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

by

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In his November 19, 2015, article, “Net Neutrality, Administrative Procedure, and Presidential Overreach,” published by the Free State Foundation, Professor Enrique Armijo, a friend and former colleague, has raised fascinating and important issues that call for broader attention. Though framed in the context of the net neutrality debate at the Federal Communications Commission and now in the courts and in Congress, the issues he has raised are crucial to the proper functioning, more generally, of all agencies at the federal and state level.

I believe that (1) this country could not function without heavy reliance on the administrative process, (2) therefore, it is important to get it right, and (3), as I have written elsewhere (“FCC Process Reform: Redrawing the Limits of Authority in the Administrative Agency System,” *TechPolicyDaily*, August 11, 2015), the original consensus among the principal government participants in the process about how the process should function has, unfortunately, dissipated. Therefore, it needs to be reviewed, adjusted as needed and reaffirmed. Because Professor Armijo shares this concern, particularly about the role of the executive branch and the disclosure requirements, his article provides a useful jumping off point for additional comment.

Like Professor Armijo’s article, this piece does not take a position on the merits of the net neutrality issue. It does not critique, on their merits, the positions that the White House took in

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this debate nor on opposing viewpoints about these issues. Professor Armijo's concern is administrative process, and so is mine.

The first part of this article addresses the role of the executive branch in the administrative agency process. Understanding of that role in the context of the net neutrality debate has been, in my view, badly skewed. (Professor Armijo's *FSF Perspectives* is not guilty of this error.) Further, failure to appreciate the executive branch's proper role has clouded useful and appropriate consideration of the substantive issues in the net neutrality debate. The second part of this paper comments on Professor Armijo's article and attempts to take its main argument one step further to consider broader implications. My hope is that this paper will add momentum to the important discussion he has launched.

I. The Role of the Executive Branch in the Administrative Process

Three components clearly play vital roles in this country's administrative law process – the agencies themselves, Congress, and the courts. Customarily, less attention is paid to the role of the executive branch, but the claim of this article is that it also plays a vital role that needs to be more clearly appreciated.

Controversy about this role erupted early this year when the White House published a video and presidential message to the FCC urging it to take certain positions with respect to the net neutrality (or Open Internet) issues that have simmered or boiled for well over a decade, not only at the FCC and, less so, the FTC, but also in Congress and the courts. Although the White House video was a matter of public record and a written summary of it was placed in the FCC's record in that proceeding for all to view and comment on, many criticized the outcome of that proceeding on the grounds that any White House input was somehow improper.

This piece does not address the substantive issues involved in the dispute. However, the widely advocated position that the White House should have no role in the workings of the administrative rulemaking process underscores that the country may need, seventy years after passage of the Administrative Procedure Act, to rejuvenate its understanding of the proper roles of the agencies, Congress, the courts and, yes, the executive branch in the administrative process.

First and most obvious, the president appoints the agency heads who make important policy, rulemaking, and other decisions. Often, as in the case of the FCC, the enabling statute specifies that no more than a bare majority of the Commissioners should be members of one party. In practice, appointment suggestions from both parties in Congress have carried considerable sway in the executive branch's nominees to administrative agencies, and currently three of the FCC's five Commissioners come from the Hill. While this requirement is prudent, the strong role of the Congress in the appointment process can lead to bonds and allegiances between members of the legislative branch and agency heads. These bonds pose the risk that the agencies will give undue weight to substantive input from Congress.

I see nothing wrong with the White House having this appointment power. The word "policy" is but a second cousin to the word "politics," and party platforms usually contain planks that address important communications policy issues and those before other agencies. Moreover, the

president is elected, presumably in part, because the electorate supports his or her policies, in general or more specifically. Congress, through its oversight and law-making functions, has the right and obligation to express its views, as well. And the courts also exercise a check on agency action, although more circumscribed.

Properly and unsurprisingly, the White House has priorities with respect to communications and media issues, as well as environmental issues, fiscal matters, energy policy, transportation, and health care, to name examples of other areas where agencies play a vital role. So, it seems unexceptional that the White House should select agency leaders who take its priorities into account and consider input from the White House on major rulemaking and policy proceedings. Of course, members of Congress also actively and frequently make their views known to the Commissioners on these issues. This is wholly proper and appropriate. (In FCC adjudications, in contrast to rulemakings, intervention by either the executive or legislative branch of government is more strictly cabined and rightly so.)

Therefore, it is difficult to credit the complaints that the White House's communicating its views on net neutrality issues to the FCC was inherently improper. The White House video was a matter of public record. All who wished to comment to the FCC on the points made in the tape were free to do so and many did. And the FCC's record in the proceeding was still open at the time the White House submitted its views to the Commission.

Moreover, despite some complaints to the contrary, the White House's making its views directly known to the FCC on the net neutrality issues was hardly unprecedented. Most noteworthy, twenty-five years ago when debate was raging over whether the FCC should repeal an existing rule that was perceived to favor the Hollywood community versus the major broadcast networks, the Reagan White House summoned FCC Chairman Mark Fowler, who was generally committed to deregulation and specifically inclined to repeal the rule in question. After the White House meeting, he promptly reversed course. There was no public record of the points presented by the White House to Chairman Fowler in that meeting or in any prior or subsequent contacts and, therefore, no meaningful opportunity for the public to respond to them. However, the points made by the White House must have closely resembled the arguments that the Hollywood community had already advocated with vigor in the proceeding and were, therefore, already part of the FCC's public record in that proceeding.

One of the functions of the National Telecommunications and Information Agency, which is embedded in the Commerce Department, and of its predecessors has been to formulate and submit policy positions to the FCC on communications issues, on behalf of the executive branch. It has done so under both Democratic and Republican administrations in the form of written filings and letters that are placed in the public record at the FCC, resulting in the opportunity for the public and other interested parties to comment. In addition, other federal government instrumentalities, such as the Antitrust Division, the FTC, the Small Business Administration, the FAA, and EPA (for instance, with respect to potential RF radiation risks emanating from radio transmitters), submit their views on the record to the FCC. The practice is regarded as a non-controversial exercise of those agencies' responsibilities, however controversial the substantive positions of those communications.

Members of Congress also convey their policy views to the agencies far more frequently and in off-the-record ways than the interventions of President Obama's or President Reagan's White House. These less dramatic, more informal expressions of policy views are often challenged on their merits but not on the ground that they are inappropriate or improper. These Congressional/FCC contacts may occur on a nearly daily basis. The positions taken in these contacts are often split along party lines, between different Congressional committees, or between the two chambers, or come from individual members of Congress. When these views are expressed in writing, the correspondence is made part of the FCC's public record for comment by others.

My experience has been that a substantial portion of the input from members of Congress to the agency, however, comes in the form of telephone calls, personal meetings, and other informal contacts to Commissioners or their staffs on either side of pending issues. The content of these contacts does not, I believe, routinely find its way into the FCC's public record. Few complain about this practice. It is difficult to understand why an expression of views from a member of Congress to the FCC should be permissible, but not from the executive branch.

Often cited in criticism of the White House's expressing policy views to administrative agencies is the sentiment that the FCC and these other agencies are "creatures of Congress." Presumably this catch phrase refers to the fact that Congress passed enabling legislation that created the agency in the first place. But the president signed that legislation and may have developed and proposed the legislation. Yes, the agencies are supposed to be independent. However, that desirable principle should not preclude the executive branch, any more than Congress, from expressing its views on communications issues or on issues before other administrative agencies.

II. Disclosure Obligations for Executive and Legislative Branch Input Into Agency Proceedings

Professor Armijo's article faults the FCC's treatment of the input from the White House on the net neutrality issue, because, other than the White House video, the input from other White House contacts was not summarized in the FCC's record. There were, however, two mitigating factors to be considered. First, the White House video *was* made part of the FCC record. Second, the gist of the conversations between the White House and the FCC probably covered points already in the record because they were advanced by earlier advocates of Open Internet safeguards and in the video itself (as was probably the case in the Reagan White House/FCC Chairman Fowler communications). Therefore, it is likely that these views probably were already part of the FCC record.

Along these lines, Professor Armijo's article wisely points out that "lawmakers' attempts to influence an agency legislative rule are not a basis for finding a violation of the APA, even if the attempt to influence succeeds, so long as there is other, non-political evidence in the record pointing in the same direction as the pressure that supports the agency's final rule." That same principle should also apply to executive branch input, for it too has a proper role, like the legislative branch, in providing input into agency proceedings. (In adjudicative proceedings, such contacts properly are barred. Disclosure does not suffice.)

Further, as also noted above, Congressional contacts with the FCC and other agencies are frequent, ongoing, often informal, and, with the exception of letter exchanges with the FCC, not part of the formal rulemaking record. Professor Armijo holds up the laudable ideal of a “politics-free process.” If it is to be the guiding principle, it should apply with equal force to Congress. It seems unlikely, however, that Congress would tolerate such a requirement across the board, let alone support it.

Thus, either all “political” contacts with agencies, whether by Congress or by the executive branch, should be placed in agencies’ public records *or* this obligation should not be required for either executive or legislative branch input *or* some categories of contact should be placed in the public record under clearly defined guidelines that apply equally to input by both the legislative and executive branches. One guideline might be, as identified in Professor Armijo’s article, that disclosures would not be required for input that replicates the input of other parties that is already included in the agency’s public record, although some might contend that knowing the identity of the person providing the input is relevant information as well.

As I consider this issue, I confess that I wonder about the absolute supremacy accorded by some to the principle of transparency and disclosure. Those are desirable values, but like most values, including First Amendment values, they are not absolute and may need to be balanced against other policy values. For example, legislative paralysis is a major concern in this country. Commentators often harken back to the good old days when members of Congress of different parties and different political stripes got together in private and hammered out compromises before surfacing them, often at the last moment, for the public to react to. Such discussions were conducted outside the public’s gaze and probably often would have been less successful if subjected to a public record requirement.

The Freedom of Information Act also recognizes this counter-consideration in its exceptions to the disclosure requirements that it imposed, most notably its exclusion for information used in the government’s “internal deliberative” processes. Whatever the field of endeavor – governmental policymaking, legislative bargaining, negotiations between countries, labor negotiations, business deals – deliberations among parties tend to work most effectively if they are conducted with some degree of confidentiality. This value, to my mind, needs to be balanced against the legitimate desire for transparency. Yes, disclosure is the best disinfectant, but applied too liberally, disinfectant kills everything – germs and all.

This article does not claim to define the proper balance between these competing considerations, but I do believe that disclosure obligations should be nuanced and tailored to a variety of circumstances and applied to both the White House and Congress equally.

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