Net Neutrality and the Rule of Law

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Note from the Editor:

This article is about the Federal Communications Commission's net neutrality rules. As always, the Federalist Society takes no position on particular legal or public policy initiatives. Any expressions of opinion are those of the authors. Generally, the Federalist Society refrains from publishing pieces that advocate for or against particular policies. However, in some cases, such as with this article, we will do so because of some aspect of the specific issue. In the spirit of debate, whenever we do that we will offer links to other perspectives on the issue, including ones in opposition to the arguments put forth in the article. We also invite responses from our readers. To join the debate, please e-mail us at info@fedsoc.org.

• Tom Wheeler, *FCC Chairman Tom Wheeler: This Is How We Will Ensure Net Neutrality*, Wired, (February 4, 2015), http://www.wired.com/2015/02/fcc-chairman-wheeler-net-neutrality/.

• Tim Wu, *Net Neutrality: How the Government Finally Got It Right*, The New Yorker, (February 5, 2015), http://www.newyorker.com/news/news-desk/net-neutrality-shows-democracy-can-work.

• Christopher S. Yoo, *Net Neutrality Rules: Why They Kill Silicon Valley's Startup Culture*, Fortune, (March 18, 2015), http://fortune.com/2015/03/18/net-neutrality-rules-why-it-kills-silicon-valleys-startup-culture/.

I. Internet Regulation by the FCC

The Federal Communications Commission (FCC) was created for "the purpose of regulating interstate and foreign commerce in communication by wire and radio." While Congress has expanded the FCC's regulatory mandate over time to embrace new communications technologies, it has never granted the FCC open-ended regulatory authority over communications. Instead, the Commission has been given express regulatory power with respect to specific types of communications. In the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Congress charged the FCC with regulating telecommunications services in Title II of the Act; broadcast television, radio, and commercial mobile radio service in Title III; and cable television in Title VI. The degree to which the FCC can stretch the bounds of its statutory mandate has critical implications for federal power to control communications.

II. Net Neutrality Rules

Probably the most controversial issue in the communications arena today is the FCC's ongoing effort to regulate the Internet to promote "net neutrality." Despite the absence of express authority to regulate the Internet, the FCC has sought for nearly a decade to impose "net neutrality" requirements on Internet service providers (ISPs)—companies like AT&T, Verizon, and Comcast as well as small and rural providers. The FCC's previous two regulatory attempts in this regard were overturned in court. Earlier this year, the Commission imposed strict net neutrality rules and, in the process, classified broadband Internet access service as a telecommunications service subject to the requirements of Title II of the Act.

III. Net Neutrality in Context

Net neutrality represents the concept that ISPs should treat all Internet traffic equally—not blocking or degrading some content and not speeding up or slowing down content based on its source. Net neutrality supporters fear that ISPs will use their control over the Internet connection they provide to their customers to extract fees from content providers or otherwise disadvantage unaffiliated content. For this reason, public interest groups and many Internet content companies (sometimes referred to as "edge providers") favor net neutrality rules. On the other hand, ISPs believe that they should be able to control their own networks and that the competitive marketplace will prevent them from engaging in misconduct of the sort net neutrality advocates invoke, noting also that other laws already exist (including antitrust laws) to address such misconduct in the unlikely event of a market failure.

Nearly everyone supports the central ideal at the core of net neutrality, including the ISPs. The heart of the debate is whether the FCC has the authority to impose net neutrality requirements through regulation. From 1998 to 2015, the FCC—under both Republican and Democrat administrations—treated Internet access as an unregulated information service under Title I of the Communications Act. The Supreme Court upheld this policy in *NCTA v. Brand X Internet Services*.[1]

After *Brand X*, the FCC issued an Internet Policy Statement adopting four principles that, according to the Commission, would "encourage broadband deployment, preserve and promote the open and interconnected nature of the public Internet," and entitle consumers to: (1) access lawful Internet

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content of their choice; (2) run applications and use services as desired, subject to the needs of law enforcement; (3) connect their choice of legal devices that do not harm the network; and (4) enjoy the benefit of "competition among network providers, application and service providers, and content providers." While not legally binding, these principles were endorsed by the largest ISPs.

The debate about net neutrality has been largely theoretical. There has been little evidence that ISPs have unfairly blocked access to websites or online services. The most high-profile incident to date involved allegations that Comcast was using network management techniques to address congestion from file sharing services such as BitTorrent, which can use up to 60 percent of the bandwidth of an ISP's network. The FCC found that Comcast's network management practices violated federal Internet policy. Comcast appealed, and the D.C. Circuit held that the Commission had not demonstrated statutory authority to regulate ISPs' network management practices.[2]

The FCC responded in 2010 by adopting net neutrality regulations under several statutory provisions, including Section 706 of the Telecommunications Act, which directs the Commission to encourage the deployment of broadband infrastructure.[3] Specifically, the FCC adopted: (1) a transparency rule requiring broadband providers to disclose their network management practices; (2) rules prohibiting wireline broadband providers from blocking access to lawful content and wireless providers from blocking access to lawful websites and competing applications; and (3) a nondiscrimination rule prohibiting wireline broadband providers from taking steps to slow or degrade Internet traffic.

The D.C. Circuit indicated that Section 706 authorized the FCC to adopt some net neutrality rules.[4] However, the court held that the no-blocking and nondiscrimination rules in particular were unlawful because they treated ISPs as common carriers in violation of the Communications Act. Because Title II common carrier regulation is reserved for telecommunications carriers, the Communications Act prohibits the FCC from regulating information service providers as common carriers. The court concluded that the no blocking and nondiscrimination rules required ISPs to give all content providers nondiscriminatory access to their subscribers—the same duty applicable to common carriers under Title II of the Act.

In response to the Verizon case, the Commission initially proposed to adopt new net neutrality rules under Section 706. However, net neutrality supporters urged the FCC to instead change the regulatory treatment of Internet access service. Specifically, they argued that the Commission should classify Internet access as a telecommunications service under Title II—the same regulatory classification of basic telephone service, which traditionally has been heavily regulated—rather than an unregulated information service under Title I. According to these advocates, treating Internet access as a telecommunications service would provide the most defensible legal foundation for net neutrality rules, allow the FCC to prohibit any "discrimination" against Internet content, and thereby prevent broadband providers from prioritizing certain content. In November 2014, President Obama weighed in on the net neutrality debate, urging the agency to adopt strict rules and reclassify Internet access as a telecommunications service subject to regulation under Title II of the Act.

On February 26, 2015, the FCC adopted President Obama's plan to regulate the Internet, reversing more than a decade of precedent treating Internet access as an unregulated information service. The Commission adopted new net neutrality rules applicable to both fixed and mobile ISPs that prohibit blocking, throttling, and paid prioritization, and require enhanced transparency. In addition, the FCC adopted a catch-all prohibition against practices that "unreasonably interfere with or unreasonably disadvantage the ability of consumers to reach the Internet content, services, and applications of their choosing or of edge providers to access consumers using the Internet." The FCC also reclassified Internet access as a telecommunications service under Title II of the Act and further declared mobile Internet access to be a commercial mobile service. Although the FCC granted forbearance from certain provisions of Title II, ISPs will be subject to various Title II obligations, the precise scope of which the agency has yet to define.

IV. Discussion of the FCC's Approach to Net Neutrality

According to the FCC, net neutrality rules are necessary to promote a "virtuous cycle" of edge provider innovation, end user demand, and ISP investment. As the Commission has explained, net neutrality rules will spur content providers to innovate, which will incent end user demand and which, in turn, will motivate ISPs to invest in their networks. Thus, in the FCC's view, net neutrality rules encourage broadband deployment as directed by Congress in Section 706 of the Telecommunications Act of 1996. And by classifying broadband Internet access as a telecommunications service under Title II of the Act, the agency believes it can ground net neutrality rules in the strongest legal authority.

The main criticism of the FCC's approach is that net neutrality is a solution in search of a problem. As indicated, nearly all ISPs openly support the concept of net neutrality, and there is no real record of ISPs blocking or degrading Internet traffic. Although the FCC found that ISPs have the incentive and ability to interfere with the Internet's openness, it has been able to identify only a handful of supposed instances of bad behavior. Instead of examining whether ISPs have market power, the Commission has acted on the belief that ISPs are gatekeepers to edge providers seeking to reach end users, and the agency has discounted evidence that subscribers are ready and willing to switch ISPs in the unlikely event they engage in misconduct.

The FCC's decision to regulate ISPs under Title II has drawn a firestorm of criticism. Title II was designed to regulate the monopoly-era telephone companies of the 1930s. By classifying broadband Internet access as a Title II telecommunications service, the FCC attempted to unlock the power to regulate the Internet in the same way it regulated telephone wires in the past. Title II gives the FCC the authority to control nearly every aspect of a telecommunications carrier's business, including the rates that the company can charge its customers. It also authorizes the Commission to impose new taxes on customer bills to support universal service. Title II regulation has long been the goal of net neutrality supporters because it

puts the Internet on par with such public utilities as water and electricity, providing a rationale for broad regulatory oversight.

Many fear that regulating the Internet under Title II will harm the vitality of the Internet. ISPs spend billions of dollars to build and maintain the broadband facilities that consumers use to access the World Wide Web. The concern is that these companies may be less inclined to invest in expanding capacity and reaching unserved areas if they are subjected to extensive government oversight under Title II. And if ISPs choose not to continue such investment—or if their sources of private capital diminish because of excessive regulation—broadband deployment in this country might stagnate and the future growth of the Internet could be threatened.

V. Guiding Principles for the Future

1. Ensuring Political Accountability. The political branches of our government must decide whether—and to what extent—the Internet should be regulated. This is a question of overriding national importance that should not be decided by an administrative agency. Delegating such a key issue to a single regulatory body undermines political accountability.

2. Promoting Investment. The Internet has flourished because the FCC's deregulatory policies heretofore have encouraged ISPs to expend billions of dollars to build ubiquitous networks throughout the country. These providers may not invest at the same pace if their services are subject to excessive government regulation. A light-touch regulatory framework will incentivize continued investment by ISPs in faster and more ubiquitous networks to the benefit of all Americans.

3. Maintaining Government Impartiality. The government should not pick winners and losers on the Internet. Using a heavy bureaucratic hand to skew the competitive playing field in favor of one preferred group over another entrenches existing business models and suppresses innovation. Instead, the market should decide which businesses succeed and which new services develop without the government tipping the scales in one direction.

4. Encouraging Innovation. The Internet has been one of the greatest developments of our time. Innovation, which is occurring both on the network and at its edges, is highly desirable and essential to maximize consumer choice. Government policy should seek to promote such innovation through continuing bipartisan support of a deregulatory approach to the Internet.

Endnotes

1 545 U.S. 967 (2005).

2 Comcast Corp. v. FCC, 600 F.3d 642 (D.C. Cir. 2010).

3 47 U.S.C. § 1302.

4 Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014).