

Reforming the Federal Communications Commission
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These comments were deliberately written before reading Philip J. Weiser's paper. That said, having now read his informed, insightful, instructive – and may I say inspirational – roadmap to a brighter (in every sense) FCC of tomorrow, and mindful that my externally imposed page limitations are much more strict than his, I'd like to simply enthusiastically incorporate the entirety of his paper by reference.

He begins his keynote paper, "FCC Reform and the Future of Telecommunications Policy," "For years, the agency has tolerated a level of mystery and secrecy over what proposals would be submitted for consideration, an extraordinary reliance on the *ex parte* process at the expense of the formal notice-and-comment procedure, and a limited degree of collegial discussion among the Commissioners and the public."

I not only agree, I think it's worse than he does – for reasons spelled out shortly.

But before addressing them there's a related approach that could perhaps turn out to be as effective as the specific suggestions for reform we will be able to come up with today. It is to focus on (1) the qualities of FCC appointees and employees, (2) the support they are provided by the Executive Branch and relevant Congressional committees, and (3) the role of the academic, research and public interest communities (which Weiser also addresses).

* Former FCC Commissioner Nicholas Johnson (1966-73) wrote about the FCC's organization, administration, process and procedure in a 1972 law review article, briefly excerpted here, in which he made observations, drew conclusions, and made proposals similar to those of Professor Philip Weiser 36 years later. He holds undergraduate and law degrees from the University of Texas, clerked for Supreme Court Justice Hugo Black, was an associate at the Washington law firm Covington & Burling, served as Maritime Administrator as well as FCC commissioner, and currently teaches media and communications law at the University of Iowa College of Law.

Qualities of Commissioners and Employees.

Most to all of the administrative and managerial challenges confronted by the Commission can and may be solved if the agency is overseen by commissioners with the right qualities who are supported in their efforts by the Administration and Congress. Indeed, Weiser writes of the accomplishments of Alfred Kahn at the old CAB, the UK's Ofcom, and our FTC and SEC. However, without such individuals and support the most innovative organizational and procedural changes imaginable (a) won't be adopted, and (b) would make little difference if they were.

What qualities? Individuals sufficiently broadly educated, bright, curious, informed and inclined to be "quick studies" of new challenges; who read widely, know what they know and what they don't, and know enough to both ask the right questions and to listen to the answers; whose search for answers is driven by an open mind rather than ideology or industry identification, who find science, data and best practices not only relevant but decisive; who will go outside the agency to the best minds available if agency process has not brought those individuals before the Commission in a given proceeding; who are possessed of a basic sense of fairness, ethics and morality; who believe public involvement is relevant in a search for "the public interest;" who have the judicial mind to withhold conclusions until all relevant information is available; who have neither come from the regulated industries nor desire to enter them when they leave; who have the courage to stand up and speak out for what they believe is in the best national interest regardless of the consequences; who have made a personal commitment to serve their full term, but would rather serve a single term than seek a second by pleasing those who come before them.

Support.

Without overt, clear, strong and consistent support for reform from the President, Congress and public interest organizations no independent regulatory (or executive branch) agency will be able to make much (if any) significant progress when confronting special interests. As a commissioner I would sometimes observe something like, “On those rare occasions when the Commission does stir as if in a fit of wakefulness the Congress insists it go back to sleep.”

Even with that support the agency may not be successful with reform, but it will at least have a chance. Given that the FCC is supposed to be an *independent* (that is, independent of the executive branch) agency, the president’s support of FCC reform would have to be implied from his general support of all agency reform, encouraging agency focus on the public interest over the special interests – with his actions making it clear he means it. But leadership from Congress could be more precise.

By way of illustration I would cite my own experience as Maritime Administrator. President Johnson made it clear to me that he was looking for reform of the maritime ship building and ship operating subsidies; and made it equally clear to the industry when he refused to respond to their demands I be fired. As a 29-year-old with no prior management experience, MBA, indeed any business school academic credits, I was sent books by some kindly folks at the Harvard Business School, with the instructions I “read them and do what they say” – which I proceeded to do. The 1965 Maritime Administration management information reporting system that came out of that effort was published by the GPO and picked up by other agencies.¹

My point is simply that I see no reason why the right commissioners, after study and support similar to what I had at Maritime, would not propose reforms comparable to those Weiser offers today and I was exploring 36 years ago.

The bad news is that without the right people, and external support, the outcome of agency process can often be accurately predicted with what I call “the vector analysis of administrative decision making.”

That is to say, where an agency comes out on a given issue can often be almost mathematically calculated on the basis of the direction and intensity of pressure applied from the outside.

The good news is that this phenomenon gives rise to the observation that “a statesman is someone who is upright due to equal pressure on all sides.”² Indeed, it is to some extent appropriate in a democracy that officials should respond to political pressure.

Beyond Government by Weathervane.

But as Edmund Burke observed in his 1774 “Speech to the Electors of Bristol,” much more is expected of elected representatives – and therefore, per force, for appointed governmental employees:

“It is [a representative’s] duty to sacrifice his repose, his pleasures, his satisfactions, to [his constituents]; and . . . to prefer their interest to his own. But his unbiased opinion, his mature judgment, his enlightened conscience, he ought not to sacrifice to you . . . These he does not derive from your pleasure; no, nor from the law and the constitution. They are a trust from Providence, for the abuse of which he is deeply answerable. Your representative owes you, not his industry only, but his judgment; and he betrays, instead of serving you, if he sacrifices it to your opinion.”³

This may have been some of what President Lyndon Johnson had in mind when he wrote to each of the agency heads he had appointed:

"I want to hear from you what you think is in the best national interest in the area over which you have responsibility. I don't want you to worry about what's politically possible. A lot of things you think we wouldn't have a prayer of getting through Congress I'll show you how we can get them enacted. And a lot of things you think would be easy to do I'll explain to you why they're impossible. I'll make those decisions, and I want you to give me a lot of those decisions to make."⁴

The more the Administration and Congress can send a message consistent with Burke and Johnson's approach to public service, and then show by their actions that they mean it, the less will there be a need for anyone outside of the FCC to concern themselves with the organization, administration, process – and even substance – of Commission decision making.

Academic, Research and Public Interest Communities.

Each commissioner needs to craft his or her own job description to some extent. Mine included that of an ambassador of sorts to the academic, research and public interest communities. One of my dreams was that the FCC might encourage a coalition of such institutions. The FCC could identify in advance the major issues it would be considering. And those institutions might be willing to provide their participation and suggestions for solutions. Like Paul Revere I travelled the country crying out, "The communications revolution is coming, the communications revolution is coming." One piece I wrote at that time, "Communications in the Year 2000," ended up being pretty close to the mark.⁵ As I recall, there was a provision in the late 1960s or early 1970s that authorized agencies to pay public interest groups for their participation – if the agency found it to be a contribution to a proceeding.

That the FCC make additional efforts to involve the academic, research and public interest communities are ideas that Philip Weiser is also advocating.

I am going to close with brief excerpts (the introduction and conclusion) from a law review article I wrote regarding the FCC's organization and procedures some 36 years ago that, especially given Weiser's contribution, may be of more use than had I chosen to expand on my ideas about the current FCC. The problems that I identified 36 years ago both put in perspective those that Weiser identifies today and perhaps thereby provide some sense of how deeply ingrained they have been in the culture of the agency.

Observations: "A Day in the Life."

During my near seven-and-a-half years as an FCC commissioner, and the 30-some years since, I have thought and written more than can either fit or be summarized in the allotted space for this paper. In Philip Weiser's paper he makes reference to one article of mine.⁶ There are many more, as well as approximately 400 separate opinions (many of which were dissents dealing with subjects relevant to this paper) written as an FCC Commissioner.⁷

Forced to select but one, and only excerpts from it at that, here is the introduction and conclusion to what is, hopefully, a self-explanatory *Yale Law Journal* article entitled, "A Day in the Life"⁸:

Introduction

For seven years I have struggled with the FCC in an effort to inject some rationality into its decision-making process and to reveal its workings to the public. There is reason enough to assert that everything

the FCC does is wrong. But, like contributions to the literature detailing disasters in given areas of Commission responsibility, such assertions are almost universally dismissed as exaggerations.

And so it is that I have come to try to describe the agency one more time, but from a unique perspective: "A day in the life" of the Federal Communications Commission. The day -- Wednesday, December 13, 1972 -- was selected from the Commission's meeting days in 1972. It is neither better nor worse than any other day during the past seven years. It is typical. This article is an effort to describe what the FCC did on that typical Wednesday.

Professors and students of administrative law tend to concentrate on a particular agency decision -- usually one that has gone to the appellate courts. But a look at one day's events may well be more instructive than a close examination of a single event in determining why an agency is failing at its job or why it acts in a consistently unprincipled manner.

The seven FCC Commissioners meet weekly, on Wednesdays, to vote on the items brought to their attention by the Commission's various bureaus. It is not clear who decides what matters will be considered. The agenda is the product of industry pressures, staff idiosyncrasies, and political judgments. If he chooses, however, the Chairman is in a position to control the flow of items to the Commission.

Most matters are not handled at FCC meetings but are delegated by the Commission to the staff for action. In theory these items are in areas of settled Commission policy but, in fact, the Commission has not so limited the scope of its delegations. During my term the majority has been unwilling to examine

its delegation orders or to enunciate what standards control the delegation of decision-making authority.

Those issues which do reach the Commissioners each week often take them by surprise. Opening a new agenda (the stack of mimeographed staff memos and accompanying recommended opinions for a Wednesday meeting) is like Christmas morning. All too often the agenda includes a long, detailed staff document dealing with a controversial and complicated matter in which: (1) numerous alternatives are presented (or excluded) after extensive staff work, (2) the proposed resolution is endorsed by all of the Commission's bureau chiefs, (3) an immediate decision is required, and (4) any alteration in the proposed resolution will mean considerably more staff work and costly delay. As a result, rational decision-making suffers.

On December 13, 1972, the Commission was presented with fifty-nine items. In each case the staff made a recommendation to the Commissioners. If a majority votes to approve the staff's recommendation, it adopts the proposed Commission opinion as well. If one of the Commissioners questions a particular item, there is a discussion with the staff prior to a vote. On December 13, twenty-eight of the fifty-nine items were discussed.

Each week's agenda is divided into thirteen substantive categories: Hearing, General, Safety and Special, Common Carrier, Personnel, Classified, CATV, Assignment and Transfer, Renewals, Aural, Television, Broadcast, and Complaints and Compliance -- in that order.

Conclusion

Ten years ago I came to Washington as an administrative law professor to find out more about administrative process. A seven-year appointment to the FCC in 1996 has given me more administrative experience than I bargained for and left me with a conviction that administrative law students and professors need more of the raw data on actual agency operation than currently is available. This article is an attempt to provide some of that material.

Several conclusions emerge.

First, it seems evident that the FCC deals each week with an incredibly broad range of communications matters. On December 13, the FCC considered everything from personnel decisions to significant issues of international consequence. The Commission delved into areas surely beyond its expertise and into issues simply beyond its ken.

Second, as the Hearing Agenda reveals, the Commission, burdened with so much work and having so few resources, takes years to resolve important cases.

Third, as both the Cable and Aural Agendas illustrate, the FCC is manipulated daily by the industries it is supposed to regulate and by its own staff. As a result the Commissioners often make precedents which return to haunt them.

Fourth, if the FCC no longer approves of its own rules and precedents, it simply ignores them -- either by waiving them to death or otherwise evading them. In short, the concept of principled decision-making does not exist at the FCC.

Fifth, the FCC not only disdains its own administrative principles, but it also ignores those established by the judiciary. Thus, on December 13 the FCC simply turned its back on numerous decisions construing the National Environmental Policy Act and relied on a construction of a recent case involving programming "format changes" not justified by the language of that case.

Sixth, as the General and Common Carrier Agendas show especially well, the Commissioners often decide cases they do not understand.

Finally, the Commission has not developed rational communications policies for governing its day-to-day decisions.

Perhaps it is easier to understand the Commission's sloppy work, its serious gaffs, when one sees an individual decision in the context of the burdensome "day in the life" on which it was voted. Yet much of the burden is of the Commission's own making. It is neither necessary nor advisable to divide up the FCC's workload between a "Broadcasting Commission" and a "Communications Common Carrier Commission." First semester business school principles would suggest that the Commission should formulate some statements of national communications policy for the benefit of itself, its staff, the business community, the Congress, the press, and the public.

Having done this, it should prepare precise delegation orders to its staff, allow the staff to handle individual cases as they come up, and create a management information reporting system whereby the Commission is able to follow the processing of cases, modifying policy and delegation orders as warranted.

Another purpose of this piece is to offer the public some information concerning the operation of one of its administrative agencies, one which has struggled to keep its activities secret. The FCC is a *public* agency, receiving public funds for the purpose of regulating, "in the public interest," communications industries whose services are crucial to the continued vitality of a democratic society. Ironically, though the agency keeps the public in the dark, the communications interests learn all the details of Commission actions through information services provided by lawyers, lobbyists, and the trade press.

Neither the Commission majority nor its staff is troubled by the agency's treatment of the public. Whether because they adhere to notions of "laissez faire" economics or because they sympathize with communications industry interests, a majority of the staff at the FCC exploit the lack of public representation day after day.

Congress has done little to correct problems so apparent at the FCC largely because, as a "generalist" and political body subject to the same sorts of pressures that barrage the Commission, Congress is not terribly competent to supervise.

A final purpose of this article, then, is to offer the judicial branch some idea of how bad things really are, of how tenuous is the basis for the idea that judges should defer to the FCC's "rational and orderly process." Long-range reforms aside, if there is to be any immediate hope for the FCC, it lies with the courts.

¹ The MARAD MIRS booklet is available at <http://www.uiowa.edu/~cyberlaw/marad/>, and discussed in the context of “governance” at <http://www.uiowa.edu/~cyberlaw/governance/>.

Not incidentally, the governance literature (whether one uses the John Carver model referenced on my governance Web site, above, or some other) has much to offer FCC commissioners engaged in rethinking their agency’s organization, administration and process. In brief (while recognizing the difficulty of summarizing entire books in a sentence), the commissioners might want to explore the possibility of their functioning more like John Carver’s “boards” (identifying what he calls “ends policies” and others would think of as “measurable goals”), leaving at least more of the details on how to reach them to the staff (perhaps coordinated through a new position closer to that of a CEO, rather than the Commission Chair).

² See, e.g., Nicholas Johnson, *How to Talk Back to Your Television Set* (1970) p. 163, available at <http://www.uiowa.edu/~cyberlaw/HTTB/>.

³ Edmund Burke, “Speech to the Electors of Bristol,” November 3, 1774, *The Works of the Right Honourable Edmund Burke* (1854-56), vol. 1, pp. 446-48, as reproduced in *The Founders’ Constitution* (University of Chicago, 1987), vol. 1, ch. 13, document 7, available at <http://press-pubs.uchicago.edu/founders/documents/v1ch13s7.html>.

⁴ Nicholas Johnson, “Freedom, Fun, and Fundamentals: Defining Digital Progress in a Democratic Society,” in George Gerbner, Hamid Mowlana and Herbert I. Schiller, editors, *Invisible Crises: What Conglomerate Control of Media Means for America and the World* (Westview Press, 1996), Chapter 6, pp. 82-90, at p. 83, available at http://books.google.com/books?id=r97NtKSZhukC&dq=%22Invisible+Crises:+What+Conglomerate+Control+of+Media+Means+for+America+and+the+World+%22&pg=PP1&ots=xrI5Hx-FRK&source=bn&sig=hxQxSNnnCEqkgyJA6b25h5Wx02s&hl=en&sa=X&oi=book_result&resnum=4&ct=result#PPA90_M1.

⁵ It ultimately became Chapter 6 of *How to Talk Back to Your Television Set* (Little, Brown, 1970), and is now available online at <http://www.uiowa.edu/~cyberlaw/HTTB/>.

⁶ Nicholas Johnson, “Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation,” 34 *Law & Contemp. Probs.* 505, 512 (1969), cited in Philip J. Weiser, “FCC Reform and the Future of Telecommunications Policy,” n. 13.

⁷ See links to numerous categories of material from bibliographies, articles and books to FCC opinions on the author’s main Web page, <http://www.nicholasjohnson.org>. Many of those FCC opinions at least touch on matters involving failings of the Commission’s organizational structure, process and procedure.

⁸ Nicholas Johnson and John Jay Dystel, “A Day in the Life,” 82 *Yale L.J.* 1575-1633 (1973). Taking its title from the Beatles’ song of the same name, this lead article in the July 1973 issue dealt, in turn, with each of the 59 items in all of the 13 agenda categories for that single Commission meeting, documented in 302 footnotes. The credits included, “This article reflects the opinion and experience of one FCC Commissioner and is written in the first person. It represents the work, however, of many people. Commissioner Johnson was assisted in the preparation of the weekly agenda by his permanent office manager and economic and legal assistant, Robert S. Thorpe, and by his other legal assistant for the 1972-1973 term, Larry S. Gage, who also assisted the authors in the preparation of this article. The idea of a “dissent” to an entire Commission agenda was initially discussed with Tracy A. Westen, the Commissioner’s legal assistant for the 1969-1970 term. The authors also thank Mrs. Mary Ann Tsucalas of Commissioner Johnson’s staff for editorial assistance and manuscript production.”