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FCC Process Reforms Protect the Rule of Law

by

Daniel A. Lyons*

I. Introduction and Summary

On the eve of independence, John Adams famously argued that ours should be “a government of laws and not of men.”¹ This warning should echo even more loudly through our current era, when the administrative state has eroded many of the structural safeguards designed to protect the rule of law. Strict judicial enforcement of the separation of powers and nondelegation has yielded to our faith in expert agencies to make important governance decisions. This tradeoff may be, in the Supreme Court’s words, a necessary concession to an “increasingly complex society.”² But it highlights the importance of internal safeguards designed to preserve the rule of law within our agencies.

For this reason, process reform is an important piece of Ajit Pai’s legacy as chairman of the Federal Communications Commission. Upon assuming the chairmanship, Pai expressly named process reform as a key part of his strategic vision. He followed through on that commitment over the next four years, making much-needed improvements to enhance transparency, accountability, and robust, data-driven decisionmaking – and in the process strengthening the rule of law within an agency that seemed to have fallen into dysfunction.

On the transparency front, these initiatives included a commitment to release draft orders to the public at the same time they are circulated internally – a welcome change that reduced the power of the chairman and special interests to manipulate the media cycle during the period before FCC votes on important items. Improvements in accountability included limiting the power of agency staff to make substantive edits to agency orders and to settle certain investigations without Commissioner approval. These changes helped shift power away from the permanent bureaucracy and to the more politically accountable agency heads. And Chairman Pai’s commitment to data-driven decisionmaking is reflected in the creation of the Office of Economics and Analytics, which helped concentrate the FCC’s economics talent and integrate it more systemically into the agency’s operations.

As a result of these and other reforms, the Commission is stronger than it was four years ago. But there remains work to be done. One hopes that President Biden will select a successor equally committed to rule of law principles.

II. Rule of Law and the Administrative State

A. The Original Conception vs Modern Agencies

The original constitutional order relied on several structural safeguards to further rule of law principles. For example, when Adams codified his maxim in the Massachusetts constitution, it was to justify the doctrine of the separation of powers:

In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: *to the end it may be a government of laws and not of men.*³

The same principle underlies James Madison’s ode to the separation of powers in Federalist 51. “If men were angels,” he wrote, “no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”⁴ But in a government “to be administered by men over men,” one needs “auxiliary precautions” to shield against misuse of authority, notably by dividing that authority among multiple institutions. In this way “ambition [is] made to counter ambition” such that “each may be a check on the other that the private interest of every individual may be a sentinel over the public rights.”⁵

A robust nondelegation doctrine also promotes the rule of law. Article I of the Constitution vests all legislative powers in Congress. By preventing Congress from delegating that power, the nondelegation doctrine assures that those exercising the legislative power are directly accountable to the electorate. It also assures that any legislative decision undergoes the constitutional procedure of bicameralism and presentment. Having to pass both houses and get the president’s approval (or enough support to override a presidential veto) helps assure that laws have the buy-in of broad majorities of the populace.

But the modern administrative state has somewhat repudiated these Madisonian principles. Agencies like the Federal Communications Commission operate at the confluence of the three branches: for example, the FCC can exercise quasi-legislative authority (such as proscribing profane language on the airwaves), quasi-judicial authority (such as fining licensees who violate this restriction), and executive authority (such as exercising prosecutorial discretion to excuse profanity aired during a screening of *Saving Private Ryan*⁶ or uttered by Boston Red Sox player David Ortiz after the Marathon bombings).⁷ And while agency action requires the approval of a majority of commissioners, the Commission need not go through the multiple veto gates of bicameralism and presentment and its decisionmakers are not directly accountable to the public.

This repudiation of the original conception was intentional. The Progressive Era architects of federal agencies believed that the legislative friction of the original design left the government paralyzed by politics and unable to meet modern challenges, particularly during crises such as the Great Depression. They instead placed great trust in governance by supposedly specialized experts. James Landis wrote that “[g]overnment today no longer dares to rely for its administration upon the casual office-seeker” but instead “men of professional attainment in various fields” who would “envisage governance as a career.”⁸ Joseph Eastman described these men as technocrats: “[N]onpartisan in their makeup, and party policies do not enter into their activities except to the extent that such policies may be definitely registered in the statutes which they are sworn to enforce. Certainly, when once the members are selected their political affiliations cease to be of the slightest consequence.”⁹ The Progressive hope was that this new breed of technocrats could, in fact, govern as angels.

But in the years since the New Deal, experience with phenomena such as agency capture have proven these hopes to be optimistic. As Madison and the Founders knew, men are not angels. This means that some controls on government are necessary to tether the modern administrative state to traditional rule of law principles. Having abandoned the structural safeguards of the Madisonian order for the sake of expedience and expertise, agencies must adopt new internal processes to minimize the risk that this concentration of power might be abused.

B. Dysfunction and the Need for Reform at the FCC

The years leading up to Pai’s chairmanship were marked by increasing dysfunction. Much of the agency’s power was formally concentrated in the chairman’s office, with little formal control over how that authority was exercised. Two of Pai’s predecessors in particular were singled out for criticism. Chairman Kevin Martin, who helmed the agency during the end of the George W. Bush administration, was described at the time as “Nixonian”: “quite closed, quite secretive, quite politicized, [and] quite centralized.”¹⁰ Even fellow Republican Commissioner Robert McDowell expressed frustration at Martin’s tendency to delay proceedings and cherry-pick data to support his preferred findings.¹¹

Chairman Tom Wheeler faced similar criticism. Opponents decried his administration’s haphazard processes (once delivering his fellow commissioners significant edits to an order at 11:50 pm the night before a vote)¹² and partisanship (such as circulating drafts of the 2014 *Open Internet Order* to fellow Democratic Commissioners but leaving his Republican colleagues out of the loop).¹³ Because of the opacity of the agency’s decisionmaking process, the telecom media

cycle was driven by strategic leaks during the period before the agency’s monthly open meetings.

Then-Commissioner Pai testified to Congress that Wheeler controlled the flow of information such that “controversial policy proposals can be (and typically are) hidden in a wave of media adulation,” citing as an example misleading coverage of the 2016 set top box order.¹⁴ Sometimes these leaks thwarted the chairman’s ambitions, as when proponents of Title II regulation used leaks to generate a barrage of criticism of the first draft of the 2014 *Open Internet NRPM*, prompting Wheeler to amend the draft to include a Title II option before the open meeting.

This dysfunction routinely prompted calls for process reform. On Capitol Hill, successive Congresses considered bipartisan bills to improve FCC transparency, accountability, and predictability by reforming the way the agency operates.¹⁵ This effort, led by former House Communications and Technology Subcommittee Chair Greg Walden, never quite cleared the bicameralism hurdle, but it kept the pressure on the agency through proposed legislation and oversight hearings. Within the agency, Commissioner Mike O’Rielly became a tireless champion for process reform. Beginning with a 2015 speech at a Free State Foundation event,¹⁶ O’Rielly pushed over sixty ideas to improve agency procedure throughout his recently concluded tenure at the Commission.

III. Pai’s Process Reforms

Pai recognized this need as well. Like Commissioner O’Rielly, Pai served as minority commissioner and saw first-hand how suboptimal processes harmed the agency. Upon assuming leadership of the agency in 2017, Chairman Pai made process reform one of the five components of his strategic vision as chair. Under his guidance, the Commission adopted reforms that improved agency functionality by promoting three key rule of law principles: transparency, accountability, and data-driven decisionmaking.

A. Transparency

Improving agency transparency was one of Pai’s first and most high-profile changes. Prior to 2017, the chairman would circulate draft orders to Commissioners prior to the monthly open meeting, but the text would only be made public after the vote – often several days later. Thus, while the Commission’s monthly meetings were open to the public, as required by the Sunshine Act, this openness was somewhat chimerical because the public lacked specific details about the measures being discussed.¹⁷

Less than a month after taking the reins as chairman, Pai ordered the agency to publish all draft items at the same time they were circulated internally to the commissioners (usually three weeks before the open meeting).¹⁸ At the suggestion of former Acting Chairwoman Mignon Clyburn, Pai also ordered that each draft item be accompanied by a one-page fact sheet that summarized the item in lay terms. And fulfilling a proposal that Pai made in 2013, the agency launched an online dashboard that publicly reports metrics about the number of items pending at the Commission by category, as well as quarterly trends over time.

These simple changes significantly improved the agency’s decisionmaking process. Because the text of each item was publicly available, the media cycle was no longer driven by strategic leaks in the weeks before meetings on high-profile items. Interested parties no longer had to use the *ex parte* process in an attempt to gain insight into anticipated Commission action. Instead they could address specific details of the proposal under consideration, improving the commissioners’ understanding about how a potential action could affect relevant participants.

Pre-meeting disclosure also improved the overall quality of the agency’s work product. Commissioner O’Rielly explained at a 2018 Free State Foundation event that “drafts are now more complete and more polished prior to the public reveal, so edits prior to the meeting are coming from Commissioners, as opposed to there being last minute changes – or rewrites – from staff or the Office of General Counsel.” The public’s ability to flag potential issues for pre-meeting revision improved the quality of the final draft and reduced the risk of successful post-meeting challenges via reconsideration or judicial review. O’Rielly went on to note that the agency seemed to be running more efficiently as well, as “[m]eetings are targeted to specific issues, unnecessary discussions of non-existent issues have been eliminated, [and] conversations are more productive.”

Metrics show that the agency was more efficient and less overtly partisan as well. The Pai FCC averaged just over six items per month, which is double the average monthly output of Pai’s immediate predecessors. And Nathan Leamer, former policy advisor to Chairman Pai, noted that 61.4% of the items adopted by the Pai FCC were unanimous and 92.1% were bipartisan, compared to 33% and 69.9%, respectively, under Chairman Wheeler.

B. Accountability

A second set of reforms centered on improving agency accountability. While the transparency initiatives changed how decisionmaking works, accountability focused on who gets to participate in the process. These reforms were designed to shift power and responsibility from the unelected bureaucracy to the agency’s five appointed commissioners.

Many of these reforms centered on the topic of editorial privileges. By long-standing custom, commission staff were permitted to make changes to agency orders, sometimes many days after the “final” order was approved by the commissioners at the open meeting. Commissioner O’Rielly had long criticized this custom, and his standing objection to granting editorial privileges was a regular part of each monthly meeting during the Wheeler era. As chairman, Pai breathed life into O’Rielly’s objection, ordering that agency staff would be prohibited from making substantive changes to an item after the vote. Editorial privileges granted to the agency’s bureaus and offices would extend only to technical or conforming edits. Any post-vote substantive changes must be proposed by a commissioner, and “only...in cases in which they are required, pursuant to the Administrative Procedure Act, as a response to new arguments made in a Commissioner’s dissenting statement.”¹⁹ Even during the circulation period prior to a vote, Pai required any substantive edits to a draft item to originate with a commissioner rather than the staff. Pai explained that the purpose of this reform was to “promote accountability and allow Commissioners to better understand where edits are coming from.”²⁰

A second set of reforms centered on consent decrees. When an entity is found to violate a Commission rule, the commissioners may vote to propose or impose a forfeiture. The responsibility for carrying out this order falls on the Enforcement Bureau, which historically had assumed the power to settle these matters with the party at fault. Pai ordered that any consent decree settling a Notice of Apparent Liability or Forfeiture Order issued by the full Commission must also be approved by a vote of the full Commission. This minimized the risk of staff failing to carry out the Commission's wishes on the matter.

Like the transparency initiatives, these accountability measures improved the rule of law by centering the agency's law-making authority on the commissioners themselves rather than the staff. By limiting editorial privileges and reforming the consent decree process, Pai helped assure that binding agency action flows from the vote of a commission majority at a properly conducted open meeting, rather than at the whim of a staff member afterward. Unlike staff, the commissioners are appointed by the president with the advice and consent of the Senate, and are more directly subject to congressional oversight in the form of hearings and informal communication. Thus, these reforms also improve oversight of agency decisionmaking by political actors, and by extension the public that they serve.

C. Data-Driven Decisionmaking

Finally, Chairman Pai undertook systemic reforms to assure that agency action was driven by data analysis rather than anecdotes. Former FCC Chief Economist Tim Brennan, a member of the Free State Foundation's Board of Academic Advisors, famously joked that the Wheeler-era *Open Internet Order* was adopted in an "Economics-Free Zone."²¹ This commentary tapped a long-standing critique that the FCC only sporadically incorporated economic analysis into its decisionmaking. This stood in stark contrast to best practices elsewhere in the administrative state. During the Obama administration, OMB Chief (and legal giant) Cass Sunstein promoted the use of cost-benefit analysis in policymaking. He wrote that agencies should "obtain a careful and objective analysis of the anticipated and actual effects of regulations, whether positive or negative...before rules are issued, and we need continuing scrutiny afterwards."²² Historically, FCC action had reflected this belief: spectrum auctions and the use of antitrust principles to shape early wireless policy in the 1990s were driven by a trust in economic principles, a trust that bore significant fruit. But by the time Pai took office, economics as a discipline appeared to have lost favor at the Commission – despite the fact that the agency employed many high-quality economists within its ranks.

Pai addressed this problem by creating an Office of Economics and Analytics to concentrate the agency's economics resources and enhance the role of economic analysis in the Commission's decisionmaking. Among other tasks, OEA is charged with preparing a "rigorous, economically-grounded cost-benefit analysis for every rulemaking deemed to have an annual effect on the economy of \$100 million or more."²³ It also must sign off on each rulemaking proceeding for completeness before release to the public, placing the office on equal footing with the agency's Office of the General Counsel.²⁴ The office's creation guaranteed the FCC's economists a seat at the table and incorporated the data-driven cost-benefit analysis that had been recognized as best practices by Democratic and Republican administrations across the administrative state.

From a rule of law perspective, the benefit of OEA integration is a more regular, comprehensive, and routine decisionmaking process. Pai noted that without procedures in place to assure the agency considered all the costs and benefits of a proposal, the agency risked governing by anecdote,²⁵ where agency action is driven by the accident of which narrative – and which narrators – gain the commissioners’ collective ear at an opportune time. OEA helps guard against the risk that “well-intentioned but unsound policies can become unintended barriers to growth and innovation.”²⁶

IV. Conclusion – and Next Steps

As impressive as these and other of Pai’s reforms are, there remains more work that can be done to strengthen the rule of law at the Federal Communications Commission. One of the most intriguing proposals, which began during Pai’s chairmanship and remains open today, is reforming the administrative hearing process. FCC hearings can be notoriously slow, even by bureaucratic standards. In a speech addressing this topic at the Free State Foundation, Commissioner O’Rielly noted several cases that have been pending before the Commission for a decade or more.²⁷ This is a classic example of the aphorism that “justice delayed is justice denied.” Parties stuck in endless hearings have no prospect of relief and cannot easily challenge this delay in court. As O’Rielly explained, the chairman can strategically use the threat of an administrative hearing to effectively kill a merger that he or she opposes, as the parties are more likely to abandon a deal than assume the costs of the hearing (as indeed happened with the Comcast-Time Warner Cable merger). The agency should move forward with its proposal to seek more efficient resolution of hearings through paper processes wherever possible, which would improve due process, reduce strategic misuse of the hearing process, and open a pathway for judicial review and oversight of agency adjudication.

In the same speech, Commissioner O’Rielly also recommended codifying the agency’s current practices into regulations, to create a more normalized functionality and minimize the risk of autocracy by a future chairman. O’Rielly estimated that only about a quarter of the agency’s regular procedures exist as formal rules. Publishing more of them in the Code of Federal Regulations would be a fairly simple process that would improve transparency and regularity by providing a stronger legal foundation for the agency’s daily tasks.

This last point highlights one concern about Chairman Pai’s reforms: the risk that what one chair can do, the next can undo. Chairman Pai (with Commissioner O’Rielly’s steadfast assistance) accomplished a wide range of reforms that together put the Federal Communications Commission on much firmer legal ground and strengthened the rule of law within the agency. But in the long run, his success will depend on how many of these reforms “stick” through successor regimes. Thus far, there is some cause for optimism: Acting Chairwoman Jessica Rosenworcel has committed to continuing the practice of releasing draft orders publicly before the Open Meeting, and has not yet taken steps to minimize the Office of Economics and Analytics despite having voted against its creation in 2018.

But President Biden has not yet nominated a permanent replacement to fill the chairman’s office. Let us hope that his criteria for selecting a chairman include a commitment to transparency,

accountability, data-driven analysis, and other reforms that help assure that our government – and that includes the FCC – remains a government of laws rather than of men.

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¹ John Adams, "Novanglus Papers," no. 7 (1774), in 4 The Works of John Adams 106 (Charles Francis Adams, ed.) (1851).

² *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

³ Mass. Const. Part I, Art. XXX.

⁴ Federalist Papers No. 51 (Madison).

⁵ Id.

⁶ See *In re Complaints Against Various Television Licensees Regarding Their Broadcast on November 11, 2004 of the ABC Network's Presentation of the Film "Saving Private Ryan"*, 200 FCC Rcd. 4507 (2005).

⁷ See Mark Morgenstein, "Ortiz of Boston Red Sox Tosses F-Word, FCC Doesn't Complain," CNN, Apr. 22, 2013, available at <https://www.cnn.com/2013/04/21/us/massachusetts-fcc-ortiz/index.html>.

⁸ James Landis, *The Administrative Process* 154-55 (1938).

⁹ Joseph B. Eastman, *The Place of the Independent Commission*, 12 Const. Rev. 95, 100-101 (1928).

¹⁰ Kevin Martin's "Contentious Turn at the Helm of FCC," *All Things Considered*, NPR, Feb. 5, 2008 (quoting former FCC Chairman Reed Hundt), available at <https://www.npr.org/templates/story/story.php?storyId=18711487>.

¹¹ Id. (quoting Commissioner Robert McDowell).

¹² *In re Policies Regarding Mobile Spectrum Holdings Expanding the Economic and Innovation Opportunities of Spectrum through Incentive Auctions*, 29 FCC Rcd. 6133, 6272 (Pai, Commissioner, dissenting).

¹³ See Kate Tummarello, "FCC Republicans Were Last to See 'Fast Lane' Plan," *The Hill*, May 13, 2014, available at <https://thehill.com/policy/technology/205964-fcc-republicans-in-the-dark-on-newest-fast-lane-proposal?rl=1>.

¹⁴ See Testimony of Ajit Pai Before the Subcommittee on Communications and Technology of the United States House of Representatives Committee on Energy and Commerce, Oversight of the Federal Communications Commission, March 22, 2016, available at https://apps.fcc.gov/edocs_public/attachmatch/DOC-338511A1.pdf.

¹⁵ See, e.g., Press Release, "Walden Applauds Senate Introduction of FCC Process Reform Act," Feb. 10, 2015, available at <https://republicans-energycommerce.house.gov/news/press-release/walden-applauds-senate-introduction-fcc-process-reform-act/>.

¹⁶ Implementing Regulatory Reform at the FCC, Remarks of Commissioner Michael O'Rielly before the Free State Foundation, July 28, 2015, available at <https://docs.fcc.gov/public/attachments/DOC-334606A1.pdf>.

¹⁷ See Randolph J. May, "The Sunshine Act and Transparency at the FCC," *The Regulatory Review*, Dec. 12, 2017, available at <https://www.theregreview.org/2017/12/12/may-sunshine-act-transparency-fcc/>.

¹⁸ See Brendan Bordelon, "Pai Says FCC to Publish Draft Items Weeks Ahead of Commission Votes," *Morning Consult*, Feb. 2, 2017, available at <https://morningconsult.com/2017/02/02/pai-says-fcc-publish-draft-items-weeks-ahead-commission-votes/>.

¹⁹ See John Eggerton, "FCC's Pai Reforms 'Editorial Privileges' Privilege," *Broadcasting & Cable*, Feb. 9, 2017, available at <https://www.nexttv.com/news/fccs-pai-reforms-editorial-privileges-privilege-163236>.

²⁰ FCC, Chairman Pai Leads a Year of Action and Accomplishment, Jan. 24, 2018.

²¹ See Tim Brennan, "Is the Open Internet Order an Economics Free Zone," *Perspectives from FSF Scholars*, Vol. 11, No. 22, June 28, 2016, available at <https://freestatefoundation.org/wp-content/uploads/2019/06/Is-the-Open-Internet-Order-an-%E2%80%9CEconomics-Free-Zone%E2%80%9D-062816.pdf>.

²² See Ajit Pai, "The Importance of Economic Analysis at the FCC," Remarks at Hudson Institute, Apr. 5, 2017.

²³ 47 C.F.R. § 0.21.

²⁴ Id.

²⁵ Pai, *supra* note 22.

²⁶ Id.

²⁷ Remarks of FCC Commissioner Michael O'Rielly Before the Free State Foundation, June 28, 2018.