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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION

IN THE MATTER OF

Proposal for Creation of the Low Power FM (LPFM) Broadcast Service	)	RM-9242

COMMENTS OF:

David Moore
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I, David Moore, file these comments on April 21, 1998, in the FCC's rule-making procedure in consideration of the above-captioned "Proposal for Creation of the Low Power FM (LPFM) Broadcast Service, RM-9242." Below please find a summary of my comments, followed by details, explanations and other needful materials.

It is my belief that the petition in question is moot in light of the fact there are certain unsettled issues of fact and law which should be addressed and resolved prior to the creation of any new "Broadcasting Service." These issues are set forth as follows:

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1. The authority and jurisdiction of the FCC is limited, both Constitutionally and by statute, to the regulation of "interstate and foreign commerce."

> Constitution for the united States of America
> Article 1, §8, clause 3
>
> The Congress shall have the power...To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;
>
> 47 U.S.C. §151 Purposes of Chapter; Federal Communications Commission Created
>
> For the purpose of regulating interstate and foreign commerce in communication by wire and radio...there is created a commission to be known as the "Federal Communications Commission"...

However, the wording of 47 U.S.C. §301 appears to give, and has been interpreted by the FCC in it's application and enforcement to give, the FCC *carte blanche* authority over matters that are solely intrastate in nature.

> 47 U.S.C. §301
>
> ...No person shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a)from one place in any State...to another place in the same

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> State...except...with a license in that behalf granted under the provisions of this chapter.

The situation that currently exists in our country demonstrates that something is horribly WRONG with 47 U.S.C. §301, either in the FCC's interpretation of the statute, or in the wording of the statute itself. The FCC has of late established a habit and pattern of attempting to regulate INTRASTATE commerce, utilizing enforcement tactics against so-called "microbroadcasters" which include pre-dawn raids on private homes by armored "officials" bearing automatic weapons, temporary arrest ("kidnapping") of private citizens in the pursuit of such raids, and seizure and forfeiture ("theft") of private property.

I believe that this situation exists because of either one of two reasons:

(a) The FCC does not understand the true wording and intent of the statute, or

(b) 47 U.S.C. §301 is patently unconstitutional on its face.

Explanations and further details regarding both of these possible reasons follow in the section titled "Explanations and Other Needful Materials" as "1. §301 Brief, Parts (a) and (b)."

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2. The licensing requirements found at 47 U.S.C. §308, along with the implementing regulations codified at 47 C.F.R. §§73.3511, et seq., constitute "collections of information" pursuant to the 1995 Paperwork Reduction Act, 44 U.S.C. §§3501, et seq., and as such, are required to display OMB (Office of Management and Budget) control numbers.

However, the regulations at 47 C.F.R. §§73.3511, et seq., fail to display OMB control numbers, and therefore the public protection provisions of 44 U.S.C. §3512 apply. In this light, the licensing requirements of 47 U.S.C. §308 are invalid and unenforceable.

Laws and lawsuits are held invalid and dismissed, and people are released or sent to prison every day because of technicalities, and the technical deficiencies described above must be addressed and corrected before serious consideration can be given to any further licensing schemes. Indeed, those who have been convicted or otherwise penalized by the application and enforcement of invalid regulations may have ground for redress against the FCC in this regard.

Explanations and further details regarding this situation follow in the section titled "Explanations and Other Needful Materials" as "2. PRA Violations Brief."

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3. The purported requirement for one to obtain a license from the Federal Communications Commission is predicated upon 47 U.S.C., §308, which in turn is implemented by 47 C.F.R., §73.3514, neither of which dictates

that an applicant for a license provide specific information to the Commission in an application form. Further, the alleged legal requirement of an applicant for a radio broadcasting license to supply specific information arises only from the actual application form itself, which consequently makes such form a "rule" under the Administrative Procedures Act, 5 U.S.C., §552, et seq.

However, this application form has never been promulgated as a rule pursuant to the Administrative Procedures Act, consequently such application form is void and unenforceable.

Since any enforcement or prosecution completely depends upon a valid legal requirement that a person apply for a license from the FCC, but since the application form is an unenforceable rule, no penalty may be imposed upon any person who does not possess or declines to apply for such a license.

Again, laws and lawsuits are held invalid and dismissed, and people are released or sent to prison every day because of technicalities, and the technical deficiencies described above must be addressed and corrected before serious consideration can be given to any further licensing schemes. Indeed, those who have been convicted or otherwise penalized by the application and enforcement of invalid regulations may have ground for redress against the FCC in this regard.

Explanations and further details regarding this situation follow in the section titled "Explanations and Other Needful Materials" as "3. APA Violations Brief."

****

It is my sincere hope that the FCC will give serious thought and consideration to the issues addressed in my comments. Indeed, it is the FCC that should take the "moral high ground," as servants of the American population at large, and in the pursuit of justice, to correct the Constitutional and technical deficiencies which now plague the Commission in it's pursuit to fulfill it's mandate. Instead of waiting until a non-licensed broadcaster is shot and killed in the service of a dead-of-night "no-knock" seizure warrant, I strongly urge Chairman Kennard and the other Commissioners to take the initiative.

I urge Chairman Kennard, the Commissioners, and all others in the FCC, in their individual and official capacities, as servants of the American population at large, and in the pursuit of justice, to campaign and lobby NOW for true and just reform in the application and enforcement of the FCC mandate. I further urge them to REFUSE to apply and enforce unconstitutional and invalid statutes and regulations. I urge them to discard "procedure" when it conflicts with true justice. In doing so, they will not only be taking the "moral high ground;" they will also be engendering the faith and confidence which they, as keepers of a public trust, deserve.

May God bless you all, and may God bless our Republic,

Submitted by:
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(Comments Re: RM-9242)

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EXPLANATIONS AND OTHER NEEDFUL MATERIALS

1. §301 Brief, Parts (a) and (b).

(a) The FCC does not understand the true wording and intent of the statute, or

(b) 47 U.S.C. §301 is patently unconstitutional on its face.

(a). The FCC does not understand the true wording and intent of the statute.

NOTE:
All common definitions of words are taken from Webster's Seventh New Collegiate Dictionary, and shall be referred to simply as "Webster's." All legal definitions of words are taken from Black's Law Dictionary with Pronunciations, Sixth Edition, and shall be referred to simply as "Black's."

CREATION AND PURPOSE OF THE FCC

47 CFR Sec. 0.405 Statutory Provisions
The following statutory provisions, AMONG OTHERS, will be of interest to PERSONS HAVING BUSINESS with the Commission [emphasis added]:
(a) The Federal Communications Commission was created by the Communications Act of 1934, 48 Stat. 1064, June 19, 1934, as amended, 47 U.S.C. 151-609.
(b) The Commission exercises authority under the Submarine Cable Landing Act, 42 Stat. 8, May 27, 1921, 47 U.S.C. 34-39....
(c) The Commission exercises authority under the Communications Satellite Act of 1962, 76 Stat. 419, August 31, 1962, 47 U.S.C. 701-744.
(d) The Commission operates under the Administrative Procedure Act, 60 Stat. 237, June 11, 1946, as amended, ... the provisions of the Administrative Procedure Act now appear as follows in the Code:

Administrative Procedure Act	5 U.S.C.
Sec. 2-9 -	551-558
Sec. 10 -	701-706
Sec. 11 -	3105, 7521, 5362, 1305
Sec. 12 -	559

This section of the Code of Federal Regulations (CFR) lists items pertinent to the FCC which have been provided for by statute. Let us examine some of them in detail.

> 47 U.S.C. Sec. 151 Purposes of Chapter; Federal Communications Commission Created
>
> For the purpose of regulating interstate and foreign commerce in communication by wire and radio...there is created a commission to be known as the "Federal Communications Commission"....

The FCC was created by an ACT OF CONGRESS (we will get to that later) "for the purpose of regulating interstate and foreign commerce...." The power of law is in the details, especially the definitions of words and phrases. Just what is "interstate and foreign commerce in communication by wire and radio"?

The common meaning of the word "interstate" is "of, connecting, or existing between two or more states...."

"Commerce," in this context, means "the exchange or buying and selling of commodities on a large scale involving transportation from place to place."

"Foreign" means "situated outside a place or country."

When thinking of "foreign commerce," most people would imagine trade with China or Spain. However, definitions in law are often different from commonly understood definitions, as we shall shortly see.

Black's has separate definitions for "foreign," "foreign nations," "foreign states," "foreign commerce," "commerce with foreign nations," "nation," "country," "interstate," "commerce," "interstate commerce," "interstate and foreign commerce," and "state." The serious researcher should examine all of these definitions, as their thorough study could easily fill an entire book, and will not be attempted here.

In Black's we find:

> Interstate commerce. Traffic, intercourse, commercial trading, or the transportation of persons or property between or among the several states of the Union, or from or between points in one state and points in another state; commerce between two states, or between places lying in different states....

Also from Black's:

> Interstate and foreign commerce. Commerce between a point in one State and a point in another State, between points in the same State through another State or through a foreign country, between points in a foreign country or countries through the United States, and commerce between a point in the United States and a point in a foreign country or in a Territory or possession of the United States, but only insofar as such commerce takes place in the United States. The term "United States" means all of the

> States and the District of Columbia. 49 U.S.C.A. Sec. 10102.

Note the differences between these two definitions -- subtle, yet distinct.

What is the difference between a state (not capitalized) and a State (capitalized)? Are they the same as one of the "several states of the Union"? Why is the word "state" capitalized in one place and not in another? What is the difference between the "United States" and the "several states of the Union"?

It is no accident that the alternate use of "state," "State," "United States," and "several states of the Union" is found throughout the entire American law, as well as Black's; yet neither offer clear reasons for this important situation. Again, a thorough study of this subject could easily fill an entire book, and will not be attempted here. However, a clue may be found in one particular definition from Black's:

> State/Foreign state. A foreign country or nation. The several United States are considered 'foreign' to each other except as regards their relations as common members of the Union.

In essence, the "several states of the Union" are foreign and sovereign countries, with different laws, etc. That is why people living in Kansas are not subject to the laws of Texas, and vice versa. In fact, further research indicates that the "several states of the Union" are foreign to the "United States," and the federal government!

Even further research indicates that people living in "the several states of the Union" are not subject (except in specific, limited cases) to the laws of the "United States," any more than they are subject to the laws of France! (The astute researcher will notice that the definition above does not mention the "several states of the Union," but instead mentions "the several United States," indicating that, just as there is more than one "state," there is more than one "United States." These concepts are quite astounding to most people and, in an effort to unravel and understand them, the unprepared researcher may rapidly develop a headache!)

If words are to have meaning, and laws made up of words are to be enforced, there must be a way to understand the meanings of the words used in the law. Many court decisions have stated this concept, such as the following:

> (The) correct format for evaluating (the) constitutionality of (a) statute is: is (the) expression of crime so clearly explicit that every person of ordinary intelligence may understand specific provisions thereof and determine in advance what is and is not prohibited. -- Whaley v. State, Okl. Cr., 556 P.2d 1063 (1976).

In other words, if the ordinary man on the street cannot understand the law, then that law is probably unconstitutional!

How can the law relating to the FCC be understood? The answer lies, among other places, in the DEFINITIONS of words contained in the law itself. Words contained in law can have meanings other than those commonly understood, as long as those definitions are PART of the law.

Therefore, "green" can be defined as "blue," as long as that definition is contained in the law, and this is all perfectly "legal."

Since 47 U.S.C. Sec. 151 uses the phrase "interstate and foreign commerce," then we will adhere to that definition, as it is different from the definition of "interstate commerce."

> 47 U.S.C. Sec. 152 Application of chapter [CHAPTER 5]
> (a) The provisions of this chapter shall apply to all INTERSTATE AND FOREIGN communication by wire or radio and all INTERSTATE AND FOREIGN transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, and to the licensing and regulating of all radio stations as hereinafter provided....
> (b) Except as provided in Sections 223 through 227...and Section 332...and subject to the provisions of Section 310...and subchapter V-A of this chapter, NOTHING in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with INTRASTATE communication service by wire or radio....[emphasis added]

The above section seems clear enough -- 47 U.S.C. Chapter 5 applies only to interstate (between states) and foreign matters, and NOT to "intrastate" (within a state) matters. Notice, however, the word "except" in (b). "Except as provided in...." The sections mentioned in (b) deal with the following:

Sec. 223 - Obscene or harassing telephone calls....
Sec. 224 - Pole attachments (connecting wires, etc. to utility poles)
Sec. 225 - Telecommunications services for hearing-impaired and speech-impaired individuals
Sec. 226 - Telephone operator services
Sec. 227 - Restrictions on use of telephone equipment
Sec. 332 - Mobile services (such as car phones)
Sec. 301 - License for radio communication or transmission of energy
Subchapter V-A - Cable communications

Only Sec. 301 deals with radio and its pertinent sections read as follows:

> 47 U.S.C. Sec. 301 License for radio communication or transmission of energy
> It is the purpose of this chapter, among other things, to maintain the control of the United States over all the channels of radio transmission...but not the ownership thereof....

> No person shall use or operate any apparatus for the transmission of energy for communications or signals by radio (a) from one place in any State, Territory or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District; or (b) from any State, Territory or possession of the United States, of from the District of Columbia to any other State, Territory or possession of the United States; or (c) from any place in any State, Territory or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any State when the effects of such use extend beyond the borders of said State... EXCEPT UNDER AND IN ACCORDANCE WITH THIS CHAPTER and with a license in that behalf granted UNDER THE PROVISIONS OF THIS CHAPTER. [emphasis added]

This section is one that is pointed to by many ham radio operators, who proudly proclaim they have complied with "the law," by working so hard to obtain their Amateur Radio "License." But, if they had carefully read this statute they would have discovered what appears, on the surface, to be a glaring contradiction.

If the purpose of the FCC is to regulate "interstate and foreign commerce," and the provisions of 47 U.S.C. Chapter 5 "apply to all interstate and foreign communication," and NOT "intrastate communication," then how can a person be forbidden to broadcast "from one place in any State...to another place in the same State" without first being granted a license?

The key to understanding Section 301 lies in the definitions found in Section 153, and an understanding of the word "includes."

> 47 U.S.C. Sec. 153 Definitions
> (e) "Interstate communication" or "interstate transmission" means communication or transmission (1) from any State, Territory or possession of the United States (other than the Canal Zone), or the District of Columbia, (2) from or to the United States to or from the Canal Zone, insofar as such communication or transmission takes place within the United States, or (3) between points within the United States but through a foreign country; but shall not, with respect to the provisions of subchapter II of this chapter (other than Section 223 of this title), include wire or radio communication between points in the same State, Territory, or possession of the United States, or the District of Columbia, through any place outside thereof, if such communication is regulated by a State commission....
> (cc) "Station license", "radio station license", or "license" means that instrument of authorization REQUIRED BY THIS CHAPTER or the rules and regulations of the Commission made PURSUANT TO THIS CHAPTER.... [emphasis added]

Why the authors of this statue used the word "means" in one place and the word "includes" in others remains a mystery. However, they do have distinctly different definitions which must be understood in order to unravel the purpose of the law.

The question is: how can a person be forbidden to broadcast "from one place in any State...to another place in the same State"?

> 47 U.S.C. Sec. 153 Definitions
> (g) "United States" means the several States and Territories, the District of Columbia, and the possessions of the United States, but does not include the Canal Zone....

Note the use of the word "means" here. Since Black's contains no pertinent definition of the word, we will turn to Webster's:

> Means. Usage 2: (1): to have in mind as a purpose: INTEND (2): to serve to convey, show, or indicate: SIGNIFY...

If "United States means the several States," does it MEAN Texas or Ohio? Does it MEAN "the several states of the Union"?

> 47 U.S.C. Sec. 153 Definitions
> (v) "State" includes the District of Columbia and the Territories and possessions....

Does (v) contain the words "Texas" or "Ohio"? NO! It most definitely does NOT.

But, one might say, aren't Texas and Ohio "States"? Doesn't this definition "include" them by inference, along with the other 48 "several states of the Union"?

The answer once again is a resounding NO!

Let us examine the words "include" and "includes."

According to Black's:

> Include. (Lat. inclaudere, to shut in, to keep within.) To confine within, hold as in an inclosure, take in, attain, shut up, contain, inclose, comprise, comprehend, embrace, involve. Term may, ACCORDING TO CONTEXT, express an enlargement and have the meaning of "and" or "in addition to," or merely specify a particular thing already included within general words theretofore used. "Including" within statute is interpreted as a word of enlargement or of illustrative application as well as a word of limitation. [emphasis added]

This definition may surprise the novice researcher, who may also argue that the term should be interpreted as an enlargement. This must, however, be done "according to context," "and with a different intention apparent."

From the "Legal Thesaurus," Deluxe Edition, by William C. Burton, MacMillan Publishing Company:

> Include, verb -- absorb, (Lat.) "adscribere," be composed of, be formed of, be made up of, begird, boast, bound, bracket, circumscribe, classify, close in, combine, compass, (Lat.)

> "complecti," comprehend, (Lat.) "comprehendere," consist of, consolidate, contain, cover, embody, embrace, encircle, encompass, engird, envelop, girdle, hold, incorporate, involve, merge, put a barrier around, span, subsume, surround, take in, unify, unite.

And from "A Dictionary of Modern Legal Usage," 2nd Edition, by Bryan A. Garner, Oxford University Press:

> Included. See "Including".
>
> Including is sometimes misused for "namely." But it should not be used to introduce an exhaustive list, for it implies that the list is only partial. In the words of one federal court, "It is hornbook law that the use of the word 'including' indicates that the specified list...is illustrative, not exclusive." .... See "Including but not limited to."
>
> Including but not limited to; including without limitation. In "drafting", these cautious phrases are often essential to defeat three canons of contruction: (Lat.) "inclusio unius est exclusio alterius" ("to express one thing is to exclude the other"), (Lat.) "noscitur a sociis" ("it is known by its associates"), and (Lat.) "ejusdem generis" ("of the same class or nature"). .... Even though the word "including" itself means that the list is merely exemplary and not exhaustive, the courts have not invariably so held. So the longer, more explicit variations may be considered necessary....

Note that the definition in 47 U.S.C. Sec. 153 does not use the word "including" as a term of enlargement, but rather uses the more limiting word "include(s)." In the absence of an apparently different intention and based upon some understanding of the rules of construction of law, it is the conclusion of this author that there is NO contradiction between Section 301 and Section 151 and 152, because the definition of "State" in 47 U.S.C. does not "include" Texas, Ohio, Kansas, or any of the other "several states of the Union."

In the context of 47 U.S.C. and the FCC, the "United States" includes ONLY the District of Columbia and the Territories and possession of the United States.

This brings up an interesting situation in which it can be argued that "interstate and foreign commerce" and "communication" or "transmission" takes place ONLY among the District of Columbia and the Territories and possessions! Therefore, commerce, communication, or transmission between someone in Texas and someone in Kansas is not "interstate"! This may, however, be pushing the legal "envelope" a bit, and should, for now, be considered only as icing on what appears to be a well-defined cake.

CONCLUSION OF (a)

The FCC exists solely to regulate "interstate and foreign commerce"; that is, commerce between states and other states and/or countries.

Pertaining to low-power radio broadcasters and stations, 47 U.S.C. Chapter 5 applies ONLY to interstate and foreign communication or transmission, and clearly does NOT apply to commerce, communication, or transmissions taking place solely within the confines of one of the several states of the Union.

(b). 47 U.S.C. §301 is patently unconstitutional on it's face.

The FCC has in the past brought civil and criminal actions pursuant to 47 U.S.C. §510, alleging a "willful and knowing intent" to violate 47 U.S.C. §301. The FCC has contended that radio transmissions were made from one place in a State to another place in the same State, a solely "intrastate" activity. The FCC, in these actions, has not alleged that such broadcasts were related in any way to "interstate and foreign commerce," which are the Constitutionally mandated boundaries of the authority delegated by Congress to the Federal Communications Commission (FCC). Thus, the allegations of the FCC's actions make it clear that the FCC seeks to make penal acts occurring within intrastate commerce, i.e., that specifically occurring wholly within a "State."

The FCC's complaints have been clearly based upon subsection (a) of §301 which proscribes radio transmissions "from one place in any State, Territory, or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession or District" without first having obtained a license from the Federal Communications Commission.

Section 301(a) is unconstitutional in that it attempts to regulate activity and make penal that which is beyond the foreign and interstate commerce powers of Congress granted to it via Art. 1, §8, cl. 3 of the Constitution for the united States.

A. Congressional Interstate Commerce Powers.

The police power is vested in the states and not the federal government; see Wilkerson v. Rahrer, 140 U.S. 545, 554, 11 S.Ct. 865, 866 (1891) (the police power "is a power originally and always belonging to the states, not surrendered to them by the general government, nor directly restrained by the constitution of the United States, and essentially exclusive"); Union National Bank v. Brown, 101 Ky. 354, 41 S.W. 273 (1897); John Woods & Sons v. Carl, 75 Ark. 328, 87 S.W. 621, 623 (1905); Southern Express Co. v. Whittle, 194 Ala. 406, 69 So.2d 652, 655 (1915); Shealey v. Southern Ry. Co., 127 S.C. 15, 120 S.E. 561, 562 (1924) ("The police power under the American constitutional system has been left to the states. It has always belonged to them and was not surrendered by them to the general government, nor directly restrained by the constitution of the United States...Congress has no general power to enact police regulations operative within the territorial limits of a state"); and McInerney v. Ervin, 46 So.2d 458, 463 (Fla. 1950). Further, there are no common law offenses against the United States; see United States v. Hudson, 7 Cranch (11 U.S.) 32 (1813); United States v. Coolidge, 1 Wheat. (14 U.S.) 415 (1816); United States v. Britton, 108 U.S. 199, 206, 2 S.Ct. 531, 535 (1883); Manchester v. Massachusetts, 139 U.S. 240, 262-63, 11 S.Ct. 559, 564 (1891); United States v. Eaton, 144 U.S. 677, 687, 12

S.Ct. 764, 767 (1892); and United States v. Flores, 289 U.S. 137, 151, 53 S.Ct. 580, 582 (1933). But within the territories and insular possessions, Congress has the power of a state legislature; see Berman v. Parker, 348 U.S. 26, 31, 75 S.Ct. 98, 102 (1954); and Cincinnati Soap Co. v. United States, 301 U.S. 308, 317, 57 S.Ct. 764, 768 (1937). And Congress' power to make an act penal committed within a state of the American Union must have some relation to its delegated powers; see United States v. Hall, 98 U.S. 343, 345-46 (1879); and Logan v. United States, 144 U.S. 263, 12 S.Ct. 617 (1892).

Perhaps the greatest power of Congress to enact legislation applicable within the jurisdiction of the states is its power to control interstate commerce, and every lawyer and judge is familiar with the case precedence elucidating the breadth of this power. Before 1936, the Supreme Court construed Congressional interstate commerce powers in a very restrictive sense; see Hammer v. Dagenhart, 247 U.S. 251, 38 S.Ct. 529 (1918); Bailey v. Drexel Furniture Company, 259 U.S. 20, 42 S.Ct. 449 (1922); Hill v. Wallace, 259 U.S. 44, 42 S.Ct. 453 (1922); and United States v. Butler, 297 U.S. 1, 56 S.Ct. 312 (1936). But since the Great Depression, Congress has enacted legislation to expressly control activity affecting interstate commerce, and the Supreme Court has sanctioned such legislation and held it constitutional; see Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 85 S.Ct. 348 (1964); and Katzenbach v. McClung, 379 U.S. 294, 85 S.Ct. 377 (1964). But even today, this power is not limitless; see United States v. Lopez, ___ U.S. ___, 115 S.Ct. 1624 (1995). Because of the apparently grey parameters of this congressional power which is explained in terms of malleable concepts, it consequently is important to briefly discuss some of the major features of this power.

In United States v. Steffens, 100 U.S. 82 (1879), the Supreme Court was required to determine the constitutionality of certain statutes proscribing the fraudulent use of trademarks. Here, Congress had adopted certain legislation regarding trademark registration in 1870, and it supplemented that legislation in 1876 by an act making it penal to fraudulently use a registered trademark. In this case, parties from New York and Ohio who had been indicted for alleged violations of this latter act challenged its constitutionality. The Court in its decision noted that Congress had no constitutional authority regarding trademarks and the protection of trademarks; such being the case, the act in question could have a constitutional foundation only if it was based on Congressional power over interstate commerce. But, the problem regarding the act before the Court arose from the fact that nothing in the act itself mentioned interstate commerce or even attempted to connect this particular law with any regulation of such commerce. Addressing this deficiency, the Court stated:

"[T]here still remains a very large amount of commerce, perhaps the largest, which, being trade or traffic between citizens of the same State, is beyond the control of Congress. "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the statute, or from its essential nature, that it is a regulation of commerce with foreign nations, among the several States, or with the Indian Tribes. If it is not so limited, it is in excess of the power of

Congress. If its main purpose be to establish a regulation applicable to all trade; to commerce at all points, especially if it is apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress," 100 U.S., at 96-97.

Since this trademark law did not confine its operation to interstate commerce, it was held unconstitutional. See also United States v. DeWitt, 76 U.S. (9 Wall.) 41 (1870); and United States v. Fox, 95 U.S. 670 (1878).

A similar question was presented to the Court in Illinois Central Railroad Company v. McKendree, 203 U.S. 514, 27 S.Ct. 153 (1906). Here, Congress adopted an act to suppress cattle diseases, and made the act applicable to cattle shipped in interstate commerce; the act also permitted the Secretary of Agriculture to implement regulations for enforcement of the act. Pursuant to this authority, the Secretary promulgated a regulation which established a quarantine district in the southern portion of the continental United States, and prohibited shipments of cattle from the quarantine district to points outside and north thereof. In this case, the railroad company shipped infected cattle from a part of the State of Tennessee in the quarantine district to a point in Kentucky outside the district; these cattle then infected other cattle and the owner sued for damages. The railroad company's contention that the regulations were unconstitutional prevailed in the Supreme Court, where the Court stated:

"We think the defendant was right in the contention that, if the act of February 2, 1903, was constitutional, and rightfully conferred the power upon the Secretary of Agriculture to make orders and regulations concerning interstate commerce, there was no power conferred upon the Secretary to make regulations concerning intrastate commerce, over which Congress has no control," 203 U.S., at 527. "The terms of order 107 apply to all cattle transported from the south of this line to parts of the United States north thereof. It would, therefore, include cattle transported within the state of Tennessee from the south of the line as well as those from outside that state; there is no exception in the order, and in terms it includes all cattle transported from the south of the line, whether within or without the state of Tennessee .... But the order in terms applies alike to interstate and intrastate commerce," 203 U.S., at 528.

It was because the regulation in question was not limited to interstate commerce and was broader than such and encompassed intrastate commerce that it was found unconstitutional.

In Howard v. Illinois Central Railroad Company, 207 U.S. 463, 28 S.Ct. 141 (1908), the Supreme Court found unconstitutional a Congressional act which regulated both intrastate and interstate commerce. Here, Congress adopted legislation ("Employers' Liability Act") which denied the defense of contributory negligence in tort actions brought by employees against employers who were common carriers in interstate commerce. In this wrongful death action, the railroad challenged the constitutionality of the act, arguing that its scope covered both intrastate and interstate commerce in that it attached liability to

interstate carriers regardless of whether the employee involved or the accident was similarly involved in interstate commerce. In holding this act unconstitutional, the Court held:

"The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce," 207 U.S., at 498.

"As the act thus includes many subjects wholly beyond the power to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution," 207 U.S., at 499.

The case of Hill v. Wallace, 259 U.S. 44, 42 S.Ct. 453 (1922), is very similar to United States v. Steffens, supra, in that the act in question was also devoid of an interstate commerce foundation. Here, Congress enacted legislation to tax certain transactions involving futures contracts and to regulate boards of trade, but the act contained nothing in it basing the act on Congressional interstate commerce powers. Members of the Board of Trade of Chicago challenged the constitutionality of this act, arguing that Congress had no innate authority of its own to regulate boards of trade and that the only power of Congress to enact such legislation would be its interstate commerce powers with which this act was totally unconnected. The Supreme Court agreed and held the act unconstitutional.

The lesson of the above cases is clear. United States v. Steffens and Hill v. Wallace, supra, stand for the proposition that if Congressional legislation can be valid only under the power of Congress to regulate interstate commerce, the statute itself must express its relationship to interstate commerce; in the absence of such statutory expression, the act is not one based on Congressional interstate commerce powers. The cases of Illinois Central Railroad Company v. McKendree and Howard v. Illinois Central Railroad Company, supra, demonstrate that certain laws statutorily connected to interstate commerce can be unconstitutional if they are overbroad and encompass both intrastate and interstate commerce.

All will readily admit that Congress can adopt legislation to regulate and control interstate commerce as well as that which "affects" interstate commerce. But, it is equally true that there is a boundary or limit to Congressional power to regulate those activities which "affect interstate commerce." Simply stated, acts "affecting interstate commerce" do not include all human activity, and there is a sizeable amount of human activity which is neither interstate commerce or acts "affecting" interstate commerce; see United States v. Five Gambling Devices, 346 U.S. 441, 74 S.Ct. 190 (1953). It is the "de minimis" rule which describes and defines this outer boundary of the power of Congress to regulate activities "affecting interstate commerce." To fall within this rule, an act must have some effect or impact on interstate commerce. Any act which does not affect interstate commerce is outside the scope of this Congressional power.

There exists a line of cases clearly demonstrating just some of the acts which are beyond and outside the "de minimis" rule. In United States v. Critchley, 353 F.2d 358 (3rd Cir. 1965), an union official was indicted for a Hobbs Act violation, the facts being based upon the defendant making a complaint against a roofing company for the sole purpose of soliciting a bribe. His conviction was reversed on the grounds that this act was not one which affected interstate commerce, and there was no other evidence offered to show an interference or obstruction of interstate commerce. In Houchin v. Thompson, 438 F.2d 927, 928-29 (6th Cir. 1970), at issue was whether certain workers in a commercial office building were covered by the provisions of the Fair Labor Standards Act. The court found that these workers were not engaged in activities affecting interstate commerce, so they were not covered by the act. Regarding the "de minimis" rule, the Court stated:

> "Where some inconsequential incident of interstate commerce happens to result from the general conduct of a fundamentally intrastate business, the rule of de minimis is applicable and the Act does not apply."

In National Labor Relations Board v. Clark, 468 F.2d 459, 466 (5th Cir. 1972), an attempt was being made to subject a nursing home in Alabama to federal labor laws. Here, the only nexus of the home to interstate commerce was a $1,700 purchase of supplies from a company whose main office was in Atlanta, Georgia; but, it was not shown how these supplies were shipped to the nursing home. Regarding the "de minimis" rule, the Court held:

> "In passing the National Labor Relations Act, Congress intended to provide the Board with the fullest jurisdictional power constitutionally permissible under the Commerce Clause .... If intrastate activity has more than a de minimis effect on interstate commerce, it affects commerce within the meaning of the Act."

The Court concluded here that there was no evidence showing that the home's activities affected interstate commerce. See also Austin Road Company v. O.S.H.A., 683 F.2d 905 (5th Cir. 1982).

In United States v. Merolla, 523 F.2d 51 (2nd Cir. 1975), a conviction under the Hobbs Act was reversed upon a showing that the underlying facts of the case demonstrated no "effect" upon interstate commerce. The defendant in this case had contracted with the victim to build a car showroom for an automobile dealership, but when work on the showroom was jeopardized, the defendant beat the victim and extorted money and property from him. Nonetheless, under the facts of this case, the Court held that there was not a sufficient jurisdictional nexus in the facts to support a Hobbs Act conviction.

In United States v. Elders, 569 F.2d 1020, 1023-24 (7th Cir. 1978), Elders' conviction under the Hobbs Act was reversed also on the basis that the facts involved in the case showed no "de minimis" connection to interstate commerce. In essence, Elders, an employee of a municipality, sought and obtained a series of "kickbacks" or bribes from a tree trimming company engaged in work for the city. In its

opinion, the Court summarized the requirements for a federal interstate commerce prosecution as follows:

"In each case, however, a nexus has been required between the extortionate conduct and interstate commerce in order to establish federal jurisdiction. That nexus may be de minimis ...but it must nonetheless exist."

A federal indictment was dismissed in United States v. Mennuti, 639 F.2d 107 (2nd Cir. 1981), on the grounds that the defendants' conduct in the case had no "de minimis" effect on interstate commerce; the facts involved the bombing of a residential home. In another attempted bombing case, convictions were reversed on the grounds that the events of which the government complained had no minimal connection to interstate commerce; see United States v. Monholland, 607 F.2d 1311 (10th Cir. 1979). And in United States v. Voss, 787 F.2d 393 (8th Cir. 1986), it was held that an attempted arson of a home, even though potentially held for commercial activity, involved no "de minimis" connection with interstate commerce; see also Gramercy 222 Residents Corp. v. Gramercy Realty Assoc., 591 F.Supp. 1408 (S.D.N.Y. 1984).

The sum and substance of the above cases is that the maximum, constitutional reach of Congressional interstate commerce powers extends to regulating activities "affecting interstate commerce." The above cases are just a few instances of conduct and acts which do not affect interstate commerce, and are therefore beyond Congressional power. And there are many more countless acts encountered in everyday life which are obviously beyond the control of Congress under the commerce clause; Congressional attempts to control these many acts outside this power would be unconstitutional.

Of course, all would recognize the abundance of cases where federal criminal laws have been upheld against commerce clause challenges, many of which concern guns and drugs; cases of this nature are cited in abundance in the annotations to Art. 1, §8, cl. 3, and typical examples of commerce clause construction are found in Hodel v. Virginia Surface Mining Recl. Ass'n., 452 U.S. 264, 276, 101 S.Ct. 2352, 2360 (1981); and American Life League v. Reno, 47 F.3d 642, 647 (4th Cir. 1995)("A federal statute is valid under the Commerce Clause if Congress (1) rationally concluded that the regulated activity affects interstate commerce and (2) chose a regulatory means reasonably adapted to a permissible end"). However, in United States v. Lopez, ___ U.S. ___, 115 S.Ct. 1624, 1629-30 (1995), the Supreme Court took the opportunity to precisely define the breadth of the commerce clause and held as follows:

"Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. [cites omitted] First, Congress may regulate the use of the channels of interstate commerce. [cites omitted]

Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from

intrastate activities. [cites omitted] Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. [cites omitted]"

It is the decision in Lopez which breathes new life back into commerce clause challenges. Here, the Supreme Court has redefined the maximum reach of the commerce clause to that which "substantially affects interstate commerce." That "ancient" decisional authority of the seventies and early eighties which many had thought was no longer applicable is now very relevant today, including that "old" authority, the "de minimus" rule.

B. The Federal Communications Act.

In an effort to establish an uniform national network of licensing for radio stations, Congress adopted this law in 1934 and made the licensing process applicable only to those stations involved in interstate commerce.

Prior to 1982, the "preamble" portion of 47 U.S.C., §301 simply stated that Congress intended "to maintain control of the United States over all the channels of interstate and foreign radio transmission." Prior to 1982, subsection (a) of §301 limited its intrastate reach to those areas plainly within the territorial jurisdiction of the United States as evidenced by the following language:

"(a) from one place in any Territory or possession of the United States or in the District of Columbia to another place in the same Territory, possession or District."

But pursuant to P.L. 97-259, 96 Stat. 1091, adopted in 1982, Congress struck the phrase "interstate and foreign commerce" from the "preamble" portion in the first sentence of this section and changed subsection (a) to read as follows:

"(a) from one place in any State, Territory or possession of the United States or in the District of Columbia to another place in the same State, Territory, possession, or District."

Clearly, the claim to control the airwaves of this entire country, both intrastate and interstate, is only a recent legislative invention arising from the 1982 act.

It is remarkable that there has been precious little litigation, civil or criminal, regarding the scope of this law. There are very few reported criminal prosecutions under the pre-1982 version of this law, and the most notable are United States v. Betteridge, 43 F.Supp. 53 (N.D.Ohio 1942), which involved a radio transmission receivable on Lake Erie, and United States v. Brown, 661 F.2d 855 (10th Cir. 1981), which involved a radio transmitter powerful enough to cross state lines. It must be remembered that these two cases were prosecutions under a law which clearly was tied to the constitutional limits of Congressional interstate commerce powers and they thus have no relevance to the issue raised herein.

The simple fact of the matter is that §301(a) is unconstitutional under the Lopez rationale. The maximum breadth of this power extends only to that which substantially affects interstate commerce (this might require re-examination of some of the cases discussing the "de minimus" rule). The full breadth of the interstate commerce power is already encompassed within §301(d), which requires those radio stations having an effect beyond the borders of the state where it is located to be licensed. Because §301(d) already reaches the maximum extent of this federal power, the 1982 amendment to §301 can only be construed to apply to purely intrastate commerce in its classical sense. This, of course, is unconstitutional.

The only other manner by which Congress can exert any type of control over intrastate commerce is if it makes a legislative finding that all intrastate commerce in the activity to be regulated affects interstate commerce. However in reference to the 1982 expansion of the relevant provisions of §301, no such finding was made. In fact, the 1982 amendment was adopted for the sole purpose of assisting criminal prosecutions under the Communications Act:

"The present statutory ambiguity imposes wasteful burdens on the Commission and various United States Attorneys, particularly with regard to prosecution of Citizen Band (CB) radio operators transmitting in violation of FCC rules. Typically in such a case, the defendants concede the violation, but challenge the Federal Government's jurisdiction on the ground that the CB transmission did not cross state lines. To refute this argument, the Commission invariably is asked to furnish engineering data and experts witnesses, often at considerable expense. In most instances, once the expert evidence is made available, the defendants plead guilty and the case terminated.

"The provision would end these wasteful proceedings. Further, it would make Section 301 consistent with judicial decisions holding that all radio signals are interstate by their very nature. See, e.g., Fisher's Blend Station Inc. v. Tax Commission of Washington State, 197 U.S. 650, 655 (1936)." See 1982 U.S.C.A.N.S. 2275-76.

Thus the reason for expanding §301 to encompass purely intrastate commerce was not based upon the requisite Congressional finding but was instead done to achieve an ulterior purpose of assisting criminal prosecutions and making them easier. The reason why such prosecutions needed to be made easier arose from cases where the defense insisted upon proof that the prosecution was really one which fell within the scope of federal laws. Consequently, because there has been no congressional finding regarding the impact of intrastate activities upon this type of interstate commerce, §301(a) cannot be justified as constitutional; see United States v. ORS, Inc., 997 F.2d 628 (9th Cir. 1993).

CONCLUSION

For the foregoing reasons, §301(a) is plainly and without a doubt unconstitutional.

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(Comments of David Moore, 1108 W. Main, Suite 101, Norman, OK 73069, RE: RM-9242)

2. PRA Violations Brief

A. The Legislative History of the Paperwork Reduction Acts.

President Roosevelt commissioned the Central Statistical Board to study the problem of governmental paperwork on May 16, 1938, (*1) and the Board's study thereafter became the basis for the Federal Reports Act of 1942 (herein "FRA") (*2) which constituted the first attempt by Congress to regulate the information collection activities of federal agencies. The FRA granted authority to the Bureau of the Budget to approve the requests of federal agencies seeking to collect information, (*3) and it prohibited any federal agency from engaging in such conduct if the Director did not approve the proposed collection of information. (*4) The act granted rule the making authority necessary for its implementation, (*5) and on February 13, 1943, such rules were promulgated. (*6) These rules clearly encompassed both forms used by federal agencies to collect information as well as agency regulations.

A weak attempt to strengthen the FRA was made in 1973, (*7) and revisions to Circular No. A-40 which implemented the FRA were made on May 3, 1973, again on February 10, 1976, and finally on November 5, 1976. In late 1974, Congress established a Commission on Federal Paperwork and directed it to study and report needed changes in the laws, regulations and procedures which would insure that information essential for the functioning of federal agencies was obtained with a minimal amount of burden, duplication and cost. (*8)

On October 3, 1977, after lengthy and careful study of the matter of paperwork requirements mandated by federal agencies, the Federal Paperwork Commission submitted the last of its many reports. (*9) This Report concluded that while the existing FRA seemed sufficient to control the use of forms by federal agencies to collect information, it was insufficient to control the source for the use of such forms, i.e., agency regulations. (*10) Prior to this report, it had been suggested that Congress clarify and strengthen the FRA "to allow the clearance agency to challenge the need for regulatory information."(*11) The Commission readily perceived that changing the rule making process of federal agencies was essential to reduce paperwork burdens:

"Rulemaking is, in essence, legislation by executive departments and agencies. Agency rules and regulations have the full force and effect of law, and translate broad congressional mandates into operational programs and practices.

"Most of the specific reporting and recordkeeping requirements imposed on the public stem from such rules and regulations." (*12)

Still later, another report concluded as follows:

"The Act is not clear on its coverage of a major portion of the paperwork burden-- recordkeeping requirements-- although recordkeeping is covered in OMB Circular A-40, the primary guideline instruction, as well as other OMB and GAO guidelines... Not all

agencies covered by the Federal Reports Act comply fully with its requirements.

"For years, several of the regulatory agencies, particularly the Federal Trade Commission (FTC) and the Securities and Exchange Commission (SEC) held themselves exempt, not always with success, from the reports clearance control of the Bureau of the Budget. The FTC took the position that its law enforcement responsibilities, mandated by the Congress, required the collection of information from business entities and industries which was for it alone to determine." (*13)

While legislation was proposed in 1976 to address the problem of federal paperwork burdens, it was not until 1979 that a major effort was undertaken in this respect. In hearings upon a paperwork reduction bill introduced in the Senate, Senator Lawton Chiles stated:

"While OMB is required to supervise the approval or disapproval of agency requests within 60 days, individuals, businesses, and State and local governments will be told they do not need to answer requests not acted upon by OMB.

"Forms without an OMB number on them will be 'bootleg forms' that the public can ignore." (*14)

And while Senator Chiles stated the purpose of this proposed legislation, Senator Lloyd Bentson explained some of the problems the legislation was designed to address:

"Each of these reporting requirements, all of which have been approved by either OMB or GAO under the provisions of the Federal Reports Act, creates an average of ten separate forms-- and the staff at the GAO reported finding one OMB-approved reporting requirement that actually created 90 separate forms." (*15)

Senator Bentson's sentiments in this regard were echoed by Gerald L. Hegel, of the Association of Records Managers and Administrators:

"The Federal Paperwork Commission addressed the issue of statutory recordkeeping and reporting requirements and found that, not statutes, but agency rules and regulations comprised the bulk of the paperwork burden. For example, in the Occupational Safety and Health Act, there are five references to reports from employers, but the Commission identified more than 400 reporting and recordkeeping references in OSHA regulations. Bear in mind that OSHA is not an isolated example." (*16)

Plainly, this legislative history reveals a Congressional intent to make not only agency forms but also agency regulations subject to the control of the Office of Management and Budget ("OMB"). The intent and purpose of the proponents of such a law was to force federal agencies to comply by submitting their information collection requests to OMB for approval, and this approval by OMB was to be evidenced by the proper display of an OMB control number upon the item seeking information. If an agency did not comply, then the law was to have some

"teeth": unapproved collections of information were to be considered "bootleg" requests that the public could ignore with impunity.

B. The 1980 and 1995 Paperwork Reduction Acts.

On December 11, 1980, the Paperwork Reduction Act of 1980 (herein "PRA") was approved; see Public Law 96-511, 94 Stat. 2812, previously codified at 44 U.S.C., §§ 3501, et. seq. This act in substance required all federal agencies to submit to the Director of O.M.B. all "collections of information" for his approval and the assignment of O.M.B. control numbers; see §3507. Subsection (f) of this section provided as follows:

"An agency shall not engage in a collection of information without obtaining from the Director a control number to be displayed upon the information collection request."

Section 3502(4) defined the term "collection of information" generally as the obtaining of facts or opinions by a federal agency "through the use of written report forms, ... reporting ... requirements, or other similar methods calling for ... answers to identical questions". An "information collection request" was defined in §3502(11) to mean "a written report form, application form, schedule, questionnaire, reporting or record keeping requirement, or other similar method calling for the collection of information".

The chief method of securing compliance by federal agencies with this act was §3512, which provided:

"Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to maintain or provide information to any agency if the information collection request involved was made after December 31, 1981, and does not display a current control number assigned by the Director, or fails to state that such request is not subject to this chapter."

Clearly just from the act itself, federal agencies were required to submit to OMB all information collections requests for its approval, which was evidenced by the display of an OMB control number. If any collection of information failed to make the required display, the public was authorized to ignore the request with impunity. Indeed, the Senate Committee on Governmental Affairs expressly so stated:

"The purpose of this section is to protect the public from the burden of collections of information which have not been subjected to the clearance process described by section 3507. Information collection requests which do not display a current control number or, if not, indicate why not are to be considered 'bootleg' requests and may be ignored by the public." (*17)

The Public Protection Clause of the PRA was intentionally designed to enlist the support of the American public in helping OMB secure compliance with the commands thereof by the federal agencies. This was repeatedly stated in the many reports on this legislation, but was

perhaps stated best by President Carter when he signed the bill on December 11, 1980:

"The act I'm signing today will not only regulate the regulators, but it will also allow the President, through the Office of Management and Budget, to gain better control over the Federal Government's appetite for information from the public. For the first time it allows OMB to have the final word on many of the regulations issued by our Government. It also ensures that the public need not fill out forms nor keep records which are not previously approved by OMB." (*18)

There can thus be no dispute that this act by clear legislative intent and express statutory provision was specifically designed to afford the American public a statutory right to refuse to provide to a federal agency information which had not been approved by OMB, and approval was to be demonstrated by the proper display upon the request of a control number. This right to refuse to provide information not approved by OMB could be exercised without running the risk of the imposition of penalties of any kind, civil or criminal.

The implementation of regulations for the PRA was hotly contested, and 54 federal agencies and 90 members of the public offered comments and criticisms of the proposed regulations. 19 The major issue of concern related to whether agency regulations, current as well as those to be promulgated in the future, were subject to the requirements of the act, the federal agencies contending that only forms were covered by the act. This contention was rejected by O.M.B., which found:

"It is not possible to argue that OMB clearance authority is confined to forms and similar instruments .... Many reporting requirements are enforced by means of forms, but other reporting requirements and virtually all record keeping requirements are imposed by other means, including oral surveys, guidelines, directives, and --- most significantly --- regulations .... The only way all reporting and record keeping requirements can be covered by the Act is to cover these other methods for the collection of information, including regulations," Id., at 13667.

"It follows that OMB has authority over reporting and record keeping requirements in rules that were in effect when the Act was passed as well as in rules subsequently issued with or without public notice and comment," Id., at 13668.

"Pursuant to these authorities, the Director has concluded that all collections of information, including those mandated by regulations, must display a currently valid OMB control number," Id., at 13669.

The initial regulations for the PRA thus expressly subjected agency regulations to the PRA clearance and approval process; see 5 C.F.R., §1320.14.

The act clearly required that forms seeking the collection of information must be approved by O.M.B. and had to display O.M.B.

control numbers. But, regarding the instances in which specific "reporting requirement" regulations would likewise be subject to the PRA, the report stated:

"As discussed in connection with section 1320.7(d), any collection of information specifically contained in a regulation (such as a form printed as part of a regulation) is considered part of the collection of information requirement imposed by that regulation, and does not need an additional approval. Such a collection must display the control number assigned to the collection of information requirement in the regulation. On the other hand, a form is not considered to be 'specifically contained in' a regulation merely because the regulation refers to or authorizes the form. A generally valid test is that the form requires independent clearance if the information collection component of the related regulation cannot be enforced without the form. For example, if a regulation states that respondents must supply certain data 'on a form to be provided by the agency', the form must be cleared independently," Id., at 13682.

Stated differently, if a reporting requirement regulation simply mentions a form, both the regulation and the form must be separately approved by O.M.B., although sometimes both will display the same O.M.B. control number.

The first regulations promulgated for the PRA on March 31, 1983 (48 Fed. Reg. 13689), 5 C.F.R., part 1320, were specific in the requirements placed upon the information collection activities of federal agencies. Section 1320.4(a) of these regulations provided that:

"An agency shall not engage in a collection of information without obtaining Office of Management and Budget (OMB) approval of the collection of information and displaying a currently valid OMB control number and, unless OMB determines it to be inappropriate, an expiration date."

Section 1320.7 contained important definitions. A "collection of information" was defined as including forms and reporting requirements, the latter being defined as "a requirement imposed by an agency on persons to provide information to another person or to the agency". By the plain terms of this definition, a "reporting requirement" encompassed a regulation which required the provision of information. The "display" of OMB control numbers meant the printing of such numbers in the upper right hand corner on forms. For regulations, the "display" of the control number was required to be a "part of the regulatory text or as a technical amendment". Section 1320.14 of these regulations plainly commanded federal agencies to obtain and display O.M.B. control numbers for agency regulations subject to the act.

Subsequent regulations for the PRA prove the above contention precisely; see 53 Fed. Reg. 16623, May 10, 1988. Section 1320.5 of this edition of the PRA regulations provided that:

"The failure to display a currently valid OMB control number for a collection of information contained in a current rule does not,

as a legal matter, rescind or amend the rule; however, its absence will alert the public that either the agency has failed to comply with applicable legal requirements for the collection of information or the collection of information has been disapproved, and that therefore the portion of the rule containing the collection of information has no legal force and effect and the public protection provisions of 44 U.S.C. 3512 apply."

In May, 1995, Congress substantially amended the PRA in an obvious effort to rectify problems which had arisen under the earlier 1980 act. (*20) Such apparently confusing terms like "collection of information requests" and "collection of information requirements" were avoided in this new act, which contained at §3502(3), the following definition of the term "collection of information":

"(3) the term 'collection of information'--

"(A) means the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format, calling for either -

"(i) answers to identical questions posed to, or identical reporting or recordkeeping requirements imposed on, ten or more persons, other than agencies, instrumentalities, or employees of the United States; or

"(ii) answers to questions posed to agencies, instrumentalities, or employees of the United States which are to be used for general statistical purposes..."

Under §3507 of the new act, Congress has continued its prior prohibition that no federal agency may solicit information without approval of the Director of OMB, which is indicated by "a control number to be displayed upon the collection of information." Like its predecessor, the new act also contains a public protection provision in §3512:

"(a) Notwithstanding any other provision of law, no person shall be subject to any penalty for failing to comply with a collection of information that is subject to this chapter if -

"(1) the collection of information does not display a valid control number assigned by the Director in accordance with this chapter; or

"(2) the agency fails to inform the person who is to respond to the collection of information that such person is not required to respond to the collection of information unless it displays a valid control number.

"(b) The protection provided by this section may be raised in the form of a complete defense, bar, or otherwise at any time during the agency administrative process or judicial action applicable hereto."

Under the new PRA regulations, a "collection of information" is defined in 5 C.F.R., §1320.3(c), as "the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or

disclosure requirements imposed on, ten or more persons ... 'Collection of information' includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. As used in this Part, 'collection of information' refers to the act of collecting or disclosing information, to the information to be collected or disclosed, to a plan and/or an instrument calling for the collection or disclosure of information, or any of these, as appropriate." There can be no doubt that existing agency regulations are subject to the PRA because §1320.12 of the PRA regulations clearly commands that they be submitted to OMB for approval.

This legislative and regulatory history plainly demonstrates that collections of information do appear within regulations adopted by various federal agencies and consequently, those regulations must be approved by OMB. Further, regulations subject to the PRA must display a control number, either in the text of the regulation itself or in a preamble to that text; see 5 C.F.R., §1320.3(f).

C. Litigation Under the PRA.

One of the first substantive appellate decisions acknowledging the statutory right of the public to "regulate the regulators" was United States v. Smith, 866 F.2d 1092, 1098-99 (9th Cir. 1989). Here, a miner working on federal lands was charged with and convicted of failing to submit to the Forest Service's District Ranger a "Plan of Operations" commanded by a Forest Service regulation published at 36 C.F.R., §228.4.

The Ninth Circuit noted that neither the form or regulation in question displayed a control number required by the PRA and its regulations. In defining the parameters of the PRA, that court held:

"This definition encompasses agency regulations that require disclosure of information to the government and that call for the disclosure or reporting of information through answers to standardized (identical) questions."

Here, because the Forest Service's applicable "collections of information" lacked the display of OMB control numbers, the Ninth Circuit reversed Smith's conviction as mandated by §3512.

Within a month of the decision in Smith, the PRA defense was pleaded in another case also involving a miner on federal lands who was similarly being charged with a failure to submit a "Plan." On appeal from the conviction in that case, the Court in United States v. Hatch, 919 F.2d 1394 (9th Cir. 1990), held that compliance with the PRA was a jurisdictional prerequisite to the imposition of criminal penalties. Since the regulation at issue in Hatch likewise failed to display a control number, Hatch's conviction was reversed.

In Action Alliance of Senior Citizens of Greater Philadelphia v. Sullivan, 930 F.2d 77 (D.C. Cir. 1991), at issue was a regulation promulgated by the Department of Health and Human Services requiring regulated entities to make available to the agency upon request certain "self evaluation reports." Here, the Court concluded that even this