INTERVIEW VI

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INTERVIEWEE: FRANK M. WOZENCRAFT

INTERVIEWER: T. H. Baker

PLACE: Mr. Wozencraft's office, Department of Justice, Washington, D.C.

Tape 1 of 1

W: About two weeks after I was sworn in as assistant attorney general in April of 1966, I was called over to the Bureau of the Budget for an interdepartmental conference on proposed legislation that would establish a nine-mile contiguous fisheries zone beyond our three-mile territorial seas. The conference included representatives of Navy, the Department of Fisheries in Interior, State Department, Treasury in its capacity as head of the Coast Guard, Bureau of the Budget, and Department of Justice. Within the Department of Justice, both the Lands Division and the Office of Legal Counsel (OLC) had been concerned with this problem. The nature of the concern of OLC was that the proposed legislation ran against what seemed to be the letter of the provisions of the conventions on the high seas that had been adopted in 1958. The Lands Division thought that it was clearly and directly in violation, and my predecessor had so advised the Bureau of the Budget on an earlier proposal. The State Department felt that it did not violate the conventions. Navy thought it did; Interior thought it did not; Treasury didn't care.

So you had a fairly classic situation with five executive departments involved, and

a two-to-two vote with one not caring. And the Bureau of the Budget, seeking to be an umpire to pull together, if they could, a basic executive branch position. This is an important role of the Bureau of the Budget that doesn't get very much attention, but that deserves a lot more than it gets. They don't end up insisting that every department and agency do as they wish, but a report that that department sends to the congressional committee on a proposed bill cannot include a line at the end that the Bureau of the Budget has advised that this is not in conflict with the administration's program, or that this furthers the administration's program, unless the Bureau of the Budget has so advised. Everybody understands this code and therefore knows that if the report omits this line, it has not been cleared through the Bureau of the Budget. I think this contiguous fisheries proposition is a beautiful example of the importance of the role that B.O.B. can play in pulling together the various positions.

B: May I ask here, before we go any further, does that Bureau of the Budget approval also tacitly mean White House approval? Is that part of the code?

W: It does not mean White House approval, but it would probably imply no White House opposition, because the White House somewhere along the line would have made its views felt, presumably, through some executive department or another, if not the Bureau of the Budget itself. But when the Bureau of the Budget says, "This is in support of the administration's position," you know the White House has really approved that. "Not in opposition to it," "not contrary to it," might simply mean nobody has really spoken out against it.

This was the first one of these conferences that I had attended, and I went

primarily to listen, I thought, with my experts to do the talking. I learned that when you go to one of these conferences, the ranking officer talks, whether he wants to or not. And I ended up having to expound the Justice Department position even though I was much less familiar with it than some of my colleagues. This was a pretty good lesson. It kept me away from a few conferences where I wouldn't have known enough to speak intelligently. And in this case, I did get enough briefing beforehand to be able to survive without too much damage, although I could have used a lot more opportunity.

The State Department in its proposed report to the committee had acted as if these conventions on the high seas simply did not exist, and, as we talked around the table at the Bureau of the Budget, it became clear that they had taken this view because they, in their own mind and one might even say here in their infinite wisdom, had concluded that there was no problem and therefore why mention them. As far as we were concerned, the language in these conventions raised the problem, and it was not consistent with intellectual integrity to fail to acknowledge the existence of the convention provisions. The State Department's concern was that if we did not okay a contiguous fishery zone in this area, then everybody would automatically go ahead and move the territorial sea limit out to twelve miles, and they didn't want that if they could help it.

Navy's opposition to this was that if you gave anybody an inch of anything over three miles, they'd take it all anyway. So Navy and State were [of] the same desire, the same goal in mind, but they were taking precisely opposite positions. I might indicate that, in the two and a half years since then, I think matters such as the *Pueblo* seizure have indicated that everybody *has* pretty well taken twelve miles, despite what either of the

departments think and regardless of this legislation, which has not been all that instrumental in what other nations have done. Nevertheless, this was the source of our executive branch dispute.

The Interior Department Bureau of Fisheries had a somewhat ambivalent attitude, because they represented both the salmon industry, which was against foreign aggression, and the tuna fishing industry from southern California, which was a major foreign aggressor in the sense that the tuna fishers go fish off other people's coasts, whereas the salmon fishers are worried about other people coming in and fishing off of our coasts. So you have a diametrically opposed position within the fishing industry in different halves of that industry.

Our position, as usual in this kind of thing, was simply we were the lawyers, and we didn't want to come out with a statute that seemed to oppose and be in contravention to the provisions of the treaty. We also recognized that there might be some point in which our national interests would require an express position to be taken as a matter of law, one way or the other, and we weren't too anxious to chain our hands by coming down foursquare on that kind of problem here when the context didn't warrant all that much emphasis, and when there might be other factors in another situation that would require greater importance.

Well, after going back from the conference, I got convinced that there was a good deal to the State Department position, but that it had not been expressed in their report, and that it therefore was necessary to completely rewrite their report. But the Lands Division people still felt that the treaty was contravened. This was a time when it was

very fortunate to have Nick Katzenbach in the attorney general's chair, because Nick is an accomplished international law professor; I went into his office and described the situation to him, and he was able to give me a cram course on international law beyond what the other lawyers had given me.

B: Who was in Lands [Division] at this time? Was Mr. [Ramsey] Clark--?

W: Clark, no. Clark was Deputy. [Edwin] Weisl [Jr.] was the Assistant Attorney General, but a lawyer named Martin Greene was actually calling the shots on this one.

Well, Katzenbach felt, and I was easily persuaded, that the nine-mile contiguous fisheries zone legislation would not violate the treaty because the treaty itself, the high seas convention, was in itself a restatement of international law as it existed in 1958. Since 1958, other countries have begun acknowledging the existence of contiguous fishery zones, even though a proposal to adopt such a zone in the high seas conventions had barely failed of passage. But there was an international trend toward this kind of animal to where State Department could properly say not that international law approves the creation of these zones, but these zones are not in contravention of international law--do not violate international law.

Now this is the kind of subtle distinction that would soar right over the head of most domestic lawyers, and I admit it would have soared over mine if I hadn't been talking to Katzenbach. It did soar over the heads of the Lands Division, who still are convinced that a treaty is a treaty, and that's what it says, and that's all there is to it. But it's this evolving international custom by the consent of the states, the acquiescence of states, that shapes international law and is the very reason why something like this

convention on the law of treaties becomes so crucially important across the board.

Well, the final outcome was that we sided with State, reversing our position, reversing the Lands Division's position, but only on the condition that State spell out its theory and not act as if the problem didn't exist, as if the treaties weren't there. We made them face up to it and say why they thought this was nevertheless okay.

Navy was the hardest to convince, but they grudgingly went along too, as long as it was made very clear, which they did in their report, that this was just fisheries and had nothing to do with territorial seas or right of overflight or right of ships in passage, which are the aspects that differentiate a territorial sea from a fisheries zone, which only applies to the taking of fish from those waters and certain basic supply activities in connection with the trawlers. We all know that the Russian trawlers off our Oregon and Washington and Alaska coasts cause a good deal of concern, and this was happening around then. And as far as the senators from that part of our country were concerned, international law or not, there ought to be a two-hundred-mile limit within which trawlers could not come from other countries. It just depends on what you're worried about at the time. Our Navy people, on the other hand, were worried about going within three-miles of other countries, and they didn't want something we had done to be used to hamper our freedom to do that. I think this is a vivid example of where valid, competing interests of national import come to bear on a problem.

B: While this was going on, I presume State and Navy were aware that we were either operating or planning to operate ships like the *Pueblo*, which may have been a factor in their position--

W: Oh. I'm sure that they both were thoroughly aware of it, and yet they had opposite results. I'm sure Navy wanted the *Pueblo* to be able to go to within three miles, and State did, too. They just had different ways of what they felt would be the wisest way of enabling this to happen, and obviously, neither of them was able to do it.

In any event, we came into this as the legal umpires between the various departments, and really it was our basic decision that resolved the problem. Yet, we are nowhere in the *Congressional Record*. We declined an invitation to testify before the committee, unofficially. We made it clear that we would not oppose the State Department position, but that they wouldn't get anything out of us that they'd like any better, and they'd better just go with State and with Navy.

The reason we did this was because we wanted to keep our powder dry in the event of a new kind of question in a different context where we might have to come down a slightly different way. In other words, we were trying to stay loose and stay as flexible as we could, because international law is flexible. It could be changing a great deal more before we would have to face this problem in another context, and there was really nothing to be gained by getting us on the line. When we got on the line, it was the official legal voice of the United States government that had spoken, and we would have an awful time backtracking or modifying, even though international law had changed in the meantime. No constructive purpose would have been served, therefore, by our getting on the firing line, and yet we were really calling the shots. We also advised informally with the Senate committee staff, but we did not testify. The same thing happened when the bill came up in the House, and the bill did pass. But this also, illustrates, of course,

the Bureau of the Budget's role as well as our role. It was a good indoctrination for me on how these things work. I think that's really all I have here unless you have questions.

B: Are the people in the Bureau of the Budget who work on this kind of thing lawyers too?

W: Yes, there is an Assistant Director for Legislative Reference, Wilf [Wilfred] Rommel, and his deputy and his assistants are--I think all of them are lawyers--and they are very good at this. They act as mediators, though, rather than arbitrators.

B: That may answer my next question. I was wondering if the Bureau of the Budget ever lets itself in for resentment. I know this kind of thing goes on in all kinds of areas. If the Bureau of the Budget has, in many cases, almost a final sign off on these things, then it seems to be the kind of situation that could create resentment.

W: Well, of course it can, in that anybody who is an umpire gets resented. A runner is either safe at home, or he's out. A ball is either a ball or a strike, and the one decided against often resents.

B: Except that the things that the Bureau of the Budget mediates are not always that clear-cut.

W: Sometimes it isn't very clear-cut as to whether a man is safe at home or out, but certainly they acquire some resentments, and so does the Office of Legal Counsel. It acts as umpire in a legal sense. And we do work very closely with the Bureau of the Budget on this kind of thing. B.O.B. is not staffed to make the final legal determinations and doesn't purport to be. If I had one suggestion to B.O.B., I think it should make more decisions than it does rather than fewer. I think that an awful lot of questions get bucked over to the White House because B.O.B. tries so hard to keep everybody as happy as it can. But

maybe if they didn't, they would run into the resentments that you're talking about to an intolerable degree.

B: I suppose it would be natural for a cabinet-level man as secretary whose position is overruled at B.O.B. to buck it to the White House.

W: Well, the cabinet-level people always have access to the White House; and very frequently, if the decision cannot be made at B.O.B., then it will go to the White House. Sometimes the decision will be made there, and sometimes the decision will be to simply let the departments go their own way. But you could not have four different government departments coming in here with completely different views of what the law is. There had to be one decision, and it was achieved both by B.O.B. getting everybody together and by our being willing to review even our own departmental position, which turned out to be wrong because it had not received the attention of international law people until that point.

B: How did you settle that within the Justice Department?

W: By the Attorney General's decision; that this was the way it was. At that point, Lands Division said, "Well, we think you're wrong, but okay." The government, as a whole, is quite good at this, much better than a lot of people give it credit for. There may be some departments where things continue to get relitigated after a decision is made, but in Justice, at least, once the shots get called, everybody follows them.

I might add one parenthetical note about the high seas conventions, which I think is pretty interesting. There are more conventions coming up on this, including the seabeds now that people are very concerned about. In the 1958 conference, a

compromise proposal that would have established a six-mile territorial sea and a six-mile fishery zone beyond that came within one vote of passage. There are many explanations of why we failed to achieve this. One is that in the first conference we were unwilling to have anything more than a three-mile limit, and by the time we were willing to come around to the six and six, the situation had devolved to where we couldn't sell it. The second explanation is that we still could have sold it, except that one or two nations offered to vote with us only if they were given what, in effect, would have been commitments tantamount to a bribe in terms of aid or something like that, and Foster Dulles refused to consider that, so we lost their votes.

Another version is that we made a deal with India where we would back them on one thing, and they would back us on this, and then we backed them, but they failed to back us. This sounds like India. Another version is that one of the key delegates that would have voted with us didn't show because he had been out too late the night before. Of such minor little events is history made. In any event, we now have no six and six, but what is all too close to a twelve-mile limit, and if we want to let people within three miles of our shore, that's our privilege, but it doesn't let us within three miles of North Korea.

B: That seems to be the way it stands right now.

W: Right. But either of these--anything within this twelve-mile area is not in contravention of international law. There can be a twelve-mile territorial sea with no violation of international law. Or there can be a three-mile territorial sea and a nine-mile contiguous fishery zone. We do claim still that it would be in contravention of international law to insist on a two hundred-mile limit for fisheries, like Ecuador and Peru.

B: Is it legally true that the origin of the three-mile limit is the length of artillery shells?

W: I have not the vaguest notion. But even with the three-mile limit, you can play a lot of interesting games because where does the three miles start? Canada has a position which runs it from point to point on the outside of a bay. For instance, they'll take the Bay of Fundy and run three miles from the mouth of the Bay of Fundy, making that an inland sea. If you take some of their jutting capes up near Alaska and around the St. Lawrence, you get some fairly extravagant territorial seas without ever losing your three-mile basic claim.

There's also a matter of historical fishing rights that comes into here, and we honor historic fishing rights. For instance, on the West Coast, the Japanese have certain historic rights which remain honored under our contiguous fishery zone situation. So it's a very complicated business for a landlubber and, indeed, even for an expert.

B: Yes, indeed.

W: Before I had recovered completely from learning about international law in its elementary concepts through the fisheries zones, I was quickly educated in quite a different area. Our Office of Legal Counsel had been in charge of the legislative negotiations that resulted in the creation of COMSAT, the Communications Satellite Corporation, in 1962. This legislation created the corporation as a strange kind of combination public and private entity. Some directors were named by the President, some by the shareholders, and half of the stock was held by the record carriers such as IT&T, AT&T, RCA, and Western Union International. The statute was extremely vague on how much jurisdiction remained in the FCC, how much of it was vested in the Executive Branch and how much

would be exercised by the corporation itself.

To compound the confusion, in 1964 there was an executive agreement, the International Telecommunications Satellite, or INTELSAT, Agreement, on which renegotiation starts today internationally, February 24th. It was a five-year executive agreement, and it made COMSAT our representative in the consortium, even though it's a private corporation. And COMSAT actually negotiated on our behalf a couple of agreements, the arbitration agreement, and signed and became party signatory to that agreement. COMSAT also acts as manager for this consortium, which is yet a different role, yet the FCC [Federal Communications Commission] says, "Here, this is just another U.S. corporation, and we, the FCC, are setting communications policy, and we have to be able to tell COMSAT what to do."

The State Department says, "Internationally, we have to be able to tell COMSAT what to do, " and the Office of the Director of Telecommunications and the Office of the Science Adviser of the White House has supposedly the coordinating role in all this. Meanwhile, of course, the Defense Department wants its communications channels established and has its own views of what the policy should be. And you have more cooks than any one cup of broth ought to be asked to have stirring it.

In June of--

B: Before you go on, I think there is one question that's appropriate here. Who gave COMSAT the authority to represent the United States in the--

W: The Communications Satellite Act of 1962.

B: Regardless of the opinion of State and the FCC?

W: Well, they didn't really object to this at the time.

B: They didn't notice the implications, I guess, at the time--

W: Well, what really happened was that you had head-to-head combat between a great many powerful economic forces. AT&T, for instance, wanted to run the whole thing. Senator [Albert] Gore and others felt that the whole thing ought to be public because we had, as a public matter, developed space communications. The other carriers wanted to be in on it somewhere. It was a nice idea to get the public in on it somewhere. The result was this very unusual creation which, in some respects, does resemble the camel which, you will remember, is defined as the horse put together by a committee, but there were some intentional fudges in areas where drawing the lines too tightly and too clearly at that point would have flared off people who were willing to support the compromise.

Well, I knew nothing about this background, and in early June, I was importuned by the Director of Telecommunications Management, General [James] O'Connell, to meet with him and try to straighten out what he thought then was simply a dispute between the FCC and the record carriers and get them to go along with the proposal whereby DOD would enter into a contract with COMSAT to provide thirty circuits via satellite, thirty communications circuits, to the Far East--ten to Japan, ten to the Philippines, and ten to Thailand. It's obvious that all of these had a great deal of connection with communications to Vietnam.

These communications were in critical supply. This was at a time when our Vietnam effort was expanding a great deal and the present cable communications were grossly inadequate, and radio communications were too unreliable. The need for satellite

communications channels of this dimension--and thirty circuits is a great deal of communication when you have it on a twenty-four basis--was something of major national importance.

One provision of the COMSAT Act could have been interpreted as saying that this kind of communication can be provided only by record carriers. Those are carriers that transmit by a written record like IT&T, Western Union International--which is separate from Western Union itself--and RCA. Those are the three domestic record carriers. Every other country in the world has simply one entity representing it in all these areas, and indeed a recent task force report has recommended that we reach this in some way. But this is 1969, and that was 1966, and even though that task force was on the horizon, the important thing was to get thirty circuits built.

FCC was indignantly opposed to having COMSAT enter into this contract with DOD and start erecting the equipment, earth-stations and so forth, necessary for this without FCC approval. The record carriers were insistent that they should be in on this construction and be able to do the transmission themselves, and that the DOD had no right to make a direct contract with COMSAT. This depends upon a technical, legal problem--the definition of the term "authorized user." It also depends on the meshing and interrelation of a great many provisions in the COMSAT Act, which seem to have quite different meanings and are very difficult to mesh together.

I remember the occasion particularly well because on June 15, the day the van arrived from Houston with our furniture, was the day that I was summoned to the White House for this meeting, and my wife hasn't quite forgiven me yet for having missed the

moving van that afternoon. In any event, it quickly became one of the most intriguing legal and practical negotiating problems that I've ever seen. I went to the Attorney General, Nick Katzenbach, who had been crucial in drafting the statute, and pointed out to him the seemingly conflicting provisions. He quickly acknowledged that indeed, they did conflict, and indeed, they had known in 1962 that someday a problem like this would arise, but that it had been politically impossible to spell it out any more meticulously on that occasion.

So I became persuaded that there was something in the Act for everybody. This was the one time when I found myself being visited in depth by private interests. COMSAT came in for a meeting, and I regarded them as private in this context; the record carriers, IT&T, came in for a meeting; I met with FCC people; I met with DOD people. And every time they would pull a provision of the Act and show, "Look, it says right here where we can do this and the other fellows can't," I would say, "Yes, but look over here and over here and over here, and the main thing we must do is sit down and see what kind of practical solution will work, not who is right and who is wrong as a matter of law, because it's not that clear as a matter of law." This upset everybody, because they wanted their position to be the only one that was clear as a matter of law.

OLC refused in this case to back any of them up to the exclusion of the others. We felt that the FCC, in its role of regulating the spectrum, had a role that certainly had to be considered. On the other hand, we felt the DOD certainly had to be able to get its thirty circuits without waiting for all of the procedural delays that a FCC decision would have involved if every part of that decision were to be open to competition from the

record carriers.

Another crucial aspect of this was our old friend money. The record carriers controlled the cables. The cable rates had been at a level that DOD considered unconscionably high, and for over two years they had been trying to get the FCC to get the cable rates lowered. There was a somewhat understandable reluctance on the part of the record carriers to ever quite get around to this. The FCC insisted that it really didn't have the occasion yet to force the carriers to do this, and a hearing on the whole rate picture would take years, as the AT&T rate picture has taken with the FCC.

So DOD was burning mad at what it regarded as the exploitation of the defense needs of the Far East by the record carriers. So it signed a contract with COMSAT, authorizing COMSAT to build the thirty circuits. The record carriers then complained to the GAO [Government Accountability Office] that this was beyond the authorization of the statute, and that therefore, GAO should give an advisory opinion that no funds could be used by the Defense Department for this purpose. The FCC was also furious at this derogation of its jurisdiction, and everybody was headed for the courthouse. If it had reached the courthouse, there would have been no way for those thirty circuits to have been built, or to have been provided, within a year. You simply couldn't start negotiating permits for the earth-stations that were necessary with the Japanese government, with the Thai government, with the Philippines' government, until you knew who was doing the negotiating. And so it was a matter of major national import.

Once in a while the controversy would creep into the newspapers and into the trade gossip, and practically nothing that anybody did was a secret. I've never seen such

an open book, particularly in the FCC. Anything that the FCC did was known by the record carriers within minutes as far as I could tell.

B: Leaking of information?

W: Clearly, yes. Anyway, the legal complications--there being some provision in the Act that would support everybody's provision a little bit--were complicated by the really hard feelings and intense animosities that had developed between DOD and FCC and between COMSAT and the record carriers. It was a really sharp confrontation. This was a situation where my experience as a negotiator in the private practice turned out to be fairly invaluable. I didn't care who got what, but I wanted thirty circuits built, and I wanted it done at the least possible cost to the country, to the government. And I wanted it done without delay and without litigation. So that was my mission. That was really everybody's mission in theory, but in practice there were some directly opposing views about how this should be done.

Just as DOD had not consulted with FCC before signing the contract with DOD or at least announcing that it would sign, the FCC did not consult with DOD before issuing an edict and opinion that would have, in effect, precluded the DOD from qualifying as an authorized user. Now this also brought the GSA [General Services Administration] in, because the GSA uses a lot of these communications for other government agencies. And it was getting hoisted on the DOD petard without any hearing at all. So GSA came into the fray with a very real interest.

Well, we had a couple of moments of truth here that were really something. Mass meetings were held--as I had earlier learned in dealing with contiguous fisheries zones,

every delegation has to have five people in it with rare exceptions. DOD usually requires about ten, but a minimum of five. Justice would usually try to get along with two. I would try to have one key man with me whenever I went to one of these meetings, and fortunately, a man on my staff, Sol Lindenbaum, had been in with Katzenbach on the drafting of the Act and knew all the background. So we were as well equipped as anybody to deal with the legal aspects of it. There was one meeting at which we hammered out what was basically an agreement. This was a very large meeting with, say, twenty-five people. It was supposed to be an off-the-record meeting. It stayed off-the-record about ten minutes, but the gist of the settlement technique was an idea that I came up with from my private practice experience with a somewhat different twist to allow for this situation.

The idea was to let DOD go ahead and enter into a contract with COMSAT, but to make that contract, assign it, by DOD, or at the will of DOD, from COMSAT to one or more of the record carriers when certain conditions were fulfilled. The conditions in this case were not spelled out in the contract, but they were very clearly understood. It would be a reduction in the cable rates that would result in an overall saving to the United States government on its military and GSA business of reasonable and substantial dimension. The record carriers and the FCC had kept saying, "Well, we're going to do this," and the DOD had kept saying, "You've been saying that for two years and you haven't yet, and why should we think you will now? And why should we pay more to the record carriers when COMSAT will be providing the service in either case by the satellite, and we can do it cheaper with COMSAT? We have to account to the Congress for these dollars, and

to the American people."

So by the idea of an assignment, we made the record carriers and the FCC put their money where their mouth was and actually reduce the rates. Until then, the contract stayed in COMSAT. And if the votes didn't come down, it continued to stay in COMSAT at the cheaper rates. This kept the problem out of the courts, because as long as the carriers could eventually get the business and keep COMSAT from being a competitor undercutting them, they were willing to try to work it out and get around to these cable rate reductions, which they really should have done long before anyway.

There was still the problem of the FCC opinion and what they would say, which had to be cleared up if the government was going to be an authorized user. So the next stage of the negotiations was with the general counsel of the FCC and with the Commission itself. The GSA lawyers and the DOD lawyers helped with this, but basically, this had to be my ball park. And also the Director of Telecommunications had a lawyer who was in on it. But here again, I had to prove to the FCC that unless they came along satisfactorily here to admit that the executive branch had to be consulted as well as just the FCC on these matters of basic communications policy, we as executive branch lawyers would be supporting the position against them, and if they wanted to take it to court, okay, we'd go to court. We didn't think that anybody would be helped by that, and meanwhile we assured them that if a lawsuit was filed, they weren't going to be getting much attention out of the executive branch to their needs or desires on this issue.

So it was again a matter of bargaining position, but also seeking the best national policy of accommodating the considerations of spectrum use, which the FCC has to have

authority in, as well as the executive branch needs in terms of foreign affairs, in terms of military necessities, and in terms of overall executive policy. So here again, your valid competing considerations have to be ironed out in a phrase that the State Department uses, "where does our overall balance of interests lie?" And this is really what we have to achieve. What kind of workout will satisfy most of these basic interests?

Well, just to make life more complicated, I attended at one point an FCC meeting. I think I may have been the only executive branch man to do that in quite awhile. It was at their invitation, and it was to express to the whole Commission the importance of this being worked out amicably, how the assignability clause that I had come up with would work, what the FCC could properly expect, and therefore what it should do and say in a revised opinion that it was issuing. Part of the deal--and it was a deal, it was a negotiated settlement--was that the FCC would not assert that it had sole and preemptive authority in this area and would not negate the ability of the United States under some circumstances to be the authorized user. But the United States, by this same token, would not automatically be going to COMSAT without ever paying any attention to the record carriers. So we achieved a bit of an overall communications policy that got everything in much better shape, at least for a while.

But at that meeting, it became very clear to me that the FCC's Common Carrier Bureau was a very powerful entity within the Commission. Only four of the commissioners were there, and I was the only one able to rebut the position that the Carrier Bureau people were taking. If I had not been there, their position would have been unrebutted, and I doubt that anybody on the Commission itself or the FCC's general

counsel would have been in a position to rebut it.

This is a real commentary on government, too, because this is what one lawyer calls the "dark side of the moon." What happens when the space ship or whatever it is goes around behind the moon and you don't see it anymore? It's all dark, and that side of the face of the moon is never turned to the earth. Well, similarly, the general public cannot ever know really what is going on in these commission hearings, but I became absolutely persuaded of the importance of the staff, especially when it knows more than the commissioners know in this kind of area. Now in other commissions there are situations where the commissioners know more than the staff. This was an extremely technical area, and it would have been unfair to expect the commissioners to know more than the staff did here. My own view was that it was a very fortunate thing indeed that I was there. I don't think this view was shared by the Carrier Bureau people.

There was one man in particular in the Carrier Bureau who was vociferously and almost venomously pro-record carrier and anti-DOD-COMSAT. I won't try to pass judgment on this, but the opinion that was supposed to come out of that meeting contained a last paragraph that completely departed from the views that I thought had been unanimously accepted. When I indignantly called the general counsel and the chairman, I was told that this was a mistake, that they just hadn't checked it well enough. This was done by the Carrier Bureau, and they were awfully sorry about it. Well, the problem became "Well, what do you do about it?" In the final outcome what happened was another subsequent opinion after the contract was executed with the assignability clause, which did a good deal to remedy the damage that had been done by this paragraph.

But the paragraph should never have existed in the first place, and everybody on the Commission and the general counsel quickly agreed with me on that. And yet it had gotten there. This is a good example of how hard it is to keep control of the process within the administrative agency, and this was in a situation where I'm sure that the chairman and the other commissioners were being just as careful as they could, and they didn't think they were doing anything wrong. Well, I sure thought they were doing something wrong and--

Again, it did work out, and the final happy outcome--I don't know how happy it was, but compared to the alternatives, it was happy--was that the circuits got built. COMSAT got them into business, and COMSAT then assigned the contract, at the direction of DOD, to the three record carriers, IT&T, RCA, and Western Union International in each of these three Far East countries, after cable rates had been reduced to an amount which did produce substantial savings to the United States government. So without any court case, the circuits were provided as fast as they could have been. There were some delays in terms of negotiations with the various countries on the earth stations, but they got established a couple of years sooner than they would have if we had not come up with this assignability clause and managed to enable everybody to save enough face to get it done. The FCC would have rather had it a little different; the DOD would have rather had it a little different, but everybody survived.

The GAO did not get in the middle of this, despite the invitation from the record carriers, because they knew the FCC was working on it. If they had, it would have been chaos; it would have been a real donnybrook. And one of my concerns about the present

structure of our laws and the role of the GAO is that they could have legally, at least in their view of the law, come in and told the DOD they couldn't sign that contract with COMSAT, and there would have been no appeal from the GAO under any existing government machinery; whereas at least from the FCC you could appeal. The only appeal from the GAO would have been to go to the Congress and try to get legislation, which, I guess, we would have done. But it would have been again chaos, and the GAO wisely refrained from entering into the chaos. In the final analysis, I think everything came out as well as it possibly could in what had been a really bitter situation.

B: Did the White House, Mr. Johnson or the staff, ever get directly involved in this?

W: The main preoccupation of General O'Connell was to keep the White House from having to get directly involved in it. That was successfully achieved. If we had not been able to work out a settlement, it might have been necessary to involve the White House in it. I reported to the Special Counsel at the White House Harry McPherson just how things were going, but I never got any instructions from him as to what should be done. And indeed, he couldn't have issued it, because he can't control the FCC, which is an independent agency of bipartisan nature. So it had to be me as a negotiator using the whole bargaining position and my role in the Office of Legal Counsel for interpreting the statute, and what kind of views we would take had considerable amount of significance, although they weren't controlling. But it was about as much of a negotiator's donnybrook as I've ever been involved in, and I think it's a good example of the role of OLC as the negotiator on a legal position.

I might mention just briefly that this is not the only donnybrook involving

COMSAT. For example, the extent to which COMSAT can bind the United States government internationally as manager of this consortium without FCC prior approval remains another thorn. FCC insists that before they can go doing things, they have to check with the FCC. The other countries who are parties to the INTELSAT consortium insist that this subjects them to the FCC and they didn't make any deal like that. And they're both right, and they're both wrong. How do you work it out? Perhaps this new agreement, when the INTELSAT agreement is renegotiated, will contain some better resolution of this, but before you bind the FCC, it has got to be in the statute or a treaty. They're not going to pay any attention to executive agreements *per se*, so you continue to have this problem of the role of COMSAT.

Another problem is the voting power within the consortium, which presently is on the basis of investment and not on the basis of sovereign equality of states. The little states, you will not be surprised to hear, think it would be much nicer for every state to have more of an equal voice. These kinds of problems are going to continue; they're never going to be resolved completely. The best you can do is get everybody together and try to work out where the balance of our interest does lie and then achieve that as best you can, recognizing that there are no real villains here. The FCC has a point; the DOD has a point; COMSAT has a point; the record carriers have a point, and the goal is to take these points and try to work them into a sensible and practical solution.

End of Tape 1 of 1 and Interview VI

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FRANK M. WOZENCRAFT

In accordance with the provisions of Chapter 21 of Title 44, United States Code, and subject to the terms and conditions hereinafter set forth, I, Shirley Ann Wozencraft of Houston, Texas do hereby give, donate and convey to the United States of America all my rights, title and interest in the tape recordings and transcripts of the personal interviews conducted with my late husband Frank M. Wozencraft in Washington, D.C. on October 21 and November 12, 1968; January 21 and 22, and February 24, 25, 26, and 27, 1969, and prepared for deposit in the Lyndon Baines Johnson Library.

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