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**Response: The Administrative Process, the Legislative and Executive
Branches, Net Neutrality, and Disclosure**

by

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I don't have much to say in response to Jon Blake's thoughtful response to my November 19 *Perspectives* piece; I have learned much from Jon, both now and during our time as colleagues. I have only two points to make.

First, I don't believe (nor has Jon characterized my paper as arguing) that there was anything improper *per se* about the President's intervention in the net neutrality debate. As Jon's piece shows, it is a convenient fiction to pretend that in administrative law, there is much if any daylight between politics and policy. But it is a more troubling fiction to pretend that a nominally independent agency, as a matter of mere coincidence, happened to change its mind on a pending issue at the very time the President made his position on that issue known to the agency and the public.

For those who followed the recent oral argument in the D.C. Circuit closely, one particular exchange was telling. Judge David Tatel asked the FCC's counsel for "the crispest answer" to his question of why the FCC changed course from the lighter-touch approach propounded in its Notice of Proposed Rulemaking and in Chairman Wheeler's public statements to Title II reclassification of both fixed and mobile broadband in its final rule. The answer to that question was one that everyone in the courtroom and listening online knew, but it was an answer FCC's counsel could not give: "Because the President said so." If there is really nothing wrong with the FCC adopting a rule because the President said so, one wonders why it can't admit in court that this was the case.

Second, Jon emphasizes the complementary points that (1) the White House's arguments for reclassification were identical to arguments already made by other parties in the net neutrality docket; and (2) those parties advocating for less strict rules had multiple opportunities to argue against reclassification to the FCC, both as against those comments I just mentioned and as against the White House's statement itself, which was made part of the rulemaking record as well. Again, no disagreement here. But here is an interesting fact: in the 317 pages, 600-plus paragraphs, and nearly 2,000 footnotes of the operative part of the Commission's Open Internet Order, the President's statement is not cited a single time. *Not once.*

The FCC claims to have been persuaded to reclassify by the four million commenters who demanded Title II regulation of broadband service. But it is beyond meaningful dispute – despite the agency's claims and its voluminous record – that the deciding proposal was the one filed by the metaphorical 4,000,001st commenter, who happened to also be the President of the United States. That may not be undemocratic, for the reasons Jon explains. But it isn't what the APA intended for agency rulemaking procedure.

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