Private Diplomacy and Public Business: Public Supervision of the Communications Satellite Corporation

The Communications Satellite Act of 1962\textsuperscript{1} authorizes the creation of the Communications Satellite Corporation (Comsat) and vests it with responsibility for developing a program for global satellite communications. Comsat is a private business organized for profit\textsuperscript{2} and is financed entirely by commercial loans and the sale of capital stock.\textsuperscript{3} The corporation receives no federal grants and cannot invoke the authority of the United States in support of its actions.\textsuperscript{4}

The decision to use a wholly private corporation as the instrument for satellite system development was in keeping with the tradition of relying on the private sector for telecommunications facilities.\textsuperscript{5} The overall aim of the 1962 Act, however, was not solely to promote commercial opportunities. The Act also declares that the satellite system shall be responsive “to public needs and . . . contribute to world peace and understanding.”\textsuperscript{6} Accordingly, the Act involves the Federal Communications Commission (FCC) and the executive branch in the public supervision of Comsat.\textsuperscript{7}

This comment examines the statutory accommodation of the functions of Comsat, the FCC, and the Executive, focusing particularly upon the extent of executive branch power to supervise Comsat’s international activities. Its thesis is that the Executive has exceeded its supervisory powers by dictating Comsat’s position on

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  \item President Kennedy stated in his message to Congress on the bill to create Comsat: “Throughout our history this country’s national communication systems have been privately owned and operated, subject to governmental regulation of rates and service. In the case of the communications satellite operation . . . the national objectives . . . can best be achieved in the framework of a privately owned corporation . . . .” Letter to Lyndon Johnson (Feb. 7, 1962), reprinted in [1962] U.S. CODE CONG. & AD. NEWS 2288-90.
  \item Id. § 201, 47 U.S.C. § 721 (1970).
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technical and operational matters arising in the course of Comsat’s activity within INTELSAT, the international organization established in 1964 to own and operate the global satellite system.¹

I. CURRENT EXECUTIVE BRANCH SUPERVISION OF COMSAT’S INTERNATIONAL ACTIVITIES

The executive branch currently exercises supervisory authority over Comsat’s international activities in three principal ways: (1) negotiation with foreign governments of international agreements regarding satellite systems; (2) participation in the INTELSAT Assembly of Parties; and (3) instruction of Comsat on the positions it should take concerning matters coming before the INTELSAT Board of Governors.

The Department of State’s role in the negotiation of the interim and definitive INTELSAT agreements illustrates the Executive’s exercise of supervisory authority through negotiation of international agreements. Initial negotiations regarding the establishment of a global communications satellite system were handled by the State Department and resulted, in 1964, in the signing of executive agreements that created an interim INTELSAT consortium. The INTELSAT consortium was governed by an intergovernmental agreement formally associating nations in their sovereign capacity. The Department of State’s role in the negotiation of the interim and definitive INTELSAT agreements illustrates the Executive’s exercise of supervisory authority through negotiation of international agreements. Initial negotiations regarding the establishment of a global communications satellite system were handled by the State Department and resulted, in 1964, in the signing of executive agreements that created an interim INTELSAT consortium. The INTELSAT consortium was governed by an intergovernmental agreement formally associating nations in their sovereign capacity. Comsat was named manager in the design, development, construction, operation, and maintenance of the space segment. Ownership in the system and voting power in the governing body, the Interim Communications Satellite Committee (ICSC), were based on traffic forecasts for 1968. Comsat received an initial investment quota and vote of sixty-one percent, nearly twice the voting power of the


² See text and notes at notes 162-167 infra.


¹² D. SMITH, COMMUNICATION VIA SATELLITE 138 (1976).

entities representing all the European nations.\textsuperscript{14}

The interim consortium agreement expressly provided that definitive arrangements for the governance of the satellite system would be considered by 1969.\textsuperscript{15} In the meantime, it became increasingly evident that the consortium structure inadequately represented the variety of interests within INTELSAT,\textsuperscript{16} and in 1969 a plenipotentiary conference was convened in Washington to determine the future governance of INTELSAT systems.\textsuperscript{17} The State Department again handled the negotiations on behalf of the United States. After two years of negotiations, a new agreement was reached.\textsuperscript{18}

In general, the definitive agreement was designed to prevent any single interest or group of nations from exercising dominant influence over INTELSAT affairs.\textsuperscript{19} The institutional arrangements replaced the ICSC with a Board of Governors,\textsuperscript{20} which was given responsibility for handling the business of the organization.\textsuperscript{21} The Board is composed of telecommunications agency representatives whose vote is weighted according to relative investment.\textsuperscript{22} Voting rights on the Board are not fully correlated with investment participation, however, as had been the case in the ICSC; rather, a forty percent ceiling was placed on Comsat’s voting power.\textsuperscript{23} Furthermore, because Comsat’s management role had been so irksome to the Europeans,\textsuperscript{24} the definitive arrangements established an international administrative organ that would gradually absorb the management functions previously performed by Comsat.\textsuperscript{25}

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\item\textsuperscript{14} See id.
\item\textsuperscript{16} See Levy, \textit{INTELSAT: Technology, Politics and the Transformation of a Regime}, 29 \textsc{Int'l Organization} 655, 667-76 (1975). INTELSAT’s membership had increased from 19 to 83 members, many of whom were underdeveloped states with a low level of investment and consequently little voice in management.
\item\textsuperscript{17} \textit{INTELSAT Conference Opens at Washington}, 60 \textsc{Dep’t State Bull.} 231 (1969).
\item\textsuperscript{18} Doyle, \textit{The Permanent Charter for INTELSAT}, 65 \textsc{Dep’t State Bull.} 415 (1971).
\item\textsuperscript{19} Levy, supra note 16, at 668-700.
\item\textsuperscript{20} See INTELSAT Definitive Agreement, supra note 8, Arts. IX, X, [1972] 23 U.S.T. at 3832-45, T.I.A.S. No. 7532, ___ U.N.T.S. ___.
\item\textsuperscript{21} Id., Art. X(a), [1972] 23 U.S.T. at 3840-44, T.I.A.S. No. 7532, ___ U.N.T.S. ___.
\item\textsuperscript{22} Id., Art. IX(a)(i), (ii), [1972] 23 U.S.T. at 3832, T.I.A.S. No. 7532, ___ U.N.T.S. ___.
\item\textsuperscript{23} See id., Art. IV(g)(iv), [1972] 23 U.S.T. at 3838, T.I.A.S. No. 7532, ___ U.N.T.S. ___.
\item\textsuperscript{24} Also, the new arrangements insured that the Board of Governors would reflect a wide geographic base, by reserving five positions for representatives selected on a basis other than investment shares. Id., Art. IX (a)(iii), [1972] 23 U.S.T. at 3832, T.I.A.S. No. 7532, ___ U.N.T.S. ___.
\item\textsuperscript{25} A particular source of complaint was Comsat’s unwillingness to promote the distribution of procurement contracts among the European nations. See \textit{Comsat Fights for a Job}, \textsc{Bus. Week}, March 3, 1961, at 60-61.
\item\textsuperscript{25} The INTELSAT agreements provided that for an initial period of six years after the
In addition to forming the Board of Governors, the INTELSAT definitive agreement organized an Assembly of Parties. The Assembly’s jurisdiction extends to “those aspects of INTELSAT which are primarily of interest to the Parties as sovereign States.” The Assembly is composed of diplomatic representatives of all INTELSAT members, and each member is entitled to one vote. The Department of State’s representation of the United States in the Assembly, which functions as a political check on the actions of the INTELSAT Board of Governors, constitutes the second mode of executive branch supervision of Comsat. The Assembly generally considers issues of diplomatic concern to the member states—matters such as the formal relations of the organization with states and other international organizations, the long term goals of the organization, and the applicability of various treaties to which member countries are party.

However, because the United States has only one vote in the Assembly of Parties and the weighted voting system affords Comsat approximately one-third of the Board of Governors vote, the Executive as a practical matter can best further its foreign policy interests by influencing the position taken by Comsat on those matters which come before the Board. Since 1966 such control has been exercised pursuant to the terms of a joint Department of State-Office of Telecommunications Policy-Federal Communications Commission memorandum entitled “Procedures for U.S. Instruction of the Communications Satellite Corporation in its Role as U.S. Representative to the Interim Communications Satellite Committee.” This instruction procedure is the third, and most controver-


27 See id., Art. VII(a, b), (f), [1972] 23 U.S.T. 3824-25, 3827, T.I.A.S. No. 7532, U.N.T.S. 23. Other universal membership bodies in which each member had a single vote were also established. A meeting of Signatories was established to deal with matters of the budgetary requirements of the organization and the operational characteristics of the system. Id., Art. VIII [1972] 23 U.S.T. at 3828-30, T.I.A.S. No. 7532, U.N.T.S. 23.


of the means the Executive has employed to supervise the international affairs of the corporation. The procedure requires Comsat to advise the appropriate agencies, at least four weeks in advance, of the proposed agenda for INTELSAT Board of Governors meetings. Each agency then reviews the agenda and advises the State Department on those matters which the agency believes require prior instructions to Comsat. Comsat is obligated under the memorandum to take no action on agenda items singled out for attention by the various agencies until it receives State Department instructions. These instructions set forth the positions that Comsat "should take on the agenda items which require United States Government instructions" and are intended to be binding.

The propriety of these three modes of executive supervision must be determined under domestic law. Indeed, the INTELSAT Definitive Agreement provides that "relations between any telecommunications entity, acting as Signatory, and the Party which designated it shall be governed by applicable domestic law." The next section of this comment examines the limits domestic law places on executive authority to supervise Comsat.

II. THE LIMITS OF EXECUTIVE AUTHORITY OVER COMSAT
A. Executive Supervision of Comsat's International Business Activities: Sections 201(a)(4) and 402

Sections 201(a)(4) and 402 are the principal provisions of the 1962 Act governing the scope of the Executive's role respecting Comsat's relationships with foreign governments and international or

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31 Comsat officials have refused to acknowledge that the instructions are binding, referring to them instead as providing mere "guidance." See Letter from James McCormack, Chairman, Communications Satellite Corporation, to Frank E. Loy, Department of State (Aug. 27, 1966), reprinted in Government Use of Satellite Communications, Hearings before a Subcomm. of the House Comm. on Government Operations, 89th Cong., 2d Sess., 406 (1966) (hereinafter cited as Government Use Hearings). The State Department has claimed that the instruction procedure does not interfere with Comsat's corporate responsibilities, see Letter from Frank E. Loy to James J. McCormack (Aug. 18, 1966), reprinted in Government Use Hearings, supra, at 406, but the corporation feels that State Department instructions do interfere. See In re Communications Satellite Corp., 56 F.C.C.2d 1101, 1156-57 (1975) remanded, No. 75-2193 (D.C. Cir., Oct. 14, 1977). The FCC and Department of State have also had disagreements over their respective authorities under the 1962 Act. See COMPTROLLER GENERAL'S REPORT, supra note 30, at 54.

32 COMPTROLLER GENERAL'S REPORT, supra note 30, at 79.

33 Id. at 81.


foreign entities. Section 402 appears to limit the role of the State Department in Comsat's business negotiations concerning "facilities, operations, and services" to "advising the corporation of relevant foreign policy considerations." Section 201(a)(4), on the other hand, provides that the President shall "exercise such supervision over relationships of the corporation with foreign governments or entities or international bodies as may be appropriate to assure that such relationships shall be consistent with the national interest and foreign policy of the United States," and thus appears to grant the President plenary authority to supervise Comsat's international

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28 Satellite Act §§ 201(a)(4), 402, 47 U.S.C. §§ 721(a)(4), 742 (1970). Other sections of the 1962 Act further delineate aspects of the Executive/Comsat relationship. Section 201(a)(5) is particularly important in the area of Comsat's relationships with foreign governments. It provides that the President shall "insure that timely arrangements are made under which there can be foreign participation in the establishment and use of a communications satellite system." Satellite Act § 201(a)(5), 47 U.S.C. § 721(a)(5) (1970). Because there is little or no tension between the grant of this authority and the restriction of the State Department's role in Comsat's business negotiations in section 402 of the Act, see text and notes at notes 102-110 infra, section 201(a)(5) will not be discussed further in this section of the comment.

Satellite Act § 201(c)(3), 47 U.S.C. § 721(c)(3) (1970), which provides that upon the determination of the Secretary of State that communication should be established to a particular foreign point, the FCC shall institute proceedings under 214(d) of the Communications Act of 1934 "to require the establishment of such communication," and § 201(a)(3), 47 U.S.C. § 721(a)(3) (1970), which authorizes the President to "coordinate the activities of governmental agencies with responsibilities in the field of telecommunication," will be discussed in this part of this comment.

Finally, the President has some direct contact with Comsat's internal affairs. He has the power, subject to the approval of the Senate, to appoint three of the fifteen members of the company's board of directors. Satellite Act § 303, 47 U.S.C. § 733 (1970). However, the Attorney General concluded in 1962 that these appointees are neither government officials nor agents of the President. Op. Att'y Gen. No. 11 (1962). As directors their principal obligation is to the corporation and its shareholders, see Schwartz, Governmentally Appointed Directors in a Private Corporation—The Communications Satellite Act of 1962, 79 Harv. L. Rev. 350, 361-63 (1965). Comsat's articles of incorporation provide that all classes of directors have the same fiduciary duty. Articles of Incorporation of Communications Satellite Corp., Art. VIII, § 8.04, reprinted in Nominations of the Incorporators of the Communication Satellite Corporation, Hearings before the Senate Comm. on Aeronautical and Space Sciences, 88th Cong., 1st Sess. 49 (1963). Presidential appointment was provided for primarily to prevent domination of Comsat by the communications common carriers, principally AT&T. See Schwartz, supra, at 353; S. Rep. No. 1584, 87th Cong., 2d Sess. 11, reprinted in 1962 U.S. Code Cong. & Ad. News 2269, 2272.


"Whenever the corporation shall enter into business negotiations with respect to facilities, operations, or services authorized by this chapter with any international or foreign entity, it shall notify the Department of State of the negotiations, and the Department of State shall advise the corporation of relevant foreign policy considerations. Throughout such negotiations the corporation shall keep the Department of State informed with respect to such considerations. The corporation may request the Department of State to assist in the negotiations, and that Department shall render such assistance as may be appropriate.

relationships without distinguishing commercial relationships that arise in the ordinary course of business. That the scope of Presidential authority under section 201(a)(4) may be limited, however, is suggested by the use of the term “supervision,” as opposed to some more specific term such as “guidance” or “control.” More important, the legislative history of the 1962 Act suggests that Congress did not view section 201(a)(4) as an all-inclusive delegation of authority to the President to regulate the dealings of the corporation in foreign commerce. Although it has been stated that “in a statute dealing with foreign affairs, a grant to the President which is expansive to the reader’s eye should not be hemmed in or ‘cabined, cribbed, confined’ by anxious judicial blinders,” courts have often resorted to legislative history in order to determine the scope of delegated authority even in the face of broad statutory language.\(^1\)

Sections 201(a)(4) and 402 as eventually enacted differ significantly from the comparable provisions in the original Administration bill.\(^1\) The original version of section 201(a)(4) stated that the President shall “exercise general supervision over relationships of the corporation with foreign governments or entities or with international bodies”;\(^1\) the Administration’s proposed section 402 provided that Comsat “shall not enter into negotiations with any international agency, foreign government, or entity without a prior notification to the Department of State, which will conduct or supervise such negotiations,” and that “all agreements and arrangements with any such agency, government, or entity shall be subject to the


\(^{40}\) [W]hen Congress uses far-reaching words in delegating authority to the President in the area of foreign affairs, courts must assume, unless there is a specific contrary showing elsewhere in the statute or in the legislative history, that the legislators contemplate that the President may and will make full use of that power in any manner not inconsistent with the provisions or purposes of the Act. Id. (emphasis added). See Algonquin SNG, Inc. v. Federal Energy Admin., 518 F.2d 1051 (D.C. Cir. 1975), rev’d on a contrary reading of the legislative history, 426 U.S. 548 (1976); United States v. Yoshida International, Inc., 526 F.2d 560 (C.C.P.A. 1975).


approval of the Department of State.\textsuperscript{43} The Administration proposals as to the President’s supervisory authority were amended to substantially their present form by the Senate Committee on Aeronautical and Space Sciences.\textsuperscript{44} After the Senate Committee on Aeronautical and Space Sciences reported its version of the legislation, a bill\textsuperscript{45} containing identical provisions\textsuperscript{46} was introduced into the House by Representative Oren Harris, chairman of the House Committee on Interstate and Foreign Commerce.\textsuperscript{47} This bill was referred to his House Commerce Committee, which was already considering the Administration proposal.\textsuperscript{48} This Committee reported out the legislation without altering the Senate Committee’s versions of what were to become sections 201(a)(4) and 402 of the 1962 Act.\textsuperscript{49}

The purpose of amending sections 201(a)(4) and 402 was apparently to redefine the role of the Executive in the regulation of Comsat. Both committees heard much testimony concerning the desirable scope of Executive authority, both from Administration witnesses and from representatives of private enterprise. In particular, the testimony was replete with reference to existing practice with respect to Executive involvement in the business affairs of the international communications carriers (principally AT&T and ITT).\textsuperscript{50} This testimony established that the international carriers usually notified the State Department when they negotiated with foreign governments but that the State Department’s role in the negotiations had been quite limited. A vice-president of AT&T testified that the State Department had been “helpful in one phase or the other” in the negotiation of “a few” of AT&T’s international agreements, usually at the request of the corporation,\textsuperscript{51} and the State

\textsuperscript{43} S. 2814, 87th Cong., 2d Sess. § 402, reprinted in Space Sciences Hearings, supra note 41, at 10.
\textsuperscript{44} The Senate Aeronautical and Space Sciences Committee’s changes are discussed in S. Rep. No. 1319, 87th Cong., 2d Sess. 3, at 8-9 (1962). The text of S. 2814, as amended by the Senate Space Sciences Committee, is reprinted in Communications Satellite Legislation: Hearings before the Senate Comm. on Commerce, 87th Cong., 2d Sess. 4 (1962) [hereinafter cited as Senate Commerce Hearings].
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{51} House Commerce Hearings, supra note 41, at 550.
Department could point to only three telecommunications agreements for which it conducted the "overall" negotiations. Such testimony was usually elicited by committee members who were distressed by the broad grant of authority to the State Department in section 402 of the Administration bill.

The evident opposition to strict State Department control over Comsat prompted disclaimers of any such intent by the bill's advocates. Conceding that the past practice of limited Executive involvement in the global affairs of the international carriers had generally worked out satisfactorily, the State Department spokesman, Under Secretary of State of Political Affairs George McGhee, reassured the House Commerce Committee that the State Department's interest would be limited to "establishing the basic relationship between [a] . . . country and the international net . . . . We would merely be inhibiting and blocking [Comsat] in carrying out its functions if we insisted on negotiating every agreement as to rates and frequencies and all the commercial factors." Before the Senate Aeronautical and Space Sciences Committee, McGhee stated: "The State Department will in no sense be a regulatory body corresponding to that of the FCC. The State Department would . . . facilitate and supervise those negotiations which involve important foreign policy relations between us and the other government . . . ."

Mere assurances that State would be restrained in the exercise of its authority, however, did not placate the opponents of broad State Department power over the corporation's international dealings. In the Senate Aeronautical and Space Sciences hearings Senator Cannon suggested an amendment to section 402 substantially similar to that eventually approved. McGhee admitted that "your language corresponds quite closely to the present relationship [between the Executive and the international carriers]," though he protested that "a new situation would be created here which would mean that our Government must get into negotiations." Several

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22 Id. at 446; Space Sciences Hearings, supra note 41, at 172.
24 House Commerce Hearings, supra note 41, at 457-58.
25 Id. at 476.
26 Space Sciences Hearings, supra note 41, at 164-65.
27 Id. at 190.
28 Id.
days later the Administration evidently decided to take a somewhat
different tack and to accede to congressional pressure for a different
arrangement.

Attorney General Robert Kennedy revealed the Administration's
apparent change of heart in the final days of the House Com-
merce Committee hearings. Pressed to explain the meaning of, and
the need for, the broad grant of Executive power in the Administra-
tion's proposed section 402, Kennedy conceded that the language
was "stronger than it has to be." The Administration, he said, did
not intend the statute to deviate from the ordinary Executive-
common carrier relationship, a relationship which generally "has
worked very well." Rather, the concern was that the Act might be
construed to deprive the Executive of the authority to undertake
major negotiations with foreign governments. Kennedy emphasized
that the satellite corporation was qualitatively different from exist-
ing common carriers and that "a lot of this will have to take place
between the governments." The primary purpose of section 402
was to provide a channel for communications:

We have to make sure that if this Corporation got into
existence and wanted to make some arrangements with a coun-
try that would be against our foreign policy to make such ar-
rangements, that the State Department was informed; the
President was kept informed.

I think that was the only purpose of section 402, which I
think is a necessary laudable purpose, but I think that the
language can be altered, and we would be delighted to work
with this committee to try to work out mutually acceptable
language.

Section 402 was amended shortly thereafter by the Senate
Aeronautical and Space Sciences Committee and the House Inter-
state and Foreign Commerce Committee concurred. Rejecting a
compromise amendment offered by FCC Chairman Newton Minow,
which would have required State Department approval of Comsat's
arrangements with foreign agencies to the extent such arrangements
affected United States foreign policy, the committees instead
largely wrote into the legislation existing practice regarding Execu-

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59 House Commerce Hearings, supra note 41, at 578.
60 Id.
61 Id.
62 Id. at 580.
63 See text and notes at notes 43-44 supra.
64 See text and notes at notes 45-49 supra.
65 Space Sciences Hearings, supra note 41, at 471.
tive branch involvement in the global business activities of the international carriers. The amended section imposed a legal requirement that Comsat notify the State Department of any business negotiations between Comsat and foreign governments or entities, and directed the State Department to advise the corporation of “relevant foreign policy considerations” with respect to such negotiations. The bills also provided that, upon the request of the Corporation, the State Department is to render “appropriate” assistance in the negotiations. The Senate Space Sciences Committee explained: “In summary, the proposed section [402] reflects the practices now followed in regard to business negotiations which communications carriers conduct with international and foreign entities.”

The committees did not intend the amendment of the proposed section 402 to change “the responsibility of the President, and through him of the Department of State, for the conduct of foreign relations.” In apparent response to the plea of Attorney General Kennedy “to recognize the interest of the Government,” the proposed language of section 201(a)(4) was amended to provide that the President “shall exercise such general supervision over relationships of the corporation with foreign governments as may be appropriate to assure that such relationships shall be consistent with the national interest and foreign policy of the United States.” The report of neither committee commented on the purpose or intended effect of this revision. However, given the declared purpose of curtailing the State Department’s role in the Corporation’s business negotiations through the amendment of section 402 and the recognition that, in the field of foreign affairs, the President acts by and through the Department of State, it cannot have been intended simply to transfer to the President the substantive authority that the Administration’s bill would have reposed in the State Department. Indeed, a floor amendment offered in the House by Representative Celler that would have accomplished substantially that, by authorizing the President to “disapprove all acts or actions, both by the

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68 Id.
69 See text and note at note 59 supra.
70 S. 2814, 87th Cong., 2d Sess. § 403(a)(4) (1962), as amended, reprinted in Senate Commerce Hearings, supra note 44, at 5 (italicization not in original; italicized language added by amendment discussed in text). See also text and notes at notes 44-49 supra.
71 See text and note at note 68 supra; House Commerce Hearings, supra note 41, at 442, 461, 485, 580; Space Sciences Hearings, supra note 41, at 155, 165.
corporation and by departments and agencies of the Government, whenever necessary, to attain full compliance with the national policy regarding communications through space satellites," was defeated by voice vote.\(^2\)

Considered in conjunction with the concurrent amendment to section 402, it seems clear that the purpose of the section 201(a)(4) amendment was not to grant the President plenary authority to control the corporation in its international business activity. Rather, the amendment accords legislative recognition to the Executive's traditional role in the conduct of foreign relations. In hearings before both committees Administration spokesmen emphasized that the establishment of an international communications satellite system would implicate the interests and necessarily involve the cooperation of many sovereign countries, that the arrangements would therefore have to be negotiated on a diplomatic level between the interested governments, and that one of the principal goals of the Administration's proposed bill was to ensure that such negotiations would be conducted by the President's representative in foreign affairs, the Department of State.\(^3\) Negotiations between gov-

\(^2\) 108 CONG. REc. 7709 (1962).

\(^3\) See, e.g., House Commerce Hearings, supra note 41, at 476, 486, 584, 592; Space Sciences Hearings, supra note 41, at 158-59, 165, 169, 171, 180, 192. Remarks of Under Secretary of State McGhee in the Senate Space Sciences Hearings are representative:

SENATOR ANDERSON...

What part does the State Department now play in negotiations made by present communications carriers with foreign countries?

MR. McGHEE. Senator, in most cases the actual negotiation would be conducted by the carrier. In many instances the Department or its representatives abroad would facilitate the negotiation, would set the stage by discussions with the foreign government or entity involved, and would assist in every way possible. But the burden of the negotiation would be conduct by the carrier.

We envisage that under the proposed bill this would actually be the case, where purely commercial or technical considerations were involved or where relatively routine negotiations were involved. But the present negotiations largely involve point-to-point or country-to-country facilities. We are speaking here of facilities which encompass large segments of the earth, and many countries, and in quite new situations.

So it would be necessary, in many cases, for the Department to break the ground by first negotiating a general agreement pursuant to which the Corporation could negotiate, or to sit with the Corporation to negotiate, to supervise, to see that the foreign policies of the United States were achieved and that the Corporation was facilitated in the accomplishment of its objectives. Space Sciences Hearings, supra note 41, at 158.

What is envisaged here is a system which, at one time, covers most of the globe, which involves novel means of communications and novel arrangements, which involves foreign policy objectives of our country with respect to developing nations and with respect to many of our allies and friends in the world. This program involves the foreign relations of the United States which are the responsibility of the President. The Department of State acts as his representative in dealing with these problems.

\(\text{Id. at 165.}\)
ernments, which would, for example, establish "the basic relationship between [a] ... country and the international net," have traditionally been the responsibility of the President. When section 201(a)(4) is viewed as a recognition of that fact, it appears that the bill as reported out of the House Commerce and Senate Space Sciences Committees established a division between public and private responsibility for the international aspects of the corporation's functions: those aspects of a diplomatic nature, involving the relations of the United States with foreign nations, would be the affair of the President; on the other hand, those of a business nature, involving "facilities, operations and service," would be the affairs of the corporation, subject only to FCC regulation and, where appropriate, State Department advice.

The attempts to reconcile what appeared to some as the conflicting directives of sections 201(a)(4) and 402 in hearings held by the Senate Commerce Committee in April of 1962 affirm this view of the bill's division of responsibility. An FCC spokesman testified that the bill only limited the State Department's role with respect to Comsat's business negotiations, while allowing the Executive branch to determine policy in the context of diplomatic decisions:

"Now, under [section 201(a)(4)] there is reserved the right of the President and Department of State to do the real policy matters with respect to the use of the satellite. There will be multilateral negotiations, with respect to frequency negotiations, ... with respect to the technical parameters, and ... with respect to the rights of each country for the use of it."

I don't think that this [section 402] precludes the State Department from doing its legitimate function. I think it just indicates that the ordinary day-to-day business negotiations which are done now by common carriers with other governments is what this refers to.75

Several committee members, however, felt that the role of the President was not clearly delineated in the bill.76 To this end, the Committee reported an amendment to section 201(a)(4) deleting the qualifying term "general" so that the section now authorized the exercise of "such supervision ... as may be appropriate." The

71 House Commerce Hearings, supra note 41, at 476 (Under Secretary of State McGhee).
72 Senate Commerce Hearings, supra note 44, at 121 (Commissioner Craven).
73 See, e.g., id. at 162-64 (Sen. Yarborough).
Committee report stated that the word "general" was deleted because it suggested "restriction of the President's powers and responsibilities with respect to the formation and execution of the foreign policies of the United States."\[77\]

That this amendment was not intended to affect the compromise between public and private responsibility effectuated by the previous amendments to sections 201(a)(4) and 402 is evident from the Commerce Committee's report:

Section 402 should be read with section 201(a)(4) as both are concerned with the role of the corporation in relation to U.S. foreign policy. . . . Section 402(a)(4) [sic]\[78\] . . . reaffirms the traditional responsibility of the President, and through him of the Department of State, for conducting foreign policy. Section 402, on the other hand, is concerned with the narrower problem of the corporation's business negotiations with international or foreign entities. With respect to these negotiations, the corporation is to notify the Department of State when entering into negotiations and that Department is to advise the corporation of relevant foreign policy considerations.\[79\]

The Committee's analysis suggests that the Executive branch was barred from regulating Comsat's commercial dealings with foreign agencies with respect to facilities, operations, or services. As stated by Under Secretary of State McGhee:

Section 402 is limited to business negotiations with respect to facilities, operations or services. Negotiations of this character are carried on by private firms in the normal course of business. Any agreements, however, of a character which customarily call for approval by the Executive or the Congress would, in our opinion, continue to require that approval.\[80\]

The amended bill passed the House on May 3, 1962,\[81\] with only minor opposition. However, the bill ran into serious trouble on the Senate floor. Several senators picked up on the criticism voiced in the minority report of the Senate Commerce Committee that the

\[78\] The Committee meant § 201(a)(4).
\[80\] Letter from George C. McGhee, Under Secretary of State for Political Affairs, to Senator Pastore (June 22, 1962), reprinted in 108 CONG. REC. 15152 (1962). The agreements referred to would, of course, be executive agreements or treaties.
\[81\] 108 CONG. REC. 7712-13 (1962). The vote was 354 to 9.
bill delegated to a private monopoly the function of conducting American foreign policy;\textsuperscript{65} moreover, it was argued, the distinction between the "political" and "business" aspects of the satellite system was too elusive to be capable of application.\textsuperscript{65} These problems, among others,\textsuperscript{84} threatened to inspire a filibuster.\textsuperscript{85} The bill was therefore referred to the Foreign Relations Committee for clarification.\textsuperscript{86}

The Foreign Relations Committee heard testimony primarily from Administration witnesses. FCC Chairman Newton Minow,\textsuperscript{87} Attorney General Robert Kennedy,\textsuperscript{88} Secretary of State Dean Rusk,\textsuperscript{88} and Secretary of Defense Robert McNamara\textsuperscript{88} all testified to the effect that the bill did not delegate the foreign affairs power to a private corporation. Secretary Rusk served as the principal spokesman. Although Rusk disclaimed any interest in the State Department's becoming officially involved with the technical and commercial aspects of the satellite program,\textsuperscript{91} he asserted that the revision to section 201(a)(4) had restored the original effect of the Administration's proposals and that the purpose of the amendments to sections 201(a)(4) and 402 had been to transfer to the President, in whose hands it properly belonged, the substantive authority to control the corporation's international affairs.\textsuperscript{92}

The Senate Foreign Relations Committee reported the bill favorably without amendments. In its report the Committee simply summarized "the views of the executive branch with respect to the question of the authority of the President"\textsuperscript{79} by reproducing an exchange between Senator Sparkman and Secretary Rusk. In that


\textsuperscript{67} Three other principal objections were raised: (1) that the bill effected a "giveaway" by the government of a national asset; (2) that the corporation would be controlled by the communications carriers, particularly AT&T; and (3) that the FCC could not be expected to protect the public interest, given its past regulatory record. See 108 Cong. Rec. 16918-22 (1962) (Sen. Pastore).

\textsuperscript{68} See 108 Cong. Rec. 15187-88 (1962). See also id. at 16430-31 (Sen. Kefauver).

\textsuperscript{69} Id. The motion to recommit the bill was passed on August 1, 1962. The Foreign Relations Committee was instructed to report the bill back within 10 days.


\textsuperscript{71} Id. at 34.

\textsuperscript{72} Id. at 178-80, 209-11.

\textsuperscript{73} Id. at 298.

\textsuperscript{74} Id. at 174.

\textsuperscript{75} Id. at 175, 176, 178-79, 210-11.

exchange Rusk indicated that the President would have authority to decide what negotiations the government would conduct and what negotiations concern business matters within the meaning of section 402,\(^4\) that the President would conduct important negotiations with foreign governments,\(^5\) and that the Executive branch would conduct any negotiations leading to an Executive agreement or a treaty.\(^6\)

Secretary Rusk's reassurances did not satisfy the bill's opponents. On the Senate floor the opponents again advanced the claim that the bill delegated the foreign affairs power to a private corporation.\(^7\) However, the bill's proponents successfully invoked the recently-passed cloture rules,\(^8\) and the bill passed the Senate.\(^9\) Despite some differences between the House and Senate versions, the bill did not go to conference; instead, the Senate version was introduced directly onto the House floor. After limited debate, during which House opponents repeated the "delegation of the foreign affairs power" argument,\(^10\) the bill passed the House.\(^10\) President Kennedy signed the bill shortly thereafter.

The effect of the proceedings in the Senate Foreign Relations Committee upon the interpretation of the relationship between sections 201(a)(4) and 402 is unclear. On the one hand, Senator Pastore, in the final speech before the Senate vote, approved the Rusk interpretation and read a letter from the Secretary that repeated the assertion that "the authority contained in the original section 402 was transferred to section 201(a)(4)."\(^10\) On the other hand, Rusk's assertion is plainly inconsistent with what appears to have been the intention underlying the amendments to sections 201(a)(4) and 402 early in the legislative process.\(^13\) The distinction drawn between business and diplomatic aspects of satellite system development becomes meaningless under the Rusk interpretation because the Executive could control any Comsat foreign business activity simply by deciding that it affects some foreign policy interest.\(^14\)

\(^{6}\) Id. at 4, [1962] U.S. Code Cong. & Ad. News at 2321.
\(^{7}\) 108 Cong. Rec. 16816-17 (1962).
\(^{8}\) Id. at 16431.
\(^{9}\) Id. at 16926.
\(^{10}\) Id. at 17674, 17677.
\(^{11}\) Id. at 17681. The vote was 372 to 10.
\(^{12}\) Id. at 16924.
\(^{13}\) See text and notes at notes 36-74 supra.
Moreover, the Senate Foreign Relations Committee did not expressly adopt Rusk's interpretation of the bill—it simply purported to report the Administration's view.

To resolve this ambiguity it is useful to consider the context in which Rusk's testimony was elicited. The concern which led to the Foreign Relations "clarification" hearings was that the bill would delegate foreign policy powers to a private corporation. The minority views of Senators Morse, Long, and Gore reported in the Foreign Relations Committee Report articulate this concern. The senators claimed that section 402 gave the corporation the authority to determine for itself that a given negotiation was a "business negotiation" and thereby delegated to Comsat the power "to negotiate agreements with foreign governments on matters affecting U.S. foreign policy," including the power to handle the anticipated negotiations regarding the establishment of an international satellite system.

Viewed from this perspective Rusk's assertions are less persuasive authority. The congressmen were concerned that the bill might delegate, perhaps unconstitutionally, the Executive power over foreign diplomacy to a private corporation. However, one need not assent to the proposition that the Executive has plenary authority to intervene in Comsat's affairs simply upon a finding that those affairs affect foreign policy in some way in order to read the statute as leaving the Executive's power to conduct foreign relations undisturbed. Matters of diplomacy—matters affecting the rights, duties, and interests of the United States as sovereign—are fundamentally different in nature from matters concerning a corporation's international business, even though such business matters may implicate foreign policy interests. This distinction, as was suggested above, was recognized and incorporated into the bill by the House Commerce and Senate Space Sciences Committees and adopted by the Senate Commerce Committee. The proceedings before the Foreign Relations Committee cannot, consistently with that prior legislative history, be viewed as reading the distinction out of the bill. Since it is not necessary to do so in order to effectively assuage the concerns that prompted, and in fact permeated, the Foreign Relations hearings, Rusk's assertions before that Committee should be discounted.

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166 Id. at 2324.
167 Id. at 2325.
168 See, e.g., Senate Foreign Relations Hearings, supra note 87, at 372.
169 See text and notes at notes 65-75 supra.
It is fair to conclude that preemptive Executive authority extends only to matters of foreign relations—that is, that the Executive can determine that a negotiation involves a foreign policy interest such that the government will carry on the negotiation as a matter of diplomacy—and that Executive branch control over business negotiations the Executive is unwilling to raise to a diplomatic level is limited to the giving of advice under section 402.

B. Comsat, the Executive, and the FCC

The role accorded the FCC in the regulation of the corporation also delimits the scope of Presidential supervisory power under section 201(a)(4). Sections 201(c) and 401 of the Act vest in the FCC primary regulatory authority over Comsat. Section 201(c)

In fact, at some points this appears to be the way the Administration spokesmen read the bill:

MR. CHAYES [Legal Advisor, Department of State]: I would say generally if I may in this connection that the President has constitutional authority in the field of foreign relations, and to assert the foreign policy, to define it, to assert it and to represent the Government of the United States in its foreign relations with other countries. So that when the bill says that the President shall supervise the relationship of this entity with foreign nations, entities, and international organizations, it means he shall use his constitutional authority to conduct the foreign relations of the United States to do so.

Senate Foreign Relations Hearings, supra note 87, at 212. However, other statements by Administration officials are inconsistent with this interpretation. See, e.g., Senate Foreign Relations Hearings, supra note 87, at 178 (Secretary Rusk); 90-91 (Minow); 196, 212 (Chayes). Particularly troublesome is the State Department’s opinion that an amendment offered by Senator Gore stating that “the corporation shall comply with the directives of the President” need not be adopted, on the ground that it was unnecessary in light of the broad language of section 201(a)(4). See id. at 433-34. Senator Gore, however, saw no such authority implicit in the statute. Id. at 212-13. Moreover, it must be remembered that it is what the congressmen thought the bill meant, not what the State Department thought, that is of primary importance, and, as argued in the text, it was not necessary to adopt some of the broad propositions asserted by State Department spokesmen in order to meet the objections of some senators, objections that threatened to impede the bill’s progress. The force of State Department rejections of proposed amendments is further undercut by the Administration’s anxiousness that the bill pass quickly because of impending international negotiations. See 108 Cong. Rec. 16924 (1962) (Sen. Pastore). Perhaps a major reason underlying State’s opposition to the Gore and similar amendments was the fear that its inclusion might revive the concern that had led to the amendment to section 402, thereby further delaying passage of the bill, and the hope that the legislative history which had been “created” in the Foreign Relations hearings would serve the same end.


Id. § 741 (1970).

See generally Throop, Some Legal Aspects of Satellite Communication, 17 AM. U.L. REV. 12, 20-22 (1967). It should be noted that FCC regulation comprehends the overall structure of the United States’s international communications satellite service industry and not merely the affairs of one corporation. See Satellite Act § 201, 47 U.S.C. § 721(c) (1970). In practice, the Commission has structured the industry on the assumption that Comsat will operate principally as a wholesaler of communications—“a carrier’s carrier”—with the ultimate users (except the United States government per § 201(a)(6) of the 1962 Act) procuring
specifically authorizes the FCC, inter alia, to insure the technical compatibility of the satellite facilities with existing facilities,\textsuperscript{114} approve the technical characteristics of the satellite system,\textsuperscript{115} grant appropriate authorizations for the construction of terminal stations,\textsuperscript{116} insure that no additions to the system are made unless required by the public interest, convenience, and necessity,\textsuperscript{117} and require additions to the systems as may be required by the public interest, convenience, and necessity.\textsuperscript{118} The section also grants the Commission power to determine the terms and conditions for utilization of the satellite system, including commercial rates and services.\textsuperscript{119} Furthermore, it gives the agency far-reaching authority over Comsat's management actions related to the corporation's financial affairs.\textsuperscript{120}

The specific powers accorded the FCC in section 201(c) supplement the agency's regulatory authority under section 401. That section designates Comsat a common carrier subject to titles II and III of the Communications Act of 1934,\textsuperscript{121} to the extent that the 1934 Act requirements are consistent with those of the 1962 Act. Sections 214 and 319 of the 1934 Act require carriers to obtain Commission approval for the acquisition or construction of new lines of communications or the extension of existing lines,\textsuperscript{122} and to secure a permit from the FCC prior to the construction of any radio facility.\textsuperscript{123} Thus, Comsat must obtain FCC authorization before it can participate in the establishment of new lines of communication between geographic points,\textsuperscript{124} undertake the construction of a ground station, or

\begin{itemize}
\item[\textsuperscript{115}] Id. § 201(c)(6), 47 U.S.C. § 721(c)(6) (1970).
\item[\textsuperscript{116}] Id. § 201(c)(7), 47 U.S.C. § 721(c)(7) (1970).
\item[\textsuperscript{117}] Id. § 201(c)(9), 47 U.S.C. § 721(c)(9) (1970).
\item[\textsuperscript{118}] Id. § 201(c)(10), 47 U.S.C. § 721(c)(10) (1970).
\item[\textsuperscript{119}] Id. § 201(c)(2)(5), 47 U.S.C. § 721(c)(2)(5) (1970).
\item[\textsuperscript{120}] See, e.g., id. § 201(c)(1), 47 U.S.C. § 721(c)(1), (8) (1970). This grant of authority was viewed by Congress as necessary to prevent excessive capitalization or accumulation of disproportionate amounts of debt or equity capital. See Legislation Note, 76 Harv. L. Rev. 388, 390 n.11 (1962). In fact, the Commission has exerted a profound, though indirect, influence over Comsat's capital structure through the ratemaking process. The FCC has recently held that Comsat's authorized rate of return will be measured on the basis of an imputed debt/equity ratio substantially greater than that which actually prevails. See In re Communications Satellite Corp., 66 F.C.C.2d 1101, 1157-60 (1975), remanded on other grounds, No. 75-2193 (D.C. Cir., Oct. 14, 1977).
\item[\textsuperscript{121}] 47 U.S.C. §§ 201-223, 301-30 (1970).
\item[\textsuperscript{122}] Id. § 214.
\item[\textsuperscript{123}] Id. § 319.
\item[\textsuperscript{124}] See COMPTROLLER GENERAL'S REPORT, supra note 30, at 10.
\end{itemize}
participate in the construction of an INTELSAT facility. In determining whether an authorization is in the public interest the FCC considers factors beyond those peculiar to satellite services. The Commission’s policy is to license future facilities only after consideration of the proper mix of satellite and conventional facilities.

The breadth of FCC authority to regulate the financial affairs of the corporation and the technical aspects of satellite system development cannot be easily squared with a broad view of Executive branch authority under section 201(a)(4). Recognition of Executive authority to control Comsat’s foreign business activities whenever those activities affect foreign policy or the national interest would necessarily imply Executive power to dictate FCC decisions or to circumvent the FCC entirely.

So broad a reading of section 201(a)(4) would virtually neutralize the explicit restrictions on executive authority over the FCC found elsewhere in the Act. For example, section 201(a)(7) as proposed provided that the President would “insure efficient frequency use,” thus perhaps implying executive authority to oversee the FCC’s allocation of commercial frequencies. The Senate Commerce Committee amended this section to its present form, which authorizes the President only “to exercise his authority . . . to help attain coordinated . . . use of the electromagnetic spectrum.” The committee report explained: “The amendment will make clear that no new authority is granted to the President to accomplish these ends but that he will have to rely on his present authority.” The present authority referred to was apparently the power to conduct diplomatic negotiations on international frequency questions. The committee chairman explained: “Once we decide on an international . . . level what frequencies can be used by what country, the FCC shall then determine what use shall be made of the frequencies which have been allocated to us.”

Similarly, the one area of the Act which delineates with any

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125 Id.
particularity the respective roles of the FCC and the President reflects a rather narrow view of executive branch authority. Section 201(c)(3) provides that

in any case where the Secretary of State, after obtaining the advice of . . . [NASA] as to technical feasibility, has advised that commercial communication to a particular foreign point . . . should be established in the national interest, [the FCC shall] institute forthwith appropriate proceedings under . . . [47 U.S.C. § 214(d)(1970)] to require the establishment of such communication by the corporation and the appropriate common carriers . . . .133

Under this provision, the Secretary of State does not have the power to order Comsat to establish an overseas connection nor may he dictate the terms of the FCC's order. Rather, the FCC is empowered to define the terms and conditions of the order after a full hearing.134 While the Secretary of State's determination of the national interest justification for the issuance of the order will in all likelihood be conclusive, the FCC does have the responsibility, under section 214(d) of the Communications Act of 1934, to determine whether the extension of service will impair the ability of communications companies to perform their duties to the public as common carriers.135

Congressional amendments to other sections of the Act also demonstrate an intention to cut down on the scope of Executive authority.136 These amendments were motivated in part by congres-

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136 Section 201(a)(1) of the Act, as originally proposed, would have authorized the President to "plan, develop, and supervise the execution of a national program for the establishment . . . of a . . . satellite system." S. 2814, 87th Cong., 2d Sess. § 201(a)(1) (1962), in Space Sciences Hearings, supra note 41, at 6 (emphasis added). The section was amended to provide that the President should "aid . . . and foster the execution of a national program." Satellite Act § 201(a)(1), 47 U.S.C. § 721(a)(1) (1970) (emphasis added). See S. 2814, 87th Cong., 2d Sess. § 403(a)(1) (1962), as amended by the Senate Comm. on Aeronautical & Space Sciences, reprinted in Senate Commerce Hearings, supra note 44, at 5. The Administration's bill had proposed that articles of incorporation filed by the Presidential incorporators could be "amended only upon the initiation by or by approval of the President." S. 2814, 87th Cong., 2d Sess. § 302 (1962), as introduced, reprinted in Space Sciences Hearings, supra note 41, at 8. This proposal was deleted from the bill. Compare id. with S. 2814, 87th Cong., 2d Sess. § 405 (1962), as amended by the Senate Comm. on Aeronautical & Space Sciences, reprinted in Senate Commerce Hearings, supra note 44, at 7. A 1969 revision of section 303 of the 1962 Act gave Comsat explicit authority to amend its corporate articles. Act of March 12, 1969, Pub. L. No. 91-3, § 1, 53 Stat. 4 (1969).
sional concern that the proposed bill unnecessarily duplicated regulatory efforts\textsuperscript{137} and, apparently, the belief that the FCC should have primary responsibility for the regulation of the corporation.\textsuperscript{138} Although section 201(a)(3) of the Act directs the President to "coordinate the activities of governmental agencies with responsibilities in the field of telecommunication, so as to insure that there is full and effective compliance at all times with the policies set forth in this chapter,"\textsuperscript{139} this "coordination" provision cannot be read as granting the President the authority to circumvent the FCC's jurisdiction, either by dictating FCC decisions or by exerting direct control over Comsat.\textsuperscript{140} President Kennedy made it clear in proposing the bill that it did not alter existing relationships among agencies: "Adequate authority and responsibility is reserved for the President to insure that the policies and objectives of the act are carried out effectively. The draft legislation does not interfere with or limit the existing prerogatives of any Government agency."\textsuperscript{141} Along the same lines, FCC chairman Newton Minow testified that section 201(c)(3) does not diminish any of the FCC's regulatory powers.\textsuperscript{142}

The FCC's mandate is to decide questions arising within its jurisdiction under the statutory criteria of public interest, convenience, and necessity. Although the President's view as to what would most effectively carry out the policies of the Act will be relevant and in some instances will be determinative\textsuperscript{143}—especially on questions

\textsuperscript{137} See House Commerce Hearings, supra note 41, at 379, 385, 389-90, 430-32, 523-26, 558, 702-03; Space Sciences Hearings, supra note 306, at 178, 316, 394-95.


\textsuperscript{139} Indeed, the House rejected the amendment to section 201(a) offered by Representative Celler that would have provided the President such power. See text and note at note 72 supra. This amendment would have granted the President authority to review and approve all actions taken by Comsat and all policies adopted by government agencies, including the FCC.


\textsuperscript{141} This has been the case in proceedings under § 201(a)(6) of the 1962 Act. Satellite Act § 201(a)(6), 47 U.S.C. § 721(a)(6) (1970). This section commands the President to "take all necessary steps to insure the availability and appropriate utilization of the communications satellite system for general governmental purposes except where a separate communications
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having foreign policy aspects—the decision is ultimately the Commission's. 144

C. Legislative Preemption

It is nearly indisputable that the President is, under the Constitution, the "sole organ" of the United States in the conduct of foreign relations,145 in the sense that only he may communicate or negotiate with foreign governments. The President asserts rights and assumes duties for the United States and can make some international agreements solely on his own authority.146 As these powers are solely the President's,147 they cannot be exercised by a private person148 or by the Congress. As noted earlier, section 201(a)(4) of the 1962 Act recognized the Executive's foreign affairs power.149

The power to conduct diplomatic relations does not exhaust the executive power over foreign affairs.150 There are undoubtedly many actions short of diplomatic negotiation which a President could justify through invocation of the foreign affairs power. This general foreign affairs power encompasses an inherent presidential power to take action designed to affect foreign commerce, at least in some respects.151 Recognition of the existence of the power, however, only

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144 See COMPTROLLER GENERAL'S REPORT, supra note 30, at 53-56.
145 See United States v. Curtiss-Wright Corp., 299 U.S. 304, 319 (1936); L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 48-49, 92-94 (1972). The phrase "sole organ" was coined by (later Chief Justice) John Marshall while a member of the House. 10 ANNALS OF CONG. 613 (1800). The constitutional basis for authority of the President to make executive agreements has been found in several provisions. See RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW [hereinafter cited as RESTATEMENT (SECOND)], § 121, comment a.
146 See L. HENKIN, supra note 145 at 48. Treaties, of course, require Senate consent. U.S. CONST. art. II, § 2, cl.2. The permissible scope of international agreements is limited only by the requirement that their subject matter be of "international concern"—that is, "relate to the external concerns of the nation as distinguished from matters of a purely internal nature." See RESTATEMENT (SECOND), supra note 145, § 117, comment b.
147 See L. HENKIN, supra note 145, at 92-94. But some international agreements may be made only with congressional authorization, see RESTATEMENT (SECOND), supra note 145, § 120.
148 Cf. United States v. Mazurie, 419 U.S. 544, 556-59 (1975). In Mazurie the Court acknowledged the principle that Congress may not delegate the legislative power to nongovernmental agencies. It held that a delegation of the authority of Congress to govern the Indian tribes, U.S. CONST., art. I, § 8(d)(3), to a tribal council was permissible only because the council possessed "attributes of sovereignty."
149 See text and notes at notes 73-79 supra.
150 See L. HENKIN, supra note 145, at 48-49.
"opens the door to analysis,"\textsuperscript{112} for the power to regulate foreign commerce is expressly committed to Congress.\textsuperscript{113} When Congress legislates comprehensively in an area pursuant to its article I foreign commerce power, that legislation preempts the field, and the President may not take any action in the area except as authorized by the legislation.\textsuperscript{114}

In the two major cases involving the preemption doctrine, the Supreme Court has given it a wide scope. In the case of \textit{Little v. Barreme},\textsuperscript{115} Chief Justice Marshall held that the President did not have authority to order the seizure of a vessel sailing from a French port because Congress had enacted legislation which authorized only the seizure of vessels bound to France. Similarly, in the \textit{Steel Seizure} case\textsuperscript{116} four of the six members of the Supreme Court majority applied the preemption doctrine to hold that the executive was without authority to seize and operate steel mills in the interests of the Korean War effort.\textsuperscript{117}

These cases clearly indicate that the President cannot rely on "some aura of 'inherent' Presidential authority"\textsuperscript{118} to legitimate ac-

\footnotesize{(Leventhal, J., dissenting), \textit{cert. denied}, 421 U.S. 1004 (1975).}
\footnotesize{\textsuperscript{113} U.S. CONST. art. I, § 8, cl. 3.}
\footnotesize{\textsuperscript{115} 6 U.S. (2 Cranch) 170 (1804).}
\footnotesize{\textsuperscript{116} \textit{Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579 (1952).}
\footnotesize{\textsuperscript{117} The four justices were Frankfurter, Clark, Jackson, and Burton. Justice Frankfurter left open the question whether the President's actions would be proper in the absence of legislation bearing upon the asserted presidential authority. He concluded that the enactments of the Taft-Hartley Act and the Defense Production Act of 1950 were intended to deny such authority. \textit{Id.} at 597-614. Justice Clark's opinion rested squarely on \textit{Little v. Barreme}, 6 U.S. (2 Cranch) 170 (1804), and held that it was incumbent on the President to follow the procedures established by the Selective Service Act, as well as the Taft-Hartley and Defense Production Acts, in order to effect the seizure. \textit{Id.} at 663-65. Justice Jackson noted that the seizure of private property was not an open field, but had been covered by three statutory policies inconsistent with the President's action. \textit{Id.} at 659. Finally, Justice Burton stated that the passage of the Taft-Hartley Act meant that Congress had authorized a procedure that the President had failed to follow. \textit{Id.} at 659. The other members of the majority, Justices Black and Douglas, took a broader view of congressional authority, reasoning that the power to seize property was wholly committed to the legislature. \textit{Id.} at 682-90 (Black, J.); \textit{id.} at 629-34 (Douglas, J.).}
\footnotesize{\textsuperscript{118} The phrase is Judge Leventhal's. \textit{Consumers Union of U.S., Inc. v. Kissinger}, 506 F.2d 136, 149 (D.C. Cir. 1974) (dissenting opinion), \textit{cert. denied}, 421 U.S. 1004 (1975). \textit{See United States v. Western Union Tel. Co.}, 272 F. 311 (S.D.N.Y.), \textit{aff'd}, 272 F. 893 (2d Cir. 1921), \textit{rev'd on consent of the parties}, 260 U.S. 754 (1922). \textit{Western Union} held that in the absence of statutory authorization, the President could not impose conditions upon the landing in American territory of international cables owned by a domestic company which, like Comsat, operated under a federal franchise. The court stated: "It is not sufficient to say that he must
tions taken outside a comprehensive Congressional scheme of foreign commerce regulation. The recent case of *Consumers Union of U.S., Inc. v. Kissinger* confirms the point. In that case the District of Columbia Circuit upheld Presidential negotiation, pursuant to his foreign affairs powers, of voluntary limits on steel imports by foreign steel producers, but based its holding, in part, on the ground that Congress had not preempted the field with respect to such voluntary agreements. The President could negotiate an enforceable agreement, the court noted, only pursuant to the procedures and under the circumstances spelled out by the Trade Expansion Act of 1962.

The preemption doctrine is applicable to the field of international satellite communication. Acting pursuant to its power to regulate foreign commerce Congress in the 1962 Act prescribed a comprehensive structure to govern American participation in the global satellite system. It chose to create a private corporation and to rely in part on business incentives to accomplish its statutory objectives. The primary regulatory authority was vested in the FCC. Moreover, Congress recognized the essential role of the President in the conduct of foreign relations through the inclusion of section 201(a)(4). Any exercise of Presidential or Executive power not authorized by the 1962 Act should therefore be precluded. This is especially true with respect to Executive actions inconsistent with the restriction of Executive authority over Comsat's business negotiations under section 402 or in conflict with the regulatory role entrusted to the FCC by sections 201(c) and 401.

### III. THE LEGALITY OF CURRENT EXECUTIVE BRANCH SUPERVISION

The foregoing discussion of the limits of Executive authority over Comsat has important implications. This section of the comment will apply that analysis to the three principal means whereby the Executive currently exercises supervisory authority.

The first means, negotiation with foreign governments of international agreements regarding satellite systems, is clearly a permissible exercise of Executive authority. Comsat and the State Department, however, have differed over what role each should play in the negotiation of INTELSAT agreements. During the initial
negotiations leading to the interim agreement, Comsat regarded the State Department's involvement as an unwarranted intrusion into the corporation's affairs. The State Department prevailed, and the basic decisions regarding the establishment of the satellite system were resolved through diplomatic channels. The course of events respecting the negotiation of the interim arrangements in 1969 followed a similar pattern: Comsat wanted to maintain the interim consortium but the State Department, sensitive to foreign political pressures for a new organization, preempted Comsat and the negotiations were conducted through a plenipotentiary conference. State's actions appear to be a proper exercise of Executive authority under section 201(a)(5) of the Act, which authorizes the President to insure timely arrangements for foreign participation in the satellite system; the resulting agreements, moreover, were Executive agreements binding on the United States as well as Comsat, and therefore State Department intervention was a proper exercise of Presidential supervisory authority under section 201(a)(4).

This mode of Executive supervision may also be available to prevent Comsat from pursuing certain activities within INTELSAT. For example, in late 1972 Comsat proposed that INTELSAT provide a maritime service capability in future systems. In response, the British suggested that although INTELSAT might provide such service under contract to third parties, the treatment of the complex questions concerning planning, financing, implementing, and operating a global maritime system might require the establishment of a new international organization. The United States acquiesced in this position and, after consulting Comsat, participated in discussions under the auspices of the United Nations Intergovernmental Maritime Consultative Organization. Comprehensive agreements were ultimately concluded establishing a new international organization, the International Maritime Satellite Organization [INMARSAT], with responsibility for maritime service.

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164 See text and notes at notes 9-17 supra.
166 See text and notes at notes 17-18 supra.
170 INMARSAT Convention and Operating Agreement (London 1976). Legislation is cur-
The second form of Executive supervisory authority over Comsat involves its participation in the INTELSAT Assembly of Parties. Since the Assembly considers decisions of interest to sovereign states as such,\textsuperscript{171} it seems appropriate for representatives of the State Department, rather than of Comsat, to act within this forum. The mandate of section 201(a)(4) of the 1962 Act, that the Executive branch may employ any measures appropriate to assert the sovereign interests of the nation, provides ample justification: the members of the Assembly are the sovereign nations party to the INTELSAT Definitive Agreement and the Assembly's jurisdiction extends only to diplomatic issues. When the Assembly acts on matters outside its authority—for example, by passing resolutions concerning INTELSAT operations—its views are not binding on the Board of Governors, which is required only to give them due consideration.\textsuperscript{172}

There is serious question, however, about the third mode of supervision adopted by the Executive—the practice of instructing Comsat on the positions it should take on matters coming before the INTELSAT Board of Governors.\textsuperscript{173} One such instruction, issued in September, 1976, required Comsat to urge the Board of Governors to develop operational plans for the forthcoming INTELSAT V series of satellites.\textsuperscript{174} This instruction was ostensibly prompted by the concern that the proposals then before the Board failed to ensure efficient utilization of space satellite facilities.\textsuperscript{175} Possibly the State Department was also apprehensive that the Board would approve economically wasteful plans or plans that would so occupy the spectrum of available frequencies and orbital space that any other systems, established apart from INTELSAT, would be unable to operate efficiently. Another instruction expressed the stance Comsat should take concerning the orbital positioning of a particular satellite in the INTELSAT III series.\textsuperscript{176} This directive was motivated by the Department of State's desire to assure spare satellite capacity
for both Indian and Pacific Ocean regions.\textsuperscript{177}

Notwithstanding the important policy concerns underlying the instructions, it is doubtful that they have binding legal effect.\textsuperscript{178} Since the Executive has no inherent constitutional power to direct the international affairs of the corporation,\textsuperscript{179} authority for the instruction procedure must be found in the statute. The Department of State has justified its supervision of Comsat's Board of Governors' activities in part on the ground that section 201(a) of the 1962 Act vests in the President or his delegate\textsuperscript{180} the authority to determine the "national interest" with respect to the establishment and operation of the satellite system, and that this authority subsumes whatever public interest determinations may be within the jurisdiction of the FCC.\textsuperscript{181} This reading of the statute is flawed in two respects.

First, it ignores the primacy of the FCC in determining the demands of public interest. The responsibility for the issuance of regulatory orders pertaining to Comsat's operations is vested in the FCC. Indeed, certain of the issues raised by the instructions described above have been the subject of FCC proceedings.\textsuperscript{182} As the Commission has maintained, foreign policy interests are only one component of the public interest standard under which requests for authorizations for participation in the ownership and operation of INTELSAT facilities are determined.\textsuperscript{183} That particular instructions of a regulatory nature have not brought the State Department into direct conflict with the FCC is beside the point; under the Act the regulatory jurisdiction is the Commission's alone.

Second, the State Department reads too much into section

\textsuperscript{177} Interview with J.S. Hannon, General Attorney, Communications Satellite Corporation, in Washington, D.C. (September 15, 1977).

\textsuperscript{178} Enforcement of the instructions presumably would be accomplished pursuant to section 403(a) of the Act, which authorizes the Attorney General to sue for equitable relief "[i]f the corporation . . . shall engage in or adhere to any action, practices, or policies inconsistent with the policy and purposes declared in section 701 of this title." Satellite Act § 403(a), 47 U.S.C. § 743(a) (1970).

Although the merits of a foreign policy decision may be nonjusticiable, questions of the authority of the Executive to take certain actions in the foreign relations area are certainly susceptible to judicial treatment. See Baker v. Carr, 369 U.S. 186, 211 (1962) (dictum); cf. Kent v. Dulles, 357 U.S. 116 (1958) (inquiry into Secretary of State's authority to deny passport applications).

\textsuperscript{179} With respect to the President's inherent authority over foreign affairs, the 1962 Act preempted the field. See text and notes at notes 145-161 supra.


\textsuperscript{181} See COMPTROLLER GENERAL'S REPORT, supra note 30, at 54.

\textsuperscript{182} See, e.g., In re Communications Satellite Corp., 44 F.C.C.2d 726, 729-30 (1973) (admonishing Comsat to plan for efficient facilities utilization).

\textsuperscript{183} See COMPTROLLER GENERAL'S REPORT, supra note 30, at 53-56.
201(a)(4). Quite apart from the character of the instructions given, implementation of the instructions procedure seems to be outside the scope of the Executive's authority under section 201(a). The President's authority under section 201(a)(4) to supervise the corporation in its international dealings is significantly limited. Executive branch control over business negotiations that the Executive branch is unwilling to raise to a diplomatic level is restricted by section 402 to the giving of advice. It is arguable that the INTELSAT agreements, by making separate provision for the Assembly of Parties, effect a clear functional separation of political and business matters within INTELSAT, and therefore that Comsat's activities on the Board of Governors constitute business negotiations within the meaning of section 402 of the 1962 Act. Indeed, the matters committed to the Board under the INTELSAT agreements are matters of management policy with regard to INTELSAT's operations, facilities, and services—the very matters specified in section 402 respecting which the State Department can only advise Comsat. Although it could perhaps be argued that Comsat's activities on the INTELSAT Board of Governors are not the type of "business negotiations" which section 402 concerns, and do not involve the kind of matters the Executive could or would negotiate over at a diplomatic level, such an argument proves too much. The legislative

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184 See text and notes at notes 109-110 supra.

185 It is worthwhile to note that although the United States was originally opposed to the creation of the Assembly, its opposition was not prompted by the belief that the establishment of the Assembly of Parties separated artificially the political from the business aspects of the organization; rather, American opposition was due to apprehension that adoption of the proposal would result in the unnecessary introduction of "political" issues into an organization that was primarily concerned with "matters of the design and development of the system." See Plenipotentiary Conference on Definitive Arrangements for the International Telecommunications Satellite Consortium, Document No. Com. I/61 (March 10, 1969) (statement of the United States Representative to Committee I) (on file with The University of Chicago Law Review). The U.S. Negotiator argued:

[W]e do not see this organization as having a continuing series of political questions to deal with. . . . [I]t is our most sincere desire that this organization provide a service which, like the scales of justice, is blind; [that] seeks to provide a service that everyone needs, free of the political considerations that are such a heavy burden on so many of our other international organizations.

Id. at 2. This perception of the character of INTELSAT makes it difficult to claim that ordinary Board business requires diplomatic attention and executive supervision pursuant to section 201(a)(4).

186 See generally INTELSAT Definitive Agreement, supra note 8, Art. X [1972] 23 U.S.T. at 3840-45, T.I.A.S. No. 7532, U.N.T.S. . . . . Furthermore, this separation of the "political" from the "business" aspects of INTELSAT's functions is carried out in practice. When the Assembly made the political determination to admit the Peoples' Republic of China (Peking) and expel the Republic of China (Taipei), for example, the Board of Governors' sole responsibility was to work out the financial adjustments incident to the latter's departure. See INTELSAT Assembly of Parties, Record of Decisions, AP-2-3E (1976).
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history reveals that the purpose of section 201(a)(4) was to insure that the Act did not place truly major foreign policy decisions in the hands of a private corporation. It was never seriously contemplated that technical details of a business nature should be within the province of the Executive. Indeed, the spectre of detailed State Department supervision of Comsat affairs was one of the features of the original Administration bill which its opponents found most objectionable.

Thus, by instructing Comsat on the positions it should take on INTELSAT business matters, the State Department assumes responsibilities which Congress entrusted to the corporation and the FCC, and the instructions issued therefore have no binding legal effect.

An amendment proposed by Representative Celler that would have empowered the Executive to "disapprove all acts or actions" of the corporation was defeated by a voice vote.

The truly radical nature of the State Department's assertion of authority is brought out by an exchange between Senator Gore and the State Department's legal advisor, Abram Chayes, which occurred during the Senate Foreign Relations Committee Hearings after Chayes asserted a plenary presidential power to direct the corporation:

Senator GORE. I concur in your view that the President has constitutional responsibility with respect to our Nation's foreign policy, but I challenge any assumption that he has constitutional responsibility or authority for telling a private corporation what to do—giving it directions as to what agreements it shall enter—unless the law so provides. The Constitution makes no such reference.

Mr. CHAYES. We believe this law does provide it in 201(a)(4), sir.

Senator GORE. Do you really believe that?

Mr. CHAYES. Yes, sir, I do.

Senator GORE. Would you cite any provision in this bill which confers any authority upon the President which he does not already have?

Mr. CHAYES. I think it is 201(a)(4).

Senator GORE. Does it say he shall do so-and-so?

Mr. CHAYES. Yes. It says he shall use his powers as President to conduct the foreign policy of the United States to insure that this happens.

Senator GORE. Does it say he shall supervise and direct the actions of this private corporation which is authorized to be chartered under the District of Columbia for profit?

Mr. CHAYES. It is authorized to be chartered within the framework of this statute, which provides an authorization to the President to act in this way.

Senator GORE. If what you say is correct, which I challenge, then there should be no objection to making it explicit in the bill.

Mr. CHAYES. Well, it depends—

Senator GORE. If the administration contends it is thus, then what harm is there to flow from making it explicit?

Mr. CHAYES. I would say there is no harm in making it explicit within the framework of the limitations laid down in the Secretary's statement. The Secretary's statement contains some limitations.

Senator GORE. Thank you, Mr. Chairman.

Senate Foreign Relations Hearings, supra note 87, at 212-13. The authorization was never made "explicit" in the statute.

See text and notes at notes 50-56 supra.

The Executive has also justified the instruction procedure on grounds of need for
CONCLUSION

The 1962 Act attempts to protect the public's interest in an activity in which political and commercial interests are interrelated. The Executive branch has broad authority to ensure that the commercial satellite program is managed consistently with U.S. foreign policy. However, the means for the execution of this authority are limited by Congress's reliance upon business judgment for the accomplishment of the statutory objectives and by the regulatory role which it assigned to the FCC. The Executive branch is free to decide that a given issue involves fundamental interests of the United States in foreign affairs and thereby to raise the issue to the level of diplomacy. The State Department may then assume responsibility for negotiations carried out on behalf of the United States, and may supervise Comsat accordingly. When foreign policy questions arise in the context of Comsat's business activity, however, the State Department can provide only guidance and advice. The FCC alone has the authority to issue regulatory orders concerning Comsat's operations. Current Executive branch instruction procedures are overly broad to the extent that they claim to result in legally binding directives.

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policy coordination. See COMPTROLLER GENERAL'S REPORT, supra note 30, at 54-56. The possibility does exist that activities supported by Comsat within INTELSAT might be disapproved by the FCC when Comsat seeks regulatory approval. See In re Communications Satellite Corp., 4 F.C.C.2d 8, 10-11 (1966) (concurring statement of Comm'r Cox); REPORT OF THE TWENTIETH CENTURY FUND, COMMUNICATING BY SATELLITE 40-41 (1969). The President's authority to effect intergovernmental policy coordination under section 201(a)(3), however, does not permit him to circumvent the FCC. See text and notes at notes 139-141 supra. Moreover, the FCC has recognized that considerations of international comity compel it to discharge its regulatory responsibilities without disrupting INTELSAT programs, see, e.g., Amendment of Part 25 of the Commission's Rules, 4 F.C.C.2d 251 (1966); Communications Satellite Corp., 4 F.C.C.2d 8, 10-11 (1966) (concurring statement of Comm'r Cox); and has adopted procedures requiring Comsat to obtain FCC approval before it commits itself to specific programs. See Statement of Policy, 46 F.C.C.2d 338 (1974); COMPTROLLER GENERAL'S REPORT, supra note 30, at 55-56.