

In Search of a Captive Audience: Susan Crawford's *Captive Audience*

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TABLE OF CONTENTS

I.	THE TRIUMPH OF PERSONALITIES OVER LAW	314
II.	SKIP THE ECONOMIC ANALYSIS	316
III.	SKIP THE INTERNATIONAL COMPARISONS.....	320
IV.	SKIP THE HYPERBOLE ABOUT THE IMPORTANCE OF COMCAST	322
V.	THE ANTITRUST CASE THAT WASN'T	323
VI.	EXAMINING THE CULT OF WASHINGTON PERSONALITIES	325
VII.	THE LOSING CASE FOR GOVERNMENT OWNERSHIP	329
VIII.	WHO IS THE CAPTIVE AUDIENCE?.....	332

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Visit an academic conference where Professor Susan Crawford is presenting a paper, and you are sure to find a large crowd and a good story in the room where she is speaking. In the world of academic telecommunications policy, Crawford would appear to be a rock star with a loyal cadre of groupies. Yet as an accomplished classical violist, Crawford does not evoke an image of Led Zeppelin and acid; lead crystal and claret seem more appropriate.

Crawford has her detractors. She is an unapologetic champion of having big government, rather than corporations, solve big problems. She is well-known, but not well-liked, in corporate America. The feeling is probably mutual.

Crawford has something that few in academic telecommunications policy can match: experience at the highest levels of government.¹ And now she has something that many in her academic audience actually can match: a book. Better than many of the books written by those in her audience, Crawford's book is published by Yale University Press and curiously titled *Captive Audience*. Just who is in this audience, and why are they captive? The subtitle, "The Telecom Industry and Monopoly Power in the New Gilded Age," is inapposite. A few strands of fiber are pictured on the cover of the book, but nowhere is there a clear image of the elusive captive audience that she references.

Before exploring the book in search of the captive audience, let's learn a little more about Crawford. The American public owes Crawford a debt of gratitude. From 2005–2008, she served on the board of the Internet Corporation for Assigned Names and Numbers ("ICANN"). ICANN serves as a minimalist form of governance for the Internet.² It may appear innocuous and unimportant, but looks are deceiving. Many who seek to destroy the Internet and weaken America have their eyes set on first eliminating ICANN.³ If one defines a friend as the enemy of our enemies, America has few greater friends than ICANN, and by extension, its board.

Crawford also worked on President Obama's Federal Communications Commission ("FCC") transition team and then served as a Special Assistant for Science, Technology, and Innovation Policy in 2009.⁴ To have supported President Obama in 2008 is not unusual in academia. To have actually served in the White House is.

I once attended a meeting with a small group in a conference room in the Old Executive Office Building. When Crawford entered the ornately decorated room, she remarked something to the effect of: "This room

1. See generally Susan Crawford, Professor, Cardozo Law Sch., Written Statement given at the FCC Field Event on: "The Information Needs of Communities" (Oct. 3, 2011) [hereinafter Crawford Statement], available at <http://transition.fcc.gov/arizona-field-event-100311/Susan-Crawford.pdf>.

2. See Jonathan Weinberg, *Governments, Privatization, and "Privatization": ICANN and the GAC*, 18 MICH. TELECOMM. & TECH. L. REV. 189, 213 (2011).

3. See *id.*

4. See Crawford Statement, *supra* note 1, at 1.

belongs to the American people. Enjoy it. We are all here as visitors.” Jimmy Stewart could not have said it better. Unforced and unaffected, humble, and spoken without the slightest hint of sarcasm, these were not the words of a Washington insider. The usual message is both unspoken and unambiguous: “This room belongs to me, and you had better do what I say.”

As it turns out, Crawford was indeed a visitor, not a Washington insider; she left the White House to return to academia in early 2010.⁵ This is just when the storyline of *Captive Audience* begins.

There is an old adage in academia that once you leave, you can never return. Academia is filled with those who have never left, who have never seen the vistas about which they write and teach, who cannot imagine the nether world in which mere mortals live and breathe.

Crawford is an exception to that rule. She was a partner at a major law firm before deciding to try academic life. She left academia briefly to witness the highest levels of government. Returning to academia must be painful, not so much relearning the precision and rigors of academic life as reimagining an idealism that cannot long survive elsewhere. Before writing *Captive Audience*, Crawford had to relearn that idealism a second time.

I. THE TRIUMPH OF PERSONALITIES OVER LAW

Having scaled the ivory tower, Crawford has now written a book about government from an insider’s perspective, or at least an academic’s perception of an insider’s view. This is something that is certainly not the norm for an academic book. Crawford’s book is also not the standard fare of recent government employees. Written in the first person, those works often have a “kiss-and-tell” familiarity with events framed in one of a few predictable story lines. For those looking for an even better government job, there is the “I-worked-for-the-best-Administration-ever-and-please-hire-me-again” story line. Or for those looking for a private sector job, there is the “Here-is-why-I-am-important” story line. Or for those ready to retire, there is the “Here’s-my-legacy” story line. Or for those with a policy axe to grind, there is the “Here’s-how-to-save-the-world” story line. Or for the occasional bad experience, there is the “You-won’t-believe-how-bad-it-was” story line.

Crawford, however, writes a different story. She does not write in the first person about her government experiences, although that might be a worthwhile story. Ostensibly, the book is about the Comcast-NBC Universal merger and the government approval process. Crawford clearly did not like the approval of the merger.⁶ Some readers, myself included, were pleased with the outcome of the Comcast-NBC Universal merger. We

5. *Id.*

6. SUSAN CRAWFORD, *CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE 2* (2013).

viewed it as the inevitable outcome of law and economics. Crawford sees the outcome of the merger as resulting from different forces.

Captive Audience is about more than the failure of the federal government in one instance to block a merger.⁷ It is not a mere fisherman's tale about the big one that got away. No, the book has a much bigger theme: the federal government did not do its job.⁸ It is difficult not to be troubled by Crawford's story where larger-than-life personalities overshadow the details of law in Washington. Although Crawford does discuss laws and her interpretation of how government processes should work, she never lapses into a diatribe about the lawlessness of the unfolding story. Crawford is careful not to demonize any of the giant characters that populate her book. She even praises them with human qualities, strengths and weaknesses.⁹ They are not individually evil. They are just doing their job. According to her, the result, in Washington, is the triumph of personality over law.

This is a disturbing observation, particularly for those of us who toil with the cold facts of economics and law. One is left almost to wonder: why bother with economics and law if decisions are made based on other factors? I can only imagine the shock of those in academia whose idealism about government and government processes must be shattered by the insights of Crawford. She does not extrapolate beyond this one example, but the reader is hard pressed to infer that Crawford's view of the failure of the federal government in Comcast-NBC Universal is a one-time aberration.¹⁰

Crawford writes primarily in the third person about events that take place *after* she has left government. No doubt, her government experience informs her work, but she generally refrains from focusing on it. She reviews the history of the merger of Comcast and NBC-Universal, not with the perspective of an academic, but almost with the view of a journalist. To emphasize points, she frequently quotes important people in industry and government.

I was initially annoyed by the frequency of quotes, a journalistic style, in an academic book. Yet perhaps there is good reason. It might sound a little too cynical and fantastic for Crawford, the academic, to say in the first person that Washington is run by personalities with too much influence. But when John Malone and other large personalities say there is influence—albeit rather like Charlie McCarthy sitting beside the ventriloquist Susan Crawford—it sounds less like the rant of an academic and more like the clever observation of a successful businessman.

Ultimately, the reader finds Crawford, an unapologetic champion of bigger government, giving the eulogy for a government process gone

7. *Id.* at 18.

8. *Id.* at 17.

9. *Id.* at 7.

10. *Id.* at 18.

wrong. *Captive Audience* focuses on the merger of Comcast and NBC-Universal, and implicitly condemns the Obama Administration for failing to block it. The Camelot of the Obama White House in January 2009 must have become something less exalted a year later. The administration, which she had worked very hard to support, would, after she left, do nothing to block the largest media merger in history. Anyone who shared her political idealism must have been crushed.

II. SKIP THE ECONOMIC ANALYSIS

There is much to like in *Captive Audience*, and I will return to its strengths later. There are, however, glaring weaknesses. These parts of the book should be read quickly, or not at all. Crawford is gifted at storytelling and sketching characters, but her many strengths leave little room to be a skillful economist. Indeed, she makes no pretenses about being one.

Practically all of her economic analysis is at best informal, and more likely wrong. I will give just a few examples. Those seeking a more complete catalog of Crawford's economic misstatements might look elsewhere.¹¹

Crawford uses economic terms casually. If the casual usage were approximately correct, I would not quibble, but her form of casual usage is often exactly wrong. Consider the word "monopoly." Crawford frequently states that Comcast is a "monopoly,"¹² a powerful word with a clear meaning to economists: a single supplier in a market. Yet in practically every instance in which she uses the word "monopoly," Crawford mentions one or two other competitors that she claims are weak.¹³ With the exception of rural markets, she never describes a market in which there is only one or even a plausibly small number of providers. At worst, Crawford describes an oligopoly. I believe that Crawford means to say "a firm with potential market power" when she says "monopoly." The correct term sounds, and is, less sinister than "monopoly."

Crawford suggests that Comcast and a few other firms are not merely monopolists, but that they continue to attempt to enhance their market power.¹⁴ Crawford's informal use of *monopoly* is not entirely what government agencies charged with enforcing antitrust laws have in mind;

11. See, e.g., Robert Hahn & Hal Singer, *Is the U.S. Government's Internet Policy Broken?: A Review of Captive Audience by Susan Crawford*, Economic Policy Vignette 2013-1-13, GEORGETOWN UNIV. McDONOUGH SCH. OF BUS., CTR. FOR BUS. & PUB. POLICY 6-13 (Jan. 2013), http://www.gebpp.org/files/EPV/EPV_HahnInternetBroken_12013.pdf; see also George Ford, *Sloppy Research Sinks Susan Crawford's Book . . .*, @LAWANDECONOMICS BLOG (Jan. 18, 2013, 3:56 PM), <http://phoenix-center.org/blog/archives/1075>.

12. See, e.g., CRAWFORD, *supra* note 6, at 1.

13. See, e.g., *id.* at 2-3.

14. See, e.g., *id.* at 5-11 (discussing Comcast, AT&T, and Verizon).

often, they seek to prevent the enhancement of market power.¹⁵ Had Crawford focused more on claims of attempted abuse of market power rather than claims of monopoly, her arguments might have at least a tinge of plausibility.

To compound a problem, Crawford sometimes refers to a *natural monopoly*, as in “[u]tilities like water and electricity are natural monopoly services. So is telecommunications.”¹⁶ A natural monopoly has a specific meaning in economics, and it is not the meaning Crawford applies to it. If telecommunications were a *natural monopoly*, one firm could provide such services at lower cost than any combination of other firms. Any competitor is unnatural and almost certainly the artifact of government intervention. Worse, such a competitor imposes increased costs on consumers. If telecommunications were a natural monopoly, the hundreds of firms that compete in that market could be likened to leaches sucking on the blood of the American consumer; to help consumers, these firms would cease operations and give themselves over to Comcast, or another designated natural monopolist. I am quite sure that Crawford does not mean any of this. Rather, I suspect that she means the exact opposite: competition is the natural outcome of telecommunications markets.

Whether Comcast or any other firm is a natural monopolist, or simply a monopolist, or merely has some small measure of market power, is an empirical matter and depends on how one defines the relevant service market. Not surprisingly, in an informal book, Crawford does not formally define markets. Instead, she asserts that many services are separate markets without evidence. Along with many other economists,¹⁷ I tend to view markets more broadly than Crawford, and I am not persuaded by her assertions of separate markets.

For example, Crawford distinguishes between “truly high-speed Internet access ranging from 100 Mbps” and Internet access at slower speeds.¹⁸ Crawford’s definition of “high speed” is not universally recognized. The FCC uses a much lower speed to define broadband

15. Although Crawford does not distinguish monopoly from market power, much of the *Horizontal Merger Guidelines* (“Guidelines”) of the Department of Justice and the Federal Trade Commission focuses on preventing the enhancement of market power. See generally U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES (Aug. 19, 2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf>. The Guidelines note that their purpose is not so much to prevent monopoly as to prevent the enhancement of market power: “The unifying theme of these Guidelines is that mergers should not be permitted to create, enhance, or entrench market power or to facilitate its exercise.” *Id.* at 2.

16. CRAWFORD, *supra* note 6, at 17.

17. See, e.g., MICHAEL L. KATZ & BRYAN KEATING, NETWORK EFFECTS, SWITCHING COSTS, AND COMPETITION IN UNIFIED COMMUNICATIONS 1 (Nov. 5, 2012), available at http://newsroom.cisco.com/documents/10157/1142732/Katz_and_Keating_on_Compatibility_Competition_UCC.pdf.

18. CRAWFORD, *supra* note 6, at 2.

Internet.¹⁹ Akamai, which publishes quarterly with international comparisons of Internet access speeds,²⁰ uses 10 Mbps as the boundary for high-speed Internet access, which includes most 4G wireless services.²¹ This may be a useful distinction, but it does not mean that the two forms of broadband access are necessarily in separate markets. They may well be in the same market, albeit one that economists might call a “differentiated service market.”²² Sadly for Crawford, it is difficult to be a monopolist in a differentiated service market.

Indeed, to make the point of the book, Crawford should be embracing a broader differentiated service market that would encompass all forms of information distribution. With a narrow market definition for high-speed Internet access, demand for other services will be scarcely affected as the price of high-speed Internet access declines. Yet Crawford repeatedly bemoans that Americans often purchase low-speed Internet access at high prices, supposedly because they have only limited access to high-speed service, and then only at even higher prices.²³ If high-speed access were a separate market from low-speed access, relatively few consumers would switch from low-speed to high-speed access as prices fall. That cannot be the point that Crawford is trying to make.

In a differentiated service market for information distribution, Comcast becomes just one of dozens of competitors to distribute information. In such a market, Comcast or another company may still have some limited ability to raise prices above competitive levels, but such an ability is just that—limited.

Part of Crawford’s reasoning for the high threshold is to keep wireless services in a separate market from wireline.²⁴ To many Americans, there is no meaningful difference. Akamai presents average broadband speeds by any medium, combining all services together; in the United States, average broadband speeds were 7.2 Mbps in the third quarter of 2012, ranking in the top ten in the world.²⁵ Average wireless broadband speeds in the United States ranged from 1.3 to 2.7 Mbps in the third quarter of 2012.²⁶ The speeds for American carriers are roughly in line with those of other countries.²⁷ The Department of Commerce’s National Broadband Map (“National Broadband Map”) project finds similar results with the

19. FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 135 (2010), available at <http://www.broadband.gov/download-plan>.

20. See AKAMAI, THE STATE OF THE INTERNET: 3RD QUARTER 2012 REPORT 12 (Jan. 2013).

21. *Id.* at 16.

22. See generally EDWARD H. CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION: A RE-ORIENTATION OF THE THEORY OF VALUE 56-68 (8th ed. 1962) (explaining the meaning of differentiation among products and services in markets).

23. CRAWFORD, *supra* note 6, at 10.

24. *Id.* at 234.

25. See AKAMAI, *supra* note 20, at 12, fig. 9.

26. *Id.* at 29, fig. 25.

27. See *id.*

June 30, 2012, median wireline broadband speed at home of 6.4 Mbps and the median wireless broadband speed of 1.9 Mbps.²⁸

“Substitute” and “complement” are other economic terms that Crawford consistently misuses. She repeatedly states that wireline and wireless high-speed broadband are “complements” not “substitutes.”²⁹ If that were true, demand for wireline broadband services would increase as prices for wireless broadband services continue to decline. I don’t see that. If they were complements, the younger generation of Americans, who have cut the cord and own no landline devices at all, would buy landline broadband devices as wireless prices fall. Again, I don’t see that. I have seen no studies that reach that conclusion; rather they find just the opposite. Young Americans cut the cord not merely for basic telephone service but for cable and other services as well.³⁰ If one raises the price of wireline broadband services, one does not find Americans reducing their demand for wireless broadband services.

Nor do AT&T and Verizon have “market power” for wireless services enabling them to “raise prices at will.”³¹ If that were so, prices would always go up, but they don’t. Market power merely means that a firm can for a “nontransitory” period of time raise prices above competitive levels. Yet, Crawford gives no basis for this assertion.

Nor does Crawford accurately explain accounting terms in *Captive Audience*. The phrase “margin” is used throughout the book as if all margins were the same, but they are not. Throughout the book, Crawford usually refers to “margins” without specificity. For example, Crawford describes “profit margins of about 95 percent” for “wired access” offered by Comcast and Time Warner Cable.³² The underlying footnote tells a different story and refers to *gross margin*, not *profit margin*.³³ Many an unprofitable business has had high gross margins. Profits are more commonly associated with net income, and one must deduct not only the cost of goods sold (to get the gross profit margin) but also selling, general, and administrative expenses. Depreciation and amortization also must be considered as well as interest expenses and taxes, all before getting to net

28. See *National Broadband Map*, NAT’L TELECOMS. & INFO. ADMIN., <http://www.broadbandmap.gov/summarize/nationwide> (last visited June 28, 2013) (nationwide summary).

29. CRAWFORD, *supra* note 6, at 157, 234-35.

30. Shalini Ramachandran, *More Television Viewers Taking an Ax to Cable*, WALL ST. J. (Aug. 11, 2012), <http://online.wsj.com/article/SB10000872396390443991704577577420645763122.html>.

31. CRAWFORD, *supra* note 6, at 158.

32. *Id.* at 10.

33. Alex Sherman, *Watching Netflix Could Lead to Higher Cable Bills*, BLOOMBERG (Nov. 30, 2011), <http://www.bloomberg.com/news/2011-11-30/netflix-viewing-seen-swelling-u-s-cable-bills-next-year-tech.html> (“Cable’s broadband *gross margins* are about 95 percent.” (emphasis added)).

income. Wired access may be profitable, but it does not likely have anything remotely resembling a 95% net income margin.³⁴

I could go on, but mercy to the patience of the readers of this review suggests I stop. The wise reader should simply glance at the paragraphs with economic jargon and pass over them remembering that the good in the book is yet to come.

III. SKIP THE INTERNATIONAL COMPARISONS

Even if Crawford's analysis of economics and the American market were correct, which they are not, her analysis of the international market for broadband access is simply wrong. The clever reader will skip the international comparisons as well.

Crawford frequently suggests that the United States is "lagging far behind other countries when it [comes] to . . . the speed and capability of this basic communications tool."³⁵ Without clear evidence, Crawford even states that Internet access in excess of 100 Mbps "was routinely available in other countries but could not be purchased at all in most parts of the United States."³⁶

The most recent evidence suggests otherwise. The National Broadband Map finds that all but four states as of June 30, 2012, had at least part of their populations having access to advertised broadband rates in excess of 100 Mbps.³⁷ In twenty-two states plus the District of Columbia, over half of the population had access to speeds in excess of 100 Mbps.³⁸ Indeed, in thirty-seven states plus the District of Columbia, some part of the population as of June 30, 2012, had access to advertised rates in excess of 1 Gbps.³⁹ Of course, Crawford's statements on the lack of speed in the United States likely were drafted many months ago when speeds may have been less than today.

34. On a consolidated basis, Comcast earned \$4.16 billion of net income on revenue of \$55.8 billion, or a 7.5% net income margin. Detailed income statements just for broadband access services do not appear to be available. See Comcast Corp., Annual Report (Form 10-K) 78 (Feb. 22, 2012), available at http://www.comcast.com/2011annualreview/pdfs/Comcast_Form_10-K.pdf?SCRedirect=true; see also GEORGE S. FORD & LAWRENCE J. SPIWAK, WHAT IS THE EFFECT OF REGULATION ON BROADBAND INVESTMENT? 6 (2011), available at <http://www.phoenix-center.org/perspectives/Perspective12-05Final.pdf> (demonstrating that the profitability of Broadband Service Providers is below that of the average for S&P 500 firms, and well below that of other firms in the broadband ecosystem (i.e., Google and eBay)).

35. See, e.g., CRAWFORD, *supra* note 6, at 1. See also *id.* at 261.

36. *Id.* at 2.

37. *National Broadband Map*, NAT'L TELECOMS. & INFO. ADMIN., <http://www.broadbandmap.gov/rank/all/state/percent-population/within-nation/speed-download-greater-than-100mbps/ascending> (last visited June 28, 2013).

38. *Id.*

39. *Id.*

Maximum available speeds are substantially greater than average actual speeds. But in international comparisons of actual speeds, the United States fares far better than Crawford suggests. Akamai finds average U.S. broadband speeds at 7.2 Mbps, ranking ninth in the world, and ahead of other large countries with the exception of Japan and South Korea.⁴⁰ Those two countries were the only two in the world with average speeds slightly above 10 Mbps,⁴¹ hardly the 100 Mbps that Crawford sees as necessary. The United States did slightly less well in average peak speeds (fourteenth globally).⁴² Hong Kong led the world with average peak speeds of 54.1 Mbps, and the United States had speeds of 29.6 Mbps, both well below Crawford's 100 Mbps threshold for "truly high speed" access.⁴³ The United States placed slightly better in percentage of broadband using high-speed (greater than 10 Mbps) access, with 18% (seventh globally).⁴⁴ South Korea led the world with 52%, still well below 100% of access.⁴⁵ Nothing in the Akamai study suggests that Internet access in excess of 100 Mbps "was routinely available in other countries."⁴⁶

If individual states were treated as separate countries, some states would have done about as well as the leading countries. Under average broadband speed, Delaware would have ranked second in the world, behind South Korea.⁴⁷ The District of Columbia would have ranked third in peak speed, behind Hong Kong and South Korea.⁴⁸ New Hampshire, Vermont, the District of Columbia, Delaware, Massachusetts, and Rhode Island would have ranked third to eighth, respectively, in terms of availability of high-speed (more than 10 Mbps) broadband.⁴⁹ New Hampshire would have ranked first in the world in overall broadband (greater than 4 Mbps) connectivity at 87%.⁵⁰

I do not suggest putting much weight on these international comparisons. Every year, various organizations publish international comparisons. The relative rankings of countries vary over time. The inescapable trend, however, is that Internet speeds and connectivity are improving globally and in the vast majority of countries. Newer technologies are diffused globally and adopted globally. Indeed, the market for Internet network equipment is entirely global; there are no national markets for technology. The same manufacturers, with headquarters around the world, but with manufacturing operations primarily in China, sell

40. AKAMAI, *supra* note 20, at 12.

41. *Id.*

42. *Id.* at 13.

43. *Id.*

44. *Id.* at 14.

45. *Id.*

46. CRAWFORD, *supra* note 6, at 2.

47. AKAMAI, *supra* note 20, at 12, 16.

48. *Id.* at 13, 17.

49. *Id.* at 14, 18.

50. *Id.* at 15, 19.

network equipment to every country. Differences in measured speed such as in the Akamai report are the result of choices about different network configurations and differences in vintages of equipment, not differences in available equipment.⁵¹

The adoption, rates, and Internet speeds in countries that ranked in first place will be matched in a few years by a large number of other countries. What we are seeing is not a permanent difference in Internet technology across countries but rather a different speed in adoption. The speeds of adoption are remarkably similar across the major industrialized countries, including the United States.⁵²

IV. SKIP THE HYPERBOLE ABOUT THE IMPORTANCE OF COMCAST

Comcast is a major corporation in America, but it is far from the largest or the most important. It does not need the assistance of Crawford to be larger or more important than it actually is. Chances are, far more Americans have heard of Apple, Exxon, AT&T, or Verizon, than have heard of Comcast. For those Americans who do not live in Comcast's service footprint, which accounts for a great many, if not most, Americans, it is unlikely that they have heard of Comcast. Crawford attributes in a footnote to David Cohen this characterization of Comcast: "the dominant distributor of communications in twenty-two of American twenty-five largest cities."⁵³ To the regret of Comcast shareholders, the statement is not accurate. Looking at only the top ten cities in population,⁵⁴ Comcast is the overwhelming cable distributor in only four: Chicago, Houston, Philadelphia, and San Jose. It is difficult to imagine that if one took a survey of the residents of these four cities, or any other city in America, that Comcast, rather than another company, would necessarily be labeled "the dominant distributor of communications." More likely, residents would accurately suggest that there is competition and no company is the "dominant provider."

For those of us who live in areas served by Comcast, it is difficult to think of it as a "dominant" company. For high-speed fiber broadband service, my home is a once and perhaps future Comcast subscriber. I have used two other providers in addition to Comcast. I may in the future return to Comcast, not because it is dominant, but precisely because it is not. Instead, I might return because it, along with the other firms in the area, is competitive. The wireline service is in addition to several different high-

51. *Id.*

52. *Id.* at 12.

53. CRAWFORD, *supra* note 6, at 8, 272.

54. See CENSUS BUREAU, TOP 20 CITIES: HIGHEST RANKING CITIES 1790 TO 2010 (2012), available at <http://www.census.gov/dataviz/visualizations/007/508.php>.

speed wireless providers that friends and family view as clear substitutes for wireline service.

Comcast tends to serve urban and suburban areas of America. These are precisely the areas that have the most competition for both greater quality of service and lower prices. Because Comcast and most other major telecommunications providers have nationwide pricing plans, customers in less competitive areas still benefit from more competition in other areas.

Telecommunications services are less competitively provided only in high-cost, low-density areas. Those are precisely the areas where Comcast does not serve. Crawford occasionally addresses rural issues,⁵⁵ but these are not part of Comcast's service.

Crawford occasionally lapses into extraordinary overstatement: "The future of the Internet itself in America . . . would be radically affected by the merger decision."⁵⁶ If this statement applied to the Comcast-NBCU merger, would it not apply equally well to mergers of other companies? Surely if one were to canvass a recent batch of college graduates and ask them, "On which company does the future of the Internet in America depend?" they would not say Comcast. Crawford, however, would have us believe that Comcast would be high on the list of companies mentioned. Based on her assessment, these graduates would be clamoring for the coveted job at Comcast over companies like Google, Facebook, Twitter, Microsoft, Intel, Qualcomm, Apple, AT&T, and Verizon.

Crawford goes on to suggest with understatement, "Truly high-speed wired Internet access is as basic to innovation, economic growth, social communication, and the country's competitiveness as electricity was a century ago."⁵⁷ If Crawford is correct and access to 100 Mbps is the minimum essential level for "innovation, economic growth, social communication, and the country's competitiveness," then both America and the rest of the world fail these standards. Of course, many businesses, universities, and research centers and an increasing number of residential customers have access to Internet speeds in excess of 100 Mbps, but, as the Akamai and the National Broadband Map data reveal, these speeds are far from ubiquitous.⁵⁸

V. THE ANTITRUST CASE THAT WASN'T

A reader of the introduction to *Captive Audience* might conclude that Comcast faced an impossible hurdle of antitrust law in getting its merger with NBC-Universal approved. After all, "Comcast was gaining strength as a monopoly provider of wired high-speed Internet access."⁵⁹ Also,

55. CRAWFORD, *supra* note 6, at 236.

56. *Id.* at 3.

57. *Id.*

58. *See generally* AKAMAI, *supra* note 20.

59. CRAWFORD, *supra* note 6, at 1.

“Comcast’s new amplified role as a programmer . . . would probably make content too expensive for any potential competing data distributor.”⁶⁰ “Competition would be unlikely, leaving Americans in Comcast’s territories reliant on Comcast alone for truly high-speed wired Internet access.”⁶¹

Curiously, Crawford has relatively little to say about the Department of Justice (“DOJ”), the one agency that could have effectively blocked the merger. The introductory chapter makes it appear that the merger would make a bad monopoly much worse. But in a brief description of the DOJ’s role, Crawford makes a series of concessions that contradicts the parade of horrors in the introduction and throughout much of the book:

From the start, blocking the merger was unlikely. The agency [DOJ] economists took the view that there were positive gains from vertical integration between content and distribution; “double marginalization” (overhead overlaps triggered by the involvement of multiple companies) could be reduced, innovation could be enhanced by coordinating work on content with work on new forms of distribution, and overall costs could be cut through economies of scale and scope. Case law supported the idea that vertical integration was less worrisome than horizontal mergers; the antitrust agencies had not successfully litigated a vertical merger challenge for decades.⁶²

It is odd to find such a concession near the end of the book. Perhaps that would have been the beginning and the end of the story: antitrust case law compelled approval of the Comcast-NBC Universal deal. However, that is not the story that Crawford wanted to tell, and she has some insights that are worth considering.

The statement about the DOJ is a straightforward assertion of laws governing people, rather than personalities trumping the law.⁶³ The DOJ’s decision not to pursue an antitrust case is not based on the decisions of large personalities but on the judgments of anonymous “economists.”⁶⁴ “Case law” governs decisions of those leading the DOJ, not vice versa.⁶⁵

Crawford could have lectured the reader on communications and antitrust law and how the federal government got it wrong. There is no shortage of such books. While *Captive Audience* gives a sense that blocking the merger would have been good, Crawford never descends into

60. *Id.* at 2.

61. *Id.* at 3.

62. *Id.* at 216.

63. *Id.* at 206.

64. *Id.* at 213.

65. *Id.* at 216.

arguing that such an outcome was dictated by law and that a proper reading of the law would have blocked the merger.

VI. EXAMINING THE CULT OF WASHINGTON PERSONALITIES

Despite its shortcomings on economics and other areas, *Captive Audience* is perhaps one of the best recent anthropological books on Washington politics and the cult of personality. Crawford's insight is not that the merger passed Washington review because the law and the economics were inescapable; rather, it is that the personalities marshaled by Comcast were undeniable.⁶⁶ Many decisions in Washington, or so Crawford would have the reader believe, are the outcome of extraordinary personalities. With the exception of decisions by the DOJ, Crawford portrays major government decisions as driven more by the whim of personality than by the inescapable logic of law and economics.

Throughout the book, Crawford gives the reader the detailed insights of Rep. Ed Markey, Sen. Al Franken, Sen. Herb Kohl, and other D.C. politicians.⁶⁷ These individuals wanted to stop the merger of Comcast and NBC-Universal.⁶⁸ Allied on the other side were Brian Roberts and David Cohen of Comcast.⁶⁹ As third-party arbiter, Crawford often relied on the words of the great antagonist to many liberal causes, John Malone.⁷⁰ The irony was precious.

A key takeaway from the book is that when legal outcomes depend as much, if not more, on personalities, anything can happen. The approval of the merger was not the inevitable outcome of Washington; it was merely the inevitable outcome of the alignment of personalities.⁷¹ The Comcast merger would have been blocked had a different FCC Chairman or group of Commissioners been in place.⁷² Crawford does not use those specific words, but the message is clear.

According to Crawford, even the Obama Administration itself became an unwitting tool in the hand of corporate interests.⁷³ Thus, the Obama Administration, the FCC, and DOJ were duped into promoting the concept of the "spectrum crisis," an idea supposedly originated by AT&T and Verizon.⁷⁴ The spectrum crisis, according to Crawford, "did not exist."⁷⁵ Contrary to this assertion, spikes in the spectrum prices in recent

66. *Id.* at 211.

67. *Id.* at 87, 91, 206-07.

68. *Id.*

69. *Id.* at 207.

70. *Id.* at 216.

71. *Id.* at 211.

72. *Id.*

73. *Id.* at 247.

74. *Id.* at 241-43.

75. *Id.* at 242.

transactions suggest that the “spectrum crisis” is, in fact, real.⁷⁶ Crawford sees the Obama Administration as mere putty in the hands of crafty corporate potters.⁷⁷ Even the decision of Deutsche Telekom to sell T-Mobile was caused by an unwitting administration.⁷⁸ “In a sense, the Obama Administration itself caused T-Mobile to seek a deal.”⁷⁹

Crawford does not suggest that government decisions are entirely the tawdry result of Washington’s cult of titan personalities, but she does emphasize the importance of personality in ways that are chilling to those of us who would like to see Washington as a dispassionate and impersonal follower of the law.

Crawford saves her greatest insights for Chapter 11, “The FCC Approves,” which is an unintentional parody of a federal agency. The chapter alone is worth the price of the book as it describes the merger review process at the FCC.

It’s a game: the companies that plan to merge know that if they can get the regulators to spend enough time considering the deal, it will probably go through [I]f no other large companies oppose the deal, the feds’ investment of time in working with the merging parties, coupled with their interest in moving on to other items on their agenda, generally overcomes any private concerns about consolidation of market power.⁸⁰

Crawford’s description of the FCC is hardly flattering. An agency governed by statutes has a process that is described as a “game,” and one that it appears to be easily manipulated by those who know how to play the game. This description complements Crawford’s description of the titan personalities of Washington. How better to play a game than with larger-than-life personalities?

One of Crawford’s statements runs contrary to any reading of a civics text book or the Communications Act: “if no other large companies oppose the deal,”⁸¹ it goes through. Washington is not merely influenced by personalities, in fact, corporate personalities trump mere individuals. The anonymous economists at the DOJ, the years of court precedents, and the sincere government official standing in a conference room in the Old

76. Press Release, Tech. Policy Inst., Spectrum Prices Have Increased over Past Four Years (Jan. 24, 2013), *available at* <http://www.techpolicyinstitute.org/news/show/23392.html>.

77. CRAWFORD, *supra* note 6, at 243 (“But having worked with the administration to frame both the policy problem (more spectrum capacity!) and its solution (take spectrum away from the broadcasters and give it to broadband!)”).

78. *Id.* at 247.

79. *Id.*

80. *Id.* at 208.

81. *Id.*

Executive Office Building are nothing compared to the power of corporate interests, either pushing for or against a merger. Merger review at the FCC is reduced not to the application of law or economics, but to the public posturing of large corporations. Sadly, Crawford's observation may be all too accurate.

If the merger review process at the FCC is a game, its name must be charades. Here is how Crawford describes the game:

The merging companies figure out whom they have to please in order to avoid controversy and set to work persuading those groups or companies to support their transaction; the FCC, after much negotiating, creates conditions that it feels will serve the public interest and outweigh the anticompetitive harms created by the deal; the merging parties complain bitterly that the conditions are not specific to the merger but are broad attempts to make policy; a long series of meetings and filings is followed by a last-minute scramble for concessions; and on the day the deal is approved, the parties and regulators both issue press releases claiming victory.⁸²

In this game of charades, everyone knows their role. The merging parties must persuade other parties. The FCC must "create[] conditions that it feels will . . . outweigh the anticompetitive harms."⁸³ Crawford cleverly uses the verb "feels" rather than "knows" or "can demonstrate." In Crawford's rendition of the FCC's merger review game, the words "law," "statute," "rule," or "administrative procedure" never appear.

But the critique of the FCC's merger review process does not end there. Crawford describes the details of the process as well:

The merger-approval dance requires a series of steps. What is called a "record" of filings with the FCC is created over a period of months, amounting to hundreds of thousands of pages. Deals are struck before and during the process to make stakeholders (such as interest groups and trade associations) who might object feel that they have gotten something out of the process Yet after all the filings and the hundreds of meetings, the last phase is often an unseemly scramble for concessions. "At the end," the content-industry employee told me, "people will all be in the room trying to get something. It will matter who is in the room."⁸⁴

82. *Id.* at 211.

83. *Id.*

84. *Id.* at 208-09.

According to Crawford, the merger review process is not merely a child's game; it is a teenager's dance. There is the public appearance of propriety of a record, consistent with the federal Administrative Procedure Act.⁸⁵ But, Crawford notes, the inside process is anything but an appearance of propriety. It involves backroom "deals" and an "unseemly scramble for concessions."⁸⁶

I am all too familiar with the accuracy of Crawford's assessment. As a Commissioner, I dissented from every condition (other than compliance with laws, FCC rules, or comity with other government agencies) on every merger before the FCC.⁸⁷ I tried repeatedly to have my staff invited to the "room" where the deals were cut so that they could be witnesses to the sordid abuse of government processes, but they were politely never invited. Crawford aptly quotes Thomas Koutsky and Lawrence Spiwak: "Are consumers really well-served by back-room, closed-door negotiations between the regulator and prospective merging parties?"⁸⁸

Crawford goes on to note, "[T]his 'awful,' detailed, backroom drafting of broad voluntary conditions routinely leads to deal points that are trumpeted by the commissioners approving the merger as wins for consumers that are either unenforced or unenforceable."⁸⁹

Crawford is not always accurate in her description of the FCC. For example, she is way off the mark when she ascribes the failed FCC merger review process to "the belief of some commissioners in the power of 'intermodal competition.'"⁹⁰ I have seen no relationship between the willingness of Commissioners to approve merger conditions coerced in closed-door meetings and views on any particular policy matter including intermodal competition.

Crawford is also inaccurate in her whimsical view that "the FCC has broader authority over mergers than the antitrust division of the Department of Justice."⁹¹ She claims that the FCC is charged with "determining how the public's long-term interest will be served by any merger transaction."⁹² That is a nice sentiment, but it cannot be found in any federal statute, or even any FCC rule. The Communications Act never mentions the word "merger." The entire legal construct of "merger review"

85. See 5 U.S.C. § 553 (2006).

86. CRAWFORD, *supra* note 6, at 208-09.

87. See, e.g., App'ns for Consent to Transfer by Time Warner & Am. Online, Inc., to AOL Time Warner, Inc., *Memorandum Order and Opinion*, FCC 01-12, FCC Rcd. 6547 (2001) (Furchtgott-Roth, concurring in part and dissenting in part), available at <http://apps.fcc.gov/ecfs/document/view?id=6512460712>.

88. CRAWFORD, *supra* note 6, at 209 (quoting Thomas M. Koutsky & Lawrence J. Spiwak, *Separating Politics from Policy in FCC Merger Reviews: A Basic Legal Primer of the "Public Interest" Standard*, Phoenix Ctr. Policy Bulletin No. 18 (May 2007), available at <http://www.phoenix-center.org/PolicyBulletin/PCPB18Final.pdf>).

89. CRAWFORD, *supra* note 6, at 210.

90. *Id.* at 209.

91. *Id.* at 210.

92. *Id.*

is based on the FCC's authority to review license transfers.⁹³ For its own convenience, it routinely approves tens of thousands of such license transfers each year, but it pauses to engage in a separate proceeding on only those licenses associated with major mergers of firms heavily regulated by the FCC.⁹⁴

Crawford also applauds rather than criticizes the FCC and the DOJ for coordinating their information and analyses.⁹⁵ Nothing in the Communications Act gives the FCC the authority to share its information with DOJ, and nothing in DOJ's statutes or rules gives it the authority to share its confidential information with other government agencies, such as the FCC, which collect different and less confidential information. The reason the FCC and DOJ coordinate is not a matter of law, but of convenience. The FCC can block a merger by failing to act on it; the DOJ can block a merger only by going to court and convincing a judge to block it. Given the ease of its process, the FCC's discretion is correspondingly larger.

VII. THE LOSING CASE FOR GOVERNMENT OWNERSHIP

In Chapter 14, the final chapter of her book, Crawford makes an unpersuasive case for government ownership of telecommunications networks. It is an anticlimactic way to end the book after its compelling description of the FCC merger review process. The chapter has two themes: lack of competition and a need for more government ownership.

Crawford is unpersuasive in her assessment of competition in the United States:

America has emerged decades after the breakup of AT&T with a communications system that has all the monopolistic characteristics of the old Bell system but none of the oversight or universality.⁹⁶

The federal government does not share Crawford's assessment, nor do the hundreds of companies that compete in the American telecommunications market. Rather than embracing competition, Crawford seems intent on ignoring it. She confuses the Telecommunications Act of 1996, a law designed to deregulate telecommunications markets,⁹⁷ with a law that led to more regulation.

93. HAROLD FURCHTOTT-ROTH, *A TOUGH ACT TO FOLLOW?* 109 (2006).

94. *Id.* at 112.

95. CRAWFORD, *supra* note 6, at 213-14.

96. *Id.* at 261.

97. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. § 151 (2012).

America needs more people who can calmly and rationally oppose the free-marketeer rhetoric. People who don't have the knee-jerk response that "we tried regulation in the 1996 Telecommunications Act and it didn't work."⁹⁸

Crawford misconstrues the "free-marketeer" rhetoric. Such rhetoric is more likely to express the sentiment that we tried deregulation in the 1996 Telecommunications Act, and it worked.

Had Crawford wanted to focus her intellect on the one area of telecommunications that is more challenging than others, she might have addressed low-density, high-cost markets. The stories of thin competition and government support might make sense in those areas, but it makes little sense in Manhattan, New York, or even Manhattan, Kansas.

The supposed need for government ownership springs from the argument that there is a lack of competition nationwide. It is no more persuasive. Municipally owned telecommunications systems appear to compete with privately owned networks,⁹⁹ but Crawford never examines whether the local taxpayers are wittingly or unwittingly subsidizing government enterprises. Crawford trumpets Google's decision to deploy advanced services in Kansas City, but she does not examine the effect of municipal accommodations given to Google and not to other companies. She celebrates municipal electricity utilities,¹⁰⁰ but she does not examine why there has been remarkably little innovation in electricity distribution in the past century.

Crawford claims that government ownership of some form would help American telecommunications:

Not coincidentally, the United States has fallen from the forefront of new developments in technology and communications. It now lags behind countries that long ago defined communications as a public, and publicly overseen, good.¹⁰¹

As noted above, the evidence does not support the assertion that America is lagging behind other countries.¹⁰²

Although the South Korean government and others may mandate 1 Gbps broadband speed,¹⁰³ government mandates do not translate into actual speeds. However, Crawford builds on this false foundation to claim a need for greater public involvement in broadband networks. She states that "[i]t

98. CRAWFORD, *supra* note 6, at 268.

99. *Id.* at 254-57.

100. *Id.* at 256.

101. *Id.* at 261.

102. *See supra* text accompanying notes 40-50.

103. CRAWFORD, *supra* note 6, at 262.

is clear from extensive evidence around the world that this publicly supervised infrastructure should be made available to everyone and provided on a wholesale basis to last-mile competitors in order to keep speeds high and prices low.”¹⁰⁴ The evidence of the benefits of government ownership and direction is far different from that suggested by Crawford. Some countries have extensive central government planning and direction while others do not. The evidence from practically every country is that broadband adoption and speeds are improving rapidly. This is the natural outcome of market forces and is inescapable even in countries with centralized planning.¹⁰⁵

Crawford calls for a \$90 billion federally owned telecommunications network,¹⁰⁶ while private markets have provided the United States with a telecommunications market that is the most robust and highly invested in the world.¹⁰⁷ Also, America’s multiple telecommunications networks provide consumers with more service choices than in other countries.¹⁰⁸

Even if there were a need for another telecommunications network, it is surprising that Crawford would trust the United States government with managing a \$90 billion dollar investment in which it has no experience.¹⁰⁹ She accurately ridicules the U.S. government as incapable of effectively reviewing mergers.¹¹⁰ The reader is asked to believe that a government awed by the greater-than-life personalities in one realm would be a model of efficiency in another. That is a hard story to believe.

Many of the facts and figures in the final chapter fall under the category of economics, which the clever reader will simply skip. For example, Crawford appears to claim that it will only cost \$90 billion to provide fiber optic cables to all American households.¹¹¹ According to Dr. George Ford, Crawford relies on Corning’s comments to the *National Broadband Plan*.¹¹² Yet, the comments state that “[t]he investment required to deploy [fiber to the home] in the least dense 20% of areas is difficult to estimate due to the lack of existing deployments and published data. We have therefore focused on the remaining 80% of [households] in our analysis and recommendations.”¹¹³ Thus, Cambridge Strategic Management Group’s \$90 billion number is *not* an estimate of the “cost to bring fiber to the homes of all Americans” as Crawford claims.¹¹⁴ Instead, the \$90 billion

104. *Id.*

105. *Id.* at 261.

106. *Id.* at 267.

107. *Id.*

108. *Id.* at 260-61.

109. *Id.* at 267.

110. *Id.*

111. *Id.*

112. Ford, *supra* note 11.

113. CAMBRIDGE STRATEGIC MGMT. GROUP, FTTH DEPLOYMENT ASSESSMENT 2 (2009), available at http://www.ftthcommunitytoolkit.wikispaces.net/file/view/ftth_deployment_assessment_-_corning_10_12_09_final.pdf.

114. CRAWFORD, *supra* note 6, at 267.

number excludes the 20% of American homes that are the most costly to serve.¹¹⁵ Dr. Ford calculates that the full cost of deploying fiber to all American homes could run between \$190 billion to \$240 billion for just the upfront capital investment.¹¹⁶

VIII. WHO IS THE CAPTIVE AUDIENCE?

Crawford never formally identifies the captive audience. Presumably, it is the millions of Comcast customers, but practically all of them have competitive alternatives on land, in the air, and in space. But perhaps there is another truer captive audience: the career federal government employees who are asked to review mergers, but who actually do not make the decisions on them. Political appointees above them make the decisions. The career employees, who may have other views and other analyses to offer, have no choice but to go along with their political superiors. The career staff is the real captive audience.

115. CSMG, *supra* note 113, at 2.

116. Ford, *supra* note 11.