THE FCC'S INTERNET POWER SURGE: THE CONSTITUTIONAL AND STATUTORY LIMITS ON THE FCC'S AUTHORITY TO PROMULGATE INTERNET TRAFFIC RULES

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The FCC's Internet Power Surge: The Constitutional And Statutory Limits On The FCC's Authority To Promulgate "Net Neutrality" Rules

By Gregory G. Garre*

The Federal Communications Commission (FCC or Commission) has established authority over the regulation of virtually all television, radio, satellite, and cable services in America. Recently, the FCC has proposed an expansion of its authority into a new arena—broadband Internet access service. In October 2009, the Commission noticed its intent to adopt rules governing traffic over the Internet.[1] Proponents of the FCC's so-called "net neutrality" rules maintain that they would allow Internet traffic to flow more freely, while opponents claim that federal regulation in this area could stifle the innovation and growth that has been the hallmark of the Internet since it became a household word less than two decades ago.[2] Whatever the proper resolution of that important policy debate, there is a critical threshold question that must be answered—whether Congress has authorized the FCC to regulate at all in this area. And upon examination, the FCC's broad new assertion of power over the Internet is unsound.

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An examination of the FCC's authority over broadband Internet access service must start with first principles. The Constitution vests "[a]ll legislative Powers" in the Congress.[3] Administrative agencies, including independent agencies like the FCC, are "creature[s] of statute" and draw their authority from Congress.[4] The FCC's regulatory reach is thus constrained by the fundamental separation-of-powers principle that an agency "literally has no power to act—unless and until Congress confers power upon it."[5] Moreover, courts are "skeptical" of agency efforts to assert power in "new arenas" and perform a "close and searching analysis of congressional intent" to authorize such undertakings.[6] Even where a statute is "imperfect," the Supreme Court has stressed that an agency "has no power to correct flaws that it

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[1] *Preserving the Open Internet; Broadband Industry Practices*, Notice of Proposed Rulemaking, GN Docket No. 09-191, WC Docket No. 07-52, at 36 (rel. Oct. 22, 2009) [Net Neutrality NPRM].

[2] *See generally* Aaron K. Brauer-Rieke, Note, *The FCC Tackles Net Neutrality: Agency Jurisdiction and the Comcast Order*, 24 BERKELEY TECH. L.J. 593, 595-99 (2009).

[3] U.S. Const. art. I, § 1.

[4] *Guardians Ass'n* v. *Civil Serv. Comm'n*, 463 U.S. 582, 614 (1983).

[5] *Louisiana Pub. Serv. Comm'n* v. *FCC*, 476 U.S. 355, 374 (1986).

[6] *ACLU* v. *FCC*, 823 F.2d 1554, 1567 n.32 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 959 (1988). As the D.C. Circuit observed: "Where the issue is one of whether a delegation of authority by Congress has indeed taken place (and the boundaries of any such delegation), rather than whether an agency has properly implemented authority indisputably delegated to it, Congress can reasonably be expected both to have and to express a clear intent. The reason is that it seems highly unlikely that a responsible Congress would implicitly delegate to an agency the power to define the scope of its own power. When an agency's assertion of power into new arenas is under attack, therefore, courts should perform a close and searching analysis of congressional intent, remaining skeptical of the proposition that Congress did not speak to such a fundamental issue." *Id.*

perceives in the statute that it is empowered to administer" by extending its "rulemaking power" beyond the boundaries set by Congress.[7] When a statute "falls short" of conferring the authority necessary for an agency to provide "safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the [agency] or the courts, to address."[8]

Like many organic Acts, the statute creating the FCC speaks in broad—though by no means unbounded—terms. The Communications Act of 1934 established the FCC to "regulat[e] interstate and foreign commerce in communication by wire and radio so as to make available . . . rapid, efficient, Nation-wide, and world-wide wire and radio communication service."[9] The Act confers jurisdiction covering "all interstate and foreign communication by wire or radio,"[10] with the Commission's authority covering "instrumentalities, facilities, apparatus, and services"[11] used for the receipt and delivery of such transmissions. Generally speaking, the Act is divided up into provisions governing the regulation of interstate "wire and radio" communications (Title I), interstate common carriers (Title II), spectrum licensees in radio (Title III), and cable operators (Title VI). With the advent of the digital era, Congress in the Telecommunications Act of 1996 amended these statutory provisions to authorize the Commission to regulate "telecommunications carriers, but not information-service providers, as common carriers."[12] And, importantly, the FCC has classified broadband Internet service providers as "information-service providers" that are, by definition, not subject to regulation as common carriers.[13]

Neither of these statutes explicitly addresses broadband Internet access service, which is understandable given that the Internet did not become a fixture of American life until after 1996. In recent years, Congress has considered, but failed to enact, bills that would expressly confer authority on the FCC to adopt rules governing broadband Internet networks. For example, the proposed "Communications Opportunity, Promotion, and Enhancement Act of 2006"[14] provided that "[t]he Commission shall have the authority to enforce the Commission's broadband policy statement and the principles incorporated therein."[15] The bill did not become law. Similar bills have been proposed that would provide the FCC with such authority, but none has passed.[16]

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[7] *Board of Governors of Fed. Reserve Sys.* v. *Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986).

[8] *Id.*

[9] Communications Act of 1934, § 1, 47 U.S.C. § 151 (2006).

[10] 47 U.S.C. § 152(a).

[11] *Id.* § 153(33).

[12] *National Cable & Telecommunications Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 975 (2005).

[13] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd 4798, 4821-23 ¶¶ 36-38, 2002 WL 407567 (2002); *see* Net Neutrality NPRM at 11 ¶ 29. That determination was upheld by the Supreme Court in the *Brand X* case.

[14] Communications Opportunity, Promotion, and Enhancement Act of 2006, H.R. 5252, 109th Cong. § 715.

[15] *Id.* § 715(a).

[16] *See, e.g.*, Internet Freedom Preservation Act of 2009, H.R. 3458, 111th Cong. § 3 (2009); Internet Freedom Preservation Act, S. 215, 110th Cong. § 2 (2007); Network Neutrality Act of 2006, H.R. 5273, 109th Cong. § 4 (2006).

Title I of the Communications Act generally describes the FCC's powers. The statute states that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[17] While phrased in broad terms, the Supreme Court has rejected the argument that such a general grant of rulemaking confers unbounded authority.[18] Rather, the Court has held that a statute's general rulemaking provision "only permits [an agency] to police *within the boundaries* of the Act; it does not permit the [agency] to expand its jurisdiction beyond the boundaries established by Congress in [the Act's substantive provisions]."[19]

The Supreme Court has stated that Title I grants the FCC a measure of "ancillary jurisdiction" to impose "regulatory obligations" in carrying out is statutory charge[20]—and it is on that "ancillary" basis alone that the Commission asserts "authority to prescribe rules implementing Federal Internet Policy."[21] Under the ancillary jurisdiction doctrine, the FCC may exercise jurisdiction where "(1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[22] As the D.C. Circuit has cautioned, however, exercise of this "amorphous" category of jurisdiction must be carefully "constrained" to comply with the fundamental principles limiting the exercise of agency authority to that delegated by the Lawmaking Branch.[23] Without such limits, the ancillary jurisdiction doctrine would confer "unbounded" jurisdiction on the Commission.[24]

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A series of cases underscores the restraint that must be exercised in evaluating the FCC's assertion of ancillary jurisdiction. In *United States* v. *Southwestern Cable Co.*, the Supreme Court considered the FCC's efforts to extend its regulatory jurisdiction to cable television (CATV) systems in the absence of any express grant of authority over such systems from Congress.[25] The Court upheld this authority. First, the Court noted that it was undisputed that CATV systems fell within the ambit of interstate "communication by wire or radio," fulfilling the necessary grant of subject matter general jurisdiction under Title I.[26] Second, the Court concluded that the FCC's exercise of jurisdiction over CATV systems was "reasonably ancillary" to other provisions of the Act that expressly obligated the agency (through various

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[17] 47 U.S.C. § 154(i).

[18] *Dimension Fin. Corp.*, 474 U.S. at 373-74.

[19] *Id.* at 373 n.6.

[20] *See Brand X*, 545 U.S. at 976.

[21] Net Neutrality NPRM at 36 (heading; initial capitals omitted); *id.* at 36 ¶ 83.

[22] *American Library Ass'n* v. *FCC*, 406 F.3d 689, 700 (D.C. Cir. 2005) (citing *Flag Order*, 18 FCC Rcd 2355, 2356 ¶ 23 (2003)); *see United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968).

[23] *Id.* at 692; *see Motion Picture Ass'n of Am., Inc.* v. *FCC*, 309 F.3d 796, 804 (D.C. Cir. 2002).

[24] *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 706 (1979).

[25] 392 U.S. 157, 167 (1968).

[26] *Id.* at 168 (quoting 47 U.S.C. § 152(a)).

specific means) to establish "an appropriate system of local television broadcasting."[27] The Court also stressed, however, that its decision "express[ed] no views as to the Commission's authority, if any, to regulate CATV under any other circumstances or for any other purposes."[28]

The Supreme Court's subsequent decisions addressing the FCC's ancillary authority underscore that the doctrine is indeed limited. In *United States* v. *Midwest Video Corp.* (*Midwest Video I*)—decided four years after *Southwestern*—a bare plurality of the Court upheld the FCC's exercise of ancillary jurisdiction with respect to rules limiting CATV systems from carrying broadcast stations that did not provide adequate facilities for local programming.[29] That decision, however, provoked a strong dissent by Justice Douglas on behalf of four Justices, who argued that the plurality opinion had effected an "amendment to the broadcasting provisions of the Act, which only the Congress can effect."[30] And Chief Justice Burger, who provided the crucial fifth vote but concurred only in the result reached by the Court, candidly observed that "the Commission's position strains the outer limits of even the open-ended and pervasive jurisdiction that has evolved by decisions of the Commission and the courts."[31]

Seven years later, the Court revisited the FCC's authority to promulgate CATV rules in *FCC* v. *Midwest Video Corp.* (*Midwest Video II*).[32] This time the Court rejected the Commission's assertion of ancillary jurisdiction. The rule at issue prescribed a series of obligations ensuring public, educational, and governmental access channels on large CATV systems.[33] The Court stated that the exercise of ancillary jurisdiction in *Midwest Video I* "'strain[ed] the outer limits' of the Commission's authority," and refused to embrace the exercise of such jurisdiction in *Midwest Video II*.[34] The Court explained that the rule at issue in *Midwest Video II* both "impose[d] common carrier obligations on cable operators" and restrained the "editorial discretion" of broadcasters in contravention of other provisions of the Act.[35] Moreover, the Court emphasized that, "[t]hough afforded wide latitude in its supervision over communication by wire, the Commission was not delegated unrestrained authority."[36]

Taking its cue from the Supreme Court, the D.C. Circuit has refused to embrace the FCC's assertion of ancillary jurisdiction in two recent cases. In *Motion Picture Association of America, Inc.* v. *FCC* (*MPAA*), the court held that the Commission lacked authority to promulgate rules mandating video description.[37] The court concluded that "the FCC can point to

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[27] *Id.* at 173-78 (discussing provisions).

[28] *Id.* at 178.

[29] 406 U.S. 649 (1972).

[30] *Id.* at 680 (Douglas, J., dissenting, joined by Stewart, Powell, and Rehnquist, JJ.)

[31] *Id.* at 676 (Burger, C.J., concurring in the result).

[32] 440 U.S. 689 (1979).

[33] *Id.* at 693-94.

[34] *Id.* at 708 (quoting *Midwest Video I*, 406 U.S. at 676 (Burger, C.J., concurring in result).

[35] *Id.* at 701-02, 708.

[36] *Id.* at 706.

[37] 309 F.3d 796 (D.C. Cir. 2002).

no statutory provision that gives the agency authority to mandate visual description rules," and that the agency had "acted without delegated authority from Congress."[38] Moreover, the court stressed that Title I "does not give the FCC unlimited authority to act as it sees fit with respect to all aspects of television transmissions, without regard to the scope of the proposed regulations."[39] And the court soundly rejected the notion "that the adoption of rules mandating video description is permissible because Congress did not expressly foreclose the possibility."[40]

In *American Library Association* v. *FCC*, the D.C. Circuit likewise rejected the FCC's assertion of ancillary jurisdiction "to regulate consumers' use of television receiver apparatus after the completion of a broadcast transmission."[41] After reviewing the Supreme Court cases discussed above, the court observed that the Court has "followed a very cautious approach in deciding whether the Commission had validly invoked its ancillary jurisdiction, even when the regulations under review clearly addressed 'communication by wire or radio.'"[42] And the court concluded that "[g]reat caution is warranted here, because the disputed broadcast flag regulations rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing."[43] The court refused to countenance such an exercise of jurisdiction, observing that it would improperly "confer 'unbounded jurisdiction on the Commission.'"[44] Moreover, the court "categorically reject[ed]" the suggestion that the Commission "possesses *plenary* authority to act within a given area simply because Congress has endowed it with *some* authority to act in that area."[45]

As these cases illustrate, the Supreme Court and D.C. Circuit have carefully constrained the ancillary jurisdiction doctrine and applied it with great care. That restraint is necessitated by the constitutional limits on the exercise of administrative authority beyond that which is delegated by Congress. Moreover, it is consistent with the "amorphous"[46] and precarious nature of the ancillary jurisdiction doctrine altogether, which is underscored by the fact that it was conceived by the Supreme Court in an era in which the Court took a more free-wheeling approach to the interpretation of congressional authorizations and jurisdiction.[47] Yet, given the importance of the Internet in America today—a phenomenon that literally "has transformed our

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[38] *Id.* at 807.

[39] *Id.* at 798.

[40] *Id.* at 805.

[41] 406 F.3d 689, 691 (D.C. Cir. 2005).

[42] *Id.* at 702 (discussing *Illinois Citizens Committee for Broadcasting* v. *FCC*, 467 F.2d 1397 (7th Cir. 1972)). In *Illinois Citizens*, the Seventh Circuit observed that the Supreme Court "appeared to be treading lightly even where the activity at issue easily falls within [provisions of the Act] as being 'communication by wire or radio,' and 'transmission of . . . signals, pictures, and sounds of all kinds.'" 467 F.2d at 1400.

[43] 406 F.3d at 702.

[44] *Id.* at 703 (quoting *Midwest Video II*, 440 U.S. at 706).

[45] *Id.* at 708.

[46] *Id.* at 692.

[47] *Cf. Alexander* v. *Sandoval*, 532 U.S. 275, 287 (2001) (observing that the Court has "sworn off the habit of venturing beyond Congress's intent" in the context of determining whether a private cause of action exists).

nation's economy, culture, and democracy"[48]—the FCC's assertion of ancillary jurisdiction over the matters at issue in these prior cases pales in comparison to the Commission's assertion of ancillary jurisdiction over "Federal Internet Policy."[49]

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While it is more than 100 pages long (including appendices), the FCC's notice of proposed rulemaking on "net neutrality" deals with the question of the agency's "authority to prescribe rules implementing Federal Internet Policy" in about a page.[50] The Commission bases its authority solely on the exercise of "ancillary jurisdiction," explaining that "we believe that exercising ancillary authority over facilities-based Internet access will 'promote the objectives for which the Commission has been [specifically] assigned jurisdiction' and 'further the achievement of . . . [legitimate] regulatory goals.'"[51] The NPRM then points to three sections of the Communications Act, as amended—section 230(b), section 706(a), and section 201(b), respectively—the first two of which consist of statements policy and goals with respect to the Internet and the latter of which is a general rulemaking provision.[52] Even assuming that the Commission can satisfy the subject matter prong of the ancillary jurisdiction test, the question is whether the provisions identified by the FCC support the exercise of ancillary jurisdiction.

Section 230(b) does not impose any "statutorily mandated responsibilit[y]" on the FCC.[53] To the contrary, it simply states "the policy of the United States" with respect to the Internet.[54] The Commission has argued that, "[g]iven section 230's placement within the Act, we think that the Commission's ancillary authority to take appropriate action to further the policies set forth in section 230(b) is clear."[55] But a provision's "placement within the Act" cannot transform a general statement of federal policy into a statutorily mandated responsibility of the FCC. Moreover, the terms of Congress's policy statement is, if anything, directly at odds with the

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[48] Net Neutrality NPRM at 2.

[49] *Id.* at 36 (heading).

[50] *Id.* (initial capitals omitted).

[51] *Id.* ¶¶ 83-84 (alterations in original).

[52] *Id.* ¶ 84. The NPRM also refers to the fact that "[v]oice and video services are increasingly delivered over the Internet," and that wireless broadband Internet access services use "radio spectrum" allocated under Title III. *Id.* ¶¶ 85-86, at 36. These observations fall far short of identifying a statutorily mandated responsibility that would support the exercise of ancillary jurisdiction over broadband Internet access service, and are far more amorphous than any provision of law that has been recognized as a source of ancillary jurisdiction. Indeed, the fact that there is a *connection* between the Internet and communications or facilities that the Commission *has been* delegated the authority to regulate provides no basis for the exercise of ancillary jurisdiction over the Internet. If it did, the FCC's authority truly would be limitless given the reach of wire and radio communications in our society today.

[53] *American Library Ass'n*, 406 F.3d at 700.

[54] 47 U.S.C. § 230(b).

[55] *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Applications; Broadband Industry Practices; Petition of Free Press et al. for Declaratory Ruling that Degrading an Internet Application Violates the FCC's Internet Policy Statement and Does Not Meet an Exception for "Reasonable Network Management,"* Memorandum Opinion and Order, 23 FCC Rcd 13,028, 13,036 ¶ 15 (2008).

FCC's assertion of regulatory authority over the Internet. Among other things, Congress stated that it is the "policy of the United States" to "preserve the vibrant and competitive free market that presently exists for the Internet . . . *unfettered by Federal or State regulation*."[56] And the text of the proceeding findings similarly states that that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[57] Section 230(b) is thus a rather unlikely source of ancillary authority to subject broadband Internet access service to a brand new federal regulatory regime.

Section 706(a) of the Telecommunications Act is a no more plausible source of ancillary jurisdiction. That section provides that the FCC shall offer incentives to promote "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[58] The statute defines advanced telecommunications capabilities as "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."[59] As a basis for ancillary authority, section 706(a) fails in the same fundamental respects as section 230(b). First, like section 230(b), section 706(a) does not impose any specific statutory mandate on the agency. Rather, section 706(a) is simply a statement of "congressional policy,"[60] which itself "is not an operative part of the statute and it does not enlarge or confer powers on administrative agencies or officers."[61] Second, like section 230(b), section 706(a) calls for forbearing—not unleashing—regulation of the Internet. For example, it urges "regulatory forbearance" and "other regulating methods that *remove* barriers to infrastructure investment."[62]

And section 201(b) is similarly unavailing. That section provides the Commission with general rulemaking authority "to carry out the provisions of this chapter."[63] But the Supreme Court has already rejected the notion that a statute's delegation of general rulemaking authority can authorize an agency "to expand its jurisdiction beyond the boundaries" established by the substantive provisions of the statute.[64] What is more, the "provisions of th[e] chapter" covered by section 201(b) address obligations imposed on common carriers. And the FCC—in the ruling upheld by the Supreme Court in *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*—determined that Internet service providers "are *not* subject to mandatory

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[56] 47 U.S.C. § 230(b)(2) (emphasis added). The legislative history of this provision underscores that its drafters sought to prevent, rather than unleash, "an army of bureaucrats regulating the Internet." 141 CONG. REC. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox).

[57] 47 U.S.C. § 230(a)(4).

[58] *Id.* § 1302(a).

[59] *Id.* § 1302(d)(1).

[60] *National Cable & Telecommunications Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 339 (2002).

[61] *Association of Am. R.R.s* v. *Costle*, 562 F.2d 1310, 1316 (D.C. Cir. 1977).

[62] 47 U.S.C. § 1302(a) (emphases added).

[63] 47 U.S.C. § 201(b).

[64] *Dimension Fin. Corp.*, 474 U.S. at 373 n.6.

common-carrier regulation under Title II."[65] So, especially as interpreted by the FCC, section 201(b) cannot confer ancillary jurisdiction to regulate broadband Internet access.

There is an additional and perhaps even more fundamental difficulty with the FCC's efforts to exercise ancillary jurisdiction to promulgate "net neutrality" rules: Recognizing such authority would undermine other provisions of the Communications Act. In authorizing the exercise of ancillary authority over the CATV services at issue in the *Southwestern* case, the Supreme Court emphasized that the proposed rules were "not inconsistent with [the] law."[66] The FCC overstepped this bound in *Midwest Video II* by adopting rules that "contravene[d] statutory limitations designed to safeguard the journalistic freedom of broadcasters" and "impose[d] common carrier obligations on cable operators."[67] The FCC's assertion of authority to regulate broadband access suffers from the same basic flaw. For example, as discussed, Congress has expressed a policy of regulatory *forbearance* with respect to the Internet—whatever the merits of the regulations, subjecting broadband Internet access service to the Commission's proposed "net neutrality" rules (and any attendant regulation) contravenes that statement of policy.

Furthermore, the central feature of the proposed regulations is the imposition of "a Principle of Nondiscrimination" that would "prohibit[] a broadband Internet access service provider from discriminating against, or in favor of, any content, application, or service, subject to reasonable network management."[68] Such nondiscrimination mandates are central to common carrier regulation.[69] But, as discussed, the FCC itself has determined that Internet service providers should be treated as information service providers and *not* common carriers. The proposed regulations therefore contravene the Communications Act's express prohibition on treating entities like common carriers when they do not provide common carrier services.[70] This statutory disconnect also undermines the agency's assertion of authority.

Finally, here, as in the recent D.C. Circuit cases discussed above, the FCC's assertion of ancillary jurisdiction to regulate broadband Internet access service has no limiting principle. As explained, the proposed "net neutrality" regulations "rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing."[71] Recognizing ancillary jurisdiction to promulgate those regulations therefore would be tantamount to conferring "unbounded" jurisdiction on the

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[65] 545 U.S. at 976 (emphasis added). In *Brand X*, the Supreme Court observed that "the Commission remains free to impose special regulatory duties on facilities-based [Internet service providers] under its Title I ancillary jurisdiction." *Id.* at 996. But because the question in *Brand X* was whether the FCC had correctly classified cable Internet services as "information services," not whether specific regulations fell within the agency's authority, that language is dicta. In fact, the very next sentence of the opinion notes that the FCC properly had "invited comment on whether it *can* and should do so." *Id.* (emphasis added).

[66] *Southwestern Cable Co.*, 392 U.S. at 178 (internal quotation marks omitted).

[67] *Midwest Video II*, 440 U.S. at 700, 701-02.

[68] Net Neutrality NPRM at 41 ¶ 104.

[69] *See* 47 U.S.C. § 202(a).

[70] *See id.* § 153(44) ("A telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent that it is engaged in providing telecommunications services* . . . .") (emphasis added).

[71] *American Library Ass'n*, 406 F.3d at 702.

Commission.[72] Both the Supreme Court and the D.C. Circuit have rejected the Commission's assertion of such "unbounded jurisdiction" in prior instances and the constitutional limits on the exercise of administrative authority compel no less here. Especially when viewed with the "skeptic[ism]" with which courts greet an agency's attempt to extend its power into "new arenas," the FCC has failed to justify its far-reaching assertion of ancillary jurisdiction here.[73]

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All of which gets back to Congress. We are talking about regulation of the Internet—an engine that "has transformed our nation's economy, culture, and democracy."[74] As the Supreme Court has observed, Congress "does not . . . hide elephants in mouse holes."[75] If Congress had intended to authorize the FCC to regulate the Internet, it is at a minimum reasonable to assume that it would have done so more directly. But it has not. In fact, as discussed, while several bills have been proposed in Congress that would give the FCC express authority to regulate the Internet, none has passed. Rather than embark on a path-marking effort to regulate broadband Internet access service based on a misguided conception of ancillary jurisdiction, the FCC could go to Congress and seek an express delegation of the authority that it currently lacks. And the nation no doubt would be well served by the ensuing debate. In any event, as the Supreme Court has admonished, "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."[76] And when it comes to the "net neutrality" rules, Congress has not delegated that authority.

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[72] *Midwest Video II*, 440 U.S. at 706.

[73] *ACLU*, 823 F.2d at 1567 n.32. Recent events underscore that the courts are likely to be skeptical of the FCC's exercise of rulemaking authority in this new area. Before issuing its NPRM on net neutrality, the FCC asserted ancillary authority—based on the same considerations discussed above—to regulate broadband Internet service through a targeted *adjudication* brought against the nation's largest broadband service provider (Comcast Corporation), purporting to enforce a "Federal Internet Policy" statement issued by the Commission in 2005. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd 14,986 (2005). In early January 2010, the D.C. Circuit heard oral argument on the validity of the FCC's enforcement efforts in *Comcast Corp.* v. *FCC*, No. 08-1291. According to news reports, the three-judge panel "appeared skeptical" that the Commission had ancillary authority to regulate such broadband providers. Associated Press, *Comcast, FCC Take Net Neutrality Dispute to Court*, N.Y. TIMES, Jan. 8, 2010, http://www.nytimes.com/aponline/2010/01/08/business/AP-US-TEC-Comcast-FCC-Internet-Rules.html; *see also* Cecilia Kang, *FCC Looks at Ways To Assert Authority over Web Access*, WASH. POST, Jan. 15, 2010, at A22, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/01/14/AR2010011404717.html (noting that the "three judges grilled an FCC lawyer over whether the agency had acted outside the scope of its authority"). The case remains pending before the court of appeals. Even if the D.C. Circuit rules in favor of Comcast, however, it may choose not to reach the question of ancillary authority. The court also could rule more narrowly that the Commission improperly attempted to enforce a policy statement through adjudication and vacate the FCC order as unlawful on that ground without reaching the question whether the FCC has ancillary authority to regulate in this area at all. *See* Br. for Pet'r at 20-27, 56, *Comcast Corp.* v. *FCC*, No. 08-1291 (D.C. Cir. July 27, 2009).

[74] Net Neutrality NPRM at 2 ¶ 1.

[75] *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

[76] *Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).