



THE FREE STATE FOUNDATION

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Perspectives from FSF Scholars
January 2, 2015
Vol. 10, No. 1

A Question for 2015: Is the FCC Unlawful?

by

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In May 2001, I published a law review article titled, ["The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?"](#) In the article, I suggested that the ubiquitous public interest standard, invoked in support of so much of the Federal Communications Commission's regulatory activity, is so lacking in any "intelligible principle" that the standard is unconstitutional. After all, in 1928 the Supreme Court held that, in order for congressional delegations of authority to comply with the constitutionally-mandated nondelegation doctrine, they must contain an "intelligible principle" to guide the agency or official exercising the authority. The public interest standard, I concluded, "is inconsistent with the separation of powers principles vindicated in our constitutional system through the nondelegation doctrine."

Not too long after the article's publication, I was in attendance at a conference at which Cass Sunstein, now a Harvard Law School professor and former Obama Administration "regulatory czar," was addressing the lawfulness of certain executive actions. I was startled when, referring to my "Public Interest Standard" article, Professor Sunstein, as part of a recitation of various challenges to administrative actions, declared: "And Randy May claims the FCC is unlawful!"

Well, to be frank, I had never considered my contention that the public interest standard is unconstitutional to mean that the FCC itself is unlawful. To my mind, I simply had suggested that the lawfulness of actions taken pursuant to the public interest standard should be questioned.

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I suspected then, and still do, that perhaps Professor Sunstein simply used shorthand to capture what he understood to be my particular claim.

But, more recently, and increasingly, I have been turning over in my head the question suggested by Professor Sunstein's characterization: "Is the FCC unlawful?" Now, to be sure, and not to be misunderstood, I do not wish to suggest that I believe a court, or certainly the Supreme Court, will hold in 2015 that the FCC itself is unlawful.

Instead, here I propose only to begin what I anticipate will be a yearlong conversation. As we begin the New Year, there are reasons why this year will be a propitious time to examine – even more intensely than in the past – the FCC and its actions through just such a lawfulness frame of reference.

First, 2015 marks the 800th anniversary of Magna Carta. There are many ways of thinking about the Magna Carta and what the "Great Charter" represents. Some of these ways of thinking are contested as matters of history and of legal significance. But there is widespread agreement that the Magna Carta signed by King John at Runnymede in 1215 represents an important milestone in the development of our rule of law tradition. In fairly short order, Magna Carta came to be understood to mean that the law, at least in certain ways, protected the king's subjects against certain of the king's claims.

The most famous of Magna Carta's protections – and most significant for purposes of advancing the rule of law tradition – was Clause 39: "No free man is to be arrested, or imprisoned, or disseised, or outlawed, or exiled, or in any other way ruined, nor will we go against him, except by the lawful judgment of his peers *or by the law of the land.*" As Brian Tamanaha points out in his book, [*On the Rule of Law: History, Politics, Theory*](#), the phrase "due process of law" was used in a statute in England as early as 1354, and it soon came to be identified with Magna Carta's phrase "by the law of the land."

The U.S. Supreme Court has invoked Magna Carta over 170 times, including Clause 39 on many of these occasions. For example, in 1855 in [*Murray's Lessee v. Hoboken Land and Improvement Co.*](#), the Court stated that "[t]he words, 'due process of law,' were undoubtedly intended to convey the same meaning as the words, 'by the law of the land,' in Magna Carta."

In his concurrence in [*Youngstown Sheet & Tube Co. v. Sawyer*](#), which held that President Truman's order seizing control of the nation's steel mills exceeded the president's executive authority, Justice Jackson invoked the Due Process Clause when he famously declared, "there is a principle that ours is a government of laws and not of men, and that we submit ourselves to rulers only if under rules."

On this 800th anniversary year of the signing of Magna Carta, it is especially fitting to consider whether the actions of our government, including those of the Federal Communications Commission, are consistent with the rule of law.

The second reason the timing is propitious to consider the question “Is the FCC lawful?” is that we now have before us Philip Hamburger’s magisterial new book, [*Is Administrative Law Unlawful?*](#) In a massive work that surely consumed many years, Professor Hamburger claims – and backs up his claims by extensive research into English and American constitutional history – that most, if not all, of the actions of our administrative agencies are unlawful. The FCC and its actions fall squarely within the ambit of Professor Hamburger’s critique.

In no way can I do justice to the fullness of Professor Hamburger’s argument here. For present purposes, I need only to state the boldness of his contention:

“Once it is clear how administrative power revives absolute power, and how this power conflicts with the very nature of American law, liberty, and society, one can dig into the details of how it violates the Constitution. Because it returns to the very power that constitutional law developed in order to defeat it, it does more than simply depart from one or two constitutional provisions. It systematically steps outside the Constitution’s structures, thereby creating an entire anti-constitutional regime.”

Or as he states in his 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.”

Although there is much rich scholarship in Professor Hamburger’s book, I don’t necessarily subscribe to his claim, at least as expounded in its most expansive fashion, that *all* “administrative law is unlawful.” I say this for no other reason than, aside from the merits of the claim, it is most improbable that, at any time in the foreseeable future, the Supreme Court will agree with him.

But that does not mean that Professor Hamburger’s contentions, and the questions he raises, won’t impact administrative law or our nation’s jurisprudence. In my view, they should and will – and these arguments and questions should also impact the way we think about the lawfulness of various FCC actions and the way the courts consider these actions on review. Professor Hamburger’s arguments concerning the lawfulness of administrative rulemaking and administrative adjudication, subdelegation of agency decision-making, affording due process of law, and so forth, all apply to the FCC and its modes of operation.

Most fundamentally, the FCC, an agency at the crux of what has been called the “headless fourth branch” of government, derogates from separation of powers principles at the core of our tripartite constitutional system, with the legislative, executive, and judicial branches established and their powers delineated. In an early case, [*FCC v. Pottsville Broadcasting Co.*](#), involving the FCC’s authority under the public interest standard, Justice Frankfurter, an enthusiastic supporter of the Progressive Era and New Deal alphabet agencies, quoted Elihu Root to this effect:

There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation.

I suspect our Founders would shudder if they could hear the words concerning “these experiments.” Nevertheless, it is likely true that, despite any arguments by Professor Hamburger or me to the contrary, there will be “no withdrawal from these experiments,” at least in the sense of any wholesale withdrawal – and at least in the sense that a court will conclude that “the FCC is unlawful.”

But that is not really the point for the work ahead in 2015 for myself, Free State Foundation scholars, and for all those who share the conviction that the FCC, and communications law and policy, at least should be reformed in ways that are consistent with rule of law norms.

And there will be plenty of such reform and rule of law-oriented work on which to focus. By way of example:

- Despite two previous setbacks in which courts already have held that the FCC exceeded its authority under the Communications Act, Chairman Tom Wheeler appears intent, especially after President Obama’s intervention, on forcing adoption of new public utility-like net neutrality mandates applicable to Internet service providers – once again relying on questionable legal authority.
- And it is likely – given a past statement by Mr. Wheeler to the effect that the FCC should use its authority to review proposed mergers to achieve broad industry-wide regulatory objectives – that the agency will abuse its merger review authority by imposing, or inducing merger applicants to “volunteer,” conditions unrelated to any competitive concerns directly raised by the proposed transactions.
- Moreover, it is likely that the FCC will continue to try to micromanage competition in ways that favor certain parties over others without sufficient regard to reliance or proprietary interests or due process concerns.
- Finally, during his short tenure Chairman Wheeler increasingly has evidenced a tendency to diminish his colleagues’ ability to participate in FCC decision-making processes, for example, by directing the agency staff to act on “delegated authority” on significant matters or acting alone. Of course, each commissioner, under the law, has an equal vote, but that vote becomes meaningless if the Commission’s business is conducted in a way that avoids voting on various measures.

These and other examples implicate both substance and process issues that should be considered this coming year with an eye on reform. And, in one way or the other, they implicate rule of law norms that harken back to what was done in the fields of Runnymede in 1215. It is not my intent

to suggest that the FCC's past or future actions in any way rise to the level of the import of Magna Carta. And it is not my intent to subscribe in any wholesale manner to Phillip Hamburger's contention that all of administrative law is unlawful.

But I do want to suggest, as 2015 begins, that we ought to draw inspiration from Magna Carta's 800th anniversary and the recent publication of Professor Hamburger's book to renew our commitment to contributing in a constructive way to reforming communications law and policy and the FCC as an institution, always with an eye on consistency with rule of law norms.

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