EDITOR'S NOTE

This summer, the Federal Communications Bar Association selected the George Washington University Law School as the new host institution for the Federal Communications Law Journal ("FCLJ"). We are honored to hold this distinction. On behalf of the George Washington FCLJ team, I would like to thank everyone at the University of Indiana's Maurer School of Law, who worked tirelessly to produce the FCLJ over the years. We have big shoes to fill, and Indiana's editorial board has helped us make a smooth transition.

We are excited to take advantage of all that the Washington, D.C. area has to offer the FCLJ, such as the Federal Communications Commission ("FCC"), the Federal Communications Bar Association, and many of the nation's communications attorneys. We would like to extend special thanks to the Chairman of the FCC, Julius Genachowski, for speaking at our inaugural reception, and to the members of the Washington-area communications law community for their overwhelming support.

The issue opens with an article by David Opderbeck, professor of law at Seton Hall University, discussing cybersecurity reform and the executive power to shut down all or part of the Internet in the event of a cyber- emergency or cyberwar. Professor Opderbeck evaluates the language, history, and application of section 606 of the Communications Act of 1934, and argues that cybersecurity reform should include explicit executive emergency powers with clear and appropriate limitations.

Next, Frank W. Krogh, a telecommunications regulatory attorney at Wilkinson Barker Knauer, LLP, discusses the judicial review of the FCC's denial of streamlined tariff protests. Mr. Krogh argues that judicial review should be available to parties who unsuccessfully challenge streamlined LEC tariffs because the damages immunity conferred by such protest denials cannot be remedied by either courts or the FCC.

Then, T. Randolph Beard and Michael Stern, Senior Fellows at the Phoenix Center for Advanced Legal & Economic Public Policy Studies, along with Chief Economist George S. Ford, and President Lawrence J. Spiwak, also from the Phoenix Center, present an economic theory of market performance that addresses the "Spectrum Crunch." Given the FCC's stated position on spectrum exhaust, the authors argue that the FCC needs to re-orientate the way it thinks about spectrum policy.

After that, the issue turns to its note: Hugh Campbell, a third-year law student at the University of Indiana's Maurer School of Law, evaluates the constitutionality of the statutory restrictions on tobacco advertising and compares it with the self-regulatory model of advertising employed by alcohol companies. Mr. Campbell concludes that the Supreme Court will be more deferential in its First Amendment analysis for tobacco advertising regulations.

The Editorial Board thanks all of its authors for their dedicated scholarship throughout the drafting and editorial process. We also express our gratitude to the Federal Communications Bar Association for its continuing guidance and mentorship, specifically Deborah J. Salons, Edgar Class, Lawrence J. Spiwak, Richard K. Welch, Stan Zenor, and Laura

Phillips. Finally, I want thank the FCLJ editors and staff; without their hard work, this issue would not have been possible.

The FCLJ is committed to providing its readership with substantive coverage of relevant topics in communications law, and we appreciate the continued support of contributors and readers alike. We welcome your feedback and submissions—any questions or comments about this Issue or future issues may be directed to fclj@law.gwu.edu, and any submissions for publication consideration may be directed to fcljarticles@law.gwu.edu.

Dennis W. Holmes
Editor-in-Chief

FEDERAL COMMUNICATIONS LAW JOURNAL

VOLUME 65 ISSUE 1

JANUARY 2013

Published by the GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
and the FEDERAL COMMUNICATIONS BAR ASSOCIATION

Federal Communications Law Journal

The Federal Communications Law Journal, the nation's oldest and largest communications law journal, is published jointly by the Federal Communications Bar Association (FCBA) and the George Washington University Law School. The FCLJ is in its sixty-fifth volume of publication (it was not published during World War II), and this is the journal's inaugural year at GW Law.

The FCLJ publishes three issues per year with spine dates of January, April, and June, and features articles and student notes on issues in telecommunications, the First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, privacy, communications and information policymaking, and other related fields. As the official journal of the Federal Communications Bar Association, the FCLJ has over 4,100 subscribers including Association members as well as legal practitioners, industry experts, government officials and academics. Only 25 other law journals in the United States have as many or more subscribers. The FCLJ has the second largest readership of any specialty law journal in the United States.

Federal Communications Bar Association

The Federal Communications Bar Association (FCBA) is a volunteer organization of attorneys, engineers, consultants, economists, government officials and law students involved in the study, development, interpretation and practice of communications and information technology law and policy. From broadband deployment to broadcast content, from emerging wireless technologies to emergency communications, from spectrum allocations to satellite broadcasting, the FCBA has something to offer nearly everyone involved in the communications industry. That's why the FCBA, more than two thousand members strong, has been the leading organization for communications lawyers and other professionals since 1936.

Through its many professional, social, and educational activities, the FCBA offers its members unique opportunities to interact with their peers and decision-makers in the communications and information technology field, and to keep abreast of significant developments relating to legal, engineering, and policy issues. Through its work with other specialized associations, the FCBA also affords its members opportunities to associate with a broad and diverse cross-section of other professionals in related fields. Although the majority of FCBA members practice in the metropolitan Washington, D.C. area, the FCBA has ten active regional chapters, including: Atlanta, Carolina, Florida, Midwest, New England, New York, Northern California, Pacific Northwest, Rocky Mountain, and Texas. The FCBA has members from across the U.S., its territories and several other countries.

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Established in 1865, the George Washington University Law School is the oldest law school in Washington, DC. The school is accredited by the American Bar Association and is a charter member of the Association of American Law Schools. The Law School is located on the GW campus in the downtown neighborhood familiarly known as Foggy Bottom.

GW Law has one of the largest curricula of any law school in the nation with more than 250 elective courses covering every aspect of legal study. GW Law's home institution, the George Washington University, is a private, nonsectarian institution founded in 1821 by charter of Congress.

The Federal Communications Law Journal (http://www.fclj.org) is published by the George Washington University Law School and the Federal Communications Bar Association three times per year. Offices are located at 2029 K St. NW, 4th Floor, Washington DC, 20006. The FCLJ can be reached at fclj@law.gwu.edu, and any submissions for publication consideration may be directed to fcljarticles@law.gwu.edu. Address all correspondence with the FCBA to the Federal Communications Bar Association, 1020 19th St. NW, Suite 325, Washington DC, 20036-6101.

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Citation: Please cite this issue as 65 FED. COMM. L.J. ___ (2013).

Erratum: An error occurred in the printing of Volume 65, Issue 1. Please destroy the version you received in January 2013 and replace it with this one. You should cite to this version of Volume 65, Issue 1.

FEDERAL COMMUNICATIONS LAW JOURNAL

GW LAW

FCBA FEDERAL COMMUNICATIONS BAR ASSOCIATION

VOLUME 65 ISSUE 1

JANUARY 2013

ARTICLES

A key area of debate over cybersecurity policy concerns whether the President should have authority to shut down all or part of the Internet in the event of a cyber-emergency or cyber-war. The proposed Cybersecurity Act of 2009, for example, contained what critics derided as an Internet "kill switch." The current iteration of a comprehensive cybersecurity reform bill, the Cybersecurity Act of 2012, opts for a soft public-private contingency plan model instead of a kill switch. But the kill switch may yet live. Sponsors of the present legislation have argued that section 606 of the Communications Act of 1934 already gives the U.S. President plenary powers over the Internet in times of emergency or war. If this claim is correct, it should be particularly troubling to network neutrality advocates who have argued for expansive FCC jurisdiction over the Internet, since the Executive powers under section 606 are tied to the FCC's authority over communications policy. This paper evaluates the language, history, and application of section 606, and argues that instead of implicitly relying on the vague and antiquated provisions of a statute crafted long before the Internet was born, cybersecurity reform should include explicit executive emergency powers with clear and appropriate limitations.

Generally, an FCC order denying a petition to reject or suspend and investigate a tariff is non-final and unreviewable because: (1) such a denial is an interlocutory action involving no determination on the merits; (2) review is not necessary to prevent irreparable injury, given the possibility of refunds or damages; and (3) judicial intervention would invade the province reserved for agency discretion. The Telecommunications Act of 1996, however, upended this regime in the case of "streamlined" tariffs filed by local exchange carriers by adding a new provision to the Communications Act providing that such tariffs "shall be deemed lawful" if they are allowed to take effect without suspension or investigation. The FCC found that this "deemed lawful" status eliminates the retrospective complaint damages remedy conferred by sections 206-07 of the Communications Act. Thus,

notwithstanding a finding in a subsequent formal complaint case that a "deemed lawful" streamlined tariff is actually unlawful, no damages can ever be awarded for the resulting injury.

The extraordinary conclusive immunity from damages conferred by the "deemed lawful" status of a streamlined tariff and the resulting irreparable injury to customers and others potentially harmed by such immunity requires that judicial review be available to parties unsuccessfully protesting new streamlined tariffs. Denial of a tariff protest permanently denies the right to damages for the entire period that a streamlined tariff is in effect. Appeal of an FCC denial of a streamlined tariff protest also would not invade the province of the agency, since there will be no FCC proceeding addressing damages resulting from the tariff. Moreover, an FCC denial of a streamlined tariff protest is not committed to the agency's discretion by law because of the finality and irreparability of such a denial and because the FCC's tariff suspension rules, which were derived from judicial standards, provide sufficient "law to apply" to enable judicial review. The sole issue on review would be whether the FCC's determination that the petitioner failed to demonstrate at least one of the predicates for suspension of a tariff is arbitrary and capricious.

Wireless Competition Under Spectrum Exhaust

By T. Randolph Beard, PhD, George S. Ford, PhD,
Lawrence J. Spiwak, Esq., Michael Stern, PhD

There is a growing concern that the present inventory of commercial spectrum—an essential input for providers of mobile wireless services—represents just a fraction of the amount necessary to match growing demand for mobile data services. At the same time, there has been mounting anxiety among policymakers about the number of competitors in the mobile wireless industry. What is lacking from the policy debate today is an economic theory of market performance that integrates these two key issues—spectrum exhaust and industry structure. In this Article we provide such a theory, and our findings are significant. The addition of a spectrum constraint to the traditional model of competition turns the conventional view that high industry concentration is a bellwether of poor economic performance on its head. Indeed, under a binding spectrum constraint, a market characterized by few firms (rather than a large number of firms) is more likely to produce lower prices and possibly increase sector investment and employment. Given the FCC's stated position on spectrum exhaust, the agency needs to re-orientate the way it thinks about spectrum policy. Policies that impede incumbent carriers from acquiring more spectrum—via either auction or acquisition—may do harm rather than good.

NOTES

A First Amendment Look at the Statutory Ban on Tobacco Advertisements and the Self-Regulation of Alcohol Advertisements

Since the 1970s, the government has had some form of restrictions on the ability to advertise cigarettes and tobacco-related products using electronic communications. This approach is different from the self-regulatory model used for alcohol advertisements. This note analyzes the history of the Supreme Court's first amendment doctrine regarding commercial speech to its present day test under *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York* to determine whether the distinct approaches to dealing with the speech of alcohol versus tobacco companies would be upheld. The note then considers the social and legal history of tobacco and alcohol, as well as the health effects of each and finds that the regulation of these two vices can be distinguished based on the substantial governmental interest prong of the *Central Hudson* test. It concludes that a complete ban on tobacco advertising in broadcast would be held constitutional due to the severe health effects that can result from any amount of smoking. Because tobacco advertising regulations were enacted by Congress and deal with the broadcast medium, the Court will be more deferential in its First Amendment analysis.

Does the Communications Act of 1934 Contain a Hidden Internet Kill Switch?

David W. Opderbeck*

TABLE OF CONTENTS

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* Professor of Law, Seton Hall University Law School, and Director, Gibbons Institute of Law, Science & Technology. Thanks to Rob Frieden, Brett Frischmann, Adam Candeub, and the participants in the 2012 Internet Law Scholars Conference for helpful feedback on earlier versions of this paper. Thanks also to Andrew Lavadera for his excellent research assistance.

I. INTRODUCTION

Congress has been grappling with proposed cybersecurity legislation for several years. A key area of debate concerns whether the President should have the authority to shut down all or part of the Internet in the event of a cyber-emergency or cyber-war. The proposed Cybersecurity Act of 2009, for example, contained what critics derided as an Internet "kill switch."[1]

At the same time, a heated public debate has been roiling over "network neutrality." Network neutrality is the notion that Internet service providers ("ISPs") should be prohibited from interfering with services, content, or applications on their networks.[2] The Federal Communications Commission ("FCC" or "Commission") has stepped boldly into this fray by issuing policy statements and regulations that assert expansive jurisdiction over the Internet.[3] Many scholars, activists, and policymakers who fear a cybersecurity kill switch are also ardent proponents of network neutrality rules. Holding these positions simultaneously seems to make ideological sense: the underlying concern being that the Internet should remain open and accessible to everyone, regardless of technological platform or content.

But network neutrality advocates who applaud the FCC's interventions in this area have not focused on the problem of cybersecurity. In particular, the FCC's assertion of jurisdiction over the Internet in the name of network neutrality might also imply a vast executive power to control the Internet in times of war and emergency–a kill switch–under laws crafted long before the Internet was born. These executive powers are

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1. S. 773, 111th Cong. § 18(2), (6) (2009). The 2009 bill stated that the President

> may declare a cybersecurity emergency and order the limitation or shutdown of Internet traffic to and from any compromised Federal Government or United States critical infrastructure information system or network [and m]ay order the disconnection of any Federal Government or United States critical infrastructure information systems or networks in the interest of national security.

Id; see also Internet Blackouts: Reaching for the Kill Switch, ECONOMIST, Feb. 10, 2011, at 67, *available at* http://www.economist.com/node/18112043; Jennifer Granick, *Federal Authority Over the Internet? The Cybersecurity Act of 2009*, ELEC. FRONTIER FOUND. (Apr. 10, 2009), https://www.eff.org/deeplinks/2009/04/cybersecurity-act ("[T]he bill gives no guidance on when or how the President could responsibly pull the kill switch on privately-owned and operated networks."); David W. Opderbeck, *Cybersecurity and Executive Power*, 89 WASH. U. L. REV. 795, 798 (2012).

2. *See* BARBARA VAN SCHEWICK, NETWORK NEUTRALITY AND QUALITY OF SERVICE: WHAT A NON-DISCRIMINATION RULE SHOULD LOOK LIKE (2012), *available at* http://cyberlaw.stanford.edu/files/publication/files/20120611-NetworkNeutrality_0.pdf.

3. *See, e.g.*, Appropriate Framework for Broadband Access to the Internet over Wireline Facils., *Policy Statement*, FCC 05-151, paras. 4-5 (2005) [hereinafter *Internet Policy Statement*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf; Preserving the Free and Open Internet, *Report and Order*, FCC 10-201, paras. 1, 9 (2010) [hereinafter *Open Internet Order*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-201A1.pdf.

codified in section 606 of the Communications Act of 1934,[4] which in turn derives from a statute governing radio communications prior to World War I, the Radio Act of 1912.[5] The Radio Act was invoked by President Wilson during the Great War to nationalize all radio stations under the authority of the U.S. Navy.[6] Advocates of network neutrality may therefore have handed the President emergency powers over the Internet due to current statutory provisions that date to a time when all radio communications in the United States were militarized.

This "hidden" Internet kill switch emerged during the debates over comprehensive cybersecurity legislation over the past few years. The Cybersecurity Act of 2009, introduced by Senator Rockefeller, with its explicit kill switch, never emerged from committee. Another similar bill, the Protecting Cyberspace as a National Asset Act of 2010 ("PCNA") was introduced by Senators Lieberman, Collins, and Carper on June 10, 2010.[7] The PCNA retained the broad emergency powers that appeared in the Cybersecurity Act of 2009.[8] Partly in response to concerns over the kill switch, the Cybersecurity Act of 2009 bill was revised to the "Cybersecurity Act of 2010," and reintroduced as amended on March 24, 2010.[9] Under that 2010 Cybersecurity Act, the President would have retained the authority to "declare a cybersecurity emergency," which would trigger implementation of emergency response plans crafted jointly by both private and governmental groups, including owners of critical infrastructure systems and the Department of Homeland Security.[10] This represented a move towards a public-private cooperative model for emergency management.

Debate over the propriety and scope of emergency executive powers in cyberspace continued throughout 2010. Somewhat surprisingly, Senator Lieberman and other sponsors of the PCNA began taking a new tack: they argued that the President *already* has the authority to shut down the Internet under the Communications Act of 1934.[11] As a report on the PCNA prepared by the Senate Committee on Homeland Security and Governmental Affairs stated,

> The Committee understands that Section [606 of the Communications Act of 1934] gives the President the authority to take over wire communications in the United States and, if the President so chooses, shut a network down. But it is not

4. 47 U.S.C. §§ 151-609, § 606(a) (2006); *see infra* Part II.
5. *See* Radio Act of 1912, ch. 287, 37 Stat. 302 (repealed 1927).
6. *See* CHRISTOPHER H. STERLING & JOHN MICHAEL KITTROSS, STAY TUNED: A HISTORY OF AMERICAN BROADCASTING 48-49 (Taylor & Francis 3d ed. 2001) (1978).
7. S. 3480, 111th Cong. (2010).
8. *See id.* § 249; S. 773, 111th Cong. § 18(2), (6) (2009).
9. *See* S. REP. NO. 111-384, at 1 (2010).
10. S. 773, 111th Cong. § 201 (2010).
11. S. REP. NO. 111-368, at 10 (2010).

> clear that the President could order a lesser action, such as the blocking of a particular malicious signature or directing a company outside of the communications sector, such as an electricity generation facility, to take action to protect its cyber networks. It is this gap that S. 3480 is meant to fill.[12]

Thus, the PCNA's supporters argued that they were merely clarifying, and as a practical matter, limiting existing law.[13]

The emergency powers provisions in recent iterations of bills proposed by Senator Lieberman and others have coalesced towards Senator Rockefeller's model of a public-private regulatory partnership without an express provision for executive authority in case of war or emergency.[14] This is reflected in the proposed Cybersecurity Act of 2012, introduced by Senators Lieberman, Collins, Rockefeller, and Feinstein in February 2012.[15] Debate in Congress and among cyber civil libertarians, the cybersecurity community, and private industry has shifted from the kill switch to information disclosure requirements and the extent to which ordinary industry cybersecurity compliance should be required.[16]

The kill switch issue, however, remains very much alive, even if now dormant. The assumption among many policy makers after the debate on the PCNA is that the Communications Act of 1934 ("1934 Act") indeed

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12. *Id.*

13. *Id.* (stating that the PCNA "would allow the President to take such action quickly, without any debate over what authorities the government actually has or the need to resort to the drastic measure of taking over an entire communications network.").

14. See Opderbeck, *supra* note 1, for a summary of comprehensive cybersecurity bills through early 2012. For the current version of Senator Lieberman's bill as of August, 2012, see Cybersecurity Act of 2012, S. 3414, 112th Cong. (as introduced, July 19, 2012). During debates in July and August, 2012, the Cybersecurity Act of 2012 attracted significant support in the Senate and from various industry and civil liberties groups, but a cloture vote taken on August 2, 2012 failed. *See Cybersecurity*, U.S. S. COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, http://www.hsgac.senate.gov/issues/cybersecurity (last visited Nov. 2, 2012).

15. *See* S. 2105, 112th Cong. (as introduced, Feb. 14, 2012) (containing no provision for executive authority in case of war or emergency).

16. *See, e.g.*, Eva Galperin, *Four Unanswered Questions About the Cybersecurity Bills*, ELEC. FRONTIER FOUND. (Mar. 27, 2012), https://www.eff.org/deeplinks/2012/03/four-unanswered-questions-about-cybersecurity-bills (questioning how the proposed cybersecurity bills will affect civil liberties); Ken Dilanian, *U.S. Chamber of Commerce Leads Defeat of Cybersecurity Bill*, L.A. TIMES, Aug. 3, 2012, http://articles.latimes.com/2012/aug/03/nation/la-na-cyber-security-20120803 (discussing the Chamber of Commerce's characterization of a cybersecurity bill that would "regulate privately owned crucial infrastructure" as "execessive governmental interference in the free market"); Rainey Reitman, *Victory Over Cyber Spying: The Cyber Security Act of 2012 (S 3414) Defeated in the Senate this Morning*, ELEC. FRONTIER FOUND. (Aug. 2, 2012), https://www.eff.org/deeplinks/2012/08/victory-over-cyber-spying (arguing that "[p]ressure from civil liberties groups . . . convinced the bill sponsors [of Cybersecurity Act of 2012] to put privacy protections into the final version of the Cybersecurity Act).

confers sweeping presidential powers over the Internet.[17] Therefore, the removal of a kill switch from the current version of Senator Lieberman's bill is something of a ruse. Like Godzilla hibernating deep under the sea before a nuclear blast wakes him,[18] the kill switch still lurks in the dark recesses of legislation crafted for pre-World War I radio networks, when military censorship was routine.

Or does it? What authority, exactly, does section 606 of the 1934 Act convey? How might that authority map onto cyberspace? If the FCC's power to enforce network neutrality rules is upheld, can executive power over cyberspace under the 1934 Act be cabined under the express terms of the statute or by other principles?

These are the questions this article will explore. Part II of this article summarizes the current provisions of section 606, examines the context and legislative history of those provisions, and reviews Executive Orders and other policy documents that have invoked section 606. Part III reviews the expansion of the FCC's power over cable television, discusses the present regulatory framework that distinguishes between "telecommunications" and "information services," and discusses the FCC's expansive assertion of jurisdiction over the Internet in the context of the network neutrality debate. Part III further draws these threads together in an analysis of the potential scope of section 606 in light of its language, legislative history, and historical application, and in relation to the FCC's presumed authority over the Internet.

Part IV concludes that Senator Lieberman is right about at least one thing: the problem of executive emergency powers should not be ignored in any comprehensive cybersecurity legislation. It is imperative that the scope of executive powers be expressly clarified and limited. As a move towards such clarifications and limitations, Part IV offers a rubric for policymakers that considers both the network layer affected by emergency measures and the type of measures taken. The alternative, in the increasingly likely event of a major cyber incident, could involve a return to the communications regime of World War I: a re-militarization of our civilian communications networks and a Great Firewall around the Internet.[19]

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17. *See* Megan Carpenter, *Joe Lieberman and the Myth of the Internet Kill Switch*, TALKING POINTS MEMO (June 21, 2010), http://tpmdc.talkingpointsmemo.com/2010/06/joe-lieberman-and-the-myth-of-the-internet-kill-switch.php.

18. *See Godzilla, King of the Monsters!*, IMDB, http://www.imdb.com/title/tt0197521/ (last visited Nov. 2. 2012).

19. *See Internet Content: Please Delete*, ECONOMIST (Sept. 3, 2010), http://www.economist.com/blogs/dailychart/2010/09/internet_content (discussing China's "great firewall" and other government efforts to filter Internet content); Jonathan Zittrain & John Palfrey, *Internet Filtering: The Politics and Mechanisms of Control*, *in* ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING 29, 29-30 (Ronald Deibert et al. eds., 2008) (discussing Chinese efforts to censor Wikipedia); Robert Faris & Nart Villeneuve, *Measuring Global Internet Filtering*, *in* ACCESS DENIED: THE PRACTICE AND POLICY OF GLOBAL INTERNET FILTERING, *supra*, at 5, 6 (noting that Iran, China, and

II. THE WAR AND EMERGENCY POWERS IN SECTION 606 OF THE COMMUNICATIONS ACT OF 1934

Before analyzing whether or to what extent section 606 might apply to the Internet, it is important to understand precisely what authorities section 606 confers. Subpart A summarizes section 606's express provisions. Subpart B describes pertinent aspects of the legislative history. Subpart C discusses Executive Orders and other executive branch directives that have been issued pursuant to section 606.

A. Summary of Provisions

1. Preferential Communications

Subsection (a) of section 606 provides for preferential communications during wartime.[20] Section 606(a) can only be triggered (1) "[d]uring the continuance of a war in which the United States is engaged," and (2) if the President finds prioritized communications "necessary for the national defense and security."[21] If these conditions are met, the President is authorized "to direct that such communications as in his judgment may be essential to the national defense and security shall have preference or priority with any carrier subject to this chapter."[22]

2. Obstruction

Subsection (b) of section 606 prohibits interference with communications during wartime.[23] Section 606(b) states that "[i]t shall be unlawful for any person during any war in which the United States is engaged to knowingly or willfully, by physical force or intimidation by threats of physical force, obstruct or retard or aid in obstructing or retarding interstate or foreign communication by radio or wire."[24]

Saudi Arabia lead the list of countries "that not only intercede on a wide range of topics but also block a large amount of content relating to those topics").

20. 47 U.S.C. § 606(a) (2006).
21. *Id.*
22. *Id.*
23. *Id.* § 606(b).
24. *Id.*

3. Control over Stations or Devices Capable of Emitting Electromagnetic Radiations

Subsection (c) confers three related powers. First:

> [T]he President, if he deems it necessary in the interest of national security or defense, may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations or devices capable of emitting electromagnetic radiations within the jurisdiction of the United States as prescribed by the Commission.[25]

In addition, the President "may cause the closing of any station for radio communication, or any device capable of emitting electromagnetic radiations between 10 kilocycles and 100,000 megacycles, which is suitable for use as a navigational aid beyond five miles, and the removal therefrom of its apparatus and equipment . . . ."[26] Finally, the President

> may authorize the use or control of any such station or device [that is, any station for radio communication, or any device capable of emitting electromagnetic radiations between 10 kilocycles and 100,000 megacycles, which is suitable for use as a navigational aid beyond five miles] and/or its apparatus and equipment, by any department of the Government under such regulations as he may prescribe upon just compensation to the owners.[27]

The authority to use these powers may be triggered under two circumstances: (1) "[u]pon proclamation by the President that there exists war or a threat of war, or a state of public peril or disaster or other national emergency" or (2) "in order to preserve the neutrality of the United States."[28]

4. Wire Communications

Subsection (d) also confers three powers.[29] The President may:

> (1) suspend or amend the rules and regulations applicable to any or all facilities or stations for wire communication within the jurisdiction of the United States as prescribed by the

25. *Id.* § 606(c).
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* § 606(d).

> Commission, (2) cause the closing of any facility or station for wire communication and the removal therefrom of its apparatus and equipment, or (3) authorize the use or control of any such facility or station and its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.[30]

The exercise of these powers requires that two conditions be met: (1) "proclamation by the President that there exists a state or threat of war involving the United States"; and (2) the President deems the action "necessary in the interest of the national security and defense . . . ."[31] The suspension, closing, use, or control of facilities under this section must terminate within "a period ending not later than six months after the termination of such state or threat of war and not later than such earlier date as the Congress by concurrent resolution may designate."[32]

5. Compensation

Subsection (e) specifies the manner of determining just compensation for a party affected by use or control of its facilities, presumably under subsection (d).[33]

6. State Powers

Subsection (f) reserves state police and tax powers "except wherein such laws, powers, or regulations may affect the transmission of Government communications, or the issue of stocks and bonds by any communication system or systems."[34]

7. Limitations

Subsection (g) contains two limitations on presidential authority exercised under subsections (c) and (d).[35] First, the President is not authorized to "make any amendment to the rules and regulations of the Commission which the Commission would not be authorized by law to make."[36] Second, the authorities granted in subsection (d) may not be "construed to authorize the President to take any action the force and effect

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30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* § 606(e).
34. *Id.* § 606(f).
35. *Id.* § 606(g).
36. *Id.*

of which shall continue beyond the date after which taking of such action would not have been authorized."[37]

8. Penalties

Subsection (h) specifies the penalties for failure to follow directives issued pursuant to the President's authority under section 606.[38]

B. Legislative History

This subsection discusses pertinent legislative history concerning section 606. It begins with a review of war and emergency powers provisions and executive actions in the context of radio regulation prior to the 1934 Act. It then discusses the original section 606 and the amendments to section 606 adopted after World War II.

This legislative history discloses a fascinating storyline concerning American communications policy during the nation's three global wars in the Twentieth Century: World War I, World War II, and the Cold War. During World War I, the war powers relating to radio communications permitted outright control and censorship over radio by the military. Between the World Wars, control over radio communications shifted from the military towards a more decentralized structure, although the executive power to close radio stations was retained in the law. At the outset of the Cold War, the primary concern over the security of radio and wire communications related to the potential guidance of nuclear weapons and the restoration of command communications in the event of a nuclear attack. The decentralization of emergency and war power control after World War I parallels the growth of radio as a civilian commercial enterprise.

1. The Radio Act of 1912 and World War I

The 1934 Act has roots in the Radio Act of 1912.[39] The Radio Act required any person, company, or corporation within the jurisdiction of the United States to register for a license in order to operate commercial radio communication.[40] Section 2 of the Radio Act provided:

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37. *Id.*

38. *Id.* § 606(h).

39. *See generally* Radio Act of 1912, ch. 287, 37 Stat. 302 (repealed 1927); Mark S. Fowler & Daniel L. Brenner, *A Marketplace Approach to Broadcast Regulation*, 60 TEX. L. REV. 207, 214 (1982) ("The Radio Act of 1927 . . . was largely replicated in the Communications Act of 1934.").

40. Radio Act of 1912 § 1.

> Every such license shall provide that the President of the United States in time of war or public peril or disaster may cause the closing of any station for radio communication and removal therefrom of all radio apparatus, or may authorize the use or control of any such station or apparatus by any department of the Government, upon just compensation to the owners.[41]

In 1914, President Wilson exercised his authority under the Radio Act and issued Executive Order 2042, to "Tak[e] Over High-Power Radio Station for Use of the Government."[42] Pursuant to this directive, the U.S. Navy assumed control of all radio stations in the nation.[43]

2. Emergency Measures and the Conclusion of World War I

Under the control of the Navy, radio communication became more efficient, laying the groundwork for the growth of radio as a medium in subsequent decades.[44] Following World War I, the Navy retained control of radio communications while the Senate considered ratification of the Treaty of Versailles.[45] In fact, the Navy wanted to retain control over the radio stations even after ratification of the Treaty, but various players who were wary of full governmental control—notably, the Navy's chief rival in radio, the Marconi Company—resisted.[46]

In 1918, Congress considered H. R. 13159, "a bill to further regulate radio communication."[47] The bill under consideration contained language

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41. *Id.* § 2.

42. *Woodrow Wilson: Executive Order 2042–Taking Over High-Power Radio Station for Use of the Government*, AM. PRESIDENCY PROJECT (Sept. 5, 1914), http://www.presidency.ucsb.edu/ws/?pid=75378 ("Now, Therefore, it is ordered by virtue of authority vested in me by the radio Act of August 13, 1912, that one or more of the highpowered radio stations within the jurisdiction of the United States and capable of trans-Atlantic communication shall be taken over by the Government of the United States and used or controlled by it to the exclusion of any other control or use for the purpose of carrying on communication with land stations in Europe, including code and cipher messages.").

43. *See* J. GREGORY SIDAK, FOREIGN INVESTMENT IN AMERICAN TELECOMMUNICATIONS 44 (1997).

44. *Id.*

45. *See generally Government Control of Radio Communication: Hearings Before the Comm. on the Merch. Marine and Fisheries*, 65th Cong. 5-38 (1918) (statement of Hon. Josephus Daniels, Sec'y of the Navy), *available at* http://books.google.com/books?id=_1LXF6vgUl0C.

46. *Id.* at 169-72 (statement of Edward J. Nally, Vice President and Gen. Manager of Marconi Wireless Tel. & Tel., Co.).

47. *Id.* at 3.

that would have expanded the executive war power over radio.[48] In addition to the power to close radio stations, the bill would have given the President authority to censor the content of radio communications.[49]

When this more comprehensive bill failed, Congress considered separate legislation focusing solely on the executive war power.[50] This resulted in a Joint Resolution, which provided that

> the President during the continuance of the present war is authorized and empowered, whenever he shall deem it necessary for the national security or defense, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system or systems, or any part thereof, and to operate the same in such manner as may be needful or desirable for the duration of the war, which supervision, possession, control, or operation shall not extend beyond the date of the proclamation by the President of the exchange of ratifications of the treaty of peace: *Provided*, That just compensation shall be made for such supervision, possession, control, or operation, to be determined by the President . . . .[51]

Thus, while the Radio Act focused solely on radio stations, this Joint Resolution covered additional means of communication that had become

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48. *See* H.R. 13159, 65th Cong. (1918), *reprinted in Government Control of Radio Communication: Hearings Before the Comm. on the Merch. Marine and Fisheries*, *supra* note 45, at 3-4.

49. *Id.* § 6. The bill provided:

> That when the United States is at war or when war is threatened, or during any war in which the United States is a neutral nation, or during any national emergency, such fact being evidenced by the proclamation of the President—
>
> (a) The President may issue regulations for the conduct and censorship of all radio stations and radio apparatus within the jurisdiction of the United States or of any of its possessions . . . ; and
>
> (b) The President may cause the closing of any radio station on land or on a permanently moored vessel within jurisdiction of the United States or any of its possessions and the removal therefrom of any radio apparatus, or may authorize the use of the station or it apparatus by the United States.
>
> The regulations for the conduct and censorship of radio stations, the closing of a radio station, and the removal of apparatus therefrom shall continue no longer than the duration of such war or emergency. The fact that the war or emergency has ended shall be evidenced by the proclamation of the President.

Id.

50. H.R. REP. NO. 741, at 1 (1918).

51. Act of July 16, 1918, ch. 154, 40 Stat. 904 (1918) (authorizing the President, in time of war, to supervise or take possession and assume control of any telegraph, telephone, marine cable, or radio system) (repealed 1919).

important for civilian and military purposes: telegraph, telephone, marine cable, and radio systems.[52]

In 1918, Woodrow Wilson exercised his new powers under this Joint Resolution and issued two executive proclamations to take control of the telegraph and telephone systems, radio stations, and marine cables.[53] President Wilson's action resulted in litigation over the federal government's authority to preempt state telephone rate regulation.[54] In *Dakota Central Telephone Co. v. South Dakota*, the Supreme Court held that federal preemption of state telephone rate regulation was a proper exercise of federal power.[55] In a variety of related challenges, other courts likewise held that the President was authorized to exercise plenary power over the radio and telephone systems during wartime.[56]

The executive powers granted under the Joint Resolution expired by the end of 1919 with the conclusion of the Treaty of Versailles, and control over all of the communication equipment returned to its original owners.[57]

3. The Radio Act of 1927

After World War I and until 1927, pursuant to the Radio Act of 1912, radio station allocation and usage was regulated by the U.S. Department of Commerce, run by Herbert Hoover.[58] In a series of decisions, courts required the Department of Commerce to issue broadcast licenses to

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52. *Id.*

53. *See* Proclamation, 40 Stat. 1807, 1807 (July 22, 1918) ("tak[ing] possession and assum[ing] control and supervision of each and every telegraph and telephone system"); Proclamation, 40 Stat. 1872, 1873 (Nov. 2, 1918) ("tak[ing] possession and assum[ing] control and supervision of each and every marine cable system").

54. *See* Dakota Cent. Tel. Co. v. South Dakota, 250 U.S. 163, 179-83 (1919).

55. *See id.* at 187.

56. *See, e.g.*, Commercial Cable v. Burleson, 255 F. 99, 99-103 (S.D.N.Y. 1919) (holding that a state of war persisted even during the armistice period when the Treaty of Versailles was being negotiated), *rev'd on other grounds*, 250 U.S. 360 (1919); Read v. Cent. Union Tel. Co., 213 Ill. App. 246, 246-47 (Ill. App. Ct. 1919) (stating that "[t]he war power and all powers incident to it reside in the nation's right of self-preservation, and the means of enforcing such right are left to the discretion of the nation, and cannot be interfered with at the pleasure of the States or their courts").

57. *See* Act of Congress Covering Return of Wires, ch. 10, 41 Stat. 157 (1919), *reprinted in* U.S. POST OFFICE DEP'T, GOVERNMENT CONTROL AND OPERATION OF TELEGRAPH, TELEPHONE AND MARINE CABLE SYSTEMS: AUGUST 1, 1918 TO JULY 31, 1919, at 55-56 (1921), *available at* http://books.google.com/books?id=2EguAAAAYAAJ.

58. Radio Act of 1912, ch. 287, § 3, 37 Stat. 302, 303 (repealed 1927); *see* Mark Goodman, *The Radio Act of 1927 as a Product of Progressivism*, MEDIA HISTORY MONOGRAPHS, http://www.scripps.ohiou.edu/mediahistory/mhmjour2-2.htm (last visited Nov. 1, 2012) (noting that "[b]y mailing a postcard to Secretary of Commerce Herbert Hoover, anyone with a radio transmitter, ranging from college students experimenting in science classes, to amateur inventors who ordered kits, to newspaper-operated stations, could broadcast on the frequency chosen by Hoover").

anyone who applied.[59] Some argued that this resulted in interference from too many overlapping stations.[60] Others argued that the problem of interference was minimal and that the federal government actually desired to control the airwaves in order to censor.[61]

The pro-regulation forces prevailed.[62] The Radio Act of 1927 ("Radio Act") established a Federal Radio Commission ("FRC") with the authority to issue broadcast licenses and assign frequencies and power levels.[63] Under the Radio Act of 1927, the FRC only had limited authority to prohibit "obscene, indecent, or profane language."[64] However, in practice, the FRC's authority to grant or revoke licenses frequently was employed for purposes of political or religious censorship.[65]

Section 6 of the Radio Act contained an emergency powers provision.[66] In addition to permitting the President to assume control over radio stations (as in the 1918 Joint Resolution), consistent with this new regulatory scheme, the Radio Act also permitted the President to suspend or amend the rules and regulations applicable to radio.[67] The Radio Act's emergency powers provision further broadened the President's authority to exercise these measures not only in wartime, but also in "a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States . . . ."[68]

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59. Fed. Regulation of Radio Broad., 35 Op. Att'y Gen. 126, 129-30 (1926); Hoover v. Intercity Radio Co., 286 F. 1003, 1007 (D.C. Cir. 1923); United States v. Zenith Radio Corp., 12 F.2d 614, 617 (N.D. Ill. 1926).

60. *See* Goodman, *supra* note 58 ("Maine Congressman Wallace White warned his colleagues in 1926 that radio stations jammed the airwaves, causing interference between stations in many locations.").

61. *See id.*; LOUISE M. BENJAMIN, FREEDOM OF THE AIR AND THE PUBLIC INTEREST: FIRST AMENDMENT RIGHTS IN BROADCASTING TO 1935, at 70-71 (2001); STERLING & KITTROSS, *supra* note 6, at 91-99.

62. *See* Goodman, *supra* note 58.

63. *See* Radio Act of 1927, ch. 169, §§ 3-5, 44 Stat. 1162, 1162-65.

64. *See id.* § 29.

65. *See* BENJAMIN, *supra* note 61, at 78; STERLING & KITTROSS, *supra* note 6, at 146.

66. Radio Act of 1927, ch. 169, § 6, 44 Stat. 1162, 1165.

67. *Id.*

68. *Id.* ("Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United states, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the licensing authority, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulation as he may prescribe, upon just compensation to the owners.").

4. The Interstate Commerce Commission

The Interstate Commerce Commission ("ICC") represents another important aspect of communications infrastructure regulation. The ICC introduced the notions of communications facilities as infrastructure for both military and civilian uses and communications infrastructure as "common carriers" like railroads.[69]

The ICC originally was created under the Interstate Commerce Act of 1887 to regulate railroad rates, in response to populist unrest over shipping costs for farm commodities.[70] The original Interstate Commerce Act related primarily to rate regulation and originally did not include any emergency powers.[71]

After a number of court challenges by the railroads that curtailed the ICC's powers, Congress enacted new legislation further expanding federal control over transportation infrastructure. This included the Hepburn Act of 1906, which gave the ICC ratemaking authority over bridges, terminals, ferries, sleeping cars, express companies, and oil pipelines,[72] and the Mann-Elkins Act of 1910, which brought telephone, telegraph, and wireless rates under the ICC's ambit.[73] All of these facilities were designated as "common carriers" subject to obligations of non-discrimination in rate-making.[74] Neither of these Acts included emergency powers.[75]

During World War I, the Interstate Commerce Act was amended to include a set of executive war powers. The first power prohibited interference with train or other vehicular traffic during the War.[76] The

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69. *See* Delbert D. Smith, *The Interdependence of Computer and Communications Services and Facilities: A Question of Federal Regulation*, 117 U. PA. L. REV. 829, 847-48 (1969); *see also* KIMBERLY VACHAL, THE INTERSTATE COMMERCE COMMISSION: PAST AND PRESENT 1-2 (1993), *available at* http://www.ugpti.org/pubs/pdf/SP111.pdf (discussing the history of the ICC's regulation of railroads).

70. Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America's Infrastructure*, 95 MARQ. L. REV. 1151, 1151-52 (2012) ("In 1887, the U.S. government established the first independent regulatory agency, the Interstate Commerce Commission ("ICC" or "Commission"), and would grant it jurisdiction to regulate the rates and practices of the railroads. Currently, several federal agencies, including the Surface Transportation Board, the Federal Maritime Commission, the Federal Energy Regulatory Commission, and the Department of Transportation, regulate rail, motor, air, and water carriage, as well as pipelines and freight forwarders. Despite substantive differences between the kind and scope of regulation by the various agencies, each mode of transportation is in the business of moving passengers or commodities from one point to another.").

71. *See* VACHAL, *supra* note 69, at 1-2.

72. Hepburn Act, ch. 3591, sec. 1, § 1, 34 Stat. 584, 584 (1906).

73. Mann-Elkins Act, ch. 309, sec. 7, § 1, 36 Stat. 539, 544-45 (1910).

74. *See id.*; Hepburn Act § 1.

75. *See* Mann-Elkins Act; Hepburn Act.

76. Interstate Commerce Act, 1918 Supp. Fed. Stat. Ann. 393 ("[A]ny person or persons who shall, during the war in which the United States is now engaged, knowingly and willfully, by physical force or intimidation by threats of physical force obstruct or retard, or aid in obstructing or retarding, the orderly conduct or movement in the United

second power authorized the President to prioritize transportation traffic and commodities shipments in accordance with war needs.[77] These provisions were subsequently adapted into section 606 of the 1934 Act.[78]

5. The Communications Act of 1934 and the Original Section 606

By the early 1930s, the allocation of radio spectrum suffered from confusion and chaos, while the importance of radio as a national communication forum increased.[79] Meanwhile, the ICC focused predominantly on railroad regulation and largely ignored the telephone, telegraph, and wireless sectors.[80] To address these problems–and as part of President Roosevelt's New Deal program to nationalize economic infrastructure–Congress passed the Communications Act of 1934 ("1934 Act"). The 1934 Act created the Federal Communications Commission and brought radio, telephone, telegraph and wireless communications under the FCC's jurisdiction.[81]

One of the reasons given for creating the FCC in section 1 of the 1934 Act was "for the purpose of the national defense."[82] This purpose was

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States of interstate or foreign commerce, or the orderly makeup or movement or disposition of any train, or the movement or disposition of any locomotive, car, or other vehicle on any railroad or elsewhere in the United States engaged in interstate or foreign commerce shall be deemed guilty of a misdemeanor . . . .").

77. *Id.* ("[D]uring the continuance of the war in which the United States is now engaged the President is authorized, if he finds it necessary for the national defense and security, to direct that such traffic or such shipments of commodities as, in his judgment may be essential to the national defense and security shall have preference or priority in transportation by any common carrier by railroad, water, or otherwise. He may give these directions at and for such times as he may determine, and may modify, change, suspend, or annul them, and for any such purpose he is hereby authorized to issue orders direct, or through such person or persons as he may designate for the purpose or through the Interstate Commerce Commission.").

78. Communications Act of 1934, Pub. L. No. 416, § 606(a)-(b), 48 Stat. 1064, 1104-05 (codified as amended at 47 U.S.C. § 606(a)-(b) (2006)), *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, at 965 (Max D. Paglin ed., 1989); *see also Hearing on S. 2910 Before the S. Comm. on Interstate Commerce*, 73rd Cong. (1934) (testimony of AT&T President Walter Gifford), *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, *supra*, at 219.

79. *See* BENJAMIN, *supra* note 61, at 135; STERLING & KITTROSS, *supra* note 6, at 147-48; Arthur Martin, *Which Public, Whose Interest? The FCC, the Public Interest, and Low-Power Radio*, 38 SAN DIEGO L. REV. 1159, 1167-68, 1171 (2001).

80. *See* Daniel F. Spulber & Christopher S. Yoo, *Toward A Unified Theory of Access to Local Telephone Networks*, 61 FED. COMM. L.J. 43, 47 (2008) ("[T]he ICC focused its attention primarily on the railroads. As a result, the ICC did little to exercise the scant regulatory jurisdiction over telephone service that it did possess, undertaking only four telephone rate cases during the twenty-four years during which it had jurisdiction over the telephone industry.").

81. 47 U.S.C. § 151 (2006).

82. *Id.*

implemented in section 606 of the Act.[83] The Executive powers granted in the original section 606 were similar to the present version in much of their content and structure. Subsections (a) and (b) were adapted from the World War I amendments to the Interstate Commerce Act and have not substantially changed since 1934.[84]

The present subsection 606(d) is derived from the original subsection (c).[85] In the original version of subsection 606(c), the emergency powers were lifted from the Radio Act of 1927.[86] The present subsection (d) amends the prior subsection (c) to include a termination period for the war powers granted therein.[87] This amendment was passed in 1942.[88]

The legislative history of section 606 confirms that the original subsection 606(c), now subsection 606(d), was intended to extend the emergency powers of the Radio Act of 1927 to radio and telephone stations to provide the ability to control particular *stations* not entire *systems*. This is evident in the original text of this section: the President could "suspend or amend . . . the rules and regulations applicable to any or all *stations* within the jurisdiction of the United States as prescribed by the Commission"—which at the time would have included both radio and telephone stations—and to "cause the closing of any *station* for radio communication and the removal therefrom of its apparatus and equipment . . . ."[89] It is also reflected in the legislative history. In a hearing on the bill

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83. *Id.* § 606.

84. *Id.* § 606(a)-(b).

85. *Compare id.* § 606(d) (permitting the President, "[u]pon proclamation . . . that there exists a state or threat of war" to "suspend or amend the rules and regulations" regarding wire communication, to close any wire communication facilities or stations, or "authorize the use or control of any such facility or station" to the government), *with* Communications Act of 1934 § 606(c), 48 Stat. at 1104-05 (authorizing the President, "[upon proclamation . . . that there exists war or a threat of war" to "suspend or amend . . . the rules and regulations applicable to any or all [U.S.] stations," to shut down "any station for radio communication," or "authorize the use or control of any such station . . . by any department of the Government").

86. *See* Communications Act of 1934 § 606(c), 48 Stat. at 1104-05 ("Upon proclamation by the President that there exists war or a threat of war or a state of public peril or disaster or other national emergency, or in order to preserve the neutrality of the United States, the President may suspend or amend, for such time as he may see fit, the rules and regulations applicable to any or all stations within the jurisdiction of the United States as prescribed by the Commission, and may cause the closing of any station for radio communication and the removal therefrom of its apparatus and equipment, or he may authorize the use or control of any such station and/or its apparatus and equipment by any department of the Government under such regulations as he may prescribe, upon just compensation to the owners.").

87. 47 U.S.C. § 606(d) (2006).

88. *Id.*

89. Communications Act of 1934 § 606(c), 48 Stat. at 1104-05 (emphasis added).

before the Senate Committee on Interstate Commerce on March 14, 1934, Walter S. Gifford, President of AT&T, testified as follows:[90]

> Paragraph (c) authorizes the President . . . to take over the use or control of any telephone office or station, upon just compensation to the owners. This paragraph is an adaptation of the existing provisions of section 6 of the Radio Act, which authorizes the President . . . to seize any radio station. It is here extended to the telephone system.
>
> This paragraph might be deemed to confer upon the President the power, which he has not sought, to take over the control and operation of the telephone system of the country, upon proclamation by him of the existence of a national emergency. At least until such time as the President shall indicate that the interests of the country require that he be invested with such power, I respectfully submit that Congress should not thrust it upon him. Especially is this [sic] so in view of the President's special message in which he expressly excludes conferring new powers incident to the creation of a Federal Communications Commission.[91]

The present subsection 606(c) was not part of section 606 as passed in 1934. It was added in 1951, as discussed below.

6. Cold War Amendment of Section 606 After World War II

Section 606 was amended in 1951 to include a new subsection (c), which covered "any device capable of emitting electromagnetic radiations between 10 kilocycles and 100,000 megacycles, which is suitable for use as a navigational aid beyond five miles . . . ."[92] This Cold War amendment

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90. *Hearing on S. 2910 Before the S. Comm. on Interstate Commerce*, 73rd Cong. (1934) (testimony of AT&T President Walter Gifford), *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, *supra* note 78, at 220. At the time, AT&T and its associated companies under the Bell System controlled 85% of telephone service in the U.S. *Id.*

91. *Id.* at 220. The "President's special message" seems to refer to President Roosevelt's February 26, 1934 message to Congress recommending the creation of the FCC. *See* President Franklin D. Roosevelt, Message to Congress Recommending Creation of the Federal Communications Commission (Feb. 26, 1934), *in Papers of Franklin D. Roosevelt, February 26, 1934, Message to Congress*, AM. PRESIDENCY PROJECT, http://www.presidency.ucsb.edu/ws/index.php?pid=14814 (last visited Nov. 4, 2012). The President's message does not seem as restrictive as Mr. Gifford suggested. It does refer to the transfer of "present" Radio Commission and ICC authorities to the FCC, but it also states that "[t]he new body [the FCC] should, in addition, be given full power to investigate and study the business of existing companies and make recommendations to the Congress for additional legislation at the next session." *Id.*

92. 47 U.S.C. § 606(c) (2006).

was adopted at the urging of the Department of Defense ("DOD") in response to fears about "piloted or pilotless aircraft or missiles directed toward targets in the United States."[93] The DOD believed that the then-existing section 606(c) was not broad enough to cover certain kinds of navigational aids.[94] Testimony in the legislative history of this amendment repeatedly makes clear that its purpose was to protect against aircraft and missile attacks.

For example, Major General Francis L. Ankenbrandt, Director of Communications for the United States Air Force, testified before the Senate Commerce Committee that "this proposed legislation will provide the authority to counteract the activities of saboteurs, fifth columnists, or other subversive elements who would use or attempt to use electromagnetic radiations to guide aircraft and missiles of a hostile nation."[95] Major General Ankenbrandt stated that:

> There are two general types of devices for which control must be provided:
>
> a) Those devices, the existence, location, and hours of operation of which can be determined by the enemy through his intelligence channels, and which will permit either a good degree of precision in locating a target, or long-range navigation to the target area.
>
> b) Those devices, which might be operated by enemy agents for the purpose of providing guidance to their nation's aircraft, ship or submarine.[96]

Major General Ankenbrandt argued that this amendment was important because "[t]here is evidence that potential enemies possess the atomic bomb" and that "German scientists" who had been working on a Nazi navigation technology had relocated to the Soviet Union after World War II.[97] To allay concerns that this provision was too broad, Major General Ankenbrandt testified that "[i]t is not contemplated that a complete shut-down" of radio networks would ever be required by this authority.[98] Instead, Major General Ankenbrandt stated the military would craft contingency plans to control "only those devices which may give positive

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93. *See An Act to Further Amend the Communications Act of 1934: Hearing on S. 537 Before the H. Comm. on Interstate and Foreign Commerce*, 82nd Cong. 8 (1951) [hereinafter *Hearing on S. 537*] (statement of Major General Francis L. Ankenbrandt, Director of Communications, United States Air Force).

94. *Id.* at 20.

95. *Id.* at 9. General Ankenbrandt's testimony offers a fascinating window onto this slice of cold war history. For example: "It is known that many German scientists are now working for the U.S.S.R." *Id.* at 8.

96. *Id.* at 10.

97. *Id.* at 8.

98. *Id.* at 9.

navigational guidance to a potential enemy," based on a study of the state-of-the-art in homing devices.[99]

Section 606 has not been modified since the 1951 amendments were adopted.[100]

C. *Executive Orders and Executive Branch Directives Relating to Section 606*

The scope of executive powers under section 606 and the responsibilities under those powers of various entities within the executive branch have been the subject of a number of Executive Orders and other directives since the 1950s. This subsection reviews those orders and directives in some detail. The history of these orders and directives demonstrates two themes: (1) section 606 was primarily considered in terms of war powers;[101] and (2) prior to the September 11 attacks, the provision for specific war powers under section 606 primarily related to the sorts of large-scale disruptions that preoccupied defense planners during the cold war–specifically the threat of nuclear attack.[102] After September 11, the focus shifted to terrorism, but only insofar as various existing functions were consolidated under the Department of Homeland Security.[103] As a result, there has never been a comprehensive plan under section 606 that would encompass all of what would fall under the banner of "cybersecurity" today.

1. The 1950s to the 1970s

A number of Executive Orders issued from the 1950s through the 1970s relate to section 606. These orders primarily concern the reorganization of the executive branch after World War II under President Eisenhower, and subsequent reorganizations under Presidents Kennedy, Nixon, and Carter.

Executive Order 10,705, signed by President Eisenhower in 1957, delegated the President's powers under subsections 606(a), (c), and (d) of the Communications Act of 1934 to the Director of the Office of Defense Mobilization.[104] The order stated that these powers could be exercised in the event of a continuance or presidential proclamation of war.[105] It further specified that "[n]othing in this order shall be construed as authorizing the exercise of any authority with respect to the content of any station program

99. *Id.*
100. *See* 47 U.S.C. § 606 (2006).
101. *See* discussion *infra* Part II.C.1-3.
102. *See* discussion *infra* Part II.C.1-3.
103. *See* discussion *infra* Part II.C.4.
104. Exec. Order No. 10,705, 22 Fed. Reg. 2729, 2729 (Apr. 17, 1957).
105. *Id.* § 1(b).

or of communications transmitted by any communication facility."[106] This order was amended by Executive Order 10,995, signed by President Kennedy in 1962, to transfer these functions to the Director of Telecommunication Management.[107]

Executive Order 11,051, also signed by President Kennedy in 1962, delegated to the Director of the Office of Emergency Planning the responsibility of "planning for the mobilization of the nation's telecommunications resources in time of national emergency," and redelegated the functions in Executive Order 10,705 to this office.[108] Executive Order 11,556, signed by President Nixon in 1970, transferred these functions to the Director of the Office of Telecommunications Policy.[109] Executive Order 12,046, signed by President Carter in 1978, revoked Executive Order 10,705, and assigned the war power functions under section 606 of the Telecommunications Act of 1934 once again to the President.[110]

2. The 1980s

The 1980s brought a relative flurry of activity in directives and orders relating to section 606. This activity was related to the Reagan Administration's broader efforts to win the Cold War.[111]

National Security Decision Directive 97, signed by President Reagan in 1983, notes that "[t]he nation's domestic and international telecommunications resources, including commercial, private, and government-owned services and facilities, are essential elements in support of U.S. national security policy and strategy."[112] This directive was principally concerned with demonstrating that U.S. telecommunications facilities could survive a nuclear attack.[113] The objectives listed in the directive all related to military capability, priority communications, and government continuity.[114] Government agencies were directed to work with

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106. *Id.* § 1(d).

107. Exec. Order No. 10,995, 27 Fed. Reg. 1517, 1519-20 (Feb. 20, 1962).

108. Exec. Order No. 11,051, 27 Fed. Reg. 9683, § 306 (Oct. 2, 1962).

109. Exec. Order No. 11,556, 35 Fed. Reg. 14,193, § 6 (Sept. 9, 1970).

110. Exec. Order No. 12,046, 43 Fed. Reg. 13,349, § 4-101 (Mar. 27, 1978).

111. For a discussion of the Reagan administration and the Cold War, see, for example, JACK F. MATLOCK, JR., REAGAN AND GORBACHEV: HOW THE COLD WAR ENDED, at xiii (2005).

112. National Security Decision Directive No. 97, at 1 (June 13, 1983), *available at* http://www.fas.org/irp/offdocs/nsdd/nsdd-097.htm.

113. *Id.* (stating "[i]t must be manifestly apparent to a potential enemy that the U.S. ability to maintain continuity of command and control of all military forces, and conduct other essential national leadership functions cannot be eliminated by a nuclear attack. If deterrence fails, the national telecommunications infrastructure must possess operability, restorability, and hardness necessary to provide a range of telecommunications services to support these essential national leadership requirements").

114. *Id.* at 1-2.

commercial carriers and other private sector telecommunications entities to facilitate the location of backbone facilities outside likely nuclear target areas and to develop restoration plans in the event of a nuclear attack.[115]

Executive Order 12,472, signed by President Reagan in 1984, is titled "Assignment of National Security and Emergency Preparedness Telecommunications Functions."[116] One of the statutory authorities under which it was promulgated was the Communications Act of 1934.[117] The order states that it establishes a "National Communications System (NCS)," which is responsible for facilitating priority telecommunications and securing "the survivability of national security and emergency preparedness telecommunications in all circumstances."[118] In fact, the NCS was established in 1963 by President Kennedy, following the Cuban Missile Crisis, to facilitate the interconnection and survivability of government networks, and was only formalized by Executive Order 12,472.[119]

Executive Order 12,472 further specifies the executive branch's responsibilities under section 606.[120] It states that in wartime, the National Security Council "shall provide policy direction for the exercise of the war power functions of the president . . . should the president issue implementing instructions in accordance with the National Emergencies Act . . . ."[121] It further states that any war powers exercised by the President under section 606 shall be directed by the Office of Science and Technology Policy ("OSTP").[122]

Executive Order 12,472 also establishes "non-wartime emergency functions" relating to telecommunications resources.[123] In contrast to the "wartime emergency powers" provisions, this section of the order does not refer specifically to section 606. Here, the order directs the National Security Council to help develop plans and standards for the use of telecommunications resources by the federal government "and by State and local governments, private industry and volunteer organizations upon request, to the extent practicable and otherwise consistent with law," in the event of a crisis or emergency that does not trigger the President's war

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115. *Id.* at 3, 5.

116. Exec. Order No. 12,472, 49 Fed. Reg. 13,471, 13,471 (Apr. 3, 1984).

117. *Id.* § 1(a).

118. *Id.* § 1(c). For information on the NCS, see NATIONAL COMMUNICATIONS SYSTEM, http://www.ncs.gov/ (last visited Nov. 3, 2012).

119. *Background and History of the NCS*, NAT'L COMM. SYS., http://www.ncs.gov/about.html (last visited Nov. 3, 2012).

120. Exec. Order No. 12,472, 49 Fed. Reg. 13,471 § 2 (Apr. 3, 1984).

121. *Id.* § 2(a) (citing National Emergencies Act, 50 U.S.C. § 1601 (2006)). The National Emergencies Act specifies the manner in which a national emergency can be declared under statutes that authorize executive powers in the event of such a declaration, and provides for Congressional oversight of the continuation and termination of a state of national emergency. 50 U.S.C. §§ 1621-22, 1631, 1641.

122. Exec. Order No. 12,472, 49 Fed. Reg. 13,471 § 2(a)(2) (Apr. 3, 1984).

123. *Id.* § 2(b).

powers.[124] It further creates a Joint Telecommunications Resources Board ("JTRB") to assist the Director of OSTP with these responsibilities.[125]

Other portions of the Executive Order 12,472 concern plans for allocating radio spectrum and frequency assignments in the event of a crisis or emergency.[126] One subsection of this portion of the order specifically outlines the FCC's responsibilities.[127] The FCC is required to "[r]eview the policies, plans and procedures of all entities licensed or regulated by the Commission that are developed to provide national security or emergency preparedness communications services, in order to ensure that such policies, plans and procedures are consistent with the public interest, convenience and necessity."[128] In addition, the Commission is required to

> [p]erform such functions as are required by law with respect to all entities licensed or regulated by the Commission, including (but not limited to) the extension, discontinuance, or reduction of common carrier facilities or services; the control of common carrier rates, charges, practices and classifications; the construction, authorization, activation, deactivation or closing of radio stations, services and facilities; the assignment of radio frequencies to Commission licensees; the investigation of violations of pertinent law and regulation; and the initiation of appropriate enforcement actions.[129]

Finally, the order requires all Federal departments and agencies to assess and develop their own internal telecommunications preparedness for national security and emergency events.[130]

Executive Order 12,656, issued by President Reagan in 1988, governs basic national security emergency preparedness policies.[131] That order defines a "national security emergency" to include any "natural disaster, military attack, technological emergency, or other emergency, that seriously degrades or seriously threatens the national security of the United States."[132] The order notes that it "does not constitute authority to implement the plans prepared pursuant to this Order" and that such plans "may be executed only in the event that authority for such execution is authorized by law."[133] It further notes that it "does not apply to national

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124. *Id.* § 2(b)(1).
125. *Id.* § 2(b)(3).
126. *Id.* § 3.
127. *Id.* § 3(h).
128. *Id.* § 3(h)(1).
129. *Id.* § 3(h)(2).
130. *Id.* § 3(i).
131. Exec. Order No. 12,656, 53 Fed. Reg. 4791 (Nov. 23, 1988).
132. *Id.* § 101(a).
133. *Id.* § 102(b).

security and emergency preparedness telecommunications functions and responsibilities that are otherwise assigned by Executive Order 12472."[134]

Under Executive Order 12,656, the National Security Council is vested with principal responsibility for emergency preparedness, as advised by the Director of the Federal Emergency Management Agency ("FEMA").[135] Each federal department and agency is required to develop national and international emergency plans relating to their respective functions.[136]

Among the various departments and agencies specifically mentioned in the order, the FEMA is generally responsible for "[s]upport[ing] the heads of other Federal departments and agencies in preparing plans and programs" concerning contingencies including "continuance of industry and infrastructure functions essential to national security."[137] The United States Information Agency is required, "[i]n coordination with the Secretary of State's exercise of telecommunications functions affecting United States diplomatic missions and consular offices overseas," to develop plans for maintaining "the capability to provide television and simultaneous direct broadcasting in major languages to all areas of the world, and the capability to provide wireless files to all United States embassies during national security emergencies."[138] There are no other references in the order to what could be considered information infrastructure, although directives in the order to departments including Defense, Treasury, and Energy could imply responsibilities over communications and inter-networking relating to the monetary, credit, financial, and energy systems.[139]

In 1990, the FCC issued *Procedures for the Use and Coordination of the Radio Spectrum During a Wartime Emergency* pursuant to Executive Order 12,472.[140] These procedures permit the Director of OSTP to revoke frequency authorizations issued by NTIA and the FCC, redelegate to the Secretary of Defense "the authority necessary to control the use of radio spectrum in areas of active combat," and direct the closure of "all non-government radio stations in the international broadcasting service," except those carrying U.S. government-controlled radio broadcasts.[141]

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134. *Id.* § 103(d).
135. *Id.* § 104(a)-(f).
136. *Id.* § 201.
137. *Id.* § 1702(1).
138. *Id.* § 2501(2).
139. *See id.* §§ 501, 701, 1501.
140. Procedures for the Use and Coordination of the Radio Spectrum During a Wartime Emergency, 47 C.F.R. § 214.0 (2008).
141. *Id.* § 214.4.

3. The 2000s Prior to the September 11 Attacks

There were no Executive Orders relating to section 606 under the George H.W. Bush or Clinton administrations. Under the Clinton administration, however, an important directive and related FCC rule were issued that involved the NCS, established by Presidents Kennedy and Reagan.[142]

The NCS issued its Telecommunications Service Priority (TSP) System for National Security Emergency Preparedness (NSEP) Directive in August 2000.[143] This directive states that it was issued pursuant to section 606 of the Telecommunications Act and Executive Order 12,472, and related regulations.[144] The NSEP TSP regulations state that they are issued under sections 1 (general statement of purpose), 4(i) (duties and powers of FCC), 201-205 (service and charges, discriminations and preferences, schedule of charges, hearing on new charges, just and reasonable charges), and 303(r) (FCC rulemaking authority) of the Communications Act, as amended.[145]

In general, the NSEP TSP program assigns priority levels for the provisioning or restoration of various telecommunications services in the event of a crisis, attack, or war.[146] The NSEP TSP rule further states that "[u]nder section 606 of the Communications Act, this authority may be superseded, and expanded to include non-common carrier telecommunication services, by the war emergency powers of the President of the United States."[147] Additionally, the NCS Directive states that the Director of the OSTP will "act as the final approval authority for priority actions or denials of requests for priority actions" and the adjudication of disputes during the exercise of the President's war powers under section 606.[148]

4. The 2000s After the September 11 Attacks

Under President George W. Bush, there was an initial effort to restate priorities for critical information infrastructure protection, which was subsequently folded into the administration's efforts to deal with the terrorist threat after the September 11 attacks. Curiously, however, the entities and authorities established by President Bush relating to

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142. *See Public Safety Tech Topic #20–Cyber Security and Communications*, FCC, http://www.fcc.gov/help/public-safety-tech-topic-20-cyber-security-and-communications (last visited Nov. 4, 2012).

143. NAT'L COMM. SYS., NCS DIRECTIVE 3-1, at 1 (Aug. 10, 2000).

144. *Id.* at 1.

145. 47 C.F.R. § 64, app. A(1)(b) (citing 47 U.S.C. § 151, 154(i), 201-05, 303(r) (2006)).

146. *Id.* at app. A(5).

147. *Id.* at app. A(1)(b).

148. NAT'L COMM. SYS., NCS DIRECTIVE 3-1, at 6-7 (Aug. 10, 2000).

information infrastructure protection were merely voluntary and advisory. Most of the administration's efforts in cyberspace after September 11 were directed towards expanding surveillance authorities (or circumvention of legal surveillance restrictions) rather than executive emergency or war powers.[149]

Executive Order 13,231, titled "Critical Infrastructure Protection in the Information Age," was signed by President Bush in 2001.[150] It was amended and restated by Executive Order 13,286, signed by President Bush in 2003.[151] The 2003 order implemented changes to various prior Executive Orders as required by the Homeland Security Act of 2002, which was passed in the wake of the September 11 attacks.[152] The 2003 order also amended Executive Order 12,472 to bring some of the responsibilities delineated in that order under the Department of Homeland Security.[153]

The amended Executive Order 13,231 states that "[t]he information technology revolution has changed the way business is transacted, government operates, and national defense is conducted. Those three functions now depend on an interdependent network of critical information infrastructures."[154] The order establishes a "voluntary public-private partnership" framework for protecting critical information infrastructure.[155] The National Infrastructure Advisory Council (NIAC), a public-private advisory body, was tasked with developing security risk assessment models and monitoring the development of private sector Information Sharing and Analysis Centers (ISACs).[156] In short, the order established only non-binding advisory functions relating to what is now called cybersecurity.

5. Summary

This discussion of section 606's provisions in light of the legislative history shows that the underlying executive powers first granted over radio prior to and during World War I were exceedingly broad and resulted in full military control over radio communications. Within the context of the 1934 Act, however, section 606 was originally intended to confer a more

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149. The subject of this paper is emergency and war powers rather than ordinary surveillance. For a discussion of the expansion of online surveillance authorities after the September 11 attacks, see Opderbeck, *supra* note 1.

150. Exec. Order No. 13,231, 66 Fed. Reg. 53,063 (Oct. 16, 2001).

151. Exec. Order No. 13,286, 68 Fed. Reg. 10,619 (Feb. 28, 2003).

152. *See id.*

153. *Id.* § 46.

154. *Id.* § 7 (restating Exec. Order No. 13,231, 66 Fed. Reg. 53,063, § 1 (Oct. 16, 2001)).

155. *Id.*

156. *Id.* (restating Exec. Order No. 13,231, 66 Fed. Reg. 53,063, § 3 (Oct. 16, 2001)). For further information on the NIAC, see *National Infrastructure Advisory Council*, U.S. DEP'T OF HOMELAND SEC., http://www.dhs.gov/files/committees/editorial_0353.shtm (last visited Nov. 3, 2012). For further information on ISACs, see NAT'L COUNCIL OF ISACS, http://www.isaccouncil.org/ (last visited Nov. 3, 2012).

narrow range of authorities relating specifically to radio and telephone stations and equipment and radio navigation devices. The various Executive Orders and directives that have been issued relating to section 606 assume that it confers a specific set of war powers relating primarily to priority telephone, radio, and wire communications. If section 606 extends to the much wider variety of equipment, devices, and protocols that make up the Internet, and if it confers authority that implies a total network "shut down," then the subsequent expansion of the FCC's express or ancillary authority potentially is as broad as that granted to President Wilson in the Congressional Joint Resolution issued during the Great War. The background for that discussion is supplied in the next Part, *infra*.

III. THE FCC, THE INTERNET, AND SECTION 606

The question of whether, and to what extent, the FCC has authority to regulate the Internet is one of the most contentious issues in communications law today.[157] This Part discusses the background of that issue, which has boiled over in the "network neutrality" debate. In light of this debate, this Part will suggest that the claim that section 606 implies an Internet kill switch is an unprecedented and astonishing assertion of FCC Internet jurisdiction. Such an unprecedented expansion of federal power over the Internet under the banner of cybersecurity represents an unforeseen consequence of moves by cyber civil libertarians to enforce network neutrality through the FCC.

A. Background: The FCC's Regulation of Cable Television

The history of the FCC's regulation of cable television ("CATV") forms the background of the network neutrality and Internet regulation debate. The FCC had determined in the 1950s that "CATV systems are neither common carriers nor broadcasters, and therefore are within neither of the principal regulatory categories created by the Communications Act."[158] Nevertheless, in the 1960s, when Congress failed to pass legislation dealing specifically with CATV, the FCC began to assert jurisdiction.[159] The FCC's authority to regulate CATV was upheld to an extent by the Supreme Court in its 1968 *Southwestern Cable* decision.[160]

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157. *See, e.g.*, James B. Speta, *The Shaky Foundations of the Regulated Internet*, 8 J. TELECOMM. & HIGH TECH. L. 101 (2010).

158. *See* United States v. Sw. Cable, 392 U.S. 157, 164 (1968).

159. *Id.* at 165.

160. *Id.* at 178 (the Court held that "[t]he Commission may . . . issue 'such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law,' as 'public convenience, interest, or necessity requires.' We express no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes.") (citing 47 U.S.C. § 303(r) (2006)).

The Court rejected Southwestern Cable's argument that the FCC's jurisdiction was delimited by the contours of Titles II and III of the 1934 Act, which relate to common carriers and broadcasters, respectively.[161] The cable companies argued that their service represented aspects of both common carriers and broadcasters, without falling under either category, and therefore a new statutory scheme was needed to regulate them.[162] The Court noted, however, that the 1934 Act was broader than the "common carrier" and "broadcaster" silos and applied to

> all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided . . . .[163]

Therefore, the Court held:

> We cannot construe the Act so restrictively. Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions.[164]

In particular, the Court was sensitive to the rapid development of telecommunications technology after World War II. "Certainly," the Court said,

> Congress could not, in 1934 have foreseen the development of community antenna television systems, but it seems to us that it was precisely because Congress wished 'to maintain, through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority.'[165]

Thus, according to the *Southwestern Cable* Court, "[u]nderlying the whole [Communications Act] is recognition of the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the

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161. *Id.* at 172-73.
162. *Id.* at 172.
163. 47 U.S.C. § 152(a) (2006).
164. Sw. Cable, 392 U.S. at 172.
165. *Id.*

corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors."[166]

The precise scope of the FCC's authority over CATV, however, was not defined by the Court. Instead, the Court noted that

> [t]here is no need here to determine in detail the limits of the Commission's authority to regulate CATV. It is enough to emphasize that the authority which we recognize today under § 152(a) is restricted to that reasonably ancillary to the effective performance of the Commission's various responsibilities for the regulation of television broadcasting.[167]

The FCC's regulation of CATV pursuant to *Southwestern Cable* continued until Congress enacted the Cable Communications Policy Act of 1984 ("1984 Cable Act").[168] This legislation amended the Communications Act of 1934 to establish a local municipal franchising system for cable television.[169] There were no national security or emergency provisions in the 1984 Cable Act amendments.

CATV regulation was tweaked again with the 1992 Cable Act.[170] The 1992 Cable Act provided more power to municipal franchising authorities to encourage rate competition and imposed carriage and signal quality requirements.[171] The only emergency or security related provision was a requirement that cable operators provide access to emergency broadcast system information.[172] In addition, the 1992 Cable Act authorized FCC rulemaking authority to regulate direct broadcast satellite services.[173]

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166. *Id.* at 172-73 (quoting FCC v. Pottsville Broad. Co., 309 U.S. 134, 138 (1940) (citations omitted)).

167. *Id.* at 178.

168. *See* Cable Communications Policy Act of 1984, 47 U.S.C. § 551 (2006), *invalidated in part by* Application of U.S. for an Order Pursuant to 18 U.S.C. § 2703(D) Directed to Cablevision Sys. Corp., 158 F. Supp. 2d 644, 648-49 (D. Md. 2001) (holding that "the Electronic Communications Privacy Act implicitly repealed those provisions of the Cable Communications Policy Act that require that a subscriber to an electronic communications service or remote computing service provided by a cable company be given notice of a court order directing the cable company to disclose personal information about the subscriber to a governmental entity").

169. *See id.*; *see also The Evolution of Cable Television*, FCC, http://www.fcc.gov/encyclopedia/evolution-cable-television (last updated Mar. 14, 2012).

170. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended in scattered sections of 47 U.S.C.); *see also* FCC, *supra* note 169.

171. *See* 47 U.S.C. § 544 (2006).

172. *Id.* § 544(g) (requiring that "each cable operator shall comply with such standards as the Commission shall prescribe to ensure that viewers of video programming on cable systems are afforded the same emergency information as is afforded by the emergency broadcasting system pursuant to Commission regulations in subpart G of part 73, title 47, Code of Federal Regulations.").

173. 47 U.S.C. § 335 (2006).

B. A New Era: The Telecommunications Act of 1996

The Communications Act of 1934 was substantially amended by the Telecommunications Act of 1996 ("1996 Act").[174] The 1996 Act's focus was on deregulation of telecommunications markets.[175] It consists of seven Titles, three of which cover substantive areas of telecommunications: Title I ("Telecommunications Services"), Title II ("Broadcast Services"), and Title III ("Cable Services").[176]

A key aspect of the 1996 Act is its distinction between "telecommunications" and "information services." The Act defines "telecommunications" as "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[177] "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . . ."[178] "Telecommunications" can be conceived of as an "unaltered communications pipe, analogous to traditional voice telephone service," while an "information service involves some computer processing that acts upon the content transmitted across the network."[179]

This difference codified an earlier distinction between "basic" and "enhanced" services, made by the FCC when it first began to address computer technologies starting in the 1960s.[180] Providers of "enhanced" services generally were not subject to as stringent regulation by the FCC as basic services.[181] This distinction regarding the level of regulation was extended to the 1996 Act under which providers of information services are not subject to common carriage or most other regulatory requirements that are imposed on telecommunication providers.[182] This reflects the common metaphor of communications systems as a series of "layers," including physical, code, and content layers.[183] The presumption is that regulatory power decreases as the communications layer in question moves closer to core first amendment values.

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174. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

175. *See id.* at 56.

176. *Id.* at 56-57.

177. 47 U.S.C. § 153(50) (2006).

178. *Id.* § 153(24).

179. Kevin Werbach, *Off the Hook*, 95 CORNELL L. REV. 535, 541-42 (2010).

180. *Id.* at 542.

181. *Id.*

182. *Id.* at 542-43.

183. *See, e.g.*, David W. Opderbeck, *Deconstructing Jefferson's Candle: Towards a Critical Realist Approach to Cultural Environmentalism and Information Policy*, 49 JURIMETRICS J. 203, 226-38 (2009); David W. Opderbeck, *The Penguin's Genome, or Coase and Open Source Biotechnology*, 18 HARV. J.L. & TECH. 167, 169-83 (2004).

Through all of these changes, section 606, as amended in 1952, remained intact. This raises the question whether the authorities granted in section 606 cover the components of today's Internet. If the various components of the Internet are largely classified as "information services," does section 606 confer authority to the Executive over those services in times of emergency or war?

This question is particularly difficult to answer because of the convergence between telecommunications and information services made possible by the Internet. Once traditional telecommunications providers began to offer broadband Internet access, the regulatory silos separating telecommunications and information providers began to collapse, and the network neutrality debate kicked into high gear.[184] Advocates of the "open" Internet argued for legal rules that would prohibit Internet pipe providers from discriminating based on user applications, and the FCC eventually responded.[185] As discussed in the next subsection, this ironically might prove to have been a Pyrrhic victory: what network neutrality rules give, cybersecurity powers could take away.

C. The FCC, the Network Neutrality Debate, and Cybersecurity

The broad language of *Southwest Cable* and the progressive expansion of the FCC's authority over CATV, satellite, and wireless services set the stage for the current fight over network neutrality. This subsection summarizes key rulings concerning the FCC's jurisdiction over the Internet and network neutrality, with a particular eye toward the implications of those rulings for cybersecurity.

The explosive growth of the Internet, starting in the early 1990s, transformed global communications and human society. A key component of this transformation was the Internet's "agnosticism" about the kinds of devices that could be inter-networked under the Internet protocols.[186] Seamless inter-networking of divergent end-of-pipe communications platforms eroded the technological and regulatory silos that previously applied to radio, wire, telephone, cable, satellite, cellular, and computers.[187] At the same time, the globally distributed and decentralized nature of Internet "governance," at least concerning the addressing system and protocols that make seamless inter-networking possible, suggested a return to the "wild west" days of radio before World War I.[188] This presented, and

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184. *See* Werbach, *supra* note 179, at 543-44; s*ee also* Susan P. Crawford, *The Internet and the Project of Communications Law*, 55 UCLA L. REV. 359, 367 (2007).

185. Werbach, *supra* note 179, at 545-49.

186. *See, e.g.*, LAWRENCE LESSIG, CODE VERSION 2.0 43-45 (2006).

187. *See id.* at 2-3.

188. Indeed, the perhaps irrational exuberance of some early Internet prophets led them to declare independence from all ordinary legal and cultural structures. *See* John Perry Barlow, *A Declaration of Independence of Cyberspace*, ELECTRONIC FRONTIER FOUNDATION (Feb. 8, 1996), https://projects.eff.org/~barlow/Declaration-Final.html.

continues to present, significant policy challenges for regulatory bodies, such as the FCC. These issues became even more acute as broadband Internet access began to penetrate retail markets.

One of the FCC's initial forays into this minefield was its 2002 *Cable Modem Order*, which concerned the regulation of broadband Internet service over CATV lines.[189] The FCC determined that broadband cable Internet service is an "information service" and not a "telecommunications service," and therefore was exempt from common carrier regulation under Title II.[190]

A series of challenges to this order reached the Supreme Court in the *Brand X* case.[191] The Court upheld the FCC's order as a reasonable interpretation of an ambiguity in the 1996 Telecommunications Act.[192] The Court noted that

> [i]n the telecommunications context, it is at least reasonable to describe companies as not 'offering' to consumers each discrete input that is necessary to providing, and is always used in connection with, a finished service. We think it no misuse of language, for example, to say that cable companies providing Internet service do not 'offer' consumers DNS, even though DNS is essential to providing Internet access.[193]

This sort of statement suggests that at least some key components of the Internet infrastructure are not within the FCC's jurisdiction under the 1996 Act. However, at another point the Court stated that "the Commission remains free to impose special regulatory duties on facilities-based ISPs under its Title I ancillary jurisdiction"—suggesting that independent ISPs might be allowed access to cable company facilities pursuant to FCC's ancillary authority.[194] The scope of the FCC's jurisdiction generally over the Internet or components of the Internet therefore remained ambiguous.

In 2005, the FCC adopted the *Wireline Broadband Order*, which did not contain any new rules or regulations.[195] In that document, the FCC classified wireline broadband Internet access service as an "information

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189. Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facils., *Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77 (2002) [hereinafter *Cable Modem Order*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-77A1.pdf.

190. *Id.* at para. 38.

191. Nat'l Cable & Telecomms. Assoc. v. Brand X Internet Servs., 545 U.S. 967 (2005).

192. *Id.* at 1001-03.

193. *Id.* at 990.

194. *Id.* at 996.

195. Appropriate Framework for Broadband Access to the Internet Over Wireline Facils., *Report and Order and Notice of Proposed Rulemaking*, FCC 05-150, paras. 5-7 (2005) [hereinafter *Wireline Broadband Order*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-150A1.pdf.

service" not subject to regulation under Title II.[196] Wireline broadband service was defined as "a service that uses existing or future wireline facilities of the telephone network to provide subscribers with Internet access capabilities."[197] The Commission noted that "[w]ireline broadband Internet access service, like cable modem service, is a functionally integrated, finished service that inextricably intertwines information-processing capabilities with data transmission such that the consumer always uses them as a unitary service."[198] Among other things, the Commission observed that "as with cable modem service, an end user of wireline broadband Internet access service cannot reach a third party's web site without access to the Domain Naming Service (DNS) capability . . . ."[199]

In the *Wireline Broadband Order*, the Commission recounted recent changes in digital communications infrastructure, including the convergence of satellite, cable, wireless and wireline technologies, and packet-based technologies.[200] The Commission noted that "[a] wide variety of IP-based services can be provided regardless of the nature of the broadband platform used to connect the consumer and the ISP. Network platforms therefore will be multi-purpose in nature and more application-based, rather than existing for a single, unitary, technology specific purpose."[201] Accordingly, the Commission deregulated wireline broadband services by relieving providers of previous Title II requirements, including common carrier rules.[202]

The Commission addressed law enforcement, national security, and emergency preparedness in a separate section of the *Wireline Broadband Order*.[203] The Commission concluded that the Communications Assistance for Law Enforcement Act (CALEA) governs providers of facilities-based broadband Internet access service and interconnected VoIP service and that the classification of wireline broadband Internet access services has no impact on the government's authorities under the PATRIOT Act.[204]

In addition, the Commission found that its classification decision would not impact the NSEP TSP system.[205] The Commission concluded that "[t]he facilities-based wireline broadband Internet access service providers that are the subject of our Order today are telecommunications carriers with respect to other services that they provide" and therefore

196. *Id.* at para. 5.
197. *Id.* at para. 9.
198. *Id.*
199. *Id.* at para. 15.
200. *Id.* at paras. 32-40.
201. *Id.* at para. 40.
202. *Id.* at para. 41.
203. *Id.* at paras. 114-18.
204. *Id.* at paras. 114-15.
205. *Id.* at para. 116.

"remain subject to the NSEP TSP."[206] Nevertheless, in response to a concern raised by the Secretary of Defense, the Commission noted that "should the need arise, we do have the authority to regulate NSEP" pursuant to the Commission's ancillary authority under Title I.[207]

The Commission subsequently forcefully asserted authority over the Internet in its 2008 *Comcast* network neutrality order.[208] That order addressed Comcast's practice of interfering with the performance of peer to peer ("P2P") applications such as BitTorrent.[209] The Commission stated that "any assertion [that] the Commission lacks the requisite statutory authority over providers of Internet broadband access services, such as Comcast, has been flatly rejected by the U.S. Supreme Court."[210] The Commission relied on the Court's statement in *Brand X* about its Title I ancillary jurisdiction.[211] Internet broadband P2P connections, the Commission stated, "are undoubtedly a form of 'communication by wire,'" within the Commission's Title I jurisdiction.[212] Further, the Commission found that section 230(b) of the Telecommunications Act, as well as other general policy statements in the Act, enshrine the promotion of national Internet policy within the FCC's purview.[213]

If the FCC's reading of its authority in the *Comcast Order* was correct, there is no doubt that section 606, in turn, would provide broad executive powers over the Internet in times of war or emergency. However, the *Comcast Order* was struck down by the D.C. Circuit as outside the Commission's express or ancillary authority.[214] The court held that although the Supreme Court's statement about ancillary authority in *Brand X* "may allow [the Commission] to impose *some* kinds of obligations on cable Internet providers," it does not confer "plenary authority over such providers."[215]

The D.C. Circuit further held that the general policy statements in the Telecommunications Act relied upon by the Commission did not confer broad authority over Internet providers without reference to more specific statutory delegations of authority.[216] The Commission's interpretation, the court stated, "would virtually free the Commission from its congressional

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206. *Id.*

207. *Id.* at para. 117.

208. Formal Complaint of Free Press and Pub. Knowledge Against Comcast Corp. for Secretly Degrading Peer-to-Peer App'ns, *Memorandum Opinion and Order*, FCC 08-183, paras. 13, 15 (2008) [hereinafter *Comcast Order*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf.

209. *Id.* at paras. 1-2, 5-9.

210. *Id.* at para. 14.

211. *Id.*

212. *Id.* at para. 15 (citing 47 U.S.C. § 152(a) (2006)).

213. *Id.* at paras. 15-21.

214. Comcast Corp. v. FCC, 600 F.3d 642, 661 (D.C. Cir. 2010).

215. *Id.* at 650 (emphasis in original).

216. *Id.* at 653-56.

tether."[217] The court said that, if the Commission's theory of ancillary authority were correct, "we can think of few examples of regulations that apply to Title II common carrier services, Title III broadcast services, or Title VI cable services that the Commission . . . would be unable to impose upon Internet service providers."[218] This, the court said, would not only "stretch" the limits of the Commission's authority; it would "shatter them entirely."[219] Moreover, the court held, none of the specific statutory provisions cited by the Commission conferred anything like the specific authorities the Commission had attempted to assert.[220] Therefore, the court vacated the order.[221]

The FCC subsequently issued a new network neutrality order titled *Preserving the Open Internet*.[222] The Commission stated that:

> These rules are within our jurisdiction over interstate and foreign communications by wire and radio. Further, they implement specific statutory mandates in the Communications Act ("Act") and the Telecommunications Act of 1996 ("1996 Act"), including provisions that direct the Commission to promote Internet investment and to protect and promote voice, video, and audio communications services.[223]

More specifically, the Commission stated that "Broadband Internet access services are clearly within the Commission's subject matter jurisdiction and historically have been supervised by the Commission,"[224] and recited much the same statutory authority as it had in the *Comcast Order*.[225] Nevertheless, the Commission said the *Comcast* court had misconstrued its prior orders, and that it had specific authority under various provisions of the Telecommunications Act to promulgate network neutrality rules.[226]

D. Applying the Terms of Section 606 in Light of the FCC's Authority Over the Internet

The *Open Internet Order* is now being challenged by Verizon and other providers in the D.C. Circuit.[227] Not surprisingly, commentators are

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217. *Id.* at 655.
218. *Id.*
219. *Id.*
220. *Id.* at 658-61.
221. *Id.* at 661.
222. *Open Internet Order*, *supra* note 3, at para. 1.
223. *Id.* at para. 9.
224. *Id.* at para. 115.
225. *Id.* at para. 116; *Comcast Order*, *supra* note 208, at paras. 15-16.
226. *Open Internet Order*, *supra* note 3, at paras. 117-37; *see also* Werbach, *supra* note 179, at 585-92 (suggesting various statutory bases for FCC authority over the Internet).
227. *See* Verizon v. FCC, No. 11-1355 (D.C. Cir. filed Sept. 30, 2011).

deeply divided about the FCC's role in Internet governance.[228] The Homeland Security Committee's Report on the PCNA, whether intentionally or not, implicitly reflects the broadest possible maximalist reading of the FCC's authority—indeed, a reading of FCC authority over the Internet exceeds even the FCC's own expansive interpretation in the *Comcast* and *Open Internet* orders.[229]

Consistent with the *Wireline Broadband Order*, the *Open Internet Order* notes that "open Internet rules do not supersede any obligation a broadband provider may have—or limit its ability—to address the needs of emergency communications or law enforcement, public safety, or homeland security authorities . . . ."[230] Further, the *Open Internet Order* states that a uniform safety and security rule is necessary to ensure that providers comply with security obligations.[231] Therefore, the *Open Internet Order* adopts the following "clarifying provision":

> *Nothing in this part supersedes any obligation or authorization a provider of broadband Internet access service may have to address the needs of emergency communications or law enforcement, public safety, or national security authorities, consistent with or as permitted by applicable law, or limits the providers ability to do so.*[232]

It appears, then, that although the FCC has asserted broad ancillary jurisdiction over Internet-related services with respect to the network neutrality rules, cybersecurity at present is only lightly regulated. The primary existing requirement is to prioritize traffic in the event of a crisis, attack, or war in accordance with the NSEP TSP system and to comply with information and surveillance authorities under CALEA and the PATRIOT Act/FISA. Although the *Wireline Broadband Order*, the NSEP TSP directive, and the *Open Internet Order* leave open the possibility of

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228. *See, e.g.*, Werbach, *supra* note 179 (favoring FCC authority over the Internet); Rob Frieden, *Rationales For and Against Regulatory Involvement in Resolving Internet Interconnection Disputes*, 14 YALE J.L. & TECH. 266, 300-02 (2012) (describing rationales for and against FCC authority over the Internet, and ultimately concluding that "[t]he Commission should act cautiously in light of having questionable jurisdiction over Internet issues and the fact that the ISPs have managed to operate largely free of regulation while satisfying subscribers' service expectations."); Rob Frieden, *Assessing the Merits of Network Neutrality Obligations at Low, Medium and High Network Layers*, 115 PENN ST. L. REV. 49, 81 (2010) (arguing that "[t]he FCC should take affirmative steps to regulate ISPs in their capacity as gatekeepers, bottleneck operators, and intermediaries," but cannot regulate "content and applications").

229. *See* S. REP. NO. 11-368, at 10 (2010) ("The Committee understands that Section 706 [of the Telecommunications Act of 1934] gives the President the authority to take over wire communications in the United States and, if the President so chooses, shut a network down.").

230. *Open Internet Order*, *supra* note 3, at para. 108.

231. *Id.* at paras. 108-10.

232. *Id.* at para. 107 (emphasis in original).

further emergency measures under section 606, none of these authorities specify the possible parameters of any such measures.

1. Provisions in Section 606 that Relate to Existing FCC Regulations

Most of the authorities granted in section 606 relate *only* to areas in which the FCC has already regulated pursuant to its statutory authority. These provisions cannot authorize wholesale executive power over the Internet even if the FCC's *Open Internet Order* is upheld by the courts.

Subsection 606(a) refers to preferential communication "with any carrier subject to this chapter."[233] At most, this section might authorize the President to change some of the requirements for Internet traffic imposed in the *Open Internet Order*–perhaps, for example, by requiring ISPs to *throttle* P2P applications suspected of use by a terrorist organization. In any event, subsection (a) relates only to preferential communications, and is not any sort of kill switch.

The first part of subsection 606(c) speaks of suspending or amending "the rules and regulations applicable to any or all stations or devices capable of emitting electromagnetic radiations within the jurisdiction of the United States as prescribed by the Commission."[234] On its face, this clause, taken in isolation, seems exceedingly broad. All electronic devices, including computers, cell phones, tablets, modems—indeed, literally, *all* electronic devices—are capable of emitting electromagnetic radiations, since electronic devices, by definition, utilize various parts of the electromagnetic spectrum.[235]

Even read in isolation, however, the only *existing* FCC "rules and regulation" broadly concerning the Internet are those relating to network neutrality, and even those rules and regulations are of dubious validity and only tangentially touch on cybersecurity. A variety of more specific FCC rules and regulations with some effect on the Internet could come into play under this subsection—for example, the rules that otherwise apply to the licensing of facilities of telecommunications backbone providers that are ISPs as well as telephone or cable providers. But this would result in more of a patchwork approach to emergency powers than the hidden kill switch proponents suggest.

Moreover, this first clause in subsection 606(c) should not properly be read apart from the remainder of the subsection in light of its legislative history. As discussed in Part II, *supra*, it is clear that the entire subsection concerns only certain kinds of navigation facilities and devices.

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233. 47 U.S.C. § 606(a) (2006).

234. *Id.* § 606(c).

235. *See generally* NAT'L AERONAUTICS AND SPACE ADMIN., RADIO FREQUENCY INTERFERENCE HANDBOOK 3-5 (1971).

The types of navigation devices originally contemplated by this subsection would not seem to encompass the Internet *in general*.[236] It is true that various devices capable of internetworking under Internet protocols could serve as homing beacons for missiles or bombers. Indeed, Internet-connected applications and programs such as Google Earth or a GPS-enabled smart phone can accomplish navigation far more accurately than early Cold War-era radio devices.[237] Section 606(c) could apply specifically to such applications, programs, and devices.

For example, a recent issue of Wired magazine described the rise of DIY drone technology.[238] For less than $1,000, a hobbyist can purchase and assemble the components for a small autonomous helicopter equipped with GPS navigation and a webcam.[239] Such devices could easily be outfitted with servos and other components capable of, say, dropping radioactive or biological materials over a busy subway stop–a DIY drone dirty bomb, or a fleet of them. Such an attack could be monitored and controlled remotely over the Internet using cell phones, tablet computers, or other devices. Or, the bomb could be delivered the "old fashioned" way—strapped to a suicide bomber—whose movements are directed using GPS-enabled cell phones, Google Street View, or other Internet-enabled software.

It would seem unlikely, however, that section 606(c) would serve as the primary authority in the event of an attack by such means. The GPS satellite system is directly managed by the U.S. federal government and could in any event be shut down apart from section 606(c). It seems a significant stretch, if not a constitutional overreach, to suggest that the President could also order under section 606(c) that *all* GPS-enabled smart phones or computers capable of using Internet-based mapping programs must be confiscated by federal authorities in such an event. Certainly, the plain language and intent of section 606(c) could not be stretched to authorize the U.S. federal government control of *all* U.S. based computers, servers, cables, cell phones, and other devices capable of Internetworking

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236. 47 U.S.C. § 606(c).

237. *See, e.g.*, GOOGLE EARTH, http://www.google.com/earth/index.html (last visited Nov. 2, 2012) ("Get the World's Geographic Information at Your Fingertips"); GARMIN, http://www.garmin.com/us/ (last visited Nov. 2, 2012) (advertising various internetworked portable GPS devices); *Garmin Mobile SDKs*, GARMIN DEVELOPER, http://developer.garmin.com/mobile/mobile-sdk/ (last visited Nov. 2, 2012) (offering system developer kits that "provide . . . application[s] with access to GPS information, map interaction, and routing"); *GPS History, Dates & Timeline*, RADIO-ELECTRONICS.COM, http://www.radio-electronics.com/info/satellite/gps/history-dates.php (last visited Nov. 2, 2012) (discussing GPS developments during the Cold War and how GPS technology "required many other related developments to take place to enable, what is a very sophisticated technology to become reality").

238. Chris Anderson, *How I Accidentally Kickstarted the Domestic Drone Boom*, WIRED (June 22, 2012), http://www.wired.com/dangerroom/2012/06/ff_drones/.

239. *See, e.g.*, Chris Anderson, *A Newbies Guide to UAVs*, DIY DRONES (Mar. 28, 2009), http://diydrones.com/profiles/blogs/a-newbies-guide-to-uavs (listing the various plans and kits available to make an amateur Unmaned Aerial Vehicle).

under the sort of scenario described above, much less to authorize American presidential interference with the Internet protocols or the DNS. And section 606(c) seems, on its face, to not apply at all to the multitudes of other cyber-threats that do not involve anything analogous to the navigation of an intercontinental ballistic missile or Soviet bomber.

Similarly, the first authority granted in section 606(d) relates only to suspending or amending the "rules and regulations applicable to any or all facilities or stations for wire communication within the jurisdiction of the United States as prescribed by the Commission."[240] Again, as related to the Internet, the only applicable "rules and regulations" seem to be the network neutrality rules and to other rules and licensing requirements that may apply to ISPs that are also common carriers. As the *Wireline Broadband Order* notes, many Internet backbone and broadband providers will otherwise be subject to regulatory requirements because they also provide Title II telephone and wire services.[241] But many components of the Internet are not subject to such requirements. Perhaps most significantly, neither the DNS nor the code-based protocols that make internetworking possible are governed by the Telecommunications Act—either specifically under Title II or, arguably, under the FCC's ancillary jurisdiction under Title I.

2. Provisions in Section 606 that Do Not Necessarily Relate to the Modification or Suspension of Existing Regulations

Some subparts of section 606 do not specifically relate to the modification of existing FCC rules or regulations. These subparts may convey broader executive authorities.

Subsection (b) does not refer to existing FCC regulations, but it also does not confer any executive powers. It merely prohibits interference with communications during wartime. Nothing in this subsection would authorize a presidential Internet kill switch.

The second part of section 606(c) does not specifically mention existing FCC rules or regulations, but it clearly refers only to navigation devices as discussed in subpart D.1, *supra*.

The second and third grants of authority in section 606(d) could be construed broadly in that they do not specifically relate to FCC rules and regulations. Those sections concern the closing, use, or control of "any facility or station for wire communication" or removal, use or control of any such station's "apparatus and equipment."[242] Section 606(g), however, further limits the authorities granted in subsections (c) and (d): the President may not "make any amendment to the rules and regulations of the

240. 47 U.S.C. § 606(d) (2006).
241. *Wireline Broadband Order*, *supra* note 195, at para. 9.
242. 47 U.S.C. § 606(c).

Commission which the Commission would not be authorized by law to make."[243] At the very least, then, subsection (d) only permits the President to remove, use, or control stations and their apparatus and equipment to the extent the FCC otherwise has the authority to authorize or prohibit the existence of such stations and the use of such apparatus and equipment.

This limitation is particularly acute in light of section 606(d)'s legislative history.[244] At least according to AT&T President Gifford's Senate testimony, the statutory language intentionally distinguished between radio and telephone *stations* and the entire telephone *system*.[245] This is a potentially important distinction as it relates to an Internet kill switch. A large switching hub owned by a major Internet backbone provider might be analogous to the radio and telephone "stations" referred to in the statute.[246] However, by design and definition, the Internet is a decentralized network of networks without readily definable transmission "stations."[247]

Here, then, is the nub of the issue: under subsection 606(d), read in light of subsection 606(g), does the FCC's ancillary jurisdiction extend to full plenary authority over the Internet? In particular, does the FCC's ancillary jurisdiction include the DNS, the Internet's code-based protocols, and each and every component of the Internet's physical and communications layers? If not, then section 606 is not nearly so broad in relation to cybersecurity as Senator Lieberman and other advocates of a kill switch suggest. If so, then control over the Internet vests fully in the FCC and the President can exercise the same powers over it as President Wilson did over radio during World War I—a result most network neutrality advocates would not endorse.

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243. *Id.* § 606(g).

244. *See supra* Part II.B.6.

245. *Hearing on S. 2910 Before the S. Comm. on Interstate Commerce*, 73d Cong. (1934) (testimony of AT&T President Walter Gifford), *reprinted in* A LEGISLATIVE HISTORY OF THE COMMUNICATIONS ACT OF 1934, *supra* note 78, at 220 (stating that "[t]his paragraph might be deemed to confer upon the President the power, which he has not sought, to take over the control and operation of the telephone system of the country, upon proclamation by him of the existence of a national emergency" and urging that such power should not be given until the President can show "that the interests of the country require that he be invested with such power").

246. For a discussion of Internet backbone facilities, see, for example, Nicholas Economides, *The Economics of the Internet Backbone*, *in* 2 HANDBOOK OF TELECOMMUNICATIONS ECONOMICS: TECHNOLOGY EVOLUTION AND THE INTERNET 375-410 (Sumit K. Majumdar et al. eds., 2005); Rudolph van der Berg, *How the 'Net Works: An Introduction to Peering and Transit*, ARS TECHNICA, (Sept. 2, 2008, 12:11 PM), http://arstechnica.com/features/2008/09/peering-and-transit/.

247. *See* van der Berg, *supra* note 246. Neither is a source of Internet content, such as a website, akin to a radio or telephone "station" circa 1934. Most website operators do not own all (or perhaps even any) of the physical layers over which their content travels, unlike the large vertically integrated (or in the case of AT&T, monopolistic) radio and telephone providers of an earlier age.

3. Wartime vs. Emergency Powers in Section 606(d)

There is one further, and significant, complication to this discussion of subsection 606(d). Even if subsection 606(d) is read against a background of unlimited ancillary jurisdiction over the Internet, it applies *only* in wartime. The same is true of subsections (a) and (b), which are war powers only, and not broader emergency powers. Only subsection (c) can be triggered by a presidential proclamation that "a state of public peril or disaster or other national" emergency exists apart from a state of war.

This is an important contrast. This difference makes sense in light of the differing purposes of subsections (a), (b), and (d) in contrast to subsection (c). As discussed, the present subsection (c) is a Cold War measure designed to frustrate the capacity of a hostile country such as the Soviet Union to launch a nuclear first strike. It makes sense that subsection (c) can apply prior to a formal declaration of war.

This is a crucial distinction in the cybersecurity context because many of the most pernicious cyber-attacks on U.S. information infrastructure are not attributable to nation-states and therefore cannot comprise acts of war.[248] Even as to those cyber-attacks that might be attributable to nation states, it is unclear whether or when a purely cyber-based action would comprise an act of war, since the existing international law of war focuses on traditional kinetic attacks.[249]

Thus, if section 606 provides a presidential Internet kill switch in emergency times without a formal declaration of war, as the Senate Homeland Security and Governmental Affairs Committee Report on the PCNA seems to suggest, not only are the FCC's powers over the Internet unlimited, but also the executive's putative war time powers apply even in peace time.

IV. CONCLUSION: MOVING TOWARDS A NEW EMERGENCY POWERS RUBRIC FOR CYBERSECURITY

Senator Lieberman is right about one thing: the problem of Executive power in a time of cyber-crisis or cyber-war should be addressed directly and clearly as part of comprehensive cybersecurity reform. The threats facing our cyber infrastructure from state agents, terrorists, organized criminals, hacktivist collectives, and rogue actors are real.[250] Cyber-threat scenarios involving widespread disruptions to utility grids, water purification plants, financial markets, agriculture, healthcare delivery, news

248. *See* JEFFREY CARR, INSIDE CYBER WARFARE: MAPPING THE CYBER UNDERWORLD 52-56 (Mike Loukides et al. eds., 2009).

249. *See id.* at 31-39.

250. *See* Opderbeck, *supra* note 1, at 797.

media, and other vital services are entirely plausible.[251] In the event of such an emergency, the executive must have authority to act decisively to prevent further damage and restore order. The war and emergency powers are among the main reasons our Constitution establishes an executive branch.

But the nature and limits of such authority should be clearly delineated by statute. The multifarious technological, communicational, and cultural layers that comprise the Internet are too complex and too important to leave to the vagaries of whether and to what extent section 606 might apply to them. Not even the most ardent network neutrality advocate would want to suggest that the FCC enjoys plenary regulatory power over the Internet, such that section 606 by extension gives the President an unfettered kill switch in both wartime and peace time. A meaningful cyber-emergency provision should detail specific powers and limits relating to different aspects of Internet infrastructure, mandate clear time limitations on the exercise of such powers, incorporate privacy and data protection measures, require meaningful Congressional oversight, and provide for expedited judicial review if the powers are extended beyond a short emergency period.[252] None of these features exist in section 606, except for some limited Congressional oversight in subsection 606(d).[253] Indeed, in this light, the invocation of section 606 as a general kill switch during the debate over the PCNA was an irresponsible prod at a slumbering monster.

Some of these limitations already exist in the National Emergencies Act, which was passed in 1976.[254] The Senate Committee on Government Operations Report on the National Emergencies Act states that "[a]t a time when governments throughout the world are turning with increasing desperation to an all-powerful executive, this legislation is designed to insure that the United States travels a road marked by carefully constructed legal safeguards."[255] The Report notes that a state of national emergency had existed for over forty years after President Truman's declaration of emergency during the Korean War.[256]

The Act applies only to presidential—not congressional—declarations of emergency.[257] It provides that Congress may terminate a presidential declaration of emergency by joint resolution.[258] It requires Congress to review any presidential declaration of emergency every six months to determine whether such a joint resolution should be issued and limits committee review of any such joint resolution to fifteen calendar

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251. *Id.*
252. For a further discussion of some of these issues, see Opderbeck, *supra* note 1.
253. 47 U.S.C. § 606(d) (2006).
254. 50 U.S.C. § 1601 (2006).
255. S. REP. NO. 94-1168, at 2289 (1976).
256. *Id.* at 2294.
257. 50 U.S.C. § 1601(a).
258. *Id.* § 1622(b).

days.[259] Further, any presidential declaration of emergency automatically terminates on the anniversary of the declaration unless the President publishes a notice of continuance within ninety days prior to the anniversary date.[260] The President is required to consult with Congress and make regular reports to Congress concerning the circumstances relating to any proclamation of a state of emergency.[261]

The National Emergencies Act's limitations were mitigated to some extent by the International Emergency Economic Powers Act of 1977.[262] This Act and its subsequent amendments give the President authority to undertake specific actions "to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency with respect to such threat."[263] These authorities include the investigation, regulation, or prohibition of certain financial and property transactions and the seizure of foreign-held property.[264] These authorities specifically do not include, however, regulation or prohibition of "any postal, telegraphic, telephonic, or other personal communication, which does not involve a transfer of anything of value,"[265] or

> the importation from any country, or the exportation to any country, whether commercial or otherwise, regardless of format or medium of transmission, of any information or informational materials, including but not limited to, publications, films, posters, phonograph records, photographs, microfilms, microfiche, tapes, compact disks, CD ROMs, artworks, and news wire feeds.[266]

The National Emergencies Act supplies important congressional oversight even if section 606 applies to the Internet, consistent with the congressional oversight already present in section 606(d).[267] The International Emergency Economic Powers Act and its amendments suggest a policy against interdicting the content of most communications, although those limits do not apply directly to other grants of emergency powers such as those in section 606.[268] The National Emergencies Act does

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259. *Id.* § 1622(c).
260. *Id.* § 1622(d).
261. *Id.* § 1703(a).
262. International Emergency Economic Powers Act, Pub. L. No. 95-233, tit. 2, 91 Stat. 1625, 1626-29 (codified as amended at 50 U.S.C. §§ 1701-07 (2006)).
263. 50 U.S.C. § 1701(a).
264. *Id.* § 1702(a).
265. *Id.* § 1702(b)(1).
266. *Id.* § 1702(b)(3).
267. *Id.* § 1601.
268. *Id.* § 1702.

not, however, provide any constraints on presidential war powers (with which section 606 is largely concerned), nor does it include any provisions for judicial review. A more robust framework is required.

Given the Internet's international, decentralized nature, and the various layers that comprise the Internet as a communications network, checks and balances on executive powers should be tiered according to the nature of the power exercised. The following rubrics suggest one way to envision this tiering:

Network Layers and Powers

	Powers	**Priority Communi-cations**	**Seizure / Control**	**Shut Down**
Network Layer	Communications	Yes	No	No
	Internet Protocols	No	No	No
	DNS	Yes	Yes, limited to routing and priority communications	No
	Physical	Yes	Yes, limited to specific compromised hardware	Yes, limited to specific compromised hardware

Network Layers and Limitations

	Limitations	Congressional Oversight	Automatic Expiration	Judicial Review
Network Layer	Communications	Yes – monthly reviews	Yes – three months, with renewal upon joint resolution of Congress	Yes for scope and renewal
	Internet Protocols	Yes (Prohibited)	Yes (Prohibited)	Yes (Prohibited)
	DNS	Yes – monthly reviews	Yes – three months, with renewal upon joint resolution of Congress	Yes for scope and for renewal
	Physical	Yes – bi-monthly reviews	Yes – six months, with renewal upon joint resolution of Congress	Yes for scope and renewal

As the rubric suggests, the layers that comprise the Internet as a communications network include the physical layer of cables, routers, and so-on; the Internet protocols (often referred to as "code"); the DNS; and the communications layer.[269] The categories of potential executive emergency powers include prioritizing communications, seizing or controlling physical or virtual assets or the content of communications, and shutting down all or part of a network layer. The possible limitations on the exercise of such powers include congressional oversight, automatic expiration of emergency measures, and judicial review.

The "higher" layers of a communications network, in particular the communications layer, can in some sense be understood as emergent cultural features of the lower layers.[270] These emergent cultural features of the network are what enable the sorts of interactions, such as speech and association, which are at the core of first amendment values, and which in cyberspace have been "governed" by international consensus rather than by

269. *See* David W. Opderbeck, *Deconstructing Jefferson's Candle: Towards a Critical Realist Approach to Cultural Environmentalism and Information Policy*, 49 JURIMETRICS 203, 237 (2009).

270. *Id.* at 237-41.

hard law.[271] The degree and duration of control exercised over the various layers in the event of emergency ought to become more restricted as the layer affected moves higher towards core expressive values. Thus, the rubric allows for limited "shut down" of elements of the hardware layer if necessary, for example, to contain a spreading malware attack, but it does not allow for any "shut down" of the Internet protocol or communications layers. Likewise, the requirements for congressional oversight, automatic expiration, and judicial review become more stringent as the measures move up the network levels. Although the details of this rubric would need to be fleshed out in regulations and Executive Orders, this approach would enhance cybersecurity without leaving executive power to the vagaries of section 606.

271. *Id.*

Judicial Review of Streamlined Tariff Protest Denials

Frank W. Krogh*

TABLE OF CONTENTS

* Frank W. Krogh is a telecommunications regulation attorney with the Washington, D.C. firm of Wilkinson Barker Knauer, LLP. He specializes in wireline regulation matters and telecommunications administrative litigation. Special thanks to Joan E. Neal for her helpful suggestions and insights regarding earlier iterations of this article.

I. INTRODUCTION

Section 204(a) of the Communications Act of 1934 ("Communications Act"), as amended, sets forth the authority of the Federal Communications Commission ("FCC" or "Commission") to review new interstate service tariffs filed by telecommunications common carriers.[1] Section 204(a) states, in part:

> Whenever there is filed with the Commission any new or revised charge . . . or practice, the Commission may either upon complaint or upon its own initiative . . . enter upon a hearing concerning the lawfulness thereof; and pending such hearing and the decision thereon the Commission . . . may suspend the operation of such charge . . . or practice . . . .[2]

Under section 204(a), a party may petition to reject or suspend and investigate a carrier's new tariff filing.[3] Such tariff protests are reviewed under the procedures outlined in the FCC's Rule 1.773(a)(1), which provides that a tariff meeting certain technical criteria "will not be suspended . . . unless" the petition shows:

> (A) That there is a high probability the tariff would be found unlawful after investigation;
> (B) That the suspension would not substantially harm other interested parties;
> (C) That irreparable injury will result if the tariff filing is not suspended; and
> (D) That the suspension would not otherwise be contrary to the public interest.[4]

The FCC will not suspend a proposed tariff "if any one of these prongs is not met."[5]

Traditionally, a decision denying a petition to reject or suspend and investigate a new tariff filing has been treated as nonfinal and unreviewable, both in the case of FCC tariff protest denials and similar

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1. 47 U.S.C. § 204(a) (2006).
2. *Id.*
3. Implementation of Section 402(b)(1)(A) of the Telecomm. Act of 1996, *Report and Order*, FCC 97-23, para. 52 (1997) [hereinafter *Streamlined Tariff Order*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-97-23A1.pdf, *recon. denied*, *Order on Reconsideration*, FCC 02-242 (2002) [hereinafter *Streamlined Tariff Reconsideration Order*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-02-242A1.pdf.
4. 47 C.F.R. § 1.773(a)(1)(iv) (2011).
5. Ameritech Operating Cos. Tariff F.C.C. No. 2, *Order*, FCC 08-42, para. 7 (2008), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-08-42A1.pdf.

orders of other agencies overseeing parallel tariff regimes.[6] That is because judicial review is appropriate only in cases involving agency "orders of definitive impact, where judicial abstention would result in irreparable injury to a party."[7] Typically, agency denial of a petition challenging a tariff, thereby allowing the tariff to go into effect without suspension or investigation, is unreviewable because: (1) denial of such a tariff protest is an interlocutory action involving no determination on the merits; (2) review is not necessary to prevent irreparable injury, since there is the possibility of refunds or damages; and (3) judicial intervention would invade the province reserved to agency discretion.[8]

Most significantly, for purposes of this article, a party may later challenge the same tariff in a formal complaint brought under sections 206-08 of the Communications Act[9] and collect damages for any injury caused by a tariff found to be in violation of the statute.[10] That is because

> A denial of a mere petition to reject or to suspend and investigate a tariff filing is neither an approval of the filed rates nor a barrier of [sic] challenges to their lawfulness. . . . Their lawfulness . . . remains subject to challenge until the FCC approves the rates after "full opportunity for hearing." That hearing may be initiated by filing a complaint under § 208 . . . .[11]

Section 402(b)(1)(A)(iii) of the Telecommunications Act of 1996 ("1996 Act"), however, upended this regime in the case of interstate tariffs filed by local exchange carriers ("LECs") by adding a new subsection (3) to section 204(a).[12] Section 204(a)(3) enables LECs to file tariffs "on a streamlined basis" and provides that such a tariff "shall be deemed lawful and shall be effective" seven days (in the case of a rate reduction), or fifteen days (in the case of an increase), "after the date on which it is filed . . . unless the Commission takes action [to suspend or investigate the tariff] . . . before the end of that . . . period."[13] According to the FCC, this provision was intended to accelerate its review of LEC tariffs.[14] All LEC tariffs meeting the criteria of section 204(a)(3) are eligible for streamlined treatment.[15]

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6. *See, e.g.*, Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234 (D.C. Cir. 1980); Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 238 (D.C. Cir. 1980).
7. *Papago*, 628 F.2d at 238.
8. *Id.* at 239-40. *See also Aeronautical Radio*, 642 F.2d at 1234.
9. *See generally* 47 U.S.C. §§ 206-08 (2006).
10. ABC, Inc. v. FCC, 662 F.2d 155, 158-59 (2d Cir. 1981).
11. *Id.* at 158.
12. Telecommunications Act of 1996, Pub. L. No. 104-104, § 402(b)(1)(A)(iii), 110 Stat. 56 (1996).
13. 47 U.S.C. § 204(a)(3) (2006).
14. *Streamlined Tariff Order*, *supra* note 3, at para. 1 n.2.
15. *Id.* at paras. 31-34.

In the *Streamlined Tariff Order*,[16] the FCC adopted rules implementing the new provision that eliminated the retrospective damages remedy conferred by sections 206-07 of the Communications Act in the case of LEC streamlined tariffs permitted to become effective without suspension or investigation.[17] The FCC interpreted the phrase "shall be deemed lawful"[18] to mean that a new LEC streamlined tariff, unless suspended or investigated, is "conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect."[19] Accordingly, in any subsequent section 208 complaint case that results in a finding that a streamlined tariff is unlawful, the FCC will invalidate the tariff prospectively but will also deny any damages relief for the entire period that the tariff was in effect up to the date of its invalidation.[20]

The Commission also set forth the procedures to be followed when parties seek to challenge LEC streamlined tariffs. Such tariffs are not "deemed lawful" immediately upon filing.[21] Rather, they "become both effective and 'deemed lawful'" only if the Commission has not exercised its suspension or investigation authority by the end of the seven or fifteen day notice period.[22] The Commission denied petitions for reconsideration of its interpretation of "deemed lawful" in the *Streamlined Tariff Reconsideration Order*.[23]

The consequences of this "deemed lawful" treatment of streamlined tariffs are illustrated by an FCC order denying any damages to a long distance carrier in its formal complaint case against an LEC in spite of the FCC's finding that the LEC "vastly exceeded the prescribed rate of return" over a two year period,[24] a finding that would have resulted in damages

16. *See generally Streamlined Tariff Order*, *supra* note 3.

17. 47 U.S.C. §§ 206-07 (2006).

18. *Id.* § 204(a)(3).

19. *Streamlined Tariff Order*, *supra* note 3, at para. 19.

20. *Id.* at paras. 19-20. *See also* 47 U.S.C. § 208 (2006).

21. *Streamlined Tariff Order*, *supra* note 3, at para. 22.

22. *Id.* Petitions challenging tariffs that are effective on seven days' notice must be filed within three calendar days from the date of the tariff filing, and petitions challenging fifteen day streamlined tariffs must be filed within seven calendar days of the tariff filing. *Id.* at paras. 78-79.

23. Separately, the United States Court of Appeals for the District of Columbia Circuit, in *ACS of Anchorage, Inc. v. FCC*, also upheld the *Streamlined Tariff Order*'s interpretation of "deemed lawful." 290 F.3d 403, 410-11 (D.C. Cir. 2002). Based on that interpretation, *ACS* reversed an FCC order requiring an LEC to pay damages to a customer taking access service under a streamlined tariff. *Id.* In the *Streamlined Tariff Reconsideration Order*, *supra* note 3, at para. 5 & nn.17-19, the FCC cited *ACS* as additional support for its interpretation.

24. Qwest Comm. Corp. v. Farmers & Merch. Mut. Tel. Co., *Memorandum Opinion and Order*, FCC 07-175, para. 25 (2007) [hereinafter *Qwest Order*], *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/FCC-07-175A1.pdf, *aff'd sub nom.* Farmers & Merch. Mut. Tel. Co. of Wayland, Iowa v. FCC, 668 F.3d 714 (D.C. Cir. 2011).

liability prior to the 1996 Act.[25] Even though the LEC "manipulated the Commission's rules to achieve a result unintended by the rules,"[26] damages were denied solely because the LEC's overearning tariffs had been filed on a streamlined basis and had not been suspended or investigated. Thus, the conclusive presumption of lawfulness arising from an FCC decision not to investigate or suspend such a tariff confers on the tariffing LEC an extraordinary immunity from damages.[27]

In light of the immunity from damages and irreparable injury to customers that results from this presumption of lawfulness, judicial review should be available to parties who are unsuccessful in challenging new LEC streamlined tariffs at the FCC. Currently, there are at least two pending applications seeking review by the full Commission of denials by the Wireline Competition Bureau ("Bureau") of petitions challenging a streamlined tariff.[28] Affirmance by the full Commission of the Bureau's denial would directly present the question of whether such a denial is judicially reviewable and thus whether petitioners can ever secure damages relief from harmful practices in the case of a wrongful protest denial.

Part I of this article provides a general discussion of the effect of the "deemed lawful" presumption on the judicial reviewability of orders denying streamlined tariff protests. Part II examines in greater detail one aspect of this issue, namely, whether such orders are "committed to agency discretion by law" under 5 U.S.C. section 701(a)(2). The remainder of the article delves into some of the implications of judicial review of streamlined tariff protest denials. Part III discusses the standards to be applied by courts in reviewing such orders and the interplay of the standard of review and the issue of reviewability. Finally, Part IV examines some of the practical problems that are likely to be encountered in vindicating the right to judicial review of streamlined tariff protest denials.

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25. *See, e.g.*, AT&T v. Nw. Bell Tel. Co., *Memorandum Opinion and Order*, FCC 89-343, 5 FCC Rcd. 143 (1990), *appeal dismissed sub nom.* Mountain States Tel. & Tel. Co. v. FCC, 951 F.2d 1259 (10th Cir. 1991) (per curiam), *damages determined in* AT&T v. Nw. Bell Tel. Co., *Memorandum Opinion and Order*, FCC 93-69, 8 FCC Rcd. 1014 (1993).

26. *Qwest Order*, *supra* note 24, at para. 27.

27. *See generally Streamlined Tariff Order*, *supra* note 3, at paras. 19-20.

28. *See* App'n for Review of Sprint Comm. Co., Bluegrass Tel. Co., Transmittal No. 3, Tariff FCC No. 3, FCC WC Docket No. 10-227 (filed Nov. 15, 2010) [hereinafter Sprint Application]; Emergency App'n for Review of Qwest Comm. Co., Bluegrass Tel. Co., Transmittal No. 3, Tariff FCC No. 3, FCC WC Docket No. 10-227 (filed Nov. 8, 2010) [hereinafter Qwest Application]; Comment Sought on Qwest Comm. Co., LLC, Emergency App'n for Review of the Bluegrass Tel. Co., Inc. Tariff, *Public Notice*, DA 10-2219 (WCB 2010), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-2219A1.pdf. Typically, petitions to reject or to suspend and investigate tariffs are handled by the Bureau. An application for review by the full Commission under section 1.115 of the FCC's rules of a Bureau tariff protest denial is "a condition precedent to judicial review" of such denial. 47 C.F.R. § 1.115(k) (2011). *See infra* Part I.

II. THE EFFECT OF THE "DEEMED LAWFUL" PRESUMPTION ON REVIEWABILITY

In the *Streamlined Tariff Order*, the Commission recognized that its interpretation of the "deemed lawful" language in section 204(a)(3) changed "significantly the legal consequences of allowing tariffs filed under this provision to become effective without suspension."[29]

> Under current practice, a tariff filing that becomes effective without suspension or investigation is the legal rate but is not conclusively presumed to be lawful for the period it is in effect. Indeed, if such a tariff filing is subsequently determined to be unlawful in a complaint proceeding . . . customers who obtained service under the tariff prior to that determination may be entitled to damages. In contrast, tariff filings that take effect, without suspension, under section 204(a)(3) that are subsequently determined to be unlawful . . . would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness.[30]

The Commission found that a streamlined tariff could be found unlawful in a section 208 complaint proceeding or in a tariff investigation under section 205, but only "as to its future effect."[31] Thus, for streamlined tariffs the "deemed lawful" provision reversed the legal status of a filed, unsuspended tariff from what it would have been under the regime prior to the 1996 Act—from merely "legal" to conclusively "lawful"—at least during the period the tariff is in effect.[32]

Although the Commission recognized some of the implications of its interpretation of "deemed lawful," it has overlooked the effect of that interpretation on the potential reviewability of its decisions not to suspend or investigate such tariffs. Generally, under section 402 of the Communications Act, "any order of the Commission" may be appealed to the United States Court of Appeals for the District of Columbia.[33]

There is, however, an exception to this reviewability requirement in the case of decisions not to suspend or investigate traditional tariffs, which arises largely from the interlocutory nature, involving no determination on

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29. *Streamlined Tariff Order*, *supra* note 3, at para. 20.

30. *Id.*

31. *Id.* at para. 21.

32. *See* Investigation of Certain 2007 Annual Access Tariffs, *Order Designating Issues for Investigation*, DA 07-3738, para. 3 & n.13 (WCB 2007), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-07-3738A1.pdf.

33. 47 U.S.C. § 402(b) (2006). A staff decision not to suspend or investigate a tariff must be reviewed by the full Commission before it becomes a final "order of the Commission" under section 402(b). *See supra* note 12.

the merits, and the lack of "irreparable injury," of such decisions.[34] In *Southern Railway*, the Supreme Court found that an Interstate Commerce Commission decision not to investigate a tariff was non-final and unreviewable because the complaint procedure was still available.[35] Relying on *Southern Railway*, the court in *Aeronautical Radio* found that an FCC decision to accept a tariff filing without suspension or investigation was not subject to judicial review because "a complaint . . . procedure comparable to that of the Interstate Commerce Act is available."[36] Finally, judicial review of an agency decision to accept a traditional tariff filing without suspension or investigation invades the province of the agency "'by bringing the courts into the adjudication of the lawfulness of rates in advance of administrative consideration.'"[37]

Under the Commission's application of section 204(a)(3), however, these criteria require the opposite result in the case of an appeal of a decision not to suspend or investigate an LEC streamlined tariff. With respect to finality, "an agency order is final for purposes of appellate review when it 'imposes an obligation, denies a right, or fixes some legal relationship.'"[38] Under the Commission's application of section 204(a)(3), the denial of a petition to reject or to suspend and investigate an LEC streamlined tariff, thereby allowing it to go into effect, permanently "denies a right"[39] to damages for the entire period that the tariff remains in effect. The immunity conferred by such a tariff protest denial is final, not interlocutory, since damages from the effective date of the tariff will never be available. Unlike merely reducing the measure of damages from restitution to actual damages, a complete denial of damages "'necessarily affects [a] citizen's ultimate rights' so as to permit judicial review."[40] As the court pointed out in *Nader v. Civil Aeronautics Board,*[41] "the nonreviewability-of-[tariff] suspension-orders doctrine is predicated on the interlocutory nature of the suspension orders, and . . . it should therefore not be extended beyond that context . . . ."[42]

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34. Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 239-40 (D.C. Cir. 1980). *See also* Aeronautical Radio v. FCC, 642 F.2d 1221, 1234 (D.C. Cir. 1980).

35. S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 454 (1979).

36. *Aeronautical Radio*, 642 F.2d at 1235. In *Southern Railway* and *Aeronautical Radio*, the courts commented that although the complaint procedure shifts the burden of proof onto the party challenging a tariff and restricts the challenger's remedy to actual damages, rather than full restitution, neither of these consequences "'necessarily affects any citizen's ultimate rights' so as to permit judicial review." *Id.* at 1235 n.34 (quoting *S. Ry.*, 442 U.S. at 454-55).

37. *Papago*, 628 F.2d at 242 (quoting *S. Ry.*, 442 U.S. at 460).

38. *Id.* at 239 (citation omitted).

39. *Id.*

40. *Aeronautical Radio*, 642 F.2d at 1235 n.34 (quoting *S. Ry.*, 442 U.S. at 454-55).

41. *See generally* Nader v. Civil Aeronautics Bd., 657 F.2d 453 (D.C. Cir. 1981).

42. *Id.* at 456 n.10. *See also* Advanced Micro Devices v. Civil Aeronautics Bd., 742 F.2d 1520, 1528 (D.C. Cir. 1984).

Similarly, "irreparable injury" can be shown where a party has "no practical means of procuring effective relief after the close of the proceeding"[43] or can "prove the existence of a 'concrete, perceptible harm of a real, non-speculative nature.'"[44] For example, courts have noted that, in certain nontelecommunications regulated market contexts, where refunds are an inadequate remedy for excessive charges, customers might be entitled to judicial review of agency orders accepting rate filings.[45] Similarly, the denial of an LEC streamlined tariff protest confers immunity from damages for the period that the tariff is effective. Therefore, anyone that unsuccessfully petitions against a tariff at the FCC and then pays rates later held to be unreasonable can show a "'concrete, perceptible harm'" for which no "effective relief" can ever be procured.[46]

In an analogous context, one court cautioned against "lenient[]" review of the Civil Aeronautics Board's interim approval of a fare agreement, pending further investigation of the fares, because "even interim approval would have a serious impact upon those adversely affected," given that the interim approval "*operates with finality to invest the agreement with immunity to the antitrust laws*."[47]

Finally, judicial review of a Commission denial of a challenge to an LEC streamlined tariff would not invade the province of the agency, since there can be no FCC proceeding in which damages covering the period that the tariff was effective will ever be addressed. Nor, as a practical matter, will such an appellate review interfere with an effective tariff.[48] Therefore,

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43. *Papago*, 628 F.2d at 240 (suggesting that irreparable injury might entitle party to judicial review).

44. N.C. Utils. Comm'n v. FERC, 653 F.2d 655, 662 (D.C. Cir. 1981) (quoting Pub. Citizen v. Lockheed Aircraft Corp., 565 F.2d 708, 716 (D.C. Cir. 1977)) (requirements for a showing of "aggrievement" resulting from agency action). *See also id.* at 668 (respondent's reviewability argument closely tied to its "aggrievement" argument).

45. See *Papago*, 628 F.2d at 241 n.15, and cases cited therein.

46. *N.C. Utils. Comm'n,* 653 F.2d at 662; *Papago*, 628 F.2d at 240.

47. Nat'l Air Carrier Ass'n v. Civil Aeronautics Bd., 436 F.2d 185, 191 (D.C. Cir. 1970) (emphasis added). In the case of the denial of a petition to reject or suspend a streamlined tariff, the immunity from damages conferred thereby is not any less final because its significance is contingent on the subsequent filing of a section 208 complaint against the tariff by the petitioner and the securing of a final order invalidating the tariff prospectively. City of Fremont v. FERC, 336 F.3d 910, 914 (9th Cir. 2003) ("Because the [decision] attach[es] legal consequences to . . . future . . . proceedings," it is final.); *Papago*, 628 F.2d at 239 ("The ultimate test of reviewability is . . . in the need of the review to protect from the irreparable injury threatened . . . by administrative rulings which attach legal consequences to action taken in advance of other . . . adjudications that may follow, the results of which the regulations purport to control."). *See also* City of Tacoma v. FERC, 331 F.3d 106, 113 (D.C. Cir. 2003) (holding that agency proceedings subsequent to order are irrelevant to its finality if order "firmly establish[es] [agency's] position on the issues under review").

48. The only purpose to be served by appealing the denial of a streamlined tariff protest is to provide a basis for retrospective damages resulting from a tariff that has been invalidated in a section 208 complaint proceeding. Thus, a party will only prosecute such an appeal if it has filed a formal complaint under section 208 of the Communications Act

parties unsuccessfully challenging LEC streamlined tariff filings at the FCC should be able to seek judicial review of Commission decisions affirming Bureau denials.

Because of the concrete harm resulting from a decision to allow a streamlined tariff to go into effect without suspension or investigation and the absence of any remedy for that harm, such a decision is more akin to agency decisions to *suspend or to reject* traditional tariffs than it is to decisions to allow traditional tariffs to go into effect without suspension or investigation. Agency orders rejecting rate filings are final orders disposing of all issues for which the filing carrier can never obtain a remedy from the agency in any subsequent proceeding.[49] Judge Skelly Wright made a similar point in his concurring opinion in *Exxon*, involving a tariff suspension order of the Federal Energy Regulatory Commission ("FERC"),[50] where he noted that, unlike a decision to allow a traditional tariff to go into effect without suspension, decisions to suspend traditional tariffs for lengthy periods "are final decisions that can have substantial impact on the rights of private parties" and are thus reviewable, at least as to the length of the suspension.[51] If a suspended higher rate is ultimately found reasonable, the carrier can never recoup the amount that could have been charged during the period of the suspension.[52]

Thus, it is the finality and absence of another remedy that led to reviewability, not whether a tariff is suspended. Indeed, as Judge Wright observed, "[i]f the Commission's failure to suspend permanently cut off all remedies for the customers, *it would be reviewable*."[53] That is precisely the situation presented by a decision to allow an LEC streamlined tariff to go into effect without suspension or investigation.[54]

Agency decisions accepting tariff filings are also reviewable in another context that provides a useful analogy to LEC streamlined tariff filings. The *Sierra-Mobile* doctrine holds that a utility cannot file a revised tariff in contravention of its contractual obligations unless and until the agency finds the contractual rate unjust and unreasonable.[55] In cases where orders accepting tariff filings were challenged on *Sierra-Mobile* grounds,

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resulting in the invalidation of the tariff. Accordingly, by the time that a court can review the tariff protest denial, the tariff will no longer be in effect. *See infra* Part III.

49. *See Papago*, 628 F.2d at 241 n.16.

50. Exxon Pipeline Co. v. FERC, 725 F.2d 1467, 1477 (D.C. Cir. 1984) (Wright, J., concurring).

51. *Id.*

52. *Id.* at 1482-83.

53. *Id.* at 1478 n.7 (emphasis added).

54. *Cf.* Verizon Cal. Inc. v. Peevey, 413 F.3d 1069, 1075-84 (9th Cir. 2005) (Bea, J., concurring) (interim rates inflicting loss that cannot be remedied by subsequent "true-up" meet finality and hardship criteria for purposes of assessing ripeness for review).

55. *See* United Gas Pipe Line Co. v. Mobile Gas Serv. Corp., 350 U.S. 332, 338-44 (1956); Fed. Power Comm'n v. Sierra Pac. Power Co., 350 U.S. 348, 352-53 (1956); Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 244 n.22 (D.C. Cir. 1980) (referring to *Mobile Gas* and *Sierra Pac.* collectively as "Sierra-Mobile").

courts have addressed those issues on review. As the court explained in *Papago*,

> The Supreme Court and this court have treated orders deciding Sierra-Mobile claims as immediately reviewable . . . . At first blush, this may appear anomalous since such orders are a subcategory of orders accepting . . . rate filings . . . . However, Sierra-Mobile orders are sharply different . . . in their finality, their irremediable consequences, and their relation to agency discretion.[56]

A decision allowing a challenged LEC streamlined tariff to go into effect without suspension has a similar impact. Like a decision to accept a tariff challenged under the *Sierra-Mobile* doctrine, an order allowing an LEC streamlined tariff to go into effect without suspension has denied a claim on the merits that cannot be reviewed or remedied later.[57] As the court explained in *Papago*, denial of a petition to reject a tariff filing challenged on *Sierra-Mobile* grounds "finally disposes of a substantive claim of right" because the legal issue of contractual interpretation will not be addressed later in a tariff investigation.[58] Thus, review of the agency's decision will not disrupt any ongoing tariff investigation.[59] Moreover, the customer "will have been denied its contractual right to purchase . . . at the agreed-upon rate during the administrative process," which "cannot be restored upon review of a final order."[60] "[I]n their finality, their irremediable consequences, and their relation to agency discretion," streamlined tariff protest denials—which forever deny customers the right to any retrospective damages—are similar to "*Sierra-Mobile* orders" and thus should be equally reviewable.[61]

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56. *Papago,* 628 F.2d at 244-45.

57. Often, a tariff filing challenged on *Sierra-Mobile* grounds is suspended when it is accepted for filing, but agency orders accepting and then suspending such tariffs are nonetheless relevant here because they are judicially reviewable on the *Sierra-Mobile* issues prior to any full agency hearing on the merits of the non-*Sierra-Mobile* issues. *See, e.g.*, *id.* at 237 n.3, 244 n.24 (citing Papago Tribal Util. Auth. v. FERC, 610 F.2d 914, 916, 918-20 (D.C. Cir. 1979)).

58. *Id.* at 245.

59. *Id.*

60. *Id.*

61. *Id.* at 244-45. The court also mentioned another factor favoring reviewability in the case of tariffs challenged on *Sierra-Mobile* grounds, namely, the agency's lack of discretion to accept a rate filing that contravenes a contract. *Id.* at 245. Although section 204(a)(3) may give the FCC some discretion to allow a challenged LEC streamlined tariff to go into effect without suspension or investigation, review of such decisions is not precluded on the grounds that they are "committed to agency discretion by law." *See infra* Part II.

III. DENIALS OF PETITIONS TO REJECT OR SUSPEND LEC STREAMLINED TARIFFS ARE NOT COMMITTED TO FCC DISCRETION.

At first blush, it may seem that an FCC decision to deny a challenge to a LEC streamlined tariff and to let it go into effect without suspension or investigation is the type of agency action "committed to agency discretion by law" under 5 U.S.C. section 701(a)(2) and thus unreviewable. In *Chaney*, the Supreme Court explained that review was not appropriate "if the statute is drawn so that a court would have no meaningful standard against which to judge the agency's exercise of discretion," i.e., where "'there is no law to apply.'"[62] Over the years, the Court has found certain categories of agency actions to fit this standard and thus "presumptively unreviewable."[63] Among the types of actions held to be committed to agency discretion under section 701(a)(2) are decisions not to undertake enforcement proceedings, the termination of employees for national security reasons, refusals to grant reconsideration of an action, the allocation of funds from lump sum appropriations[64] and "managerial decisions," such as the granting of rent increases[65]—i.e., decisions

62. Heckler v. Chaney, 470 U.S. 821, 830 (1985) (quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).

63. *Id.* at 832.

64. *See* Lincoln v. Vigil, 508 U.S. 182, 190-95 (1993); *Chaney*, 470 U.S. at 831-32.

65. Hahn v. Gottlieb, 430 F.2d 1243, 1249 (1st Cir. 1970). *Hahn* relies, *see id.* at 1249-50, on Panama Canal Co. v. Grace Line, Inc., 356 U.S. 309, 317 (1958) (holding that "initiation of a proceeding for readjustment of" Panama Canal tolls presents "problems of . . . cost accounting" and "involve[s] nice issues of judgment and choice," which are committed to agency discretion). Although *Panama* has been criticized as "opaque," *see* Chevron Oil Co. v. Andrus, 588 F.2d 1383, 1391 n.14 (5th Cir. 1979), and has not been cited in any subsequent Supreme Court case, it retains some vitality in cases addressing similar accounting and managerial decisions. *See* Fla. v. Dep't of Interior, 768 F.2d 1248, 1255-57 (11th Cir. 1985) (citing *Panama*) (decision of the Secretary of the Interior to exercise authority, "in his discretion," to acquire land in trust for Native Americans not reviewable); Rank v. Nimmo, 677 F.2d 692, 700 (9th Cir. 1982) (citing *Panama*) (Veterans Administration ("VA") decision not to assign and refund VA mortgage loan in default not reviewable); Helgeson v. Bureau of Indian Affairs, 153 F.3d 1000, 1003-04 (9th Cir. 1998) (citing *Panama*) ("whether, and in what amount, a government loan should be afforded is an area of executive action usually reserved to agency discretion"); *see also* Forsyth Cnty. v. U.S. Army Corps of Eng'rs, 633 F.3d 1032, 1040-42 (11th Cir. 2011) (citing *Florida*, 768 F.2d 1248) (Army Corps of Engineers exercise of authority to award lease at water resource development project that it determines to be "reasonable in the public interest" not reviewable). *But see* Pac. Nw. Generating Coop. v. Bonneville Power Admin., 596 F.3d 1065, 1072-1074 (9th Cir. 2010) (Bonneville Power Administration's decision to sell electric power was reviewable for "consisten[cy] with sound business principles").

addressing "resource allocation and policy priorities."[66] "[T]here continues to be a 'strong presumption' that other agency action is reviewable."[67]

It is not entirely clear how *Chaney*'s "no law to apply" standard interacts with these presumptively unreviewable categories of cases. *Chaney* states that the presumption of nonreviewability of nonenforcement decisions, for example, "may be rebutted where the substantive statute has provided guidelines"—i.e., law to apply—"for the agency to follow in exercising its enforcement powers."[68] Similarly, *Lincoln* notes, in holding agency decisions to allocate funds generally unreviewable, that "Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes."[69] On the other hand, "detail[ed]" statutory "criteria" do not necessarily provide sufficient "law to apply" in a presumptively unreviewable case.[70] In any event, the "law to apply" standard generally appears to govern in a situation not involving a presumptively unreviewable category of cases, although, as discussed below, other factors may affect how the "law to apply" standard is interpreted in a given case.

Section 204 of the Communications Act does not explicitly provide any standards to govern the FCC's decision whether to allow an LEC streamlined tariff to become effective without suspension or investigation.[71] Section 204(a)(3) simply states that a new LEC streamlined tariff "shall be deemed lawful and shall be effective" seven or fifteen days, as the case may be, "after the date on which it is filed . . . unless the Commission takes action [to suspend or investigate the tariff] under paragraph (1) before the end of that . . . period."[72] Subsection 1 of section 204(a) provides, in part, that when a new tariff is filed, "the Commission may . . . enter upon a hearing concerning the lawfulness thereof; and . . . the Commission . . . may suspend the operation of such [tariff] . . . ."[73]

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66. Am. Med. Ass'n v. Reno, 57 F.3d 1129, 1135 (D.C. Cir. 1995).

67. Robbins v. Reagan, 780 F.2d 37, 44 (D.C. Cir. 1985) (citing *Chaney*, 470 U.S. at 830).

68. *Chaney*, 470 U.S. at 832-33. *See also* Sierra Club v. Hodel, 848 F.2d 1068, 1075 (10th Cir. 1988) (nonenforcement decision reviewable because there is law to apply). Even agency regulations can provide the requisite law to apply to the review of nonenforcement decisions. *See, e.g.*, Greater L.A. Council on Deafness, Inc. v. Baldrige, 827 F.2d 1353, 1361 (9th Cir. 1987).

69. *Lincoln*, 508 U.S. at 193

70. City of Santa Clara v. Andrus, 572 F.2d 660, 668 (9th Cir. 1978) (pointing out that the statute at issue in *Panama* "set out in some detail the criteria to be considered . . . in prescribing tolls"). Justice Scalia has questioned whether the "law to apply" standard adequately explains all of the situations in which agency action has been held to be committed to agency discretion. Webster v. Doe, 486 U.S. 592, 608-10 (1988) (Scalia, J., dissenting).

71. *See* 47 U.S.C. § 204 (2006).

72. *Id.* § 204(a)(3).

73. *Id.* § 204(a)(1).

In *Southern Railway*, the Court observed that similar language in the cognate provision of the Interstate Commerce Act "is written in the language of permission and discretion."[74] The Court noted that "[t]he statute is silent on what factors should guide the Commission's decision; . . . there is simply 'no law to apply' in determining if the decision is correct. Similar circumstances have been emphasized in cases in which we have inferred nonreviewability."[75]

Southern Railway, however, should not be determinative in the case of the denial of a challenge to a new streamlined tariff, for a number of reasons. First, tariff protest denials allowing traditional tariffs to go into effect without suspension or investigation fit easily within the category of nonenforcement decisions, which are presumptively committed to agency discretion.[76] In fact, Justice Marshall, in his concurring opinion in *Chaney*, characterized *Southern Railway* as "a denial of enforcement case."[77] By contrast, in deciding to allow a LEC *streamlined* tariff into effect without suspension or investigation, the FCC has taken action that finally determines parties' rights and found tariffed rates lawful for the period that the tariff is effective. The FCC thus has "exercise[d] its *coercive* power over . . . property rights," which is not the case with a mere nonenforcement decision.[78]

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74. S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 455 (1979).

75. *Id.* (citations and footnotes omitted) (citing Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 410 (1971)).

76. *See* Lincoln v. Vigil, 508 U.S. 182, 190-95 (1993).

77. Heckler v. Chaney, 470 U.S. 821, 844 n.3 (1985) (Marshall, J., concurring). Although *Southern Railway* addressed only the reviewability of a decision not to investigate a tariff, rather than the concomitant decision not to suspend it, the Court noted that the reviewability analysis is the same, explaining that "[t]he two powers are inextricably linked because the Commission has no occasion to suspend a rate unless it also intends to investigate it." *S. Ry.*, 442 U.S. at 458. It is possible for the FCC to conduct a tariff investigation without suspending the tariff. *See* Policy & Rules Concerning Rates for Competitive Common Carrier Servs. & Facilities Authorizations Therefor, *First Report and Order*, 85 F.C.C. 2d 1, para. 108 n.93 (1980) [hereinafter *Tariffing Rules*], *modified by Second Report and Order*, 91 F.C.C. 2d 59 (1982), *extended by Third Report and Order*, 48 Fed. Reg. 46791-01 (CCB 1983), *modified by Fourth Report and Order*, 95 F.C.C. 2d 554 (1983), *vacated on other grounds*, AT&T v. FCC, 978 F.2d 727 (D.C. Cir. 1992), *modified by Fifth Report and Order*, 98 F.C.C. 2d 1191 (1984), *modified by Sixth Report and Order*, 99 F.C.C. 2d 1020, (1985), *rev'd on other grounds*, MCI Telecomm. Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985). Nevertheless, in the overwhelming majority of cases, a tariff is not likely to be investigated without also being suspended, if only for one day. *See, e.g.*, July 1, 2007, Annual Access Charge Tariff Filings, *Order*, DA 07-2862, paras. 2, 9 (WCB 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-2862A1.pdf; Investigation of Certain 2007 Annual Access Tariffs, *Order Designating Issues for Investigation*, DA 07-3738, (WCB/PPD 2007) *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-3738A1.pdf. In any event, either suspension or investigation would seem to qualify as "action under paragraph (1)" of section 204(a) of the Communications Act, which would preclude "deemed lawful" status for the challenged tariff. 47 U.S.C. § 204(a)(3) (2006).

78. *Chaney*, 470 U.S. at 832. *See also* Adams v. Richardson, 480 F.2d 1159, 1162 (D.C. Cir. 1973) (Department of Health, Education and Welfare policy of "actively" funding

Second, a uniform "law to apply" standard may not always explain whether a particular agency action regarding a tariff is committed to agency discretion. In the case of the reviewability of FCC actions concerning traditional tariffs decided under the section 204(a) criteria, as well as analogous actions under similar tariffing regimes, a double standard applies depending on which way the agency decides. For example, both the Interstate Commerce Act and the Communications Act provide that the relevant agency, upon delivery to a carrier of a "statement in writing of its reasons," "may" "suspend" the carrier's tariff.[79] Under these provisions, tariff protest denials that allow traditional tariffs to go into effect without suspension or investigation are not typically reviewable. Orders suspending tariffs, however, are reviewable for the purpose of evaluating the reasoning given for the length of the suspension.[80]

This ambiguous standard poses an analytical problem for purposes of the "committed to agency discretion" rubric because the same discretionary statutory language governs both reviewable agency decisions to suspend and investigate tariffs and unreviewable decisions allowing traditional tariffs to go into effect without suspension or investigation. Under this rubric, an agency decision to take an authorized action under a permissive statutory standard generally is "functionally the same as" a decision not to take such action, for purposes of assessing reviewability.[81] Accordingly, an agency decision not to take an action that it "may" take should be no more discretionary or less reviewable than a decision to take such action, all other factors being equal.[82]

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segregated schools was reviewable because the policy did not constitute mere nonenforcement of Title VI of the Civil Rights Act of 1964).

79. *See* Exxon Pipeline Co. v. FERC, 725 F.2d 1467, 1470 n.7 (D.C. Cir. 1984) (discussing Interstate Commerce Act tariff suspension authority); 47 U.S.C. § 204(a)(1) (2006) (Communications Act tariff suspension authority).

80. *Compare* Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1234 (D.C. Cir. 1980) (decision allowing a tariff to go into effect without suspension is unreviewable), *with Exxon*, 725 F.2d at 1470, 1473 (tariff suspension order reviewable).

81. McAlpine v. United States, 112 F.3d 1429, 1434 (10th Cir. 1997).

82. *See, e.g.*, Dickson v. Sec'y of Def., 68 F.3d 1396, 1401-02 (D.C. Cir. 1995) (provision stating that military board "may" waive "a failure to file" subjects the board's denial of such waiver to judicial review); Envtl. Def. Fund, Inc. v. Hardin, 428 F.2d 1093, 1098 (D.C. Cir. 1970) (provision stating that Secretary "may" suspend registration of an agricultural poison allows judicial review of his inaction on a request for suspension).

In some situations, however, statutory goals may justify a different reviewability conclusion depending on which way the agency decided. For example, in State v. Spellings, 453 F. Supp. 2d 459, 495 n.21, 497 (D. Conn. 2006), *judgment entered sub nom.* State v. Duncan, 549 F. Supp. 2d 161 (D. Conn. 2008), *aff'd in part and modified in part*, 612 F.3d 107 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1471 (2011), the court suggested that, in certain circumstances, grant of a waiver would be reviewable, but denial of a waiver under the same statutory and regulatory criteria would not be reviewable, partly because denial leaves all statutory requirements in place. Here, however, as explained *infra* Part III, statutory goals would not justify denial of the limited judicial review required to scrutinize streamlined tariff protest denials.

The answer to the double standard affecting tariff actions may be, as discussed *supra* Part I, that it is the finality of a suspension order, at least as to the length of the suspension, as well as the absence of another remedy, that lead to reviewability. As Judge Wright explained in *Exxon*, "[i]t is presumed that final agency decisions that can cause irreparable injury *are not committed to agency discretion*."[83] Similarly, agency orders rejecting rate filings, as opposed to decisions allowing traditional tariffs to go into effect without suspension or investigation, are final orders disposing of all issues, for which the filing carrier can never obtain a remedy from the agency in any subsequent proceeding.[84] As the Court noted in *Southern Railway*, "a 'no-suspension' decision" would be "far more conducive to a finding of reviewability" where "non-reviewability would leave the aggrieved party without any judicial remedy at all."[85]

A streamlined tariff protest denial thus has the characteristics of reviewable orders suspending or rejecting traditional tariffs and is unlike a traditional tariff protest denial. Indeed, the consumer harm that results from the damages immunity conferred by the deemed lawful status of a nonsuspended streamlined tariff is potentially far more irreparable than the harm to a carrier from the reviewable rejection of its tariff. Thus, the factors favoring review discussed *supra* Part I—finality and irreparable harm—also weigh heavily in determining whether agency action is committed to its discretion, independently of the "law to apply" standard.

Third, notwithstanding the Court's emphasis in *Southern Railway* on permissive statutory language, the use of a "permissive term . . . rather than a mandatory term . . . does not mean the matter is *committed* exclusively to agency discretion."[86] For example, although agencies are authorized under the Administrative Procedure Act ("APA") to grant or withhold declaratory relief in their "sound discretion," an agency's refusal to initiate a declaratory relief proceeding is nevertheless reviewable.[87] Similarly, although the decision to institute a rulemaking "is one that is largely committed to agency discretion," an agency's refusal to initiate a

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83. *Exxon*, 725 F.2d at 1481 n.15 (Wright, J., concurring) (emphasis added). *See also* Envtl. Def. Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 592 n.20 (D.C. Cir. 1971) ("The irreparable character of any harm threatened is . . . relevant to . . . the propriety of permitting judicial review of an order that lacks some of the ordinary indicia of finality.").

84. *See* Papago Tribal Util. Auth. v. FERC, 628 F.2d 235, 241, n.16 (D.C. Cir. 1980); Capital Network Sys., Inc. v. FCC, 28 F.3d 201, 204-06 (D.C. Cir. 1994) (challenge to tariff rejection order considered without discussion of reviewability); N. Cent. Truck Lines, Inc. v. ICC, 559 F.2d 802, 805 (D.C. Cir. 1977) (same).

85. S. Ry. Co. v. Seaboard Allied Milling Corp., 442 U.S. 444, 459 n.12 (1979).

86. *Dickson*, 68 F.3d at 1401-04 (provision stating that military board "may" waive "a failure to file" "in the interest of justice" subjects board's decision to judicial review).

87. Intercity Transp. Co. v. United States, 737 F.2d 103, 106 & n.3, 107 n.4, 108 (D.C. Cir. 1984). *See also* Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 747 (D.C. Cir. 1986).

rulemaking is reviewable.[88] Where there is "irreparable injury"—unlike the situation in *Southern Railway*—the fact that the governing statute "is drafted in permissive rather than mandatory terms" is not a sufficient basis to find that the agency's decision is "committed . . . to unreviewable administrative discretion" and thus "beyond judicial scrutiny."[89]

Another distinguishing factor is *Southern Railway*'s exclusive focus on the relevant *statutory* tariff suspension provision.[90] Courts will also find that there is "law to apply" if the agency has promulgated *regulations* that "set forth sufficiently 'law-like' criteria to provide guideposts for a reasoned judicial decision."[91] In the case of the FCC's review of tariffs under section 204 of the Communications Act, FCC Rule 1.773 (a)(1) provides regulatory criteria.[92] For example, under Rule 1.773(a)(1), a particular category of LEC tariff "will not be suspended . . . unless" the petition shows:

> (A) That there is a high probability the tariff would be found unlawful after investigation;
>
> (B) That the suspension would not substantially harm other interested parties;
>
> (C) That irreparable injury will result if the tariff filing is not suspended; and
>
> (D) That the suspension would not otherwise be contrary to the public interest.[93]

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88. WWHT, Inc. v. FCC, 656 F.2d 807, 815 (D.C. Cir. 1981). *See also* Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 4-5 (D.C. Cir. 1987).

89. Envtl. Def. Fund, Inc. v. Hardin, 428 F.2d 1093, 1097-99 (D.C. Cir. 1970) (provision stating that Secretary "may" suspend registration of an agricultural poison allows judicial review of his inaction on a request for suspension, resulting in "irreparable injury"). *Hardin* was "reaffirm[ed]" on this point by *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 590 (D.C. Cir. 1971), which also stated that "the permissive statutory term 'may' does not preclude judicial review." *Id.* at 590 n.9. *See also* Tooahnippah v. Hickel, 397 U.S. 598, 599, 600 n.3, 607 (1970) (allowing review under statute providing that Secretary of the Interior "may approve or disapprove" the will of an Indian under certain circumstances, noting that the phrase "'in his discretion'" does not "cloak[] the Secretary's actions with immunity from judicial review"); Beno v. Shalala, 30 F.3d 1057, 1066 (9th Cir. 1994) ("discretionary language does not make agency action unreviewable"); Robbins v. Reagan, 780 F.2d 37, 48 (D.C. Cir. 1985) (Department of Health and Human Services ("HHS") authority "to make grants . . . 'related to the purposes' of [relevant statute] . . . . provides sufficient guidance" for review of HHS decision to *rescind* commitment to fund shelter).

90. *S. Ry.*, 442 U.S. at 454-64 (explaining nonreviewability under the Interstate Commerce Act of order allowing tariff to go into effect without investigation).

91. Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of the Interior, 255 F.3d 342, 349 (7th Cir. 2001). *See also, e.g.*, Service v. Dulles, 354 U.S. 363, 388 (1957); McAlpine v. United States, 112 F.3d 1429, 1433-34 (10th Cir. 1997); *Robbins*, 780 F.2d at 45-46; Cal. Human Dev. Corp. v. Brock, 762 F.2d 1044, 1048-49 (D.C. Cir. 1985).

92. *See* 47 C.F.R. § 1.773(a)(1) (2011).

93. *Id.* § 1.773(a)(1)(iv).

The "high probability" of unlawfulness, "irreparable injury" and "public interest" criteria, as well as variations on the "harm to other parties" criterion, apply to all other types of tariff filings as well, all of which may be filed by an LEC on a streamlined basis.[94] Although the "will not be suspended . . . unless" language of Rule 1.773(a)(1) makes suspensions of tariffs more clearly reviewable, it does not impose similar mandatory requirements for decisions not to suspend tariffs. Nevertheless, by providing specific criteria to be applied in reaching a suspension decision, the rule provides sufficient "law to apply," which could be used to review streamlined tariff protest denial decisions.[95]

Other than categories of cases traditionally held to be committed to agency discretion, such as non-enforcement decisions, numerous cases have held similarly permissive regulatory standards to provide "law to apply" sufficient for judicial review.[96] In fact, although a 1975 case held that a "broad" authorizing statute did not provide sufficient "law to apply" to review the denial of a special use permit by the Forest Service, later cases held that intervening permissive procedural regulations governing applications for such permits do provide "some law to apply," thereby enabling judicial review.[97] Statutory or regulatory permissive standards that

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94. *See id.* §§ 1.773(a)(1)(ii), (iii), (v) (referring to different types of LEC tariffs, all of which may be filed as streamlined tariffs, *see Streamlined Tariff Order*, *supra* note 3, at para. 31).

95. *See* Cardoza v. Commodity Futures Trading Comm'n., 768 F.2d 1542, 1549-52 (7th Cir. 1985) (regulation setting forth standards that agency "may consider" in exercising "its discretion" whether to grant or deny review of exchange action provides "meaningful standards" for courts to review agency action); W.G. Cosby Transfer & Storage Corp. v. Froehlke, 480 F.2d 498, 501-02 (4th Cir. 1973) (regulation providing that officer "may . . . grant" an exemption if specified criteria are met "provides the applicable law for judicial review" of denial of exemption).

96. *See, e.g.*, Menkes v. Dep't of Homeland Sec., 486 F.3d 1307, 1310 n.3, 1313 (D.C. Cir. 2007) (regulation authorizing Coast Guard to appoint pilot when "pilotage service" is not otherwise available "because of a physical or economic inability to do so" provides "manageable standards" for review of decision to terminate pilot's appointment); Payton v. USDA, 337 F.3d 1163, 1168 (10th Cir. 2003) (contract termination is reviewable under regulation providing that agency "may terminate" contract under specified conditions); Inova Alexandria Hosp. v. Shalala, 244 F.3d 342, 347-48 (4th Cir. 2001) (rule stating that agency "may dismiss" party's appeal to agency "[i]f the [party] fails to submit a final position paper" provides "judicially manageable standards" for review of agency's dismissal of appeal); *McAlpine*, 112 F.3d at 1434 (regulation requiring agency to consider certain factors in responding to requests to take land into trust status, without specifying weight to be given factors, provides "a meaningful and objective standard" on review); Schneider Nat'l, Inc. v. ICC, 948 F.2d 338, 342-43 (7th Cir. 1991) (agency procedural regulations "provide adequate guidelines for judicial review" of agency denial of petition); Chevron Oil Co. v. Andrus, 588 F.2d 1383, 1389-91 (5th Cir. 1979) (holding reviewable rejection of a bid for an oil and gas lease under permissive statute and regulations).

97. *Compare* Ness Inv. Corp. v. USDA, 512 F.2d 706, 715-16 (9th Cir. 1975) (statute is "drawn in such broad terms that there is no law to apply"), *with* United States v. Means, 858 F.2d 404, 408 n.8 (8th Cir. 1988) ("[a]dditional and more specific regulations" provide "some law to apply" to review of denial of permit), *and* Methow Valley Citizens Council v. Reg'l Forester, 833 F.2d 810, 813-14 (9th Cir. 1987) ("supplemental regulations"

provide little or no guidance or specificity, or that provide subjective or vague criteria, however, have been held not to provide sufficient "law to apply."[98] In light of all of the factors discussed above favoring reviewability of streamlined tariff protest denials, the Rule 1.773(a)(1) standards—particularly the one addressing a "high probability" of unlawfulness—are more than adequate to provide the "law to apply" to satisfy the requirements of 5 U.S.C. section 701(a)(2) and thereby enable review of such denials.[99]

Moreover, unlike most cases involving permissive regulatory language, the tariff suspension standard in Rule 1.773(a)(1) "parallels the one courts use in determining whether to issue stays or preliminary

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"constitute sufficient 'law' for this court to apply" to review of decision to issue permit), *rev'd on other grounds*, 490 U.S. 332 (1989).

98. *See, e.g.*, McCarthy v. Middle Tenn. Elec. Membership Corp., 466 F.3d 399, 406-07 (6th Cir. 2006) (statute authorizing Tennessee Valley Authority to include any terms and conditions in contract for sale of surplus power "as in its judgment may be necessary or desirable for carrying out the purpose of this chapter" did not provide meaningful standard for review of contract term prohibiting refunds); Joelson v. United States, 86 F.3d 1413, 1418-19 (6th Cir. 1996) (statute authorizing United States Trustee to supervise bankruptcy trustees "by . . . taking such action as the United States trustee deems to be appropriate" provides no "express or substantive guidelines upon which a court could base its review"); Madison-Hughes v. Shalala, 80 F.3d 1121, 1127-30 (6th Cir. 1996) (regulations requiring submission of "relevant and current" data "as responsible Department officials . . . may determine to be necessary" to ascertain compliance do not provide specific "factors" or "meaningful standard" by which to review Department's failure to collect relevant data); N.D. *ex rel*. Bd. of Univ. & Sch. Lands v. Yeutter, 914 F.2d 1031,1035 (8th Cir. 1990), *cert. denied sub nom*. N.D. Bd. of Univ. & Sch. Lands v. Madigan, 500 U.S. 952 (1991) (statute providing for waiver of requirements for enrollment of land in conservation program if "the Secretary determines that the land was acquired under circumstances that give adequate assurance that such land was not acquired for [certain] purpose" "supplies no objective criteria" by which to review Secretary's decision not to grant waiver); Woodsmall v. Lyng, 816 F.2d 1241, 1243 n.2 (8th Cir. 1987) (statute providing that agency "may" make a loan if agency "determines that an applicant . . . has the ability to repay" loan does not provide sufficiently meaningful standards to permit review); ElectriCities of N.C., Inc. v. Se. Power Admin., 774 F.2d 1262, 1264-67 (4th Cir. 1985) (statute permitting agency to dispose of certain electric power "'in such manner as to encourage the most widespread use thereof at the lowest possible rates to consumers consistent with sound business principles'" "is too vague to provide a standard" for judicial review).

Not every "law to apply" case fits this pattern precisely. There are anomalies in both directions. *Compare, e.g.*, Cnty. of Esmeralda v. U.S. Dep't. of Energy, 925 F.2d 1216, 1218-19 (9th Cir. 1991) (decision that may be made "at the discretion of" the Secretary of Energy, with no "specific factors for him to use" provided by the authorizing statute, held reviewable), *with* Perales v. Casillas, 903 F.2d 1043, 1047-51 (5th Cir. 1990) (INS regulation stating that a deportable alien "may be granted permission to be employed" prior to voluntary departure and listing factors "which may be considered" did not provide sufficient guidance for judicial review of denial of employment request).

99. *See Cardoza*, 768 F.2d 1542; *W.G. Cosby Transfer & Storage Corp.*, 480 F.2d 498; *Menkes*, 486 F.3d 1307; *Payton*, 337 F.3d 1163; *Inova Alexandria Hosp.*, 244 F.3d 342; *McAlpine*, 112 F.3d 1429; *Schneider Nat'l, Inc.*, 948 F.2d 338; *Andrus*, 588 F.2d 1383.

injunctions"[100] and, in fact, "has its roots in these judicial remedies."[101] Regulatory language that "originated with the judiciary" should be judicially reviewable.[102] The denial of a stay or preliminary injunction is certainly discretionary, but is also appealable under an abuse of discretion standard.[103] The "parallel[]" denial of a petition to reject or suspend a streamlined tariff filing, once it is affirmed by the agency, should be equally reviewable.[104] Permissive, discretionary standards governing agency actions that are "similar to the kind of . . . decisions that courts routinely review" have been held to provide "judicially manageable standards" for review in other contexts as well.[105]

Accordingly, the three criteria discussed above governing whether an agency action is committed to its discretion—finality, irreparable harm and "law to apply"—are met in the case of FCC decisions denying petitions to reject or suspend LEC streamlined tariffs.[106]

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100. Advanced Micro Devices v. Civil Aeronautics Bd., 742 F.2d 1520, 1533 (commenting on similar tariff suspension standard for CAB). The "irreparable injury" required by Rule 1.773(a)(1)(iv)(C) is perhaps not as stringent as the standard applied to petitions for injunctive relief, *see* Policy and Rules Concerning Rates for Dominant Carriers, *Report and Order and Second Further Notice of Proposed Rulemaking*, FCC 89-91, 4 FCC Rcd. 2873, paras. 446, 457 (1989), *modified on recon., Memorandum Opinion and Order on Reconsideration*, FCC 91-15, 6 FCC Rcd. 665 (1991), *rev'd on other grounds sub nom.* AT&T v. FCC, 974 F.2d 1351 (D.C. Cir. 1992), but the lesser standard for suspension would, if anything, heighten the need for an explanation for, and judicial review of, denial of a suspension request.

101. *Tariffing Rules*, *supra* note 77, at para. 109 (citing Arrow Transp. Co. v. S. Ry. Co., 372 U.S. 658, 662-69 (1963)).

102. Shipbuilders Council of Am. v. U.S. Dep't of Homeland Sec., 551 F. Supp. 2d 447, 451-52 (E.D. Va. 2008) ("As the statutory language originated with the judiciary, there is no reason to find that the judiciary could not reasonably review an agency's interpretation of that statutory language."), *rev'd on other grounds*, 578 F.3d 234 (4th Cir. 2009).

103. *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 755-56 (1986) (denial of preliminary injunction appealable), *overruled in part on other grounds*; Forty-Eight Insulations, Inc., 115 F.3d 1294, 1298-1300 (7th Cir. 1997) (denial of stay appealable, court noting its "serious consequences"); Abbott Labs. v. Mead Johnson & Co., 971 F.2d 6, 22 (7th Cir. 1992) (denial of preliminary injunction vacated); United States v. Wood, 295 F.2d 772, 778 (5th Cir. 1961) (denial of TRO appealable), *cert. denied*, 369 U.S. 850 (1962).

104. *Advanced Micro Devices*, 742 F.2d at 1533. In this connection, it should be noted that an FCC tariff order has been judicially reviewed on the basis of Rule 1.773(a)(1). In Capital Network Sys., Inc. v. FCC, 28 F.3d 201, 206 (D.C. Cir. 1994), the court considered whether the rejection of a tariff was permissible in light of the rebuttable presumption of lawfulness applied to tariffs by Rule 1.773(a)(1).

105. *See* Inova Alexandria Hosp. v. Shalala, 244 F.3d 342, 347-48 (4th Cir. 2001) (agency decision to dismiss administrative appeal pursuant to regulation providing that agency "may dismiss" administrative appeal "is similar to the kind of dismissal decisions that courts routinely review" and thus is not committed to agency discretion).

106. One commentator has pointed out that when an agency acts solely under its enabling statute, rather than pursuant to an independent executive power, a finding that its action is committed to its discretion because there is no law to apply would raise troublesome unconstitutional delegation of power issues. *See* Viktoria Lovei, Comment,

In some cases, courts have held that the goals and structure of the statute under which an agency acts commit some aspects of its decisions to its discretion, but allow limited judicial review of other aspects. Because reviewability and the scope of review are so intertwined in those cases, they are discussed in Part IV below.

IV. STREAMLINED TARIFF PROTEST DENIALS SHOULD BE REVIEWED UNDER THE APA'S "ARBITRARY AND CAPRICIOUS" STANDARD

Because an FCC decision denying a petition to reject or suspend and investigate an LEC streamlined tariff involves informal agency action, judicial review is limited to whether the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" under the APA.[107] Judicial review under the APA's "arbitrary and capricious" standard in 5 U.S.C. section 706(2)(A), which applies to agency adjudications,[108] addresses whether the reasons for the agency's decision were legally permissible and reasoned ones, and whether there was adequate factual support for the decision.[109]

In exceptional circumstances, courts have held that only limited judicial review is appropriate and that, in such cases, it is improper to go behind the agency's facial rationale and look into the factual basis for its decision. In *Dunlop v. Bachowski*,[110] the Supreme Court held that although the decision of the Secretary of Labor not to sue to set aside a union election was not entirely committed to the agency's discretion under the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"), the purposes evident in that statute limited the scope of judicial review. Specifically, the LMRDA bars a judicial "challenge to the factual basis for the Secretary's decision,"[111] thereby limiting judicial review to "examination of the [Secretary's] 'reasons' statement, and the determination whether the statement, without more, evinces that the Secretary's decision is so irrational as to constitute the decision arbitrary and capricious."[112]

Revealing the True Definition of APA § 701(a)(2) by Reconciling "No Law to Apply" with the Nondelegation Doctrine, 73 U. CHI. L. REV. 1047 (2006). It is not clear that any identifiable executive power, independent of Congress' delegated authority under the Commerce Clause, would authorize the denial of a petition to suspend and investigate a streamlined tariff under the Communications Act.

107. 5 U.S.C. § 706(2)(A) (2006).

108. *See, e.g.*, Camp v. Pitts, 411 U.S. 138, 142 (1973).

109. *Id.* at 142-43; McAlpine v. United States, 112 F.3d 1429, at 1436-37 (10th Cir. 1997); Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors, 745 F.2d 677, 683-84 (D.C. Cir. 1984).

110. Dunlop v. Bachowski, 421 U.S. 560, 568 (1975).

111. *Id.* at 577.

112. *Id.* at 572-73.

The Court's rationale for this limitation on judicial review was the congressional goal underlying the LMRDA, namely, to prevent individuals from blocking or delaying resolution of post-election disputes, to quickly settle the cloud on incumbents' titles to office and to protect unions from frivolous litigation and unnecessary interference with their elections.[113] The Court reasoned that allowing court challenges to the factual basis for the Secretary's conclusion would defeat these objectives.[114]

In *East Oakland-Fruitvale Planning Council v. Rumsfeld*,[115] the court addressed a challenge by a California nonprofit community council to the refusal by the Office of Economic Opportunity ("OEO") to override the Governor's veto of an OEO grant to the council. Based on the legislative history and language of the Economic Opportunity Act ("EOA"), the court held:

> [T]he standard to be applied by the [OEO] in determining whether to override a governor's veto [of an OEO grant] requires an evaluation of the "wisdom or desirability" of the particular project as a means to further the purposes of the [EOA] . . . . This standard is extremely general. . . . [I]t would not afford a reviewing court a practicable rule for determining the legality of the [OEO's] ultimate decision to override or not to override. That decision is therefore not subject to judicial review.[116]

The court also held, however, that "[i]t does not follow . . . that no aspect of [OEO's] action can be reviewed . . . . '[P]artial review may be available for separable issues, as to which discretion or expertise is insignificant.'"[117] For example, the court noted that OEO could be held on review to its obligation to reconsider a vetoed program even though the merits of the decision on reconsideration are unreviewable, and procedural issues could be raised on review.[118] Moreover, a court could review OEO's compliance with its obligation to consider only factors relevant to the merits of the vetoed project.[119]

Similarly, in *Save the Bay*, the court held that the decision of the Environmental Protection Agency ("EPA") not to veto a pollution

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113. *Id.* at 572-73.

114. *Id.* at 577. Subsequent decisions have expanded the *Dunlop* scope of review in LMRDA cases to the extent of examining the Secretary's statement of reasons "in relation to the evidence before the Secretary." Doyle v. Brock, 821 F.2d 778, 783 n.3 (D.C. Cir. 1987).

115. E. Oakland-Fruitvale Planning Council v. Rumsfeld, 471 F.2d 524 (9th Cir. 1972).

116. *Id.* at 533 (quoting H.R. REP. NO. 89-428, at 14 (1965)).

117. *Id.* (quoting Harvey Saferstein, *Nonreviewability: A Functional Analysis of "Committed to Agency Discretion,"* 82 HARV. L. REV. 367, 372 (1968)).

118. *Id.* at 534.

119. *Id.* at 533-35.

discharge permit issued by a state environmental commission was committed to EPA's discretion.[120] Citing *Rumsfeld*, however, the court stated that this decision

> does not mean that the [EPA] is completely beyond the scrutiny of the federal courts in performing the supervisory role over state permits that Congress . . . saw fit to establish . . . .
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> . . . .
>
> . . . [J]udicial review may appropriately confine EPA's discretion. . . . [N]othing in the statute or its history suggest [sic] any basis for allowing EPA in reviewing the merits of a permit totally to omit consideration of a particular violation of the guidelines and requirements of the [statute] . . . . Accordingly, an aggrieved person must be able to present a claim . . . that a proposed permit contains a violation . . . that the agency has failed to consider. Upon sufficient showing of a violation, the agency, if it claims to have attended to the factor during its review, will have to explain . . . how it concluded the violation did not warrant veto.[121]

The court also stated that review was available to consider whether EPA based its decision on "unlawful factors."[122] Citing *Dunlop*, the court noted that this limited review is justified partly by the absence of any other "avenue for challenging the terms of a permit once EPA has allowed it to issue," just as *Dunlop* justified limited review of the decision of the Secretary of Labor not to bring suit to set aside a union election partly on the grounds that such a suit provides the exclusive post-election remedy under the LMRDA.[123] The permissive terms of the statute at issue also did not commit the EPA's decision to its unreviewable discretion.[124]

A similarly limited scope of review has been applied to judicial challenges to certain agency tariff suspension orders. In *Exxon*, the court affirmed FERC's tariff suspension order against a challenge to the duration of the suspension.[125] The court limited the scope of its review to an inquiry as to whether the reasons given by FERC for the length of the suspension were related to "FERC's interim or ultimate inquiries."[126] It declined to

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120. Save the Bay, Inc. v. EPA, 556 F.2d 1282, 1295-96 (5th Cir. 1977).

121. *Id.* at 1295-96.

122. *Id.* at 1296.

123. *Id.* at 1296-97 n.15. *See also* Morris v. Gressette, 432 U.S. 491, 505-07 & n.20 (1977) (distinguishing Dunlop v. Bachowski, 421 U.S. 560, 568 (1975)) (Attorney General's failure to object to state voting law held unreviewable partly because law could be challenged in subsequent judicial action).

124. *Save the Bay*, 556 F.2d at 1293.

125. *See* Exxon Pipeline Co., 725 F.2d 1467, at 1469-75 (D.C. Cir. 1984).

126. *Id.* at 1473.

review the "merits" of the suspension order, explaining that such an inquiry "would disrupt the Commission's regulatory function, by forcing a consideration of the reasonableness of a proposed rate prior to a final FERC ruling on that very question."[127]

As Judge Wright explained in his concurring opinion in *Exxon*:

> [T]he decision whether or not to suspend rates . . . is not reviewable; the decision to suspend rates for a lengthy time (*i.e.*, "the reasons behind imposing a rate suspension of a given length") is reviewable . . . .
>
> . . . .
>
> . . . [B]ecause Commission decisions to suspend new rates for lengthy periods are final (as to the length of suspension) and can injure the substantial rights of parties (if the new rates are in fact reasonable), the precedents militate strongly in favor of review of such long suspensions.[128]

Thus, the "injur[y]" to "the substantial rights of parties" is the decisional factor in differentiating the length of a tariff suspension from the suspension itself with regard to reviewability.[129]

These cases demonstrate that "the question of reviewability cannot be divorced from that of scope of review. In cases where courts have evidenced serious doubts about the reviewability of agency action, they have tended to couple their decision to review with a particularly narrow scope of review."[130] For the reasons discussed *supra* Part II, however, the reviewability of decisions denying challenges to streamlined tariffs should not be subject to such "serious doubts," nor should such denials be limited to such "narrow" review. In streamlined tariff protest denials, the FCC has made a final ruling on the lawfulness of the proposed rate during its effectiveness. Unlike the situation in *Exxon*, there is no current or future regulatory proceeding concerning the tariffing LEC's liability for damages to "disrupt" because the LEC is immune from damages for the entire period of the streamlined tariff's effectiveness.[131] Moreover, as noted above, Judge Wright pointed out in his concurring opinion in *Exxon* that "[i]f the Commission's failure to suspend permanently cut off all remedies for the

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127. *Id.*

128. *Id.* at 1483-84 (Wright, J., conc.).

129. *See id.* at 1484.

130. Natural Res. Def. Council, Inc. v. SEC, 606 F.2d 1031, 1052 (D.C. Cir. 1979) (citing Dunlop v. Bachowski, 421 U.S. 560, 568 (1975)).

131. *Exxon*, 725 F.2d at 1473. *See also* Nat'l Air Carrier Ass'n v. Civil Aeronautics Bd., 436 F.2d 185, 191, 194-95 (D.C. Cir. 1970) (explaining that interim approval of a fare agreement, pending further investigation of fares, that "operates with finality to invest the agreement with immunity to the antitrust laws" is subject to review for reasonableness and whether approval is "based upon substantial evidence").

customers, it would be reviewable," citing *Dunlop*.[132] Non-suspension of a streamlined tariff "permanently cut[s] off all [damages] remedies for the customers." Thus, "the serious doubts about . . . reviewability" typically attending tariff protest denials do not apply in these circumstances, and there is no corresponding need to "narrow" the scope of review.[133]

Furthermore, aside from finality and the absence of alternative remedies, the other unique circumstances mandating limited review in *Dunlop*, *Exxon*, and the other cases discussed immediately above are not presented by review of the denial of a petition to reject or suspend an LEC streamlined tariff. Unlike the LMRDA at issue in *Dunlop*, there is nothing in the legislative history of the 1996 Act that suggests a legislative intent to modify in any way judicial reviewability of tariff actions.[134] Congress certainly intended to accelerate the FCC tariff review process for streamlined tariffs,[135] but it "did not amend the Act to eliminate the Commission's suspension authority for LEC tariffs"[136] or to affect the reviewability of tariff-related actions in the case of streamlined tariffs. Thus, streamlined tariffs and all other tariffs are equally subject to suspension and investigation under Rule 1.773.

In any event, the limited nature of the issue to be determined on appeal minimizes the interference caused by review of a streamlined tariff protest denial and is similar to the limited scope of review in *Dunlop*, *Exxon*, and the other cases discussed above. It is clear that, under the procedure dictated by section 204(a)(3), the FCC could not possibly conduct a full investigation of reasonableness in the seven or fifteen days prior to the effectiveness of an LEC streamlined tariff. As discussed above, however, a decision to allow a streamlined tariff into effect without suspension or investigation is based on a much more limited determination, namely, that petitioner has failed to demonstrate at least one of the four predicates for suspension under Rule 1.773(a)(1), such as a showing that there is a high probability that the tariff will be found unreasonable after an investigation. There is nothing in the structure of the 1996 Act that precludes a full review under the arbitrary and capricious standard of that limited determination.

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132. *Exxon*, 725 F.2d at 1478 n.7.

133. *NRDC*, 606 F.2d at 1052.

134. Senator Dole (R. Kan.) had a summary of the bill that became the 1996 Act printed in the Congressional Record. The summary briefly describes the streamlined tariff provision and concludes with the statement that "[t]o block such changes, FCC must justify its actions." 141 CONG. REC. S7898 (daily ed. June 7, 1995) (statement of Sen. Dole). This statement certainly reinforces the intent to speed up the tariff review process for streamlined tariffs, but it says nothing about the reviewability of streamlined tariff protest denials. That it requires the FCC to justify the suspension of streamlined tariffs but says nothing about protest denials is hardly sufficient to overcome the presumption of reviewability.

135. *See Streamlined Tariff Order*, *supra* note 3, at para. 1 n.2.

136. *Id.* at para. 22.

The findings that the FCC must make in order to support non-suspension of an LEC streamlined tariff—*e.g.*, that petitioner failed to show that there is a high probability of unlawfulness or that suspension would not substantially harm other interested parties—set a fairly low bar for the FCC to meet. It should not have difficulty defending the reasonableness of and factual basis for such findings on appeal.[137] For example, analogous to *Save the Bay*, a party appealing from a streamlined tariff protest denial "must be able to present a claim . . . that a proposed [tariff] contains a violation . . . that the [FCC] has failed to consider" adequately and that "[u]pon sufficient showing of a violation, the [FCC] . . . will have to explain . . . how it concluded the violation did not warrant" suspension.[138] As noted, *supra* Part II, this examination of the coherence of the FCC's reasons for denying a tariff protest is analogous to an examination of a lower court's refusal to grant a stay or preliminary injunction and does not require a review of the ultimate merits to any greater degree than is required in reviewing denial of a stay or preliminary injunction or, for that matter, in reviewing the length of a suspension order, as permitted in *Exxon*.

The minimal burden of judicial review is especially apparent given that the purpose of the appeal is to remove the immunity from damages conferred by such denials. That immunity becomes significant only if a petitioner files a subsequent section 208 complaint against the tariffed rates and prevails in a final order. At that point, the immunity becomes relevant to the issue of whether petitioner will be able to collect damages for the period that the challenged rates were in effect. Thus, the appeal of the tariff protest denial could be heard simultaneously with the appeal of the order resolving petitioner's complaint case, with no delay to any administrative processes.[139]

The only additional burden that judicial review under the APA's arbitrary and capricious standard will create is the need for the FCC to explain its reasons for finding that the petitioner has not demonstrated the factors necessary for a suspension under Rule 1.773(a)(1). Since 1986, the Bureau's policy has been to avoid preparing "orders addressing substantive or procedural issues raised by petitioners regarding tariff filings that are being allowed to take effect without imposition of an investigation or accounting or reporting requirements."[140] Such decisions

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137. As a practical matter, very few unsuccessful petitioners will appeal decisions to allow LEC streamlined tariffs into effect without suspension in the face of such a rigorous standard for suspension, further reducing the administrative burden of judicial review.

138. Save the Bay, Inc. v. EPA, 556 F.2d 1282, 1295-96 (5th Cir. 1977).

139. As explained *infra* Part IV, the decision to allow an LEC streamlined tariff to go into effect without suspension must be reviewed by the full Commission before it may be judicially reviewed.

140. Common Carrier Bureau Announces New Policy Regarding Issuance of Tariff Orders, *Public Notice*, Mimeo No. 3805 (CCB April 15, 1986) [hereinafter *Tariff Policy Notice*], *aff'd*, 1 FCC Rcd. 179 (1986).

are simply announced in "a brief Order . . . listing the petitions to reject, suspend or investigate that are being denied."[141] Application of the APA's arbitrary and capricious standard will require that Bureau denials of petitions challenging LEC streamlined tariffs address the issues raised by petitioners and provide an explanation for the decision.[142]

However, since petitions challenging tariffs are relatively infrequent and the standard set by Rule 1.773 is low, it should not be especially burdensome for the Bureau to explain in a brief order why petitioners have not made the required showings to have the tariff investigated or suspended. There have been only two public notices for tariff protest denials released in 2012[143] and only a handful in both 2010 and 2011, one of which is the protest denial at issue in the Sprint and Qwest Applications.[144] In addition, in both 2006 and 2009, there was only one such notice, and none in 2007 or 2008.[145] Moreover, the additional burden imposed on the agency by the need for an order addressing a petitioner's objections is quite modest relative to the extraordinary immunity conferred on an LEC filing a streamlined tariff that is allowed to take effect without

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141. *Id.*

142. *See, e.g.*, Dickson v. Sec'y of Def., 68 F.3d 1396, 1404-07 (D.C. Cir. 1995); Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 746 (finding decision lacking "intelligible explanation" by agency reversed); Action on Smoking & Health v. Civil Aeronautics Bd., 699 F.2d 1209, 1215-16 (D.C. Cir. 1983) (finding it arbitrary and capricious for agency not to respond to significant comments and explain how agency resolved issues raised).

143. *See* Protested Tariff Transmittal Action Taken, *Public Notice*, DA 12-101 (WCB/Pricing 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-101A1.pdf; Protested Tariff Transmittal Action Taken, *Public Notice*, DA 12-21 (WCB/Pricing 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-12-21A1.pdf.

144. *See, e.g.*, Protested Tariff Transmittal Action Taken, *Public Notice*, DA 11-1393 (WCB/Pricing 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1393A1.pdf; Protested Tariff Transmittals Action Taken, *Public Notice*, DA 11-1156 (WCB/Pricing 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1156A1.pdf; Protested Tariff Transmittal Action Taken, *Public Notice*, DA 11-21 (WCB/Pricing 2011), *available at* fjallfoss.fcc.gov/edocs_public/attachmatch/DA-11-21A1_Rcd.pdf; Protested Tariff Transmittal Action Taken, *Public Notice*, DA 10-1970 (WCB/Pricing 2010), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-1970A1.pdf (the protest denial at issue in the Sprint and Qwest Applications); Protested Tariff Transmittals Action Taken, *Public Notice*, DA 10-1917 (WCB/Pricing 2010), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-1917A1.pdf; Protested Tariff Transmittal Action Taken, *Public Notice*, DA 10-1783 (WCB/Pricing 2010), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-1783A1_Rcd.pdf; Protested Tariff Transmittals Action Taken, *Public Notice*, DA 10-1252 (WCB/Pricing 2010), *available at* http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-1252A1.pdf.

145. *See, e.g.*, Protested Tariff Transmittals Action Taken, *Public Notice*, DA 09-1493 (WCB/Pricing 2009), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-09-1493A1.pdf; Protested Tariff Transmittals Action Taken, *Public Notice*, DA 06-1351 (WCB/Pricing 2006) [hereinafter *2006 Protest Notice*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-06-1351A1.pdf.

suspension or investigation. As the United States Court of Appeals for the District of Columbia Circuit has commented:

> No one pretends that judicial review of agency action is a pleasant day at the beach for agencies, and although escaping judicial review would of course be less "disruptive to . . . operations," it would also leave regulated entities . . . unprotected from arbitrary and capricious agency action.[146]

The FCC's pre-1986 practice of explaining rejections of petitions challenging tariffs in brief orders[147] demonstrates that availability of full judicial review for decisions allowing LEC streamlined tariffs to go into effect without suspension or investigation would not impose an undue burden. Even under the streamlining regime, the FCC is able to issue orders explaining its suspension of LEC tariffs within the short notice periods applicable to streamlined tariffs.[148] Given the low bar for nonsuspension of a tariff—i.e., an absence of any one of the stringent showings required for suspension, including a high probability of unlawfulness—preparation of an order explaining the nonsuspension of an LEC streamlined tariff should not pose any greater burden than an order explaining the suspension of such a tariff.

In short, full judicial review of a decision allowing an LEC streamlined tariff to go into effect without suspension under the APA's arbitrary and capricious standard will not interfere with the objectives of section 204(a)(3). A brief order setting forth the FCC's rationale for denying a challenge to a LEC streamlined tariff under the stringent suspension criteria of section 1.773 of the FCC's rules will suffice to meet the FCC's obligation under the arbitrary and capricious standard. The limited scope of judicial review of such a protest denial is similar to the limited judicial review conducted in *Dunlop* and *Exxon*, as described above.[149] The infrequency of tariff protests further ensures that judicial

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146 Safe Extensions, Inc. v. FAA, 509 F.3d 593, 602 (D.C. Cir. 2007) (citations omitted) (quoting FAA brief).

147 *See, e.g.*, AT&T Commc'ns; Tariff F.C.C. Nos. 1 & 2, *Memorandum Opinion and Order*, 1985 FCC LEXIS 2845 (CC 1985); AT&T Commc'ns; Revisions to Tariff FCC No. 1, *Memorandum Opinion and Order*, 1985 FCC LEXIS 2560 (CC 1985).

148 *See, e.g.*, July 1, 2007 Annual Access Charge Tariff Filings, *Order*, DA 07-2862 (WCB/Pricing 2007), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-07-2862A1.pdf (streamlined tariffs filed June 15, 2007 suspended by order released June 28, 2007); Ameritech Long-Term Number Portability Query Servs.; Ameritech Tariff F.C.C. No. 2, *Memorandum Opinion and Order*, DA 98-648, 13 FCC Rcd. 6695 (CC/CPD 1998) (streamlined tariff filed March 31, 1998 suspended by order released April 3, 1998); Sw. Bell Tel. Co. Tariff F.C.C. No. 73, *Suspension Order*, DA 97-696, 12 FCC Rcd. 4201 (CC/CPD 1997) (streamlined tariff filed March 25, 1997 suspended by order released April 8, 1997).

149 *See* Dunlop v. Bachowski, 421 U.S. 560, 572-73, 577 (1975); Exxon Pipeline Co. v. FERC, 725 F.2d 1467, 1469-75 (D.C. Cir. 1984).

review will not impose a significant burden on the streamlined tariff review process.

Finally, even a judicial reversal and remand of an LEC streamlined tariff protest denial will not cause significant interference in the FCC's processes. Appeal of a streamlined tariff protest denial would not delay or otherwise disturb the tariff's effectiveness. As discussed above, the "deemed lawful" status of a streamlined tariff only has significance with regard to a potential damages claim in the event that the tariff is ultimately found unlawful and prospectively invalidated in a separate formal complaint proceeding brought under section 208 of the Communications Act.

Accordingly, a party will follow through on an appeal of a streamlined tariff protest denial only if the party has brought a section 208 complaint against the LEC resulting in the prospective invalidation of the tariff and a denial of damages on the basis of the "deemed lawful" provision in section 204(a)(3).[150] The complaint likely would have been filed shortly after the protest denial and would proceed while the protest denial is challenged at the FCC and then in court. If the complaint is unsuccessful, and the tariff remains in effect, there would be no point to an appeal of the protest denial, and it would be dropped. If the complainant wins the section 208 case, however, the complainant would then appeal the denial of damages relief in the complaint proceeding along with its appeal of the protest denial. Thus, the tariff at issue will already have been invalidated in the section 208 proceeding by the time the protest denial is judicially reviewed, precluding any impact on an effective tariff.

V. OVERCOMING THE INITIAL OBSTACLES TO JUDICIAL REVIEW

The FCC is not likely to acknowledge a right to judicial review of its decisions not to suspend or reject LEC streamlined tariffs. Exercise of that right will take some patience, at least in the first case seeking such review. First, a party seeking such review must file a petition to reject or suspend and investigate an LEC streamlined tariff within the time allowed by the FCC's streamlined tariff procedures, discussed above.[151] Unless such a petition is filed in a timely manner or there is a Commission decision to take action on its own motion, there will be no Commission "action" to review.[152]

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150. *See Streamlined Tariff Order*, *supra* note 3, at para. 20 (party filing complaint challenging streamlined tariff that was not suspended may obtain only prospective remedy, not damages for the period that the tariff was in effect).

151. *See supra* note 22.

152. *See, e.g.*, AT&T Commc'ns Tariff F.C.C. Nos. 1 & 2, *Memorandum Opinion and Order*, FCC 87-20, 2 FCC Rcd. 548, paras. 11-12 (1987), *petition for review dismissed sub nom.* Me. Pub. Advocate v. FCC, 828 F.2d 68 (1st Cir. 1987).

Bureau denials of such petitions are announced in a public notice of tariff protest denials.[153] Once the protest denial public notice is released, the petitioner will need to file an application for review of the denial, under section 1.115 of the FCC's rules, in order to secure a final, appealable decision by the full Commission, as was done in the case of the pending Sprint and Qwest Applications.[154] The FCC might treat the application for review as one for review of the denial of a petition to reject or to suspend and investigate a traditional tariff filing and accordingly might incorrectly deny the application on the grounds that the action under review is not final because it does not preclude a subsequent section 208 complaint proceeding challenging the tariff or an investigation of the tariff initiated by the FCC under section 205.[155] Once the FCC denied the application for review, however, the petitioner would have an order of the full Commission that could be judicially reviewed by the United States Court of Appeals.

Assuming that a reviewing court is persuaded that an FCC order affirming a Bureau streamlined tariff protest denial is reviewable, reversal of the FCC would seem almost certain if the FCC did not provide some rationale for its affirmance. As discussed above, the Bureau makes no effort to explain its rationale or to support its conclusions in allowing a streamlined tariff to go into effect without suspension and simply announces the list of petitions to reject or to suspend and investigate that are being denied.[156] If the Commission order denying review of the Bureau's tariff protest denial supplied no additional rationale beyond the point that such orders are not reviewable, it would not meet the requirement for APA's arbitrary and capricious standard.[157] It should be noted, however, that the FCC occasionally has ruled on the merits of applications for review of Bureau decisions denying petitions to reject or suspend a tariff.[158] In those cases, the reviewing court would apply the APA's "arbitrary and capricious" standard to the Commission's explanation.[159]

Another important point is the request for relief. Section 204(a)(3) provides that an LEC streamlined tariff "shall be deemed lawful and shall

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153. *See, e.g.*, *2006 Protest Notice*, *supra* note 145.

154. *See supra* note 28 and related text; *see also* 47 C.F.R. § 1.115(k) (2011) (filing of application for review "shall be a condition precedent to judicial review of any action taken pursuant to delegated authority").

155. *See, e.g.*, AT&T Commc'ns Tariff F.C.C. Nos. 1 & 2, *Memorandum Opinion and Order*, FCC 93-540, 9 FCC Rcd. 292, para. 7 (1994).

156. *See 2006 Protest Notice*, *supra* note 145; *see also Tariff Policy Notice*, *supra* note 140.

157. *See, e.g.*, Dickson v. Sec'y of Def., 68 F.3d 1396, 1404-07 (D.C. Cir. 1995); Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737, 746-47 (D.C. Cir. 1986); Action on Smoking & Health v. Civil Aeronautics Bd., 699 F.2d 1209, 1216 (D.C. Cir. 1983).

158. *See, e.g.*, Micronesian Telecomms. Corp. Revision to Tariff FCC No. 1, *Memorandum Opinion and Order*, FCC 04-84 (2004), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-84A1.pdf.

159. *See supra* note 109 and related text.

be effective [seven or fifteen days] after the date on which it is filed . . . unless the Commission takes action under [section 204(a)(1)] before the end of that 7-day or 15-day period, as is appropriate."[160] Section 204(a)(1) authorizes the FCC to initiate an investigation "either upon complaint or upon its own initiative." As discussed above, however, by the time the appeal of the tariff protest denial is judicially reviewed, the tariff will have been invalidated prospectively in the appellant's corresponding section 208 complaint action. There will be no effective tariff to be suspended or investigated. The appropriate request for relief in the appeal of the tariff protest denial, therefore, would be to instruct the FCC to give retroactive effect to the court's reversal by retroactively altering the status of the tariff from "deemed lawful" to merely "legal"; the status it would have had if it had been suspended.

Courts may certainly provide this type of retroactive relief in reversing a tariff order. In fact, retroactive reversal of the legal status of a streamlined tariff was ordered by the court in *Virgin Islands*—in that case, from "legal" to "deemed lawful"—as a result of the FCC's own reconsideration of its prior suspension order.[161] A comparable retroactive remedy, but in the opposite direction, should be equally appropriate in the case of a reversal of an FCC streamlined tariff protest denial.

Another example of retroactive relief from a tariff order is *MRFC*.[162] There, the court reversed a Federal Power Commission ("FPC") order rejecting a natural gas utility's tariff without a hearing as beyond the agency's authority and required the agency to accept the rejected filing. The court ordered that the tariffed rates be given immediate effect, but subject to the agency's right to initiate an investigation of the rates, notwithstanding that the statutory period within which the FPC may initiate an investigation of a newly-filed natural gas tariff had long since passed.[163] Thus, the condition imposed by the court caused its reversal to operate retroactively, placing the parties in the position they would have been in if the agency had permitted the tariff to be filed.[164] Similarly, in *Indiana & Michigan Electric*,[165] the court vacated a tariff suspension order and held that the utility could collect the tariffed rate retroactively during the period of the wrongful suspension.[166] Thus, a court may order the FCC to give

160. 47 U.S.C. § 204(a)(3) (2006).

161. V.I. Tel. Corp. v. FCC, 444 F.3d 666, 673 (D.C. Cir. 2006) (FCC reconsideration order setting aside order suspending streamlined tariff "restored the tariff to its [deemed lawful] legal *status quo ante*").

162. Miss. River Fuel Corp. v. Fed. Power Comm'n, 202 F.2d 899 (3d Cir. 1953).

163. *Id.* at 903.

164. The court, however, would not allow the utility to retroactively charge the tariffed rate to its customers for the initial period because its principal customer had already resold the natural gas based on the original rate. *Id.* at 903-04.

165. Ind. & Mich. Elec. Co. v. Fed. Power Comm'n, 502 F.2d 336, 339 & n.8 (D.C. Cir. 1974).

166. On rehearing, the court modified the relief it previously ordered to ameliorate the impact on the utility's customers, noting that a court "sitting in review of an

retroactive effect to its reversal of the FCC's prior action allowing an LEC streamlined tariff into effect, thereby removing the tariff's "deemed lawful" status.

It should be noted, however, that, although such a retroactive change in legal status is theoretically possible, it is also possible that the first appeal of an LEC streamlined tariff protest denial will result only in a remand in order to give the FCC an opportunity to either retroactively change the status of the tariff or issue the order that should have been prepared to explain its denial of the petition to reject or suspend the tariff.[167] Should the FCC be unable to satisfy the court with an order explaining its decision not to suspend or reject, the court would then be in a position to vacate the FCC's tariff protest denial and require a retroactive change in tariff status.

VI. CONCLUSION

None of the factors typically cited as reasons to deny judicial review of agency actions allowing traditional tariffs to go into effect without suspension—lack of finality and irreparable injury and interference with agency discretion—are present in the case of an FCC decision denying a challenge to an LEC streamlined tariff, thereby allowing it to go into effect without suspension or investigation. Without such review, the potential injury that can be inflicted by the extraordinary damages immunity conferred by such protest denials cannot be remedied, either by the FCC or the courts.

Moreover, given the high bar against tariff suspensions erected by Rule 1.773(a)(1), it would not be unduly burdensome for the FCC to issue brief orders explaining its decisions to deny petitions challenging LEC streamlined tariffs. In addition, review of an FCC denial of a petition challenging a streamlined tariff would not interfere with the effectiveness of the tariff itself. Therefore, review of such orders under the APA's arbitrary and capricious rubric would not undermine any identifiable goals of the 1996 Act. With the FCC's decreasing reliance on direct regulation to ensure just and reasonable rates, the complaint process will play an even more vital role. Judicial review of Commission decisions allowing LEC streamlined tariffs to go into effect without suspension or investigation is

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administrative agency . . . 'may adjust [its] relief to the exigencies of the case in accordance with the equitable principles governing judicial action.'" *Id.* at 346 (quoting Ford Motor Co. v. NLRB, 305 U.S. 364, 373 (1939)).

167. *See, e.g.*, Ass'n of Oil Pipe Lines v. FERC, 281 F.3d 239, 248 (D.C. Cir. 2002) (case remanded but order not vacated because "it is unclear whether the remanded issues will change" the outcome); Sprint Comm. Co. v. FCC, 274 F.3d 549, 556 (D.C. Cir. 2001) (decision whether to remand or vacate depends on "'the extent of doubt whether the agency chose correctly'" (quoting Allied-Signal, Inc. v. NRC, 988 F.2d 146, 150-51 (D.C. Cir. 1993))).

crucial to an effective damages remedy in the case of unjust and unreasonable LEC rates and practices.

Wireless Competition Under Spectrum Exhaust

T. Randolph Beard, PhD[*]
George S. Ford, PhD[†]
Lawrence J. Spiwak, Esq.[‡]
Michael Stern, PhD[♦]

TABLE OF CONTENTS

* Senior Fellow, Phoenix Center for Advanced Legal & Economic Public Policy Studies; Professor of Economics, Auburn University.

† Chief Economist, Phoenix Center for Advanced Legal & Economic Public Policy Studies.

‡ President, Phoenix Center for Advanced Legal & Economic Public Policy Studies. The views expressed in this paper are the authors' alone and do not represent the views of the Phoenix Center or its staff.

♦ Senior Fellow, Phoenix Center for Advanced Legal & Economic Public Policy Studies; Professor of Economics, Auburn University.

I. INTRODUCTION

Spectrum is an essential input for providers of mobile wireless voice and data service. Indeed, without spectrum there can be no service at all, and the more spectrum that a provider has, the better the services it can provide.[1] Unfortunately, as Americans continue to consume mammoth amounts of data with their smartphones and tablets, the United States is rapidly exhausting the capacity available from the existing supply of viable commercial spectrum. The *National Broadband Plan*, released in 2010, concluded that the present inventory of commercial spectrum represents "just a fraction of the amount that will be necessary to match growing demand."[2] Echoing that concern, Federal Communications Commission ("FCC") Chairman Julius Genachowski cautioned, "[w]ithout action, demand for spectrum will soon outstrip supply . . . . If we don't tackle the spectrum crunch now, network congestion will grow, and consumer frustration will grow with it."[3] The White House is also concerned, concluding that there is a "spectrum crunch that will hinder future innovation."[4]

As a result, both the FCC and the White House express the need "to free up [more] spectrum" and make it available for broadband use.[5] The *National Broadband Plan* called for the assignment of an additional 500 Megahertz ("MHz") of spectrum for broadband use, a portion of which is expected to come from spectrum currently used for broadcast television and a portion to be reallocated from government use.[6] Many praised the FCC's plan to increase the stock of spectrum for mobile broadband services, and a report by the National Telecommunications and Information

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1. T. Randolph Beard et al., *A Policy Framework for Spectrum Allocation in Mobile Communications*, 63 FED. COMM. L.J. 639, 642 (2011), *available at* http://www.law.indiana.edu/fclj/pubs/v63/no3/Vol.63-3_2011-May_Art.-03_Beard.pdf.

2. FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, at XII, 10 (2010) [hereinafter NATIONAL BROADBAND PLAN], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296935A1.pdf.

3. Julius Genachowski, Chairman, FCC, Prepared Remarks at the 2011 International Consumer Electronics Show 1 (Jan. 7 2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-303984A1.pdf.

4. Press Release, President Obama Details Plan to Win the Future through Expanded Wireless Access (Feb. 10, 2011) [hereinafter White House Press Release], http://www.whitehouse.gov/the-press-office/2011/02/10/president-obama-details-plan-win-future-through-expanded-wireless-access.

5. Service Rules for Advanced Wireless Services in the 2000-2020 MHz and 2180-2200 MHz Bands, *Statement of Chairman Julius Genachowski*, FCC 12-32, at 81-82 (2012). *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-32A1.pdf; White House Press Release, *supra* note 4.

6. *See, e.g.*, NATIONAL BROADBAND PLAN, *supra* note 2, at 75-76; Grant Gross, *FCC Wants 120MHz of Spectrum From TV Stations*, PCWORLD (Mar. 15, 2010), http://www.pcworld.com/businesscenter/article/191561/fcc_wants_120mhz_of_spectrum_from_tv_stations.html.

Administration ("NTIA") outlined some ideas for this significant reallocation of spectrum.[7] To help facilitate the reallocation of spectrum, this past February, President Obama signed into law the Middle Class Tax Relief and Job Creation Act of 2012, which provides the FCC with the authority to hold voluntary incentive auctions to repurpose television spectrum for mobile broadband use.[8] However, by the FCC's own admission, the reallocation of spectrum has historically taken several years.[9] Therefore the reallocation of broadcast spectrum and government spectrum to higher-valued uses could take years to fully implement and, even then, provides only a portion of the needed spectrum.[10] Accordingly, a "spectrum crunch" may be the market reality for the foreseeable future. As such it is important to understand what effects a binding spectrum constraint has on the nature of market performance in mobile wireless communications and how policy must adapt to this reality.

In this article, we shed some light on this important policy issue by formally modeling wireless competition under a spectrum constraint. Our findings reveal that while some in Washington policy circles increasingly view rising industry concentration (i.e., rising values of the Hirschman Herfindahl Index or "HHI") in the mobile wireless industry as a bellwether of poor market performance, the addition of a spectrum crunch to standard models of competition turns this standard, textbook view of market structure and performance on its head. Indeed, our analysis finds that under a binding spectrum constraint, competition among few firms will produce *lower* prices than competition among many firms, and will possibly increase sector investment and employment. As a result, given spectrum exhaust, policies that aggressively seek to engineer entry into the mobile

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7. NAT'L TELECOMMS. & INFO. ADMIN., PLAN AND TIMETABLE TO MAKE AVAILABLE 500 MEGAHERTZ OF SPECTRUM FOR WIRELESS BROADBAND, at ii-iii (2010) [hereinafter NTIA REPORT], *available at* http://www.ntia.doc.gov/legacy/reports/2010/TenYearPlan_11152010.pdf; *see also* Andrew M. Seybold, *Seybold's Take: Finding 500 MHz of Spectrum*, FIERCE WIRELESS (Aug. 2, 2010), http://www.fiercewireless.com/story/seybolds-take-finding-500-mhz-spectrum/2010-08-02 ("Finding 300 MHz of spectrum that will support broadband technologies will not be easy and the FCC certainly will have its hands full trying, even with the Executive Order approving these spectrum allocations.").

8. Middle Class Tax Relief and Job Creation Act of 2012, Pub. L. No. 112-96 §§ 6402-03, 126 Stat. 156, 201-30; *but cf.* Julius Genachowski, Chairman, FCC, Remarks at the 2012 Consumer Electronics Show 8-9 (Jan. 11 2012), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-311974A1.pdf (remarking on proposed statutory limits to flexibility of the FCC in optimizing auctioned spectrum allocation); Reed Hundt, *Message to Congress: With All Due Respect, If It Ain't Broke Don't Fix It,* CABLE360 (Dec. 15, 2011), http://www.cable360.net/ct/news/ctreports/commentary/Message-To-Congress-With-All-Due-Respect-If-It-Aint-Broke-Dont-Fix-It_49928.html.

9. NATIONAL BROADBAND PLAN, *supra* note 2, at 79 ex. 5-3 (summarizing years from first step until available for use: Cellular (11 years); PCS (6 years); Educational Broadband Service/Broadband Radio Service (10 years); 700 MHz (13 years); AWS-1 (6 years)).

10. *Id.* at 10, 88 (stating that the FCC seeks 120Mhz from broadcasters but concludes that the industry actually needs 500 Mhz).

market—such as efforts to impede incumbent carriers from acquiring more spectrum via either auction or acquisition—may do harm rather than good.

Our article is outlined as follows. First, we present some background material describing the looming spectrum exhaust, the government's expressed concerns about rising industry concentration, and the relevance of such details for antitrust and regulatory policy. Second, we present our theoretical model, which extends the Cournot framework to incorporate a special type of input which is *limitational* for the production of output (e.g., spectrum exhaust). Firms are taken to be capacity-constrained by their holdings of this input, and they use ordinary capital and labor inputs to produce output at or below their effective constraint. We assume that the maximal output rate of any firm is a convex, increasing function of its holding of the limiting factor (i.e., spectrum). That is, twice the spectrum holding permits more than twice the service to be delivered to consumers. We then analyze Cournot equilibria for key industry configurations, and demonstrate that under such plausible circumstances, industry output rates and consumer welfare may be increasing in the level of industry concentration. This result is counter to the standard view of competition in that under spectrum exhaust we find that few firms produce more output and sell that output at lower prices than do many firms. Concluding comments are provided in the final section.

II. BACKGROUND

In the coming decade, the federal government expects mobile wireless communications services to "be a key pillar of U.S. economic policy" and "a significant contributor to U.S. economic growth."[11] Certainly, consumer demand for mobile broadband services is rapidly growing, and mobile computing platforms are forecast to replace the desktop computer for many Americans.[12] As the demand for mobile data grows, however, so grows the capacity requirements of mobile broadband networks, and this capacity is closely linked to the amount of spectrum available to commercial wireless carriers.[13] By most measures, domestic mobile wireless carriers, today, fall short of their spectrum needs. According to the FCC, the estimated amount of additional spectrum needed

11. *Id.* at 75.

12. *See* MORGAN STANLEY RESEARCH, THE MOBILE INTERNET REPORT 6 (Dec. 15, 2009) (on file with the Federal Communications Law Journal); CTIA - THE WIRELESS ASSOCIATION, CTIA'S SEMI-ANNUAL WIRELESS INDUSTRY SURVEY (2011), *available at* http://files.ctia.org/pdf/CTIA_Survey_Year_End_2010_Graphics.pdf.

13. NATIONAL BROADBAND PLAN, *supra* note 2, at 84 ("More bandwidth begets more data-intensive applications which begets a need for more bandwidth."); FCC, MOBILE BROADBAND: THE BENEFITS OF ADDITIONAL SPECTRUM 6-10 (Oct. 2010) [hereinafter FCC TECHNICAL PAPER], *available at* http://download.broadband.gov/plan/fcc-staff-technical-paper-mobile-broadband-benefits-of-additional-spectrum.pdf.

per operator ranges from 40 to 150 MHz.[14] CTIA, an association of wireless carriers, forecasts that the industry will need an additional 800 MHz to satisfy rising demand.[15] In 2009, the total amount of auctioned spectrum was only 361 MHz.[16] The FCC estimates that there are 547 MHz of spectrum "currently licensed under flexible use rules, which allows for mobile broadband and voice services."[17] Thus, the near-term spectrum needs of wireless carriers well exceed the current total stock of spectrum assigned to commercial services. In the FCC's latest *CMRS Report*, the agency states the problem plainly:

> . . . the current spectrum forecast demonstrates that the amount of mobile data demanded by American consumers is likely to exceed the capacity of wireless networks in the near-term, and that meeting this demand by making additional spectrum available is likely to create significant value for the mobile economy. Specifically, . . . mobile broadband growth is likely to outpace the ability of technology and network improvements to keep up by an estimated factor of three, leading to a spectrum deficit that is likely to approach 300 megahertz within the next five years.[18]

The shortage of spectrum is also acknowledged by the industry's financial analysts.[19] Notably, the spectrum crisis is not limited to the U.S., and several international organizations have also expressed concerns about a looming spectrum crunch, and have done so for many years.[20]

In light of rising demand for mobile data and a limited inventory of available commercial spectrum, many believe that the most significant recommendation of the *National Broadband Plan* is to "[m]ake 500 megahertz of spectrum newly available for broadband within 10 years, of

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14. NATIONAL BROADBAND PLAN, *supra* note 2, at 84.

15. Reply Comments of CTIA at 2, A National Broadband Plan for Our Future, FCC GN Docket No. 09-51 (rel. Nov. 13, 2009), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7020348306.

16. Beard et al., *supra* note 1, at 663.

17. FCC TECHNICAL PAPER, *supra* note 13, at 15 ("547 MHz, in total, is currently licensed under flexible use rules, which allows for mobile broadband and voice services.").

18. Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Fifteenth Report*, FCC 11-103, para. 267 (2001) [hereinafter *15th Annual CMRS Report*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-103A1_Rcd.pdf.

19. *See*, *e.g.*, B. FELDMAN & D. MITCHELSON, DEUTSCHE BANK, COPING WITH THE SPECTRUM CRUNCH: PART 1 (Sept. 30, 2011) (on file with author) ("95% of wireless subscribers are supported by carriers that hold only 53% of licensed mobile spectrum" and "most carriers don't own enough spectrum to deliver competitive 4G services.").

20. Int'l Telecomm. Union [ITU], *Estimated Spectrum Bandwidth Requirements for the Future Development of IMT-2000 and IMT-Advanced,* Report ITU-R M.2078, 17, 26 (2006), *available at* http://www.itu.int/pub/R-REP-M.2078-2006.

which 300 megahertz should be made available for mobile use within five years."[21] Where this spectrum will come from remains unclear to this day, and finding large swaths of quality spectrum may prove more difficult than the authors of the *National Broadband Plan* predicted.[22] Many hope that some television broadcast spectrum, which is in the highly valued broadcast spectrum band, can be repurposed for mobile broadband use.[23] However, even though legislation was passed to give the FCC the authority to hold voluntary incentive auctions, history has shown that the bureaucratic implementation process is often slow and cumbersome.[24] Even optimistic estimates of the amount of spectrum that will be freed up by such plans falls short of industry requirements.[25] Thus, as the exact amount and delivery date of new broadcast spectrum in the auction pipeline is still very murky, acquiring spectrum resources by merger and acquisition through private transactions has become widely recognized as a sensible option for operators.[26]

However, the merger option as a solution to the spectrum shortage has been difficulty to pursue. Due to the high fixed and sunk costs of providing mobile wireless communications services, the industry has expectedly morphed into a relatively concentrated equilibrium industry structure (albeit with government approval every step of the way).[27] As a result, the question of who gets to acquire new spectrum, whether incumbent spectrum users or new entrants, is the subject of fierce political debate.[28]

According to FCC statistics, at the end of 2009, the HHI for the U.S. mobile wireless industry stood at about 2,800.[29] By the government's *Merger Guidelines* standards, the industry is classified as "Highly Concentrated," which is a label reserved for industries with an HHI

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21. NATIONAL BROADBAND PLAN, *supra* note 2, at XII.

22. NTIA REPORT, *supra* note 7, at 23-25.

23. Plans contemplate migrating about 120 MHz of broadcast spectrum. *See, e.g.*, *id.* at 8-10; NATIONAL BROADBAND PLAN, *supra* note 2, at 88-93, 102 n.82; Gross, *supra* note 6, at 1.

24. *See* NATIONAL BROADBAND PLAN, *supra* note 2, at 81-82, 100 nn.40-41.

25 *Id.* at 10, 88.

26. *See* Shara Tibken, *Verizon Defends AT&T Deal*, WALL ST. J. (Sept. 22, 2011), http://online.wsj.com/article/SB10001424053111903703604576584902573418910.html ("'I have taken the position that the AT&T merger with T-Mobile was kind of like gravity,' [Verizon CEO] Mr. McAdam said. 'It had to occur, because you had a company with a T-Mobile that had the spectrum but didn't have the capital to build it out. AT&T needed the spectrum, they didn't have it in order to take care of their customers, and so that match had to occur.'"); Sarah Frier, *Telecom Carriers Must Combine to Compete, Providence Equity Says*, BLOOMBERG (Sept. 27, 2011), http://www.bloomberg.com/news/2011-09-27/telecom-carriers-must-combine-to-compete-providence-equity-says.html.

27. *See* George S. Ford et al., *Competition After Unbundling: Entry, Industry Structure, and Convergence,* 59 FED. COMM. L.J. 331 (2007).

28. *See* Beard et al., *supra* note 1.

29. *15th Annual CMRS Report*, *supra* note 18, at para. 395.

exceeding 2,500.[30] That said, when talking about "concentration," it is also important to keep things in perspective. For example, an HHI of 2,500 equates to 4 equal-sized firms, and the FCC's most recent *CMRS Report* reveals that, by Census Block, 94.3% of all Americans have access to at least four or more mobile wireless providers, and 89.6% of all Americans have access to at least five or more wireless providers.[31] So, while the industry may be classified as "Highly Concentrated" by non-industry-specific standards like the *Merger Guidelines*, consumers in fact have numerous options when choosing a wireless carrier. Moreover, the *Fourteenth* and *Fifteenth CMRS Reports* presented compelling evidence of good market performance in the mobile wireless industry in terms of price and innovation,[32] forcing the agency to conclude:

> Shares of subscribers and measures of concentration are not synonymous with market power—the ability to charge prices above the competitive level for a sustained period of time. . . . [M]arket concentration, by itself, is an imperfect indicator of market power.[33]

Thus, while concentration statistics may have their uses, economic theory,[34] antitrust,[35] and even the FCC's own precedent[36] all make clear that such data is not the end of the analysis—it is merely the beginning.

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30. *Id*. at 9679; *see also* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 5.3 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html.

31. *15th Annual CMRS Report*, *supra* note 18, at 9881 chart 46..

32. *See generally* Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services, *Fourteenth Report*, FCC 10-81, *passim* (2010) [hereinafter *14th Annual CMRS Report*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10-81A1.pdf; *15th Annual CMRS Report*, *supra* note 18, *passim*.

33. *14th Annual CMRS Report, supra* note 32, at para. 55.

34. *See generally* Duncan Cameron & Mark Glick, *Market Share and Market Power in Merger and Monopolization Cases*, 17 MANAGERIAL & DECISION ECON. 193 (1996) (legal precedent requiring courts to draw inferences about market power based primarily or exclusively on market shares and/or market concentration can often be misleading; the only alternative to such bright-line rules is to utilize modern economic tools to undertake more extensive competitive analyses); *see also* MICHAEL. L. KATZ & HARVEY S. ROSEN, MICROECONOMICS 508 (Gary Nelson ed., 2d ed. 1994); John E. Kwoka, Jr., *Regularity and Diversity of Firm Size Distribution in U.S. Industries*, 34 J. ECON. & BUS. 391 (1982); Ford et al., *supra* note 27; Beard et al., *supra* note 1; George S. Ford & Lawrence J. Spiwak, *The Need for Better Analysis of High Capacity Services*, 28 J. MARSHALL J. COMPUTER & INFO. L. 343 (2012).

35. *See, e.g.*, United States v. Baker Hughes Inc., 908 F.2d 981, 986 (D.C. Cir. 1990) (stating that market share statistics are "misleading" in a "volatile and shifting" market); S. Pac. Commc'ns Co. v. AT&T*,* 740 F.2d 980, 1000 (D.C. Cir. 1984) (stating that when a "predominant market share may merely be the result of regulation, and regulatory control may preclude the exercise of market power . . . in such cases market share should be at most

Nevertheless, of late, the naive notion that high concentration *a fortiori* equals market power in communications markets is back in vogue. For example, in the Department of Justice's ("DOJ") comments to the FCC during the development of the *National Broadband Plan*, the DOJ unequivocally equated market performance to market concentration. The DOJ specifically recommended that the FCC "evaluat[e] the degree of competition" by doing little more than "measuring market concentration in various local markets using the HHI."[37] Similarly, in evaluating the proposed merger between AT&T and T-Mobile, the DOJ's *Complaint* consists of little more than a review of the HHI data and boilerplate commentary on the ills of high concentration.[38] Interestingly, in stark contrast to these views, many industry financial analysts believe there is an *excessive* level of competition in the mobile wireless industry.[39]

The current FCC appears to concur with the DOJ's view. For example, the FCC staff's condemnation of AT&T's proposed acquisition of T-Mobile made absolutely no inquiry into the effect of spectrum exhaust on industry structure and performance. Instead, the staff report summarily dismissed the merger because "the effect on spectrum concentration as a result of the [proposed merger] would be so substantial—well beyond what the Commission has seen to date—that significant competitive concerns are

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a point of departure in determining whether market power exists"); Metro Mobile CTS, Inc. v. New Vector Commc's Inc., 892 F.2d 62, 63 (9th Cir. 1989) ("Reliance on statistical market share in cases involving regulated industries is at best a tricky enterprise and is downright folly where . . . the predominant market share is the result of regulation.").

36. *See, e.g.,* AT&T Corp. to Be Reclassified as a Non-Dominant Carrier, *Order*, FCC 95-427 (1995), *available at* http://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1995/fcc95427.txt; NYNEX Corp. and Bell Atl. Corp. for Consent to Transfer Control, *Memorandum Opinion and Order*, FCC 97-286, para. 143 (1997) (citing another source), *available at* http://transition.fcc.gov/Bureaus/Common_Carrier/Orders/1997/fcc97286.txt (stating that "market share and concentration data provide only the starting point for analy[sis]"); NATIONAL BROADBAND PLAN, *supra* note 2 at 37 ("The lack of a large number of . . . facilities-based providers does not necessarily mean competition among broadband providers is inadequate . . . Moreover, modern analyses find that markets with a small number of participants can perform competitively . . . ."); Special Access Rates for Price Cap Local Exchange Carriers, *Order and Notice of Proposed Rulemaking*, FCC 05-18, para. 101 (2005), ("A high market share does not necessarily confer market power, but it is generally a condition precedent to a finding of market power.").

37. Ex Parte of the U.S. Dep't of Justice at 13, A National Broadband Plan for Our Future, GN Docket No. 09-51 (rel. Jan. 4, 2010), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7020355122.

38. *See* Compl., United States v. AT&T, Inc. et al., No. 1:11-cv-01560 (D.D.C. Aug. 31, 2011), *available at* http://www.justice.gov/opa/documents/Justice-ATT-TMobile-Complaint.pdf.

39. *See, e.g.,* Bengt Nordstrom, *Mobile Operators: Too Many to Make Money,* BUS. WK. (Mar. 31, 2010), http://www.businessweek.com/globalbiz/content/mar2010/gb20100331_755059.htm; James K. Glassman, *Uncle Sam Should Leave Wireless Companies Alone,* FORBES (July 16, 2009), http://www.forbes.com/2009/07/16/wireless-telecom-government-opinions-contributors-james-glassman.html (citing a recent report that stated that "there are too many competitors").

raised."[40] As a result of such "high concentration and a substantial increase in subscriber and spectrum concentration in most individual CMA markets and nationally," the agency's staff concluded that "under traditional structural analysis used to apply the antitrust laws, AT&T's proposed acquisition of T-Mobile is presumed to create or enhance market power or facilitate its exercise, creating significant potential for competitive harm in most retail mobile wireless services markets, to the detriment of consumers."[41]

Furthermore, as we detailed in our paper *A Policy Framework for Spectrum Allocation in Mobile Communications,*[42] the current FCC has a demonstrated proclivity for imposing incumbent-exclusion rules. An example of this is the way the FCC approved the merger of the firm that is now known as LightSquared.[43] The agency's approval came with a curious "voluntary" commitment, generally considered to be mandatory, wherein LightSquared agreed that it would not resell any spectrum to the two largest commercial carriers without prior FCC approval.[44] Given that LightSquared's stated business plan is to provide wholesale capacity to retail carriers,[45] this *de facto* spectrum cap seems odd indeed. Moreover, this voluntary commitment had no apparent connection to any specific anticompetitive harm revealed in the order's competitive analysis. Most troubling is the fact that this "voluntary" commitment was negotiated and adopted behind closed doors on the day the order was released, so that the public had no ability for notice and comment.[46]

The total absence of any integration of a spectrum constraint into any implicit or explicit models of concentration and market performance (particularly from the expert agency directly charged with understanding and managing the complexities of spectrum allocation) in the current policy debate is highly troubling. For some, high industry concentration implies poor market performance and thus lower economic welfare.[47] This strict

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40. Application of AT&T Inc. and Deutsche Telecom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, *Staff Analysis and Findings*, DA 11-1955, para. 45 (2011), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-1955A2_Rcd.pdf.

41. *Id.* at para. 47.

42. Beard et al., *supra* note 1.

43. SkyTerra Comm'ns, Inc., Transferor, and Harbinger Capital Partners Funds, Transferee, Applications for Consent to Transfer of Control of SkyTerra Subsidiary, LLC, *Memorandum Opinion and Order and Declaratory Ruling*, DA 10-535 (2010) [hereinafter *Harbinger Order*], *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-10-535A1_Rcd.pdf.

44. *See id.* at para. 72.

45. LIGHTSQUARED, http://www.lightsquared.com/about-us/ (last visited Oct. 6, 2012) ("LightSquared will offer network capacity on a wholesale-only basis to a variety of business partners.").

46. *See Harbinger Order, supra* note 43, at para. 72.

47. JAMES W. FRIEDMAN, OLIGOPOLY THEORY 35 (Phyllis Deane & Mark Perlman eds., 1983).

structure-to-performance link is based, in part, on the predictions of the Cournot model of competition, which says that prices and profits will decline as the number of firms increase.[48] The Cournot model does not, however, provide unambiguous predictions on other outcomes such as industry quality or innovativeness.[49] Outside the Cournot framework, it is not always the case that high concentration leads to relatively poorer market performance; but in the policy debate, particularly in traditionally regulated and highly concentrated industries, the predictions of the simple, generic Cournot model are king.[50] Since the Supreme Court has stated that economic "analysis must always be attuned to the particular structure and circumstances of the industry at issue," we believe a formal analysis of the effect of a capacity constraint on the relationship between market concentration and market performance is of significant policy relevance to both the FCC and the DOJ in the future.[51] We provide such an analysis in the next section.

III. COURNOT COMPETITION UNDER A CAPACITY CONSTRAINT

The Cournot model has been the primary theoretical framework for the analysis of industrial competition, and serves as the benchmark model of competition at both antitrust and regulatory agencies.[52] The reason is that, even in its simplest guise, the Cournot model produces a set of plausible relationships between industry structure and welfare relevant market statistics such as output, price and profit rates. In general, market equilibrium price falls and output rises as n, the number of firms, increases. Likewise, firm profits and aggregate industry profits fall as the market becomes less concentrated.[53] The relationships between n and prices,

48. *Id.* at 44.

49. This outcome may also arise with product differentiated price competition (*i.e.,* Bertrand Competition). *See generally id.*

50. *See generally id.*

51. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, L.L.P., 540 U.S. 398, 399 (2004); *see also id.* at 411 (The Court specifically noted that "[p]art of that attention to economic context is an awareness of the significance of regulation. As we have noted, 'careful account must be taken of the pervasive federal and state regulation characteristic of the industry.'" Thus, as spectrum allocation is 100% controlled by government, there will always be an inherent tension between what policymakers want the equilibrium number of firms to be and what the economics dictate the efficient equilibrium number of firms should be.).

52. Beard et al., *supra* note 1, at 642 n.14.

53. The appeal of the model is increased by several important extensions of the analysis. For example, Kreps and Scheinkman (1983) demonstrate that the Cournot model can be consistent with a more realistic, two-stage game in which firms first make binding capacity investments and, under complete information, then engage in a Bertrand style pricing game. David M. Kreps & José A. Scheinkman, *Quantity Precommitment and Bertrand Competition Yield Cournot Outcomes*, 14 BELL J. ECON. 326, 326-37 (1983). Despite the extreme substitutability between firms' outputs in this scenario, the Cournot quantities and price can be obtained as an industry equilibrium at least so long as output

output and profits is subject to diminishing marginal returns, so that as *n* rises, the additional effect on market outcomes becomes smaller and smaller (see Figure 1, Panel B, below).

We consider the generic case of an *n*-firm Cournot industry in which firms hold shares (denoted later by "*s*") in some finite pipeline or platform used to deliver services to buyers. In particular, no individual firm can sell more than some quantity of output determined directly and solely by their allocation of the limiting factor. However, unlike the typical case of a capacity constraint, we allow that the quantity of goods potentially sold can be an increasing, convex function of the share, so that there is, in effect, a kind of "scale economy" in the share.[54] Nevertheless, we will maintain the conventional assumption that, if adequate capacity is available, output may be produced at constant marginal and average costs.[55]

We determine and then consider symmetric Cournot equilibria for the resulting market, and make the distinction between equilibria that are output constrained, and those that are not. We consider how the nature of the implied equilibria can change as the size of the market for firm services gets larger, but the availability of the limiting input does not. In particular, for large enough levels of product demand, the output constraints are binding in the Nash equilibrium so that total market output will decline (and price will rise) when there are more firms inefficiently sharing the available input.[56] This result suggests that, in such markets, decreases in market concentration may, as in other cases of scale economies in the conventional sense, raise prices, reduce sales, reduce employment (labor usage) and reduce consumer welfare.

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rationing is efficient. Carl Davidson & Raymond Deneckere, *Long-Term Competition in Capacity, Short-Run Competition in Price, and the Cournot Model*, 17 RAND J. ECON 404, 404-15 (1986). Additionally, the Cournot model is solvable by iterated elimination of dominated actions, and the Cournot quantities are obtained uniquely. Thus, although the Cournot model does not really explain how equilibrium prices are implemented, the properties of the solution are appealing and more general than might first be apparent.

54. *See* Joint Declaration of Jeffrey H. Reed and Nishith D. Tripathi at 6, Applications of AT&T Inc. and Deutsche Telekom AG for Consent to Assign or Transfer Control of Licenses and Authorizations, WT Docket No. 11-65 (rel. June 10, 2011), *available at* http://fjallfoss.fcc.gov/ecfs/document/view?id=7021686851; Kevin Fitchard, *Does blocking AT&T's merger hurt the future of mobile broadband?*, CONNECTED PLANET (Sept. 6, 2011), http://connectedplanetonline.com/3g4g/news/Does-blocking-AT-Ts-merger-hurt-the-future-of-mobile-broadband-0906 ("Regardless of how AT&T would exercise those economies of scale, there's no question they would exist. AT&T could build much more high-capacity networks by combining it and T-Mobile's advanced wireless services (AWS) spectrum. It could build that high-capacity network on a single infrastructure, rather than divide it among two separate network builds. That network could not only support greater connection speeds to the device, but it could support many more of those connections simultaneously—all at a lower cost per bit.").

55. *See*, *e.g.*, Martin K. Perry & Robert H. Porter, *Oligopoly and the Incentive for Horizontal Merger*, 75 AM. ECON. REV. 219, 220-21 (1985).

56. *Id.* at 222.

A. Supply Side

We begin by considering a representative firm that is able to produce some service, q, using the classic Cobb-Douglas production technology:[57]

$$q = \sqrt{kl}\,, \tag{1}$$

where k and l are capital and labor inputs. The inputs can be purchased in any desired quantity for uniform prices r and w, respectively. The profit maximizing firm will attempt to minimize production costs for any desired output level (q):

$$c(q) = \min_{l,k}\{wl + rk\} \quad \text{such that} \quad \sqrt{kl} = q. \tag{2}$$

The solution to the firm's minimization problem yields input demands and a cost function that are all linear in the desired level of output (q):

$$l_d = q\sqrt{\frac{r}{w}}\,, \tag{3}$$

$$k_d = q\sqrt{\frac{w}{r}}\,, \tag{4}$$

$$c(q) = \beta q, \quad \text{where} \quad \beta = 2\sqrt{wr}\,. \tag{5}$$

Let S be the total industry supply of the finite shared input, and let s be the amount available to our representative firm. Our primary interest is in allowing the level of s to determine the firm's maximum salable output. Furthermore, we want to allow for the existence of scale effects in this relationship. Since diseconomies seem uninteresting and quite unlikely, we focus instead on the case of positive scale effects. For simplicity, we define the firm's maximum salable output level, $q_{\max}$, as:

$$q_{\max} = s^{1+\sigma}, \tag{6}$$

where σ is a positive constant. Thus, the maximum amount a firm can sell to consumers rises more than proportionally with its share of the finite resource, S.

57. Gerald Beer, *The Cobb-Douglas Production Function,* 53 MATHEMATICS MAG. 44, 44 (1980).

B. Demand Side

We turn next to the nature of product demand. We will restrict attention to the case of identical goods, so there is but a single market price, P, for output.[58] (Allowing for mild, symmetric differentiation is a relatively straightforward extension.) We wish to have the simplest representation of demand that is, however, "scalable," so that we can examine the effects of a large market size on the nature of the resulting equilibrium and the effects of market structure on price, quantities, input use, and welfare. The proposed candidate market demand curve is characterized by:

$$P = A - Q/M, \tag{7}$$

where Q is total market quantity sold and A and M are positive parameters. In particular, increases in M allow us to examine the implications of market scale for equilibrium.

C. Equilibrium

We may now specify equilibrium for the Cournot game in which n of these representative firms select their quantities given the distribution of S among firms. We will deal with the symmetric case, but our analytical framework can also be extended to asymmetric circumstances. Hence, assume that each firm has an identical holding of s, so $s_i = S/n$ for all i. Broadly speaking, there are two possibilities: either the capacity constraints are binding at the "conventional" Cournot equilibrium point, or they are not (under symmetry, either all bind or none do). In the case in which the constraints are binding, no firm has any incentive to unilaterally reduce its output rate, since firm marginal revenue exceeds marginal cost at this point. It is, in fact, irrelevant how severe the constraint is: given the assumptions on cost and market demand, if all the other firms are producing levels of output that collectively are less than the Cournot point, then each firm wishes to expand, not contract, output, and the constraint is binding on him. Thus, the symmetric supply of the individual firm will be:

$$q^* = \min\left\{M\frac{(A-\beta)}{(n+1)}, \left(\frac{S}{n}\right)^{1+\sigma}\right\}. \tag{8}$$

The first expression in Equation (8) is the standard Cournot equilibrium output and the second expression is the capacity constraint.

Clearly, if the market is made to be relatively large (by sufficiently increasing M), then the first expression will be larger than the second and

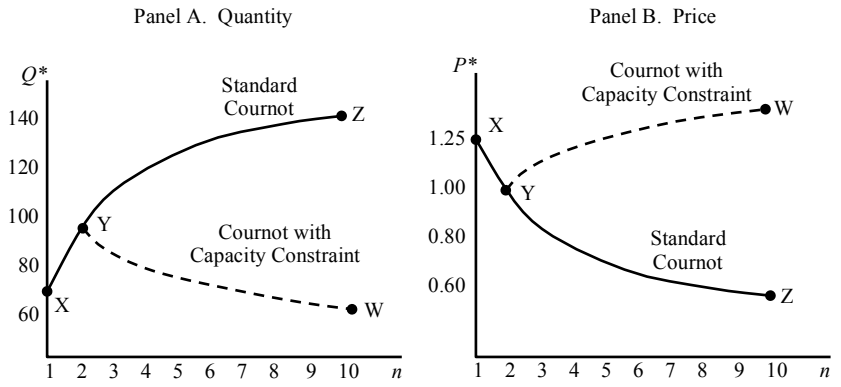
58. Owen A. Lamont & Richard H. Thaler, *Anomalies: The Law of One Price in Financial Markets*, 17 J. ECON. PERSP. 191, 191 (2003).

the firm's salable output constraint will be binding. Thus, in the case of a binding constraint, the total market output of services, Q^*, will be:

$$Q^* = nq^* = n\left(\frac{S}{n}\right)^{1+\sigma} = S\left(\frac{S}{n}\right)^{\sigma} \tag{9}$$

The result given by Equation (9) is illustrative of the combined effects of a binding S (with respect to the unconstrained Cournot quantity) and the posited existence of scale effects of any positive degree in the utilization of this resource. In particular, the market quantity of services is declining with the number of firms. Stated another way, when the constraints are binding, increases in concentration (declines in the number of firms) actually *increase* the market output of services—an outcome opposite that of the Cournot model absent such a constraint. As output rises, prices fall (by Equation 7).

Figure 1. Equilibrium Quantity and Price with Spectrum Constraint



In Figure 1, we illustrate the relationship between the equilibrium outcomes and the number of firms for some specific parameter values.[59] Both the standard Cournot and capacity-constrained Cournot outcomes are illustrated. In Panel A, we have equilibrium industry quantity (Q^*) measured on the vertical axis and the number of firms, or the inverse of the HHI given symmetry, along the horizontal axis. The standard Cournot equilibrium quantity (without a capacity constraint) is illustrated by the line segment labeled XYZ in Panel A. As n rises, quantity rises—the standard result. The line segment labeled XYW illustrates the equilibrium quantity when the capacity constraint is binding. At the chosen parameter values, the capacity constraint is binding at $n = 2$ (point Y). Thus, output rises as

59. Assumed parameter values for Equation (9) are: ($M = 100$); ($A = 2$); ($\beta = 0.5$); ($S = 45.73$); ($\sigma = 0.25$).

the number of firms increases from monopoly to duopoly, but then output falls (along segment YW) when the number of firms exceeds duopoly. So, while the standard Cournot-type framework holds that output is higher and prices lower with six firms than with two firms, under a spectrum constraint this need not be true. Indeed, for the chosen parameters, the six-firm outcome is essentially the same as the monopoly outcome. Price is lowest, and output highest, at duopoly (under the assumed parameter values).

In Panel B, we observe what happens to equilibrium price as the number of firms increase. In the standard Cournot case, price falls as the number of firms increases (line segment XYZ). Once the spectrum constraint is binding ($n = 2$), however, price rises as the number of firms increases, following line segment XYW. With a binding constraint, the more firms there are in the industry, the higher are prices.[60] *The spectrum constraint turns the standard thinking on the relationship between prices and concentration on its head—i.e., in the case of spectrum exhaust, fewer firms lead to lower prices.*

These figures illustrate clearly the primary results from adding a spectrum constraint to the standard Cournot model. If the constraint is binding, then equilibrium quantity is lower and the price is higher as the number of competitors increases. Obviously, the presence of a spectrum crunch requires substantial modification to the standard competitive model used in most cases by antitrust and regulatory agencies.

D. Jobs and Investment

The increase in market quantity generates a reduction in market prices and an increase in consumer welfare.[61] Furthermore, we see from Equation (3) that the labor demand curve is increasing in the quantity of services. Hence, when the market supply of services increases, the market demand for labor rises. The benefits are also likely to spill over into other markets as the output of services may be a key input into the production of other products. Likewise, the increases in labor demand and employment generate additional household income that increases demand in other

60. Indeed, there is already mounting anecdotal evidence that firms are responding to spectrum constraints with price to ration available capacity. *See, e.g.,* FELDMAN & MITCHELSON, *supra* note 19, at 2 (on file with author) ("The 'spectrum crunch' is real . . . [and] carriers are coping the best they can . . . [via] price increases/tiering, throttling, higher capex budgets, greater use of Wi-Fi and infrastructure sharing."); Mark Hamblen, *Sprint Adds $10 Monthly Data Charge to New Smartphone Users,* PCWORLD (Jan. 18, 2011), http://www.pcworld.com/article/216915/sprint_adds_10_monthly_data_charge_to_new_smartphone_users.html; Kevin C. Tofel, *Verizon Unplugging Unlimited Plans July 7*, GIGAOM (July 5, 2011), http://gigaom.com/mobile/verizon-unplugging-unlimited-plans-july-7; David Twiddy, *Virgin Mobile Raises Price of Unlimited Data plan, Curbs Big Users,* KANSAS CITY BUS. J. (Feb. 15, 2011), http://www.bizjournals.com/kansascity/blog/2011/02/virgin-mobile-raises-price-of.html.

61. *See* Perry & Porter, *supra* note 55, at 219.

markets. All of these impacts reflect an initially excessively atomized distribution of the resource *S* among too many firms.[62] In other words, industry structure is inefficient and a more concentrated structure is preferred from the standpoint of social welfare.

The results described above are *not* just a reformulation of the observation that, with scale economies present, market structure has an ambiguous effect on welfare due to the tradeoff between production costs/scale economies and the degree of price competition. This is apparent because the use of labor and capital inputs in production will *rise* if the industry becomes more concentrated. Usually, cost savings arising from a merger will tend to suppress input use due to direct gains in the efficiency of factors.[63] In the case at hand, use of both labor and capital inputs is proportional to quantity, i.e., there are constant returns to scale in production. The bottleneck arises because of the limitation imposed by the scarce factor *S*, the means by which the firms are able to distribute services to consumers. There is a difference between the technology of production, and the technology by which the service is delivered to consumers, a distinction that recalls Scherer's discussion of cost savings from mergers and the roles of plant-level and firm-level synergies.[64]

E. Spectrum Technology

As noted above, firms are taken to be capacity-constrained by their spectrum holdings, and we assumed that the maximal output rate of any firm is a convex, increasing function of its spectrum holdings, as characterized in Expression (6). It is not this particular assumption, however, that breaks the link between price and the number of competitors. Figure 1 can be used to illustrate this fact. If we assume there are constant returns to spectrum holdings ($\sigma = 0$ from Exp. 6), then the line segments YW in Panel B will be horizontal rather than upward sloping. In other words, once the constraint is binding, price is unrelated to the number of competitors since it does not matter how the spectrum is divided among industry participants.

F. The Asymmetric Case

We have thus far restricted attention to symmetric equilibria, and the question naturally arises as to the consequences of changes in market structure when that structure is asymmetric, as is sometimes the case in

62. *See supra* Equation (3).

63. Such effects are firm-specific and need not apply to the industry. *See* George S. Ford & Lawrence J. Spiwak, *Wireless Mergers and Employment: A Look at the Evidence*, PHOENIX CENTER POL'Y PERSP. 11-02, at 2 (2011), *available at* http://www.phoenix-center.org/perspectives/Perspective11-02Final.pdf.

64. FREDERIC M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 162-67 (Houghton Mifflin Co. ed., 3d ed. 1990).

practical application. This is a relatively difficult problem to solve in a general context because of the possibility that some firms may face binding constraints at equilibrium, while others may not. Very specific applications are straightforward in a numerical context. The important ideas from the symmetric case are still at work even in an asymmetric context. When output is capacity constrained and there are economies of scale in the use of the scarce factor, a reduction in firms and a more efficient distribution of the scarce factor can generate an increase in market quantity.[65]

G. Caveats

Our analysis is based on a Cournot model of competition; a choice based on the practical reality that the Cournot model is the foundation for most regulatory and antitrust policy. We note, however, that the Cournot set-up, at least in its more tractable formulations, has several practical defects as a policy tool. Perhaps the most obvious failing in this regard is its application in the analysis of mergers, which is the primary mechanism in the U.S. by which to consolidate spectrum holdings among fewer firms.[66] Indeed, it is difficult to rationalize mergers in the Cournot model.[67] While the merger of two firms creates a firm with higher profits than those firms existing prior to the merger and industry profits rise, the profit of the merged firm is less than two times the profit of the firms existing before the combination except in the case where a merger results in a monopoly.[68] Thus the real beneficiaries of such mergers are the non-merging firms, because they reap much of the profit arising from a reduction in the equilibrium number of firms. As such, there are many mergers that raise industry profits, but insufficient incentives exist for them to occur.

A fundamental problem with mergers in simple Cournot models is that the merged firm may not look any different than those that did not merge: only the number of firms has changed. Perry and Porter (1985) note that the difficulty arises from a lack of any effective distinction between the merger partners and the other sellers.[69] They correct for this defect by proposing that industry firms own an input (termed "capital") that they bring to any merger in which they participate. Starting then from a

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65. Such outcomes may be relevant to the analysis of spectrum swaps and divestitures.

66. *See, e.g.,* JASON B. BAZINET & MICHAEL ROLLINS, CITI EQUITIES, WIRELESS SUPPLY AND DEMAND (Sept. 22, 2011) (on file with the Federal Communications Law Journal) ("[L]arger carriers may need to acquire smaller competitors with underutilized spectrum holdings.").

67. *See* Stephen W. Salant et al., *Losses from Horizontal Merger: The Effects of an Exogenous Change in Industry Structure on Cournot-Nash Equilibrium*, 98 Q. J. ECON. 185, 187, 189, 196 (1983) (stating that in some cases, the joint profits of merged firms may be smaller than the sum of their profits prior to merger in the Cournot equilibrium).

68. George J. Stigler, *Monopoly and Oligopoly by Merger*, 40 AM. ECON. R. 23 (1950).

69. Perry & Porter, *supra* note 55, at 225.

symmetric configuration, the merged firms are *not* identical to those who do not merge: rather, they are "larger" in the sense that they possess more capital used in production. This capital lowers their costs and changes the nature of the resulting equilibrium. However, it is still true that the merged entity generally produces less than the sum of the partners' pre-merger outputs, but the increase in the combination's capital stock can be sufficient to overcome this disincentive. They further examine the role of the intensity of competition in merger incentives by introducing a conjectural variations parameter relevant to their comparative static results.

Finally, a central thesis of this paper is that there exists no tradeoff between market concentration and social welfare in a mobile wireless industry in which spectrum constraint is binding—even if we treat the firms as Cournot competitors. With spectrum exhaust, even when production itself is characterized by constant returns to scale, inefficient allocations of the spectrum to too many sellers reduces consumer welfare: prices are higher and quantities are lower than those arising from a more concentrated structure. This is not necessarily the case, however, when these constraints are *not* binding. In that circumstance, we get the usual Cournot-type results; but with that said, we also get the usual Cournot-type anomalies just mentioned. Without binding constraints on output delivery, mergers reduce social welfare and raise prices although, as usual, no incentive for merger exists.[70]

An important avenue for further study concerns the more general problem of asymmetric distributions of the scarce capacity variable, the precise consequences of this for the equilibrium, and the effects of mergers or other reductions in the number of firms. This issue is likely to require numerical methods for specialized cases or applications, but many of the key features brought to light by the symmetric case are likely to arise in many contexts.

IV. CONCLUSION

Whether we like it or not, as demand for wireless broadband continues to grow exponentially and the problem of spectrum exhaust is here to stay. As noted above, while policymakers are making laudable efforts to hold voluntary incentive auctions for broadcast spectrum and to free-up new government spectrum for commercial use, these measures are unlikely to provide either a quick or even an ultimately conclusive fix to the problem. Accordingly, the pressure for further industry consolidation remains strong.

In an effort to establish the relevance of spectrum exhaust on competition and regulatory policy, this article extends the standard Cournot framework by allowing firms to be capacity-constrained by their holdings

70. *See* Salant et al., *supra* note 67.

of the spectrum resource. We demonstrate that, under a binding spectrum constraint, industry output rates and consumer welfare may be *increasing* with the level of industry concentration. Put simply, *spectrum exhaust turns the standard thinking about the relationship between prices and concentration on its head—i.e., in the case of spectrum exhaust, fewer firms lead to lower prices.* As such, there exists no tradeoff between market concentration and social welfare for Cournot-type markets in which a constraint, like spectrum exhaust, limits market output to levels below the Cournot quantity. In the case of spectrum exhaust, too many sellers will reduce consumer welfare resulting in higher prices and lower quantities than those arising from a more concentrated structure. As a result, policies that impede incumbent carriers from acquiring more spectrum, either by auction or acquisition, may do harm rather than good.

We also demonstrate that, in this framework, increased market concentration does not necessarily result in declines in labor or capital usage, although whether one regards that as a good or a bad situation ultimately depends on the policy environment. For example, usually if mergers create savings, they do so by allowing the firm to produce more output with fewer inputs. Here, the technical conditions imposed on the firms by spectrum exhaust create a scale effect which can lead to increased usage of inputs (e.g. labor) due to total output expansion.

Our analysis has significant implications for spectrum policy going forward. First, in the face of continuing spectrum exhaust, policymakers should not view either spectrum acquisitions or intra-carrier mergers with automatic hostility. Indeed, given the complex economics of the wireless industry, responsible policymaking requires more than simple "headcounts" as an indicator of market performance. Equally as important, when those rare and unique occasions occur where the government does make new spectrum available for commercial use (e.g., voluntary incentive auctions), our analysis cautions against imposing incumbent-exclusion rules or set-asides in the hopes of creating "more" firms and de-concentrating the market. As we demonstrated, adding more firms to an already spectrum constrained market does not help matters, but puts upward pressure on prices and reduces quality.

In sum, our analysis again demonstrates that the laws of economics, and not the desires of policymakers or interest groups, will best dictate the most efficient market structure going forward. In the case of wireless broadband, this means, by definition, small numbers competition. Rather than trying to fight this trend, policymakers need to adapt their thinking to accommodate economic realities if they are serious about maximizing social welfare.

A First Amendment Look at the Statutory Ban on Tobacco Advertisements and the Self-Regulation of Alcohol Advertisements

Hugh Campbell*

TABLE OF CONTENTS

* J.D. Candidate, Indiana University Maurer School of Law, May 2013.

I. INTRODUCTION

In 1970, Congress passed the Cigarette Labeling and Advertising Act which prohibited advertising of cigarettes on "any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."[1] The Federal Communications Commission ("FCC") "regulates interstate and international communications by radio, television, wire, satellite and cable in all 50 states, the District of Columbia and U.S. territories."[2] The prohibition was later amended to include a ban on advertising little cigars.[3] Unlike tobacco, alcohol advertisements are not prohibited.[4] Instead, broadcast alcohol advertising is only subject to self-regulation by private organizations.[5]

When the Cigarette Labeling and Advertising Act was passed, the Supreme Court was less than sympathetic to commercial speech First Amendment claims.[6] Since the passage of this Act, the Court has changed

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1. Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335 (2006).

2. *What We Do*, FCC, http://www.fcc.gov/what-we-do (last visited Aug. 19, 2012).

3. Little Cigar Act of 1973, Pub. L. No. 93-109, § 3, 87 Stat. 352 (codified as amended at 15 U.S.C. § 1335 (2006)).

4. David Oxenford, *Will You Drink to That? – Advertising Liquor on Broadcasting Stations*, BROAD. L. BLOG (Nov. 30, 2007), http://www.broadcastlawblog.com/2007/11/articles/advertising-issues/will-you-drink-to-that-advertising-liquor-on-broadcast-stations/ ("Note that, though there are not FCC regulations on alcohol advertising there are still some limits on those ads. Like the beer ads about which we recently wrote, there are voluntary guidelines from alcohol trade groups (often used as a guide by the FTC in making a determination as to whether an ad is unfair or deceptive) that restrict alcohol advertising to stations and programs where children are less likely to be in the audience (shooting for audiences where at least 70% of the listeners or viewers are above legal drinking age). FTC decisions and the trade association voluntary rules also stress showing safe, not abusive, drinking in ads. Many states also have restrictions through law or regulation on certain types of alcohol ads (e.g. happy hour ads, two for one specials, even liquor-by-the-drink ads), so broadcasters and other electronic media companies should do a little research before taking every ad that comes their way. But, for the most part, the acceptance now of these ads by network-owned stations show that any bar to such ads is close to completely falling.") (emphasis omitted).

5. FED. TRADE COMM'N, SELF-REGULATION IN THE ALCOHOL INDUSTRY 2 (2008), *available at* http://www.ftc.gov/os/2008/06/080626alcoholreport.pdf.

6. *See* Valentine v. Chrestensen, 316 U.S. 52, 54-55 (1942) ("This court has unequivocally held that the streets are proper places for the exercise of the freedom of communicating information and disseminating opinion and that, though the states and municipalities may appropriately regulate the privilege in the public interest, they may not unduly burden or proscribe its employment in these public thoroughfares. We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with,

its Commercial Speech Doctrine and has become friendlier to parties challenging a regulation based on the First Amendment.[7] Currently, the Court's commercial speech test comes from *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[8] The Court set out a four-prong test, henceforth referred to as the *Central Hudson* test, for First Amendment claims in the commercial speech setting:

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.[9]

Because tobacco advertising regulations were enacted by Congress[10] and deal with the broadcast medium,[11] the Court will be more deferential in its First Amendment analysis. After taking a closer look at the Court's First Amendment Doctrine, it becomes clear why the Supreme Court would uphold the ban on tobacco advertising in the broadcast medium but would overturn a similar ban on alcohol advertising. The regulation of these two vices can be distinguished based on the substantial governmental interest prong of the *Central Hudson* test.[12] Due to the destructive nature of tobacco,[13] the government has a much stronger interest in banning its advertisement compared to alcohol.

Part I is a summary of this note. Part II provides an overview of current First Amendment Commercial Speech Doctrine and how the Court evolved to this point. In Part III of this note, the social and legal history of tobacco and alcohol, as well as the health effects of each, are discussed. In

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the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.").

7. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 569-70 (1980).

8. *Id.* at 564.

9. *Id.*

10. Blodgett v. Holden, 275 U.S. 142, 148, (1927).

11. Capital Broad. Co. v. Mitchell, 333 F. Supp. 582, 584 (D.D.C. 1971).

12. *Cent. Hudson*, 447 U.S. at 564.

13. *See, e.g.*, World Health Org. [WHO], *WHO Report on the Global Tobacco Epidemic, 2011*, at 8 (2011), *available at* http://whqlibdoc.who.int/publications/2011/9789240687813_eng.pdf.

Part IV, the Commercial Speech Doctrine is applied to tobacco and alcohol, showing how the ban on alcohol and tobacco advertising would be treated under the Court's current First Amendment Doctrine. Part V concludes that a complete ban on tobacco advertising in broadcasting would be held constitutional while a similar ban on alcohol would be found unconstitutional due to the severe health effects from any amount of smoking.

II. OVERVIEW OF THE FIRST AMENDMENT AND COMMERCIAL SPEECH

The First Amendment of the United States Constitution states that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[14] In 1942, the Supreme Court was faced with a First Amendment claim to commercial speech.[15] This was the first case in which the Supreme Court reached the conclusion that the Constitution does not impose any restraint on government regulation of purely commercial advertising.[16]

In *Valentine v. Chrestensen*, the owner of a United States Navy submarine moved to New York, where he set up the submarine as an attraction.[17] To promote this attraction, the owner printed out handbills for distribution.[18] He was advised by the Police Commissioner that distribution of commercial handbills was not allowed on city streets.[19] To avoid this law, the owner of the submarine printed two-sided handbills, one side had an advertisement and the other a criticism of city rules.[20] After the submarine owner was stopped from distributing the handbills, he brought suit in order to enjoin the city from stopping his distribution.[21]

The suit reached the Supreme Court after the lower federal courts granted an injunction in favor of the submarine owner.[22] The Court reversed the Circuit Court decision and held that commercial speech is outside of the protection granted by the First Amendment.[23] The Court held:

> We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial

14. U.S. CONST. amend. I.
15. Valentine v. Chrestensen, 316 U.S. 52, 54 (1942).
16. Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 2 (2000).
17. *Valentine*, 316 U.S. at 52-53.
18. *Id.*
19. *Id.*
20. *Id.* at 53.
21. *Id.* at 54.
22. *Id.*
23. *Id.* at 55.

> advertising. Whether, and to what extent, one may promote or pursue a gainful occupation in the streets, to what extent such activity shall be adjudged a derogation of the public right of user, are matters for legislative judgment. The question is not whether the legislative body may interfere with the harmless pursuit of a lawful business, but whether it must permit such pursuit by what it deems an undesirable invasion of, or interference with, the full and free use of the highways by the people in fulfillment of the public use to which streets are dedicated.[24]

In 1976, the Supreme Court repudiated *Valentine v. Chrestensen*.[25] The Court was given the chance to change the Commercial Speech Doctrine in a case brought by prescription drug consumers, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc*.[26] The Virginia State Board of Pharmacy regulated pharmacists through a licensing system.[27] The Board restricted price advertising of prescription drugs to preserve the professional standards of pharmacists.[28]

The Court held that the First Amendment protects commercial speech.[29] The Court held that a category of speech must be distinguished by content, not its commercial character, to fall outside the protection of the First Amendment.[30]

The Court also found that the prescription drug consumers had standing to bring suit due to their First Amendment interest in receiving drug information.[31] The Court then weighed the consumer's right to receive information against the Board's justification in restricting price advertising.[32] The Board believed that price advertisements would "make it impossible" for pharmacists to supply professional services and would cause consumers to make bad choices by going to lower quality

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24. *Id.* at 54-55.

25. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 776 (1976).

26. *Id.* at 748.

27. *Id.* at 751.

28. *Id.* at 752.

29. *Id.* at 770 ("Advertising, however tasteless and excessive it sometimes may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable.").

30. *Id.* at 761.

31. *Id.* at 763 ("As to the particular consumer's interest in the free flow of commercial information, that interest may be as keen, if not keener by far, than his interest in the day's most urgent political debate.").

32. *Id.* at 763-65.

pharmacists.[33] The Court found that the regulation protected citizens by keeping the consumers ignorant.[34] The Court overturned this paternalistic regulation, holding that the best way to protect the consumer is through the free flow of information.[35]

Finally, in bringing commercial speech within the area of protection of the First Amendment, the Court gave states the power to restrict advertisements if the advertisements are false or misleading, if illegal transactions are being advertised, or if the state is leaving open ample alternative channels of communication.[36] The Court also noted the complications arising from advertisements in broadcast media.[37]

Four years later, the Supreme Court set up a clearer four-part test for its new Commercial Speech Doctrine in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[38] The Court reiterated that commercial speech is protected by the First Amendment, but to a lesser extent than non-commercial speech.[39]

The commercial speech standard set up by the Court begins by determining whether the speech is protected by the First Amendment.[40] To be given First Amendment protection, the speech must concern a lawful activity and not be misleading.[41] If the speech is protected by the First Amendment, the government must show a substantial governmental interest for the speech restrictive regulation.[42] This substantial governmental interest must be directly advanced by the regulation, and the regulation must be no "more extensive than is necessary to serve that interest."[43]

During a time when the energy supply was a concern, New York enacted a law that completely banned Central Hudson, a utility company, from advertising use of its electricity.[44] Using the new *Central Hudson* test, the Court held that the total ban was more extensive than necessary to promote the State's interest in conservation.[45] Thus, the total ban on promotional advertising was unconstitutional under the First and Fourteenth Amendments.[46]

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33. *Id.* at 767-68.
34. *Id.* at 769.
35. *Id.* at 770, 784.
36. *Id.* at 771-72.
37. *Id.* at 770-72.
38. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980).
39. *Id.* at 562-63.
40. *Id.* at 566.
41. *Id.*
42. *Id.* at 564.
43. *Id.*
44. *Id.* at 571-72.
45. *Id.* at 566-71.
46. *Id.* at 572.

First, the Court determined that advertisements promoting energy use are protected under the First Amendment because they endorse a legal activity by means that are neither false nor misleading.[47] Second, the Court found that the two interests of the state, conservation of energy and fair and efficient energy rates, were both substantial.[48] Even though both interests were substantial, the Court found that only the interest in energy conservation was directly advanced by the advertising ban.[49] Finally, the Court held that the advertising ban was unconstitutional because the regulation was "more extensive than necessary."[50] The Court ruled that the regulation prohibited speech that would not promote energy use and that the state did not prove that less restrictive means would be less effective.[51]

Six years after the current commercial speech test was set up in *Central Hudson*, the Supreme Court applied the *Central Hudson* test to hold that the government's power to ban an activity outright includes the lesser power to ban its advertisement,[52] detracting from First Amendment protection of commercial speech. In *Posadas de Puerto Rico Associates v. Tourism Co*., the Court upheld a ban on casino advertising to locals.[53] This paternalistic advertising ban was found to be outside the protection of the First Amendment.[54] The advertising ban was held to be constitutional because while it concerned a lawful activity and was not misleading or fraudulent, the legislature's interest in preventing gambling was substantial.[55] Furthermore, the substantial interest was directly advanced by the regulation,[56] and the regulation was no more extensive than necessary.[57]

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47. *Id.* at 566.

48. *Id.* at 568-69.

49. *Id.* at 569 ("There is an immediate connection between advertising and demand for electricity. *Central Hudson* would not contest the advertising ban unless it believed that promotion would increase its sales. Thus, we find a direct link between the state interest in conservation and the Commission's order").

50. *Id.* at 570-71.

51. *Id.*

52. Posadas de P.R. Assocs. v. Tourism Co. of P.R., 478 U.S. 328, 345-46 (1986) ("Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and Carey and Bigelow are hence inapposite.").

53. *Id.* at 344.

54. *Id.*

55. *Id.* at 341 ("These are some of the very same concerns, of course, that have motivated the vast majority of the 50 States to prohibit casino gambling. We have no difficulty in concluding that the Puerto Rico Legislature's interest in the health, safety, and welfare of its citizens constitutes a 'substantial' governmental interest." (citing Renton v. Playtime Theatres, Inc., 475 U.S. 41, 54 (1986))).

56. *Id.* at 341-42 ("The Puerto Rico Legislature obviously believed, when it enacted the advertising restrictions at issue here, that advertising of casino gambling aimed at the residents of Puerto Rico would serve to increase the demand for the product advertised. We think the legislature's belief is a reasonable one, and the fact that appellant has chosen to litigate this case all the way to this Court indicates that appellant shares the legislature's view.").

The Court distinguished this case from two prior cases striking down total advertising bans because those cases involved conduct that was constitutionally protected.[58] The Court held that since Puerto Rico had the power to make gambling illegal, it also had the power to make the advertising of gambling illegal.[59] This greater-power-includes-the-lesser argument seemed to allow the Court to apply a more deferential form of the *Central Hudson* test to uphold the ban on casino advertising to locals.[60]

A decade after the deferential approach was used in *Posadas de Puerto Rico Associates v. Tourism Co*., the Court returned to the more vigorous version of the *Central Hudson* test in *44 Liquormart, Inc. v. Rhode Island*.[61] The Court in *44 Liquormart* invalidated two Rhode Island statutes.[62] These statutes completely banned price advertisements of alcohol outside stores selling alcohol, as well as alcohol advertisements on any form of broadcast media.[63] Once again, the First Amendment favored the free flow of information over paternalistic bans on the dissemination of speech.[64]

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57. *Id.* at 344 ("We think it is up to the legislature to decide whether or not such a 'counterspeech' policy would be as effective in reducing the demand for casino gambling as a restriction on advertising. The legislature could conclude, as it apparently did here, that residents of Puerto Rico are already aware of the risks of casino gambling, yet would nevertheless be induced by widespread advertising to engage in such potentially harmful conduct." (citing Capital Broad. Co. v. Mitchell, 333 F. Supp. 582, 585 (D.D.C 1971))).

58. *Id.* at 345-46 ("In *Carey* and *Bigelow*, the underlying conduct that was the subject of the advertising restrictions was constitutionally protected and could not have been prohibited by the State. Here, on the other hand, the Puerto Rico Legislature surely could have prohibited casino gambling by the residents of Puerto Rico altogether. In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* and *Bigelow* are hence inapposite.").

59. *Id.*

60. *Id.* at 346 ("As we noted in the preceding paragraph, it is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising.").

61. 517 U.S. 484, 510 (1996).

62. *Id.* at 516.

63. *Id.* at 489-50.

64. *See id.* at 503 ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good. That teaching applies equally to state attempts to deprive consumers of accurate information about their chosen products.").

III. HISTORY AND HEALTH EFFECTS OF TOBACCO AND ALCOHOL IN THE U.S.

A. Tobacco in the U.S.

The American Indians used tobacco, an indigenous plant, for many purposes.[65] Upon discovering the Americas, Christopher Columbus was introduced to the plant.[66] Tobacco became popular among Europeans because they believed it was a cure-all drug.[67]

The first commercial cigarettes were made in 1865.[68] Soon after, in 1881, a tobacco-rolling machine was invented.[69] By 1901, 3.5 billion cigarettes and six billion cigars were being sold worldwide.[70] In 1950, the first study that conclusively linked smoking to negative health effects was issued.[71]

In 2010, the United States had 13.3% of worldwide retail tobacco sales, totaling $95.6 billion.[72] Of this, $87.9 billion was from sales of cigarettes.[73] Twenty-seven percent of adults in the United States smoked tobacco in 2010, with 15.2% smoking daily.[74]

Tobacco is the leading cause of preventable deaths, killing nearly six million people a year.[75] In the U.S. alone, smoking causes 443,000 premature deaths per year, amounting for one out of every five premature deaths.[76] "Half of all those who continue to smoke will die from smoking-

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65. Vernellia R. Randall, *History of Tobacco*, UNIV. OF DAYTON (Aug. 31, 1999), http://academic.udayton.edu/health/syllabi/tobacco/history.htm.

66. *Id.*

67. *Id.*

68. *See* MARJORIE JACOBS, FROM THE FIRST TO THE LAST ASH: THE HISTORY, ECONOMICS & HAZARDS OF TOBACCO 8 (1997), *available at* http://healthliteracy.worlded.org/docs/tobacco/Tobacco.pdf (noting that the first commercial cigarette company was started by Washington Duke in North Carolina).

69. *Id.* (describing this machine's ability to roll 120,000 cigarettes a day).

70. Randall, *supra* note 65.

71. Gene Borio, *Tobacco Timeline: The Twentieth Century 1950 - 1999--The Battle is Joined*, TOBACCO.ORG, http://archive.tobacco.org/resources/history/Tobacco_History20-2.html (last updated Nov. 20, 2010).

72. DATAMONITOR, INDUSTRY PROFILE: TOBACCO IN THE UNITED STATES 2, 7-8 (2011) ("The tobacco market consists of the retail sale of cigarettes, loose tobacco, chewing tobacco, and cigars and cigarillos. The market is valued according to retail selling price (RSP) and includes any applicable taxes. Over 90% of the US tobacco sales come from three tobacco companies.").

73. *Id.*

74. *WHO Report on the Global Tobacco Epidemic, 2011*, *supra* note 13, app. V at 106.

75. *WHO Report on the Global Tobacco Epidemic, 2011*, *supra* note 13, at 8.

76. AM. CANCER SOC'Y, CANCER FACTS & FIGURES 2011, at 35 (2011), *available at* http://www.cancer.org/acs/groups/content/@epidemiologysurveilance/documents/document/acspc-029771.pdf ("The risk of developing lung cancer is about 23 times higher in male smokers and 13 times higher in female smokers, compared to lifelong nonsmokers.").

related diseases."[77] In addition, 8.6 million smokers experience chronic conditions related to smoking.[78] Any amount of smoking is harmful to the body.[79] Smoking in the U.S. costs ninety-six billion dollars in healthcare fees per year.[80]

Smoking tobacco also causes harm to nonsmokers.[81] Tobacco smoke contains sixty-nine cancer causing chemicals.[82] Exposure to secondhand smoke causes almost 50,000 nonsmoker deaths per year from lung cancer and heart disease alone.[83] Children exposed to high levels of secondhand smoke have the greatest chance of negative health effects.[84]

In 1955, the Federal Trade Commission ("FTC") first started regulating cigarette advertising by eliminating health references from advertisements.[85] In 1965, the Federal Cigarette Labeling and Advertising Act was enacted.[86] The FCC further regulated tobacco advertisements by applying the Fairness Doctrine to cigarette advertisements in 1967.[87] The Fairness Doctrine required stations broadcasting cigarette commercials to give equal air time to smoking prevention messages.[88] While the Fairness Doctrine is no longer FCC policy, federal law has banned all cigarette advertising on "any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."[89] This law went into effect on January 2, 1971.[90] The ban has since been amended to include advertising of little cigars.[91]

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77. *Id.*

78. *Id.*

79. *See* AM. CANCER SOC'Y, CANCER PREVENTION AND EARLY DETECTION FACTS AND FIGURES 2012, at 6 (2012), *available at* http://www.cancer.org/acs/groups/content/@epidemiologysurveilance/documents/document/acspc-033423.pdf ("Use of tobacco in any form may induce nicotine dependence and harm health.").

80. AM. CANCER SOC'Y, *supra* note 76, at 38 (from the years 2000 to 2004).

81. U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE, at i (2006), *available at* http://www.surgeongeneral.gov/library/reports/secondhandsmoke/fullreport.pdf.

82. *Id.* at 30.

83. *Id.* at 8.

84. *Health Effects of Exposure to Secondhand Smoke*, ENVTL. PROT. ADMIN., http://epa.gov/smokefree/healtheffects.html (last updated Nov. 30, 2011).

85. *See* Borio, *supra* note 71.

86. 15 U.S.C. § 1331 (2006).

87. Borio, *supra* note 71.

88. *Id.*

89. Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335 (2006).

90. *Id.*

91. *Id.*

B. Alcohol in the U.S.

Before Europeans came to the Americas, alcohol was relatively unknown to the Native Americans.[92] The early settlers drank mostly rum and home-brewed ales and ciders.[93] American's drinking tastes changed to whiskeys and lagers due to patriotism, British taxes, and German immigrants.[94] Alcohol was a large part of American life due to the lack of safe drinking water.[95] By the end of the eighteenth century, the United States drank 3.5 gallons of pure alcohol per capita annually.[96] By 1830, this increased to 3.9 gallons of pure alcohol.[97] This way of life came into tension with a large movement trying to ban alcohol in the United States.[98]

In 1919, the United States ratified the Eighteenth Amendment of the Constitution, which prohibited the manufacture, sale, or transportation of intoxicating liquors for beverage purposes.[99] The prohibition of alcohol was repealed in 1933.[100] Once again, the ability to regulate alcohol was given back to the states.[101] Currently, the United States drinks 9.4 liters of pure alcohol per person per year.[102]

In 2009, there were $153.9 billion in retail alcohol sales in the United States.[103] This represented only 15.9% of worldwide alcohol sales.[104] Alcohol beverage sales in the United States were portioned as follows: spirits consisted of 29.5%; wine consisted of 17.9%; and beer, ciders, and flavored alcoholic beverages consisted of 52.6% of retail sales.[105] Three companies control over sixty-six percent of the United States market,[106] and over $3 billion was spent on alcohol advertising in 2005 in the United States.[107] Of this $3 billion, 25.97% was spent on television advertising and 5.01% was spent on radio advertising.[108]

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92. Jack S. Blocker, Jr., *Kaleidoscope in Motion: Drinking in the United States, 1400-2000*, *in* ALCOHOL: A SOCIAL AND CULTURAL HISTORY 225, 225 (Mack P. Holt ed., 2006).

93. *See id.* at 225, 227.

94. *Id.* at 227.

95. *Id.*

96. *Id.*

97. *Id.* at 228.

98. *Id.* at 229-30.

99. U.S. CONST. amend. XVIII.

100. Blocker, *supra* note 92, at 234.

101. *Id.* at 234.

102. WHO, *Global Status Report on Alcohol and Health*, at 140 (2011), *available at* http://whqlibdoc.who.int/publications/2011/9789241564151_eng.pdf (study is from 2003 to 2005 of people fifteen and above).

103. DATAMONITOR, INDUSTRY PROFILE ALCOHOLIC DRINKS IN THE UNITED STATES 2. (2010).

104. *Id.*

105. *Id.* at 12.

106. *Id.* at 14 (explaining that Anheuser-Busch held 41.8% of the market, SABMiller held 15.7% of the market, and Molson Coors Brewing Company held 8.9% of the market).

107. FED. TRADE COMM'N, *supra* note 5, at 4.

108. *Id.* at 5.

Alcohol advertising is self-regulated in the United States.[109] Self-regulation codes were created by three main bodies: the Beer Institute, Wine Institute, and Distilled Spirits Council of the United States.[110] Additionally, alcohol advertising is self-regulated by individual alcohol companies and other organizations.[111]

The Beer Institute, Wine Institute, and Distilled Spirits Council of the United States all have similar purposes.[112] Each code discourages depictions of irresponsible drinking.[113] Furthermore, the codes require that a majority of expected viewers to be above the legal drinking age.[114] Finally, each requires that advertisements do not depict drinking and driving.[115] While these requirements have similar themes, the codes vary in strictness.[116]

Private companies and organizations also implement their own advertising policies.[117] Anheuser Busch's code is stricter than the Beer Institute's because Anheuser Busch aims to allow beer advertising only when seventy percent of the program's viewers are above the drinking

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109. *Id.* at 4.

110. *See* DISTILLED SPIRITS COUNCIL OF THE U.S., CODE OF RESPONSIBLE PRACTICES FOR BEVERAGE ALCOHOL ADVERTISING AND MARKETING (2009) [hereinafter DISCUS], *available at* http://www.pernodabsinthe.com/about/Responsibility.pdf; BEER INST., ADVERTISING AND MARKETING CODE (2011), *available at* http://www.beerinstitute.org/BeerInstitute/files/ccLibraryFiles/Filename/000000001166/BI%20Ad%20Code%20Text%20w-Logo%20-%20FINAL%202011a%20-%20Upddated%20Census.pdf; *Code of Advertising Standards*, WINE INST., http://www.wineinstitute.org/initiatives/issuesandpolicy/adcode/details (last updated June 2008).

111. *See, e.g.*, *Alcohol Advertising*, NAT'L COLLEGIATE ATHLETIC ASS'N (Dec. 2, 2010), http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Basketball+Resources/Basketball+alcohol+advertising; ANHEUSER BUSCH, CODE OF COMMERCIAL COMMUNICATIONS 12 (2010), *available at* http://www.anheuser-busch.com/s/index.php/our-responsibility/alcohol-responsibility-our-families-our-roads/advertising-policy/.

112. *See* DISCUS, *supra* note 110; BEER INST., *supra* note 110; WINE INST., *supra* note 110.

113. *See, e.g.*, DISCUS, *supra* note 110, at 6 (prohibiting depictions of intoxicated individuals); BEER INST., *supra* note 110, at 2, 6-7 (prohibiting depictions of excessive drinking, lack of control, or illegal activity while drinking); WINE INST., *supra* note 110 (prohibiting depictions of excessive drinking, reckless behavior, or references to alcohol strength.).

114. *See, e.g.*, DISCUS, *supra* note 110, at 4 (prohibiting advertisements unless at least seventy percent of the viewers are expected to be over the drinking age); BEER INST., *supra* note 110, at 7 (prohibiting advertising when less than 71.6% of viewers are expected to be over the drinking age); WINE INST., *supra* note 110 (requiring that models must be at least twenty-five years old, prohibiting the use of cartoons or child-like symbols, and prohibiting advertising when more than 28.4% of the audience is below drinking age).

115. DISCUS, *supra* note 110, at 9; BEER INST., *supra* note 110, at 7; WINE INST., *supra* note 110.

116. *See* DISCUS, *supra* note 110, at 9; BEER INST., *supra* note 110, at 7; WINE INST., *supra* note 110.

117. *See, e.g.*, NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 111.

age.[118] Unlike the Beer Institute's code, this code is mandatory for all Anheuser Busch operations.[119] Other private organizations not in the business of alcohol production or sales also have alcohol advertising policies.[120] The National Collegiate Athletic Association ("NCAA") has a stricter alcohol advertising policy than the alcohol institutes and companies.[121]

> The NCAA's Advertising and Promotional Standards applicable to all NCAA championships limits alcohol advertising in any form (e.g., television, radio, Internet, game publications) in association with any NCAA championship to malt beverages, beer and wine products that do not exceed six percent alcohol by volume. Further, such advertisements shall not compose more than 60 seconds per hour of any NCAA championship programming nor compose more than 14 percent of the space in the NCAA publication (e.g., game program) devoted to advertising. Also, such advertisements or advertisers shall incorporate "Drink Responsibly" educational messaging, and the content of all such advertisements shall be respectful (e.g., free of gratuitous and overly suggestive sexual innuendo, no displays of disorderly, reckless or destructive behavior) as determined by the NCAA on a case-by-case basis.[122]

A recent study by the FTC showed that over ninety-two percent of all alcohol commercials complied with the requirement that seventy percent of viewers be above the drinking age.[123]

Alcohol is the cause of over sixty diseases and injuries, accounting for 2.5 million deaths per year worldwide.[124] These health risks are caused by frequent and excessive alcohol use.[125] Moderate drinking, however, can actually have health benefits.[126] These health benefits include reductions in the risk of heart disease, heart attack, stroke, or diabetes.[127] Moderate

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118. ANHEUSER BUSCH, *supra* note 111, at 6.
119. *Id.* at 10.
120. NAT'L COLLEGIATE ATHLETIC ASS'N, *supra* note 111.
121. *See id.*
122. *Id.*
123. FED. TRADE COMM'N, *supra* note 5, at ii.
124. *Global Status Report on Alcohol and Health*, *supra* note 102, at 20.
125. *Id.* (explaining that health issues are caused by volume consumed and pattern of drinking).
126. *Alcohol Use: If You Drink, Keep It Moderate*, MAYO CLINIC (March 15, 2011), http://www.mayoclinic.com/health/alcohol/SC00024.
127. *Id.*

drinking is considered one drink a day for women and two drinks a day for men.[128]

IV. REGULATION OF COMMERCIAL SPEECH OF HARMFUL PRODUCTS

A. Deference to Congress and Broadcast Regulation

There are two main reasons why the advertising of tobacco on television and radio should be treated differently than commercial speech in previous First Amendment cases. First, the ban on advertising was enacted by Congress. Second, this ban only reaches broadcast television and radio.

In 1980, the Supreme Court decided *Fullilove v. Klutznick*.[129] The Petitioners facially challenged the "minority business enterprise" rule of the Public Works Enjoyment Act of 1977.[130] Under this statute, contractors who received federal funds were required to hire or buy from a certain percentage of minority owned businesses.[131] The Petitioners claimed that the statute violated the Equal Protection Clause of the Fourteenth Amendment, the Due Process Clause of the Fifth Amendment, and various antidiscrimination statutes.[132] When examining these constitutional claims, Chief Justice Burger explained the deference that the Supreme Court must give to Congress:

> When we are required to pass on the constitutionality of an Act of Congress, we assume "the gravest and most delicate duty that this Court is called on to perform." A program that employs racial or ethnic criteria, even in a remedial context, calls for close examination; yet we are bound to approach our task with appropriate deference to the Congress, a co-equal branch charged by the Constitution with the power to "provide for the . . . general Welfare of the United States" and "to

128. *Id.*

129. Fullilove v. Klutznick, 448 U.S. 448 (1980).

130. *Id.* at 454-55.

131. 42 U.S.C. § 6705 (2006) ("[N]o grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.").

132. *Fullilove*, 448 U.S. at 455.

> enforce, by appropriate legislation," the equal protection guarantees of the Fourteenth Amendment.[133]

Chief Justice Burger further explained that the Court would defer to Congress.[134] The Court will only overrule a statute created by Congress when "Congress has overstepped the bounds of its constitutional power."[135]

Additionally, deference is given to Congress when regulating electronic communications.[136] In *Capital Broadcasting Co. v. Mitchell*, the District Court for the District of Columbia denied a petition to a challenge of the Public Health Cigarette Smoking Act of 1969.[137] This petition, brought by the broadcasters, was denied because the statute did not impede their free speech rights.[138] Broadcasters still had a right to disseminate information and give opinions on cigarettes.[139] In the District Court's analysis, Judge Gasch stated that "[t]he unique characteristics of electronic communication make it especially subject to regulation in the public interest."[140]

Deference to congressional statutes and to regulation of electronic media distinguishes other First Amendment commercial speech cases in favor of allowing speech restrictive regulation. Although such deference is not determinative, this could help a court in deciding a close case such as the total ban on tobacco advertising from television and radio.

B. Tobacco Advertisement Regulation Under Central Hudson

Under the *Central Hudson* test, the Court first determines whether the activity is protected by the First Amendment.[141] Some have argued that tobacco advertising should not be protected by the First Amendment because it is misleading and proposes an illegal transaction (sale of tobacco to minors).[142] For the purposes of this paper, it will be assumed that tobacco

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133. *Id.* at 472 (quoting Blodgett v. Holden, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), and U.S. CONST. art. I, § 8, cl. 1; U.S. CONST. amend. XIV, § 5).

134. *Id.* at 473.

135. *Id.* (citing Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 103 (1973)).

136. Capital Broad. Co. v. Mitchell, 333 F. Supp. 582, 585-86 (D.D.C. 1971).

137. *Id.* at 587.

138. *Id.* at 584.

139. *Id.*

140. *Id.*

141. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (clarifying that "[f]or commercial speech to come within [the protections of the First Amendment], it at least must concern lawful activity and not be misleading.").

142. Kenneth L. Polin, *Argument for the Ban of Tobacco Advertising: A First Amendment Analysis*, 17 HOFSTRA L. REV. 99, 118-19 (1988) ("In order to constitute criminal solicitation, the crime solicited need not be committed. Solicitation only requires that the commission of a crime be promoted. The crime at issue is the sale of tobacco to minors. Tobacco advertising may or may not directly promote vendors to sell tobacco to

advertising is protected by the First Amendment. The last three prongs of the *Central Hudson* test will be the focus of this paper.

The government has two possible justifications for a ban on tobacco advertising: protection of children and protection of the health of all citizens. Protecting children from the influences of tobacco advertisements was a government interest discussed in *Lorillard Tobacco Co. v. Reilly*.[143] The statute being challenged in that case regulated outside advertisements within five feet of the ground, advertisements within 1,000 feet of schools, and advertisement and placement of tobacco in stores.[144] This state statute was overruled in part because the regulation did not directly advance the governmental interest and was not narrowly tailored:

> A careful calculation of the costs of a speech regulation does not mean that a State must demonstrate that there is no incursion on legitimate speech interests, but a speech regulation cannot unduly impinge on the speaker's ability to propose a commercial transaction and the adult listener's opportunity to obtain information about products. After reviewing the outdoor advertising regulations, we find the calculation in these cases insufficient for purposes of the First Amendment.[145]

The stronger governmental interest supporting a complete ban is the interest in public health. This governmental interest would be perfectly legitimate if the Court applied its reasoning from *Posadas de Puerto Rico Associates v. Tourism Co*.[146] Unfortunately for those in support of a tobacco advertisement ban, the Court has become more speech protective when paternalistic advertisements are challenged.[147]

In *44 Liquormart*, the Court explained its view on paternalistic regulations: "[t]he First Amendment directs us to be especially skeptical of

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minors, but if the advertising encourages minors to purchase tobacco, it must necessarily also promote the manner of purchase (i.e. the sale).

The first amendment affords no protection to speech whose intent, objective meaning, and effect is to promote crime. Despite the industry's public denial, their marketing plans explicitly target the young. Each year, as 1,000,000 smokers quit and another 350,000 die from tobacco use, the product, in order to continue sales success, must attract droves of new, young consumers. To date, this is precisely what the product has achieved—ninety percent of smokers in the United States start smoking before age twenty; sixty percent start before age fifteen; and each year 100,000 persons under the age of twelve start to smoke. Simply put, the continued strength of the market is dependent upon a market to whom the product may not legally be sold.").

143. 533 U.S. 525, 564 (2001).

144. *Id.* at 561-62.

145. *Id.* at 565-66.

146. *See* 478 U.S. 328, 345-46 (1986) (upholding the regulation based on a greater-includes-the-lesser argument).

147. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 510 (1996).

regulations that seek to keep people in the dark for what the government perceives to be their own good."[148] Even under a stricter review, the Court should find that the government's interest in public health is substantial. Tobacco causes 443,000 premature deaths per year, which amounts to one out of five total premature deaths yearly, and smoking-related medical costs are ninety-six billion dollars in healthcare costs every year.[149] Not only does smoking harm the smokers themselves, but second-hand smoke also causes 50,000 deaths per year.[150] Tobacco is a uniquely harmful product because it is harmful to the body when used in any amount.[151]

Due to the paternalistic nature of the advertising ban, the prong of the *Central Hudson* test requiring direct advancement of the governmental interest should also be subjected to heightened scrutiny.[152] In *44 Liquormart*, the Court found there was not enough evidence to hold that the government's interest was being advanced: "without any findings of fact, or indeed any evidentiary support whatsoever, we cannot agree with the assertion that the price advertising ban will significantly advance the State's interest in promoting temperance."[153]

This regulation should be viewed differently than the price advertisement ban in *44 Liquormart*[154] because it completely bans the advertisement of the activity rather than the price. The Court in *44 Liquormart* agreed with the State that a ban in price advertising would reduce demand for alcohol, but it would not concede that the effect would be significant. "Although the record suggests that the price advertising ban may have some impact on the purchasing patterns of temperate drinkers of modest means, the State has presented no evidence to suggest that its speech prohibition will *significantly* reduce marketwide consumption."[155] A total ban on advertisements could have a much more substantial effect than a ban on price advertising alone. According to the 2011 World Health Organization *WHO Report on the Global Tobacco Epidemic*, a complete ban on tobacco advertisement "could decrease tobacco consumption by about 7%, independent of other tobacco control interventions."[156] This

148. *Id.* at 503.

149. AM. CANCER SOC'Y, *supra* note 79, at 3.

150. *See* DATAMONITOR, *supra* note 72; U.S. DEP'T OF HEALTH & HUMAN SERVS., THE HEALTH CONSEQUENCES OF INVOLUNTARY EXPOSURE TO TOBACCO SMOKE 8 (2006), *available at* http://www.surgeongeneral.gov/library/reports/secondhandsmoke/fullreport.pdf.

151. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., HOW TOBACCO SMOKE CAUSES DISEASE: THE BIOLOGY AND BEHAVIORAL BASIS FOR SMOKING-ATTRIBUTABLE DISEASE 9 (2010), *available at* http://www.surgeongeneral.gov/library/reports/tobaccosmoke/full_report.pdf.

152. Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980).

153. *44 Liquormart*, 517 U.S. at 505.

154. *Id.*

155. *Id.* at 506.

156. WORLD HEALTH ORG., *supra* note 13, at 62.

decrease in consumption should be considered a sufficient advancement of the government's interest in protecting children or the health of all people.

The government also has the burden of proving that its actions are no more extensive than necessary to achieve its objectives.[157] This requirement will be more problematic with respect to the government's interest in protecting children than its interest in public health. The government could ban tobacco advertisement during certain hours when children are most likely to view the programs. Also, a rule similar to the voluntary codes adopted by alcohol companies requiring a percentage of viewers to be above eighteen could achieve the government's interest in protecting children.[158] Because of the options available to the government that would be less speech restrictive, the Court would most likely find that a total ban on broadcast tobacco advertising is overly restrictive and more extensive than necessary.

The interest in protecting children could be struck down just as in *Reno v. ACLU*.[159] In *Reno*, Communications Decency Act (CDA) provisions were challenged.[160] These restrictions aimed to protect children from "'indecent' and 'patently offensive' communications on the Internet" by criminalizing the "knowing transmission of obscene or indecent messages to any recipient under 18 years of age."[161] The government did not prove that the statute was narrowly tailored to further the interest of protecting children:

> The breadth of this content-based restriction of speech imposes an especially heavy burden on the Government to explain why a less restrictive provision would not be as effective as the CDA. It has not done so. The arguments in this Court have referred to possible alternatives such as requiring that indecent material be "tagged" in a way that facilitates parental control of material coming into their homes, making exceptions for messages with artistic or educational value, providing some tolerance for parental choice, and regulating some portions of the Internet-such as commercial Web sites-differently from others, such as chat rooms. Particularly in the light of the absence of any detailed findings by the Congress, or even hearings addressing the special problems of the CDA, we are persuaded that the CDA is not narrowly tailored if that requirement has any meaning at all.[162]

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157. *Cent. Hudson*, 447 U.S. at 557.
158. DISCUS, *supra* note 110.
159. *See* 521 U.S. 844 (1997).
160. *Id.* at 858-61.
161. *Id.* at 849, 859.
162. *Id.* at 879.

Although a complete ban on tobacco advertising based on an interest in protecting the health of all individuals could also be judged as overly restrictive of speech, the interest in public health has a better chance of being accepted by the Court as no more extensive than necessary. A complete ban based on general public health would be more effective than a regulation based on protecting children by limiting the hours or programming of the ban.

The total ban based on health would still be problematic because there are other ways to reduce tobacco consumption. It could be argued that the ban should be replaced with more extensive health warnings or a requirement of anti-tobacco advertising in proportion to the tobacco advertising.

Although other methods could reduce tobacco consumption, the Court should allow the complete ban on tobacco advertising. According to the WHO report, "[b]ans must be comprehensive: partial bans have little or no effect . . . well-drafted and well-enforced legislation is required because the tobacco industry will circumvent advertising bans."[163] While this is only one study, the Court should give some deference to Congress because the ban is a statute that only affects broadcasting.[164]

In analyzing the last three prongs of the *Central Hudson* test, the Court should conclude that the governmental interest in protecting the health of citizens is a substantial interest directly advanced in a way that is no more extensive than necessary. Even when viewed under heightened scrutiny, the interest in reducing tobacco use outweighs the First Amendment interest in promoting the free flow of information.

C. Distinguishing Alcohol Advertising Under Central Hudson

Although a ban on alcohol advertising would be very similar to a ban on tobacco advertising, the differences in the governmental interests could lead the Court to invalidate a complete ban on alcohol advertising. The two main governmental interests would be protection of children and prevention of abusive drinking.

The government interest in protecting children would run into the same problems as the interest in banning tobacco advertising. The interest could be alternatively served by limiting the hours of alcohol advertising or by only allowing advertisements during programs with high percentages of viewers over the age of twenty-one. Just like the complete ban on tobacco, a complete ban on alcohol to protect children would be more extensive than necessary.

Unlike the ban of tobacco advertising, the ban of alcohol advertising would not be found constitutional if its purpose is protecting the health of

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163. *WHO Report on the Global Tobacco Epidemic, 2011*, *supra* note 13, at 62.

164. *See* Fullilove v. Klutznick, 448 U.S. 448, 455 (1980); Capital Broad. Co. v. Mitchell, 333 F. Supp. 582, 585 (D.D.C. 1971).

all individuals. This government purpose would not be to prevent the drinking of any alcoholic beverages; it would only aim to prevent alcohol abuse. Unlike tobacco, alcohol can be consumed in moderate amounts without negative health effects.[165] This severely weakens the governmental interest. Although the ban could possibly have the same effect as the similar ban of tobacco advertisements, the Court would still find the ban too speech restrictive.

V. CONCLUSION

Congress treats alcohol and tobacco advertising completely differently.[166] For over forty years, Congress has prohibited the advertisement of tobacco on both television and radio.[167] Currently, beer, wine, and liquor companies are free to advertise on both radio and television.[168] The only regulation of alcohol advertisement comes from alcohol institutions and private companies.[169]

The Supreme Court currently evaluates First Amendment challenges to commercial speech restrictions under the four-prong test set out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*.[170] Under that test, the Court would uphold the ban on tobacco advertising but find that a similar ban on alcohol advertising is unconstitutional because tobacco always has negative health effects while the same is not the case for alcohol.

165. MAYO CLINIC, *supra* note 126.

166. *Compare* Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335 (2006) ("[I]t shall be unlawful to advertise cigarettes and little cigars on any medium of electronic communication subject to the jurisdiction of the Federal Communications Commission."), *with* FED. TRADE COMM'N, *supra* note 5, at i (noting that the alcohol industry is self-regulated).

167. Cigarette Labeling and Advertising Act, 15 U.S.C. § 1335 (2006).

168. Oxenford, *supra* note 4.

169. *See, e.g.*, DISCUS, *supra* note 110.

170. 447 U.S. 557 (1980).