bers of the Attorney General's Committee should not be blamed unduly for refusing to venture an opinion. In times of change, the prophet's role is a thankless one. That the answers to the questions we have raised will shortly be forthcoming, if not from the Committee then from the Supreme Court, seems apparent from the significant utterance of that body in *Federal Communications Comm. v. Pottsville Broadcasting Co.*[15]: "These differences in origin and function preclude wholesale transplantation of the rules of procedure, trial, and review which have evolved from the history and experience of courts."

Already several of the proposals made by the Committee have been put into effect by the Division of Public Contracts. At a time when other critics would radically alter the structure or personnel of the various governmental departments, or both, the path followed by the Attorney General's Committee seems to be the one best designed to further the cause of intelligent administration.

MILTON I. GOLDSTEIN.†

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MONOGRAPH NO. 3, FEDERAL COMMUNICATIONS COMMISSION.

That in the series of monographs prepared by the Attorney-General's Committee on Administrative Procedure, the only one which runs to two volumes should be the one dealing with the Federal Communciations Commission, is perhaps a tribute not so much to the importance of that Commission in the administrative scheme (although it is of the first importance), as to the variety and complexity of the matters which have been committed to its jurisdiction by Congress. It is apparent also that the monograph is more extended than it would have been had the Commission and its procedure in the past not been the subject of sharp public criticism.

The monograph is divided into two parts, the first dealing with licensing and adjudication, the second with rule-making. Subject to this division, the monograph treats separately the diverse and often quite unrelated fields over which the Commission has jurisdiction. These include broadcast stations (standard, relay, international, facsimile, high frequency, experimental and non-commercial educational); safety and common carrier radio services (embracing marine, aviation, emergency, fixed public and fixed public press services, the latter two being engaged in the common carriage of communications for hire, either by means of radio-telephone or radio-telegraph); commercial radio operators; amateur stations and operators; and telephone and telegraph carriers.

The history of the regulation of communications by wire dates back to the Post Roads Act of 1866, which related simply to the fixing of rates for Government telegrams. The Act of August 7, 1888, commenced, to a very limited extent, the regulation of telegraph carriers, the application of the Act being restricted to subsidized carriers. The jurisdiction was placed in the Interstate Commerce Commission.

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15. (1940) 60 S. Ct. 437.

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The Mann-Elkins Act of 1910 extended the general regulatory jurisdiction of the Interstate Commerce Commission to all telegraph, telephone and cable lines, whether wire or wireless, which were engaged in interstate or foreign commerce. That Commission, however, as the monograph observes, found little occasion to exercise the wide powers conferred upon it. It did not extend its regulatory requirements under the Mann-Elkins Act to radio, because it considered that broadcasting stations were not common carriers. While the Wireless Ship Act of June 24, 1910, and the Radio Act of 1912 gave the Secretary of Commerce and Labor authority to prescribe regulations with regard to the effective equipment of ships with radio apparatus, and to license radio stations and radio operators, respectively, these statutes were, of course, drawn solely with reference to radio telegraphy, and upon the development of radio broadcasting and radio-telephony in 1920 and thereafter, they proved utterly inadequate. After *United States v. Zenith Radio Corporation*[1] had destroyed any effective control over broadcasting by holding that using a frequency not assigned by the Secretary of Commerce was not a violation of the Radio Act of 1912, the enormous increase in broadcasting stations resulted in chaos on the air. To remedy this the Radio Act of 1927 established the Federal Radio Commission, giving it the same broad powers which the Federal Communications Commission now has. The Commission's jurisdiction was restricted, however, to radio, until the Communications Act of 1934 enlarged it to include all types of telegraph and telephone as well.

Upon this enlargement of jurisdiction, which transformed the Federal Radio Commission into the Federal Communications Commission, the Commission promptly created three divisions, Broadcast, Telegraph, and Telephone, each division being composed of two Commissioners, with the Chairman acting in each instance as a third member *ex officio*. Three years later, on November 15, 1937, the divisions were abolished and the Commission has since functioned in all matters as a full Commission. It is easy to understand the reasons why the Commission considered it advisable to divide its functions into three fields, the first of which was not only much more important but also much more arduous than, and utterly unrelated to, the other two. It is equally easy to understand why one of the first steps taken by Chairman McNinch, in November, 1937, was to abolish the divisions, in view of the widespread public criticism and scandal which the Commission was then facing, and to which the divisional structure had certainly contributed. These considerations are briefly referred to in the monograph.[2] While one evil has been cured by abolishing the distribution of the Commission's fields of work, it may be questioned whether the present arrangement will in the long run prove much more satisfactory. Commercial broadcasting is increasing daily, more than eight hundred stations now holding licenses; and it is inevitable that the Commission must either neglect telephone and telegraph carriers, as did the Interstate Commerce Commission, or if it gives them any time, must do so at the

1. (1926) 12 F. (2d) 614.
2. P. 13.

expense of broadcasting, which the Commission can hardly cope with even by giving full time to it. The fault lies not with the Commission, but with the Communications Act, which overloaded the Commission with such diverse duties. As far as the regulatory aspects are concerned, telegraph and telephone carriers seem to this reviewer to have much less in common with commercial broadcasting than has the moving picture industry, for example. The safety and common carrier radio services, the commercial operators and the amateur stations all belong with broadcasting, for like it they involve the allocation of wave lengths—the use of the air, but when telephone and telegraph are added the common denominator of radio is gone. And, so far as commercial broadcasting is concerned, it is simply not realistic to say that "communications" can take its place. Mr. Justice Frankfurter has recently referred to "the common factors in the administration of the various statutes by which Congress had supervised the different modes of communication."[3] These are in practice most uncommon in the commercial broadcasting field. If the telegraph and telephone carriers were returned to the Interstate Commerce Commission, whose facilities for valuation and for rate-making are the development of many years' experience, the Communications Commission would then be in a position to give its whole time to radio, unhampered by the intermittent intrusion of these alien matters.

Volume one of the monograph deals exhaustively and in the main realistically with the Commission's procedure in licensing broadcast stations. This procedure, as the court observed in the *Pottsville* case,[4] was by the statute "explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest." The monograph's analysis of the manner in which the Commission has exercised this broad power is capable and thorough. The Commission's new rules of procedure are carefully and exhaustively dealt with, and full recognition is given to the substantial improvement which the Commission as now constituted, and its present legal staff, have accomplished.

Some points of disagreement, however, may be noted. It is perhaps doubtful whether the report of the Engineering Department with reference to the granting of a license is always as invaluable to the law department as it might seem to be on paper.[5] The comment[6] with reference to the Commission's frequent failure in former years to abide by its earlier decisions, seems to this reviewer apt, as also does the comment[7] with regard to the resistance of counsel practicing before the Commission to changes in the Commission's practice; but it is difficult to agree with the monograph's treatment of the right to intervene.[8] If the Commission on an application for the granting of a license is going to enlarge the issues to include the

3. Federal Communications Comm. v. Pottsville Broadcasting Co. (1940) 60 S. Ct. 437.
4. Ibid.
5. P. 17.
6. P. 23.
7. Pp. 33-34.
8. P. 34 et seq.

"economic question," that is, the economic injury which may be caused to an existing broadcasting station by the licensing of a competitive applicant in the same locality, as the *Yankee Network* decision[9] would seem to require, then it would seem that it should permit any party who stands to be substantially and adversely affected by its determination of the economic question, to intervene and be heard. This would certainly be consistent with Section 402(b)2 of the Act, which permits any person "aggrieved or whose interests are adversely affected by any decision of the Commission" granting a license, to appeal from such order. Assuming the soundness of the *Yankee Network* decision, the most expeditious procedure would seem to be to permit any existing station, upon an intervening petition stating a prima facie case of economic injury,[9a] to intervene and be heard upon the question of granting or not granting the license. The monograph suggests[10] that the economic question may be raised and considered by the Commission after it has granted the license, by the filing of a motion for reconsideration by any station aggrieved by the grant; but to the practicing lawyer it will be obvious that he stands less chance of success upon a motion of this kind, after the Commission has reached its decision and granted the license, than he would have had had he been permitted to intervene, be heard, offer evidence and cross-examine, upon the original hearing. Technically the economic question may not be foreclosed by the granting of the license, but actually in most cases it would be. In addition it is surely more expeditious and more economical to dispose of all the issues at a single hearing than to permit them to be raised successively and determined one at a time.

The argument of the monograph upon this point[11] seems rather doctrinaire. One suspects that it results from a fundamental disagreement with the *Yankee Network* decision. As to this, it seems to this reviewer sufficient to say that the same consideration of the public interest in the maintenance of satisfactory broadcasting programs which is taken into account when the Commission determines the financial ability of the applicant to operate the station for which he asks a license, comes into play when the question is the licensing of a competitive station which, as existing stations can show, will seriously reduce their operating revenues. The question has become confused because of the improper injection into it of the suggestion that it amounts to claiming a vested right to use the air, which is not at all the case. As an extreme example, it may be suggested that if five broadcasting stations in a given community obtain a gross revenue of $500,000.00 annually, it does not follow that ten stations in the same community will obtain a revenue of $1,000,000.00; on the contrary, the excessive competition

9. Yankee Network, Inc. v. Federal Communications Comm. (App. D. C. 1939) 107 F. (2d) 212; Sanders Bros. Radio Station v. Federal Communications Comm. (1939) 106 F. (2d) 321, cert. granted (1939) 60 S. Ct. 294.

9a. For a discussion of the Commission's change of policy in regard to this, see Paul M. Segal, The Law of Broadcast Regulation: Major Trends of 1939, in *Broadcasting Yearbook* (1940) 430.

10. P. 37.

11. Pp. 39-40.

may conceivably reduce the revenue of all ten to less than the $500,000.00 which was enjoyed by the five original stations.[12]

The monograph points out the handicap under which the Commission operates by reason of its financial inability to conduct hearings in the field.[13] For cases involving purely local issues, it would assuredly be more efficacious to send a hearing officer into the city involved. Inadequate appropriations likewise make it impossible for the Commission, in ninety-nine cases out of a hundred, to be represented at the taking of depositions; and indeed a contributing factor to many of the matters for which the Commission has in the past been criticized has been its lack of adequate funds.

The monograph apparently confuses *ex parte* statements with hearsay evidence.[14] A strong criticism is made of the practice of the Commission in withholding rulings on objections to evidence on technical ground; but in practice it may be doubted whether any serious disadvantage results. The monograph pays a well deserved tribute to the effect of the new rules of procedure (which have been in force now for a year) in simplifying the issues and shortening the record. The criticisms of the new rules[15] might better be withheld until the rules have had a fair trial in actual practice. In this connection the unfortunate results of the Commission's former system of trial examiners are stated in terms which, while strong, cannot be considered too emphatic.

From a consideration of the evils of the system of trial examiners, the monograph proceeds, by a natural sequence of thought, to the subject of political influence in matters pending before the Commission. Section VII, entitled "Congressional Lobbying" is an acute statement of the problem, but the solution offered[16] is not much more than a counsel of perfection. The monograph's criticism of the practice of permitting stations which would be adversely affected by the grant of a license, to intervene, has been mentioned above. Criticism of the same nature with respect to placing rule-making hearings upon an adversary basis is expressed at some length elsewhere.[17] But surely the most effective method of checking political influence is by open formal hearings, with all parties who can demonstrate that they stand to benefit or lose by the result of the hearing given an opportunity to be represented, to offer their evidence, and to cross-examine. The sole limitation should be the requirement that the intervener show an actual and substantial interest. Under this practice also stations affected have a better opportunity to neutralize political influence by counter-political influence; and if influence cannot be eliminated, neutralization is the next best thing.

The monograph seems to pass rather lightly over a number of subjects which are of great public interest, although perhaps not strictly within the scope of the Attorney General's Committee. Among these may be men-

12. See report of argument in the United States Supreme Court, February 9, 1940, in the Dubuque case (Feb. 15, 1940) Broadcasting 20.
13. P. 41.
14. P. 48.
15. Pp. 64-69.
16. Pp. 119-120.
17. Pp. 156 et seq.

tioned the American Telephone & Telegraph hearing, and the manner in which it was conducted; the censorship question which developed subsequent to the Commission's order with respect to short wave international broadcasting,[18] the matter of political broadcasting, in which a radio station still stands between the devil and the deep sea; the extensive questionnaires which the Commission has submitted to all broadcasting stations in recent years;[19] the general allocation with which the Committee will be confronted when the Havana Treaty comes into force; as well perhaps as the problem of stations' sharing time on the same wave length, which has in the past been responsible for some of the most bitter and most extended litigation with which the Commission and the courts have had to deal.

That in some respects the monograph has, since January 1st, become out of date, is simply another illustration of what Mr. Justice Frankfurter in the *Pottsville* case termed "the rapidly fluctuating factors characteristic of the evolution of broadcasting and of the corresponding requirement that the administrative process possesses sufficient flexibility to adjust itself to these factors." Thus by a recent order the Commission has terminated all broadcasting licenses as of August 1st next, in lieu of the three-year period referred to in the monograph[20] and it has likewise, on February 28, 1940, approved new rules to regulate "limited commercial" television operation, although the allocation of channels for television was deferred until the conclusion of the hearings on frequency modulation broadcasting.[21] The omission of matters such as these is not an indication of any inadequacy in the monograph, for the Commission's rules, its procedure, and the matters with which it deals change from week to week and often from day to day. On the contrary, the fluid nature of the subject gives the monograph hope of achieving greater effectiveness than it could have if it dealt with a formalized commission whose field of action was a static one.

JOHN R. GREEN.†

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MONOGRAPH NO. 7, ADMINISTRATION OF THE GRAIN STANDARDS ACT.

In the administration of the Grain Standards Act by the Department of Agriculture, grades are established, inspectors to apply these grades in the inspection of grain are licensed or deprived of license, the work of the licensed inspectors is supervised and reviewed, misrepresentation as to grades is determined, and the findings published.[1]

Violation of certain of the provisions of the Act is a misdemeanor subject to fine of not more than $1,000 or to imprisonment for not more than one

18. Cf. H. R. 8509, which would amend the Communications Act "in order to preserve and protect liberty of expression in radio communication," introduced in the House of Representatives, Feb. 16, 1940.

19. The data obtained by these questionnaires, although published, do not appear to be made use of in the monograph.

20. P. 4. See (March 1, 1940) Broadcasting 16.

21. (March 1, 1940) Broadcasting 17.

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1. (1916) 39 Stat. 482, (1939) 7 U. S. C. A. sec. 71.