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Is the FCC Unlawful?

by

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Last year saw the publication of Philip Hamburger's new book, *Is Administrative Law Unlawful?* In his magisterial work, Professor Hamburger claims – backed up by extensive research into English and American constitutional history – that most of the regulatory actions of our federal administrative agencies are unlawful.

Certainly, many of the Federal Communications Commission's actions fall squarely within the ambit of Professor Hamburger's critique. And this undoubtedly is true of two of FCC Chairman Tom Wheeler's current signature regulatory efforts – enough so to cause one to ask, with a nod to Professor Hamburger: *Is the FCC Lawful?*

Wheeler appears determined – egged on by President Obama – to get the FCC's Democrat majority to impose public utility-style regulation on Internet service providers by classifying them as traditional common carriers under Title II of the Communications Act of 1934. "Title II," included in the 1934 statute to regulate monopolistic telephone and telegraph companies, was borrowed lock, stock, and barrel from the Interstate Commerce Act of 1887, which was adopted to regulate the then dominant (but long since deregulated) railroads. In light of this history, it is

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not surprising that, just a decade ago, the FCC fought – successfully – all the way up to the Supreme Court in defense of its then determination that Internet providers should *not* be classified as Title II common carriers.

The other major Wheeler effort is to get the FCC – once again egged on just this week by President Obama in a speech in Iowa – to preempt state laws that restrict municipal government broadband systems. Wheeler wants to preempt despite the fact that twenty state legislatures have enacted safeguards deemed necessary to protect taxpayers from having to subsidize municipal telecom networks that often fail to cover their costs and that compete unfairly against private system competitors.

While I cannot do justice to the fullness of Professor’s Hamburger’s argument here, the boldness of his claim is evident in the book’s conclusion:

Apologists for administrative power thus must overcome many constitutional objections. They must put aside the specialization or separation of powers, the grants of legislative and judicial powers, the internal division of those powers, the unrepresentative character of administrative lawmaking, the nonjudicial character of administrative adjudication, the obstacles to subdelegation, the problems of federalism, the due process of law, and almost all of the other rights limiting the judicial power.

I don’t necessarily subscribe to the breadth of Professor Hamburger’s argument that *all* “administrative law is unlawful.” But Wheeler’s hot-button proposals to impose public utility regulation on Internet providers, under the guise of sweet-sounding “net neutrality” mandates, and to preempt state laws that restrict local governments from providing telecom services implicate the “lawlessness” claims that Hamburger argues infect much of modern federal agency action.

With regard to Wheeler’s proposal to convert Internet providers into common carriers, the courts have overturned two previous attempts by the FCC to enforce net neutrality mandates. In both instances, they held that the FCC lacked authority under the current Communications Act to enforce neutrality regulations. In light of these two judicial rebukes, surely it makes sense for Chairman Wheeler to allow Congress to consider legislation which gives the agency the authority the courts have held it presently lacks and delineates how such authority should be exercised. Especially when the chairs of the relevant congressional committees have declared that they are trying to fashion legislation, the FCC should not forge full steam ahead with what Professor Hamburger calls “the unrepresentative character of administrative lawmaking.”

Wheeler’s move to preempt duly enacted state laws restricting local government provision of telecommunications services is a prime example of Hamburger’s claim that many of today’s federal agency edicts implicate federalism. In a proper conception of our federalist system, it is not enough for Wheeler simply to suggest that the wishes of municipalities should prevail over the state sovereigns under which they are created.

After all, in our constitutional regime, we do not recognize, as a matter of legal status, "citizens" of municipalities; we recognize citizens of states. And the Constitution confers upon these citizens of states the authority to exert their will through their elected representatives to adopt laws that restrict municipal activities. The Supreme Court has already previously rejected the claim that the FCC can preempt state restrictions on government telecom systems in the absence of a clear congressional statement authorizing such preemption. Thus, in 2004 in its *Missouri Municipal League* decision, the Supreme Court explained that "preemption would come only by interposing federal authority between a State and its municipal subdivisions, which our precedents teach, 'are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.'"

I may not be ready to agree with Professor Hamburger that all federal administrative law is unlawful. But, as 2015 begins, Chairman Wheeler is moving the agency he leads in a direction that makes me want to ask: "Is the FCC Unlawful?"

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