Tom,

You asked to me to investigate the origins of the phrase "public interest, convenience, and necessity" in the Communications Act of 1934. Specifically, you'd like to know if there is any information about the original meaning of this phrase that has **not** already been written about.

I wish I could say that I've identified amazing new information that can help us shed new light on this topic, but I haven't uncovered anything that hasn't been discussed in an academic article or book. This could be in part because, as I explain in more detail below, I haven't exhausted potential sources on this issue. It could also be that there is not much new to say.

One research area that I have not seen explicitly discussed and that I would like to further pursue is any correspondence, memos, or other documentation that may exist between Secretary of Commerce Hoover, Senator Clarence Dill and Representative Wallace White. Hoover encouraged radio legislation and held four annual national radio conferences in which he endorsed the concept that the air waves were public property, and thus should be used to serve the public interest. Hoover's national conferences had a strong influence on what ultimately became the 1927 Radio Act. Dill and White were eager proponents of radio law over many years and sponsored the legislation that became the 1927 Act. Because both men participated in drafting the Act, and also participated in Hoover's four radio conferences, presumably they interacted with Hoover. I'd like to better understand if they agreed with Hoover's conception of what exactly was "the public interest." Any interaction that these men had on this issue could shed new light on this subject.

In any event, to identify what has **not** been written about the history of this phrase, I first had to identify what **has** been written. I also had to review scholars' sources to determine what they used and whether other potentially useful sources exist. To do this, I have reviewed the law, original documents, academic articles, dissertations, periodicals, our office sources, and the internet, ultimately drawing on the sources listed below.

I was not able to review all of these sources' sources. Most glaringly, I did not review the original documentation held at the Hoover Institution or Presidential Library to confirm the accuracy of some information and determine if further relevant information exists there. I have not investigated the archives of Rep. Wallace White and Senator Clarence Dill, the Acts' sponsors. Finally, I have not thoroughly investigated contemporaneous periodicals.

Sources I've reviewed:

Original documents

Radio Act of 1927
Communications Act of 1934
Report of Department of Commerce Conference on Radio Telephony (First National Radio Conference), Washington D.C. (Feb. 27, 1922) (Radio Service Bulletin, May 1, 1922, pp 22-30).
Recommendations of the National Radio Committee (Second National Radio Conference), Washington D.C. (1923) (Radio Service Bulletin, April 2, 1923 pp 9-13).
Herbert J. Hoover, Proceedings of the Third National Radio Conference, Washington D.C. (Oct. 6-10, 1924) (Washington, D.C., Government Printing Office).
Herbert J. Hoover, Proceedings of the Fourth National Radio Conference, Washington D.C. (Nov. 9-11, 1925) (Washington, D.C., Government Printing Office).
Federal Radio Commission First Annual Report (Government Printing Office 1927).
Federal Radio Commission Second Annual Report (Government Printing Office 1928).
Federal Radio Commission Third Annual Report (Government Printing Office 1929).

Books

Erik Barnouw, A Tower in Babel: A History of Broadcasting in the United States, Volume I (1966).
Steven Davis, Law of Radio Communication, 1927
Clarence Dill, Radio Law Practice & Procedure (1938).
M. Franklin, The First Amendment and the Fourth Estate (1981).
Krasnow, The Politics of Broadcast Regulation
Thomas G. Krattenmaker & Lucas A. Powe, Jr., Regulating Broadcast Programming (1994).
Newton N. Minow, Equal Time (1964).
Max D. Paglin, A Legislative History of the Communications Act of 1934, Oxford University Press (1989).
Thomas Porter Robinson, Radio Networks and the Federal Government

Dissertations

Mark Arbuckle, "Herbert Hoover's National Radio Conferences and the Origin of Public Interest Content Regulation of U.S. Broadcasting: 1922-1925," School of Journalism in the Graduate School Southern Illinois University at Carbondale, July, (2001)
Glenn A. Johnson, "Secretary of Commerce Herbert C. Hoover: The First Regulator of American Broadcasting, 1921-1928," School of Journalism in the Graduate College of the University of Iowa, May, (1970)

Journal articles

Benjamin M. Compaine, "The Impact of Ownership on Content: Does it Matter," 13 Cardozo Arts & Ent. L.J. 755 (1995).
Thomas W. Hazlett, "Physical Scarcity, Rent Seeking, and the First Amendment," 97 Colum. L. Rev. 905 (1997).
Erwin G. Krasnow, Jack N. Goodman, "The "Public Interest" Standard: The Search for the Holy Grail," 50 FCLJ 605 (1998).
Note, "Federal Control of Radio Broadcasting," 39 Yale Law Journal 245 (1929).

Remaining sources of potentially useful information:

Hoover Institution and Hoover Presidential Library
Archives re: Senator Clarence Dill and House Representative Wallace White
Contemporaneous periodicals

Below, I very briefly summarize what scholars say about the history of the phrase "public interest, convenience, and necessity." Most discuss the history of the phrase's usage in legal texts, the historical circumstances of the 1927 Radio Act and 1934 Communications Act, and the legislative documents generated surrounding the drafting of these Acts.

Origin of "Public Interest, Convenience and Necessity"

Understanding the origin of the phrase "public interest, convenience and necessity" in the 1934 Communications Act requires reviewing the phrase's history and the statute's purpose. But scholars generally agree that the legislative history of the 1934 Communications Act fails to provide much insight into the phrase's origins or the drafters' intended meaning. See, e.g., Robinson at 14-16; Krasnow at 610 ("the origin of the phrase . . . is not evident from the legislative history of the Radio Act of 1927"); Franklin at 499 ("'The origin of the phrase . . . is unclear from legislative documents"); May at 445.

History of "Public Interest, Convenience and Necessity"

The phrase "public interest, convenience, and necessity" was written into the Radio Act of 1927. The Act required that "the licensing authority should determine that the public interest, convenience, or necessity would be served by the granting [of a station's license]." The Radio Act, including this phrase, was incorporated practically unchanged in the Communications Act of 1934. Communications Act of 1934, 47 U.S.C. §§ 307, 309.

Before appearing in the Radio Act, the term "public interest convenience and necessity" had been used in a number of state statutes and public utility regulations. Arbuckle at 79. It was also used by the U.S. Supreme Court in a number of cases involving businesses "affected by a public use of a national character." Id. citing Dill, Radio Law at 87. The first federal legislation that required consideration of the "public interest" and convenience and necessity was the Federal Transportation Act of 1920. Under the FTA, all carriers under the Interstate Commerce Act had to show that the public interest would be met before constructing new lines or abandoning existing ones. Arbuckle at 80. Commissioners held public hearings concerning rail service to be extended or abandoned, presumably so that the public could complain about the proposed changes and influence whether doing so was in the public interest. Id. The underlying principle was to put the public's interest above commercial or individual interest. This model for public input was loosely followed by the method by which citizens can participate in FCC licensing hearings.

Radio Act legislators drew the public interest standard from the common carrier statutes because they conceived of radio waves as passing through what they called "ether," which they considered a public resource like water or electricity. "America attempted to understand the new medium of radio by relating it to old familiar institutions and concepts." Arbuckle at 76 citing Mary S. Mander, "The Public Debate About Broadcasting in the Twenties: An Interpretive History," Journal of Broadcasting 28 (spring 1984). "The transportation model was useful when broadcast frequencies were viewed as 'ether roads,' analogous to highways and navigable rivers in need of traffic cops and rules. In addition, federal regulation of railroads and the telephone and

telegraph under authority of the commerce clause of the Constitution provided a precedent for radio regulation." Id.

Moreover, drafters of the 1927 Radio Act were dealing with a rapidly unfolding technology and industry that they didn't fully understand and didn't want to hinder. "Ever since Marconi had invented the 'wireless telegraph,' there had been something mysterious about how it worked. Ordinary people – including judges – could not comprehend radio's operation." Krattenmaker at 33-34. Thus, they incorporated a standard that they refused to define and made it broad enough to accommodate a growing industry. Krattenmaker at 28 citing 67 Cong. Rec. 12352 (1926) (Dill believed that the vague public interest standard would gain meaning by staffing the Radio Commission with "men of big abilities and big vision"). As one FRC general counsel explained, "[o]nly an indefinite and very elastic standard should be prescribed for the regulation of an art and a field of human endeavor which is progressing and changing at so rapid a pace as is radio communication." Arbuckle at 78 citing Louis G. Caldwell, "The Standard of Public Interest, Convenience or Necessity as Used in the Radio Act of 1927," 1 Air Law Review 296 (July 1930).

Years later, one of the 1927 Act's sponsors, Senator Clarence C. Dill, claimed that the phrase "public interest, convenience and necessity" was incorporated into the Act at the suggestion of a young lawyer on loan to the Senate from the Interstate Commerce Commission. Dill said that the drafters could not decide what standard to use for regulating the granting of radio licenses, and the lawyer suggested the phrase because it was present in other federal statutes. See, e.g., Krattenmker at 8 citing Minow, Equal Time at 8-9; Krasnow citing Minow & LaMay, Abandoned in the Wasteland at 4. But it

is doubtful that the concept of the "public interest" standard occurred only to a single young lawyer when Commerce Secretary Herbert Hoover had repeatedly and insistently emphasized the public interest in radio throughout the preceding years, including during four annual radio conferences. Krattenmaker at 8.

For instance, at the first conference, Hoover's keynote address noted that "[t]here is involved, however, in all of this regulation the necessity to so establish ***public right over the ether roads*** that there may be no national regret that we have parted with a great national asset into uncontrolled hands." Also: "It becomes of primary ***public interest*** to say who is to do the broadcasting, under what circumstances, and with what type of material."

The conferees unanimously resolved: "[I]t is the sense of the Conference that Radio Communication is a ***public utility*** and as such should be regulated and controlled by the Federal Government in the ***public interest***." Krattenmaker at 9 citing To Amend the Radio Act of 1912: Hearings on H.R. 11964 Before the House Comm. On the Merchant Marine and Fisheries, 67th Cong., 4th Sess. 32 (1926).

The conferees drafted a bill that was introduced in the House. Wollenberg at 64 citing H.R. 13773, 67th Cong. 1st sess. (1922). The bill attempted to comprehensively regulate radio and stated that "use of the ether" for radio was the inalienable possession of the people. Id. There was a fear that some companies were trying to create a radio monopoly and would do so if they weren't explicitly warned that the public owned the airwaves. Id. The bill died in Senate Committee. Id.

And later, at the fourth conference, within a year of the 1927 Radio Act's drafting, Hoover said that:

"The ether is a ***public medium***, and its use must be for ***public benefit***. The use of a radio channel is justified only if there is ***public benefit***. The dominant element for consideration in the radio field is, and always will be, the great body of the listening public, millions in number, countrywide in distribution. There is no proper line of conflict between the broadcaster and the listener, nor would I attempt to array one against the other. Their interests are mutual, for without the one the other could not exist.

. . . We simply must say that conditions absolutely preclude increasing the total number of stations in congested areas. It is a condition, not an emotion; but this implies a determination of who shall occupy these channels, in what manner, and under what test.

I can see no alternative to abandonment of the present system, which gives the broadcasting privilege to everyone who can raise the funds necessary to erect a station, ***irrespective of his motive, the service he proposes to render, or the number of others already servicing his community***. Moreover, we should not freeze the present users of wave lengths permanently in their favored positions irrespective of their service. This would confer ***a monopoly*** of a channel in the air and deprive us of ***public control*** over it. It would destroy the public assurance that it will be used for ***public benefit***."

Purpose of the 1927 Radio Act

Until 1927, radio was regulated by the Radio Act of 1912. The 1912 Act required radio users to be licensed by the Secretary of Commerce. But in the 1920s, the radio broadcast industry blossomed, and license-seekers multiplied. The increasing numbers of licensed stations and adventurous amateurs combined with as of yet rudimentary radio receiver technology that could not distinguish between signals on nearby bandwidth caused significant interference across the bandwidth. Starting in 1922, Secretary of

Commerce Hoover responded to this confusion by holding a series of four annual radio conferences beginning in 1922 to seek recommendations for regulating radio. Krasnow at 609.

A 1923 court decision augmented the radio broadcast confusion by holding that the Secretary did not have the authority to deny licenses even to prevent interference, though it held that he could assign different stations to different frequencies. Robinson at 8 citing Hoover v. Intercity Radio Co., 286 Fed. 1003 (D.C. Cir. 1923). The following three radio conferences focused on establishing a workable system to accommodate all radio licensees. But by the fourth radio conference in 1925, the public and broadcast industry sought legislation to effectively control the industry, as illustrated by the fourth radio conference's 1925 recommendations.

In 1926, Secretary Hoover's efforts to control radio communications were again frustrated by a court decision. This opinion held that the Secretary lacked power to pass regulations giving exclusive frequency assignments. Robinson at 9 citing U.S. v. Zenith Radio Comm., 12 F.2d 614 (N.D. Ill. 1926). Hoover responded by announcing that the Department would do nothing more than process license applications. Chaos ensued with new and existing stations broadcasting on whatever frequency, power level, or time they chose.

This confusion helped spur Congress to pass radio regulation, which became the 1927 Radio Act. Meanwhile, other developments had been taking place that helped enable the Radio Act's passage. For one, the House Committee on Merchant Marine and Fisheries had held hearings on proposed new radio legislation in 1923 and 1924. Also, people were concerned about the development of a radio monopoly. During a February

3, 1927 debate, Senator Dill stated that the proposed bill protected the public against monopoly. "As to creating a monopoly of radio in this country let me say that this bill absolutely protects the public, so far as it can protect them, by giving the Commission full power to reject a license to anyone who it believes will not serve the public interest, convenience, or necessity. It specifically provides that any corporation guilty of monopoly shall not only not receive a license but that its license may be revoked; and if after a corporation has received its license for a period of three years it is then discovered and found to be guilty of monopoly, its license will be revoked. . . ." T. Robinson at 89.