Meeting - Friday, April 25, 1969

McGeorge Bundy, President
Ford Foundation

Monday 4/21/69

11:45 McGeorge Bundy will be here on Friday at 11:45...
re Telecommunications.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

Telecommunications mtg. Bundy

April 25, 1969

MEMORANDUM FOR THE FILE

Met with McGeorge Bundy today and discussed communications policy problems, particularly the bureaucratic problems of getting some coherent policy developed; also discussed public television. Ford Foundation is considering setting up Communications Policy Research Institute, which will be heavily oriented towards policy problems rather than long-range research.

He wants it to be relevant and wanted some indication by his board of directors' meeting in June or July.

Clay T. Whitehead

Also indicated purpose of Ford dormat proposal was to keep majors from carte blanche takeover. That done, little continuing interest.

Communications
Ford Foundation

COMMUNICATIONS LAW, RESEARCH, AND PUBLIC POLICY

This paper sets forth the outlines of a proposed Institute for Communications Law, Research and Public Policy, and the reasons for recommending consideration of such action.

I. Observations

Technological change in communications has been rapid and far-reaching in recent years and will continue, if not accelerate. It is presenting society with new and basic problems at a rate that far out-strips the capability of existing government agencies to deal with them.

The Ford Foundation's initial interest in communications law, research and public policy stems largely from its involvement in non-commercial broadcasting, particularly the role it played in the Federal Communications Commission domestic communications satellite proceeding. That interest has grown as the significance and promise of major communications advances have become clearer.

Based on the experience we have gathered and our continuing review of developments in the communications field, our staff has reached the following conclusions:

1. The availability of increasingly powerful and sophisticated communications tools affects the way in which the nation deals with a virtually unlimited range of problems -- from race relations to educational techniques, from the future shape of our cities to U. S. relations with the rest of the world. Furthermore, what Foundations do through programs aimed at the problems of urban

America, of race, and of education is closely intertwined with advances in communications.

2. Technological and organizational innovations in communications are moving forward at such a rapid rate that present resources (men and money) in public and private institutions find it difficult to cope adequately with them.

Satellites, cable television, two-way telecommunications, teleprocessing are major areas of technology ripe for further analysis.

3. Each technical leap forward leaves in its wake an assortment of complex problems -- legal, economic, and social -- whose solutions require new and energetic efforts of research, analysis and direction. The impact of the media on race relations, the relationship between program content and individual behavior and the effect of computer communications systems on individual privacy are questions that need to be dealt with. In the economic area, criteria and methods of rate computation and the problem of concentration of ownership or operation should be subject to fresh appraisal.

4. The inter-disciplinary team the Ford Foundation put together for the satellite proceedings is generally acknowledged by others in the communications field to have made an important "public interest" contribution in the proceeding. It pointed up the need for "public advocacy," the value of an interdisciplinary approach, and the lack of coordination among the interested parties, academic and non-academic, in communications.

5. Public policy in the communications field has often been the result of ad hoc decisions by various governmental agencies and private industry. There

is a need to promote institutions and mechanisms to foster a more coherent, rational framework for policy discussion and decision.

6. The seriousness and scope of the communications challenge confronting the nation suggest that it would be appropriate for the Foundation to move forward toward the establishment of an institute capable of disinterested analysis and of playing a "public interest" role in the communications field.

II. The President's Task Force on Communications

In August 1967, President Johnson appointed a special Interdepartmental Task Force on Communications Policy, under the chairmanship of Under Secretary of State, Eugene V. Rostow, with a broad mandate to evaluate U. S. communications structure and policy. The report was forwarded to the President in December 1968 and although it has not been made public, a number of copies were obtained by interested observers. The study is thorough, far-reaching, and a major contribution to the communications field. It is addressed primarily to the legal and economic structure of our communications system and the policy considerations that should guide its evolution. The subjects range from frequency spectrum scarcity to cable television, from concentration of ownership within the industry to the role of the U. S. in INTELSAT.

The Report emphasizes that the extraordinary rate of technological change is a constant for the foreseeable future. It states: "No ad hoc group like this Task Force can hope to clear the desk for long." In addition, the Report stresses the paucity of long-range public policy planning and the inadequate Federal effort in regulation and analysis of options.

Among the main recommendations of the Task Force is the creation of one or more non-governmental institutes for communications policy training and research in order to ensure that the government is exposed to a steady flow of independent, critical and creative ideas. Furthermore, the Report notes the desirability of placing before the FCC more divergent views and suggests that other Federal agencies present their opinions before that body.

III. Existing Institutional Structure

In our judgment there is a need for a new organization capable of interdisciplinary disinterested analysis and public "advocacy." Our review of the institutions and groups working in communications indicates that no one existing organization is available to meet the multipurpose needs in this area.

Research Facilities -- Most technical research is done by private corporations and NASA, DOD, and ITSA. In the private sector, the Bell Laboratories of AT&T are a major resource. But the emphasis here is on new communications equipment and the technology of spectrum use.

Public policy and social science research in communications is dispersed among many institutions -- universities, institutes, centers, and consulting firms. In addition, individual economists, law professors, and behavioral scientists are working on special projects with almost no coordination or exchange of views. There is also little interaction between the major organizations doing research in communications.

The leading nonprofit centers engaged in communications research are the Institute for Communications Research (Stanford University), Rand Corporation, and the Stanford Research Institute; but each focuses on a fairly limited area.

The Institute for Communications Research at Stanford is concerned primarily with the behavioral science area. The staff is composed mostly of social scientists and psychologists whose prime concern is the effect of mass communications on individual behavior and attitudes. A similar orientation in the behavioral sciences exists in

many other universities with smaller centers, such as Illinois, Pennsylvania and Michigan.

The Rand Corporation has no separate communications division but employs a number of scientists interested in and working on specific communications problems. Some of these specialists work on technical problems, while a few deal with policy issues -- primarily in the fields of economics and systems analysis.

The Stanford Research Institute emphasizes technological research -- with a special interest in international communications. At present, it has a $300,000 contract with the FCC to do work on computers and their interconnection with communications systems.

Industry Structure -- It also seems unlikely that disinterested analysis of communications needs and problems will emerge from the present industry structure. There is little effective action by any national citizens' organization nor is such action likely, given the need for a technical base and a fairly large amount of funds. Furthermore, apart from the President's Task Force, neither government nor private industry has so far shown the commitment for the public interest planning and long range analysis that the issues here necessitate.

The industry structure in communications common carriers is essentially oligopolistic, often verging on a monopoly -- internationally: COMSAT, AT&T and the three record carriers; domestically: AT&T in voice, Western Union in record communications. In broadcasting, three major networks are dominant and the trend in the

mass media is toward further centralization of control. The absence of vigorous competition and the self-interest arising out of investment in specific modes of communication makes it improbable that long-range policy choices and the public interest will be adequately explored and served by the private sector alone.

IV. The Proposed Institute

We suggest the creation of a non-governmental, non-profit institution for communications public law and research. It should be headed by a top-flight executive, have a small, knowledgeable Board of Directors and have sufficient funds to assure independence. Specifics on structure and staff should be left to the Director, but given the present shortage of competent communications experts, most of the work in the early years will have to be contracted out. However, an in-house capacity, even if limited, should be an early goal, for we believe it essential for the Institute to have its own "critical mass" of expertise.

The Institute will support policy research with emphasis on the implications of technical development. Purely technological and hardware aspects of research would be restricted to projects which the Institute deems essential to its central concern for public policy.

The Institute will serve as a resource center and promote the representation of the public interest. Among some of the functions contemplated are the following:

Interdisciplinary research -- The drawing together and funding of interdisciplinary teams to focus on major issues will be a prime effort of the Institute. In addition,

support for interdisciplinary research in universities and other institutions should be provided.

Assistance to the FCC, State Public Utilities Commissions -- Research and analysis on projects for these organizations could be done at their request and within the Institute's resources. The Institute would normally not provide assistance in specific cases, but concentrate on the type of research and analysis relevant to broader policy decisions.

Policy papers -- Where appropriate, the Institute could prepare and/or publish position papers on issues of major importance in the area of communications.

Clearing House -- The Institute can meet the pressing need to survey and catalog communications literature, researchers, organizations, and programs. It can serve as a library and information service, and provide for the reproduction and distribution of materials which may be generally unavailable to the public and some of the experts.

Training -- Seminars for government leaders, academicians, and industry personnel should be initiated and run by the Institute. Also, funds for a limited number of fellowships for government career people in the communications field should be available.

Public Interest Representation -- There is a great need for public interest representation on important policy matters which have national implication. In our judgment, the Institute could play a meaningful role in that context and should have the capacity

to become an advocate of the public interest and/or support those who in its judgment perform this function. We do not propose that the Institute operate as a constant litigant, but rather use its prestige and resources on a selective basis.

In a few cases, the Institute would file its own submission or brief. Typically, this would occur when the Institute is invited to participate in the adjudicating process. In other cases, it would provide support for those local or national organizations which are party litigants in the matter. The United Church of Christ case, in which that organization contested the license renewal application of a broadcaster because of alleged racial discrimination, is an example of the latter category. The Ford submission before the FCC on the domestic satellite and the present CATV proceeding are types of cases that the Institute might handle on its own.

We recognize that combining advocacy and research in one institute is unusual and may raise questions about community acceptability of the research. With this in mind, the Institute should use its power to advocate sparingly while concentrating its effort on supporting and encouraging others to act and in some situations to litigate in the public interest.

The specifics of how this dual role -- research as well as advocacy -- can be played should be worked out by those who will operate the Institute. However, at this juncture, we conclude that the inadequacies of the present framework for the resolution of major issues of communications policy argue for the adoption of this function by the Institute.

V. Funding

We suggest the Foundations consider funding the proposed Institute for five years, beginning with a one-year grant of $1 million and grants of $2 million each for the following four years. After the first year, operating costs would be approximately $1 million, assuming a staff of 20-30 professionals.

Once established, the Institute should also have approximately $1 million to provide for grants, training, publications and the costs of supporting advocacy. The "advocacy" figure is particularly difficult to assess because of the complexity of the issues usually involved in litigation.

At the end of three years, the program of the Institute should be carefully evaluated to determine whether it should be continued beyond five years, and if so, to determine its long-range financing.

THE FORD FOUNDATION
320 EAST 43RD STREET
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DIVISION OF NATIONAL AFFAIRS
GOVERNMENT AND LAW

June 12, 1969

MEMORANDUM

TO : Members of the London and Ditchley Delegations

FROM : Sanford M. Jaffe

Delmar Karlen has requested that I send copies of my paper directly to you.

Sanford M. Jaffe

PARTICIPATORY DEMOCRACY AND THE ADMINISTRATION PROCESS

Participatory democracy poses significant and increasing challenges to the administration process. An increasing number of people believe that the whole process of administrative law does not adequately protect their interests and that meaningful access to it does not exist.

Participatory democracy has various meanings and forms. The current slogans are "maximum feasible participation," "community control," and to some "Black Power." But these are only a few of the labels. The core meaning or common thread is the general notion that people have a right and an obligation to participate in decisions that affect them.

Although the concept of broad participation is usually expressed in terms of minority groups versus dominant established interests, it is neither strictly contemporary nor class bound. Middle and upper class housewives block bulldozers to protect historic and scenic beauties from federal highways; Justice Douglas hikes to protect a tow-path; Californians organize to save redwoods.

Nathan Glazer, in a recent article in the New York Times Magazine (April 27, 1969), describes the move to the suburbs of America by the upper middle class as indicative of their desire to retain some measure of control over government which they have found increasingly less responsive to them. He also notes that the bitter frustration at the remoteness and inflexibility of the New York City Board of Education was expressed by the white middle class long before it was expressed by the

black community. The fight against bureaucracy, in other words, has never been restricted to poverty or minority groups or traditionally oppressed groups. Nor has the issue always been confined to government agencies. It has been applicable to corporate bureaucracies as well. In essence, the growing pervasiveness and complexity of bureaucratic life in America--both public and private--has intensified the drive for participatory democracy at all levels in American society.

A great amount of the publicity about participatory democracy centers on the use of demonstrations, community organization, marches, strikes, and even violence. But participatory democracy has always been intimately connected with the legal process. The values of this concept are expressed in terms of procedural due process--the opportunity to be heard, notice of rule-making, requirements for public hearings, etc. Many of the tactics of marginal or disenfranchised groups involve the use of law and legal process. Civil rights organizations, welfare associations, conservationists, and consumer groups are often the cutting edge of participatory democracy. See Scenic Hudson Preservation Conference vs FPC (354 F. 2d. 608) and Office of Communication of United Church of Christ vs FCC (359 F. 2d. 999) where the court required the Federal Power Commission to consider conservation interests and the Federal Communications Commission to hear consumers of television.

In my view, the crucial issue is meaningful access to the legal process by individuals and groups who want and should influence administrative decisions. The use of the legal process is part of a broad social movement, and the context of the latter affects the efficacy of the legal process.

Lawyers tend to focus primarily on the structural or institutional response. The way to "open up" administrative agencies to marginal groups to make them responsive is to change the procedures or even the substantive criteria for administrative decision. Broaden standing, requiring notice and providing for hearings are undebatable reforms. But they are also not new, and without more fundamental change, they may not prove significant. Law and the legal process work best for those who have the power, the knowledge, and the resources to use it.

My principal illustrations will be welfare administration, urban renewal, and communications. Although very different types of administration, they point out how the social and economic context determines the use of the legal process. Furthermore, they may provide some notions on how to begin to come to grips with participatory democracy in administrative systems.

Welfare Administration

At first impression, it would seem that the existing system of legal rights in welfare administration is fairly adequate in the Social Security categorical aid program. There is no question of establishing substantive rights to give standing. The privilege-right distinction, as a matter of legal theory, is gone. Every agency action can be appealed by welfare applicants or recipients. Although appeal procedures vary among the states, generally all that the aggrieved party has to do is file a very informal request for an appeal--called a "fair hearing"--and, at least according to statutory law, he gets a simple, cheap, and quick hearing before an administrative officer at a different level

of government. For example, a representative of the state welfare department will hear appeals from county or city welfare agencies. The appealing party can have counsel or anyone else to represent him.

For those clients who take appeals, the system goes a long way to meet due process ideals. State welfare representatives help the clients prosecute the appeals against the county departments of welfare, and clients are often successful. However, given the numbers of rejected applications for welfare, terminations of welfare, and agency decisions while clients are on welfare, the appeal rates are miniscule. Many clients do not know of the right of appeal, are unaware of their rights under the welfare program, and often times are discouraged from taking appeals by the local caseworkers.

The fair hearing in welfare administration is an example of our most prominent legal device for making the non-regulatory administrative agencies responsible to the person or persons affected--the adversary remedy. However, in order for the adversary remedy to "work," there has to be (a) a complainant; (b) knowledge that he has a legal right which has been violated; (c) knowledge of an available remedy; (d) the resources with which to pursue the remedy; and (e) a calculation that the potential benefits from winning outweigh the costs of losing.

In welfare administration, all of the above elements serve in varying degrees to limit the usefulness of the remedy. Rejected applicants simply do not have the resources with which to pursue an appeal; their major task is to seek alternative means of providing for the necessities of life.

Once on a program, caseworkers do not advise clients as to what they are entitled to under the program or discourage clients from asking for things to which they are entitled. Most so-called "rights" in welfare administration depend on establishing a complicated factual base and, therefore, are in effect discretionary with the official. The fact that welfare clients have to maintain an on-going relationship with officials possessed of discretionary powers serves to choke off appeals. An appeal, no matter how phased, is a challenge to authority, and this is risky business when the challenger has to rely on the discretionary judgment of the official the next day.

Thus, fair hearings in the context of welfare administration is not for many an appropriate remedy.

In addition, the system as presently constituted does not provide an effective legal tool for group representation in the process of administrative rule making. Adjudicating the propriety or constitutionality of specific rules after the fact fails to take into account the need for those affected by the agency to play a part in the initial determination of the regulations.

The recent growth of welfare rights organizations has changed the picture considerably in a number of interesting aspects. In localities where these groups have become effective, they have done the following things (1) The group socializes new clients and lets them know what they are entitled to under the program and that the organization is behind them if they run into any difficulties. (2) The presence of the organization,

even with limited resources, tends to inject a new element into the picture, and caseworkers are much more careful about making decisions. (3) The groups have been able to bring pressure on welfare agencies to grant special need items, such as extra furniture and clothing. (4) In some areas of the country, welfare rights groups are being consulted in the formulation of agency policy. For example, The National Welfare Rights Organization, which is based in Washington, has been actively involved at times in negotiating with HEW and other government agencies on the content of administrative regulations.

Where welfare rights groups have been successful, one of the essential ingredients of their success has been the use of law and lawyers. The principal organizing tool and method for getting benefits to clients has been the law, what they are legally entitled to, and the available legal remedy--the fair hearing. In other words, when the power relationships are altered through the use of an organization and good legal talent, the legal process can be used by disenfranchised groups to make their voices heard in welfare administration.

Urban Renewal

Urban renewal decisions are more non-regulatory and legislative than adjudicative; they affect groups of people, neighborhoods, and communities, along with specific individuals. The experience of urban renewal is more varied than welfare administration and the process more complicated.

As with welfare administration, the legal procedures for land-use planning and urban renewal looks impressive. Generally no decisions can be made without formal approval, after notice and public hearings, of the local government elective body (usually the city council) and the public planning commission. The statutory scheme contemplates that affected interest

groups have an opportunity to be heard before the legally-prescribed decision-makers. In fact, citizen participation in most urban renewal decisions has been fortuitous, at best.

In the classic urban renewal process the major planning and negotiation take place far from the public eye. The local governing body and relevant agencies generally present a packaged plan to the community. The public hearings are little more than routine compliance with the law, and "citizens committees," if they exist, may be no more than paper organizations. Even if there is active participation from the community, it can rarely be effective because of the resources: architects, city planners, etc., needed to present an adequate case. In sum, the legal system provides a framework, but in reality meaningful access is not available in the traditional context.

Occasionally residents and citizens groups have been able to block urban renewal. There are always difficult fights, but sometimes they are successful. However, it is important to note that in most instances they can at best only exercise a <u>veto</u>. Residents do not participate in the formulation and execution of the plan and play a minor role in the negotiating and policy formulation process. The "Model Cities" legislation is an attempt to increase participation but there has not yet been sufficient experience to measure its impact.

In these two examples, welfare administration and urban renewal, social conditions, particularly the power relationships of the parties, have a decisive effect on participatory democracy despite due process procedures. Individuals and groups who have been given access to the administrative

process, at whatever points, cannot take advantage of their legally defined positions unless they have independent resources. The agencies have full-time staffs of lawyers, public relations men, planners, statisticians, administrators, and other political resources. Participatory democracy means creating competing interest groups--groups of citizens, and to compete successfully at any level they need resources and access to present their views.

Communications

In communications, the dynamics are different but the problems similar. The FCC is a regulatory agency, and the representation issue is in the context of the group interest. In addition, the protagonists are now a fairly well definable group with specific interests to be advanced and/or protected.

The industry structure in communications common carriers is essentially oligopolistic, often verging on a monopoly--internationally: COMSAT, AT&T, and the three record carriers; domestically: AT&T in voice and Western Union in record communications. In broadcasting, three major networks are dominant, and the trend in the mass media is toward further centralization of control. The absence of vigorous competition and the self-interest arising out of investment in specific modes of communication make it improbable that long-range policy choices and the public interest will be adequately explored and served by the private sector alone.

Furthermore, there is little effective action by any national citizens' organization, nor is such action likely given the need for a technical base and a fairly large amount of funds.

Although we have made some strides to broaden the base for participation in welfare and urban renewal, little progress has been made in the communications area and almost none in the regulatory area generally. The extension of the standing doctrine in United Church of Christ and the broadening of the criteria for decision, such as the Scenic Hudson case, while steps in the right direction are clearly not the answer to the needs of large segments of the society to participate effectively in the regulatory process. The conservationists and the consumers need staying power and an institutional framework that allows fair access at the rule-making and adjudicating parts of the process.

Some have argued that building citizens organizations is as urgent and important as the creation of different procedures and different sets of decision-makers. They maintain that our principal regulatory agencies mirror the regulated industries and that it is unrealistic to view this as other than a normal development. The regulated industries have much at stake; they are constantly before the agencies; and they sometimes influence the appointment of agency personnel. To many observers, the regulatory agencies have not been the guardians of the "public interest."

If other groups--for example railroad commuters, small truckers, consumers of radio and TV programs, purchasers of drugs, etc.--were strongly organized at the grass roots level, then the process of decision-making even within the existing structures would inevitably reflect the new groups in proportion to their strength. And, the new

groups would also make their voices heard in the selection of agency personnel. However, when representatives of powerless groups enter the administrative process, they are ignored or co-opted by the more powerful groups.

There is no one formula for citizen organization. The strategies and tactics for organization depend upon the specific problem and the particular interest group. Techniques used for welfare recipients are not necessarily applicable for neighborhood groups fighting urban renewal or the loss of an educational TV Station. What is the interest group to fight: the pollution of Lake Erie? the air in New York City? Should it fight for city planning? for fair drug prices? for consumer protection against faulty and dangerous manufactured products?

There is one ingredient, however, that seems common to past efforts and will be essential for the future--the use of dedicated, skilled lawyers. Looking at past experiences, the legal process has been used extensively as a method for organization and for the assertion of rights and changes in social direction. The welfare rights movement started when welfare recipients walked into Mobilization For Youth store front offices and began complaining that their rights were being violated. M.F.Y. lawyers then began to press their claims before the welfare agencies. In New York City and elsewhere, clients were organized on the basis of what they could gain under the existing programs according to law. Negotiations at the Federal level are over the content of regulations. In a well-developed client organization, the clients run the show. The lawyers are used in a

professional, not a leadership, capacity. But in all of the really successful organizations, lawyers play a very active professional role.

The role of law will also be a key in the new areas that demand participatory democracy. In the early 1960's, little was heard of welfare law; it was an undeveloped area. Client organization lawyers created welfare law. The same is true of other vital areas of administration today. There is no health law today. Yet, we have a burgeoning field of regulation. Federal, state, and the local agencies and institutions, public and private hospitals, and the medical professions are vast administrative systems that need scrutiny, regulation, and participatory democracy--the voice of the consumer.

Supporting the public interest lawyers, with real support, will be difficult. These lawyers will not be popular with certain segments of society if they are to do their job properly and produce social change. It is difficult, if not anomalous, for public money to be spent for real opposition to government. This was one of the dilemmas of the Community Action Program in the War on Poverty.

Perhaps the top leadership of the organized bar could help in support of the public interest lawyer. When one considers the various alternatives to social change, the issue seems clear. In some segments of our society, confrontation politics, often resulting in violence, is appealing to more and more of the disenfranchised as the only way to make American institutions responsive. In other segments, no change means the continued pollution and destruction of our water, air, natural beauty, and recreational facilities.

We will continue to see a deterioration in the quality of the mass media, in education, and in the value and safety of the products we consume. Using public interest lawyers and restructuring the administrative process is a method of producing orderly changes through the rules of law.

Law and legal institutions reflect social powers. They are fully capable of being made instruments of the poor, the consumer, and the conservationist when and if these groups acquire sufficient resources to use the legal system. Resort to violence and to methods outside legal institutions is, in large part, a sign of weakness or powerlessness. Effective organizations with good legal talent can accomplish their goals within the system.

Sanford M. Jaffe

Ford Foundation