

# The “Vast Wasteland” Speech Revisited

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It is fascinating to reread the “Vast Wasteland” speech—Newt Minow’s first major policy utterance as the “new frontiersman” assumed the helm at the Federal Communications Commission (“FCC” or “Commission”) over forty years ago. There are all sorts of themes from the speech to write about: how remarkable it is that a talk delivered in 1961 by an FCC Chairman should be recalled forty years later, let alone written about; the limited space it in fact devoted to the “vast wasteland” theme; and its cultural congruence with the Kennedy embrace of change in, and challenge to, the existing order that toppled segregation, launched the environmental movement, ultimately inspired the antiwar agitation, and revolutionized dress, music, morals, and culture generally. (Newt Minow may have had more in common with John Lennon than he realized.) Of course, this era followed after the comfortable (for most) conformism of Ike and the post-World War II era. I was tempted to write about these other topics but decided to discuss what the speech did not address but assumed—the framework of administrative law on which it was premised and which has become so radically undermined in the ensuing decades.

What I was about to learn about administrative law was to be taught to me by the redoubtable Professor Alex Bickel at Yale Law School. My early experience practicing before the FCC a couple of years later confirmed the administrative law principles that I had been taught. There were bad decisions, to be sure, but there was a common understanding of

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how administrative agencies were supposed to work, and one could evaluate their performance (in fact the performance of all three parts of the process—Congress and the courts, as well as the FCC) against this common set of well-understood and, for the most part, well-accepted principles.

Back then the conventional wisdom was that Congress enacted broad principles and policy objectives; the agency used its expertise to flesh them out in roughly equal measure via specific rulemakings and adjudications; and the courts deferred to the agency's implementation of these principles and policy objectives, unless the agency's decisions were adopted pursuant to faulty procedures or were clearly wrong. Since then, a strong case can be made that all three branches of government have deviated substantially from their historic and intended roles and that this is as important a change from the era of the wasteland speech as any of the topics it specifically addressed.

### CONGRESS

Both formally (in legislation) and increasingly informally (through letters, meetings between staffs, and phone calls), Congress is taking positions on very narrow communications issues which, under old administrative law concepts, it should leave to the decision-making of the expert agency, subject, of course, to Congress's general oversight. This has spawned the quite remarkable countertrend of the FCC leaving certain decisions to Congress. A case in point is the FCC's long reluctance to take the steps necessary to implement the digital television transition, despite direction from Congress in 1992 and 1996, and its relegation to Congress to undertake the task of implementation. And because it understandably lacks expertise as to the details, Congress can be less than clear in these circumstances. Thus, the Telecommunications Act of 1996 generated the rather odd outcome of two sets of Congressmen litigating in court against each other over the meaning of the same provisions—provisions that they themselves had enacted.<sup>1</sup> This anecdote suggests that Congress tried to go too far into the details and, as a result, passed a confusing statute, whereas Congress should have adopted broad principles and left the specifics to the FCC.

Further evidencing a weakening confidence in the administrative agency process, Congress has also burdened the FCC with all sorts of procedural requirements: analysis of the impact of its actions on small

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1. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

businesses; the Regulatory Flexibility Act;<sup>2</sup> analysis of the time required by private entities to comply with FCC requirements; clearance of new FCC forms by the Office of Management and Budget; and the Sunshine Act, which bars more than two commissioners from conferring privately on issues. The latest congressionally imposed mechanism for policing the agency is the Biennial Review process, which a three-judge panel recently described in oral arguments as “absurd,” “ridiculous,” and “lacking in sense.”<sup>3</sup> Many, including Commission personnel, moan about the FCC’s reversal record in court, but some responsibility may lie with Congress and, as we shall see, with the courts themselves.

### THE COURTS

Recent court decisions reviewing FCC actions reflect a mood toward the agency process that might be described as sour. Even when not stated expressly, a fair reading of various court opinions reveals frustration, disillusionment, and confusion over how the administrative process is working. Although the criticism is most often directed at the hapless agency, Congress, as noted above, is sometimes its target. As with Congress, there is a sense that the courts have lost confidence in the process; the concept of the agency’s partnering with the other two branches of the government (the FCC and Congress) to make the system succeed is recognized in the breach.

Substantively, the courts’ interpretations of the First Amendment and the Takings Clause<sup>4</sup> of the Constitution have radically changed the legal environment in which the FCC operates. The FCC’s freedom of action is substantially cramped by these doctrines, which are far more constraining than they were forty years ago. The “Vast Wasteland” speech unselfconsciously, unashamedly, and without fear of the First Amendment or other judicially enforced constraints assumes that the FCC can and should oversee and regulate the *quality* of broadcasters’ programming. It is in this respect, more than any other, that the speech seems outdated.

### THE FEDERAL COMMUNICATIONS COMMISSION

It is hard not to have sympathy for the challenges that the FCC faces today. In addition to the inevitable dulling of the original mandate of the

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2. Pub. L. No. 96-354, 94 Stat. 1164 (1980) (codified as amended at 5 U.S.C. §§ 601-612 (2000)).

3. *Fox TV Stations, Inc. v. FCC*, 280 F.3d 1027 (comments of Edwards, C.J., Ginsburg, J., and Sentelle, J., at Oral Arguments Tr. 11, 41, 44, 59), *reh’g granted*, 293 F.3d 537 (D.C. Cir. 2002).

4. U.S. CONST. amend. V.

FCC over the past forty years (there is no dulling in Minow's speech), there are trends outside the FCC's control, some already noted, that have made its job far more difficult. The rapidity and radical consequences of technological change, the expanding breadth of its jurisdiction, the complexity of the issues, the sheer size and importance of the industries it affects—all these pose enormous challenges for the FCC. The world of the "Vast Wasteland" speech was far simpler.

Some of the FCC's critics, noting these challenges and the shortcomings of the administrative process, call for the FCC's substantial overhaul. It has lived through the Clinton-Gore Administration reinventing government and the Republican-driven FCC restructuring of 2001. Neither has had discernible impact on the success of the Commission or on how it operates. Other, more radical, restructuring proposals have surfaced from time to time, but they have promised too much, blinked realities, and/or ignored the practical problems of implementation. Even the demise of the FCC is urged by some—at a time when the rest of the world, moving toward privatization of its communications industries in order to emulate the United States's successes, seeks to understand how to establish an independent agency (like the FCC) to referee the disputes that their newly privatized environment inevitably will generate.

But let us turn back to trends within the FCC's administration of its mandate that illustrate how things have changed in forty years and why the administrative/legislative process that regulates the communications industries is in trouble.

#### A SLAVISH DEVOTION TO RULEMAKING AND BRIGHT-LINE TESTS

Justice Holmes said that law is the "triumph of experience over logic."<sup>5</sup> But over the past four decades, the FCC has relied increasingly on rulemaking and bright-line tests and has drastically cut back on hearings and case-by-case determinations. In this agency, at least, a civil law philosophy has come to control rather than the common law approach. This trend may have contributed to the agency's diminished credibility. Its claim to expertise, which should help ward off invasion into specific areas by Congress and should entitle it to judicial deference, was, in Professor Bickel's day, to be based in part on its experience in dealing with specific cases. By relying so exclusively on rules, the Commission has deprived itself of this experience. Newt Minow's speech exhibits no presumption that the FCC will adopt across-the-board rules to deal with poor

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5. OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

programming, the television community's reliance on ratings, and children's programming—three of the topics he singled out in 1961.<sup>6</sup>

Interestingly, the Powell administration has embarked on a few modest steps toward more case-by-case determinations. Its greater emphasis on enforcement actions, which are fact-specific, is a case in point. Another is the FCC's willingness to consider in its omnibus multiple-ownership rulemaking a system of presumptive, rather than determinative, guidelines that could be rebutted by showings based on particular circumstances in individual cases. An additional example of a common law approach to regulation is political broadcasting. The statute, particularly the lowest-unit-charge principle,<sup>7</sup> may be vague and flexible, but desirably so. Implementing that law, the Commission staff has come to know the broadcast and cable advertising industry and, through its handling of complaints, keeps up with new developments. It has developed expertise of the sort that lay at the heart of traditional administrative law forty years ago. The FCC's political-broadcast decisions may not always be right, but they are informed and fact-specific, and by and large a very complex area of law is well understood by those it affects: candidates, agencies, and stations alike. (By contrast, the congressional debates on this subject are, to be candid, ignorant and ill-informed.) The body of law that has developed is at least as clear as rules adopted by the Commission in other regulatory areas, and far more supple and adaptable.

#### A GREATER RELIANCE ON EXPERTS AND A LESSER RELIANCE ON EXPERIENCE

A corollary is that the FCC today seems more enamored of big theories than it used to be. Economists, who could learn something from Holmes's aphorism, play a much bigger role in Commission policymaking. They tell the Commission how the markets *should* work, whereas the Commission used to learn from individual cases how the markets, in fact, worked. The decline in the number of engineers at the FCC, which this Commission has tried hard to reverse, has meant a greater reliance on engineering theory and less exposure to real-world engineering facts that the FCC's field bureaus, testing labs, and monitoring stations—all victims of the federal budget axe—used to provide.

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6. Newton N. Minow, Television and the Public Interest, Speech Before the National Association of Broadcasters (May 9, 1961).

7. 47 U.S.C. § 315(b)(1)(A) (2000).

### THE DECLINE IN PROCEDURES THAT PROVIDE THE COMMISSION WITH CASE-BY-CASE EXPERIENCE

When Minow delivered his speech and for a decade or two thereafter, oral arguments were a staple of Commission procedures. When ITT sought to acquire ABC in the late 1960s, the FCC held two full days of oral argument.<sup>8</sup> The number of cases that were heard before the full Commission and produced a record far exceeded the number that do so today. To be sure, the Commission has adopted the mechanism of congressional-style panels—the one on financial problems in the telecommunications sector is a recent example.<sup>9</sup> But by and large, these panels are devoted to generic issues, often rulemakings. The FCC's panel on the AOL/Time Warner merger was one of few that were directed at a specific transaction.<sup>10</sup> The Commission no longer hears oral arguments on decisions on appeal from the bureaus, and in the case of those appeals, which are based solely on a written record, the bureau itself drafts the recommended decision disposing of the appeal from *its* original decision.

### THE ALLURE OF THE BIG SOLUTION

The doctrine of ascertainment was to end disputes between community groups and television stations. The lowest-unit-charge legislation was to satisfy politicians' clamoring for lower advertising rates. The eight-voice, top-four test was to bring rationality to duopoly law.<sup>11</sup> First lotteries, and then auctions, were intended to end controversy in the licensing process. And now a spectrum-commons or spectrum-ownership approach, or some combination of the two, is being touted as allocating radio frequencies in calibration with the public need. (It should be noted, however, that the proponents of spectrum reform have stressed the desirability to begin with implementing their new theories on a limited basis; for example, frequency band by frequency band.)

The philosophy of the common law is based on humility. We will never get it right for all time; we always need the escape hatch and the

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8. See Applications by ABC for Assignment of Licenses of Stations, *Opinion and Order on Petition for Reconsideration*, 9 F.C.C.2d 546, para. 4, 10 Rad. Reg.2d (P & F) 289 (1967).

9. *Restoring Financial Health to the Telecommunications Sector: En Banc Hearing on Steps Toward Recovery in the Telecommunications Industry Before the FCC* (Oct. 7, 2002), transcript available at <http://ftp.fcc.gov/enbanc/100702/tr021007.pdf> (last visited Mar. 12, 2003).

10. *Applications of America Online, Inc., and Time Warner, Inc. for Transfers of Control, CS Dkt. No. 00-30: En Banc Hearing Before the FCC* (July 27, 2000), transcript available at <http://www.fcc.gov/realaudio/tr072700.pdf> (last visited Mar. 12, 2003).

11. See 47 C.F.R. § 73.3555(b).

learning laboratory that individual cases give us. Even if government does get it right for a moment in time, technology changes, social priorities change, and markets change. There is no evidence that humility does not continue to be a desirable ingredient in government decision-making. It was not, however, a notable component of the “Vast Wasteland” speech.

### OTHER TRENDS

Other developments since Minow’s speech might be cited: the rise in the power of the staff prompted in part by the Sunshine Act; the trend of relying on private, party-by-party lobbying to frame and illuminate the issues; a reliance, generally, on draft “items” prepared by the bureaus to launch commissioner involvement in substantive issues; the chairman’s control over the agenda; the miniscule role of written pleadings in actual Commission decision-making; and the prolixity of Commission rulemaking notices. All of these and others might be examined to assess their effect on the administrative process.

### CONCLUSION

Comparing the self-assurance of Minow’s speech (some would say it was too self-assured) with the tentativeness of today’s FCC, one is tempted to urge a broader, deeper review of the administrative process. It may be no accident that several of the agencies that existed in 1961—the Interstate Commerce Commission and the Civil Aeronautics Board, to name two—have been terminated or radically restructured. In any event, it has been more than forty years since Judge Landis headed up the panel to review the working of administrative agencies, and much longer since the Administrative Procedure Act was passed.<sup>12</sup> The scope of a new review of administrative law should include the roles of Congress and the courts, as well as those of the agencies. There might emerge a vision for how the process should function—a vision that would be shared by the agencies, Congress, and the courts, and then might be better understood by the public as well. Otherwise, the administrative process that governs our critical communications services is in danger of slipping, dare it be said, into a “vast wasteland.”

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12. Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C. (2000)).

