



THE FREE STATE FOUNDATION

A Free Market Think Tank for Maryland.....Because Ideas Matter

Perspectives from FSF Scholars
November 19, 2015
Vol. 10, No. 39

Net Neutrality, Administrative Procedure, and Presidential Overreach

by

Enrique Armijo *

In the 2014 midterm elections, President Obama’s party was, to use the President’s own word in describing a similar result in 2010, “shellacked.” Looking to boost morale among his party’s loyalists, the Obama Administration found an issue seemingly tailor-made to fill the enthusiasm gap: net neutrality. Less than a week after the midterms, the President took to YouTube, calling for the “strongest possible rules” to ensure that broadband providers would treat Internet traffic equally – *i.e.*, classify broadband service as a Title II service under the Communications Act so that it would be subject to public utility-like regulations.

Though the President was forceful on the substance, on procedure, he tried (or appeared to try) to walk a fine line. Cognizant of the fact that the FCC is an independent agency, and that net neutrality was the subject of an ongoing rulemaking governed by the Administrative Procedure Act, which requires agencies to rely exclusively on record evidence when making rules with the force of law, President Obama made sure to note that the decision on whether to reclassify broadband was “the FCC’s alone.” In response, the Commission stated it would “incorporate the President’s submission into the record of the Open Internet proceeding,” just as it would any comment from any interested party. Thus, the agency suggested it was affirming the black-letter administrative law principle that, so far as legislative rulemaking

goes, a comment from the President goes into the same docket as all of the other comments in the rulemaking proceeding, and the agency must consider that entire record in promulgating its final rule.

We now know, however, that the FCC treated the White House as much more than just another commenter. In February 2015, the [Wall Street Journal](#) published an investigation detailing secret White House meetings between Obama Administration officials and entities favoring stronger net neutrality rules, with Administration aides “telling participants not to discuss the process openly.” According to the *Journal*, the White House proposal that resulted from those meetings “swept aside months of work” by Chairman Tom Wheeler “toward a compromise” between net neutrality advocates and broadband providers. In place of Chairman Wheeler’s proposal, which would have forsaken reclassification of broadband service *en toto* in favor of a “[hybrid](#)” approach that would regulate the content-provider-to-ISP chain of broadband traffic more heavily than the ISP-to-consumer chain, the rules developed in this “secretive” parallel process and proposed by Administration aides would submit the entire broadband traffic chain of service to common carrier regulation.

Less than four months after the President’s statement, the FCC adopted a set of final net neutrality rules that rejected any semblance of Chairman Wheeler’s hybrid approach, or an even less stringent regulatory approach he had earlier articulated. The final rules mirrored to a T the proposals set out in the President’s statement. Talk about fast lanes. As we Torts professors like to say, there’s your “cause-in-fact.”

Regardless of which side of the merits of the net neutrality debate you happen to fall on – and, in the interest of disclosure, if pressed, I personally would likely conclude that some form of net neutrality rules are a net benefit for Internet users, a view in contrast to that expressed by most Free State Foundation scholars – you should find this level of politicization of an independent agency rulemaking deeply troubling. The rulemaking process is expressly intended to insulate federal agencies from the political winds, and designed to give agency deliberations and interested parties’ positions an open airing. And secretly held, off-the-record meetings in another part of the Executive Branch concerning pending agency action, the results of which are adopted by the agency itself as its final rule, are in headlong conflict with that approach.

The history of the APA shows that in order for the relationship between regulated entities and their regulators to be a balanced one, rulemaking had to be an open, facts-driven, politics-free process. The template for administrative procedure reform that became the APA, the 1941 Attorney General Committee’s Report on Administrative Procedure, argued that federal agencies’ rulemaking procedures should be driven by data provided by affected parties, not politics:

An administrative agency is not a representative body. Its function is not to ascertain and register its will. Its members are not subject to direct political control as are legislators. It investigates and makes discretionary choices within its field of specialization. The reason for its existence is that it is expected to bring to its task greater familiarity with the subject than legislators, dealing with many subjects, can

have. But its knowledge is rarely complete, and it must always learn the frequently clashing viewpoints of those whom its regulations will affect. These differences are and should be reflected in its procedures, which should be adapted to giving adequate opportunity to all persons affected to present their views, the facts within their knowledge, and the dangers and benefits of alternative courses.

The Committee Report's "clashing viewpoints"-based harkening to the marketplace of ideas is not coincidental. As this excerpt affirms, in establishing the APA's procedural requirements, the Report crafted a process calling for regulated entities and other interested parties to put their positions on the agency record, and respond to the "dangers and benefits" presented by each other's positions; having done so, affected parties would then be more likely to accept their regulators' final decision as having taken all of those views into account. This focus on openness, transparency, and exchange permeates the APA. Driving a disconnect between politics and procedure is the statute's governing theme. Politics-free process ensures affected parties that their positions and concerns regarding a proposed course of agency action will be heard, heeded, and addressed by the agency in question.

And judicial review under the APA, to which I'll return in a moment, is expressly evidential in nature as well. Even when the political deck is stacked against a particular commenter or side of an issue, notice-and-comment rulemaking permits that commenter or side to develop an appellate record to challenge a final rule, and politics rightfully plays no role in the rule's review. All of these protections incentivize increased participation in the rulemaking process, which leads to better rules.

To illustrate the prejudicial nature of the process described by the *WSJ*, and to contrast it with the intentions of the APA that I've described, put yourself in the position of an advisor to an entity with a strongly held position in the net neutrality debate. Given a functioning regulatory process, you might encourage that entity to spend significant sums to develop and draft a White Paper that takes technological feasibility and investment incentives of a given course of FCC action into account, with particular focus on how that action might affect your client and those similarly situated. But if that evidence can be trumped or cancelled out by a presidential statement delivered at the 11th hour of a years-long rulemaking proceeding, any decent administrative law attorney would have to consider advising the client to save its money – or to spend it on lobbying the White House instead. But of course, this advice presumes that you or your client got wind of a parallel proceeding going on at the White House in the first place – no easy task when the parties to those meetings are told to keep them secret, as was the case here.

"Deeply troubling," however, is not necessarily the same as unlawful. Politicians are ceaseless in their attempts to influence agencies, as anyone who has watched an oversight hearing can attest. The influence game extends to legislative rulemaking as well. In the *ex parte* context, courts have held that lawmakers' attempts to influence an agency legislative rule are not a basis for finding a violation of the APA, even if the attempt at influence succeeds, so long as there is other, nonpolitical evidence in the record pointing in the same direction as the pressure that supports the agency's final rule. With respect to the Executive Branch in

particular, the D.C. Circuit, in the 1981 *Sierra Club v. Costle* case, stated that courts should “recognize the basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy.”

At what point, however, does “monitoring for consistency” become undue influence? No one disputes that in 2007 President Obama campaigned in favor of net neutrality, or that the Chief Executive has the power to establish policy priorities for the rest of the Executive Branch – though it is well-established that the policymaking function of *independent* agencies such as the FCC are independent of presidential control. But does the President’s ability to establish policy priorities permit the White House to draft legislative rules on an independent agency’s behalf? At issue in the *Sierra Club* case was a single undocketed meeting between the EPA Administrator and President Carter and his staff concerning coal emissions rules pending at the agency. Here, by contrast, the Administration is playing the role not of monitor, but of ghostwriter – again, for an agency that is statutorily insulated from Executive influence.

We should be especially concerned with a lack of transparency in this rare, if not unique case, where the final agency decision was both (1) such a wholesale adoption of the Administration’s position, and (2) such an abrupt departure from the *agency’s* position set forth in its actual *Notice of Proposed Rulemaking*, that it may be fair to deem the Administration’s reasoning as standing in the shoes of the independent agency’s. As stated, the APA consciously insulates affected parties from political caprice. The content of an agency rule and the policy underlying it should be the product of expert synthesis and review of commenter-provided data and argument—not the midterm election returns.

As administrative law recognizes, transparency is also a necessary concomitant to reviewability of agency action. The APA requires that record information an agency relies on in making a final rule be not just in the agency’s record, but in the *public* record. This is so, as the 1941 Attorney General’s Final Report recognized, because in order for viewpoints to clash, they must meet out in the open. Correspondingly, in reviewing agency action under the APA, a court is obliged to ensure that the agency record before it is adequate for judicial review. If that record is inadequate – if some material basis for the agency’s decision is not in the record – the court must remand the agency’s rule. All of which begs a few questions: Are net neutrality-favoring arguments made in secret White House meetings relied upon by the Obama Administration, and relied upon in turn by an agency that adopts the Administration’s position in full, adequately public? How might the D.C. Circuit, which will be hearing oral arguments on the net neutrality rule on December 4, adequately consider the quality of the agency’s reasoning in such a case?

The FCC and its advocates would likely laugh off an argument that a reviewing court might deem *this* agency record inadequate, pointing to literally millions of comments from the public, and the largest docket in the FCC’s history. But the one comment that was indisputably the most important to the agency in promulgating its final net neutrality rule was the product of a clandestine process that was in many ways the opposite of the transparent one that the APA requires. Under the APA, just one needle supporting the agency’s final rule can sometimes be enough, regardless of the size of the haystack. But here, this particular needle is not in the haystack at all.

More than anywhere else, in Washington DC, to the victors go the spoils. Advocates for net neutrality had much to celebrate when the President came out in favor of strong rules, and when the FCC followed the President's lead in adopting rules that mirrored those he asked the FCC to adopt. But those who truly care about administrative fairness and procedural protections should be cautious in accepting a regulatory process simply because they agree with the results of that process. One day soon, it will be the other side having secret meetings in an office on the fourth floor of the Old Executive Office Building, and the other team's president calling for the agency to adopt rules based on what was said in those meetings. And you won't be in the mood to celebrate then.

* Enrique Armijo, a member of the Free State Foundation's Board of Academic Advisors, is an Associate Professor at the Elon University School of Law and an Affiliated Fellow of the Yale Law School Information Society Project.