lawyer, as his law degree was from Georgetown rather than Harvard, Columbia, or Yale. He entered the New Deal in September 1933 via the Public Works Administration, perhaps due to the influence of his father, a business executive with interests in a New York subway and oil fields in New Mexico who also served as Undersecretary of the Interior. Thomas Corcoran met him at PWA, where Dempsey worked for Benjamin V. Cohen, and moved him to the FPC in Apr. 1937. *Rep. J.J. Dempsey Dies at Age of 78*, N.Y. TIMES, Mar. 12, 1958, at 31; *Independent Offices Appropriations Bill*, *supra* note 59, at 1518; William J. Dempsey, Statement (May 4-6, 1943), in COX COMMITTEE RECORDS, *supra* note 118, Witness Statements, box 3.

¹⁸⁴ Craven, *supra* note 160.

¹⁸⁵ Dempsey, *supra* note 183; Press release (Dec. 6, 1938) in FCC RECORDS, *supra* note 36, entry 100A, box 9; *Independent Offices Appropriations Bill*, *supra* note 59, at 1518-19.

¹⁸⁶ *Independent Offices Appropriations Bill*, *supra* note 59, at 1512.

¹⁸⁷ ADMINISTRATIVE PROCEDURE IN GOVERNMENT AGENCIES: MONOGRAPH OF THE ATTORNEY GENERAL’S COMMITTEE ON ADMINISTRATIVE PROCEDURE: PART 3: FEDERAL COMMUNICATIONS COMMISSION, S. Doc. 186, 76th Cong. 28 (1940). On this committee, consult Joanna Grisinger, *Law in Action: The Attorney General’s Committee on Administrative Procedure*, 20 J. POLICY HIST. 379 (2008).

department, fired the chief trial examiner and one of his subordinates, and transferred the remaining six trial examiners into the Law Department.¹⁸⁸ Henceforth, one FCC lawyer would preside over a hearing, after which the parties filed proposed findings of fact and conclusions. A single commissioner, after reviewing reports from the staff and the presiding lawyer, would recommend a disposition to the full commission, which itself then issued the proposed findings and conclusions previously produced by the presiding lawyer. The parties could file exceptions and request oral argument, after which the commission issued its final order.¹⁸⁹ Caldwell protested that, as a practical matter, the memorandum prepared by the presiding lawyer disposed of most cases, but the new procedure closely tracked a safe harbor Chief Justice Charles Evans Hughes had identified in a leading case, and it survived until the passage of the Administrative Procedure Act of 1946.¹⁹⁰

VI. AN OLD-LINE LAW DEPARTMENT

McNinch boasted that the FCC was finally “going to town,”¹⁹¹ but it would not get very far without “the bright New Deal boys” who elsewhere supplied administrators with strategic intelligence.¹⁹² Three obstacles hampered Dempsey and Koplovitz’s attempts to hire them. The first was a rule banning FCC lawyers from its roll of attorneys for two years after they left the agency. The second was the civil service status of most FCC lawyers. The third was the solicitude of congressional patrons for their constituents in the Law

¹⁸⁸ *Changes in Commission Personnel*, 3 FED. COMM. B.J. 5–7 (1938); Secret, *supra* note 82, at 297; *Independent Offices Appropriations Bill*, *supra* note 59, at 1449. Dempsey claimed that *Morgan v. United States*, 304 U.S. 1 (1938), made the legality of the FCC’s old procedures somewhat doubtful, but no other agency abolished its trial examiners department after the decision and in fact the FCC might have complied without doing so. *Independent Offices Appropriations Bill*, *supra* note 59, at 1511, 1513. On *Morgan*, see Daniel Ernst, *Morgan and the New Dealers*, 20 J. POLICY HIST. 447 (2008).

¹⁸⁹ *Independent Offices Appropriations Bill*, *supra* note 59, at 1512; Confidential Memorandum to All Attorneys 1 (Jan. 30, 1939), in FCC RECORDS, *supra* note 36, entry 378, box 12; Herbert Bingham, *Notes on Practice before the Federal Communications Commission*, 38 MICH. L. REV. 339, 341–350 (1940). On the new procedures and the controversy they sparked, I have benefited from reading the seminar paper *Procedural Reform at the Federal Communications Commission in 1938*, written by Evan Mateer, a 2014 graduate of the Georgetown University Law Center.

¹⁹⁰ Administrative Procedure Act of 1946, Pub. L. No. 79-404, 60 Stat. 237 (1946); *Morgan v. U.S.*, 304 U.S. 1, 21–2 (1938); Caldwell, *supra* note 96, at 769; On the APA’s provisions on trial examiners and their implementation, consult Joanna L. Grisinger, *The Administrative Procedure Act and the Hearing Examiners*, 34 J. NAT’ ASS’N ADMIN. L. JUDICIARY 1 (2014).

¹⁹¹ *Going to Town*, TIME, Nov. 21, 1938, at 40.

¹⁹² *The Reminiscences of Telford Taylor*, *supra* note 36, at 389–90.

Department. The first obstacle was the agency's own doing and easily undone, but the other two plagued the FCC throughout McNinch's chairmanship.

Until the summer of 1935, the commission's lawyers, like those elsewhere in the federal government, were free to leave and represent private clients before their former agency as long as they did not do so in any claim against the United States pending while they worked there.¹⁹³ Less than a month after Burton Wheeler denounced the revolving door at joint confirmation hearings for the new commissioners, the FCC unanimously agreed that no lawyer could present clients in *any* cause before the FCC for two years after leaving the Law Department.¹⁹⁴ Paul Spearman got out before the effective date, but Gary, other FCC lawyers, and any new hires were bound by the rule.¹⁹⁵

The two-year ban had an unintended consequence: it discouraged legal recruits who did not envision spending their whole careers at FCC from taking a job there. The problem surfaced when Felix Frankfurter urged James Landis, newly appointed chairman of the Securities and Exchange Commission (SEC), to adopt a comparable rule for its lawyers. Landis replied that such a ban would keep the SEC from hiring lawyers as good as those in corporate law firms. "We are in a different position than Communications," Landis explained, "and when I look at some of their lawyers I shudder."¹⁹⁶ Evidently Dempsey shuddered, too. He persuaded the commissioners to drop the ban in November 1938.¹⁹⁷

A second obstacle was also of relatively recent origin. General counsels at the FRC, as in most other federal agencies, had been free to hire and fire lawyers without regard for the elaborate procedures of the U.S. Civil Service

¹⁹³ Thomas D. Morgan, *Appropriate Limits on Participation by a Former Agency Official in Matters before an Agency*, 1980 DUKE L.J. 5. Radio lawyers argued the ban did not apply to them because an application for a radio license was not a claim against the United States. Rule of the Federal Communications Commission Prohibiting Attorneys at Law from Appearing before the Commission, or any Branch thereof, until Two Years Shall Have Elapsed after the Separation of Said Attorney from Said Service (1935), in FCC RECORDS, *supra* note 36, entry 100A, box 495.

¹⁹⁴ *FCC Employees Who Resign Barred from Practice for Two Years on Pending Matters*, TELECOM. REP., Jan. 31, 1935, at 8.

¹⁹⁵ *Confirmation of Members*, *supra* note 101, at 38–39.

¹⁹⁶ Letter from Felix Frankfurter to James M. Landis (Dec. 18, 1935), Letter from James M. Landis to Felix Frankfurter (Jan. 10, 1936), Letter from Felix Frankfurter to James M. Landis (Jan. 11, 1936), in JAMES M. LANDIS PAPERS, box 10 (on file with the Manuscript Division, Library of Congress, Washington, DC). Frankfurter did not contest Landis's characterization of FCC lawyers. In January 1941, after the quality of FCC lawyers had greatly improved, he still lumped them together with those of the Interstate Commerce Commission lawyers as "honorable," "devoted," but also "inadequate." President's Committee on Civil Service Improvement, Minutes of the Executive Session 74 (Jan. 21, 1941), in FELIX FRANKFURTER PAPERS, reel 111 (on file with the Manuscript Division, Library of Congress, Washington, D.C.) [hereinafter referred to as FF-LC].

¹⁹⁷ *Commission Approves New Rules of Practice*, TELECOM. REP., Nov. 29, 1938, at 4–5.

Commission.¹⁹⁸ In contrast, the few general counsels with legal staffs within the classified civil service could fire subordinates only for cause, a standard that, as interpreted by civil service officials, the New Deal lawyers despaired of meeting. Hiring procedures were even more constraining. Under them, agencies were to notify the Civil Service Commission of open positions. The Commission then announced the vacancies to law schools, bar associations, state and municipal governments, newspapers, and post offices. Applicants were directed to describe their educational background and professional career, give references, and sit for a written examination. Prepared and graded by the Civil Service Commission's small staff of legal examiners, the exams quizzed applicants on basic common-law subjects rather than relevant statutes or administrative law. All who received a passing grade (70 out of 100) were placed, in rank order, on a closed register, which the general counsel was not allowed to consult. Under "the rule of three," the Civil Service Commission sent over the names and files of the three highest-ranked "eligibles" on the register. A general counsel might try to persuade the Commission that none of the three would do, but if he did, he could then choose only from among the next three highest eligibles.¹⁹⁹

Two other rules also blocked young Ivy league graduates from legal positions in the classified legal service. First, veterans and in some cases their spouses received extra points on the exam. Able-bodied veterans received an extra five points and disabled veterans received ten points. Widows of veterans and the wives of disabled veterans also received ten points. An able-bodied veteran, therefore, needed only a score of 65 to pass a written examination, while a disabled veteran or a widow needed only 60. In addition, any holder of a ten-point preference with a passing score jumped to the top of the list. Thus, a ten-point preference holder with a score as low as 60 was not only eligible for appointment; the Civil Service Commission would certify him or her before all competitors lacking the preference, regardless of the others' scores.²⁰⁰

¹⁹⁸ U.S. CIVIL SERVICE COMMISSION, 49 ANN. REP. 26–27 (1932); Experience of the Civil Service Commission with Competitive Examinations for Attorney Positions in the Government Service (Jan. 5, 1939), at 1–2, in FRANK MURPHY PAPERS, reel 111 (on file with the Bentley Historical Library, University of Michigan, Ann Arbor, MI).

¹⁹⁹ Ernst, "In a Democracy We Should Distribute the Lawyers," *supra* note 7, at 4.

²⁰⁰ K.C. Vipond, Report on the Veterans' Preference in the Federal Civil Service, 4 PRESIDENT'S COMMITTEE ON CIVIL SERVICE IMPROVEMENT, DOCUMENTS AND REPORTS TO ACCOMPANY REPORT ON CIVIL SERVICE IMPROVEMENT, pt. 2, at 58-60 (1942) [hereinafter referred to as PCCSI, DOCUMENTS AND REPORTS]; Herbert Wechsler, Veterans' Preference and the Competitive Examination (1941), in RECORDS OF THE U.S. CIVIL SERVICE COMMISSION, record group 146, entry 1032, box 1 (on file with the National Archives, College Park, MD) [hereinafter referred to as CSC RECORDS].

A second political constraint was geographic. Eligibles from any state or the District of Columbia with more than its share of appointments went to the foot of a register, with the exception of holders of the veterans' preference, who stayed where they were. Not until all the eligibles from the under-represented states were certified would the Commission proceed to the eligibles from one of the overrepresented states. Maryland, Virginia, and the District of Columbia invariably were overrepresented. They might be joined by as many as fifteen other states, depending upon the constantly changing balance of hires and separations throughout the entire civil service. In most years, a Californian with a score of 70 would be certified before a Virginian with a perfect score.²⁰¹

Not surprisingly, general counsels at the new agencies insisted that their lawyers be outside the classified civil service.²⁰² Several expressed their revulsion to its procedures at a meeting of chief legal officers later in the decade. "No man wants to be dependent upon Civil Service Commission for the selection of individuals for a job," an unidentified attendee declared. Another volunteered that no one present would "hire at any price" many who managed to pass the Commission's exam. "We want lawyers that will go to bat for our program," a third fumed. You "cannot determine that by an examination."²⁰³

In 1934 the FRC was in such ill repute that Congress ignored such concerns and provided that in the new FCC only the general counsel, three assistant general counsels, and temporary counsel hired for the performance of special services would be outside the classified civil service. All other legal positions would be filled in accordance with the civil-service laws or the Classification Act of 1923.²⁰⁴ Thus, when the FCC sought to hire new lawyers in 1935, the Civil Service Commission compiled registers using its standard procedures. The first thirty-three positions on the register for junior attorneys went to disabled veterans, of whom ten would have received a failing score but for the ten-point preference. Other veterans took the next three places. The candidate with the highest score on the exam (99.75) was thirty-seventh on the register. Holders of the ten-point disability preference claimed the first three

²⁰¹ K.C. Vipond, Memorandum as to Apportionment of Appointments in Washington, D.C., among the States and Territories on the Basis of Population, in PCCSI, DOCUMENTS AND REPORTS, *supra* note 200, pt. 1, at 133, 136 (Apr. 1939); Vipond, *supra* note 200, at 61.

²⁰² Memorandum to Marvin H. McIntyre (Mar. 6, 1937), in CORCORAN PAPERS, *supra* note 8, box 204.

²⁰³ Transcript of the Luncheon at the Hotel Raleigh (Aug. 23, 1938), at 7-8, in JACKSON PAPERS, *supra* note 106, box 82.

²⁰⁴ Letter from L.A. Moyer to Federal Radio Commission (Jun. 20, 1934), in FCC RECORDS, *supra* note 36, entry 100A, box 10.

spots for a senior attorney position, the first fourteen spots for an attorney position, and the first sixty-eight for an assistant attorney position.²⁰⁵

On that occasion the FCC circumvented the registers by making temporary appointments and obtaining an executive order making them permanent.²⁰⁶ This dodge was not easily repeated, however, and so McNinch asked the Civil Service Commission to reconsider its interpretation that the Communications Act of 1934 in fact subjected FCC lawyers to its procedures. Unsurprisingly, the civil service commissioners declined to join in what a political columnist characterized as Corcoran's attempt to find berths for "all his cronies from Harvard."²⁰⁷ Dempsey and Koplovitz had an exemption written into legislation pending before Congress, but the bill never escaped committee.²⁰⁸ The pair were "ready to quit in despair," presidential assistant James Rowe reported to Corcoran in January 1939, because, Rowe claimed, like all lawyers under the civil service, the FCC's would not work past 4:30.²⁰⁹

A third obstacle to building a New Deal legal division was the expectation of influential congressmen that the four best-paying legal positions—the general counsel and three assistant general counsels—would be filled by patronage appointees. Dempsey and Koplovitz's selection as general counsel and assistant general counsel in charge of the Law Department's Litigation and Administration Division bucked the trend, but patronage appointees headed two other divisions throughout McNinch's chairmanship. George Porter was in charge of the large and politically sensitive Broadcast Division. The son of a well-connected member of the ICC, he had worked at the agency since 1931 and developed close relations with the radio bar. Although Telford Taylor, Dempsey's successor as general counsel, thought Porter not without ability, he also considered him "not a very energetic lawyer." Another FCC lawyer described him as "what you'd call a 'good fellow.'" ²¹⁰ James A. Kennedy, in charge of the Common Carriers Division,

²⁰⁵ Vipond, *supra* note 200, at 67–72.

²⁰⁶ Charles Gordon, *The Lawyer and the Civil Service*, 1 NAT'L LAW. GUILD Q. 294, 299 (1938); Experience of the Civil Service Commission, *supra* note 198, at 1–2; Exec. Order No. 7201 (Sept. 26, 1935).

²⁰⁷ *FCC Recommendations to Civil Service Agency to Remove Attorneys, Examiners and Others from Classified Rolls Causes Another Stormy Division*, TELECOM. REP., Oct. 6, 1938, at 5–6; George D. Riley, *Harvard Against the Field*, WASH. HERALD, Oct. 17, 1938, at 12.

²⁰⁸ S. 1268, 76th Cong. (1939).

²⁰⁹ Letter from James H. Rowe to Thomas G. Corcoran (Jan. 1939), in CORCORAN PAPERS, *supra* note 8, box 211.

²¹⁰ *The Reminiscences of Telford Taylor*, *supra* note 36, at 386–88; David H. Diebler, statement (May 13, 1943), in COX COMMITTEE RECORDS, *supra* note 118, witness statements, box 3; *FCC Assistant General Counsel Porter Resigns to Enter Private Law Practice*, TELECOM. REP., Jul. 31, 1940, at 6.

was among the temporary appointees of 1934 made permanent by executive order. The worst Taylor would say about him on the record was that he was “not terribly imaginative,” but the South Carolinian was probably the “rather senior lawyer” Taylor later identified as the appointee of Senators from a Southern state. “[H]e was largely useless,” Taylor explained, “but it was just very well known that if you didn’t keep him on his job there, all hell would break loose with a couple of important Senators whose votes were of some importance on legislation and appropriation.”²¹¹

VII. STALEMATE

Even if McNinch had had a solid phalanx of lawyers behind him, he probably could not have pushed the FCC out of its swamp after the October 1938 purge. Quarrels among the commissioners over censorship, newspaper ownership of radio licenses, and regulating the networks spilled into public view and produced embarrassing reportage on the “dissension-wracked” FCC.²¹² Further, as Rowe reported to the president’s secretary in January 1939, McNinch was “a very sick man.”²¹³ That his ravaged bowels severely limited his activity soon became common knowledge.²¹⁴

Corcoran urged Roosevelt to act. “Someone is going to make a proposal to reorganize the Commissions,” Corcoran told Roosevelt after meeting with

²¹¹ *The Reminiscences of Telford Taylor*, *supra* note 36, at 384-5; *The Reminiscences of Telford Taylor* (Dec. 5, 1967), in *FLY PROJECT*, *supra* note 132, at 43; Exec. Order No. 7201 (Sept. 26, 1935); *Kennedy Appointed Assistant General Counsel of FCC*, *TELECOM. REP.*, Jan. 26, 1938, at 4.

²¹² Drew Pearson & Robert S. Allan, *Washington Merry-Go-Round*, UNITED FEATURE SYNDICATE, INC., Apr. 20, 1939, at 2–3, <https://auislandora.wrlc.org/islandora/object/pearson%3A53496#page/2/mode/1up>. See also Warren B. Francis, *Backstage Battles of F.C.C. Stir Capital*, *L.A. TIMES*, Mar. 6, 1939, at 6 (reporting on the FCC’s internal conflicts during the Roosevelt administration); *Censor McNinch*, *N.Y. DAILY NEWS*, Mar. 11, 1939, at 111 (referring to members of the FCC as “Censor McNinch and his six dwarfs”); Clifford A. Prevost, *Filling of Jobs Assured Soon*, *DET. FREE PRESS*, Dec. 28, 1938, at 4 (discussing a potential candidate to replace Chairman McNinch who failed to “clean up the bad situation” at the FCC despite numerous purges); Fleeson, *supra* note 14, at 448; *New FCC Discord Arises Over Radio*, *BALT. SUN*, Mar. 20, 1939, at 10 (reporting on tensions within the FCC over merge of newspapers and radio sectors).

²¹³ Memorandum from James H. Rowe, Jr., Admin. Assistant to Franklin D. Roosevelt, to Missy LeHand, Sec’y to Franklin D. Roosevelt (Jan. 6, 1941), in *JAMES H. ROWE, JR., PAPERS*, box 13 (on file with the Franklin D. Roosevelt Library, Hyde Park, NY) [hereinafter *ROWE PAPERS*].

²¹⁴ *TELECOM. REP.*, Sept. 20, 1938, at 3; *McNinch Ill, Takes Leave of Absence*, *HEINL RADIO BUS. LETTER*, May 2, 1939, at 7; Paul Mallon, *FDR Strategy on Neutrality Held Failure*, *HARTFORD COURANT*, Jul. 21, 1939, at 3 (reporting on widely-held speculation that Chairman McNinch would resign due to ongoing health issues).

Senator Wheeler. “You should get the political credit for the courage of being the first to and demand the cleaning up of the mess” at FCC. If Wheeler moved before Roosevelt did, he would get the credit, because Commissioner “Payne and the publicists on the other side are much cleverer than the people on your side.”²¹⁵

Roosevelt needed little convincing: in the midst of McNinch’s purge he laughingly told Postmaster General James Farley that the FCC commissioners were “crazy” and that he would be delighted if they all resigned.²¹⁶ In a January 24th press conference, he said the administration was studying legislation to restructure the agency.²¹⁷ Although he refused to discuss which of several new blueprints he preferred, one was reportedly a bill drafted by Corcoran and Cohen to break up the FCC into a policymaking bureau situated within the Commerce Department and an independent quasi-judicial board like the Board of Tax Appeals.²¹⁸ Such legislation was unlikely to pass, as congressional leaders, alarmed by the misuse of relief funds in the elections of 1938, would have balked at conferring so much patronage to a department under the president’s direct control.²¹⁹

What did emerge was, in the parlance of the day, a “ripper bill,” a law intended to remove officials by replacing an existing agency with a new one.²²⁰ Dempsey and Rowe wrote it one evening after Roosevelt and McNinch “had conferred in desperation over the mess the Commission was in.”²²¹ It would replace the seven-member FCC with a three-member body and give its chairman the power to hire and fire staff.²²² Although Wheeler announced his support and introduced it into the Senate, he then let it languish. “This was not

²¹⁵ Memorandum from Thomas G. Corcoran, White House Aide, to Franklin D. Roosevelt, President (Jan. 23, 1939), in CORCORAN PAPERS, *supra* note 8, box 210.

²¹⁶ James A. Farley, Memoir (Oct. 14, 1938) (unpublished manuscript), in JAMES A. FARLEY PAPERS, box 41 (on file with the Manuscript Division, Library of Congress).

²¹⁷ Franklin D. Roosevelt, President, Press Conference 520 at the Executive Office of the White House, 2–4 (Jan. 24, 1939), http://www.fdrlibrary.marist.edu/_resources/images/pc/pc0076.pdf.

²¹⁸ Joseph O’Donnell & Doris Fleeson, *FDR Asks Congress to Rebuild Strife-Torn Radio Commission*, N.Y. DAILY NEWS, Jan. 25, 1939, at 80. Rumors of the bill had circulated earlier. *FCC Is Setting Up Defensive Works Against Congressional Investigation*, TELECOM. REP., Nov. 1, 1938, at 5; James D. Secrest, *Bill Reported in Making to Scrap FCC*, WASH. POST, Dec. 7, 1938, at 1.

²¹⁹ See SMITH, *supra* note 9, at 160–89 (providing historical analysis regarding the congressional concern over federal overreach during the New Deal era).

²²⁰ See *FCC Is Setting Up Defensive Works Against Congressional Investigation*, TELECOM. REP., Nov. 1, 1938, at 5 (discussing the potential for “ripper” legislation to form a new agency with new commissioners). See also S. 1268, 76th Cong. (1939) (providing a text of the bill).

²²¹ James H. Rowe, Jr., Admin. Assistant to Franklin D. Roosevelt, to Missy LeHand, Sec’y to Franklin D. Roosevelt (Jan. 6, 1941), in ROWE PAPERS, *supra* note 213, box 13.

²²² S. 1268, 76th Cong. (1939).

only because of his general attitude toward the President,” Rowe reported to the White House, but also because Wheeler “was attempting to trade” inaction on the radio bill for support of his investigation of railroad finances.²²³ Presumably his trading partner was the Republican Wallace White, who objected that Wheeler’s bill would practically “vest in one man authority over the vast communications interests of the country.”²²⁴ White introduced his own bill to create an eleven-member commission, but lobbyists for the National Association of Broadcasters kept both measures in committee.²²⁵

As the Wheeler and White bills stalled, a different way to reform the FCC presented itself. In March 1939, Judge Sykes unexpectedly announced his resignation.²²⁶ It was said that “internal friction” had finally grown too great for “the ‘father-confessor’ of the FCC,” although perhaps Sykes wished to avoid the attention a report on chain monopolies would bring to his support of the networks.²²⁷ McNinch’s colonitis had worsened, making Corcoran, it was said, “the real FCC boss.”²²⁸ The infirm chairman was sure to resign once his successor was named.²²⁹ With the term of a third commissioner up in July, FDR could remake the Commission and again forestall a congressional investigation.²³⁰

²²³ Memorandum from James H. Rowe, Jr., Admin. Assistant to Franklin D. Roosevelt, to Missy LeHand, Sec’y to Franklin D. Roosevelt (Jan. 6, 1941), in ROWE PAPERS, *supra* note 213, box 13.

²²⁴ James D. Secret, *McNinch Seeks FCC “Purge,” White Charges*, WASH. POST, Feb. 17, 1939, at 2.

²²⁵ S. 1268, 76th Cong. (1939); James H. Rowe, Jr., Admin. Assistant to Franklin D. Roosevelt, to Missy LeHand, Sec’y to Franklin D. Roosevelt (Jan. 6, 1941), in ROWE PAPERS, *supra* note 213, box 13; James H. Rowe, Jr., Admin. Assistant to Franklin D. Roosevelt, to Franklin D. Roosevelt, President (Apr. 20, 1939), in *id.*; *Roosevelt Seeks Laws Revising FCC*, N.Y. TIMES, Jan. 25, 1939, at 12; *The President’s Proposal for Reorganization of the Federal Communications Commission*, 3 FED. COMM. B.J. 8–9 (1939); James D. Secret, *McNinch Seeks FCC “Purge,” White Charges*, WASH. POST, Feb. 17, 1939, at 2 (discussing White’s prior bill proposals and intention to introduce a competing proposal to Wheeler’s bill).

²²⁶ *Resignation of Sykes Accepted*, AUSTIN AMERICAN, Mar. 11, 1939, at 7.

²²⁷ *Commissioner Sykes Deemed Certain to Resign to Enter Private Practice; Letter to President Not Yet Dispatched*, TELECOM. REP., Mar. 8, 1939, at 4–5, 18; *Push Radio Inquiry in Spite of Turmoil*, DES MOINES REGISTER, Mar. 30, 1939, at 13.

²²⁸ Ray Tucker, *News Behind the News*, SANTA CRUZ EVENING NEWS, Mar. 9, 1939, at 12.

²²⁹ See Mallon, *supra* note 214, at 3 (reporting on the expected resignation of Chairman McNinch and possible successors); *McNinch, Ill Since April 1, Seeks to Quit*, WASH. POST, Jul. 26, 1939, at 3.

²³⁰ See Richard Wilson, *Push Radio Inquiry in Spite of Turmoil*, DES MOINES REG., Mar. 30, 1939, at 13 (describing F.D.R.’s attempt to push legislation to reorganize the FCC when faced with another possible investigation of the agency).

This time Roosevelt needed a stronger chairman than Frank McNinch. He would have to have the antimonopoly credentials to satisfy Burton Wheeler, the political shrewdness to maneuver in a thoroughly partisan environment, and the toughness to stand up to attacks from the broadcast networks' well-financed lobbyists. Even then, the chairman would probably fail unless he had a strong and dedicated legal staff that could ensure the accuracy of the Commission's records and the fidelity of the staff to the Commission's new policies. As it happened, Corcoran knew just the man.²³¹

VIII. A NEW DEAL FOR THE FCC

The New Deal finally came to radio on September 1, 1939, the day Germany invaded Poland and James Lawrence Fly became chairman of the FCC. "Larry" Fly was born in 1898 into a rural community outside Dallas and a network of politically active cousins scattered across the Upper South, all descended from an adventurer who landed in Virginia in 1636.²³² He graduated from the U.S. Naval Academy in 1920, served in the Atlantic Fleet until 1923, and then attended the Harvard Law School, graduating in 1926 with a B average and the regard of Thomas G. Corcoran, who delighted in the Texan's tales of naval adventure.²³³ Fly worked for a time at a Wall Street law firm but then joined the antitrust staff of Herbert Hoover's Department of Justice.²³⁴ Although he labored mightily to succeed his boss John Lord O'Brien after Roosevelt's inauguration, the post went to a better connected but less able Democrat. Never one to defer to those he did not respect—J. Edgar Hoover

²³¹ See Thomas G. Corcoran, *Personalities Involved in the Resignation of Chairman McNinch* (n.d.), in *CORCORAN PAPERS*, *supra* note 8, box 197 (describing James Lawrence Fly's background and qualifications).

²³² *WHO'S WHO IN THE NATION'S CAPITAL*, *supra* note 99, at 296. For more biographical information, see Sigrid Arne, *New Boss of FCC, from TVA, Is 41 and 6 Feet 3; Has Gift of Gab, But Never Acquired Stuffed Shirt*, *CHATTANOOGA TIMES*, Sept. 6, 1939, at 5; Henry F. Pringle, *The Controversial Mr. Fly*, *SATURDAY EVENING POST*, Jul. 22, 1944, at 40–41; Sol Taishoff, *James L. Fly to Become Chairman of FCC*, *BROADCASTING*, Aug. 1, 1939, at 12. For information on Fly's cousins, see *New FCC Head Due to Visit Here Thursday*, *DALL. MORNING NEWS*, Aug. 16, 1939, at 8 (describing James L. Fly's visit to his brother, a county judge); Letter from B. H. Fly, Justice of the Peace, Precinct No. 1, to James Lawrence Fly (May 2, 1933), in *JAMES LAWRENCE FLY PAPERS*, box 2 (on file with the Rare Book & Manuscript Library, Columbia University, NY) [hereinafter *FLY PAPERS*] (describing B.H. Fly's correspondence with various attorneys and a former lieutenant governor).

²³³ James Lawrence Fly, *Curriculum Vitae* (n.d.), in *FLY PAPERS*, *supra* note 232, box 15; *Memorandum: Personnel Antitrust Division*, Jun. 19, 1933, in *STEPHENS PAPERS*, *supra* note 90, box 24.1.

²³⁴ James Lawrence Fly, *Curriculum Vitae*, *supra* note 233.

complained that the young lawyer had told an FBI agent that someone should “take me up a dark alley some night and give me the proper treatment, but that this event would never happen because I never went out alone”—Fly sought a job in one of the new agencies.²³⁵ With Corcoran’s help, he became General Counsel of the Tennessee Valley Authority, where he acquired a reputation as one of the New Deal’s toughest and most effective lawyers.²³⁶ A second bid to be Assistant Attorney General for the Antitrust Division in 1938 fell short when the job went to Thurman W. Arnold, but the following year Corcoran convinced Roosevelt that Fly was “the best man available” for the chairmanship of the FCC.²³⁷

Telford Taylor, whom Fly would soon hire as General Counsel, considered him the FCC’s “first really able chairman,” who set the Commission “on its feet and gave it a prestige and a reputation for being up and coming and grappling with problems that nobody’d ever done.”²³⁸ He could be very charming but also “very dominant and overbearing, if he chose to be.”²³⁹ He could “appear to lose his temper without really losing it—a very useful quality to have.”²⁴⁰ Another FCC lawyer remembered him as “brilliant, tough, honorable, and irascible”,²⁴¹ others considered him “a fearsome guy,” hard on all the lawyers appearing before the Commission but especially on his own.²⁴² Even so, his lawyers were proud of their work at Fly’s FCC, which they recalled as a period of “great activity, lots of pressures, and a pretty deft handling of the various problems as they arose from minute to minute and day to day”²⁴³ Paul Porter, CBS’s lawyer and then Fly’s successor, claimed the staff had “a kind of fierce faith in what Larry Fly was doing.”²⁴⁴

²³⁵ Letter from J. Edgar Hoover, Dir., Div. of Investigation, Dept. of Justice, to Harold M. Stephens, Assistant Att’y Gen., Dept. of Justice (Jan. 4, 1934), in STEPHENS PAPERS, *supra* note 90, box 243.

²³⁶ Drew Pearson & Robert S. Allen, *Washington Daily Merry-Go-Round*, UNITED FEATURE SYNDICATE, INC., Feb. 1, 1938, at 3, <https://auislandora.wrlc.org/islandora/object/pearson%3A25959#page/3/mode/1up>.

²³⁷ Joseph Alsop & Robert Kintner, *The Capital Parade*, ATLANTA CONST., Mar. 9, 1938, at 6; Corcoran, *supra* note 231, at 7.

²³⁸ *The Reminiscences of Telford Taylor*, *supra* note 211, at 55.

²³⁹ *The Reminiscences of Telford Taylor*, *supra* note 36, at 373.

²⁴⁰ *Id.*

²⁴¹ *The Reminiscences of Joseph L. Rauh* (Jul. 16, 1967), in FLY PROJECT, *supra* note 132, at 17.

²⁴² See *The Reminiscences of Harry Plotkin* (Dec. 27, 1967), in FLY PROJECT, *supra* note 132, at 1; *The Reminiscences of Benedict Peter Cottone* (Dec. 28, 1967), in FLY PROJECT, *supra* note 132, at 8.

²⁴³ *The Reminiscences of Peter Shuebruk* (Aug. 16, 1967), in FLY PROJECT, *supra* note 132, at 1–2.

²⁴⁴ *The Reminiscences of Paul Aldermandt Porter* (Jul. 13, 1967), in FLY PROJECT, *supra* note 132, at 10.

Even before taking office, Fly found ways to get FCC lawyers out from under the Civil Service.²⁴⁵ For example, the Communications Act allowed each commissioner to hire a secretary without regard to the civil service rules.²⁴⁶ For his, Fly chose Nathan David, a *magna cum laude* graduate of Yale College who finished fourth in his class at the Harvard Law School.²⁴⁷ Because the Civil Service Commission's registers for FCC lawyers were five years old, Fly repeated the dodge of hiring junior lawyers on a temporary basis until an executive order in 1941 changed the status of lawyers across the federal government.²⁴⁸ One way or another, Marcus Cohen (Chicago J.D. 1938, Harvard LL.M. 1940), Philip Elman (Harvard LL.B. 1939), Thomas Harris (Columbia LL.B. 1935), David Lloyd (Harvard LL.B. 1935), Lucien Hilmer (Harvard LL.B. 1931), Leo Resnick (Columbia LL.B. 1937), and Oscar Schachter (Columbia LL.B. 1939) were at work by the end of June 1940, albeit only after their appointments had been staggered so as not to confront the commissioners with too many Jewish surnames at once.²⁴⁹ Although they thought of themselves as a "new breed of lawyer," their kind had staffed other alphabet agencies since the start of the New Deal.²⁵⁰

Fly also made changes at the top of the Law Department. Dempsey and Koplovitz left in April 1940.²⁵¹ On Corcoran's recommendation, Fly named Telford Taylor as General Counsel.²⁵² The thirty-two-year-old had been an editor of the *Harvard Law Review*, clerked for the federal judge Augustus Hand, served on Jerome Frank's legal staff at AAA, and helped Corcoran and

²⁴⁵ Letter from James A. Barr to James Lawrence Fly (Aug. 11, 1939), in FLY PAPERS, *supra* note 232, box 3 (devising how to get attorney at the FCC out from under civil service).

²⁴⁶ 47 U.S.C. § 154(f) (2012).

²⁴⁷ *David Appointed Assistant to Fly*, BROADCASTING, Nov. 1, 1939, at 32.

²⁴⁸ See Letter from Oscar Cox to William J. Dempsey (Apr. 25, 1940), in OSCAR S. COX PAPERS, box 8 (on file with the Franklin D. Roosevelt Library, Hyde Park, NY) (relaying the intent to potentially resolve hiring issues with executive orders, Exec. Order No. 8743, 6 Fed. Reg. 2117 (Apr. 25, 1941)).

²⁴⁹ FCC, Press Release, Additions to Legal Staff (Jul. 17, 1940), in FCC RECORDS, *supra* note 36, entry 100A, box 9 (listing Marcus Cohn, Philip Elman, Lucien Hilmer, Leo Resnick, and Oscar Schachter as recent additions to the legal staff); *David Lloyd, Truman Aide*, COURIER-NEWS, Dec. 13, 1962, at 10 (recounting David Lloyd's accomplishments at his death); 1 MARTINDALE-HUBBELL LAW DIRECTORY 360 (86th ed. 1954) (providing an education history for Leo Resnick); *The Reminiscences of Marcus Cohn* (Jul. 31, 1967), in FLY PROJECT, *supra* note 232, at 15 (recalling a suggestion to implement a strategy of staggering appointments of lawyers with Jewish names).

²⁵⁰ Cottone, *supra* note 242, at 2 (discussing the cultural shift at the FCC from its formation to the New Deal in relation to the types of lawyers employed).

²⁵¹ FCC, Press Release, Joseph L. Rauh, Jr., Appointed Assistant General Counsel (May 8, 1940) in FCC Records, *supra* note 36, entry 100A, box 9.

²⁵² *The Reminiscences of Telford Taylor*, *supra* note 36, at 367-68.

Cohen draft the Securities and Exchange Act of 1934.²⁵³ He was stuck in a tedious investigation of railroads' financial practices headed by Burton Wheeler when the FCC job provided an escape.²⁵⁴ To take Koplovitz's place as "first" Assistant General Counsel, charged with resolving difficult legal questions and clarifying matters of policy, Taylor chose Joseph Rauh, who had led his class at the Harvard Law School, clerked for Cardozo and Frankfurter, helped Corcoran and Cohen defend the Public Utility Holding Company Act, and worked at the Wage and Hour Division of the Department of Labor.²⁵⁵ Rauh had very able lieutenants in Harry Plotkin (Harvard LL.B. 1937), Schachter, and a third recruit, Seymour Krieger (Yale LL.B. 1938), who did much of the work on a long-awaited report on the monopoly power of broadcast networks.²⁵⁶ Philip Elman, assigned to the Broadcast Division while

²⁵³ FCC, Press Release, Telford Taylor Appointed General Counsel (May 6, 1940); *The Reminiscences of Telford Taylor*, *supra* note 36, at 181, 183 in FCC Records, *supra* note 36, entry 100A, box 9.

²⁵⁴ *The Reminiscences of Telford Taylor*, *supra* note 36, at 197–201, 367–70; Letter from Felix Frankfurter to Telford Taylor (Jan. 29, 1937), in FF-LC, *supra* note 196, reel 65. FCC, Press Release, Telford Taylor Appointed General Counsel (May 6, 1940) (announcing Telford Taylor's appointment to the General Counsel position at the FCC and describing his prior legal experience) in FCC RECORDS, *supra* note 36, entry 100A, box 9; *The Reminiscences of Telford Taylor*, *supra* note 36, at 181, 183, 197–201, 367–70; (discussing Taylor's role in drafting the Securities and Exchange Act of 1934 and his later entrance into the FCC); Letter from Felix Frankfurter to Telford Taylor (Jan. 29, 1937), in FF-LC, *supra* note 196, reel 65 (relating Frankfurter's impression of the uniquely complicated case Telford was working on). Taylor is perhaps best known as the chief American prosecutor at Nuremberg after 1945. Jonathan A. Bush, *Telford Taylor*, in YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 539–40 (Roger K. Newman ed., 2009) (describing the trajectory of Taylor's career).

²⁵⁵ MICHAEL E. PARRISH, *CITIZEN RAUH: AN AMERICAN LIBERAL'S LIFE IN LAW AND POLITICS* 18–52 (2010) (delineating Joseph Rauh's life starting at childhood through his time as a Washington lawyer); *The Reminiscences of Telford Taylor*, *supra* note 36, at 369–70 (reflecting on the decision-making process in Rauh's appointment to Deputy Assistant General Counsel).

²⁵⁶ See *The Reminiscences of Telford Taylor*, *supra* note 36, at 390–91, 419 (contrasting the youthful makeup and personality of the section with the "old-line civil servants . . . in the other two sections"); *The Reminiscences of Telford Taylor*, *supra* note 211, at 15 (discussing the team that jointly wrote FCC regulations); *The Reminiscences of Joseph L. Rauh*, *supra* note 241, at 9–10 (recalling his time working with colleague Seymour Krieger); MARTINDALE-HUBBELL LAW DIRECTORY, *supra* note 249, at 341 (listing Seymour Krieger and his educational history). Dempsey had somehow managed to hire Plotkin and another very able lawyer, Benedict Cottone, to assist Koplovitz. Telford Taylor thought Plotkin "much the brighter" and Cottone "the more steady in an administrative way" and kept both on. *The Reminiscences of Telford Taylor*, *supra* note 36, at 390; *Lawyer Harry Plotkin Dies; Argued "Seven Dirty Words" Case*, WASH. POST (Jan. 31, 1998), <https://www.washingtonpost.com/archive/local/1998/01/31/lawyer-harry-plotkin-dies/74797cc2-052c-4b88-b5f9-94c6c2fbc24/>; Cottone, *FCC Attorney with Experience in Other Agencies, Is Leading Possibility To Be Assistant General Counsel*, TELECOM. REP. 4 (Jun. 12, 1941) (announcing Benedict Cottone as the probable leading candidate for the assistant general counsel position).

awaiting a clerkship with Justice Frankfurter, dispatched his assignments so quickly that he had plenty of time to complete “odd jobs for Joe Rauh,” including researching Roosevelt’s speeches.²⁵⁷ Taylor installed his college and law school classmate Lucien Hilmer as Assistant General Counsel in charge of the Broadcast Division in the summer of 1940 and replaced the politically well-fortified Kennedy with Benedict Cottone (Yale LL.B. 1933) atop the Telephone Division the following year.²⁵⁸

Thanks to what Cottone called this “great infusion of new blood,” the Law Department became the vanguard of an ambitious and aggressive FCC.²⁵⁹ Fly believed his agency “should deal with the big and the fundamental things,” one of his lawyers recalled. “[T]he little licensee who did something or didn’t do something, carried too many commercial spot announcements or didn’t carry enough public service programs—so what?”²⁶⁰ Thus, although Fly redesigned the hearing room to make it more court-like and created an investigation unit to check up on radio lawyers’ dubious factual claims, his commission also lengthened the duration of licenses to a year and dispensed with hearings for renewals and transfers.²⁶¹

The streamlining of licensing procedures allowed Fly to concentrate on more sweeping measures. His principal concern at the start of his chairmanship was the monopolization of the airwaves.²⁶² The Communications Act of 1934

²⁵⁷ NORMAN I. SILBER, WITH ALL DELIBERATE SPEED: THE LIFE OF PHILIP ELMAN 60–63 (2007) (discussing Philip Elman’s experience in the FCC early in his career).

²⁵⁸ *FCC Assistant General Counsel Porter Resigns to Enter Private Law Practice*, TELECOM. REP., Jul. 31, 1940, at 6; *The Reminiscences of Lucien Hilmer* (Sept. 16, 1967), in FLY PROJECT, *supra* note 132, at 2, 39; *James A. Kennedy, FCC Assistant General Counsel in Charge of Communications, Resigns to Become General Counsel of I. T. & T. Cable and Radiotelegraph Operating Companies*, TELECOM. REP., Jun. 4, 1941, at 6.

²⁵⁹ *The Reminiscences of Benedict Peter Cottone*, *supra* note 242, at 2.

²⁶⁰ *The Reminiscences of Marcus Cohn*, *supra* note 249, at 7.

²⁶¹ *FCC Hearing Room Undergoes Streamlining*, WASH. EVENING STAR, Nov. 4, 1939, at A-4 (describing the changes Fly made to the hearing room to make it more like a court room, which included the removal of desks, the addition of a long curved bench, and the placement of soundproof material on the ceilings); *FCC Sets Up Investigation Unit Under David Lloyd*, NAB REP., Jul. 26, 1940, in FLY PAPERS, *supra* note 232, box 30 (providing Fly’s reasoning for creating an investigation unit at the FCC); *The Reminiscences of Lucien Hilmer*, *supra* note 258, at 11 (noting the “serious doubts as to the propriety of renewing the licenses of” several stations); EDELMAN, *supra* note 24, at 36. Applicants denied licenses could demand hearings as a matter of right; intervenors could obtain them by petition. *Proposed Changes in the Communications Act of 1934: Hearings Before the Committee on Interstate and Foreign Commerce, House of Representatives*, 77th Cong., 779 (1942).

²⁶² Another battle was his successful opposition to RCA’s premature bid to impose standards for television. Mickie Edwardson, *Blitzkrieg Over Television: James Lawrence Fly v. David Sarnoff*, 25 JOURNALISM HIST. 42, 42–52 (1999) (discussing Fly’s accusation that the Radio

kept radio broadcasters subject to federal antitrust laws, but that had not prevented CBS and NBC from controlling 87 percent of night-time radio broadcasting.²⁶³ From November 1938 to May 1939, McNinch's FCC held seventy-three days of hearings on chain monopoly at which ninety-six witnesses testified, but it promulgated no rules during his tenure.²⁶⁴ Paul Porter dismissed the hearings as "a lot of self-serving declarations and economic information."²⁶⁵ In contrast, the *Report on Chain Broadcasting*, issued on May 2, 1941, hit hard. As Fly explained in a memo to the White House, "[t]wo men ([NBC's David] Sarnoff and [CBS's William] Paley) can say what more than half of the people may or may not hear. . . . Democracy cannot rest upon so frail a reed."²⁶⁶ The report required NBC to sell one of its two networks, reduced the maximum length of affiliation contracts, and limited "option time," claimed by networks for their own programming. The networks won a concession on option time but still fought the rules all the way up to the U.S. Supreme Court.²⁶⁷ There the FCC ultimately prevailed, in an opinion by Justice Felix Frankfurter.²⁶⁸

Corporation of America was attempting to achieve a monopoly by failing to include a warning in advertisements of possible obsolescence); SUSAN L. BRINSON, *THE RED SCARE, POLITICS, AND THE FEDERAL COMMUNICATIONS COMMISSION, 1941–1960*, at 36–40 (2004) (explaining the context behind the FCC's refusal to establish transmission standards for television in 1940).

²⁶³ Communications Act of 1934, Pub. L. No. 73-416, § 313, 48 Stat. 1064, 1087 (1934); Mickie Edwardson, *James Lawrence Fly's Report on Chain Broadcasting (1941) and the Regulation of Monopoly in America*, 22 *HIST. J. FILM, RADIO & TELEVISION* 397, 410 (2002) ("Fly said the large networks competed with each other only weakly and robbed stations of freedom over programming. 'Two New York corporations', he said, controlled 86.6% of nighttime radio power, and were 'footy-footy' with each other.").

²⁶⁴ Edwardson, *supra* note 263, at 399.

²⁶⁵ *The Reminiscences of Paul Aldermandt Porter*, *supra* note 244, at 27.

²⁶⁶ Memorandum on Radio Broadcasting Monopoly from James Lawrence Fly to Harry S. Truman, President (May 5, 1941), in *ROWE PAPERS*, *supra* note 202.

²⁶⁷ See Edwardson, *supra* note 263, at 411 (discussing the three ways in which the FCC softened the rules in October 1941 after listening to networks' objections the prior summer); ERIK BARNOUW, *THE GOLDEN WEB: A HISTORY OF BROADCASTING IN THE UNITED STATES 1933–1953*, at 168–74 (1968) (explaining the struggle between networks and the government fought between 1941 and 1943); VICTOR W. PICKARD, *AMERICA'S BATTLE FOR MEDIA DEMOCRACY: THE TRIUMPH OF CORPORATE LIBERTARIANISM AND THE FUTURE OF MEDIA REFORM* 51–55 (2015) (exploring the fallout following the release of the *Report on Chain Broadcasting*).

²⁶⁸ *Nat'l Broad. Co. v. United States*, 319 U.S. 190 (1943). Earlier, Frankfurter invited Fly to engage in "unfettered exchange" about the FCC. Letter from Felix Frankfurter to James Lawrence Fly, Jun. 3, 1940, in *FLY PAPERS*, *supra* note 232, box 1. Fly sent the Justice a copy of the chain monopoly report soon after its issuance. Letter from Felix Frankfurter to James Lawrence Fly, May 27, 1941, in *id.* A retrospective blamed poor enforcement by Fly's successors for their

Fly also deftly handled a presidential desire with authoritarian overtones. Newspaper ownership of radio stations grew dramatically during the 1930s, from 6 percent in 1930 to 31 percent in 1939.²⁶⁹ In nearly 100 locales, a newspaper owned the only radio station.²⁷⁰ Meanwhile, Roosevelt became convinced that most newspaper publishers were arrayed against him. Only 41 percent of daily newspapers editorialized in favor of his election in 1932, only 37 percent did in 1936, and only 25 percent did in 1940.²⁷¹ He found newspaper coverage of the Social Security Act, the National Labor Relations Act, and other legislative landmarks of 1935 particularly galling. After his reelection, he apparently had his aides inform the FCC of his opposition when a newspaper he considered an egregious culprit applied for a license.²⁷² In early 1939, his Secretary of the Interior Harold Ickes, a member of an increasingly vocal anti-monopoly faction within the administration, attacked the press as “America’s House of Lords.”²⁷³ And in May 1939, Roosevelt himself released an interview in which he attacked newspapers and declared that “only through the radio is it possible to overtake loudly proclaimed truths or greatly exaggerated half truths.”²⁷⁴

Neither the FCC nor Congress rushed to support him. In January 1937, then-General Counsel Hampson Gary opined that the FCC lacked the power to adopt a ban under the Communications Act of 1934.²⁷⁵ A pro-administration congressman promptly introduced a bill forbidding newspaper and magazine publishers from owning radio stations, but neither that measure nor a similar bill introduced in 1939 escaped committee.²⁷⁶

minimal impact on the radio industry. *See generally* *The Impact of the FCC’s Chain Broadcasting Rules*, 60 *YALE L.J.* 78 (1951).

²⁶⁹ STAMM, *supra* note 52, at 195 (outlining newspaper ownership of American broadcasting stations).

²⁷⁰ Memorandum on Newspaper Ownership of Radio Stations from James Lawrence Fly to James H. Rowe, Jr. (Dec. 23, 1940), in *ROWE PAPERS*, *supra* note 213, box 13; *see also* STAMM, *supra* note 52, at 195 (outlining newspaper ownership of American broadcasting stations).

²⁷¹ BETTY HOUCHE WINFIELD, *FDR AND THE NEWS MEDIA* 127–28 (1990).

²⁷² STAMM, *supra* note 52, at 93–95.

²⁷³ *Id.* at 103–05. On the New Deal’s antimonopoly turn, consult ALAN BRINKLEY, *THE END OF REFORM: NEW DEAL LIBERALISM IN RECESSION AND WAR* 106–136 (1995).

²⁷⁴ *A Radio Interview of the Government Reporting Factually to the People* (May 9, 1939), in *FRANKLIN DELANO ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* no. 76, at 309 (1941).

²⁷⁵ STAMM, *supra* note 52, at 96–97 (explaining the context behind, and response to, Hampson Gary’s memorandum to Montana Senator Burton Wheeler on expanding the FCC’s power under the Communications Act of 1934).

²⁷⁶ *See* H.R. Res. 3892, 75th Cong. (1937); STAMM, *supra* note 52, at 98–99.

Roosevelt, it seems clear, expected Fly to act without waiting for Congress. As reported years later by Rowe, Fly claimed that Roosevelt had asked him to pursue a ban, even though the president could not back him publicly. If Fly “got in trouble,” he would be on his own.²⁷⁷ But Fly’s top priority was the chain monopoly fight, and he did not want to jeopardize it by starting a brawl with the press. Apparently, Roosevelt also decided not to give the publishers an additional reason to accuse him of harboring dictatorial aspirations as he sought a third term. A month after his reelection in November 1940, however, Roosevelt pointedly asked Fly for an update.²⁷⁸ The FCC chairman replied that although there should be “as many *independent* channels of information and communication as possible,” he needed time to plan hearings on the issue, lest they seemed motivated by “punitive political considerations towards the press.”²⁷⁹

Rumor had it that Fly “did not really agree” with a press-radio ban.²⁸⁰ Still, in March 1941, his FCC put a hold on FM licenses to newspapers pending hearings on what policies or rules, “if any,” were necessary.²⁸¹ When the hearing convened in July 1941, Fly announced that the FCC would proceed in a “spirit of *fact-finding*.”²⁸² He and his commissioners had not decided that a rule was needed or, if so, whether it should come from the FCC or Congress.²⁸³ Between July and December 1941, the FCC devoted seventeen days to hearings but then adjourned them without acting but also without lifting the hold on FM licenses. Thereafter, the election of an anti-New Deal Congress in

²⁷⁷ *The Reminiscences of James Rowe* (Aug. 1, 1967), in FLY PROJECT, *supra* note 132, at 2. Roosevelt’s daily calendar lists meetings with Fly on September 18, October 13, 23, and 30, 1939, as well as December 21, 1939 and October 10 and November 11, 1941. *Calendar, DAY BY DAY: A PROJECT OF THE PARE LORENTZ CENTER AT THE FDR PRESIDENTIAL LIBRARY*, <http://www.fdrlibrary.marist.edu/daybyday/> (last accessed Mar. 30, 2019). In another oral history, Fly’s successor claimed that Roosevelt was “constantly putting the blowtorch on Larry” to ban newspaper ownership. *The Reminiscences of Paul Aldermandt Porter*, *supra* note 244, at 18.

²⁷⁸ Memorandum from Franklin D. Roosevelt to James Lawrence Fly (Dec. 3, 1940), in FLY PAPERS, *supra* note 232, box 1.

²⁷⁹ Memorandum on Newspaper Ownership of Radio Stations, *supra* note 270, at 1–2. See also Memorandum on Radio Press Hearing from James H. Rowe, Jr., to Franklin D. Roosevelt (Jan. 4, 1941), in ROWE PAPERS, *supra* note 213, box 13 (emphasis added) (replying to FDR’s request for an update).

²⁸⁰ Pringle, *supra* note 232, at 41.

²⁸¹ FCC, High Frequency Broadcast Stations, 6 Fed. Reg. 1580 (Mar. 22, 1941). See also STAMM, *supra* note 52, at 108–45 (describing the FCC’s newspaper-radio investigation); BRINSON, *supra* note 262, at 44–47 (summarizing the FCC hearings to review newspaper ownership of radio stations); PICKARD, *supra* note 267, at 45–51 (explaining the FCC’s investigation of newspaper-owned radio).

²⁸² Statement by Chairman James Lawrence Fly at Opening of FCC Radio-Press Hearing (Jul. 23, 1941), at 3, in FLY PAPERS, *supra* note 232, box 26 (emphasis added).

²⁸³ *Id.*

November 1942 and the antics of an outrageously partisan congressional investigation, convened in July 1943 and headed by Eugene Cox, made a ban was, as Rauh put it, “too much even for Larry Fly.”²⁸⁴ In January 1944, the FCC announced it would adopt no special rule for newspaper ownership, “in light of the record in this proceeding and of the grave legal and policy questions involved.”²⁸⁵ Instead, it would continue to apply “the general principle that diversification of control of [the] media is desirable.”²⁸⁶

World War II brought new responsibilities, pressure from the Department of Justice to engage in wiretapping, congressional red-baiting of FCC employees, and the harassment of the Cox Committee.²⁸⁷ Still, during his five years as chairman, Fly, assisted by his very able lawyers, made the FCC an independent and powerful force against concentrated power in the media.

IX. FROM THE SHALLOW STATE TO THE DEEP STATE?

Franklin D. Roosevelt won the Democratic nomination for president in 1932 by excelling at rather than disrupting existing political practices.²⁸⁸ In his first term, he did not renounce the patronage politics that got him elected. To be sure, he named more university professors and elite professionals to federal jobs than had his predecessors, but he also appointed many seasoned politicians whose support he needed in Congress and to win reelection in 1936.²⁸⁹ His staffing of the AAA, the National Recovery Administration, and other new agencies did lead to complaints that “the faithful office holders of yesterday have been forced to take a back seat and make room for the bright young men from Harvard and Columbia,” but those appointments still left plenty of other jobs and patronage for the party faithful.²⁹⁰ To service this constituency, then, Roosevelt initially left the FCC becalmed within the Shallow State, subject to repeated boardings by marauding bands of politicians, network lobbyists, and radio lawyers.

²⁸⁴ *The Reminiscences of Joseph L. Rauh*, *supra* note 241, at 10.

²⁸⁵ Newspaper Ownership of Radio Stations: Notice of Dismissal of Proceeding, 9 Fed. Reg. 702 (Jan. 18, 1944).

²⁸⁶ *Id.* at 703.

²⁸⁷ See STAMM, *supra* note 52, at 136–38 (describing Cox’s investigation of the FCC); GRISINGER, *supra* note 97, at 118–21 (reporting on the negative reaction to Cox’s investigation); see generally Mickie Edwardson, *James Lawrence Fly, the FBI, and Wiretapping*, 61 THE HISTORIAN 361–80 (1999) (discussing Fly’s involvement in wire-tapping controversies); BRINSON, *supra* note 262, at 69–87.

²⁸⁸ See generally DONALD A. RITCHIE, ELECTING FDR: THE NEW DEAL CAMPAIGN OF 1932 (2007).

²⁸⁹ See JOHN FRANKLIN CARTER, THE NEW DEALERS: POWER POLITICS IN THE AGE OF ROOSEVELT 270–306 (1934); FRANK FREIDEL, FRANKLIN D. ROOSEVELT: LAUNCHING THE NEW DEAL 159 (1973) (describing the political considerations behind FDR’s cabinet appointments).

²⁹⁰ “Cold Clammy Hand,” JEFFERSON CITY POST-TRIBUNE, Oct. 26, 1933, at 8.

During much of his second term, however, Roosevelt, angry with Congressional Democrats for opposing his Court-packing plan, experimented with governing through a network of lawyers and other executive branch officials.²⁹¹ Cleaning up the FCC now struck him as good politics. He gave Corcoran leave to try, but the FCC's old-line Law Department was not up to the task.²⁹² Only after Fly, a member of the legal network, became chairman and appointed aggressive, able, and ambitious lawyers to the Law Department did FCC set sail.²⁹³ Congressmen did not stop calling, but their intercessions counted for less during Fly's chairmanship than they did during those of his predecessors in the 1950s.²⁹⁴

If Fly's "shock troops" rescued the FCC from the Shallow State, did they imperil liberal democracy in the process? Scholars of "competitive authoritarianism" have observed that "[d]iscretionary economic power furnishes incumbents with powerful tools to compel compliance and punish opposition."²⁹⁵ Media licenses have been among the most effective of these "economic policy levers," and they offer would-be authoritarians the additional advantage of controlling the flow of information to the populace.²⁹⁶ Did FDR contemplate putting Fly's FCC to authoritarian ends? If so, did the chairman and his lawyers abet or resist their president? And if Fly's FCC heeded neither patronage-hungry congressmen nor Roosevelt's occasional authoritarian impulses, did they pursue their own agenda, like the shadowy conspirators of Deep State theorists' fever dreams?

²⁹¹ MILKIS, *supra* note 131, at 98-146; PLOTKE, *supra* note 131.

²⁹² Stanley High, *Not-So-Free Air*, SATURDAY EVENING POST, Feb. 11, 1939, 77 (Corcoran's influence at FCC); Joseph P. Lash, DEALERS AND DREAMERS: A NEW LOOK AT THE NEW DEAL 289-90 (1988) (describing Corcoran's relationship with Roosevelt).

²⁹³ Letter from Thomas G. Corcoran, Reconstruction Finance Corporation, to James Lawrence Fly, Solicitor, Tennessee Valley Authority, Oct. 4, 1934, in CORCORAN PAPERS, *supra* note 8, box 197 (recommending lawyers); Corcoran, Personalities Involved in the Resignation of Chairman McNinch, *supra* note 231; Monica Lynne Niznik, *supra* note 133 (noting Corcoran's placement of lawyers at FCC).

²⁹⁴ See Taylor, *supra* note 211, at 43 (describing the common intervention by Congressmen and political appointments at the FCC); Memorandum from James H. Rowe, Jr., Admin. Assistant to President Franklin D. Roosevelt, to Franklin D. Roosevelt, President, United States (Jan. 14, 1941), in ROWE PAPERS, *supra* note 213, box 13 (noting that there was "considerably less political maneuvering for favors than ever before" at the FCC under Fly). Porter called the FCC of the 1950s "the whorehouse regime." Interview with Paul A. Porter, Founding Partner, Arnold, Fortas & Porter (May 10, 1973) in INSPIRE RECORDS, *supra* note 176. He claimed his firm, Arnold, Fortas & Porter, considered dropping its radio practice because matters "were not 'tried' but 'arranged'" at the commission. *Id.* Many others thought so as well. GRISINGER, *supra* note 97, at 240-42.

²⁹⁵ STEVEN LEVITSKY & LUCAN A. WAY, COMPETITIVE AUTHORITARIANISM: HYBRID REGIMES AFTER THE COLD WAR 66-67 (2010).

²⁹⁶ *Id.*

The answer to each question, it seems, is no. First, although FDR did pursue a ban on newspaper ownership of radio stations, his interest in individual licensing hearings was sporadic and idiosyncratic. The tangential involvement of one of his sons apparently did prompt a White House inquiry into a dispute over New York City's WMCA.²⁹⁷ Roosevelt also instructed Rowe to "get a stopper with Fly" on any move against the University of Georgia's license,²⁹⁸ and he interceded on behalf of a hard-pressed station in Poughkeepsie, "not as President of the United States, but as a citizen of Dutchess County!"²⁹⁹ But the FCC only occasionally figured in his political calculations, and it figured in them even less as he readied the nation for war. Rowe appreciated this when he reminded his boss that if he did not back Fly he could expect to be "harassed day in and day out with the interminable details of what in these times is an unimportant struggle from the point of view of the President."³⁰⁰

Second, although Fly was, in Rowe's estimation, "the most loyal supporter the President has," he did not let loyalty keep him from slowing FDR's pursuit of the press-radio ban or from challenging the influence of the president's confidantes.³⁰¹ For example, to circumvent press secretary Stephen Early and another journalist temporarily ensconced in the White House, Fly rushed the release of the chain monopoly report after getting Corcoran to elicit what Fly could plausibly characterize as FDR's approval.³⁰² Fly's forceful

²⁹⁷ See *Statement Before the H. Select Comm. to Investigate the Federal Commc'ns Comm'n*, 78th Cong. (1943) (Norman S. Case, statement), in COX COMMITTEE RECORDS, *supra* note 118, 58–59. After initially expressing interest through an aide, Roosevelt later informed the Commission that it should feel free to award the license as it saw fit. *Id.* at 59. Rowe thought the matter "harmless enough" but conceded "it looks like the devil." Memorandum from James H. Rowe, Jr., Admin. Assistant to President to Franklin D. Roosevelt, to Missy LeHand, Secretary to Franklin D. Roosevelt (May 29, 1941), in PRESIDENT'S SECRETARY'S FILES, box 164 (on file with the Franklin D. Roosevelt Library) [hereinafter referred to as PSF]. See also Frank Adams, *WMCA Quiz Secrecy Hits as Scandal*, N.Y. DAILY NEWS, Nov. 29, 1944, at 33 (accusing the White House and FCC of "obstruction, intimidation, and underhanded tactics"); *The Reminiscences of Telford Taylor*, *supra* note 36, at 436–42, 445–46 (describing the WMCA incident and inquiry).

²⁹⁸ Letter from Stephen T. Early, Presidential Press Secretary, to James H. Rowe, Jr., Sept. 10, 1941 in ROWE PAPERS, *supra* note 202, box 13.

²⁹⁹ Memorandum from Franklin D. Roosevelt, President, United States, to James Lawrence Fly, Chairman, FCC (Apr. 23, 1941), in OF, *supra* note 37, number 136.

³⁰⁰ Memorandum from James H. Rowe, Jr., Admin. Assistant to Franklin D. Roosevelt, to Franklin D. Roosevelt, President, United States (May 29, 1941), in PSF, *supra* note 297, box 164.

³⁰¹ Memorandum from James H. Rowe, Jr., Admin. Assistant to Franklin D. Roosevelt, to Missy LeHand, Secretary to Franklin D. Roosevelt (May 16, 1941), in PSF, *supra* note 297, box 164.

³⁰² See PARRISH, *supra* note 255, at 53 (describing how Fly, fearing the report would be watered down, lied to FDR by stating that the report had already been set in type though it

congressional testimony against the Department of Justice's request for broader statutory power to wiretap earned him a rebuke from Roosevelt that left him scrambling to explain how, as Rauh ruefully put it, he could "commit treason without fault."³⁰³

Third, although the radio industry complained that the FCC went "beyond any powers conferred in the law," Fly and his shock troops carefully gauged and stayed within the statutory and political limits set by Congress.³⁰⁴ When attacking the networks or opposing wiretapping, they could point to specific provisions of the Communications Act of 1934 rather than simply the "public convenience, interest, or necessity" standard.³⁰⁵ They also declined to adopt a press-radio ban that lacked congressional support.³⁰⁶ The Cox Committee did accuse the FCC of "arrogating to itself the determination of matters of legislative policy resting solely within the competency of Congress," but even Louis Caldwell thought this charge baseless.³⁰⁷ Fly and his legal lieutenants retained influential allies on Capitol Hill. Telford Taylor remained close to his former boss, Burton Wheeler, who had urged the FCC to complete the chain monopoly report and defended the FCC's rulemaking authority.³⁰⁸ Hatton Sumners, chair of the House Judiciary Committee, was Fly's congress-

was not actually completed until hours later); *The Reminiscences of Joseph L. Rauh*, *supra* note 241, at 5–7 (same); Memorandum from James H. Rowe to Missy LeHand, *supra* note 301 (explaining that following FDR's inquiry, Rauh and Taylor rapidly completed the report and rushed the FCC to approve it).

³⁰³ PARRISH, *supra* note 255, at 54–55. See also Edwardson, *supra* note 263, at 363–68; Rauh, *supra* note 244, at 18–20.

³⁰⁴ Memorandum from Mark Etheridge, Journalist, Louisville Courier-Journal, to Unknown Recipient 1 (Apr. 5, 1941), in ROWE PAPERS, *supra* note 213, box 13, at 1.

³⁰⁵ See Communications Act of 1934, Pub. L. No. 73–416, 48 Stat. 1064, §§ 313, 314, 605 (1934) (stating that antitrust laws apply to radio-related interstate commerce, prohibiting anticompetitive behavior in the communications industry, and outlawing the unauthorized publication of communications, respectively). Rowe may have been parroting Fly when he told Roosevelt that although Congress had "set no standards for the Commission to follow," a new statute would probably be even more ambiguous. Memorandum from James H. Rowe, Jr., Admin. Assistant to Franklin D. Roosevelt, to Franklin D. Roosevelt, President (July 25, 1941), in ROWE PAPERS, *supra* note 213, box 13, at 2. "[A]s a practical legislative matter," Rowe explained, "it is impossible today to get a well-drafted law which would really regulate." *Id.*

³⁰⁶ STAMM, *supra* note 52, at 138, 142–43.

³⁰⁷ *Study and Investigation of the Federal Communications Commission: Hearings Before the H. Select Comm. to Investigate the Fed. Commc'ns Comm'n*, 78th Cong., 8 (1943) (statement of Eugene L. Garey, General Counsel, Select Committee to Investigate the FCC); STAMM, *supra* note 52, at 136–37.

³⁰⁸ *See To Authorize a Study of the Radio Rules and Regulations of Federal Communications Commission: Hearings Before the S. Comm. on Interstate Commerce*, 77th Cong. 472 (1941); Taylor, *supra* note 211, at 4, 20; *The Reminiscences of Telford Taylor*, *supra* note 36, at 418.

man and claimed to have known his “family intimately for forty years.”³⁰⁹ Another powerful Texan in the House, Majority Leader Sam Rayburn, protected Fly when a congressional investigation strayed into his personal life.³¹⁰ George Norris, the great progressive senator, praised Fly for his “unlimited courage” in “almost endless legal fights with the monopolists.”³¹¹

In sum, the history of the FCC in the mid-twentieth century suggests that an able, ambitious, and authoritative legal staff was not a threat to liberal democracy in the United States but was necessary for the public-regarding allocation and use of a valuable collective good. In the 1930s, the most pressing challenge was not an authoritarian in the White House but political parties centered in Congress and bound together by patronage, as well as the lobbyists and lawyers who served industry’s and politicians’ needs. In a milder and more localized form, radio regulation before Fly illustrates the point the political scientist Stephens Holmes made more generally for Russia after the dissolution of the Soviet Union: “state incapacity” can threaten liberal democratic values quite as thoroughly as can “despotic power.”³¹²

Today, a president more given to authoritarian impulses than Roosevelt occupies the White House, and his political party in Congress is less inclined to challenge him than were Democrats after the Court-packing plan. Further, President Trump has castigated the FCC for balking at a merger sought by one of his media supporters, and he has repeatedly denounced the media as “the enemy of the people.”³¹³ In such times, a point stated generally by Gillian

³⁰⁹ Letter from Hatton W. Sumners, Chairman, House Judiciary Comm., to Franklin D. Roosevelt, President, United States (Jan. 27, 1938), in FLY PAPERS, *supra* note 232, box 15.

³¹⁰ See TRESTMAN, *supra* note 9, at 75–80 (relating the circumstances behind the congressional investigation and noting that “Johnson and Rayburn successfully stopped [Congressman] Cox from asking Fly about [an “illicit love affair”] in the public hearings”); *The Reminiscences of Clifford Judkins Durr*, Commissioner, Fed. Commc’ns Comm’n (Sept. 17, 1967), in FLY PROJECT, *supra* note 132, 16–21.

³¹¹ Letter from George W. Norris, Senator, Neb., to Lloyd Thomas, Owner, Nebraska radio stations (Aug. 1, 1944), in FLY PAPERS, *supra* note 232, box 15.

³¹² See Stephen Holmes, *What Russia Teaches Us Now*, July–Aug. 1997 AM. PROSPECT 15, 15–19 (1998), <https://prospect.org/article/what-russia-teaches-us-now> [<https://perma.cc/LC L7-P4GV>].

³¹³ See Amber Phillips, *Sarah Sanders Presents the Official White House Policy: The Media Is the Enemy of the People*, WASH. POST (Aug. 2, 2018), https://www.washingtonpost.com/news/the-fix/wp/2018/08/02/sarah-sanders-presents-the-official-white-house-policy-the-media-is-the-enemy-of-the-people/?utm_term=.bb86faafd2a7 [<https://perma.cc/T8TS-YX 4Q>]; Eli Rosenberg, *Trump Said Sinclair ‘Is Far Superior to CNN.’ What We Know about the Conservative Media Giant*, WASH. POST (Apr. 3, 2018), https://www.washingtonpost.com/news/style/wp/2018/04/02/get-to-know-sinclair-broadcast-group-the-conservative-local-news-giant-with-a-growing-reach/?utm_term=.87095888c93d [<https://perma.cc/2SR Q-LZ3F>]; David Shepardson, *Trump Calls FCC Decision on Sinclair-Tribune Merger*

Metzger but illustrated particularly by the midcentury history of the FCC is especially apt. The very features of the administrative state that today's critics condemn, Professor Metzger observes, including "bureaucracy with its internal oversight mechanisms and expert civil service, are essential for the accountable, constrained, and effective exercise of executive power." Fly and his lawyers did not just, in Metzger's words, enable "effective governance"; they also "mitigate[d] the dangers of presidential unilateralism."³¹⁴ They illustrated how government lawyers can steer their agencies into channels that are neither shallow nor deep but liberal democratic.

'Unfair,' REUTERS (July 24, 2018, 8:59 PM), <https://www.reuters.com/article/us-tribune-media-m-a-sinclair-ma-trump/trump-calls-fcc-decision-on-sinclair-tribune-merger-unfair-id-USKBN1KF02J> [<https://perma.cc/HF2L-CCLU>].

³¹⁴ Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State under Siege*, 131 HARV. L. REV. 7 (2017).