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Obama's Involvement Jeopardizes FCC's Net Neutrality Efforts

by

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Federal Communications Commission (FCC) Chairman Tom Wheeler apparently is still considering adopting new net neutrality regulations that are based in some measure on classifying Internet service providers as common carriers under Title II of the Communications Act. Title II regulation is derived directly from the Interstate Commerce Act of 1887, the public utility-like regime developed in the 19th century to control the rates and practices of the railroads. This form of regulation was included in the 1934 Communications Act to regulate what was then the monopolistic Ma Bell system.

There are many policy reasons why Wheeler should take the prospect of Title II regulation off the table — including the fact that adopting Title II classification will result in the imposition of substantial new taxes and surcharges on consumers' bills. But here I want to focus on one particular, thus far unremarked upon, aspect of the legal difficulty that Title II classification would pose.

In last January's *Verizon* case, the D.C. Circuit Court of Appeals appears to have pointed the way for the FCC lawfully to adopt a form of somewhat flexible, case-specific net neutrality regulation

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under Section 706 of the Communications Act. Nonetheless, Title II proponents argue that, in order to achieve their most stringent pro-regulatory objectives, the agency must reclassify Internet providers as common carriers. They assert that the FCC almost certainly will receive so-called *Chevron* deference for its reclassification decision, so it need not worry about another judicial reversal, even in the face of such a radical agency action. When a statutory provision is ambiguous, *Chevron* deference requires that the agency's interpretation be given "controlling weight" if its interpretation is based on a permissible construction of the statute.

Even apart from the fact that the FCC would be completely reversing the position it defended all the way to the Supreme Court in the *Brand X* case, when it argued that Internet providers should *not* be classified as common carriers under Title II, I say not so fast.

When President Obama, on Nov. 10, interjected himself directly into the FCC's proceeding by issuing a **statement** explicitly calling on the agency "to reclassify consumer broadband service under Title II," he may have weakened, perhaps significantly, the case for granting deference to the FCC's decision. The president's intervention politicized the agency's decision-making process in a way that may give a reviewing court considerable pause before granting any deference. While Obama gave a nod to the FCC commissioners' supposed independence, he then "ask[ed] them to adopt the policies I have outlined."

It is true that the Supreme Court held in its 2009 *FCC v. Fox Television Stations* decision that an agency may change a previously adopted position — in that case, the FCC's policy regarding sanctioning indecent broadcasts — without demonstrating the new position is better than the old one. That is standard administrative law doctrine. But the institutional nature of the FCC as an independent regulatory agency insulated, at least to some extent from electoral politics, came into play in the *Fox* case in a way that, in light of the president's direct involvement in the net neutrality proceeding, could become a factor in any court review of a FCC reclassification decision.

Dissenting in *Fox*, Supreme Court Justice Stephen Breyer stated that an independent agency's "comparative freedom from ballot-box control makes it all the more important that courts review its decision[-]making to assure compliance with applicable provisions of law — including law requiring that major policy decisions be based on articulable reasons." In his separate dissent, Justice John Paul Stevens stated independent agencies like the FCC should be considered much more as arms of Congress than of the executive branch. He observed that the Supreme Court has made clear that "when Congress grants rulemaking and adjudicative authority to an expert agency composed of commissioners selected through a bipartisan procedure and appointed for fixed terms, it substantially insulates the agency from executive control." More pointedly, Stevens added: "There 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."

Justice Antonin Scalia's response, writing for the majority, is quite telling: "[T]he independent agencies are sheltered not from politics *but from the President*, and it has often been observed

that their *freedom from presidential oversight* (and protection) has simply been replaced by increased subservience to congressional direction."

My own long-held view, articulated in a **2006 law review article** and in this September 2014 **column** in *The Hill*, is that, given the odd place the "fourth branch" independent agencies occupy in our tripartite constitutional system, their statutory interpretations should receive less deference on review than those of the executive agencies. The Supreme Court has never gone that far. Nevertheless, a close reading of the court's *Fox* opinions indicates a majority of the justices may be receptive to an argument that President Obama's overt involvement in the net neutrality proceeding — explicitly asking the FCC "to adopt the policies I have outlined" — interjects enough pure politics into the proceeding that the FCC's eventual decision, if it adopts Title II regulation, should receive little or no *Chevron* reference on review.

Chairman Wheeler, to his credit, has said repeatedly that one of his main concerns is proceeding in a way that will not lead to yet another judicial setback for the agency's net neutrality efforts. He may decide, rightfully so, that the best way to accomplish that goal is to steer clear of Title II.

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