

3. What conditions, if any, might be imposed on RBOCs to limit the negative antitrust impacts of their extending their lines of business?

Any analysis of these issues is complicated by the fact that the answers to these questions may very well differ with respect to each area of business restrictions. Moreover, these questions will most likely need to be asked again and again. As Roger Noll has described the problem:

Neither the pricing issue nor the structural issue has ever been or is likely ever to be resolved. The telecommunications system is not, and never was, broke; instead, its underlying technical and eco-

nomics characteristics create an enduring policy dilemma. One can use the regulation of prices and structure for either of two ends: to encourage maximum feasible competition, or to promote an integrated monopoly. What is infeasible is a “neutral” formulaic policy regarding prices and structure that will assure the right mix of monopoly and competition. The current policy agenda is one part of the continuing futile search for better regulatory instruments, and one part rear guard actions by people who lost the last time around and who are not—and probably cannot be—convinced that the trend towards deregulated competition is the best policy.¹⁸⁸

¹⁸⁸Noll, *op. cit.*, footnote 1.

Chapter 13

Jurisdictional Issues in the Formulation and Implementation of National Communication Policy

CONTENTS

	<i>Page</i>
INTRODUCTION	361
THE PROBLEM	361
STRATEGIES AND POLICY OPTIONS.....	366

Figure

<i>Figure</i>	<i>Page</i>
13-1. Congressional Strategies and Options to Address Jurisdictional Issues in Communication Policymaking	S 368

Jurisdictional Issues in the Formulation and Implementation of National Communication Policy

INTRODUCTION

Rapid technological advances in the realm of communication, coupled with the unraveling of a traditional regulatory framework in the United States, have given rise to a highly uncertain communication policy environment that is endowed with both promise and problems. Occurring at a time when the role of information has become greatly enhanced, these developments will have a major impact on the lives of everyone. Each individual has an exceedingly high stake in the outcome of current communication policy debates. An exceptionally equitable, efficient, and effective policymaking process will be required to find appropriate solutions to the complex and thorny policy dilemmas that society faces, and to reconcile inevitable conflicts among competing—even if equally meritorious—interests. At the very least, the allocation of authority and the rules of the game will need to be clear and perceived to be legitimate.

THE PROBLEM

The lack of a coherent and coordinated national process for making communication policy is likely to severely hinder efforts to develop and execute an appropriate strategy for dealing with the myriad of communication policy issues that will emerge as the United States takes its place in an increasingly global information economy. Because of the important role of federalism and the separation of powers

in the U.S. political system, the American policy process has always been somewhat disorderly.¹ However, as discussed here and in chapter 4, the untidiness of the policy process has been particularly noteworthy in the area of communication-inducing two Presidential policy boards to recommend the creation of a central agency to formulate overall communication policy.² OTA findings also suggest that these problems are likely to be exacerbated in the future, given a number of factors. These include:

Factor 1: A shift in communication decision-making from the political arena to the marketplace.

As detailed in chapter 4, there has been an overall shift in communication decisionmaking from the political arena to the marketplace during the past decade. The divestiture of the Bell Telephone System, the emergence of large users, the liberalization of many of the regulatory restrictions historically imposed on the mass media industry, and the deregulation of the cable industry are all part of this change.³

As noted in chapter 12, this shift to the private sector has had a number of positive benefits, especially when measured in economic terms. However, at the same time, it has created a vacuum in the policymaking process with respect to societal decisions about communication that are not easily made by summing up individual preferences or deferring to market power. There are a number of instances in

¹For a recent analysis of the institutional barriers to effective government in the United States, see John E. Chubb and Paul E. Peterson (eds.), *Can the Government Govern?* (Washington, DC: The Brookings Institution, 1988).

²Communication policy boards established by president Truman and president Johnson both reached the same conclusion: adequate and effective communication policymaking required much greater organizational focus and coordination. Although the Office of Telecommunications Policy (OTP) was established in the Executive Office of the President (EOP) in 1970, in response to the Rostow Task Force's recommendations, it was abolished almost 8 years later as part of a plan to reduce the size of EOP. With the authority for communication now dispersed among a number of Federal agencies, it is not surprising that many observers of today's communication policy scene echo the concerns of these earlier commissions. See, for example, U.S. Department of Commerce, National Telecommunications and Information Administration, *NTIA Telecom 2000 Charting the Course for a New Century* (Washington, DC: U.S. Government Printing Office, 1988).

³For a discussion, see Eli Noam, "The Public Telecommunications Network: A Concept in Transition," *Journal of Communication*, vol. 37, No. 1, Winter 1987, pp. 30-47; see also Eli Noam, "The Future of the Public Network: From the Star to the Matrix," *Telecommunications*, March 1988, pp. 58, 60, 65, and 90; and Roger Nell, "Telecommunications Regulation in the 1990s," Publication No. 140, Center For Economic Policy Research, Stanford University, Stanford, CA, August 1988.

which private choices, as registered in the marketplace, may not lead to an optimal social outcome—whether it be with respect to the security/survivability, interoperability, or modernization of the communication infrastructure, or access to it. In fact, as the cases of standards-setting and open network architecture (ONA) would suggest, it may be precisely because of the enhanced role of the marketplace that the Federal Government is called on in the future to play an even more active role in establishing and reconciling communication policy.

Factor 2: Intensification of jurisdictional conflicts among traditional decisionmaking authorities.

Where power and authority are widely dispersed, as they are in the U.S. communication system, effective policymaking and implementation require that goals be clearly understood and agreed upon. Moreover, key decisionmaking roles will need to be clearly defined and generally well accepted. Otherwise, jurisdictional disputes will emerge, paralyzing the entire decisionmaking process. In chapter 8, OTA identified a number of reasons these prerequisites for effective policymaking are likely to be lacking in the future. These include:

The failure of either Congress or the executive branch to reconsider and reestablish U.S. communication policy to take into account the major technological, structural, and regulatory changes now taking place in society.

The problems entailed in national goal-setting have already been referred to above. How the failure to set communication goals might precipitate jurisdictional disputes that paralyze decisionmaking is clearly evident, for example, in the dispute between U.S. District Court Judge Harold Greene and the Federal Communications Commission (FCC) concerning line-of-business restrictions (discussed in ch. 12). As Judge Greene has noted on a number of occasions, it is in the absence of a congressionally

mandated alternative that the Frost district court has taken to establishing the Nation's communication policy.⁴

The continued convergence of communication, information, and video technologies.

In the United States, decisionmaking and regulatory authority has generally been distributed on a technology-by-technology basis.⁵ In the past—whether in congressional committees or executive branch agencies, or between Federal, State, and local entities—there has generally been a clear line of demarcation between those responsible for telephony and those responsible for mass media. With the convergence of communication, information, and video technologies, however, the boundaries among jurisdictions are becoming increasingly blurred, giving rise to a growing number of interagency and intergovernmental disputes.

One potential area of dispute, for example, is that of video distribution. If telephone companies were permitted to distribute video services, along with cable companies and broadcast networks, the cable companies could be subject to municipal franchise agreements, telephone companies could be regulated at the State level, and the networks could be regulated at the national level. To the extent that policy goals vary according to jurisdiction, as they appear to now, it may be increasingly difficult to establish a coherent national policy for video.

A growing divergence of interests between the States and the Federal Government.

The Communications Act of 1934 is somewhat ambiguous in allocating responsibility for communication policy between the States and the Federal Government.⁶ According to the act, FCC has the authority to regulate the interstate portion of the telecommunication industry, as well as the intrastate portion to the extent that it significantly affects FCC's intrastate policy. The States are assigned

⁴See, for instance, Linda M. Buckley, "Judge Greene Blasts DOJ for Lax MFJ Enforcement," *Telephony*, June 1, 1987, p. 12; see also Charles Mason, "Greene Fights Back in Ruling on R&D," *Telephony*, Dec. 7, 1987, p. 3; and Kathleen Killelte, "Judge Greene Chides DOJ," *CommunicationsWeek*, Aug. 15, 1988, p. 38.

⁵For a history of this development, see Ithiel de Sola Pool, *Technologies of Freedom* (Cambridge, MA: The Belknap Press of Harvard University Press, 1983).

⁶For a discussion, see Nell, *Op. Cit.*, footnote 3, pp. 5-7.

responsibility for regulating everything else.⁷ Because it is difficult to separate the telephone network into interstate and intrastate pieces, the potential for jurisdictional issues to emerge between the States and the Federal Government has always been inherent in the overall institutional structure.⁸ As described by Roger Nell:

... a practical limit to the FCC's jurisdiction undoubtedly exists, but its location is uncertain, and subject to swings in the reigning political philosophy of the DOJ [Department of Justice], the FCC, and the federal courts. Indeed, the jurisdictional boundary between state and federal regulation is arbitrary, uncertain, and subject to random changes. As a result, federal-state conflicts are not only inevitable, but perpetual, for a loss by one side today does not assure a loss tomorrow on a similar issue.⁹

Where jurisdictional issues emerged in the past, the Courts, until quite recently, have generally ruled in favor of the Federal Government.¹⁰ So long as the States and the Federal Government were in basic agreement, about both underlying communication policy goals and the most appropriate mechanisms for achieving them, the division of responsibility proved to be manageable if, at times, quite cumbersome.

With deregulation and divestiture, however, there has been a growing divergence of interests between the States and the Federal Government as well as among the States themselves. In the absence of a strong Federal role, the States have found themselves in a position to have far greater influence on telecommunication policy than ever before. Moreover, faced with varying kinds of problems and circumstances, they have moved in several different directions.¹¹ For example, Nebraska has approved a bill that would further decrease the public service commission's control over rates. Vermont has approved a form of "social contract" that will keep local rates down while allowing substantial freedom for the local telephone company in the more competitive services. Florida works with "equal access exchange areas" rather than local access and transport areas (LATAs), and allows banded rates for carriers. Illinois has moved aggressively to eliminate almost all forms of cross-subsidies and to transfer access costs to end-users. And California has instituted a comprehensive Lifeline program for low-income subscribers, and is developing some innovative approaches for dealing with transactions between Pacific Telesis and its affiliates.

This divergence among State policies, while allowing the States to serve as laboratories (much as

⁷Public utility regulation began at the State level 80 years ago. New York, Wisconsin, Illinois, and New Jersey were among the first States pushed by an odd alliance of progressive politicians and industry interests to establish independent regulatory bodies. Politicians defended these agencies as necessary to prevent the new "home-intruding" natural monopolies—such as telephones, electricity, and water service—from abusing the "public interest." Public utility commissions (PUCs; in some States called public service commissions, commerce commissions, corporation commissions, or public utility boards) evolved to focus on intrastate telephone service, while the Federal Communications Commission (FCC) regulated interstate telephone, telegraph, and mail service. Paul Teske, "State Regulation of Telecommunications," OTA contractor report, July 6, 1987.

⁸As Nell has pointed out: "The difficulty created by these jurisdictional separations is that they presume the existence of distinct federal and State services. But the telecommunications network is an integrated system. Very little of it is used exclusively to provide strictly intrastate services. As a result the FCC and state regulators often find themselves regulating the same thing. In all network industries jurisdictional separations are artificial and arbitrary to some degree, but these distinctions make the least sense in telecommunications." Op. cit., footnote 3, p. 6.

⁹Ibid., p. 7.

¹⁰One of the first preemption cases arose from the FCC's *Carterfone* decision in 1968. Since then, as noted by Andrew D. Lipman: "The FCC subsequently proceeded to preempt state regulation of DTS [digital termination systems], enhanced services, mobile radio, SMATV [satellite master antenna television], satellite antennas, certain aspects of inside wire, broadcast subcarriers and physically intrastate WATS [wide area telephone service] when used to originate terminate interstate calls. The FCC has been particularly prone to pre-empt in cases in which states have erected barriers that preclude new entrants from providing federally approved communication services, or when the FCC finds that state regulation would impair or prevent the provision of interstate services in contravention of national policies favoring development of nationwide communications services." Andrew D. Lipman, "Sparks Continue to Fly Over Pre-emption Issue," *Telephony*, Aug. 4, 1986. In 1986, however, the tide in favor of the FCC appeared to be stemmed when the Supreme Court's *Louisiana Public Service Commission v. FCC* (54 U.S.L.W. 4505) decision prevented FCC pre-emption of intrastate depreciation practices. For a discussion, see Joseph R. Fogerty and H. Russell Frisby Jr., "Supreme Court Decision Upends State-Federal Regulatory Balance," *Telephony*, July 14, 1986, pp. 102, 106, 110-111.

¹¹Institutional responsibility also varies greatly across States. PUCs hold quasi-judicial power, and their decisions are subject to judicial review. In some States, such as Virginia, the PUC assumes almost all regulatory functions, including insurance, banking, corporate charters, and professional licensing. In other States, like New Mexico, the PUC performs far more limited regulatory functions, in only a few instances. The original enabling statutes were passed in a period of transition from competition to consolidation, and they generally empowered PUCs to establish franchises and to balance ratepayer interests versus company finances. Universal service is generally not an explicit goal, although it has evolved into an important objective. No deregulatory, efficiency, or economic-development goals are typically specified in these laws.

James Madison had originally envisioned), has also made it difficult for FCC to implement its deregulatory policy agenda and to move forward in developing ONA. A number of States have taken steps to shield their local exchange companies from competition, and many have strongly opposed the idea of adopting alternatives to rate-of-return regulation.¹² Characterizing the different State perspectives with respect to deregulation, Roger Nell has pointed out, for example, that:

One group regards the entire federally-inspired move towards competition as a major mistake, and yearns for the reestablishment of vertically integrated monopoly with a federal-state regulatory partnership. This group tends to be motivated primarily by a desire to protect universally available, low price basic local service, and to believe that this characteristic of telephone service is precarious. Another group of state regulators adheres more closely to the FCC-NTIA [National Telecommunications and Information Administration] view. They tend to foresee a future in which most of what remains of regulation is confined to local service, and in which the dominant regulatory role is held by the states.

A third, small group of state regulators seeks to extend the logic of the antitrust decree to its ultimate implication at the state level: to permit competition everywhere, with the hope of eventually deregulating the BOCs [regional Bell operating companies] in order to eliminate the perverse incentives of regulated monopoly.¹³

There is little reason to expect that Federal and State interests will be more closely aligned in the future. Divestiture, plus inflationary pressure on local rates in the 4 years prior to AT&T's breakup,

changed the level of interest and importance for State telecommunication regulation. And it appears that the States plan to remain quite firm in protecting their interests throughout the ONA process, especially with respect to pricing.¹⁴ Five States—California, Florida, Maine, Minnesota, and New York—have already adopted their own ONA plans, parts of which are in conflict with FCC-approved plans. The States, moreover, are likely to be quite successful in exerting their influence because, although FCC has been guiding the ONA process, most ONA services will be provided in the States' jurisdictions.¹⁵ As Peter Ciccone, Vice president—Finance and Controller, New York Telephone, has laid out the dilemma facing policymakers:

Is the FCC going to dictate that if one jurisdiction is offering BSEs [basic service elements] and they're technically feasible, that all should offer them, despite what states want; is the FCC going to dictate that they be deployed?¹⁶

Also steering the States in diverse directions is the fact that many State officials are now beginning to recognize the economic development potential of telecommunication. While different costs and facilities have not yet proven to be major factors in business-location decisions, some large users feel that they are increasingly important.¹⁷ As noted by T. Travers Waltrip, of the Travelers Insurance Co., for example:

Every time we build a new site, which means we're hiring people in an area, increasingly one of our highest concerns is the telecommunication facility feeding the property. Dropping down on our

¹²For a discussion, see Roger G. Nell and Bruce M. Owen, "United States v. AT&T: An Interim Assessment," Discussion paper No. 139, Workshop on Applied Macroeconomics, Industrial Organization, and Regulation, Stanford University, June 1987. As Nell and Owen have noted: "Most states do not beat around the bush; they simply outlaw intraLATA competition. As of January 1987, only fourteen of the fifty-one states (including D. C.) allowed facilities-based intraLATA competition, and of these, three effectively prohibit competition by imposing a 'block or pay' rule, and several others restrict the extent of permissible competition or simply have failed to license any competitors." Ibid., p. 18.

¹³Noll, *op. cit.*, footnote 3, pp. 5-6.

¹⁴See Eli M. Noam, "Implementing ONA: Federal-State Partnership Needed to Connect Network of Networks," *CommunicationsWeek*, May 2, 1988, p. 15, and Eli M. Noam, "IKSEs? BSA? Federal-State Teamwork is Key to Juggling ONA Issues," *CommunicationsWeek*, May 9, 1988, pp. 17, 48; and Eli M. Noam, "States, Feds in New Battle," *CommunicationsWeek*, May 2, 1988, p. 12. For other views of State regulators, see Robert Entman, *State Telecommunications Regulation: Developing Consensus and Illuminating Conflicts*, Report of an Aspen Institute Conference, July 30-Aug. 3, 1988. See also previous discussion of price caps in chs. 9 and 12.

¹⁵According to Gerald Bork, Chief of the FCC's Common Carrier Bureau, for example: "[T]he Commission recognizes that some BSEs [basic service elements] would be basic services tariffed at the state level, and has acknowledged the states' authority over the rates, terms, and conditions of intrastate basic-service offerings used in ONA. The commission, of course, does not set rates for BSEs that are in the states' jurisdiction." As cited in Entman, *op. cit.*, footnote 14, p. 31, from a statement before the Senate Subcommittee on Communications, July 14, 1988.

¹⁶As cited in Entman, *op. cit.*, footnote 14, p. 30.

¹⁷Teske, *op. cit.*, footnote 7, p. 3.

list of priorities are such things as salary levels and real estate prices.¹⁸

Increasingly, States are taking these concerns into account. In an effort to meet the needs of large users, the State of Nebraska, for example, passed legislation in 1987 that provides for radical price deregulation of all services, including local service. Although Nebraska is a low-population State with no particular tradition of innovation in telecommunication, its political leaders decided that Nebraska had to take some dramatic action if it was to attract high-technology, telecommunication-dependent firms as called for in its economic development plan. As former Governor John Kerry explained:

If you live in a rural isolated state like Nebraska, you absolutely need to be connected to the rest of the country. And there is technology coming along that can connect us much more closely. But to get it, we have to move away from arguing, "What should the price of the product be?" and into, "What should the product be?"¹⁹

Concerned about the loss of jobs and businesses to neighboring areas, New York State has also focused on the economic development aspects of communication policy. Recently, for example, the New York Public Service Commission has taken under consideration the question of whether or not New York City will be in danger of losing a competitive edge if it fails to push for an integrated services digital network (ISDN).²⁰

If State regulators continue to view communication policy in this light, it will be increasingly difficult to construct a national policy that mutually satisfies all of their needs.

Factor 3: Increasing linkages among communication policies and other socioeconomic policies.

Because communication is both an end in itself and a means to accomplish other societal ends, communication policy has, to some extent, always been linked to a number of socioeconomic policies. However, in all realms of human endeavor, the strategic role that communication and information

will play in the future is likely to be greater than ever before (see chs. 5 through 8). Therefore, it is likely that communication policy will become more and more connected to policies in other areas.

The relationship between communication and economic development has already been mentioned. A similar convergence is also occurring between communication and trade policy. Acknowledging the special role that communication and communication technologies now play in economic growth and development, the 1988 Trade Bill, for example, singles out the telecommunication sector for special attention. OTA's analysis identifies other policy areas that may also be affected in the future. For example, how communication opportunities are realized and distributed in the political realm will depend as much on policies for campaign financing and national security as on communication policy per se (see ch. 6). Similarly, if individuals and businesses are to reap the potential benefits of new technologies, significant changes in U.S. education and information policy may be required (see chs. 5 and 8).

Factor 4: Increased interdependence of national and international communication policies.

As economies become linked across national boundaries, so do the communication systems that undergird them. And communication policymaking in one country becomes increasingly dependent on the policies adopted in others. Resolving intergovernmental differences will require much greater participation in international decisionmaking fora. Thus, as the U.S. economy becomes more integrated with other national economies, communication policymakers will increasingly have to factor in a much greater number and variety of international variables when making domestic policy decisions.

International events, for example, impelled FCC to take greater initiative in prodding the U.S. high definition television (HDTV) standards-setting process. Similarly, the growing international acceptance of open systems interconnection (OSI) stan-

¹⁸As cited in Mark Nadel, "The Changing Mission of Telecommunications Regulators at the State Level," Aspen Institute Conference, August 1986, p. 5.

¹⁹T.R. Reid, "Phone Deregulation, Phase 2," *The Washington Post*, May 27, 1986, p. A-1.

²⁰See John Foley, "New York Probes ISDN," *CommunicationsWeek*, Sept. 26, 1988, p. 1.

dards was one of the reasons the Department of Defense renounced the Transmission Control Protocol/Internet Protocol (TCP/IP) in favor of OSI.²¹ This growing interdependence of national communication policies was, of course, most strikingly illustrated at the recent World Administrative Telephone and Telegraph Conference (WATTC) meeting in Melbourne, Australia, where arriving at an international consensus required all governments to make significant compromises.²²

These kinds of interdependencies compound the problems of communication policymaking in the United States. Although all agencies now have to be more cognizant of international developments, the fragmented nature of the agencies means that no one agency is equipped to fully present a coherent and clear-cut U.S. communication policy perspective. Under these circumstances, it is not surprising that jurisdictional disputes abound among decisionmakers.²³ Cementing on this problem, NTIA Telecom 2000 notes, for example:

The Secretaries of Commerce and State and U.S. Trade Representative are legally required to coordinate their efforts with other agencies, but there is no specified mechanism to ensure that this will occur. Unfortunately, accomplishing such coordination is difficult when faced with disputes among agencies, competing demands for high-level attention, time pressures, and often inadequate resources.²⁴

Because of the growing importance of telecommunication to trade, FCC recently raised again the prospect of becoming more involved in trade policy issues. Its proposal, however, was not well received by agencies such as the U.S. Trade Representative and the Department of State, which traditionally have authority in this area.²⁵

Factor 5: Emergence of large users as key players in communication decisionmaking.

Also contributing to the confused state of communication decisionmaking in the United States is the emergence of large users as key players. Eager to employ new technologies strategically, a number of them have been unwilling to await decisions in the public policy arena. Acting outside of the formal public policymaking process, they have taken steps to create and structure their own private communication infrastructures.

For example, in the area of standards, large users are becoming particularly effective in defining their own communication environments and in sidestepping the traditional policymaking process, as seen in the development and establishment of the Manufacturing Automation Protocol (MAP) and Technical and Office Protocol (TOP). It is understandable that users are taking more and more initiative in this area, given the slow pace of the formal standards-setting process. For instance, the establishment of the X.25 standard for packet-switching—reputed to be one of the most rapidly adopted standards—took approximately 4 years. Nevertheless, the actions of large users in the area of standards can have significant public policy implications, and thus can compound the problems of developing a consistent and coherent national communication policy.

STRATEGIES AND POLICY OPTIONS

Organizational arrangements are not neutral; they define power relationships determining who will

²¹Martin Edmonds, "Defense Interests and United States Policy for Telecommunications," OTA contractor report, June 30, 1988.

²²For discussions of this meeting, see Albert Halprin, "WATTC-88 offers a Grand Opportunity," *CommunicationsWeek*, Sept. 12, 1988, p. 16; Dennis Gilhooly, "U.S. 'Isolated' at World Conference," *CommunicationsWeek*, Dec. 5, 1988, p. 17; G. Russell Pipe, "WATTC Agrees on New Telecom Rules," *Telecommunications*, January 1989, pp. 119-21; and R.E. Butler, "The Why and Whereto of WATTC-88: The Benefits of Global Agreement," *international Computer Law Advisor*, vol. 3, No. 2, November 1988, pp. 8-11.

²³NTIA called attention to this issue in 1983 when it submitted a study on the subject to the Senate Subcommittee on Communications. For a discussion, see B.W. Rein et al., "Implementation of a U.S. 'Free Entry' Initiative for Transatlantic Satellite Facilities: Problems, Pitfalls, and Possibilities," *George Washington Journal of International Law and Economics*, vol. 18, No. 459, 1985, pp. 523-524.

²⁴NTIA, *op. cit.*, footnote 2, p. 179.

²⁵For a discussion, see Andrew D. Lipman, "The FCC Jumps Into Foreign Trade Debate," *Telephony*, Apr. 16, 1987, pp. 62-63. The relationship among these agencies is governed by Executive Order 12045, but as Henry Geller has noted, the order "is so vaguely worded that it simply does not settle conflicts or provide guidance of issues of coordination." Henry Geller, "The Federal Structure for Telecommunications Policy," paper no. 8, *The Benton Foundation, Policy Options Project*, Washington, D. C., 1989.

control what, and for what ends.²⁶ Thus, strategies designed to address jurisdictional issues and problems of policy coordination generally require organizational change. Because organizations are inherently political, their creation or restructuring can serve to express national commitment, influence program direction, and order priorities.²⁷ More often than not, an organization's specific structure and the form it takes will reflect the political climate in which it emerges, rather than the current principles of public administration.²⁸

To address the problems identified above, Congress can pursue any of four basic strategies. It could:

1. take the lead in establishing communication policy priorities and in allocating organizational responsibilities accordingly;
2. establish an ongoing organizational mechanism, outside of Congress, to resolve policy inconsistencies and jurisdictional disputes;
3. provide an interagency and/or interjurisdictional mechanism for coordinating communication policy and resolving jurisdictional issues; and
4. establish an institutional basis for facilitating coordination and cooperation among government agencies, industry providers, and communication users.

These strategies, and potential options for pursuing them, are discussed below and summarized in figure 13-1.

Strategy 1: Take the lead in establishing communication policy priorities and in allocating organizational responsibilities accordingly.

Option A: Reassess and redefine national communication policy goals, revising the Communications Act of 1934 where appropriate.

This option has already been discussed in chapter 12 in conjunction with the issue of modernization. It should be emphasized here, however, that many jurisdictional issues stem from the fact that the Communications Act of 1934 has not been updated to take account of a greatly changed technological and socioeconomic environment.

Because the structure of organizations reflects their basic goals, any significant rewriting of the Communications Act will also entail considerable organizational change. In particular, if Congress decides to press for a national communication policy, it will need to rethink and perhaps restructure the roles and relationships between the States and the Federal Government with respect to establishing and implementing communication policy. Government agencies will also be affected, since the choice of lead organizations will be governed by the priorities placed on different goals. Changes of such magnitude are likely to be strongly resisted by present stakeholders if steps are not taken to build a broad, national consensus in support of new policy goals, and if roles and responsibilities appear to be unfairly and/or inappropriately allocated.

Option B: Establish a national commission to evaluate the changed communication environment and recommend to Congress appropriate policy changes and steps that need to be taken to implement them.

Another way that Congress might try to reconcile competing communication policy goals and issues would be to establish a national commission to evaluate changes in the communication environ-

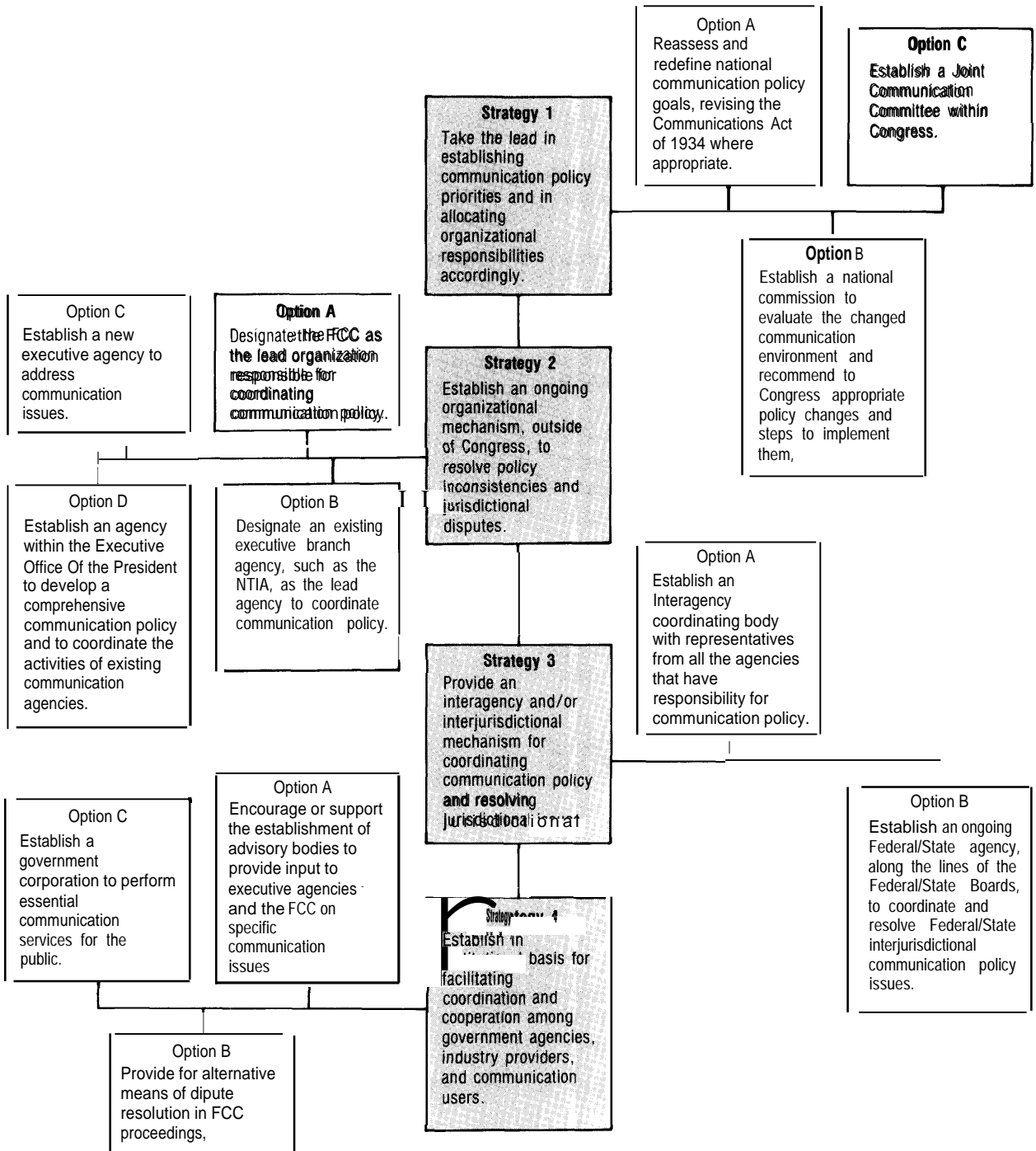
²⁶For a discussion, see Harold Seidman, *Politics, Position, and Power: The Dynamics of Federal Organization* (New York, NY: Oxford University Press, 3rd ed., 1980), p. 15; see also Dwight Waldo, *The Administrative State* (New York, NY: The Ronald Press, 1948), chs. 10 and 11.

²⁷*Ibid.* See also Harvey C. Mansfield, "Reorganizing the Federal Executive Branch: The Limits of Institutionalization," *Law and Contemporary Problems*, vol. 35, Summer 1970, p. 462.

²⁸Herbert Simon, Donald W. Smithburg, and Victor A. Thompson, "How Government Organizations Originate," *Public Administration* (New York, NY: Alfred A. Knopf, 1950).

As identified by Ira Sharkansky, there are four intellectual roots that, in this country, provide a public administration rationale. They are: "1) the desire to maintain political accountability in public administration; 2) the desire to maintain the traditional equilibrium among the three constitutional branches of government by preserving the separation of powers and checks and balances; 3) the desire to insure that professional and technical skills are brought to bear on relevant matters of policy formulation and implementation; and 4) the desire to maximize the efficient use of resources by means of a hierarchical form of organization." See Ira Sharkansky, "Administrative Organization and Control Units: Structures and Their Intellectual Roots," in *Public Administration: Policy-Making in Government Agencies* (Chicago, IL: Rand McNally College Publishing Co., 3rd ed.), ch. 4.

Figure 13-1-Congressional Strategies and Options to Address Jurisdictional Issues in Communication Policymaking



ment and recommend appropriate policy and organizational changes. In the past, national commissions have been especially useful in focusing the Nation's attention on issues of great magnitude that are likely to have a broad impact on everyone, such as those the United States is currently facing in the area of communication.²⁹ Because national commissions are generally established to deal with a specific set of problems and have a limited tenure, the risk of generating an enduring, eventually unnecessary, government bureaucracy is small. Moreover, because they are temporary and unique in nature, commissions can often attract the assistance of outstanding individuals with broad experience who would not be available on a long-term basis. By heightening the public's awareness of a problem, and by engaging the public to debate its solution, commissions can also serve an important legitimating function that can be particularly useful in times of major change.³⁰

Establishing a national commission to focus on a national communication policy might be particularly appropriate today, given the size and scope of the technological and socioeconomic changes taking place, the new communication players entering the scene, and the changing roles of traditional players. However, setting up such a commission means that valuable time is lost in the continued study of the problem.³¹ Concerned about the ability of the United States to compete, some would argue that, as a society, we don't have this time to lose. Commissions have also been known to diffuse public energy and concern, as many have been purposely designed to do.³²

Option C: Establish a Joint Communication Committee within Congress.

Congress has often been criticized for its inability to deal with long-term, global issues.³³ The Commission on Operation of the Senate, for example, found that "the legislative process as it presently

operates appears to be organized primarily for incremental decisionmaking rather than addressing major problems in a comprehensive manner."³⁴ To some extent, therefore, the organizational structure of Congress, as it presently exists, may inhibit its ability to treat communication policy as a broad-based, societal issue.

One step Congress might take is to establish a joint committee within Congress to address communication policy from the broadest possible perspective. Provision might be made, for example, to assure the participation of representatives from other committees whose past interest and involvement have been only tangential to communication policy, but whose present concerns are becoming more and more linked. At present, Congress has four joint committees-Economic, Taxation, Printing, and the Library. These committees have no legislative jurisdiction; they are established primarily for purposes of study and coordination.

The major functions of a joint communication committee might be to:

- coordinate the formulation of congressional communication policy;
- maintain a professional staff with broad expertise in, and a broad view of, communication policy;
- monitor technological and market changes in domestic and international communication; and
- coordinate the participation of other congressional committees,

Such a joint committee might not only provide for coordination within Congress; to the extent that agency and stakeholder representatives direct their lobbying activities toward the joint committee, it would also serve as a point of coordination for many other groups.

²⁹For one discussion of the role of commissions, see Frank Popper, *The President's Commission*, Twentieth Century Fund, April 1970.

³⁰For a discussion, see Seidman, *op. cit.*, footnote 26, pp. 23-25.

³¹NTIA makes this case, for example. See NTIA, *op. cit.*, footnote 2, p. 177.

³²*Ibid.*

³³For a discussion, see Ernest Gellhorn, "The Congress," ch. 13, Glen O. Robinson (ed.), *Communications for Tomorrow: Policy Perspectives for the 1980s* (New York, NY: Praeger, 1978),

³⁴U.S. Congress, Senate Committee on Government Operations, Subcommittee on National Policy Machinery, "Organizing for National Security," vol. 3, Staff Report and Recommendations, 1961, p. 7.

Although establishing a joint communication committee should not be difficult in theory, in accordance with the rules of Congress, its creation would likely be strongly resisted in practice. A number of committees in both the House and Senate are concerned with communication issues, representing a broad range of expertise. Their members would be bound to oppose any efforts that might circumscribe their power or authority. Although they do not have the same resources to resist such a reorganization, many stakeholders would also be against it. They have already established their ties and built their alliances within the existing committee and subcommittee structure.

Strategy 2: Establish an ongoing organizational mechanism, outside of Congress, to resolve policy inconsistencies and jurisdictional disputes.

To the extent that the current changes constitute part of a continuum that is likely to extend considerably into the future, it is unlikely that a one-time adjustment will suffice, even with major revisions to the Communications Act.³⁵ Instead, what may be required to handle these changes is the designation of a permanent, ongoing organization to resolve communication policy conflicts and jurisdictional disputes. Such an organization might take any of a number of forms, depending on what emphasis is preferred in a national communication policy.

In considering these options, it should be remembered, however, that organizational change is not a panacea and cannot substitute for policy agreement. As Seidman has noted:

The quest for coordination is in many respects the twentieth century equivalent of the medieval search for the philosopher's stone. If only we can find the right formula for coordination, we can reconcile the irreconcilable, harmonize compelling and wholly divergent interests, overcome irrationalities in our

government structure, and make hard policy choices to which no one will dissent.³⁶

Because of the connection between organizational structure and policy orientation, stakeholder preferences concerning where the organizational responsibility for coordinating communication policy should lie are often colored more by their policy preferences than their views about public administration. As described by one authority on public administration policy:

As a rule, however, reorganization proposals have as their objective the furtherance of some public policy. Indeed, reorganization appears to be a basic political process through which individuals and groups gain power and influence over others in order to achieve the social and political change they consider desirable.³⁷

A recent example of this phenomenon is the Dole Bill, which would have transferred the responsibility for administering the Modified Final Judgment (MFJ) from the district court to the FCC. Although the merits of the bill were argued on the basis of organizational criteria, lobbying on the bill correlated highly with stakeholders' attitudes towards liberalizing MFJ. Those in favor of liberalization supported the Dole Bill, and those opposed argued that the court should retain responsibility for MFJ.³⁸

Option A: Congress could designate the FCC as the lead organization responsible for coordinating communication policy.

Established by the Communications Act of 1934, FCC was designed, in part, to implement the act "by centralizing authority heretofore granted by law to several agencies."³⁹ However, the mushrooming of other agencies and authorities to deal with burgeoning communication and communication-related issues has seriously challenged FCC's role in this regard.⁴⁰

³⁵For a discussion of the difficulties entailed in applying short-term solutions to long-term problems, see Seidman, OP. cit., footnote 26.

³⁶Ibid., p. 205.

³⁷Ronald Moe, "Executive Branch Reorganization: An Overview," Library of Congress, Congressional Research Service, 1978, p. 6.

³⁸U.S. Congress, Senate Committee on Commerce, Science, and Transportation, *Federal Telecommunications Policy Act of 1986, hearings*, 99th Cong., 2d. sess., on S. 2565 (Washington, DC: U.S. Government Printing Office, 1986)

³⁹47 U.S.C.151.

⁴⁰For discussions of some of the problems recently faced by the FCC, see Kathleen Killete, "Patrick: The Steadfast Believer In FCC's Ability to Guide Telecom," *CommunicationsWeek*, Nov. 16, 1987, pp. 8, 21; Sam Dixon, "Observers Disagree on FCC's Success Rate in D.C. Circuit," *Telematics*, April 1988, vol. 5, No. 4, pp. 1-4; Kathleen Killete, "House Grills FCC on Regulation Plans," *CommunicationsWeek*, Nov. 16, 1987, p. 8.

Created as an independent agency, FCC is organizationally linked and ultimately responsible to the legislative branch rather than to the executive.⁴¹ And, since it is the job of the legislature to make policy (in theory at least), it can reasonably be argued that FCC should be assigned the task of reconciling national communication policy objectives and jurisdictional disputes on a day-to-day basis. This legislative connection might also serve to assure that, when developing communication policy, a broad range of interests is taken into account. Because compromise is inherent in the congressional environment, the legislative perspective is often eclectic and inclusive of many minority points of view.

This tendency to be all-embracing, however, is both a strength and a weakness of the FCC option. As seen in the Reagan Administration's pursuit of its deregulatory agenda, the congressional focus on winning political favor and fashioning political compromises can serve to put the brakes on any major policy departure.⁴²

Some might also take issue with the option of transferring considerable policymaking authority to FCC on grounds of democratic theory, which requires that policy organizations be held directly accountable to the public for their actions.⁴³ Although shifting this authority to FCC would certainly not shield the policymaking process from public influence, it might change the nature and

process of the debate about policy issues. As Glen Robinson has noted in this regard:

In the FCC, as in Congress, results depend on organized, sustained and concentrated efforts by interested persons. Not surprisingly, this gives private industry groups a decided advantage vis-a-vis less organized groups purporting to represent the interests of the general public.⁴⁴

Furthermore, as in the case of the Dole Bill, any proposal to focus policy coordination within FCC is likely to be strongly resisted by those who-by virtue of their *own* positions within the administrative bureaucracy or because of their own policy preferences—would stand to lose.⁴⁵ This option would certainly be opposed by NTIA which, as noted below, sees itself as a more appropriate locale for policy coordination. In its 1988, *NTIA Telecom 2000*, NTIA argued, in fact, that the executive branch should, at the very least:

... have the ability to disapprove FCC action, at least in matters of overriding national security, foreign policy, international trade, or economic Policy.⁴⁶

In addition, others who have been highly critical of FCC's recent performance would also oppose any extension of its present responsibilities.⁴⁷

If FCC were assigned an enhanced role in developing and coordinating national communication policy, it would clearly need much greater resources.⁴⁸ Also, the composition of FCC staff

⁴¹Although independent regulatory agencies have traditionally performed a combination of legislative, administrative, and judicial functions—and, in fact, this was one of the original justifications for their existence—they are, in theory, regarded as “arms of the Congress.” For a general discussion of independent regulatory agencies, see U.S. Congress, Senate Committee on Governmental Affairs, *Study on Federal Regulation*, vol. V, *Regulatory Organization, prepared* Pursuant to S. Res. 71, (Washington, DC: U.S. Government Printing Office, December 1977).

⁴²As Glen Robinson has pointed out, this tendency of Congress to be conservative is considered by some to be a benefit. As he notes: “For landbound conservatives . . . Congress’ incapacities are more a virtue than a vice; they discourage facile legislative solutions to social and economic problem s-solutions that often prove short-sighted and ultimately mischievous.” Robinson (cd.), op. cit., footnote 33, p. 358.

⁴³For this point of view, see Robert G. Dixon, Jr., “The Independent Commissions and Political Responsibility,” *Administrative Law Review*, vol. 25, No. 1, Winter 1975, pp. 1-16.

⁴⁴Robinson (cd.), op. cit., footnote 33, pp. 356-357.

⁴⁵For Cx-pie, there was Considerable Opposition, especially from the Departments of Commerce and State, to the recent proposal to authorize the FCC to take on more responsibility for dealing with international issues.

⁴⁶NTIA, op. cit., footnote 2, P. 20.

⁴⁷See, for instance, Henry Geller, op. cit., footnote 25, p. 15. As Geller notes: “The FCC’s failure to develop objective, effective policies has been well documented. The agency delayed cellular radio service for a decade, and still has no objective policy to deal with broadcast license renewal. In regard to the comparative renewal of broadcast licences, the FCC’s policies are ‘mush’ and much criticized by the courts. The FCC issued a notice on comparative renewals in 1981, a further notice in 1982, and a still further notice in 1988.” See also Henry Geller, “Communications Law—A Half Century Later,” *Federal Communications Law Journal*, vol. 37, 1985, p. 73.

⁴⁸For a discussion of limited resources, see Glen O. Robinson, “The Federal Communications Commission,” Robinson (ed.), op. cit., footnote 33, pp. 382-388. It should also be noted that the FCC’s limited resources for regulating the entire Bell System were one of the rationales for divestiture.

would probably need to be expanded. As Seidman has pointed out, government agencies are social institutions that take on characteristics, or even personalities, of their own:

Each profession seems to mold and shape the decisionmaking process so that issues will be presented and resolved in accordance with its professional standards.⁴⁹

Designed primarily to perform traditional regulatory functions, FCC has been dominated professionally by lawyers, and more recently by economists. To deal with the broad communication issues of the future, FCC would need to greatly enhance the scope of its expertise.

*Option B: Designate an existing executive branch agency, **such** as NTIA, as the lead agency to coordinate communication policy.*

NTIA, housed within the Department of Commerce, is also a likely candidate for coordinating national communication policy. In 1978, Executive Order 12046 established NTIA to “provide for the coordination of the telecommunication activities of the Executive Branch.”⁵⁰ NTIA has, itself, proposed this option in its report, *NTIA Telecom 2000*. According to NTIA:

The Executive branch should have the authority to *establish* policy, while the FCC should remain the agency for *implementation* of policy [emphasis in the original].

It should be noted that, if this proposal were adopted, the executive branch and legislative agencies would, in effect, be reversing their traditional roles.

Arguing in favor of this option, NTIA points out that the current organizational structure suffers from an outlook that:

- often tends to be reactive and skewed toward achieving short-term objectives;
- focuses too much on the status quo; and
- is too concerned with balancing particularist interests, rather than with long-range policy planning.⁵¹

According to NTIA, the present, fragmented decisionmaking process encourages stakeholders to shop around for the policy forum in which they are likely to receive the most sympathetic hearing.⁵²

If authority for establishing and coordinating communication policy were to be transferred from FCC to the executive branch, many of these problems, NTIA contends, would be minimized.⁵³ An executive branch agency, it is argued, can be more proactive than an independent agency. Moreover, it can more successfully bring together a cross-disciplinary depth of skills and command greater acceptance and respect within both the government and the private sector than can FCC, which is circumscribed in this respect by its narrowly conceived regulatory (and increasingly deregulatory) role.⁵⁴

The idea of transferring authority from the independent agencies to the executive branch as a means of enhancing policy coordination is by no means a new one, having been the primary recommendation of a number of Presidential commissions created to analyze the organization of government.⁵⁵ One of the most recent was the Ash Council, established by President Nixon in 1969. It criticized the independent regulatory commissions for being neither re-

⁴⁹Seidman, *op. cit.*, footnote 26, p. 156.

⁵⁰47 U.S.C. 151.

⁵¹NTIA, *op. cit.*, footnote 2, p. 165.

⁵²*Ibid.*

⁵³*Ibid.*, pp. 167-172.

⁵⁴*Ibid.*, p. 167.

⁵⁵For example, in its report to the Congress, the Brownlow Commission, established under president Roosevelt, recommended that 100 independent agencies, administrations, boards, and commissions be integrated into 12 executive departments. The report was particularly critical of the independent regulatory agencies, characterizing them as the “headless fourth branch of Government.” The First Hoover Commission, set up after the Second World War, made similar recommendations, arguing that the executive branch ought to be reorganized to create an integrated, hierarchical structure with the President as an active manager. So too did the J.M. Landis *Report on Regulatory Agencies to the President Elect*, U.S. Senate, 1960. See, for a discussion, “The Federal Executive Establishment: Evolution and Trends,” Library of Congress, Congressional Research Service, prepared for the Senate Committee on Governmental Affairs, May 1980. See also Ronald C. Moe, “The Two Hoover Commissions in Retrospect,” Library of Congress, Congressional Research Service, Nov. 4, 1981.

sponsive to the public interest nor coordinated with national policy.⁵⁶ In its conclusions, the Ash Council contended that the executive branch was too fragmented to effectively coordinate public policy.⁵⁷ Arguing against establishing interagency coordinating committees to solve the problems of policy coordination--on the grounds that they would serve only to add another layer of decisionmaking--the Ash Council recommended that the government move away from the rather narrow, constituency-oriented traditional departments towards broader, functional departments, integrating a number of independent agencies in the process. It is important to note, however, that in prescribing the integration of a number of independent agencies, the Ash Council made an exception of FCC. It argued that FCC should remain independent, given the sensitive role that it has played with respect to the mass media.⁵⁸

Although many scholars and administrators have taken issue with the concept of the independent regulatory commission, a number have strongly defended it.⁵⁹ Most early advocates of independent regulatory commissions focused on the role of such agencies as administrative expert, separate and untarnished by the political process. This rationale, however, was not long in vogue, becoming overtime a major source of criticism of independent regulatory agencies. More recently, the argument has been made that, instead of being protected from abuse and invidious influences, the commission form helps to assure that different views will be taken into account at the highest agency level.⁶⁰ Moreover, it is claimed that, although the need to compromise at this level may delay the decisionmaking process, the benefits

may be greater than the costs. As Robinson has noted in this regard:

Differences among agency members do not exist in a vacuum; they reflect basic conflicts among different groups and interests involved in a particular problem. Such conflicts cannot be resolved simply by administrative fiat and attempts to do so are likely only to shift political pressures to Congress (most often congressional committees) or the executive ("White House staff") where they may be equally effective, but less visible to the public.⁶¹

Just as NTIA opposes delegating the authority for coordinating U.S. communication policy to FCC, so it can be anticipated that FCC would strongly oppose any transfer of its authority to the executive branch. Members of congressional committees responsible for FCC oversight, who in the past have assiduously protected their prerogatives in this regard, are also likely to oppose such a measure.⁶² In fact, as Robinson has pointed out, given the historical litany of complaints against independent regulatory commissions, their continued longevity in the face of such criticism attests to the strength of congressional and stakeholder opposition to any change.⁶³

Stating the case for Congress and FCC, there are a number of arguments that might be made against such an option. For example, there is the recommendation of the Ash Council that, given FCC's special role, it be exempt from integration into the executive branch. According to the Council's report, in an area as sensitive as communication, a single administrator would be in an "exceptionally vulnerable position which, because of its appearances, could impair public trust," whereas a "collegial form increases the

⁵⁶A New Regulatory Framework: Report on Selected Independent Regulatory Agencies," The President's Advisory Council on Executive Organization, 1971. For a discussion, see Moe, *op. cit.*, footnote 31; see also Harvey Mansfield, "Reorganizing the Federal Executive Branch: The Limits of Institutionalization," *Law and Contemporary Problems*, vol. 35, Summer 1970, pp. 460-495.

⁵⁷Moe, *op. cit.*, footnote 31, p. 33.

⁵⁸The President's Advisory Council on Executive Organization, *op. cit.*, footnote 56, pp. 31-46.

⁵⁹See, for example, Louis Jaffe, "The Effective Limits of the Administrative process: A Reevaluation," *Harvard Law Review*, vol. 67, May 1954, pp. 1105-1135; Henry J. Friendly, "A Look at the Federal Administrative Agencies," *Columbia Law Review*, vol. 60, April 1960, pp. 429-446; and Glen O. Robinson, "Reorganizing the Independent Regulatory Agencies," *Virginia Law Review*, vol. 57, September 1971, pp. 947-995.

⁶⁰*Ibid.*, p. 961.

⁶¹*Ibid.*, p. 962.

⁶²As Moe has pointed out: "Congress is not well organized to deal with abstract principles, such as a unified executive branch. The committee structure is more appropriate for dealing with specific problem areas and with distinct units within the executive branch . . .

Given its constitutional power to establish units in the executive branch, and given its institutional tendency to seek influence in the making of agency policy, Congress increasingly has been inclined to create agencies which have a high degree of independence from Presidential supervision." *Op. cit.*, footnote 37, p. 12.

⁶³Robinson (cd.), *op. cit.*, footnote 33.

probability that internal checks and balances will be effective” against otherwise improper influences or biases.⁶⁴

A number of NTIA’s claims about the benefits of reorganization might also be questioned. In *NTIA Telecom 2000*, for example, the assumption is made that an executive branch agency can play a more holistic role than FCC in developing and coordinating communication policy, being less susceptible to the pressures and influences of narrow interest groups. However, challenging the Ash Council’s premise that the President’s broad national constituency would protect an executive branch agency against narrow industry pressures and influences, Robinson has noted:

As a **priori theory**, the idea has appeal. Unfortunately, however, it does not have a very solid anchor in reality insofar as it assumes that executive departments operate majestically above the interests of particular industries or clientele concerns—an assumption which cannot survive the most cursory scan of executive agencies. In fact the phenomenon of interest group representation is very much a part of the basic character of the political process in this country.⁶⁵

Equally questionable is the NTIA assumption about the limited resources and expertise available to FCC. This assumption discounts the fact that Congress could very well enhance FCC’s mandate and provide it with additional resources, as it would have to do if it designated policymaking and coordinating authority to an executive branch agency. The corollary to this assumption—that FCC’s authority is likely to be circumscribed further in the future, given continued deregulation—is also specious, insofar as support for further deregulation is clearly not a given. This is well illustrated by the recent efforts of a number of congressmen to codify the Fairness Doctrine, and by the recent congressional and State debates over price caps and rate-of-return regulation.

Just as FCC resources and staff would need to be upgraded in order for the agency to play a greater national policymaking or coordinating role, so too would those of NTIA. There is little evidence to suggest that, since the coordinating and policy planning functions of the now defunct Office of Telecommunications Policy (OTP) were transferred to NTIA in 1977, progress has been made in developing a coherent and consistent national communication policy. In fact, one could strongly argue the opposite case, given the radical differences in policy perspectives exhibited by different government agencies, as in the case, for example, of the line-of-business restrictions. Nor has NTIA been particularly successful in performing the former OTP task of coordinating the U.S. communication policy position for presentation in international policy fora.

The possibility of NTIA gaining future support to effectively play an enhanced policy role may, moreover, be seriously in doubt. It has recently been proposed, for example, that NTIA be further integrated into the Department of Commerce as part of the Technology Administration, under a new secretary.⁶⁶ Were this organizational change to take place, it would be even more difficult for NTIA to reconcile national goals, since it is more likely that commercial criteria would prevail.⁶⁷

Option C: Establish a new executive agency to address communication issues.

Over time, organizations develop a “mystique” of their own that affects how the public, other agencies, and Congress relate to them,⁶⁸ Moreover, once established, the character of an organization is extremely difficult to change, often requiring—as mentioned above with respect to both FCC and NTIA—nonorganizational measures that expand an agency’s constituency, the complete reconfiguration of administration systems, and a different mix of

⁶⁴ @Ash *Council Report*, p. 41, as cited in Robinson, op. cit., footnote 59, p. 963.

⁶⁵ *Ibid.*, p. 956.

⁶⁶ The legislation that authorized this restructuring was passed in the 100th Congress, shortly before its adjournment. Under the proposed reorganization, the National Institute of Standards and Technology (previously the National Bureau of Standards), the National Technical Information Services, and the Office of Productivity, Technology, and Innovation would be combined with NTIA to form the Technology Administration. “Commerce’s Restructuring Plan,” *Broadcasting*, Nov. 14, 1988.

⁶⁷ It should be noted, in this regard, that the Department of Commerce was deliberately established to advocate business interests.

⁶⁸ Seidman, op. cit., footnote 26, p. 25.

professional skills.⁶⁹ Keeping these factors in mind, it could be argued that—given the numerous problems experienced with the previous organization arrangements for dealing with communication policy, and the growing national importance of communication issues—the time is right to create an executive agency specifically designed to deal with communication policy.

In taking such a step, however, caution is required. As Seidman has admonished:

The *first* organization decision is crucial. The course of institutional development may be set irrevocably by the initial choice of administrative agency and by the way in which the program is designed. Unless these choices are made with full awareness of environmental and cultural influences, the program may fail or its goals may be seriously distorted.⁷⁰

Depending on the degree of prominence that Congress wants to attach to such a mission, an agency might be structured as an independent executive agency (like the Environmental Protection Agency or the Small Business Administration) or as a Cabinet-level department.⁷¹ Cabinet-level departments represent the traditional form of executive branch agency that existed up until 1860. Typically, they were directed by a single administrator, who formed part of the President's Cabinet. Today, there are 14 departments at this level.

Executive agencies residing outside the departmental structure were rare until the turn of the 20th century, becoming increasingly prominent after the First World War. Their growth parallels, in a sense, the growing complexity of society. Many independent agencies were established in response to the lobbying pressure of a particular constituency. Examples are the Departments of Agriculture, Labor, and Education (which later became Cabinet-

level agencies). Others, such as the Environmental Protection Agency, were created, in part, as a symbolic gesture to give prominence to a particular national concern.⁷²

Since both kinds of agencies can constitute major institutional entities—wielding considerable operational authority and having at their disposal sizable financial and staff resources—the most important factor that distinguishes them from one another is their approximation to the President, and hence their national prominence and relationship to the administration's overall policy program. Separating them, but to a lesser extent, is the fact that tenure is less assured in the case of independent executive branch agencies. In making a choice between these two organizational approaches, therefore, the two most important questions that need to be asked are: 1) How fundamental are the communication-related changes that are taking place within society, and 2) how permanent are they? To the extent that these changes are believed to be enduring, and in order to link together a whole range of societal issues, they might best be treated at the Cabinet level where conflicts can be resolved by the President.⁷³ On the other hand, if these changes, and the issues to which they give rise, are limited in time and can be treated in a more isolated fashion, an independent agency might be a more appropriate choice.

As noted above, the virtues of the executive-branch form of organization have long been touted by a number of scholars and commissions on governmental organization. Among the advantages typically cited are: enhanced policy coordination, greater efficiencies in division of responsibility and the execution of tasks, greater accountability, and greater ability to attract high-quality personnel.

Regardless of the merits of this option, establishing an executive department is far from simple. Historically, Congress has not been eager to create

⁶⁹Ibid.

⁷⁰Ibid., p. 25. See also Simon et al., op. cit., footnote 28.

⁷¹A characterization of the Federal executive establishment appears in Title 5 of the United States Code in sections 101-105. ¶ Harold Seidman has pointed out, there are no general Federal laws that define the particular form or organizational structure of Federal agencies. Rather, each agency is defined by the powers enumerated in its enabling actor set forth by executive order. Seidman, op. cit., footnote 26, p. 246. For a description of the wide-ranging variety of executive branch agencies, see also CRS, op. cit., footnote 55.

⁷²For a discussion, see Seidman, op. cit., footnote 26, pp. 233-234, and CRS, op. cit., footnote 55, pP. 29-31.

⁷³The Bureau of the Budget reserves departmental status for "those agencies which: 1) administer a wide range of programs directed toward a common purpose of national importance; and 2) are concerned with policies and programs requiring frequent and positive presidential direction and representation at the highest levels of Government."

new departments, often requiring an agency to serve a period of apprenticeship before being promoted to the status of an executive department. For example, although a bill to create a Department of Transportation was introduced in Congress as early as 1890, it took 60 years for such a department to be established.⁷⁴

The reluctance of Congress to establish new agencies is not surprising, given the close interrelationships between the executive and legislative branches. Any major changes in the executive branch are likely to have considerable impacts on the distribution of power and responsibility in Congress. Thus, Congress has the ultimate say with respect to any significant organizational changes.

The States also might look askance at the creation of a Department of Communication. As early as 1789, they were concerned that the growth of the executive branch would take place at the expense of their own authority and policymaking prerogatives. For this reason, the States opposed the establishment of both the Department of the Interior in 1849 and the Department of Education in 1970.⁷⁵ Given this history, and the number and intensity of recent disagreements between the Federal and State Governments about communication policy, the States might very well be averse to setting up an executive agency for communication.

A number of other stakeholders are likely to be ambivalent about creating anew agency to deal with communication policy issues. Although many may be frustrated by the lack of consistency and coherence in the present situation, they have learned how to operate effectively within it. The establishment of a new agency would be fraught with uncertainty. Since Federal agencies have often served to promote certain constituencies, many would oppose or favor an executive-branch agency depending on whether

they perceive it to enhance or detract from their particular interests.

Option D: Establish an agency within the Executive Office of the President (EOP) to develop a comprehensive communication policy and coordinate the activities of existing communication agencies.

While the option of creating an independent executive agency would provide the President with considerable control over communication policy through the powers of appointment, the President's influence would be even greater if the responsibility and authority for developing and coordinating communication policy were located right at the center, in the White House office within EOP.

EOP was established in 1939 as the principal management arm of the President, which would serve to enhance the President's ability to develop comprehensive national policies. Originally housed within it were the White House office, the Bureau of the Budget, and the National Resources Planning Board.⁷⁶ Over the years, not only has EOP grown both in terms of personnel and responsibilities; in addition, the White House office has become the key agency within it.⁷⁷

Given the growing importance of the White House office and its close relationship to the President, how one views the option of creating a communication agency to be part of it will depend, to a considerable degree, on one's views about the appropriate roles of, and relationships between, Congress and the executive. It might be noted that, had this option been available at the time of President Andrew Jackson, he would most likely have favored it, being an outspoken advocate of a strong executive. His views on this subject can still serve to illustrate the major rationale for centralizing

⁷⁴Seidman, *op. cit.*, footnote 26, p. 246.

⁷⁵*Ibid.*, p. 16.

⁷⁶CRS, *op. cit.*, footnote 55, p. 24.

⁷⁷*Ibid.* In fact, EOP became so prominent that many, even among those who had advocated its expansion, were becoming concerned about an "institutionalized" presidency.

The growth in the size of the agencies and personnel within EOP also helps to explain the shift in importance towards the White House office staff. As Seidman has noted, their usefulness to the President as a general staff decreased in inverse relationship to their size. Seidman, *op. cit.*, footnote 26, p. 252.

For a recent description of its development up through the Reagan Administration, see Samuel Kernell, "The Evolution of the White House Staff," Chubb and Peterson (eds.), *op. cit.*, footnote 1, pp. 185-237.

the responsibility for communication policy under the direct purview of the President. As he saw it:

[It is the President's] especial duty to protect the liberties and rights of the people and the integrity of the Constitution against the Senate, or the House of Representatives, or both together.⁷⁸

Seidman adds:

As the elected representative of *all* American people, the president alone has the power and responsibility to balance the national interest against the strong centrifugal forces in the Congress for the special interests of subject matter or region.⁷⁹

It was, in fact, this same argument that served as the Nixon Administration's primary rationale for creating OTP within the White House office in 1970. In his message to Congress, President Nixon made it clear that OTP would be a presidential advocate, proposing and arguing for the specific policy preferences of the executive branch.⁸⁰ And, decidedly, this was the major role that OTP played during its 8-year existence.⁸¹ It was highly political, did little long-range planning, and was unsuccessful at coordinating national communication policy.⁸² Under these circumstances, it is not surprising that OTP was never a particularly popular agency.

Because of its controversial nature, OTP's history illustrates many of the potential problems and advantages that can be associated with this kind of organizational arrangement. In addition, because OTP serves as a precedent, it is possible, to some extent, to look at the way key stakeholders regarded

it and surmise what their attitudes might be to such an institutional option today.

Although located at the center, OTP actually suffered from a lack of power and authority. It enjoyed few resources of its own. While it derived power and influence from the presidency, it was never quite clear to stakeholders when the agency was, in fact, operating on the President's behalf and with the President's authority.⁸³ Furthermore, having no operational powers, it was totally dependent on other agencies to implement its policies and programs.⁸⁴

Given its inherent organizational weaknesses, the first—and most important—task that OTP faced was to gain legitimacy for its role. This problem was compounded by the fact that few of the traditional government, industry, or political actors had favored the establishment of OTP to begin with. Many felt that it was not legitimate for the White House office to play the role of presidential advocate. And the cast of mind and style of operation⁸⁵ of the first OTP Director, Dr. Clay T. Whitehead, did little to assuage their fears. Whitehead strongly believed in the agency's advocacy role. As he described it:

[No one] who's realistic about how government works would expect that an agency could exist in the executive branch, answerable directly to the President, that would not be political in some sense.⁸⁶

Reflecting Whitehead's view of his role, most of OTP's policy decisions were arrived at not through study or analysis, but rather, as Whitehead has

⁷⁸Quoted in Clinton Rossiter, *The American Presidency* (The New American Library, Inc., 1956), p. 92, from Seidman, op. cit., footnote 26.

⁷⁹Seidman, op. cit., footnote 26, p. 72.

⁸⁰See President Nixon's message to Congress in U.S. Congress, House Committee on Government Operations, *Reorganization Plan No. 2 of 1970*, pp. 34.

⁸¹For a discussion, see James Miller, "The President's Advocate: OTP and Broadcast Issues," *Journal of Broadcasting*, No. 3, Summer 1982, pp. 625-639; and James Miller, "Policy Planning and Technocratic Power: The Significance of OTP," *Journal of Communication*, vol. 32, No. 1, Winter 1982, pp. 53-60. As part of his reorganization plan, which called for a reduction in the size of government, President Carter disbanded OTP upon coming into office in 1978, and transferred the majority of its responsibilities to NTIA.

⁸²Ibid.

⁸³Miller, op. cit., footnote 81, p. 632.

⁸⁴Ibid.

⁸⁵Reflecting on Whitehead's highly politicized, personal style, Richard Wiley, former chairman of the FCC, recounts how Whitehead stated publicly that: "Broadcasters had duty to avoid 'ideological plugola' in their newscasts and to correct situations where so-called professionals . . . dispense elitist gossip in the guise of news analysis." Richard E. Wiley, "'Political' Influence at the FCC," *Symposium: The Independence of Independent Agencies*, *Duke Law Journal*, April/June 1988, Nos. 2 & 3.

⁸⁶As cited in Miller, op. cit., footnote 81, p. 635.

himself described it, through brainstorming sessions of the agency's director and its chief counsel.⁸⁷

Congress, in particular, was worried about the role of OTP.⁸⁸ Never enthusiastic about the agency, Congress's attitude towards and relationships with OTP only deteriorated over time. Representative Herbert Macdonald, Chairman of the House Subcommittee on Communications, was particularly hostile, characterizing the agency in 1971 as "headline grabbers" who use "dramatic proposals and catch phrases" to win favor with one group and scare others, thereby "perpetuating a cruel hoax on the public by suggesting that difficult problems have simple solutions."⁸⁹ Reflecting its suspicion and hostility, Congress, in 1975, made significant cuts in OTP's budget. And Senators Weicker and Ribicoff introduced legislation to abolish OTP entirely.⁹⁰

The history of OTP suggests that an agency such as this, located so close to the President, may find it extremely difficult to simultaneously play the roles of both advocate and coordinator. Moreover, it illustrates—perhaps all too painfully—the public administration axiom that to resolve policy conflicts it is not enough to simply create a new organizational arrangement. Finally, the experience of OTP reinforces the notion that the success of any organization will depend, to a significant degree, on the factors and circumstances that led to its creation, and by the particular organizational personality that it projects to the public at the outset.

It is unclear whether a new agency, such as OTP, would be more successful in gaining political support and serving as the primary agency responsible for developing and coordinating communication policy today. Even if it were to play less of an advocacy role, it would still face the problem of having extremely limited resources. To the extent that additional resources were made available to

provide the agency with some operational authority, it could be argued that it would be too large and cumbersome to operate effectively as part of the White House staff or even EOP.⁹¹ One might also question whether it would be wise to locate the expertise for establishing communication policy within an agency that is subject to the change of administrations and the subsequent replacement of key personnel. Seidman notes:

The President ought to have the capability to adapt the Executive Office to his perceived needs, but he should not be permitted in the process to ignore the needs of future presidents, the Congress, and the people.⁹²

Strategy 3: Provide an interagency and/or interjurisdictional mechanism for coordinating communication policy and resolving jurisdictional issues.

Strategy 2, as described above, would suggest that effective coordination of conflicting communication goals and interests can best be achieved within the organizational context of a single agency. Some public administration scholars would strongly support such a proposition. James D. Mooney, for example, has defined coordination as no less than "the determining principle of organization, the form which contains all other principles, the beginning and the end of all organized effort."⁹³ However, others would contend that no ongoing, single organization or agency can address the breadth of problems, or their rapidly changing natures, that the United States faces today—especially as they appear in the realm of communication. To address such problems, it is argued, we need to establish interagency and interjurisdictional mechanisms for coordination. Two options available to Congress for such coordinating mechanisms are discussed below.

⁸⁷Ibid.

⁸⁸It should be noted, in this regard, that Congress has never allowed the president to have a free hand in organizing the EOP. As Seidman has pointed out: "Most department heads now have authority to organize and reorganize their agencies without formal congressional approval, but the President lacks comparable power." Seidman, *op. cit.*, footnote 26, p. 248.

⁸⁹Miller, *op. cit.*, footnote 81, p. 635.

⁹⁰Ibid., pp. 633-634.

⁹¹Forrest Chisman makes this case, for example, in "The Executive Branch," Robinson (ed.), *op. cit.*, footnote 33, ch. 11.

⁹²Seidman, *op. cit.*, footnote 26, p. 252.

⁹³James D. Mooney, "The Principles of Organization," in Luther Gulick and L. Urwick, *Papers on the Science of Administration* (New York, NY: Institute of Public Administration, 1937), p. 93.

Option A: Establish an interagency coordinating body with representatives from all agencies that have responsibility for communication policy.

Just as the American belief in the value of “expertise” led to the creation of independent regulatory agencies set apart from politics, so it gave rise to agencies that were separate and distinct from one another. The idea was that “single-mindedness” would “quickly develop a professionalism of spirit—an attitude that perhaps more than rules affords assurance of informed and balanced judgments.”⁹⁴

However, as the role of government expanded and the kinds of issues and problems with which government had to deal became more and more interconnected, it became increasingly apparent that the traditional organizational criterion of efficiency had to be balanced against the need for coordination. No agency had **at its** disposal all of the tools and expertise necessary to deal with major social and economic problems in a comprehensive and coordinated fashion.⁹⁵

One way of trying **to** balance the dual requirements of coordination and efficiency—although never popular or very successful—was to create interagency coordinating committees. Characterizing this form of arrangement, Seidman says:

Interagency committees are the crabgrass in the garden of government institutions. Nobody wants them, but everyone has them. Committees seem to thrive on scorn and ridicule, and multiply so rapidly that attempts to weed them out appear futile.⁹⁶

But, as Seidman is quick to add: “The harshest critics have yet been unable to devise satisfactory substitutes.”⁹⁷

Today, two intergovernmental agencies are concerned with communication and communication-related issues: The Senior Interagency Group on International Communication and Information Policy,⁹⁸ which was established by the **National** Security Council in 1984, and the Economic Policy Council, which, although it does not directly focus on communication issues, provides an interagency forum for addressing them.⁹⁹

Given the growing importance of communication, and hence the need for greater agency coordination, it is likely that proposals will continue to be made to create interagency mechanisms for coordination. Before adopting any such measures, however, it is wise to consider the extent to which, and the reasons, such organizational forms have so often failed to meet their creators’ objectives.¹⁰⁰

Some of the problems associated with interagency coordinating committees are that they tend to:

- . bury problems rather than resolve them;
- . make it difficult to get tasks accomplished because too many people with only a peripheral interest become involved;
- . dilute interest in, and commitment to, addressing a problem; and
- . lead to outcomes that are based more on the distribution of power within a committee than

⁹⁴James Landis, *The Administrative Process*, (New Haven, CT: Yale University Press, 1938).

⁹⁵Lloyd N. Cutler and David R. Johnson, “Regulation and the Political Process,” *The Yale Law Journal*, vol. 84, No. 7, June 1975, pp. 1403-1409.

⁹⁶Seidman, *op. cit.*, footnote 26, p. 207.

⁹⁷Id., ~211; **as noted above**, the Ash Council concluded that such agencies **only serve** to add an **additional** layer of **bureaucracy**. s= also Alan Schick, “The Coordinating Option,” in Peter Szanton, *Federal Reorganization: What Have We Learned?* (Chatham, NJ: Chatham House Publishers, Inc., 1981), ch. 5.

⁹⁸Comprised of 16 agencies, the Interagency Group is not a **standing body**; rather, it **meets** when issues **arise**. **The main purpose** of **this group** is to “examine proposed international telecommunications and information policy alternatives from a **full** range of perspectives.” It is chaired by the head of NTIA and the Undersecretary of State for Security Assistance, Science, and Technology. NTIA, *op. cit.*, footnote 2, p. 173.

⁹⁹President Reagan set up the Economic Policy Council in 1985 as a means for working out interagency economic policy issues. A Cabinet-level body, it is comprised of the Secretaries of the Treasury, Commerce, State, Energy, Agriculture, and Labor; the Director of the Office of Management and Budget; the U.S. Trade Representative; and the Chairman of the Council of Economic Advisors. The Vice President and the Chief of State are **ex-officio** members, and the heads of nonmember departments maybe invited to attend when **issues germane** to their activities are under discussion. *Ibid.*

¹⁰⁰It is **interesting t. note**, i, **this regard**, that even thou@ **the problems of interagency committees are well known**, **such committees continue to be** established. President Carter, for example, **planned** to reduce the number of these committees as part of his reorganization efforts. Instead, however, during one 12-month period, he established seven such committees by **executive** order, Schick, *op. cit.*, footnote 97, pp. 95-96.

on policy considerations.¹⁰¹

Turning again to the work of Harold Seidman, it is evident that many of the problems that interagency committees have experienced have been due not so much to the particular organizational form they take, but rather to the fact that expectations of what interagency committees can reasonably accomplish have generally been much too high.¹⁰² Although called on to coordinate, these committees all too often are actually expected to develop a policy consensus—a task much more easily said than done. For, if the chairman of an interagency committee actually had power to bring about a consensus, he or she would enjoy more authority than the President, himself.¹⁰³ On the contrary, chairmen of interagency committees often have very little authority. When these committees are established, it is generally well understood and agreed upon in advance that the power relationships among the members will remain the same.¹⁰⁴

Given this tendency to delegate responsibility without equivalent authority, it would appear that interagency committees are likely to be most successful when they are assigned realistic tasks. In addition, these tasks should be related to some overall shared goal—one that is agreed upon at the outset and which, over time, can sustain an organizational commitment. Alan Schick has noted that:

Interagency committees cannot succeed as organizational orphans. When nobody has a vested interest in the group's work and nobody is responsible for following through on its decisions, a committee will languish even if its formal status remains intact.¹⁰⁵

From the point of view of existing stakeholders, any proposed new interagency coordination can be expected to generate some strong opposition. As Seidman has noted, efforts at coordination are not designed to make friends. For “coordination is rarely

neutral,” and always “advances some interests at the expense of others.”¹⁰⁶ Thus, any proposal to enhance coordination is likely to be judged less on its merits than on how it might redistribute power among existing players.

While Congress has been willing to grant the executive branch considerable leeway in establishing interagency coordinating committees, it too is likely to judge such a proposal on the basis of how it might affect the distribution of power within the legislature. In the past, Congress has been most inclined towards those standing committees that operate similarly to independent agencies, and the most opposed to those that are closely associated with the executive branch and might tend to become “superagencies.”¹⁰⁷

Given the limitations of interagency coordinating committees, this analysis would suggest that while such committees might contribute to addressing the existing problem of coordinating communication policies, they could do little to resolve this problem on their own. At present, there is neither agreement on overall communication policy goals, nor agreement among agencies as to which group should take the lead in developing such a consensus.

Option B: Establish an ongoing Federal/State agency, along the lines of the Federal/State Boards, to coordinate and resolve Federal/State interjurisdictional communication policy issues.

Although a critical and enduring facet of American government, the concept of federalism has evolved over time and in response to changing events and circumstances.¹⁰⁸ The colonial period and the experience of the Revolutionary War gave rise to the notion of a “dual federalism,” which presupposed that the Federal and State Governments

¹⁰¹*Ibid.*, p. 95; and Cutler and Johnson, *op. cit.*, footnote 95.

¹⁰²Seidman, *op. cit.*, footnote 26, p. 216.

¹⁰³*Ibid.*

¹⁰⁴*Ibid.*, pp. 213-216.

¹⁰⁵Schick, *op. cit.*, footnote 97, p. 97.

¹⁰⁶Seidman, *op. cit.*, footnote 26, p. 205.

¹⁰⁷*Ibid.*, p. 222.

¹⁰⁸For three rather different perspectives on American federalism, see, for example, Michael D. Reagan, *The New Federalism* (New York, NY: Oxford University Press, 1972); Ira Sharkansky, *The Maligned States: Policy Accomplishments, Problems, and Opportunities* (New York, NY: McGraw Hill Book Company, 1972); and David B. Walker, *Towards a Functioning Federalism* (Cambridge, MA: Winthrop Publishers, Inc., 1981).

operate in their own spheres, independently of one another, with each deriving its authority from the people.¹⁰⁹ In the post-World War I and World War II periods, a growing Federal involvement in more and more economic and social activities gave rise to the notion of a “creative” or more integrated federalism. Comparing the latter to the former of these two forms, Grodzins notes, for example:

American federalism is not like a layer cake, with each level of government having its own autonomous sphere of decision making; rather, it is like a marble cake, in that decisions regarding a particular function are made at all levels of government and that all levels typically cooperate in implementing public policies.¹¹⁰

It should be noted, however, that if creative federalism is to work in practice, either:

- the States and the Federal Government will need to be in basic agreement about policy goals, or
- the Federal Government will need to have some form of leverage (such as Federal funding) over the State Governments that allows it to impose its point of view.

At present, neither of these conditions exists with respect to communication policy. As noted above, in a number of instances the States have been emphatically opposed to the direction Federal communication policy has taken. Moreover, given the Supreme Court’s decision in the case of *Louisiana v. FCC*, it would appear that the ease with which the Federal Government has been able to preempt State communication policy in the past will, in the future, be quite severely checked. Under these circumstances, it may be necessary to create an ongoing organizational

entity to help resolve Federal/State, and State/State communication policy issues.

One model that might be followed in setting up such a organization is that of the Federal/State boards, presently in use by FCC and State public utility commissions. These boards consist of three FCC commissioners and four State commissioners nominated by the National Association of Regulatory Utility Commissioners (NARUC).¹¹¹ They meet to consider divisive State-Federal issues in much the same way that collective bargaining representatives attempt to negotiate an acceptable contract. When a compromise has been reached, both groups attempt to convince their respective groups to support that compromise. At present there are three joint boards dealing with issues related to pricing of telephone services.¹¹²

According to most participants, the joint board process has been quite useful.¹¹³ Given the anticipated growth and increased intensity of jurisdictional issues, Congress may want to take steps to extend and enhance these institutional arrangements. At present, boards meet on an ad hoc basis at the initiative of FCC. One way in which Congress might strengthen their role, therefore, is to provide the necessary staff and financial resources to allow them to operate on a continual basis. In addition, Congress might authorize the States, as well as FCC, to set the agenda for discussion. Were a joint Federal/State board to exist on a standing basis, Congress might also refer issues to it for an appropriate airing.

Although States might very well favor such an option, having consistently called for a greater State role in Federal communication policymaking,¹¹⁴ it is likely that FCC would not. In recent public state-

¹⁰⁹Reagan, *op. cit.*, footnote 108, ch.1.

¹¹⁰Morton Grodzins, “The Federal System,” president’s Commission on National Goals, *Goals for Americans* (Englewood Cliffs, NJ: Prentice-Hall, 1960), as cited in Reagan, *op. cit.*, footnote 108, p. 6.

¹¹¹The joint board process was codified by Congress in 1971, after the process had been used successfully by the States and the FCC to resolve a thorny issue in 1970. It is a slight modification of the State joint boards introduced by the Interstate Commerce Commission, which attempted to resolve interstate disputes by convening meetings attended by an equal number of representatives from each of the multiple States affected by a matter. Public Law 92-131, codified at 47 U.S.C. 410 (c). For a discussion, see 1971 *U.S. Congress and Administrative News*, pp. 1513-1514. See also, 49 U.S.C. 10341-1-0344 and accompanying historical references.

¹¹²Personal communication with Ron Choura, staff member of the Michigan State Utility Commission and senior joint board staff member, Feb. 16, 1989. NARUC has been sufficiently pleased with the process that it has made about 19 requests for issues to be discussed by joint boards in the last 10 years. *Ibid.*

¹¹³Richard Schultz, “Two-Tier Regulation and Joint Boards in American Telecommunications,” unpublished manuscript, July 1987.

¹¹⁴Mark Rockwell, “States Seek More FCC Input, But Patrick Stands Ground,” *CommunicationsWeek*, Nov. 7, 1988, pp. 6, 61.

ments, the FCC Chairman has admonished States for standing in the way of Federal communication policy.¹¹⁵ Moreover, under present rules, FCC can not move forward on any issue so long as it is being considered by a joint board. Thus, if States could put items on the agenda, they might use this authority to block distasteful policies. On the other hand, if only FCC can establish the agenda, the boards are not likely to delve into fundamental or high-priority issues.

Strategy 4: *Establish an institutional basis for facilitating coordination and cooperation among government agencies, industry providers, and communication users.*

Option A: Encourage or support the establishment of advisory bodies to provide input to executive agencies and the FCC on specific communication issues.

Federal agencies have often set up advisory boards as a way of channeling public input into the administrative process. However, one problem that has typically emerged with these groups is that, over time, many have become somewhat rigid in their makeup. Thus, instead of fostering a broad public input into the policymaking process, some advisory groups have actually served to limit participation and the scope of the policy debate. Moreover, because many of these advisory bodies have appeared at times to have a life of their own, they have often been criticized for not being accountable to the public and being removed from the political process.

In recognition of these problems, Congress passed the Federal Advisory Committee Act in 1972 as an appendix to Title 5 of the U.S. Code.¹¹⁶ This act required that administrative advisory committees be

held more accountable to Congress, that meetings be open, and that membership be more representative of a broader range of views.

As noted above, a number of advisory committees have already been established to address communication issues, such as the ISDN User Forum in the National Institute for Standards and Technology (NIST) and the Advisory Committee on Advanced TV setup by FCC. FCC has also instigated the ONA process, requiring that regional Bell holding companies develop their ONA plans with the participation of user groups. To further encourage this kind of public input, Congress might promote the development of additional groups to address issues such as telecommunication competitiveness, security and survivability, and the delivery of broadband services to the home. Moreover, to assure that a broad range of considerations are taken into account, it might formalize the existence of such groups under the Federal Advisory Committee Act.

Option B: Provide for alternative means of dispute resolution in FCC proceedings.

Some Federal agencies, especially those involved in environmental regulation and labor issues, have been experimenting successfully with new means of dispute resolution as alternatives to the traditional agency procedures for resolving conflicts.¹¹⁷ Alternative means of dispute resolution (ADR) include negotiated rulemaking, mediation, arbitration, and minitrial.¹¹⁸

Negotiated rulemaking, in which an agency convenes a meeting of all interested parties to discuss a specific issue and reach a mutual resolution, has been proposed as an alternative to the traditional regulatory procedure of agency rulemaking, often followed by court challenge.¹¹⁹ In 1981, the 96th

¹¹⁵*Ibid.*

¹¹⁶Public Law 92-463, 86 Stat. 770, codified at 5 USC, app. 2.

¹¹⁷See Henry H. Perritt, Jr., "Analysis of Four Negotiated Rulemaking Efforts," Final Report prepared for the Administrative Conference of the United States, Nov. 15, 1985; Charles Pou, Jr., "Federal Agency Use of 'ADR': The Experience to Date," Center for Public Resources, 1987, reprinted in Administrative Conference of the U. S., *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution* (office of the Chairman, 1987), pp. 101-111; Philip J. Harter, "Dispute Resolution and Administrative Law: The History, Needs, and Future of a Complex Relationship," *Villanova Law Review*, vol. 29, No. 6, 1983, pp. 1393-1419.

¹¹⁸For a review of these techniques and examples of Federal use, see Administrative Conference of the U. S., *Op. cit.*, footnote 117.

¹¹⁹See Philip J. Harter, "Negotiating Regulations: A Cure for Malaise," *The Georgetown Law Journal*, vol. 71, No. 1, October 1982; Note, "Rethinking Regulation: Negotiation As An Alternative to Traditional Rulemaking," vol. 94, *Harvard Law Review*, 1981, p. 1871; Lawrence Susskind and Connie Ozawa, "Mediated Negotiation in the Public Sector," *American Behavioral Scientist*, vol. 27, No. 2, Nov./Dec. 1983, pp. 255-279; and John T. Dunlop, "The Negotiations Alternative in Dispute Resolution," *Villanova Law Review*, vol. 29, No. 6, 1983, pp. 1421-1448.

Congress considered legislation to permit contacts between agency officials and interested parties, in effect allowing agencies and affected parties to develop regulations in private negotiations.¹²⁰ In 1982, the Administrative Conference of the United States adopted recommendations outlining when negotiated rulemaking should be used and what procedures should be followed.¹²¹ In the 97th, 98th, 99th, and 100th Congresses, legislation was again introduced to establish a process to facilitate the formation of negotiated rulemaking procedures within Federal agencies. In the 100th Congress, the Negotiated Rulemaking Act (S.1504) passed the Senate, but not the House.¹²² It is expected that a similar bill will be reintroduced in the 101st Congress.

FCC appears to be willing to experiment with alternative means of dispute resolution. In 1986, FCC used a mediator/facilitator in the RKO Settlement Process.¹²³ In this case, FCC's "goal of a mediated comprehensive settlement of litigation relating to all the RKO properties is clearly not achievable."¹²⁴ In most instances, parties reached a point at which they were unwilling to negotiate further. Stuart Brotman argues that negotiated rulemaking would facilitate policy resolution at FCC, especially for issues such as must-carry. As he sees it:

Negotiated rulemaking can and should utilize the "good offices" of the FCC to encourage political consensus from the outside. This allows the Commission to focus its efforts on seeking further public comment and improving the substance of a consensus rather than on developing policies likely to be

challenged through subsequent litigation. Moreover, interested parties working together as collaborators rather than as adversaries are more likely to generate useful information that can be utilized in the rulemaking record that the FCC compiles.¹²⁵

Those who favor alternative means of dispute resolution view them as means for minimizing court involvement, reducing the time required to reach settlement, and providing parties to disputes with an opportunity to somewhat informally reach a consensus or compromise solution. Some are skeptical about the process.¹²⁶ Others raise issues about the democratic accountability of alternative means of dispute resolution, including how to: provide for public participation; ensure due-process protections; and protect confidentiality and privacy. *27

Option C: Establish a government corporation to perform essential communication services for the public.

While quite foreign to the free-market advocacy style of the American political economy, organizational arrangements that promote collaboration among government, industry, and user interests are quite common in other parts of the world. In Britain, for example, prior to privatization, users were formally represented by the Post Office Users' National Council, established by law in 1969.¹²⁸ Since privatization, the Secretary of State has appointed advisory committees in England, Wales, Scotland, and Northern Ireland to provide for articulation of consumer interests to the Office of Telecommunications (OfTel). There are also advi-

¹²⁰Two Senators introduced bills: Senator Roth introduced S. 1609 and Senator Levin introduced S. 1360. Laura B. Weiss, "Reform Plan Would Allow Developing Federal Rules in Private Negotiations," *Congressional Quarterly Weekly Report*, vol. 39, No. 37, Sept. 12, 1981, p. 1758.

¹²¹Administrative Conference of the United States, Procedures for Negotiating Proposed Regulations, Recommendation No. 82-4, 1CFR 305.82-4, July 15, 1982.

¹²²*Congressional Record*, Senate, vol. 133, No. 118, July 17, 1987.

¹²³James C. McKinley, *Final Report of the Mediator/Facilitator in the RKO Settlement process* (Report to the Federal Communications Commission, Feb. 3, 1987).

¹²⁴*Ibid.*, p. 3.

¹²⁵Stuart N. Brotman, "Communications Policymaking at the Federal Communications Commission: Past Practices, Future Direction," The Annenberg Washington Program in Communication Policy Studies, December 1987, p. 75.

¹²⁶Marguerite Millhauser, "The Unspoken Resistance to Alternative Dispute Resolution," *Negotiation Journal*, January 1987, pp. 29-35.

¹²⁷Harold H. Bruff, "Constitutionality of Arbitration in Federal Programs," (draft report to the Administrative Conference), Apr. 26, 1987, reprinted in Administrative Conference of the U. S., op. cit., footnote 117, pp. 961-1041; and Note, "Protecting Confidentiality in Mediation," *Harvard Law Review*, 1984, vol. 98, No. 2, pp. 441-459.

¹²⁸The Post Office was obligated to consult the Council, but not required to follow its requests. For a discussion, see Kevin Morgan, "Breaching the Monopoly: Telecommunications and the State in Britain," University of Sussex, Working Papers, Series on Government-Industry Relations, No. 7, January 1987, pp. 3-4.

sory committees for small-business users and for the disabled and pensioners.¹²⁹ In Japan, collaboration, an integral feature of its industrial policy, extends even further. Generally, the Ministry of International Trade and Industry (MITI) issues “administrative guidance” to alert large corporations of its plans. Industry, which often employs ex-MITI officials to facilitate its liaison with MITI, usually complies with this guidance.¹³⁰ MITI also coordinates with industry through advisory committees and public-and private-sector forums.¹³¹ Large telecommunication users and suppliers lobby the Japanese Government through Keidanren, the Federation of Economic Organizations, and the Communications Industry Association of Japan (CIAJ).¹³²

In the United States, on the other hand, such collaboration has been much more limited. Here, the most typical kind of cooperative arrangement between government and the private sector has taken the form of the government corporation.¹³³ Although there are precedents for this kind of government involvement in the performance of economic activities as far back as 1781 with the establishment of the First Bank of the United States, its popularity has ebbed and flowed, becoming more popular during periods of crisis and emergency.¹³⁴ For example, a number of government corporations were established to deal with the problems arising during the

Depression and during the First and Second World Wars, including the Reconstruction Finance Corp., Commodity Credit Corp., and Tennessee Valley Authority.¹³⁵

As in the case of independent regulatory agencies, support for government corporations originally came from those who were suspicious of politics and politicians. Such organizational arrangements were viewed with special favor by those “who wanted government to be ‘run in a more business-like manner.’”¹³⁶ Over time, however, the rapid growth and increased autonomy of government corporations began to raise concerns among government administrators¹³⁷ and political scientists, who feared that they were no longer accountable to either Congress or the President.¹³⁸

Two government corporations have been established in the realm of communication—the Communications Satellite Corp. (COMSAT) and the Corp. for Public Broadcasting (CPB). COMSAT was, in fact, somewhat atypical, insofar as it was a private for-profit corporation sponsored by the Federal Government. Established by the Communications Satellite Act of 1962, COMSAT was intended to be a carriers’ carrier for the telecommunication industry. While it was designed to take its place in the private sector, COMSAT benefited from certain

¹²⁹John King, “The British Telecom Experience—Transformation of a Public Corporation to a Public Limited Company,” *International Journal of Technology Management*, vol. 1, No. 1/2, 1986, p. 82.

¹³⁰Jill Hartley, “The Japanese Approach to the Development of New Residential Communication Services,” Marjorie Ferguson (ed.), *New Communication Technologies and the Public Interest* (London, England: Sage, 1986), p. 168.

¹³¹Jill Hills, *Information Technology and Industrial Policy* (London: Croom Helm, 1984), pp. 251-252.

¹³²Kas Kalba, “Opening Japan’s Telecommunication Market,” *Journal of Communication*, vol. 38, No. 1, Winter 1988, p. 99; and Jill Hills, *Deregulating Telecoms* (Westport, CT: Quorum Books, 1986), p. 141.

¹³³For a discussion, see Ronald C. Moe, Library of Congress, Congressional Research Service, “Administering Public Functions at the Margin of Government: The Case of Federal Corporations,” HD 2755, Dec. 1, 1983. See also Ira Sharkansky, *Whither the State? Politics and Public Enterprise in Three Countries* (Chatham, NJ: Chatham House, 1979); and National Academy of Public Administration, *Report on Government Corporations* (Washington, DC: National Academy of Public Administration, 1981). There is no formal definition of what constitutes a government corporation. The organizational structure of each is defined in its enabling legislation and, hence, these corporations have taken a variety of forms. Concerned that government corporations were becoming unaccountable, and that their growth was getting out of hand, Congress, in 1945, passed the Government Corporation Control Act, which established budgeting and auditing standards. The act provided, moreover, that no corporation be created or acquired by any agency or corporation of the Federal Government without the specific authorization of Congress.

¹³⁴Moe, op. cit., footnote 133, pp. 6-7.

¹³⁵*Ibid.*

¹³⁶*Ibid.*, p. 9.

¹³⁷The Brownlow Commission, while recognizing the value of this form of organizational arrangement, recommended that they be incorporated within existing Federal agencies.

¹³⁸See, for example, Harold Seidman, “Government-Sponsored Enterprises in the United States,” Bruce Smith (ed.), *The New Political Economy: The Public Use of the Private Sector* (London, England: Macmillan Co., 1975).

advantages that this government arrangement bestowed on it.¹³⁹

CPB was established in accordance with the provisions of the Public Broadcasting Act of 1967.¹⁴⁰ Its purpose was to serve as a financial sponsor and catalyst for “public television,” fostering programming for “general enrichment” and educational purposes.¹⁴¹ The government corporation was selected as the ideal organizational form because it was thought that this kind of arrangement would shield CPB from government and political pressure. Although CPB has been quite effective in generating high-quality programming, it has not been completely successful in deflecting political pressure (as the earlier discussion in ch. 9 concerning the financing of public broadcasting clearly illustrates).¹⁴²

As the United States begins to adjust to the many technological, economic, and social changes taking place in the realm of communication, there may be a role for government corporations in certain areas. For example, just as CPB was established to provide programming that might not be developed in the marketplace, so a government corporation might be

established to provide certain kinds of information services, gateways, and navigational tools. Similarly, just as stabilization corporations were established during the Depression to help farmers and consumers survive the structural changes that were taking place in the economy, so government corporations might be set up today to help small businesses or rural areas, for example, move into the information age. The benefits and costs of adopting this kind of approach have perhaps best been summarized by the National Academy of Public Administration, which was asked by the Office of Management and Budget to examine the utility of government corporations. In its report, it concluded:

Created for an appropriate purpose, organized and managed soundly, operating responsibly within the policies laid down by Congress and the Administration, they (government corporations) are valuable tools of modern government. However, the inappropriate use of the corporate device together with a lack of consistency in exempting such corporations from financial, personnel and other types of controls has led to a host of problems, as has the failure to use the corporate form in situations where it would contribute to the improved management of programs.¹⁴³

¹³⁹Moe, *op. cit.*, footnote 133, p. 22; for a discussion, see also Lloyd Musolf, *Uncle Sam's Private, Profitseeking Corporations* (Lexington, MA: Lexington Books, 1983.)

¹⁴⁰For a discussion, see Robert K. Avery and Robert pepper, “An Institutional History of Public Broadcasting,” *Journal of Communication*, vol. 30, No. 3, Summer 1980, pp. 126-138.

¹⁴¹Moe, *op. cit.*, footnote 133, pp. 82-83.

¹⁴²See also *ibid.*

¹⁴³National Academy of Public Administration, *Report on Government Corporations*, vol. 1 (Washington, DC: National Academy of Public Administration, 1981), p. 3.