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## Blacklining Editorial Privilege

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## ESSAY

# BLACKLINING EDITORIAL PRIVILEGE

*Justin (Gus) Hurwitz*

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*Over the past year, FCC Commissioner Mike O’Rielly has drawn valuable attention to various Commission procedures in need of reform.<sup>1</sup> Of these procedures perhaps the most perplexing is that of “editorial privileges” – a process whereby Commission staff is granted permission to continue editing Commission Orders subsequent to their adoption, such that the text of the Order voted on by the Commission is not necessarily the same as that ultimately published in the Federal Register or otherwise released to the public.<sup>2</sup> This procedure is longstanding – predating institutional memory; yet it is also entirely unprecedented in the canon of administrative law. No other federal agency uses anything like it, nor is anything like it contemplated by the Administrative Procedure Act.<sup>3</sup>*

*This essay attempts to unravel the mysteries of editorial privileges: the practice’s history, its purpose, its current practice, and, most importantly, its legal meaning. The historical aspect of this effort is important. Editorial privileges are a holdover from an earlier era in the*

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1. See, e.g., Michael O’Rielly, Comm’r, Fed. Commc’ns Comm’n, Remarks before the Free State Foundation: Implementing Regulatory Reform at the FCC (July 28, 2015) (transcript available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-334606A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-334606A1.pdf)); Michael O’Rielly, Comm’r, Fed. Commc’ns Comm’n, Remarks at the National Association of Broadcasters State Leadership Conference 2015 (Feb. 24, 2015) (transcript available at [https://apps.fcc.gov/edocs\\_public/attachmatch/DOC-332191A1.pdf](https://apps.fcc.gov/edocs_public/attachmatch/DOC-332191A1.pdf)); Tom Wheeler, Chairman, Fed. Commc’ns Comm’n, Statement before the Subcommittee on Communications and Technology, Committee on Energy and Commerce, U.S. House of Representatives: Oversight of the Federal Communications Commission (Nov. 17, 2015) (transcript available at <http://docs.house.gov/meetings/IF/IF16/20151117/104195/HHRG-114-IF16-Wstate-WheelerT-20151117.pdf>) (“I have made it a priority to reform the FCC’s processes. . . Last spring, I asked my fellow Commissioners to designate a senior representative to participate in a Task Force. . . The Task Force has been considering topics in response to Commissioner O’Rielly’s Concerns.”).

2. Michael O’Rielly, *Fixing Flawed and Non-Existent “Editorial Privileges”*, FCC (Mar. 9, 2015, 4:00 PM), <https://www.fcc.gov/news-events/blog/2015/03/09/fixing-flawed-and-non-existent-editorial-privileges>.”

3. The only other agency I have found that uses anything similar is the Administrative Conference of the United States (ACUS). In the case of ACUS, however, this procedure is used because ACUS meets only rarely – typically only twice per year – such that any delay in adopting an item is necessarily a substantial delay.

*Commission's history: the pre-Sunshine Act era, during which the Commission could carry out its statutory duties in a more collegial and informal manner. In the modern era, under both Democratic and Republican leadership, editorial privileges have been used to patch over a broken and dysfunctional deliberative process – worse, it likely exacerbates that process's problems.*

*It should be emphasized that “mystery” is an apt way to describe this unique practice: its origins are unclear; it has not been subject to significant scrutiny; and its practice is governed by internal agency manuals that are not available to public inspection. Fortunately, I had a great deal of help in researching this topic: I had the opportunity to speak to former and current senior FCC officials, including bureau chiefs, senior Office of General Counsel staff, and individual Commissioners and their staff.<sup>4</sup> Collectively, I spoke with individuals – including those with experience in, or who were appointed by, both Democratic and Republican administrations – familiar with the Commission's use of editorial privileges continuously from before the adoption of the Government in the Sunshine Act of 1976 through present.*

*While mystery surrounds editorial privileges, there is little mystery as to my conclusions about them: the Commission must take immediate action to reform its use of this process, and, ideally, should abandon it entirely. The current practice of using editorial privileges conceivably opens many Commission Orders to attack on substantive and procedural grounds.<sup>5</sup> Importantly, a simple procedural change in how items are voted on at open meetings could save the practice (to the extent it is worth saving): instead of voting to approve items on which staff would request editorial privileges, commissioners should vote to place those items on circulation. This would effectively preserve the practice as currently used in a procedurally-defensible way.*

*That said, as I argue below, “editorial privileges” are not a thing worth saving. As captured by administrative-law colleagues to whom I described the practice, editorial privileges are “absurd” and “flabbergasting” – this practice is an unwarranted deviation from standard administrative practice, and, in its current form, it is overtly used by the current Commission and other recent Commissions to subvert basic principles of administrative law.*

*This essay proceeds in four parts. Part I provides a general overview of Commission voting, including the governing statutes and rules, and the*

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4. In order to ensure candid discussion, these conversations have been conducted confidentially. The normative evaluation of editorial privilege in Part IV is my own and stands separate from my discussions with past or current FCC officials.

5. As a practical matter, it is likely that courts would find a way to “save” past Commission decisions from the concerns expressed in this essay. However, given the attention drawn to this issue by Commissioner O’Rielly, it is less likely that courts would either be able to or be inclined to save more recent or future orders.

*distinction between voting on items on circulation and at open meetings. Part II discusses the history of editorial privileges, focusing on its evolution from the time of the adoption of the 1976 Sunshine Act through its modern practice. Part III turns to criticisms and defenses of the practice. And Part IV considers the future of the practice, explaining that it can be saved but arguing that it should be abandoned.*

## I. VOTING AT THE FEDERAL COMMUNICATIONS COMMISSION

Editorial privileges arise in the context of votes taken at Commission open meetings. This Part discusses the how the Commission deliberates and votes on items before it.

Generally, most major items before the Commission are voted on at regularly-scheduled open meetings. The items on which the Commission is voting are circulated among the commissioners, but not to the public, prior to the meeting. As discussed in the Part II, Commission staff is routinely granted editorial privileges to continue editing items (including sometimes making substantive changes) after the Commission has already voted to approve an item.<sup>6</sup> But, only a small fraction of Commission business is voted on at open meetings. The vast majority of items are voted on “notationally.” Under this process, items are placed “on circulation,” with copies being sent individually to each commissioner along with a voting form on which commissioners indicate their votes in writing. Importantly, editorial privileges predate modern voting practices at the Commission – they predate the bifurcation between open meetings and notational voting. Understanding editorial privileges, therefore, requires a brief review of Commission voting procedures. Indeed, as I will argue later, a vote to grant “editorial privileges” is in substance a vote to place an item before the Commission at an open meeting on circulation for further consideration.

### A. *The Sunshine Act*

Commission votes are governed generally by a number of statutes and rules: the APA,<sup>7</sup> the Communications Act,<sup>8</sup> procedural rules adopted by the Commission,<sup>9</sup> and the Sunshine Act.<sup>10</sup> Of these, the Sunshine Act is the most important to understanding the Commission’s voting procedures. Adopted in

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6. Because the text of items that the Commission votes on is generally not made public – and, indeed, the FCC goes to lengths to avoid disclosure of such texts – it is difficult to know how extensive these edits are for any particular item. *See infra* note 48 and accompanying text (discussing withholding of such text under FOIA). However, there are known examples of substantive changes being made during the editorial process. *See infra* notes 22-23 and accompanying text.

7. Administrative Procedure Act, 5 U.S.C. § 501, et seq. (2012).

8. Communications Act of 1934, 47 U.S.C. § 151, et seq. (2012).

9. 47 C.F.R. § 0.1, et seq. (2016).

10. Government in the Sunshine Act, 5 U.S.C. § 552b (2012).

1976, the Sunshine Act requires that all meetings with a quorum of agency decision makers – for the FCC, three or more Commissioners – be conducted pursuant to rigorous open meeting rules. The practical effect of the Sunshine Act is better understood as the contrapositive of this requirement: it prohibits discussions between more than two Commissioners in any context other than open meetings.

The purpose of the Sunshine Act is, in principle, to improve the deliberative process. Forcing substantive agency discussions to occur in public is meant to ensure that the public is informed about and has opportunity to participate in those discussions. On the one hand, this is responsive to concerns about the democratic nature of our government, ensuring that decisions are not made in secret, with parties or for purposes that are not in the public interest. On the other hand, this is responsive to concerns about the quality of those decisions, ensuring that the agency process is inclusive so that the agency has access to the widest range of relevant input. This aspect of the Sunshine Act echoes the purposes of the Administrative Procedure Act, which defines the processes by which agencies develop and promulgate rules and orders. Most notably, the APA's notice-and-comment procedures are designed to ensure that agency processes are inclusive, that agencies are provided wide-ranging substantive input as they develop those rules, and that they incorporate and respond to that input in the final rules that they adopt.

Prior to adoption of the Sunshine Act, Commission meetings were regular, collegial affairs. As described in my discussions with officials who were at the Commission at the time, Commissioners would regularly meet in closed session to discuss and debate the issues before them, and would allow staff to present substantive discussion of all sides of an issue.<sup>11</sup> Final rules and orders would be adopted over the course of several meetings, incorporating changes that result from the ordinary give-and-take of the deliberative process until a final text had been adopted. This practice was common not just at the FCC but also at most multimember agencies. In this setting, the Commission could – and did – regularly agree on items or changes to items in principle, granting staff the editorial privilege of finalizing the text before its final approval at a subsequent meeting. While other agencies did not use this terminology, the basic process was often the same: directional votes taken at closed meetings guided staff in finalizing the text of agency decisions that was ultimately approved and adopted by the agency.

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11. See also Kathy Bradley, Note, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 *FED. COMM. L.J.* 473, 481–83 (1997).

### B. *Deliberation under the Sunshine Act*

This process had to change in response to the Sunshine Act, under which collegial closed meetings are impermissible. The effects of the Sunshine Act – almost uniformly negative – have been discussed extensively elsewhere, both as they relate to the FCC<sup>12</sup> and generally.<sup>13</sup> Generally, the Sunshine Act pushed deliberation and decision-making from collegial, closed, meetings to other, less organic, processes. Commissioners could only engage each other one-on-one, slowing the process of deliberation and limiting the freedom and each with which ideas could be explored – limiting the flexibility and even possibility of compromise. Substantive discussions were largely pushed to Commissioners' staffs. And the Sunshine Act effectively gave the Chairman much greater power, because the process of drafting items and bringing them to a vote now required a coordinated and orchestrated process between the various Commissioners' offices.

Another way of understanding the changes wrought by the Sunshine Act is that it refocused individual Commissioners' attention from their relationships with their colleagues to their relationships with the public and their Congressional political masters. Before the Sunshine Act, it was advantageous for a Commissioner to be known amongst her colleagues as collegial, thoughtful, and willing to engage and compromise on difficult issues in order to do the work of government. These interpersonal relationships were the currency of exchange, by which the deliberative process moved along. Following the Sunshine Act, there was little value in collegiality because there was relatively little opportunity to engage with one's colleagues. Indeed, there was often substantial cost: in the caustic light of the sun compromise often appears like political weakness or betrayal of one's political masters.

It needs to be noted that deliberation and sound decisions can still be taken under a regime such as that envisaged by the Sunshine Act. But the resulting process is premised on public-facing formal processes – such as those required by the APA – as opposed to the relationships of the individual decision makers. The importance of fidelity to the procedural aspects of decision-making – meaningful notice and comment, meaningful consideration of substantive comments, and meaningful response to those comments – is redoubled under such a regime.

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12. See, e.g., Harry Shooshan III, *A Modest Proposal for Restructuring the Federal Communications Commission*, 50 FED. COMM. L.J. 637, 649 n.39 (1998); Bradley, *supra* note 11; Kevin Ryan, Comment, *Communications Regulation – Ripe for Reform*, 17 COMM.LAW CONSPICUOUS 771, 814 (2009).

13. See, e.g., Reeve Bull, *The Government in the Sunshine Act in the 21st Century, Final Report of the Administrative Conference of the United States* (March 10, 2014), <https://www.acus.gov/sites/default/files/documents/Government%20in%20the%20Sunshine%20Act%20Draft%20Report%20REVISED%205-7-14.pdf>; Larry W. Thomas, *The Courts and the Implementation of the Government in the Sunshine Act*, 37 ADMIN. L. REV. 259 (1985).

### C. Voting under the Sunshine Act

The process by which agencies vote also changed in response to the Sunshine Act. Previously, an agency's voting members could meet on an as-needed basis to take care of agency business. This would be accomplished through a mixture of open and closed meetings, depending on the agency and its docket. In response to the Sunshine Act, today most agencies (including the FCC) rely on a combination of "notational" voting – by which voting members of an agency pass their votes on paper or electronically – and open meetings.

Nominally, the Sunshine Act requires all votes to be taken at open meetings. This substantially altered agencies' workflows. And, importantly, it legitimately imposed an unworkable burden on agencies like the FCC – agencies that may need to vote on dozens of items (or more), most of which are routine and of only the barest interest to the public, every month. Indeed, there is a sound argument that requiring consideration of these items in an open meeting meaningfully reduces the public's access to these meetings, because it substantially increases the cost and complexity of participating in the meeting process.

The FCC was the vanguard of responding to these concerns, adopting a new form of voting on routine items. Routinized items are considered using a process known as "notational voting" – or, in the parlance of the Commission, "on circulation." Such items are circulated among the individual Commissioners, who review the items on their own time, without necessarily consulting any of their colleagues or meeting with more than one at a time. Each Commissioner indicates whether they vote for or against the item with an annotation in a register kept administratively by the agency.<sup>14</sup> Commissioners may suggest edits to an item, and the annotations are kept such that each Commissioner has the opportunity to vote on the final form of an item, and the final form of the item is the one receiving sufficient votes for passage.

The FCC was the vanguard of "notational voting": it successfully fought its way through the multiple cases – including going to the Supreme Court – to defend this practice. In *ITT World Communications*, the first Sunshine Act case considered by the Supreme Court, the Commission successfully argued that the "informal meetings," such as those between Commissioners, and individual Commissioner's staff, and others did not meet the Sunshine Act's definition of "meeting,"<sup>15</sup> and therefore was not subject to the Act's open meeting requirements. Later in *Communications Systems*, the FCC's use of notational voting was challenged, and directly affirmed by the DC Circuit.<sup>16</sup>

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14. Historically, these annotations were made in a physical register accompanying each item; today they are kept electronically.

15. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 467 (1984).

16. *Commc'ns Systems, Inc. v. FCC*, 595 F.2d 797, 800 (D.C. Cir. 1978).

As explained by the Court, “If all agency actions required meeting, then the entire administration process would be slowed—perhaps to a standstill. Certainly requiring an agency to meet to discuss every trivial item on its agenda would delay consideration of the more serious issues that require joint face-to-face deliberation. Clearly Congress did not intend such a result.”<sup>17</sup>

## II. EDITORIAL PRIVILEGES, HISTORY AND PRACTICE

Editorial privileges are a long-standing, if unusual, aspect of Commission procedure. The practice certainly predates the Sunshine Act – and it likely does so by a substantial margin.<sup>18</sup> In the era before the Sunshine Act, editorial privileges were part of the back-and-forth that existed structurally between agency decision makers and between those decision makers and the bureaus and staff drafting rules and orders. The practice existed temporally between the meetings at which rules and orders were discussed and ultimately voted upon.

The practice and use of editorial privileges, however, has changed in response to adoption of the Sunshine Act. Below, I discuss how it is practiced today and how its use has changed over the years.

### A. Practice

The basic practice of editorial privileges is in some ways the same today as it was prior to the Sunshine Act, though it has been adapted to use contemporary voting mechanisms.<sup>19</sup> Both now and then, following a vote to adopt an item at a Commission meeting, the staff routinely (but not always) requests that the Commission grant editorial privileges. With the exception of Commissioner O’Rielly’s recent practice of not supporting this request, this request has been routinely granted by all Commissioners.<sup>20</sup>

The grant of editorial privileges means that the bureau or office responsible for the text of an agency rule or order – including specific sections in

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17. *Id.*; See also Thomas, *supra* note 13 (discussing same).

18. It is likely impossible to determine the origins of this practice. Individuals familiar with Commission practice prior to the Sunshine Act describe the practice as routine. To this date, the Commission’s Managing Director is directed to oversee the process. See 47 C.F.R. 0.231(b) (2016) (“The Managing Director, or his designee, is delegated authority to make nonsubstantive, editorial revisions of the Commission’s rules and regulations upon approval of the bureau or staff office primarily responsible for the particular part or section involved.”). This authority was first assigned by the Commission to the Managing Director (at the time known as the Executive Director) in 1971. See 36 Fed. Reg. 15120 (1971).

19. These practices are governed by an internal agency manual that is kept by the Managing Director. This manual, however, is non-public. The procedures presented herein are based on discussions with past and present Commission officials.

20. Commissioner O’Rielly began voting against the grant of editorial privileges at the February 2015 Open Commission Meeting. See *February 2015 Open Commission Meeting*, FCC (Feb. 26, 2015), <https://www.fcc.gov/news-events/events/2015/02/february-2015-open-commission-meeting> (at timestamps 50:50 and 149:00).



the case of texts drafted by multiple bureaus – can continue making non-substantive edits to the text. As explained recently by FCC General Counsel in one of the only public statements ever made by the Commission describing editorial privileges, after an item is approved, “final proofreading and nonsubstantive ‘clean up’ edits may be needed” before the text can be distributed.<sup>21</sup> The text of the item also needs to be formatted for publication in the Federal Register, which may require formatting changes or trivial textual changes to streamline the publication process. The Managing Director oversees this entire process of making non-substantive edits. Once the final text has been compiled, it is also reviewed by the Office of General Counsel to ensure that it complies with any legal requirements, and that it has not otherwise been substantively changed.

In principle, the editorial privileges are only to be used to make non-substantive, “editorial,” revisions to an item approved by the Commission. In practice, however, these changes are sometimes substantive. Indeed, there have been instances when the Commission has voted on non-existent text, only voting on what the order it is approving should do.<sup>22</sup> In such cases, the final text is by definition substantively different than the text on which the Commission voted. And there have been other examples in which the text an order released by the Commission is substantively different than that on which the Commission voted – in the case of the Connect America Fund Order, editorial changes were made replacing a \$4.5 billion *ceiling* on funding of the program with a \$4.5 billion *floor*.<sup>23</sup>

Importantly, in cases where substantive changes to an order are made subsequent to the Commission’s vote, the Managing Director and Office of General Counsel work to identify them and to ensure that the Commission approves them. Prior to the Sunshine Act, the Commission would relatively simply consider the changes and vote to approve them. Subsequent to the Sunshine Act, the revised item is, in effect, put on circulation (and managed as though it were on circulation) for the Commissioners to review and vote on notationally.<sup>24</sup> In effect, this allows Commissioners to request further ed-

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21. Jon Sallet, *Process of Governance: The FCC & the Open Internet Order*, FCC (Mar. 2, 2015), <https://www.fcc.gov/news-events/blog/2015/03/02/process-governance-fcc-open-internet-order>.

22. See, e.g., U.S. GEN. ACCT. OFFICE, GAO-94-202, REPORT TO THE CHAIRMAN, SUBCOMMITTEE OF COMMUNICATIONS AND FINANCE, COMMITTEE ON ENERGY AND COMMERCE, HOUSE OF REPRESENTATIVES: FCC PROCEDURES DELAY RELEASE OF DECISION DOCUMENT 2 (1994) (“On a few occasions, the Commissioners have voted on a summary document.”).

23. See Scott Wallsten, *Administrative Procedures, Bureaucracy, and Transparency: Why Does the FCC Vote on Secret Texts?* (Tech. Policy Inst., Working Paper, Feb. 2015), available at <https://techpolicyinstitute.org/wp-content/uploads/2015/02/administrative-procedures-bure-2007691.pdf> (discussing the USF/CAF change from \$4.5 billion as a ceiling to a floor).

24. This was not always the case. See U.S. GEN. ACCT. OFFICE, *supra* note 22 (“FCC lacks procedures that require the documentation of the decisions that the FCC Commissioners adopt and of subsequent changes made to these decisions until they are publicly released. . . .

its to an item – as with any item on circulation – that will then be approved by a majority of the Commission. Different individuals with whom I have spoken characterize the role of dissenting commissioners in this process differently. Some are of the view that a commissioner who dissented on the initial vote is not invited to participate in the editorial process, including in the review and suggestion of substantive edits to an item. Others explain that, formally, dissenting commissioners *could* participate in this process, but that, in practice – reflecting an understanding that dissenting commissioners are unlikely to change their vote to support the revised item and that, having dissented from the item, any suggestions they make are unlikely to be accepted – they are simply irrelevant to the process.

### B. *Evolution of Purpose behind Editorial Privileges*

1. The purpose of editorial privileges – how they are used – has changed dramatically over the years.

As described above, in the era before the Sunshine Act editorial privileges reflected the relatively informal and organic approach the Commission took to drafting rules and orders. Given the ease and frequency with which the Commission could meet, the editorial process was, in effect, part of an ongoing drafting and approval process. This process likely was not technically in compliance with the APA, but the relative informality of the voting process led to a final product that was substantially in compliance.

Important changes came with adoption of the Sunshine Act in 1976, both contemporaneous with and as a result of it. This can be clearly seen in data collected by Scott Wallsten, which shows a substantial increase in the time between a Commission vote to adopt an item and the eventual release of that item starting in 1977.<sup>25</sup> Between 1934 and 1976, it rarely took more than 5-10 days to release an order; in most years the average time to release an order was zero or one days.<sup>26</sup> In 1977, it took an average of 10 days and up to over 40 days; this was typical between 1977 and 1981.<sup>27</sup> These delays often result from the use of editorial privileges. It is unclear, however, precisely why these delays increased at this time. It is reasonable, and indeed likely, that this was in part a result of the Sunshine Act, which disrupted the

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FCC'S files on decisions do not contain the information needed to review post-vote changes and verify that all significant changes were approved. . . . Although FCC's files contain the officially circulated document and the released document, because the draft decision document voted on and all subsequent revisions are not kept, including the Commissioners' approvals of all significant revisions, FCC is unable to verify whether or not substantive changes to the text of a decision occurred after a vote and were properly approved." As described to me by recent agency officials, current practice appears to make use of the same internal controls used through the notational voting process.

25. Wallsten, *supra* note 23, at 6.

26. *Id.*

27. *Id.*

informal process by which items had previously been drafted and finalized. On the other hand, there were other contemporaneous issues to which these delays could be attributed. As Wallsten documents, in 1977 Congress began requiring agencies to pay for their publications in the Federal Register, leading to delay-inducing changes in the relationship between agencies and the GPO.<sup>28</sup> It is also likely that delays were largely influenced by the chairman of the Commission – the average delays were consistently high during Chairman Ferris’s tenure, were consistently low during Chairman Fowler’s tenure, and again rose slightly during Chairman Patrick’s tenure.<sup>29</sup>

Regardless of the reason for the increased delay in publication of orders, it ultimately caught the attention of Congress. In 1994, the GAO issued a study conducted at the request of Representative Markey, in response to concerns “that FCC has been taking an excessively long time to release decision documents after the Commissioners have voted.”<sup>30</sup> This report explains provides one of the few publicly available discussions of the FCC’s voting and editing process, explaining that (as of 1994):

The FCC Commissioners’ practice is to vote on a draft decision document that sets forth the proposed action in detail and explains the rationale underlying the action. However, in a few instances the Commissioners vote without a draft decision, although they would have a summary document that establishes what is being discussed. In either case, post-vote revisions to the document may be necessary to incorporate final edits. FCC officials characterize all post-vote changes as “editorial revisions.”<sup>31</sup>

The report continues to say that (again as of 1994):

Although the term “editorial revision” suggests nonsubstantive changes, FCC places no restrictions on the extent or nature of changes that can be made to the text of an FCC decision between the time the Commissioners vote on it and the time the decision is released to the public, other than that no change can be made to the “bottom line” of any publicly announced decision without another vote. According to FCC’S Associate and Assistant General Counsels, all substantive changes must be approved by the Commissioners before a decision is released.<sup>32</sup>

The report cites to the following explanation for these delays offered by the Chairman of the FCC:

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28. *Id.*

29. *Id.*

30. U.S. GEN. ACCT. OFFICE, *supra* note 22, at 1.

31. *Id.* at 7.

32. *Id.*

the delays in releasing final written documents were the result of “the administrative process of incorporating the final edits of all those involved in the decision-making and drafting process. This has often taken more time than is desirable. While the reasons for delay in the release of specific items may vary, the delay generally reflects this fact. The delay does not reflect any significant substantive changes, after the Commission’s vote, in the specific action taken by the Commissioners.”<sup>33</sup>

The GAO study’s conclusions were not particularly favorable to the Commission, finding that the Commission lacked procedures to ensure that items on which the Commission voted were not substantially changed between a vote and the release of an item; and that the Commission lacked procedures to ensure that any substantial changes that were made had been approved by the Commissioners.<sup>34</sup> As a result, the GAO recommended procedural changes be put in place to correct these concerns.<sup>35</sup> The GAO report concludes by noting that “The FCC officials said that they do not believe that additional documentation of the Commissioners’ decisions is necessary.”<sup>36</sup>

### C. Contemporary Practice

Since the 1994 GAO report, the Commission’s use of editorial privileges has continued unabated. Though the advent of electronic notational voting has possibly addressed some of the GAO’s concerns about assuring that the Commissioners have approved any substantive changes, there are, however, two developments in the practice of editorial privileges that are worth noting.

The first is acknowledgement of the culmination of the breakdown of collegial deliberations. The end result of the Sunshine Act, predictable in hindsight, has been that Commissioners now bargain over coarse items, engaging in horse-trades and log-rolling up to the last minute before an item is voted on in an open meeting. As explained by one commentator, FCC “decisions are often a patchwork of pieces, each intended to satisfy some (internal or external) interest. Granting the staff ‘editorial privileges’ following adoption of an item has become a euphemism for stitching together the necessary pieces after the fact.”<sup>37</sup> We have seen this on dramatic display as recently as the Commission’s February 2015 vote to adopt the Open Internet Order, only days prior to which Commissioner Clyburn requested a dramatic

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33. *Id.* at 8.

34. *Id.* at 9-10.

35. *Id.* at 10.

36. *Id.* at 11.

37. Shooshan, *supra* note 12, at 648.

change to the Order in response to *ex parte* presentations from powerful industry stakeholders.<sup>38</sup>

The second, and incredibly important, recent development is the use of editorial privileges to incorporate responses to Commissioners' dissenting statements into orders and rules prior to their publication. This practice has been used by recent chairmen from both the Obama and Bush administrations. As explained by current FCC General Counsel Jonathan Sallet:

Commissioners often prepare individual statements expressing their opinions on the order . . . [T]he order itself must address any significant argument made in the statements – or risk being overturned in court for failing to address the issue. This is a very important point – the United States Court of Appeals for the D.C. Circuit has made clear on multiple occasions, as recently as last year, that, “[u]nder the APA, we must set aside orders that are ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, [and in] particular, ‘it most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it’. . . including the arguments of the agency’s dissenting commissioners.”<sup>39</sup>

### III. JUSTIFICATIONS FOR AND CRITICISMS OF EDITORIAL PRIVILEGE

Having set the stage with a background of editorial privileges, I now turn to the core concern of this article, the arguments for and against this practice, to be followed by a normative assessment.

#### A. *Justifications Offered for Editorial Privileges*

There are several arguments commonly offered in favor of – or at least offered as justification for – editorial privileges. The main practical and procedural argument in support of editorial privileges is that they are needed in order to reconcile changes made at the last minute to items voted on by the Commission; I have also been told that it is necessary for the Commission to allow these edits due to the large volume of items that the Commission deals with. The key response to these arguments is, in effect, “so what?” Other agencies deal with issues of equal or greater complexity without turning to

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38. See Jon Brodtkin, *Net neutrality order could get last-minute change on peering disputes: FCC Democrat reportedly questions Chairman Tom Wheeler's plan*, ARSTECHNICA (Feb. 24, 2015, 4:55 PM), <http://arstechnica.com/business/2015/02/net-neutrality-order-could-get-last-minute-change-on-peering-disputes/> (“A Democrat on the Federal Communications Commission reportedly objects to a portion of the FCC’s net neutrality order, potentially paving the way for a last-minute change to preserve the Democratic majority expected to vote in favor of the plan. . . [Commissioner] Clyburn apparently shares the legal concerns of Google, advocacy groups such as Free Press and the Open Technology Institute, and even AT&T.”).

39. Sallet, *supra* note 21 (citations omitted).

editorial privileges; and other agencies have similar volumes of business.<sup>40</sup> It is true that the FCC deals with matters of great complexity – but it is not unique in this regard; and the same can be said for the FCC’s volume of items it must consider. It is perhaps most telling that the only other agency that I have found that uses similar procedures is ACUS, which only meets infrequently such that any delay in adopting an order is a major delay. None of the other major federal agencies use anything similar to the FCC’s editorial privileges procedure.

The simple fact of the matter is that every other agency addresses these concerns by only presenting final drafts of items to voting members for consideration. Stated alternately, the FCC is the only federal agency that routinely votes on “decision drafts.” There is nothing so unique about the FCC’s constitution or subject matter that justifies this exceptionalist approach to voting.

Indeed, the problematics of the Commission’s approach are made painfully clear by other justifications that have been offered – and that the Commission’s General Counsel has publically announced – for the Commission’s use of editorial privileges, namely concern about the need to respond to dissenting commissioners. In one form, the concern is that the Commission needs to incorporate responses to substantive concerns raised by dissenting Commissioners into the text of an item before it can be released.<sup>41</sup> In the other form, the concern is articulated as being about delay: the Commission does not release the text of items on which it is voting, and treats the text of items on which it is voting as draft, because otherwise dissenting Commissioners would raise 11th hour concerns that would delay voting on the item.<sup>42</sup> Rather than give dissenting commissioners “multiple bites at the apple” – allowing them to raise an ongoing stream of substantive concerns that need to be iteratively addressed through edits to an order before it is ultimately voted on – editorial privileges are used to channel and respond to all substantive criticisms into a single statement by each dissent-

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40. See, e.g., H.R. REP. NO. 114-305, at 24 (2015), available at <https://www.congress.gov/114/crpt/hrpt305/CRPT-114hrpt305.pdf> (noting that FERC, “which operates at an almost identical size, composition, budget, and statutory basis as the FCC,” at the FTC release the text of items contemporaneous with a vote); U.S. GEN. ACCT. OFFICE, *supra* note 22, at 1, 2, 8 (comparing the FCC to the NRC and SEC. By way of comparison, in 2016 the FCC’s budget was approximately \$380 million supporting over 1,700 FTEs, compared to the SEC’s budget of approximately \$1.7 billion supporting over 4,800 FTE and the NRC’s budget of approximately \$1 billion supporting over 3,500 FTEs).

41. Sallet, *supra* note 21 (“the order itself must address any significant argument made [by Commissioners] in the[ir] statements – or risk being overturned in court for failing to address the issue.”).

42. See SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION, WRITTEN QUESTIONS FOR THE RECORD TO CHAIRMAN TOM WHEELER: “OVERSIGHT OF THE FEDERAL COMMUNICATIONS COMMISSION” 10 (2016) available at [http://www.commerce.senate.gov/public/\\_cache/files/14f98671-6a66-4a4d-8b1a-90160ffd4faa/327B19E8B250D3EC592254D47C1200FD.wheeler-response-to-qfrs.pdf](http://www.commerce.senate.gov/public/_cache/files/14f98671-6a66-4a4d-8b1a-90160ffd4faa/327B19E8B250D3EC592254D47C1200FD.wheeler-response-to-qfrs.pdf).

ing commissioner. Under this theory of editorial privileges, responses to concerns raised by dissenting commissioners can then be incorporated into the final rule or order through the editorial process.

The problem in both of these justifications should be obvious. The very purpose of the deliberative and consultative (that is, notice-and-comment) process is to ensure that the items on which an agency votes have considered and responded to all substantive critiques. The fact that the Commission is concerned that dissenting commissioners will raise *new* substantive critiques that will delay a vote on, or otherwise require subsequent edits to, an item demonstrates in the clearest possible terms that the Commission has failed in its deliberative or consultative process. The *only* proper response to the concerns advanced to defend editorial privileges is to delay a vote and complete the deliberative and consultative process – not to simply ignore the fact that these processes have failed by cutting off deliberation.

One final justification – and perhaps the most defensible one – is that the agency occasionally is subject to impracticably short deadlines.<sup>43</sup> In such cases, it may be necessary for the Commission to adopt draft, or otherwise incomplete, items, and leave editing and completion of the item until later. But even if we allow that there may be occasional instances where this is required, the use of procedures such as editorial privileges should be the very rare exception to the rule – not business as usual. Indeed, the APA generally allows for deviations from established procedures where an agency has good cause for such deviations – as is surely the case where such a deviation is required by Congressional or judicial order.

### B. *Criticisms of editorial privileges*

Use of editorial privileges has met bipartisan criticism for decades. It was part of the concern animating the 1994 GAO report, initiated by Democratic Senator Markey. Panelists at a conference convened by Public Knowledge and Silicon Flatirons criticized the practice. As captured in a report published by Public Knowledge summarizing their comments: “panelists repeatedly highlighted the importance of issuing written decisions contemporaneously with agency votes on an issue. The practice of post-adoption edits and issuing written decisions well after a vote has been taken undermines confidence in the integrity of the decision-making process. The delay has caused many to feel that ‘real’ negotiations on an issue do not begin until

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43. See *Schurtz Communs. v. FCC*, 982 F.2d 1043, 1057 (7th Cir. 1992) (“The remaining question is the precise length of the deadline. . . [T]o draft new rules, [the FCC] could meet the deadline by taking 30 days to rewrite the rules, giving the interested public 45 days to submit its comments, taking 15 days to reexamine and if necessary revise its proposed rules in light of the public comments, and publishing the rules 30 days before they became effective. . . The schedule we have outlined may seem tight. . .”).

after the vote.”<sup>44</sup> Discussing this issue with academics and practitioners familiar with the Commission, I have found none outside of the Commission who defend this practice and many who identify themselves as long-standing critics. And, having started by noting Democratic Senator Markey’s concerns, Republican Commissioner O’Rielly’s recent attention to editorial privileges marks the far end of the pendulum’s swing across the political spectrum of the practice’s critics.

Most *criticisms* of the use of editorial privileges reflect the very same concerns offered as *justifications* for the practice. But the criticisms turn those concerns around: instead being justified as a way to address issues that arise in the course of the FCC’s decision-making process, the need to use these privileges demonstrate a fundamental failure in the FCC’s deliberative and consultative process. These failures result from the FCC’s existing approach to rule-making – and the solution is to fix that approach, not to adopt new procedures that conflict with basic principles of administrative law. Other concerns relate to the public-facing aspects of the practice: the practice leads to confusion in a public that expects items to be made available following a vote – indeed, the public generally expects the thing being voted upon to be available at the time of the vote, no matter whether it is adopted<sup>45</sup> – and may undermine confidence in the Commission. To the extent that modern use of editorial privileges has been shaped by the Sunshine Act, itself intended to push agency decisions into the public view and foster confidence in government practices, these concerns are particularly stark.

A final set of concerns, which shall be considered in more detail in Part IV, is that the legal status of Commission orders and rules subject to revision through editorial privileges is uncertain. If the document voted on is not the document published in the Federal Register, and the document published in the Federal Register is not the document published in the Federal Register, it is unclear whether either document is (or, more precisely, would be deemed by the courts to be) in compliance with the procedural requirements of the APA. This results in the dramatic concern that Commission Orders subject to editorial privilege simply may not be legally binding.

#### IV. EVALUATING, SAVING, AND ABANDONING EDITORIAL PRIVILEGE

Granting staff editorial privileges is an unprincipled and unsound administrative procedure. But this does not mean that it is necessarily illegal or that it necessarily compromises rules and orders adopted pursuant to it. The final part of this paper considers the legal consequences of the use of edito-

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44. GIGI B. SOHN & MICHAEL WEINBERG, AN FCC FOR THE INTERNET AGE 4 (2010), available at <https://ecfsapi.fcc.gov/file/7020454474.pdf>.

45. See Michael O’Rielly, *Post Text of Meeting Items in Advance*, FCC (Aug. 7, 2014, 12:44 PM), <https://www.fcc.gov/news-events/blog/2014/08/07/post-text-meeting-items-advance>.



rial privileges and whether, if they are legally problematic, these privileges can (or should) be saved.

#### A. *Legal Issues Raised by Editorial Privileges*

There are at least three potentially important legal issues raised by the Commission's embrace of editorial privileges.

The first concern is that use of editorial privileges may result in publication of a version of rules or an order that is substantively different than that approved by the Commission. This would result in the unusual circumstance that the item published in the Federal Register is not the item approved by the Commission, and that the item approved by the Commission has not satisfied the APA's publication requirements. As a practical matter, this concern is not likely to lead to substantial legal problems for the Commission. Courts generally find that failure to properly publish a rule or an order do not invalidate that item – publication defects can be cured after the fact.<sup>46</sup> There is still potential for at least confusion, and perhaps serious concern, if there are substantive differences between the item as published and as voted on by the Commission.<sup>47</sup> But, here too, courts are likely to allow the agency so save its preferred interpretation.<sup>48</sup> So long as there is not substantial reason to believe that a majority of the Commission would not have approved the item as published, courts are likely to allow that version of an item stand as the official version. In such cases, the only cost incurred by using editorial privileges is the time and uncertainty that the public and regulated parties would face if there were conflicting versions of an item – though this cost may certainly be great.

The second concern brings us to a more substantive place: the availability of the “decision draft” text voted upon by the Commission. The Commission has consistently refused to release such text until staff has exhausted its editing process. Indeed, the Commission has consistently withheld such text even against FOIA requests, claiming the deliberative process exemption.<sup>49</sup>

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46. *See Prows v. Dep't of Justice*, 938 F.2d 274, 276 (D.C. Cir. 1991) (“While failure to comply with the notice and comment requirements of § 553(b) is fatal to the validity of the challenged rule, § 553(d)'s 30-day requirement calls for a different solution. We agree with the Tenth Circuit that ‘§ 553(d) is susceptible of a reasonable construction that the regulation may be saved and held valid after passage of the 30-day notice period.’”).

47. Such concerns are suggested, for instance, by the 1994 GAO report. U.S. GEN. ACCT. OFFICE, *supra* note 22, at 9 (“FCC's files on decisions do not contain the information needed to review post-vote changes and verify that all significant changes were approved.”).

48. Courts generally defer to agency interpretations of ambiguous agency regulations, so long as there is no reason to suspect that the proffered interpretation reflects the agency's “fair and considered judgement.” *See Auer v. Robbins*, 519 U.S. 452, 453 (1997).

49. *See, e.g., In re Dunbar*, 23 F.C.C. Rcd. 9850 (2008) (denying Associated Press FOIA request, citing the deliberative process privilege exemption); Letter from Elizabeth Lyle, FCC Assistant General Counsel, to Berin Szoka, TechFreedom, (March 27, 2015) (copies on file with author and journal) (denying Tech Freedom FOIA request, citing the deliberative process privilege exemption).

The Commissions analysis in these cases is, simply, wrong. As explained by FCC General Counsel, the purpose of the deliberative process exemption is to “protect[ ] the internal deliberative processes of an agency . . . [because] allowing the Commission to engage in frank, non-public discussions improves the decision-making process.”<sup>50</sup>

But this exemption is far from absolute. Indeed, with respect to “final opinions,” the Supreme Court has said that the deliberative process exemption simply “can never apply.”<sup>51</sup> As explained by the Court,

the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions. The quality of a particular agency decision will clearly be affected by the communications received by the decisionmaker on the subject of the decision prior to the time the decision is made. However, it is difficult to see how the quality of a decision will be affected by communications with respect to the decision occurring after the decision is finally reached.<sup>52</sup>

If we take the Commission at its word that editorial revisions are inherently non-substantive, then there is simply no basis for withholding the so-called “decision draft” on which the Commission votes. Only predecisional communications are protected by the deliberative process exemption – any communications following adoption of an item, including the item itself, are by definition post-decisional and therefore subject to disclosure.<sup>53</sup> Indeed, the Court’s discussion of the deliberative process exemption makes clear that all internal agency discussions following the adoption of an agency policy that relate to the implementation of or explain the basis for that policy – such as one would expect to arise in the execution of editorial privileges – are expressly outside of the scope of the deliberative process exemption.<sup>54</sup> To take the most extreme example, under the Court’s rationale, in cases where the Commission has adopted a summary draft of an item, leaving it to staff to flush out the final text of the item, the Commission’s “decision” is embodied in the summary alone. The purpose of the deliberative process exemption is limited to protecting deliberations that went into the drafting of the summary. The process of rendering that summary into a final order is post-deci-

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50. Sallet, *supra* note 21.

51. *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153-54 (1975).

52. *Id.* at 151.

53. “Accordingly, the lower courts have uniformly drawn a distinction between predecisional communications, which are privileged, and communications made after the decision and designed to explain it, which are not.” *Id.*

54. “This distinction is supported . . . , in the case of those communications which explain the decision, by the increased public interest in knowing the basis for agency policy already adopted. . . . The public is vitally concerned with the reasons which did supply the basis for an agency policy actually adopted. These reasons, if expressed within the agency, constitute the ‘working law’ of the agency and have been held by the lower courts to be outside the protection of [the deliberative process exemption].” *Id.* at 151-52.

sional, and the Court makes plainly clear that any communications relating to that process are not protected.

The third, and most substantial, legal concern relates to the Commission's alarming trend of using editorial privileges as an opportunity to respond to concerns raised by dissenting Commissioners. As explained by Commission General Counsel, "The statements may generate additional internal discussions, during which both the order and the statements may be clarified. In addition, the order itself must address any significant argument made in the statements – or risk being overturned in court for failing to address the issue."<sup>55</sup> Courts should reject such additions to Commission orders and rules as litigating positions and post-hoc rationalizations.

The lodestone of judicial review of agency proceedings is ensuring an "agency's fair and considered judgment on the matter,"<sup>56</sup> and a central purpose of requiring that agencies include a "concise general statement of basis and purpose" in its Orders is to allow courts "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did."<sup>57</sup> The very concept of revising an order subsequent to its adoption by the agency in order to incorporate post-hoc responses to arguments raised contemporaneous with or subsequent to its adoption is contrary to the very purposes of administrative process. At minimum, such post-hoc revisions are "not the result of the agency's deliberative processes," so are in the same category as other convenient litigating positions and post-hoc rationalizations.<sup>58</sup> The APA requires the FCC to consider and deliberate relevant substantive issues in crafting its rules and orders – it is wholly inappropriate for the Commission to use self-granted "editorial privileges" to "skirt [ ] those procedures."<sup>59</sup>

### B. Saving Editorial Privileges . . .

Despite these concerns, there is a straightforward cure for the defects in the Commission's use of editorial privileges. Where Commission staff would intend to request editorial privileges, staff should inform the Commission prior to its vote on an item. Rather than voting to adopt such items, the Commission should vote to either place the item on circulation for further consideration (the equivalent to a current vote in favor of an item), or to remove the item from further consideration (the equivalent of a current vote against an item). The language of such a vote is clear, indicating to the public

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55. Sallet, *supra* note 21.

56. Nat'l Wildlife Fed'n v. Browner, 127 F.3d 1126, 1129 (D.C. Cir. 1997) (quoting Auer v. Robbins, 519 U.S. 452, 462 (1997)).

57. United States v. Nova Scotia Food Products, 568 F.2d 240, 252 (2d Cir. 1977) (quoting Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968)).

58. Nat'l Wildlife Fed'n, 127 F.3d at 1129 (citing Fed. Labor Relations Auth. v. United States Dep't of Treasury, 884 F.2d 1446, 1455 (D.C. Cir. 1989)).

59. Fed. Labor Relations Auth., 884 F.2d at 1455.

that the item is not being adopted. This avoids concerns about the decisional and deliberative status of the item. It places it into a structured system to ensure that substantive (indeed, all) changes continue to be tracked through the Commission's established notational mechanisms. In sum, it would cure all *procedural* defects.

C. . . . or not

It would be better, however, for the Commission to abandon its editorial process entirely and instead require staff to present only final items to the Commission for votes. No other agency requires special post-adoption revision mechanisms.

The truth of the matter is that the Commission's contemporary use of editorial privileges is a reflection of more basic dysfunction within the agency. The process is a hold-over from a more collegial and informal time in the Commission's history – a time when ongoing staff edits were part of a collaborative drafting process that facilitated ongoing deliberation between commissioners. Today, however, the practice is used to patch over a broken deliberative process. More troubling still, it facilitates and likely exacerbates this dysfunction.

If you don't believe me, I suggest that you describe the process and the rationale offered to support it to your local administrative law scholar. They likely won't make it past the Commission's concern that, without editorial privileges, agency action will be subject to interminable delays as dissenting Commissioners raise an ongoing series of substantive 11th hour objections. And if they do, the idea of adding post-hoc responses to dissenting Commissioners' statements is sure to floor them. The very purpose of administrative process is to ensure that all of those 11th hour objections and concerns raised in dissenting statements are thoroughly considered and incorporated into an order *before* it is voted on. The fact that these are offered as serious justifications for the Commission's continued use of editorial privileges demonstrates why the process is fundamentally flawed and why use this practice must be condemned to the dustbin of legal history.