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The FCC and the Rule of Law

by

Randolph J. May *

In my [Independence Day 2012 blog](#), I wrote about how Chen Guangcheng, the blind Chinese legal activist, took the Declaration of Independence as his makeshift English language textbook, and how he saw the concepts embodied in the Declaration as integral to what he calls China's "march toward rule of law and democracy."

I pointed out that one of the Free State Foundation's purposes is to promote understanding of rule of law principles, along with free market and limited government principles.

Most people assume they understand what is meant by "free market" and "limited government." But I am sometimes asked, "What do you mean by rule of law principles, and why are they important to the work of a think tank with a special focus on communications, Internet, and high tech policies?"

Fair enough question.

First, to review what I said in the [Independence Day 2012 blog](#) regarding the definition of a rule of law regime. The crucial elements, *all of which must be present*, are: (1)

The Free State Foundation
P.O. Box 60680, Potomac, MD 20859
info@freestatefoundation.org
www.freestatefoundation.org

fidelity to rules, (2) of principled predictability, (3) embodied in valid authority, (4) that is external to individual government decisionmakers.

Keeping these elements in mind, it is not difficult to conclude that many of the actions of the Federal Communications Commission are inconsistent with a proper rule of law regime, or, at the very least, they are problematic.

A good starting point – and a useful reference regarding the rule of law – is the Supreme Court's unanimous decision last month in the [FCC v. Fox Television Stations, Inc.](#) case. In *Fox*, the Court held unconstitutional the FCC's determination that Fox and ABC violated the agency's new indecency policy. The Court ruled the Commission failed to give the broadcasters fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent, and that this lack of fair notice violated the Fifth Amendment's Due Process Clause.

Now consider what the Court said in explaining its decision.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.... This requirement of clarity in regulation is essential to the protections provided by the Due Process Clause of the Fifth Amendment.... It requires the invalidation of laws that are impermissibly vague."

"Even when speech is not at issue, the void for vagueness doctrine addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.... When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech."

It is easy enough to see the close connection between the Due Process Clause's constitutional protections as articulated by the Court in *Fox* and a proper rule of law regime that requires, at its core, fidelity to rules of principled predictability.

Let's identify some of the FCC's other actions that are problematic from a rule of law perspective. At FSF, we have addressed many of these agency actions in the past at some length and surely will do so again. So here I'm not reciting all over again all the legal and policy arguments that may arise in connection with considering these actions. I only want to point out why they present serious problems from a rule of law perspective.

- *The FCC's transaction review process.* Because the Commission reviews proposed mergers and other transactions, such as the assignment and transfer of spectrum licenses, under the indeterminate public interest standard, parties lack clarity as to what will be required of them and what standards will apply to the review. The inherent vagueness of the public

interest standard allows the Commission to abuse the transaction review process by extracting so-called "voluntary" concessions from applicants that have little choice but to comply – if they don't want their transaction relegated to "no action land." Often, these "voluntary" concessions are unrelated even to alleged, much less proven, competitive impacts of the proposed transaction. For more on this abusive practice which is inconsistent with a rule of law regime, see my early piece, ["Any Volunteers?"](#)

- *The net neutrality rules.* The FCC's net neutrality mandates, which prohibit "unreasonable discrimination" by broadband providers in transmitting network traffic, are themselves open to arbitrary and discriminatory enforcement. Because the rules require no showing of market failure or the exercise of market power, or even a showing of consumer harm, the vagueness of the prohibition against unreasonable discrimination is more problematic than it otherwise might be if these elements were required. While we've written much on this subject that bears reading, for a particularly good piece explaining why the new net neutrality rules invite agency arbitrariness and regulatory favoritism, see my colleague Seth Cooper's [Perspectives](#) entitled, "Opening the Internet to Regulation: Assessing the Risks of the FCCs' New Powers." Apart from inviting arbitrary enforcement by virtue of their vagueness, the net neutrality rules were adopted on the basis of questionable claims of statutory authority. And the restrictions likely violate the First Amendment rights of the Internet providers as I explained in this 2007 [law review article](#), "Net Neutrality Mandates: Neutering the First Amendment in the Digital Age."
- *The FCC's use of spectrum screens.* There have been several instances where it appears the FCC either has changed, or has considered changing, the way it applies its so-called spectrum screen or caps in the midst of a transaction review, rather than through the conduct of an open process with public participation. The employment of such screens in ways that are opaque and arbitrary is the antithesis of the principled predictability that is the *sine qua non* of a rule of law regime. Seth Cooper's [Perspectives](#), "Stifling the Spectrum Market: The Negative Implications of the AT&T/Qualcomm Order," discusses, and bemoans, the FCC arbitrary manipulation of its spectrum screen in ways designed to achieve preconceived results.
- *The FCC's Tennis Channel Ruling.* An agency Administrative Law Judge has granted the Tennis Channel's "program carriage" complaint against Comcast and the matter is now pending before the full Commission. In essence, the ALJ ruled Comcast discriminated against the Tennis Channel, which is not affiliated with Comcast, by not acceding to the Tennis Channel's request that it be moved, in the midst of its contract term, to the same program tier as two of Comcast's affiliated sports channels. The ALJ

determined the Tennis Channel is sufficiently similar to the Golf and Versus channels so that they must all be located in the same "program neighborhood" for Comcast to avoid running afoul of the anti-discrimination prohibitions in the agency's carriage regulations. In my [piece](#), "The Tennis Channel Ruling: No Mere Foot Fault," I explain why this FCC action, which like net neutrality involves the application of a prohibition against "discrimination," is a violation of a rule of law regime in light of the lack of clarity of the rule to be applied and its inherent unpredictability. And as I stated, in order to make the type of determination rendered in the *Tennis Channel* case, as well as in other program carriage complaint cases, "the government regulator is required to examine the intricacies of program genres, program ratings, target audiences, and the like. This type of examination into programming decisions raises obvious free speech concerns." This is exactly what the Court meant in the *Fox* case when it declared: "When speech is involved, rigorous adherence to those [fair notice] requirements is necessary to ensure that ambiguity does not chill protected speech."

This catalog of actions that raise serious rule of law concerns is not intended to be exhaustive. I'm sure you can come up with some examples of your own, and I would be pleased to receive any responses.

I am not aiming to reach a certain number of hits on a score sheet, though. It is troubling enough to point to rule of law concerns with regard to such major areas of FCC regulatory activity as transaction reviews, net neutrality mandates, spectrum decisions, and program carriage requirements.

The main point I want to make is that the rule of law principles that may be discerned in our Declaration of Independence, and which are secured by our Constitution, don't just apply to some parts of our government or some government activities. They apply to the FCC and its regulatory activities as well. Indeed, because so much of the FCC's activity, including in one way or the other all the actions discussed above, impacts First Amendment free speech rights, rule of law norms should apply even more rigorously.

Sooner or later – and perhaps sooner – communications law and policy will be meaningfully reformed. A positive recognition of the role rule of law principles ought to play in the FCC's decisionmaking will be an essential component of that reformation.

* Randolph J. May is President of the Free State Foundation, a non-partisan Section 501(c)(3) free market-oriented think tank located in Rockville, Maryland.