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Why *Chevron* Deference May Not Save the FCC's Open Internet Order – Part II

by

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In my recent *Perspectives*, "Why Chevron Deference May Not Save the FCC's Open Internet Order – Part I," I suggested that, despite oft-repeated claims by net neutrality proponents to the contrary, the FCC's Open Internet Order may not receive *Chevron* deference that is outcome-determinative.

I don't want to repeat the argument here. My basic point was that the Commission arguably failed to justify its about-face regarding Title II classification of broadband Internet access services by not adequately supporting its conclusion that consumers no longer perceive the transmission component of broadband Internet service to be integral – "part and parcel of" – the overall broadband offering. I pointed out that in *FCC v. Fox Television Stations, Inc.* (2009), the Supreme Court emphasized that an agency sometimes must provide a more detailed justification for a change of policy than would suffice for a new policy. As the Court put it, "when, for example, its new policy *rests upon factual findings that contradict those which underlay its prior policy*; or when its prior policy has engendered serious reliance interests that must be taken into account."

In Part II, I suggest another reason why the Commission may not receive as much deference on judicial review of the Open Internet order as it might receive under different circumstances. Here

I have in mind the way in which President Obama's high-profile involvement in the FCC's proceeding may affect the deference accorded the agency. In a 2010 law review article, *"Defining Deference Down, Again: Independent Agencies, Chevron Deference, and Fox,"* I suggested, based on my reading of the *Fox* decision, that at least some Justices would grant the FCC less deference in cases in which they consider the agency's independence to have been compromised.

Most readers are familiar with President Obama's video and statement released on November 10, 2014, in which he said: "I respectfully *ask* [the Commissioners] to adopt the policies I have outlined here." He detailed with specificity "the rules I am *asking for*," including the explicit ask that the FCC "reclassify Internet service under Title II." When the FCC acted in February 2015, the Commission's Democrat majority adopted an order that did exactly what President Obama "asked" – this despite the fact that the action differed substantially from what the Commission had proposed in its rulemaking notice.

President Obama acknowledged that the FCC is an independent agency and "ultimately the decision is theirs alone." However atypical and unusual the President's direct involvement in FCC matters, I do not claim President Obama's release of the video and statement, even with his specific "asks," was unlawful. But I do wish to suggest that the President's actions – and what followed thereafter at the Commission with its seeming reversal of position – may mean, upon review, the FCC's decision will receive little or no deference, whether characterized as *Chevron* deference or otherwise.

It has been my position since 2006 that independent agencies, such as the FCC, should receive less deference on review than executive branch agencies. In my law review article, "Defining Deference Down: Independent Agencies and Chevron Deference," I explained that, under *Chevron's* primary political accountability rationale, the independent agencies, because they are much less politically accountable than the executive agencies to the "Chief Executive" and not part of what *Chevron* called the "incumbent administration," should receive less deference. [Please see the law review article for a full explanation and note that Elena Kagan, dean of the Harvard Law School at the time I wrote the article, agreed with my view.]

Now, back to *Fox* and its relevance to review of the Open Internet order. A close reading of *Fox* reveals that at least some Justices, sensitive to the FCC's status as an independent agency, may insist that the agency's decisions be grounded firmly in expertise and not politics. Exemplifying this view, Justice Breyer declared that, even though in particular cases the law may grant independent agencies broad authority, "*it does not permit them to make policy decisions for purely political reasons* nor to rest them primarily upon unexplained policy preferences." Justice Breyer added that an independent agency's "comparative freedom from ballot-box control makes it all the more important that courts review its decisionmaking to ensure compliance with applicable provisions of law – including law requiring that major policy decisions be based on articulable reasons." Justice Ginsburg joined in Justice Breyer's dissenting opinion.

Justice Stevens, also in dissent, said this: "[W]hen Congress grants rulemaking and adjudicative authority to an expert agency composed of commissioners selected through a bipartisan procedure and appointed to fixed terms, *it substantially insulates the agency from executive*

control." He declared that independent agencies are better viewed as agents of Congress, quoting *Humphrey's Executor* to the effect that these agencies are established "to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative . . . aid."

What this all means for purposes of reviewing agency action, according to Justice Stevens, is that "*[t]here should be a strong presumption that the FCC's initial views, reflecting the informed judgment of independent commissioners with expertise in the regulated area*, also reflect the views of the Congress that delegated the Commission authority to flesh out details not fully defined in the enacting statute." This language obviously has particular relevance to the FCC's Title II classification about-face with its appearance of responsiveness to the President's direction.

It is difficult to predict the outcome of litigation, and I am not in the business of taking wagers to do so. My purpose in this Part II essay as well in Part I is to suggest that there are reasons to think that, upon judicial review, the FCC's decision to classify broadband Internet access services as Title II "telecommunications" services to be regulated like public utilities may receive little or no deference. As I discussed in Part I, a good case can be made that the Commission did not support adequately its reversal of policy regarding classification of Internet services, "when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy." And, as shown in Part II, it is arguable that President Obama's explicit "asks," coupled with the agency's abandonment of its primary proposal in the rulemaking notice, may cause courts to be less deferential than they otherwise would be if they consider political considerations to have trumped the Commission's exercise of its supposed expertise.

Either of these two lines of argument, separately, could mean the Commission's order is not accorded *Chevron* deference or any deference, however denominated. Taken together, the chances that the FCC's Open Internet order may not pass judicial muster are further increased.

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