

COMMEMORATION

The Federal Communications Law Journal at Sixty

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The Federal Communications Law Journal reached two milestones this past year: The Journal published its fiftieth volume and celebrated its sixtieth anniversary. Such longevity is noteworthy among law journals and especially among communications publications. To celebrate this occasion, the Editorial Board and the Federal Communications Bar Association's Editorial Advisory Board invited Adrian Cronauer, former radio personality, longstanding member of the Association and of the Editorial Advisory Board, and a contributor to the Journal, to talk with former editors about their experiences publishing the Journal.

Cronauer selected Edward P. Taptich, who edited the Journal from 1964 through 1971, making him one of the Journal's longest-serving editors, and John Wells King, who served as editor from 1974 through 1976, pivotal years for the communications industry and communications regulators. From recordings of those interviews, Cronauer crafted this Essay about their experiences with the Journal, the Association, and the changing practice of communications law.

The members of the Editorial Board and the Federal Communications Bar Association's Editorial Advisory Board are grateful to Messrs. Cronauer, Taptich, and King for helping mark this important milestone in the Journal's and the Association's history.

The Early Years

The Federal Communications Bar Association was formed in 1936. By the following year, membership had grown to 182, bar dues were five dollars per year, and the Association recognized the need for a publication to keep its members up-to-date. So, in March 1937, the Association published the first edition of the then *Federal Communications Bar Journal*.

Looking back at the first volume, Ed Taptich recalls that the *Journal* started as a newsletter, rather than a scholarly journal, and the content was much like today's FCBA News. Early editions had reports of the various committees, overviews of what the Association was doing, a few reviews of significant cases, and presidents' letters. While there were occasional notes, most of the content was committee information.

Before Taptich took over as editor, the *Journal* had been published by Henry Fischer of Pike & Fischer under the name *Journal of the Federal Communications Bar Association*. Fischer initiated the process of change from the initial newsletter format. Fischer had been publishing the *Journal* as sort of a variation on the format that was used by the Pike & Fischer reporter service. Over several years, publication became increasingly sporadic, due to World War II and the demands of Fischer's other publications and of his practice. In 1948, John W. Willis, a Fischer colleague at Pike & Fischer, assumed editorship and helped keep the publication going, on a quarterly basis for the next decade. However, during the late 1950s, production dropped to approximately one issue per year, and in 1962 none were published at all. It was around this time that the *Journal's* name was changed back to the *Federal Communications Bar Journal*.

Shortly after Taptich began practicing in the fall of 1964, he got involved in trying to resuscitate the *Journal*. "It was an effort to maintain the continuity of years and numbers; the last one was in '63. We put out our first, in this new format in '65," says Taptich, "because we did not want a chronological gap there, we called it 1964-1965 but it wasn't published until 1965."

Getting editorial contributions was a constant preoccupation with *Journal* editors. Taptich relied on several stratagems to get contributions from bar members. The FCBA's Executive Committee wanted to see the *Journal* succeed. Most of them were senior members in communication boutiques at the time, and Taptich used them to get written product from their firms. He would go to monthly luncheons and say, "You're all senior policy folks and

there is certainly some stuff that is worth putting out. Even if it expresses a view which we will have to flag that you might want other people to see for whatever reason, we really do need products, so if you guys each promise me one article a year, it's not too much to ask from your firms."

After a year or two Taptich started to communicate with various law school publications, law reviews and law school administrations, trying to encourage students to write articles for the *Journal*. Some schools offered courses in administrative law, although none at the time were specifically tailored to communications.

Taptich admits to being a demanding editor because he wanted to enhance the *Journal's* credibility as a scholarly publication. "There were some reasonably good articles that were published which I hope helped people get jobs based on their writing skills, but they weren't there when they hit my desk. Perhaps it was because I had it drummed into me so deeply while I was on the *Georgetown Law Journal* about the need for writing precision, that I may have been more critical than I should have been, but I thought that whatever went out in these early issues, in this new format, really had to be as good as we could make it."

For two years, Taptich was working nearly alone; other young lawyers were not interested in the *Journal* because, as yet, there was not much to be interested in. "In retrospect, I'm surprised that I could do it," he says, "and that's not a prideful claim; it was something I enjoyed doing and wanted to but, when I look back, I don't know how the hell I got it done."

The Pivotal Years

In 1974 John Wells King took over as Editor-in-Chief from Suzanne Meyer, who held the position in 1972 and 1973. Although King had a publications committee, it was small and, as with Taptich, much of the work fell to him. "You know in those days, without fax and e-mail, it's amazing how we ever got anything done years ago. It was a labor of love for me. It was something that I did because I enjoyed the work, just because of my own educational and professional background." King and his committee were full-time practitioners, so the *Journal* was an evenings and weekends undertaking for them and "it was a very small shop."

Also, like Taptich, getting editorial material was always a concern for King. His committee met quarterly and "we never reached a point where we were wringing our hands and wondering how we'd fill the next issue. But then, too, we didn't have a planning board mapping out the next five issues, by no means." Yet, King is proud of the quality of the articles he found. "I think the issues that I edited," says King, "if you look at the origin and you know a little bit of background of some of the people, the contributors, you'll see we are really fortunate to have these come in from different points on the compass . . . some of the finest scholarship, I think, the *Journal* has ever published. If you go back now and take a look at some of the pieces that are twenty years old, on electronic information transfer generally, and regulation, you'll find a considerable bit of prescience in them."

By the time King took over as Editor-in-Chief, everyone recognized that, despite its small staff, the *Journal* was becoming an important service to the communications bar. By his third year, King and his colleagues had to face the practical truth: they couldn't do the *Journal* the justice it required without considerably more manpower.

Already, the *Journal* had been communicating with UCLA Law School. While editor, Taptich had not envisioned that the publication would move to another institution, but he knew they had to identify with an educational institution in some way, if only as a dependable source of material. "I figured we'd start off as 'co-something' and then see how or where it went from that point."

"I don't remember if it was when I passed it off to my successor or beforehand that we tried to get a law school as a copublisher," says King. He further describes the *Journal's* multifaceted desire to associate with a law school: "In part because it would provide grunts for the grunt work, in part it would give that institution, whatever one it might be, an ability to motivate contributors in addition to getting contribution from practitioners, and it would give it more stature if it was under the umbrella of an academic institution—or at least associated with it."

One of the people who eventually became interested in an affiliation with the FCBA was Charles M. Firestone who, in the late 1970s and early 1980s, was the Director of UCLA's Communications Law Program. King "recognized the

resources that this school of law had, and the reputation this school of law had, and really, the reputation that Charlie Firestone had. He had a good visibility in the academic community." The consensus was that Firestone would have a very positive influence on the *Journal*.

The transition to having UCLA do the actual publishing was gradual. "It was an effort, initially, to just to get a call—we'll work on a deal later. First thing we wanted to do was get their name and their interest to put with ours, and it was later, after I was gone, that finally they would do the publication and we would sort of recede as the administrators of the logistics and production."

With the winter 1977 publication of Volume 30, the *Journal* began its UCLA era and took on the name it holds today—the *Federal Communications Law Journal*. After fifteen successful years on the West Coast, the Association and UCLA agreed that it was time to move the *Journal* to a new law school home. After reviewing proposals from five schools, the Association chose Indiana University School of Law—Bloomington.

In the *Journal's* five years at Indiana, readership has more than doubled to 3,700 subscribers. The *Journal* is available full-text on Lexis and Westlaw, and on the *Journal's* World Wide Web site, where more than 150,000 readers from around the world accessed the *Journal* in 1997. The pool of contributors has expanded as well, to include not only familiar voices from the communications bar, but also AT&T Chairman Robert Allen, Governor Evan Bayh, MCI Chairman Seth Blumenfeld, President Bill Clinton, QVC Chairman Barry Diller, Senator James Exon, INTELSAT Director General Irving Goldstein, Assistant Secretary of Commerce Larry Irving, OMB Office of Information and Regulatory Affairs Director Sally Katzen, talk show host Larry King, Reporters Committee for Freedom of the Press Executive Director Jane E. Kirtley, Representative Edward J. Markey, White House Counsel Abner Mikva, Senator Carol Moseley-Braun, consumer advocate Ralph Nader, former Assistant Secretary of Commerce Janice Obuchowski, the Reverend Pat Robertson, Senator Paul Simon, Bell Atlantic Chairman Raymond Smith, American Civil Liberties Union President Nadine Strossen, and Governor William Weld, among many others.

Today's Practice

John Wells King looks at the students coming out of law school today and finds they "are having to grasp a far broader (pardon the expression) spectrum of subject matters in this field known as communications than I did." Taptich also sees a wider range of issues that communications lawyers need to deal with, regardless of how long one has been in practice.

First, he sees a change in regulatory emphasis: the emphasis has moved from mass media to new technology and information movement via telephony wireless—be it voice or data. "Plainly, the amount of preoccupation with the details of broadcasting has shriveled—in part because the agency was overwhelmed by what it had undertaken," says Taptich. "The institutional belief was that diversity would permit the withdrawal of oversight. That indeed has occurred and, depending on whether you are a critic or a supporter of federal regulation, you can say either it's proof of a resounding victory or it would have happened anyway; if they would have stayed out of the way it would have happened earlier."

The changes in the regulatory environment, says Taptich, resulted in concurrent changes in private practice. The character of the practice in the 1950s and 1960s had been a multiplicity of small- to medium-sized boutiques that were supported by broadcasters' need to respond to extraordinarily pervasive broadcast regulation. Today, in contrast, he sees far less pure regulatory activity than back when there were virtually no large firms involved in what we would consider today to be telecommunication practice.

Taptich is a devotee of the nineteenth century German philosopher George W. F. Hegel, who posited a sort of pendulum-like motion to social and political change. Taptich sees an easily discernable Hegelian movement as the evolution of our practice has moved away from regulatory toward commercial and transactional kinds of activities and financing.

The Future of Communications Law

Turning from the past to the future, John Wells King thinks we are in for some rough social upheavals. "When there

are difficult social times, the law strives to meet those challenges," he says, "and the reason I think we are heading for tough times is because of what access to the Internet is doing to us. We are now along the very beginning—just the beginning edge of serious regulatory questions about the Internet."

King sees today's situation as pure chaos, no different from the Hyde Park analogy where anybody could step up on a soap box if they wanted. "Inevitably, questions important to our social fabric arise and the old question of how we handle these social challenges arises also."

King holds little hope for regulatory answers. As a practical matter, these challenges cannot be met by regulation, he feels, but that will not stop a well-intended attempt to regulate them. "Have we stopped the oldest profession in the world? Not hardly. Did we stop Americans from drinking? Not hardly. Will we stop people from smoking? Of course not, but that won't stop people, well-intended, from attempting to. Of course, that is the essence of our form of government: to find the middle ground between those who would and those who wouldn't [regulate society] in any given subject matter. So, yes, there will continue to be attempts [to regulate communications], I think."

King ultimately believes we must have faith in the better side of human nature. "I don't think any legislative undertaking can substitute for the human obligations and responsibilities that members of any group, the family group being the most prominent, owe one another."

King is also an optimist about new communications technology and where it is taking us as a society. "I see an unparalleled opportunity to broaden horizons, to promote the earlier acquisition of wisdom. I mean this is pretty lofty stuff but one of my favorite novels is [Umberto] Eco's *The Name of the Rose*. I was so taken with the fact that the books in the library were unavailable not only to the general public, but they were not available to the monks and the scribes, except on a strict turnkey basis, a gatekeeper basis, by the librarian. 'I will give you this book if I believe you are entitled to have it for any reason.' Information, intelligence, and wisdom were kept under lock and key. So to the extent now that you can go to one of half a dozen search engines and say 'tell me about fourteenth century Italy,' there's never been such a library in the history of mankind."

"Hand in hand with that is the growth and maturity of the telecommunications industry. It means the stakes have never been higher in any venture, whether it's doing a startup software company or acquiring your 350th radio station, or starting a new television network, or becoming a reseller of communication services. So the irony is that you've never had less time to devote to considering the business of legal regulatory risks involved in an enterprise that is worth so much. I think that the real challenge to those who go after us will be the loss of the luxury of time to consider these things. The time demands and the money demands will be phenomenal."

In trying to predict the future of the practice, Ed Taptich returns to his Hegelian pendulum. "Pendulums swing back and forth never in the same place. You have what in retrospect would seem like an almost obsessive preoccupation with program content in the '50s and '60s. You then had, through the next thirty years, small outlets in the community multiplying and things became more commercial and the [Commission] decided to loosen up—in part because it could not handle the volume it was working for."

In the '80s, Taptich recalls, free competition was triumphant over regulation; he characterizes the decade's dominant regulatory philosophy, competition, as being the solution to everything. The '90s, though, have retreated somewhat from that laissez-faire attitude in reaction to some of the excesses of the '80s. "You had the shock jock showing up, the New York late night adult type of programming. People said competition may be great, but you have to draw the line somewhere."

Taptich believes that, so long as there is a federal government that believes it has a responsibility to look after the national population, governmental controls will never go away completely; there will always be some vestigial regulation. "So long as that fundamental notion persists there will be an oversight of mass media communications," he says, "simply because they have an immediate and political effect."

Again, Taptich returns to his pendulum metaphor. "I think you've seen the pendulum swing as far as it could go this time around toward deregulation. At least you're seeing a pause if not a start back toward some measure of intrusion again on content. Will it go back to the same place? Hegel would say never. The pendulum does not swing back and

forth at the same level; it progresses each time, taking the best of the last extreme."

"I don't think politically there will come a time where we have no control over these frequencies, and you may use them as you like. I think that time will never come." Taptich feels that, lacking any other justification, the government will continue to regulate simply because electronic media are so pervasive. While discounting the need for content regulation, he still sees a continuing need for the traffic cop functions.

On the other hand, Taptich recognizes the traditional problem of licensees not being able to hold property rights in their frequencies. "In the last number of years, the commercial realities have required, along with the avid public policy promoting competition, . . . the government to understand that financing is necessary . . . publicly or privately. Many of the new ventures have gone under," he points out, "simply because money could not be gotten because licensees could not grant lenders security interests in licenses or in the frequencies."

"I cannot see, though, that the government . . . would simply forswear any measure of control and ownership in those frequencies. The traffic cop simply can't walk out to the intersection and say it's free competition; get through as you will. I think there is a governmental instinct not to completely withdraw."

Although Taptich sees a retreat from deregulating mass media, he insists that common carrier is another story. "I think the same cycle isn't being seen on what we'd call the common carrier side or the non-mass media side. I think there the pendulum is still swinging toward deregulation. It's swinging on a different time table because . . . competitive telecommunication suppliers really didn't start to multiply [until] the end of the '70s."

Taptich now wonders about the extent regulatory schemes will be applied to new technology. "The Internet is the logical next step and it will be a tester of our conviction that everyone has the right to do what they want, to some point."

The traditional use of governmental power to keep the big fish from swallowing all the little fish is still an important item to Taptich. "Support of the new little guys is increasing and it will continue in the direction of the agencies withdrawing unless they see that the big guys are beginning to monopolize, and I don't mean that in a legal sense. There isn't enough room, without more governmental intrusion, for the little guys to survive."

The Future of the *Journal*

Through over a half century's changes in the practice of communications law, the *Federal Communications Law Journal* seems to have kept up well with all the major changes. John Wells King believes there is not any question that the *Journal* has matured marvelously. "Under the auspices of formal law school oversight and production it has thrived in the way that the field of communications law has exploded in subject matter over the past ten to fifteen years. In the last fifteen years telecommunication services to the public has turned that field of the law upside down. The *Law Journal* has kept right apace with that. So I am very pleased with the way it has developed."

In coming years, the *Journal* may change its editorial approach, in response to either technological changes or differing demands from practitioners. These same changes already produce changes in the way the *Journal* is distributed. With the Internet, with exponentially increasing capacity of storage devices, and with an array of other innovations yet to be imagined, the way information is presented and distributed is certain to undergo drastic changes that, in turn, will lead to changes in the *Journal*. Says Taptich, "I would think that if most other hi-tech stuff is on CD then this will be on CD, probably more likely on a database somewhere, whether it's accessed through the Internet or another fashion, downloadable just as anything else that will be moved around, stored, or disseminated."

"Such changes are only to be expected," says Taptich, "in a field of law that deals specifically with technological innovations. This publication will be no different than others, indeed it may be farther ahead in that regard. The communications field will be one of the most involved [and] presumably it will be most familiar with the techniques, and will be at least most self-conscious about not being up to date on the transmission of information being moved around."

Changes in the industry, especially the increasing rapidity of transactions, will effect the sort of information

practitioners will need and how fast they need it. "It may be that you have more information on more current things of a news reportorial nature than analytical studies," Taptich predicts. "The number of constant rules is fewer and less important in a commercial environment. As broadcasting for example, becomes more commercial and less regulatory, those who are reading day in and day out on their subject area, on the Internet or on a piece of paper are less concerned with history. What did they do about this fifteen years ago? Who cares! I've got to make a decision today and I've got to know where to go with it."

My conversations with Taptich and King included not only serious discussion, but also interesting trivia about the *Journal*. For example, John Dean, former Nixon White House counsel, and the man responsible for beginning the unraveling of the Watergate scandal started as a communications lawyer. In fact, he worked on the *Journal* when Ed Taptich was editor and even published an article in 1966.

Before turning off the cassette recorder, I asked each of them if there was anything else they wanted to put on the record. John Wells King summed up his tour at the *Journal's* helm almost wistfully: "I feel like I'd jumped on a merry-go-round at a certain point in time, and had a fun ride." Ever the cautious lawyer, when asked if there was anything he wanted to add, Ed Taptich replied, "Absolutely not. Except: everything I said, I may be wrong."

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