THE BROADCASTERS ARE SMILING

OBTUSE POLITICS AND THE FCC

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It seemed for a time, after Watergate, that federal officeholders were looking under every rug in their energetic efforts to associate themselves with clean government. As a constructive part of that spirit the Senate Commerce Committee caused to be published the Kramer-Graham report on appointments to the FCC and other regulatory commissions. The report accurately observed that, "With noteworthy exceptions, the appointive process as it now exists has consistently failed to provide the federal regulatory agencies with able, energetic and forceful leadership dedicated to the public interest." The clear suggestion was that henceforth the committee should not, and would not, put up with this newly discovered abuse of public trust. It may come as a shock, but the report seems to have had little influence upon the Senate's most recent participation in "the appointive process as it now exists."

On September 8, the Commerce Committee approved the nomination of Margita White to the Federal Communications Commission. (Joseph Fogarty, former committee counsel, was approved for the FCC the same day.) It was as good an example as can be found of the process of Presidential appointments to regulatory commissions which the committee's report had deplored. In the battle over the nomination of Mrs. White are all the elements of crass political dealing, moralistic posturing, and noncomprehension of the issues that produce regulatory commissions which serve only themselves and the regulated industries. Broadcasters seem to be smiling, and the Senate has made clear that, despite the rhetoric of the past three years, it is not willing to change the rules of the political game.

As soon as Margita White's nomination was announced, in early July, controversy began to brew over her suitability. There were many problems, including the manner of her selection and her lack of any real qualifications. (Some accounts indicated that President Ford was trying to get Mrs. White out of the White House Office of Communications—she had been hired for President Nixon's Herb Klein operation—to make room for some high-powered PR men for his campaign.) Even more devastating than her background, questionable qualifications and Ford's motives, however, was the very serious conflict of interest posed by her sitting on the FCC. It became clear that Mrs. White could not serve as a commissioner without appearing to have a financial stake in the proceedings.

The issue arises because Mrs. White's husband, Stuart White, is a partner in the Washington law firm of Hamel, Park, McCabe, and Saunders. The firm's clients include a growing number who appear before the FCC. Their fees currently represent 10 per cent of the firm's income, and the potential for growth is enormous. Three of the firm's communications lawyers are as well connected as any in Washington: the president of the Federal Communications Bar Association, a former assistant to former FCC Chairman Dean Burch, and a former general counsel to the FCC. The firm advertises itself in Martindale and Hubbell, the yellow pages of the legal profession, as specializing in communications law. And now a partner's wife sits on the FCC.

The law of conflict of interest is, with good reason, tough. Courts have long recognized that the efficacy of

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a system of justice rests on the public acceptability of the decisions. And that, in turn, requires that there shall be not the slightest whisper of self-interest on the part of the decision maker. For example, subsequent to Mrs. White's hearings, Judge Sirica disqualified himself in a case because of a possible appearance of conflict. It was not his interest that was involved, nor that of his parents, his wife, or any of his children. The problem was that his brother-in-law sat on the board of one of the banks that had lent money to one of the parties in the case. Sirica did not want to risk this (seemingly remote) appearance of possible conflict. If the law applies in this way to Judge Sirica—and it was Judge Sirica's law that was applied to President Nixon—the same spirit should guide those considering the case of Margita White.

All parties recognize her conflict. The White House, the Justice Department, the General Accounting Office and the FCC offered legal opinions to the Senate. Mrs. White ultimately agreed to recuse herself from any case in which Hamel, Park was participating. She will take steps, as yet unspecified, to insure that she is insulated from information about FCC action in Hamel, Park cases. Her husband agrees to forgo any of the firm's profits from its communications work, as long as his wife sits on the commission. Again, the details are not clear. Mrs. White's inadequate proposals were not dictated merely by public pressure. The case law and statutes governing conflict of interest required some action. The Justice Department letter to the Senate makes clear that Mr. White's decision was also necessary.

There are a number of very serious problems with the arrangements suggested for the Whites. For one thing, there are no specifics as to how any of them are to be carried out. It is hard to imagine how a commissioner can be kept insulated from an unknown number of cases. Nor did the committee have any way of assuring that Mr. White's end of the bargain would be honored. Aside from a letter from the managing partner of Hamel, Park stating that such an arrangement would be established, no further method of monitoring was suggested. Without seeing the books of Hamel, Park there is no way to know whether Mr. White is being compensated directly or indirectly from the communications business. In any event, it is impossible for Mr. White to continue as a partner of the firm, as he intends to do, without participating to some degree in decisions affecting the growth and direction of the firm's communications practice. And there is no way to be sure that the Whites will not receive some form of compensation from the firm's expanded communications work in the future. Finally, as Sen. John Pastore himself pointed out at the hearings, the Congress would have absolutely no recourse if Mr. White did violate the arrangement—even if it could find out about it.

Mrs. White's nonparticipation in FCC cases also causes severe problems. The FCC has enough problems trying to be an effective regulator without having one member who is at the mercy of the regulated industries. And that's exactly what Mrs. White will be. If her position in a case were known, or predictable, it would be a simple matter for the adversely affected party to hire Hamel, Park and thereby eliminate her vote.

Many instances of conflict will still exist. As anyone familiar with commission business can tell you, there are times when a company has a strong interest in a case in which it does not participate. For example, the positions of AT&T—another of Hamel, Park's clients—are often represented before the FCC by state public utility commissions. The firm may have a real financial interest in cases involving clients for whom they do a lot of work, although some other firm is representing the client, or another party entirely, in that particular matter.

Harvey Shulman, an able lawyer for the Media Access Project in Washington, did a thorough job of laying out at the hearings the almost infinite potential instances of conflict. What of a client, for which Hamel, Park is general counsel, which uses another firm in a minor matter? Does Mrs. White participate or not? What of a client that uses Hamel, Park to take its cases before the FCC's Administrative Trial Judge and Review Board, but drops the firm's name from the briefs when it appears before the full commission? What if a client is never "represented" by Hamel, Park at the FCC, although it gets virtually all its legal counsel from the firm? How is Mrs. White to discover this fact when the company is before the commission? Will it make any difference to her? What of cases in this election year that involve equal time, or fairness complaints, affecting her former employer, President Ford? Does she abstain from those cases as well? Shulman's examples go on and on. The point is that Mrs. White must either disqualify herself from so many cases as to render herself totally ineffective as a commissioner, or be involved in cases in which she has an apparent, and potentially a real, conflict of interest.

Perhaps the saddest part of this case was the way in which it was manufactured into a women's issue by those who understood it least. There was an attempt to argue in some quarters, including the editorial page of *The Washington Post*, that it was sexist to apply conflict of interest laws to Mrs. White, and that to do so impedes women from pursuing their careers. I want more women on the FCC, but such arguments do not hold water in this case.

Mrs. White has had no career as a government administrator, lawyer, economist, or consumer advocate that could be "impeded" by a refusal to seat her on the FCC. Her career has been in public relations, and she's perfectly free to pursue it in government or business. Moreover, as Senator Pastore mentioned at the hearings, Mrs. White could have been appointed to any other regulatory commission or executive agency without any problem, and he urged President Ford to do so. Ford refused. She certainly would have been as qualified for any of them as she is for the FCC. Unfortunately, the National Organization for Women (NOW), ordinarily a leader in the fight for media reform, backed down from opposition to this nomination. The absence of NOW participation weighed heavily on the committee.

Then, when Harvey Shulman, and others, tried to respond to *The Washington Post* editorial, the paper curiously refused to print any of their letters. Given its very lucrative broadcast properties, which account for a large proportion of the *Post*'s yearly profit, one would have

thought the paper would be particularly sensitive to fairness on the issue. Senator Pastore used the unanswered editorial in explaining his ultimate vote for Mrs. White.

Thus, less than six months after publishing its promising report on the appointive process, the Senate Committee accepted a nominee whose principal qualifications seem to be that she had served her President and party well. She was selected without any search for the most qualified woman, and brings to the FCC an enormous, unresolved problem of conflict of interest that the subcommittee thoroughly documented and recognized.

We have, indeed, put Watergate behind us. □