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Moving Away From Regulation and Legislation: Solving the Network Neutrality Debate During Obama's Presidency

Cara J. Daley
Claremont McKenna College

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CLAREMONT McKENNA COLLEGE

**MOVING AWAY FROM REGULATION AND LEGISLATION: SOLVING THE
NETWORK NEUTRALITY DEBATE DURING OBAMA'S PRESIDENCY**

SUBMITTED TO
PROFESSOR RODERIC CAMP
AND
DEAN GREGORY HESS
BY
CARA J. DALEY

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INTRODUCTION

The principles and physical systems that make up the modern-day Internet were intended to foster a network for “community use” among computers and achieve a “critical mass” of talent by “allowing geographically separated people to work effectively in interaction with a system.”¹ Today, 43 years after MIT program manager Lawrence Roberts described this vision that promoted an openness and collaborative ability on what was to become the Internet, the United States is in the midst of a nationwide problem. Not only has it been impossible to define what kind of service the Internet provides under the Federal Communication Commission’s charter Telecommunications Act of 1934 (and major 1996 overhaul), but none of the parties involved, be them political interest groups, Internet service providers, or members of our legislative branch, have been able to effectively solve the problem we have come to know as network neutrality. Simply put, our country’s Communications law, which still operates under the assumption that voice, data, and television services are carried on separate networks, no longer makes sense. The question of network neutrality asks consumers, politicians, regulators, and businessmen whether or not the Internet is to remain a fundamentally open and equal service or whether like other communications services, it needs be subjected to principles of management involving tiered pricing for different services. Why is solving this matter such an uphill battle? Why has it taken so long to get to such a solution? What is the correct way to move forward solving the issues surrounding network neutrality?

¹ Jane Abbate, *Inventing the Internet*. (Cambridge: The MIT Press, 1999), 2.

Failed Regulation

To answer these questions and more, I will first define the nature of the debate itself. Then, I will delve into technical definitions, the arguments presented by all sides, and the historical precedents of the innovation behind the phenomenon we now know as the Internet. The intent here is to better understand these foundations and how the Internet has morphed into the dynamic service for which we are provided today. After establishing a basis of knowledge on the subject, I will critically identify the FCC's failed regulatory actions, beginning in 2005. Using an analysis of specific cases that have been presented before the FCC, we will be able to see just how Internet service providers (ISPs) are able to damage consumers. I will decipher how major telecommunications players, like Comcast, AT&T, BellSouth, and Verizon have asserted their financial power in an attempt to bully their way through posed threats for net neutrality principles. Before concluding this section, I will also review the most recent developments contributing to the network neutrality controversy including the crucial April 2010 Federal Appeals Court ruling and the plan proposed by Google and Verizon in August 2010.

Failed Legislation

The net neutrality battle is not the first time Congress has tried to apply legislation to the Internet, but it is the most outstanding case of failure. I will look at early examples of Internet-related legislation and the protections it has offered and then move on to discuss the different bills relating to net neutrality that members of Congress have introduced for the past four years. More detail will be provided on the most recent attempts to reach a bipartisan consensus on the issue; identifying the political forces on

both sides of the aisle that have led to such a standstill for so long. Republicans worry about big government prospects and the economic implications of regulating major corporations, Democrats are concerned with First Amendment issues behind privately managing these networks, and both are not sure how to catch up with the rest of the world using our country's decrepit broadband infrastructure and pithy numbers in the investment into large scale technological upkeep and innovation.

Obama's Inauguration and a Net Neutrality Solution

Even before he was elected, President Barack Obama had publicly supported net neutrality efforts. Obama's interest in the issue stems from his larger Open Government Initiative and his promotion of using the Internet for transparency and communication in all branches of government. Obama must support net neutrality in order to support digital democracy. In addition to focusing on the Obama administration efforts, I will examine how both opposing and supporting parties have reacted to Obama's stance on net neutrality and the prospect of managing the Internet. Like many interests within the debate, the focus (especially with prospects of expansion of broadband infrastructure) has been largely on the economics of the issue. Will the United States be able to catch up with the speed of global broadband development if the government imposes net neutrality regulations? Top administration leadership understands that the old legislation is clunky and requires reform, but they must work outside of the current regulation and legislation efforts to kick-start the implementation of America's neutral networks. If our current legislation is simply too archaic and regulatory efforts have been drowned by partisan politics, we pragmatically search for another answer. In order to resolve the controversial issue of net neutrality, President Obama must write an Executive Order stating the FCC

partially reclassifies broadband into Title II of the Telecommunications Act. Doing this would define high-speed portions of the Internet much more appropriately as a telecommunications service rather than an information service (as it now stands). I will address further points of consideration for the next two years of Obama's presidency. Finally, after discussing in more detail the power granted to the President through the "stroke of his pen," I will also consider the way in which the November 2010 midterms have made it even more imperative for President Obama to use his executive power to enact such an order.

CHAPTER 1: MAPPING OUT THE NETWORK NEUTRALITY DEBATE

Defining Network Neutrality: A Divisive Notion

Before exploring the ins and outs of the net neutrality issue, it is important to first define the terms of the debate. In this chapter, I will identify the ways in which net neutrality has been defined, the advent of the Internet as we know it, exactly how the controversy began, and the elements of the debate. The contentious nature of the net neutrality debate makes it challenging to come up with a comprehensive way to describe the issue at hand. More specifically, it is difficult to define net neutrality because there is even a dispute over its precise meaning and implication. Some view net neutrality rights as stemming from the First Amendment of the Constitution, some view it primarily in a philosophical light, while others view it as mostly dealing with the efficiency of economic markets. Timothy Wu, professor of law at Columbia University and best known in the net neutrality policy environment for coining the term "net neutrality", offers a broad and technical definition:

Network neutrality is best defined as a network design principle. The idea is that a maximally useful public information network aspires to treat all content, sites, and

platforms equally. This allows the network to carry every form of information and support every kind of application. The principle suggests that information networks are often more valuable when they are *less* specialized—when they are a platform for multiple uses, present and future.²

Dividing the Debate: Net Neutrality Advocates

If we separate the debate between net neutrality advocates and network management advocates, interest groups and nongovernmental organizations (NGOs) would be recognized leading advocates for neutrality while large telecommunications companies and Internet service providers (ISPs) largely support some type of management of the networks. The nonprofit advocacy group Free Press has led the charge on the pro-neutrality front. As large benefactors of the Save the Internet Coalition, Free Press along with hundreds of other organizations, have defined net neutrality as “the guiding principle that preserves the free and open Internet” explaining that “net neutrality is the reason the Internet has driven economic innovation, democratic participation and free speech online.”³ As noted, advocates of net neutrality tend to draw inspiration from the Constitution’s First Amendment and its strong right to free speech. Senator Al Franken (D-MN) even declared net neutrality to be the “First Amendment issue of our time.”⁴ Freedom of the press, freedom of expression, and a desire to protect fair competition commonly underlie most of these advocates’ views.⁵ As Bruce Harpham notes, even though there is often a fundamental agreement on basic principles, there is disagreement on the goal of net neutrality policies. Some advocates simply want “common carriage” and mandate that networks carry all traffic that comes to them. The

² Timothy Wu, “Network Neutrality FAQ,” http://www.timwu.org/network_neutrality.html.

³ Save The Internet Coalition, “Frequently Asked Questions,” <http://www.savetheinternet.com/faq>.

⁴ Alex Altman, “Net Neutrality: Flash Point for Foes of Big Government,” *Time*, 8 September 2010. <http://www.time.com/time/nation/article/0,8599,2016316,00.html>.

⁵ Bruce Thomas Harpham, *The Role of Civil Society Organizations in the Net Neutrality Debate in Canada and the United States*. MA Thesis. University of Toronto, Toronto, 2009. ProQuest Dissertations and Theses. 3 October 2010.

human rights vision for neutrality focuses on a full expression of intellectual rights “through the creation of new cultural products.”⁶ Gigi Sohn, president of Public Knowledge, defines net neutrality as simply “a guarantee of fairness, a prohibition on discrimination” because putting the telephone, cable, and wireless companies in control of the content is “a recipe for economic disaster.”⁷ Major technology companies like Google have shown support net neutrality because of the way in which it fosters innovation and the conducive environment an open Internet provides for startups. The natural “end-to-end” architecture of the Internet means that users, not network providers, decide what fails or succeeds online. This, in the eyes of Google executives and many others in Silicon Valley is what has resulted in the incredible innovation, investment, and consumer choice we have seen in the online world’s first three decades.⁸

Dividing the Debate: Net Neutrality Opponents

Conservative policy think tanks like Cato Institute and free-market advocacy groups like FreedomWorks Foundation and the Competitive Enterprise Institute oppose net neutrality because they see it as a technical issue best left to engineers. They fear that costs will be only passed on to consumers and regulation will ultimately backfire. For those against net neutrality, moves towards regulation are also seen as far too preemptive.

Director of Telecommunication Studies at Cato Institute Adam Thierer explains there

is no evidence that broadband operators are unfairly blocking access to websites or online services today, and there is no reason to expect them to do so in the future. No firm or industry has any sort of "bottleneck control" over or market power in the broadband marketplace; it is very much a competitive free-for-all, and no one has any idea what the

⁶ Ibid.

⁷ Kim Hart, “Republican Leaders to Obama: Net neutrality regulations are harmful,” The Hill, 2 October 2009. <http://thehill.com/homenews/house/61469-republican-leaders-to-obama-net-neutrality-regulations-are-harmful>.

⁸ Rick Whitt, “Hey FCC, keep the Internet open—and awesome!” Google Public Policy Blog, 14 January 2010. <http://googlepublicpolicy.blogspot.com/2010/01/hey-fcc-keep-internet-open-and-awesome.html>.

future market will look like with so many new technologies and operators entering the picture.⁹

Holman W. Jenkins of the *Wall Street Journal* describes the idea of broadband carriers “nefariously blocking access to Web sites” as the “most-talked about, least-seen bogeyman in the history of bogeymen.”¹⁰ Jenkins notes that it is impossible for broadband suppliers to operate on any other basis than insuring their customers are “maximally happy” because of the noted effect on profitability with “churn” of customers defecting from one company to another. He blames companies like AOL and Google trying to maintain a certain status quo against technological change in order to best protect their business models.¹¹

Internet service providers are often vilified, but for their part, these companies have and will continue to protest saying they do not in fact have any plans to unfairly exploit consumers. Responding to skepticism surround the Madison River case of 2005,¹² Chief Technology Officer Bill Smith of BellSouth declared that “we have no intention of controlling where you can and can’t go on the Internet... if [phone companies] restrict where people go on the Net, they’d leave in droves” for cable competitors.¹³ That being said, not every broadband service provider seems to agree. In an interview with *BusinessWeek Online*, AT&T CEO Edward Whitacre Jr. argued his company in fact needed to be able to exact a toll from particularly high-traffic web services. “What [Google, Vonage, and others] would like to do is use my pipes for free.

⁹ Adam D. Thierer, “‘Net Neutrality’: Digital Discrimination or Regulatory Gamesmanship in Cyberspace?” Cato Institute Policy Analysis No. 507. 12 January 2004.

¹⁰ Holman W. Jenkins, Jr. “Neutering the ‘Net,” *The Wall Street Journal*, 23 September 2009. <http://online.wsj.com/article/SB10001424052970204488304574429030182627044.html>.

¹¹ *Ibid.*

¹² Discussed in more detail later in the paper.

¹³ Catherine Yang, “At Stake: The Net as We Know It,” *Bloomberg BusinessWeek*, 15 December 2005. http://www.businessweek.com/technology/content/dec2005/tc20051215_141991.htm.

But I ain't going to let them do that.”¹⁴ Broadband is growing and in their eyes, intensive users are not paying their fair share. In 2005, Dave Caputo, CEO of a company that sells technology to manage network traffic, estimated that file-sharing for movies and music accounts for more than 60% of North American domestic broadband use.¹⁵

In the legislative arena, Republican Party leaders like John Boehner (OH) and Whip Eric Cantor (VA) feel that resources should not focus on regulation that will discourage Internet service providers from investing billions of dollars in more far-reaching efforts for national broadband access.¹⁶ Boehner has also accused the FCC of a “government takeover of the Internet,” imploring lawmakers to stop the agency from encroaching too much on private business interests.¹⁷ In the eyes of net neutrality’s opponents, there is absolutely no precedent for the government to regulate in the absence of clear harm. Jeffrey A. Eisenach, managing director at Navigant Economics LLC, goes as far as to label the push for net neutrality as radical in its blatant use “of Federal regulatory power to redistribute wealth.”¹⁸ In August 2010, thirty-five Tea Party groups sent a letter to the FCC urging it to scrap moves towards net neutrality. The Virginia Tea Party Patriot Federation specifically called the potential policy an “affront to free speech and free markets”—quite a different policy framing than other opponents. Although the Tea Party voice is often far right of center, it is important to take this view into consideration. Whose free speech is being impacted here? Are these conservative voices

¹⁴ Ibid.

¹⁵ Ibid.

¹⁶ Kim Hart, “Republican Leaders to Obama: Net neutrality regulations are harmful,” The Hill, 2 October 2009. <http://thehill.com/homenews/house/61469-republican-leaders-to-obama-net-neutrality-regulations-are-harmful>.

¹⁷ Tony Romm, “Boehner slams FCC for ‘takeover of Internet,’” The Hill, 5 May 2010.

<http://thehill.com/blogs/hillicon-valley/technology/96503-boehner-slams-fcc-for-takeover-of-internetq>

¹⁸ Jeffrey A. Eisenach, “The Radicalism of Net Neutrality,” The Hill’s Congress Blog, 2 September 2010. <http://thehill.com/blogs/congress-blog/technology/116995-the-radicalism-of-net-neutrality>

defending important investments into infrastructure or simply the corporate financial interests at stake?

It should come as no surprise that “net neutrality” is not the only way in which this debate is framed. Telecommunication companies and ISPs tend to avoid the term “net neutrality” at all in press releases to news media or in the submission of reports to regulatory agencies preferring instead to use more euphemistic phrases like “network management” or “traffic management.”¹⁹ This idea of defining net neutrality as a management issue misses important aspects of the loss of innovation and fundamental freedoms but importantly identifies the way in which corporate interests choose to depoliticize the term. Furthermore, opponents of net neutrality look skeptically upon the FCC’s regulatory power to reclassify broadband as Title II. Howard Waltzman, a lawyer representing broadband service providers, dismisses the notions that the courts would even accept the regulatory agency’s attempt to reclassify and reverse the most recent classification from 1996. Waxman suggests that for the FCC to reverse these decisions, “they’d have to make a factual demonstration that the manner in which broadband services are offered today are different from the time that the FCC viewed broadband as an integrated service.”²⁰

Are Both Sides Wrong?

Although net neutrality is most typically framed as a partisan policy debate, many viewpoints fall somewhere in between. Larry Downes, a fellow at Stanford Law School’s Center for Internet and Society believes both sides are wrong. He instead sees that the concept of net neutrality has become “a proxy fight for who you hate more—big

¹⁹ Harpham, 42.

²⁰ Kim Hart, “What’s next for net neutrality?” The Hill, 10 April 2010. <http://thehill.com/blogs/hillicon-valley/interviews-profiles/91401-3-opinions-whats-next-for-net-neutrality>.

corporations or big government.”²¹ Downes frames the debate as a pointless argument with no end in sight: “the antigovernment people say [FCC regulation would be] a takeover of the Internet. Anti-corporate people say a deal between Google and Verizon²² would ruin the Internet. And they’re both wrong.”²³ Although both sides may not have the perfect answer, there is still room to look past staunch opposition and failed attempts in order to solve this issue.

How Does the FCC Define Internet Access?

Cable modem Internet access has always been categorized under the Telecommunications Act of 1996 as an information service (not a telecommunications service) and thus not subject to such common carriage regulations. Internet access across the phone network, however, was considered a telecommunications service until the FCC reclassified DSL services as information services in August 2005. The FCC replaced the common carriage requirements with a set of four “principles,” but no solid FCC law. The institution and implementation of these principles would require federal legislation or official action by the FCC, neither of which have yet occurred. Advocates argue that the way to keep the Internet free and open is for the FCC to assert its authority and regulate broadband. This process is known as reclassification because it would serve to reclassify broadband services as part of Title II services of the Telecommunications Act (and its 1934 predecessor). The Act, as amended, affords the Commission several powers including: the preservation of the competitive free market for the Internet, continued development of the Internet and deployment of advanced telecommunications to all

²¹ Altman, 1.

²² This deal will be discussed in more detail later in the analysis.

²³ Ibid.

Americans.²⁴ Title V of the Act explicitly references Internet Service Providers. In other cases, Internet services have been read into the original 1934 Act as an information service. Senator Byron Dorgan (D-ND) and FCC member Michael Copps jointly assert the need for the FCC to insert reasonable safeguards, explaining that it would be quite “a terrible irony if all of the hard-fought protections that consumers enjoy with plain old telephone service, such as privacy, truth-in-billing and rules prohibiting discrimination were taken away in a broadband world.”²⁵ Unsurprisingly, advocacy groups like Free Press have pushed the FCC to make sure competition and affordability are still taken into account. In their eyes, reversing the decision to classify broadband as an information service would mean the reversal of a horrible deregulatory mistake. It would, as they say, be a “step in the right direction that rejects the special interests of giant network owners” and solve the “looming cable monopoly problem ahead.”²⁶

Examining the History of the Controversy: The Advent of the Internet

It is equally as important to understand the basis of this controversy as it is to outline the opposing views. Where does the Internet come from? What was the original intent in its creation? The principles and physical systems that make up the modern-day Internet date back to the 1960s when American researchers associated with the US Department of Defense’s Advanced Research Projects Agency (ARPA) developed a single experimental network linking other researchers at different institutions. The Internet is not a recent phenomenon but a product of a long history of development.

²⁴ Federal Communications Commission, “Policy Statement Released September 5, 2005.” http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

²⁵ Sen. Byron Dorgan and Michael Copps, “Dorgan & Copps: Online Freedom Is Good for Democracy,” Roll Call, 6 May 2010. http://www.rollcall.com/issues/55_128/ma_congressional_relations/45925-1.html.

²⁶ Jason Rosenbaum, “Obama Administration, FCC Chairman Genechowski set to do the right thing, reclassify broadband and protect net neutrality,” FDL The Seminal, 6 May 2010. <http://seminal.firedoglake.com/diary/45681>.

Originally intended to solely assist scientists in overcoming difficulties associated with running programs on remote computers, the Internet (and its predecessor ARPANET) has flourished, but not the way in which it was first planned. The current commercially-run and consumer oriented product we know as the Internet emerged only after a long process of political, technical, and organizational restructuring.²⁷ Many of the vague ideas eventually turned into the fundamental principles we can now identify as the basis of today's Internet. Specifically, all messages transmitted through ARPANET had to be treated equally in order to realize maximum efficiency and flexibility within the network.²⁸ The Internet has no central coordination and therefore requires a highly collaborative environment to function properly. A September 2010 *Wired* article, however, sheds light on certain contradictory factors AT&T had brought to the fore. The telecom company insisted that the Internet Engineering Task Force (IETF) added the "DiffServ" field to Internet Protocol (IP) to "facilitate paid prioritization as a means for encouraging the further growth and development of the Internet."²⁹ DiffServ, or "Differentiated Services" was cited in a grouping of documents published by a group of IETF engineers as primarily functioned to "allow different levels of service to be provided for traffic streams on a common network infrastructure" and predicted the end result would be "that some packets receive different services than others."³⁰ What we see happening here, as it often does, is American society unable to resolve the difficult

²⁷ Jane Abbate, *Inventing the Internet*. (Cambridge: The MIT Press, 1999), 2.

²⁸ Harpham, 10.

²⁹ Matthew Lasar, "Did Internet Founders Actually Anticipate Paid, Prioritized Traffic," *Wired*, 11 September 2010. <http://www.wired.com/epicenter/2010/09/paid-prioritized-traffic/all/1>.

³⁰ *Ibid.*

question of net neutrality through legislation or regulation and turning instead to history for guidance.³¹

The Internet as Naturally Neutral

Before the net neutrality debate entered the limelight, the principle of neutral networks was more a custom than anything else. ARPANET and the Internet had very intentionally been created for academic, scientific, and research purposes but the 1990s fielded a growing popularity in the idea of the potential for a universally connected network. The service moved into recreation and business, dramatically transforming the world's economic and social life.³² In 1994, Vice President Al Gore foresaw the need to protect this increasingly important force in society:

How can government ensure that the nascent Internet will permit everyone to be able to compete with everyone else for the opportunity to provide any service to all willing customers? Next, how can we ensure that this new marketplace reaches the entire nation? And then how can we ensure that it fulfills the enormous promise of education, economic growth and job creation?³³

The Changing Internet in the 21st Century

Beginning in the late 1990s and early 2000s, Internet users began using the Internet in new ways. Whether consumers were attaching new devices to connections or simply accessing the network much more frequently, Internet service providers saw this as an economic opportunity. In a paper written in 2003, Tim Wu studies exactly how broadband networks favored certain uses of the Internet in 2002. His overall findings told us that broadband operators' networks and usage restrictions favored the applications of the late 1990s (primarily the World Wide Web and other client-server applications) and "disfavored more recent applications and usage, like home networking, peer-to-peer

³¹ Ibid.

³² Harpham, 11.

³³ Remarks as delivered by Vice President Al Gore to the Superhighway Summit. Royce Hall, UCLA, Los Angeles, California. 11 January 1994. <http://artcontext.com/calendar/1997/superhig.html>.

applications, and home telecommuting”³⁴—all applications requiring more bandwidth than before. Wu found at the time that cable and DSL operators were imposing thirteen different types of usage restrictions, mostly focusing on ways to restrict usage that would aid in the development of further application-types. At the time of his survey, he found that 100% of cable operators and 33% of DSL operators were restricting “overusing bandwidth.”³⁵ Many companies also imposed restrictions on usage access to Virtual Private Networks (VPNs), File Transfer Protocol (FTP) servers, and home networking—all services that were becoming popular at the time.³⁶ Comcast, for example, blocked certain VPN ports thereby forcing the state of Washington to contract with individual providers to ensure its state employees had full access to appropriate applications from their home networks. AT&T (at the time still operating independently from Comcast) went as far as to explicitly ban the connection of Wireless (WiFi) equipment. The provider indicated it was a breach of the customer’s agreement to maintain a WiFi connection that would be accessible by outside parties: “[It is a breach of the agreement to] resell the Service or otherwise make available to anyone outside the Premises the ability to use the Service.”³⁷

The more deeply the Internet has permeated into every function of the average American’s life, the most difficult it has been to define and understand the larger issue behind the net neutrality debate. Advocates fight for net neutrality for almost completely

³⁴ Timothy Wu, “Network Neutrality, Broadband Discrimination,” *Journal on Telecommunications and High Technology*: (Vol. 2, 2003), 159.

³⁵ Wu, 160.

³⁶ VPNs allows consumers to connect to their work network through a secure connection, FTP servers allow the copy of files from a client to a server computer (often in large file format), and home networking consists of two or more computers interconnected within a domestic micro-network, allowing for faster and more efficient connections.

³⁷ AT&T Broadband Internet Acceptable Use Agreement, *supra* note 50, at paragraph 14.

different reasons that opponents fight against it. As we have seen, even the original intent of the Internet is even up for debate. We will next look at how the legislative branch has unsuccessfully attempted to achieve neutrality.

CHAPTER TWO: FAILED REGULATORY ACTIONS

In this chapter, I will focus on the ways in which the various leaders of the Federal Communications Commission have attempted to shape the agency's policy in a way that would preserve a neutral Internet. Circumstances change with every new presidential administration and Commission chairman, making it more difficult for the FCC to produce a stable and concise message. I will also examine specific cases on which the FCC has worked and look at how these outcomes have shaped the terms of the debate. At the end of the chapter, I will look at important recent developments and new proposals current Chairman Genachowski has considered that would help the formation of an appropriate Executive Order from Barack Obama.

The FCC Steps In

In 2004, FCC Chairman Michael Powell announced a new set of non-discrimination principles in order to deal with early instances of "broadband discrimination." Speaking at the Silicon Valley Flatirons Symposium in February, Powell outlined the principles he called "Network Freedom" for consumers:

1. Freedom to access content.
2. Freedom to run applications.
3. Freedom to attach devices.
4. Freedom to attain service plan information.³⁸

Before the FCC actually adopted these rules as a policy statement in August 2005, they were modified under Chairman Kevin Martin's leadership to read:

1. Consumers are entitled to access the lawful Internet content of their choice;
2. Consumers are entitled to run applications and services of their choice, subject to the needs of law enforcement;
3. Consumers are entitled to connect their choice of legal devices that do not harm the network; and

³⁸ Michael Powell, "Preserving Internet Freedom: Guiding Principles for the Industry," 8 February 2004. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.

4. Consumers are entitled to competition among network providers, application and service providers, and content providers.³⁹

These statements were not intended to hold the force of law but merely provide a way for the FCC to assert their official policy in a way that may deter discrimination by Internet service providers. This is one of the biggest problems the network neutrality debate faces. The FCC, with its current Democratic majority, could enforce regulation of these telecommunications companies but chooses instead to only draft “rules” holding no real weight. Ultimately, this has affected the outcome of many controversial cases with which the FCC has been involved.

The Madison River Communications Case

The 2005 case of Madison River Communications is the first time the matter of FCC enforcement and the reality of net neutrality concerns came into the public eye. The telecommunications company, operating in North Carolina, blatantly blocked its users from using Vonage, a Voice over IP (VoIP) provider, in order to refer users back to its own phone services. As Tim Wu had noted early in the decade, the Internet is structurally biased against these voice and video applications.⁴⁰ Vonage is a company that provides telephone services over a broadband connection. In this case, Madison River chose to block this competition instead of launching a comparable VoIP service or lowering its own fees. By offering long-distance services for a fraction of the cost, Vonage posed a threat to the long-term viability of the telecom company’s profitability. In response, Vonage took up legal action against Madison River with the FCC. Although it is believed the FCC levied a fine against the actions taken by Madison River, the event

³⁹ Federal Communications Commission, “New Principles Preserve and Promote the Open and Interconnected Nature of Public Internet,” 5 August 2005.

http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260435A1.pdf

⁴⁰ Wu, 146.

did nothing to further clarify net neutrality principles. The case was in fact closed before any legal findings were made. There is instead record of a settlement between the FCC and Madison River in which the company agreed “to make a voluntary payment to the United States Treasury...in the amount of fifteen thousand dollars...” in order to avoid “the expenditure of additional resources that would be required to further litigate the issues raised by the investigation” at hand.⁴¹

Importantly, because the FCC never formally established that Madison River Communications had in fact violated some form of law or regulation, the aforementioned settlement set no precedent for the future of the network neutrality debate. Informally, however, the FCC had for the first time asserted that it would indeed take action if presented with evidence of these types of broadband discriminations by telecom companies or Internet service providers. This and other instances demonstrate that since the issue of net neutrality came to the attention of the agency, policy decisions have for the most part been reactive.

The FCC’s Four Freedoms

Not long after the FCC announced their original statements on consumer rights, the agency released another declaration of four guiding net neutrality principles—words that have since heavily affected the frame of debate for net neutrality:

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to access the lawful Internet content of their choice.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to run applications and use services of their choice, subject to the needs of law enforcement.

⁴¹ Federal Communications Commission, “Consent Decree: In the Matter of Madison River Communications LLC and affiliated companies.” File No: EB-05-IH-0110. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-543A2.pdf

- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to connect their choice of legal devices that do not harm the network.
- *To encourage broadband deployment and preserve and promote the open and interconnected nature of the public Internet*, consumers are entitled to competition among network providers, application and service providers, and content providers.⁴²

In the conclusion of this statement, the FCC also proclaimed this is all a product of their duty to “preserve and promote the vibrant and open character of the Internet as the telecommunications marketplace enters the broadband age.”⁴³

From here on out, the FCC focuses on consumer interests and a general faith of the success of a competitive marketplace.

This important policy statement did however directly contrast with a Supreme Court ruling from June 2005 that upheld cable broadband services were almost completely free of regulation. The Supreme Court decision upheld the view that cable ISPs were not required to honor common carriage principles⁴⁴ and the case again deemed cable service providers as information, instead of telecommunications services. Bruce Harpham notes that although the case, *National Cable & Telecommunications Association et. al v. Brand X Internet Services et. al*, is now defective, it is still significant in that it was one of the first clear approximations of net neutrality by any branch of government.⁴⁵

AT&T and BellSouth’s 2006 Merger

In 2006, the FCC authorized the merger of AT&T and BellSouth. In a letter from AT&T to the FCC outlining the details and strategies for the transfer of control, the

⁴² Federal Communications Commission, “Policy Statement Released September 5, 2005.” http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-151A1.pdf.

⁴³ Ibid.

⁴⁴ Discussed earlier in this analysis.

⁴⁵ Harpham, 49.

companies were careful in the way in which they approach the top of net neutrality. In their two part mention of the topic, AT&T/BellSouth first asserted they would “conduct business in a manner that comports with the principles set forth in the Commission’s Policy Statement” effective on the Merger Closing Date and “continuing for 30 months thereafter”⁴⁶ and moved on to commit that “it will maintain a neutral network and neutral routing in its wireline broadband Internet access service.” This commitment, however, would not apply to the companies’ enterprise managed IP services including but not limited to virtual private network (VPN) services, Internet Protocol television (IPTV) services, and wireless broadband Internet access service. As discussed earlier, this is an important distinction between the types of broadband services these major corporations are choosing to price discriminate against. In this instance, wireline broadband may be protected by the FCC, but even as early as 2006, it was apparent the issue of other shared services and especially wireless was going to be a further point of controversy within the terms of this debate. Also interesting is this proposal’s claim that the commitment will “sunset” on the earlier of (1) two years from the Merger Closing Date, or (2) the effective date of any legislation enacted by Congress after this same Merger Closing Date that “substantially addresses ‘network neutrality’ obligations of broadband Internet access providers..”⁴⁷ The FCC soon accepted this merger, worth an estimated \$86 billion dollars.

Although the merger created a supersized AT&T that had the power to control more than half the telephone and Internet access lines in the U.S., the FCC (at the time

⁴⁶ Robert W. Quinn Jr. (AT&T Senior Vice President Federal Regulatory), “In the Matter of Review of AT&T Inc. and BellSouth Corp. Application For Consent to Transfer of Control, WC Docket No. 06-74.” 28 December 2006. www.fcc.gov/ATT_FINALMergerCommitments12-28.pdf.

⁴⁷ Ibid.

composed equally of Democrats and Republicans), approved the merger by a vote of 4-0. In a statement released by the Commission they asserted “significant public interests benefits [were] likely to result,” but that “today's order does not mean that the Commission has adopted an additional Net neutrality principle. We continue to believe such a requirement is not necessary and may impede infrastructure deployment.”⁴⁸ Gigi Sohn, president of Public Knowledge, saw this two-year term agreement as enough time for Congress to draft adequate legislation under the same definitions AT&T themselves gave: “the two-year term of the agreement should give policymakers in Congress and the FCC enough time to come up with a permanent Net neutrality policy that reflects the significant agreements AT&T has set out, said Sohn.” As we now know, however, no legislation was able to be passed before the end of this two-year sunset period.

Net Neutrality Advocates Petition against Comcast

The next point of contention came in November 2007 when the FCC received a Petition for Declaratory Ruling filed by Free Press, Public Knowledge, and other Net neutrality advocacy groups requesting the Commission declare “that intentionally degrading applications without informing Internet users is a deceptive practice” and further accusing Comcast of explicitly involving itself in “paradigmatic Network neutrality violation.”⁴⁹ Specifically, this petition accused Comcast of intentionally and secretly blocking peer-to-peer applications, notably from the BitTorrent application, a large-scale source of legal downloading of music and movies for Comcast customers.

⁴⁸ Marguerite Reardon, “FCC Approves AT&T-BellSouth merger,” *CNET News*, 29 December 2006. http://news.cnet.com/FCC-approves-ATT-BellSouth-merger/2100-1036_3-6146369.html.

⁴⁹ Petition for Declaratory Ruling before the Federal Communications Commission, 1 November 2007. www.fcc.gov/.../fp_et_al_nn_declaratory_ruling.pdf.

The advocacy groups writing this petition implored the FCC to take action to resolve the controversy. Although the FCC cannot directly enact legislation, these groups strongly felt that condemnation from the FCC would force Comcast to engage in such deceptive and harmful activity. The gaping holes in past FCC policy statements led to minutiae such as the need to clarify that intentionally degrading an application could not be considered “reasonable network management” under the 2005 FCC Policy Statement discussed earlier. This process could seemingly continue forever; if ISPs are forced to concede to one reclassification, they will only continue to exploit another.

The FCC’s 2008 Public En Banc Hearings on Broadband Network Management Practices

As a result of the November 2007 petition submitted by Net neutrality advocacy groups, the FCC set up a range of hearings and public consultations to further review the steps that should be taken in broadband service practices. They fielded statements from a variety of prominent experts in the field including Tim Wu, Harvard Law School professor Yochai Benkler, Comcast Executive Vice President David Cohen, Verizon Executive Vice President Tom Tauke, and MIT Media Lab Professor Dr. David Reed. The FCC used these hearings to discuss whether network management or discrimination necessarily threatens to undermine the open nature of the Internet. Unlike the FCC’s previous non-action, this series of hearings was the first time these officials said they were considering taking steps to discourage certain practices contradictory to net neutrality. Michael Copps, one of the Democratic commissioners, said “the time has come for a specific enforceable principle of nondiscrimination at the FCC...our job is to figure out where you draw the line between unreasonable discrimination and reasonable

network management.”⁵⁰ The term “reasonable network management” was used in the Commission’s 2005 policy statement, but much of the controversy moving forward stemmed from the ambiguity of exactly what this term means, which in turn lead to the hearings.

A variety of viewpoints were considered by the Commission at these hearings. Tim Wu discussed two factors he saw as most concerning about Comcast’s actions. First, he explained that this type of “filtration” of certain broadband services directly contradicts U.S. Internet policy. Much like Net neutrality advocates, Wu uses the long-standing tradition of citing free press and First Amendment rights to argue for the openness of the Internet. He worried that with all the preaching the U.S. did to push other nations to keep their networks open, allowing Comcast to suppress even one application would set a negative precedent.⁵¹ He saw nothing wrong with “reasonable network management” as the FCC Policy statement allows but if Comcast chooses one use of the Internet and bans it (instead of a blind adjustment of traffic flows), “that’s a form of censorship and filtering rather than management, and that’s why it demands FCC attention.”⁵²

Yochai Benkler, a professor at Harvard Law School, focused on the consequences stemming from the lack of meaningful competition in the broadband service industry: “If

⁵⁰ Stephen Labaton, “F.C.C. to Act on Delaying of Broadband Traffic,” *New York Times*, 25 February 2008. http://www.nytimes.com/2008/02/25/technology/25cnd-fcc.html?_r=1&ref=business.

⁵¹ Tim Wu, “Net Neutrality Hearing: The Installation and Use of Filtering Software on Public Networks Contradicts U.S. Policy, Testimony Draft,” Broadband Network Management Practices En Banc Public Hearing, Harvard Law School, Cambridge, Massachusetts, 25 February 2008. http://www.fcc.gov/broadband_network_management/hearing-ma022508.html

⁵² *Ibid.*

you have no competition, you have to get into setting standards because abuses follow.”⁵³ The difficulties the FCC and consumer groups were dealing with in 2008, he says, were mostly a result of the ability of a few major players forcefully directing certain practices. With more competition, ISPs would be able to be held more accountable.

David Cohen, one of Comcast’s vice presidents, insisted Comcast (and the cable industry in general) was committed to “offering the best broadband experience to as many Americans as possible” but also indicated that it was difficult to balance these expectations with the rapid growth of bandwidth consumption.⁵⁴ Left unmanaged, Cohen said, congestion threatens the integrity and stability of the Internet for all providers and consumers. Presenting a point of clarification to the widespread accusations following reports that Comcast had indeed slowed some broadband traffic, Cohen explained that “we *only* manage those protocols during limited periods of heavy network traffic...we *only* manage uploads, not downloads...we *only* manage uploads when the customer is not simultaneously downloading” (i.e., when the customer’s computer is likely unattended) and “if and when we delay those P2P uploads, we *only* do so until usage drops below the threshold.”⁵⁵ Cohen ended his statement by strongly asserting the only way to ensure growth and innovation in the Internet is for the government to not take a regulatory approach. Government regulation, to Cohen, would inevitably slow growth and increase the cost to broadband service providers of the future growth of the incredibly necessary

⁵³ Stephen Labaton, “Net Neutrality Hearing: When Is an Internet Traffic Delay O.K.?” *New York Times*, 25 February 2008. <http://bits.blogs.nytimes.com/2008/02/25/net-neutrality-hearing-when-is-an-internet-traffic-delay-ok/>

⁵⁴ Statement of David L. Cohen, Executive Vice President Comcast Corporation, Federal Communications Commission Public En Banc Hearing on “Broadband Network Management Practices” WC Docket No. 07-52. Cambridge, Massachusetts. 25 February 2008. http://www.fcc.gov/broadband_network_management/hearing-ma022508.html

⁵⁵ *Ibid.*

broadband infrastructure. Cohen ended his statement on a strong note, indicating that although the Commission has looked at these issues over and over again, they have always decided that regulation is not the answer. He urged that the focus remain on the future of networks to deploy more and more broadband as more Americans get online because “that’s going to take lots more investment, lots more innovation, and lots more competitive differentiation. It will also take network management.”⁵⁶

Tom Tauke, an executive vice president at Verizon, explained that his company was not experiencing the same difficult management decisions as Comcast because it boasted a greater bandwidth capacity. Tauke made a key point with consumer choices: “so long as consumers have information about the nature of their broadband services and the practices of their providers they will vote with their feet and their pocketbooks on the practices of various providers.”⁵⁷ He focused on the transparency he saw within the Internet industry and argued that there would be no reason his company or any other would take any action that would hurt the consumer.

MIT Professor Dr. David Reed took a more technical approach to assert exactly how Comcast disrupted the standard mechanisms of which Internet access has been comprised. The Internet itself, he stated, is just the “network of networks” that results from the “interoperability among a wide variety of Autonomous Systems.”⁵⁸

Furthermore, he described that all it takes to become a part of this network of

⁵⁶ Ibid.

⁵⁷ Tom Tauke, “Prepared Testimony of Verizon EVP Thomas J. Tauke, FCC En Banc Hearing, Cambridge, Massachusetts, Monday, February 25, 2008.” http://www.fcc.gov/broadband_network_management/hearing-ma022508.html.

⁵⁸ Dr. David P. Reed, “Opening Statement of Dr. David P. Reed, Adjunct Professor MIT Media Laboratory, MIT Communications Futures Program,” Federal Communications Commission, 25 February 2008, Harvard Law School. http://www.fcc.gov/broadband_network_management/022508/reed.pdf

Autonomous Systems is to provide a host (computer) that is connected to one of the Autonomous Systems and the ability to send and receive information to any other host connected to any other Autonomous System. Reed admits that “congestion control techniques” have been a part of the Internet’s design since its inception, but that these techniques have and must continue to remain standardized “across the *entire Internet*.”⁵⁹ Internet Access Providers have a responsibility to adhere to these rules as part of a standard protocol and it would be dangerous to introduce new techniques that have not already been carefully orchestrated by groups like the Internet Engineering Task Force.

After months of hearings, the FCC formally ordered Comcast to stop its broadband network discrimination on August 1, 2008. Speaking to the Commission’s findings, Chairman Kevin Martin explained

Comcast was delaying subscribers’ downloads and blocking their uploads. It was doing so 24/7, regardless of the amount of congestion on the network or how small the file might be. Even worse, Comcast was hiding that fact by making effected users think there was a problem with their Internet connection or the application...by applying the framework we adopt today, the Commission will remain vigilant in protecting consumers’ access to content on the Internet. Subscribers should be able to go where they want, when they want, and generally use the Internet in any legal means. When providers engage in practices truly designed to manage congestion, not cripple a potential competitive threat, they should not be afraid to disclose their practices to consumers.⁶⁰

Genachowski Attempts to Clarify Policy

Despite attempts by new Obama-appointed Chairman Julius Genachowski to turn the Commission’s principles into regulation in 2009, the FCC’s principles were not regulation and ultimately proved somewhat powerless in establishing any real form of punishment to Comcast and its competitors. “The slap on the wrist” was enough to get Comcast to change its practices, but it was still undetermined whether or not network

⁵⁹ Ibid.

⁶⁰ Kevin J. Martin, “Statement of Chairman Kevin J. Martin,” in FCC, “Memorandum Opinion and Order (WC Docket No. 07-52)” http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-08-183A1.pdf.

management practices of any kind were reasonable.⁶¹ Genachowski proposed adding two principles to the original 2005 policy statement. The first would unmistakably prevent ISPs from slowing or discriminating against particular applications, services, or content while still allowing for “reasonable network management.” The second proposed principle would guarantee these ISPs are completely forthcoming about the types of network management they implement in their service plans.

April 2010 Federal Appeals Court Ruling

These proposals, however, never came to life. In April 2010, a federal appeals court ruled that the FCC had very limited power over Web traffic under the current law. The FCC’s principles never turned into legislation, and this left the Commission with very limited power in the eyes of the court. FCC spokeswoman Jen Howard noted that although the court decision invalidated the former Commission’s approach on Net neutrality, the Court was not disagreeing with fundamental Net neutrality principles. Howard said the decision also did not “close the door to other methods for achieving this important end”—likely referring to Congressional legislative efforts to give the FCC more regulation or reclassification of broadband as a telecommunications service under the Telecommunications Act of 1996.⁶²

A Third Way and the Summer 2010 Google-Verizon Plan

After the pivotal April 2010 court of appeals ruling against the FCC’s jurisdiction over broadband, the Net neutrality debate reached an important turning point. Paul Sharma of the *Wall Street Journal* admitted in August 2010 that “Net Neutrality 1.0”—

⁶¹ Marguerite Reardon, “FCC Chief proposed new Net neutrality rules,” *CNET News*, 21 September 2009. http://news.cnet.com/8301-30686_3-10357411-266.html.

⁶² Ryan Singel, “Court Drives FCC Towards Nuclear Option to Regulate Broadband,” *Wired*, 6 April 2010. <http://www.wired.com/epicenter/2010/04/fcc-next/>.

absolutely no discrimination of any type of Internet traffic—was “always a nonstarter.”⁶³ He elaborated by explaining for Net Neutrality 1.0 to have worked it would have meant that high-definition video streaming would have to be treated the same as large-scale spam. Although this would create a highly efficient system, it would not be very likely to actually transpire. In April, it seemed as though there were two options for the FCC: attempt again to reclassify or leave things as they are. In May, however, Chairman Genachowski introduced a third way: *reclassify partially*.⁶⁴ Genachowski basically suggested that the high-speed portions of Internet traffic should be separated and put in Title II of the Telecommunications Act while the rest would remain as they are in Title I.⁶⁵ Rob Pegoraro at *The Washington Post* thought this was good policy: “It will restore to the FCC a clear right to investigate and punish Internet providers if they’re tempted to abuse their market power. That alone should count as a victory for customers: I’d rather see competition keep companies honest, but when the market fails, having the government serve as a referee is usually the next-best option.”⁶⁶ In an arena where there seems to be no perfect answer, many felt that this is the best bet for the creation of some sort of happy medium.

In August 2010, Google and Verizon jointly released a policy proposal for the future of the Internet—something Paul Sharma might consider to be “Net Neutrality 2.0.” The proposal was meant to be a suggested legislative framework inserted into the

⁶³ Paul Sharma, “Winners, Losers From the New Net Neutrality,” *Wall Street Journal*, 9 August 2010. <http://blogs.wsj.com/source/2010/08/09/winners-losers-from-the-new-net-neutrality>.

⁶⁴ Tracy Rosenberg, “Net Neutrality and the Third Way,” *The Huffington Post*, 10 May 2010. http://www.huffingtonpost.com/tracy-rosenberg/net-neutrality-and-the-th_b_569883.html.

⁶⁵ Julius Genachowski, “The Third Way: A Narrowly Tailored Broadband Framework,” 6 May 2010. http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-297944A1.pdf.

⁶⁶ Rob Pegoraro, “FCC chair outlines regulatory foundation for broadband providers,” *Washington Post*, 6 May 2010. http://voices.washingtonpost.com/fasterforward/2010/05/fcc_opts_for_skinny_regulation.html.

dialogue of the debate. Excerpts of the seven key elements of the document are as follows:

1. First, both companies have long been proponents of the FCC's current wireline broadband openness principles, which ensure that consumers have access to all legal content on the Internet, and can use what applications, services, and devices they choose. The enforceability of those principles was called into serious question by the recent Comcast court decision. Our proposal would now make those principles fully enforceable by the FCC.
2. Second, we agree that in addition to these existing principles there should be a new, enforceable prohibition against discriminatory practices. This means that for the first time, wireline broadband providers would not be able to discriminate against or prioritize lawful Internet content, applications or services in a way that causes harm to users or competition.
3. Third...our proposal would create enforceable transparency rules, for both wireline and wireless services.
4. Fourth, because of the confusion about the FCC's authority following the Comcast court decision, our proposal spells out the FCC's role and authority in the broadband space.
5. Fifth, we want the broadband infrastructure to be a platform for innovation.
6. Sixth...under this proposal we would not now apply most of the wireline principles to wireless, except for the transparency requirement.
7. Seventh, we strongly believe that it is in the national interest for all Americans to have broadband access to the Internet.⁶⁷

Many critics of this plan believed Google was selling out from its long time Net neutrality advocacy. Others believed the Verizon-Google proposal gave companies too much room to find loopholes.⁶⁸ It was hard for many to discern the companies were suggesting a legislative framework, not making a business deal. Critics slammed the proposal mostly because for all it did to uphold principles of a free and open Internet, it exempted wireless. The public interest view that all data that moves across our networks must be treated equally is not only inefficient, but unrealistic.

⁶⁷ Alan Davidson and Tom Tauke, "A joint policy proposal for an open Internet," *Google Public Policy Blog*, 9 August 2010. <http://googlepublicpolicy.blogspot.com/2010/08/joint-policy-proposal-for-open-internet.html>.

⁶⁸ Editorial, "The Google/Verizon Payment Plan," *The New York Times*, 13 August 2010. <http://www.nytimes.com/2010/08/14/opinion/14sat1.html>.

Google is not a traitor to Net neutrality with this proposal; they just chose to look at the realities of the issue at hand. In fact, the proposal did more to bridge differences on the issue than anything that had preceded it. Despite advances with Net Neutrality 2.0-type proposals, the hard-core Net neutrality advocates will still perceive anything other than absolute as a sellout, and “because the FCC so badly shot itself in the foot by pursuing the Comcast case” the issue has remained in a state of limbo.⁶⁹ Before turning to more plausible solutions, however, we will take time to examine the history of legislative attempts a national Net neutrality policy as well as the influence of Obama’s inauguration as president in 2008.

⁶⁹ Joe Nocera, “The Struggle For What We Already Have,” *The New York Times*, 3 September 2010. <http://www.nytimes.com/2010/09/04/business/04nocera.html>.

CHAPTER THREE: FAILED NET NEUTRALITY LEGISLATION

The Net neutrality debate is not the first time Congress has tried to apply legislation to the Internet, but it is the most outstanding case of continual failure of tech-related legislation. What are legislators trying to accomplish with these attempted codifications? Like many of the Net neutrality advocacy groups, some politicians focus on the moral, constitutional, or First Amendment issues surrounding the debate. Many naively focus on the Internet not as a force for social good, but more of stage for potentially harmful and illegal content distribution. Others lobby for the economic and structural growth the Internet has and will continue to provide, doing what they can to pass legislation that will benefit the expansion of the broadband infrastructure. In this chapter, I will examine several early attempts at Internet-related legislation as well as outline the different ways in which our legislature has attempted to write Net neutrality ideals into our nation's law.

Early Internet Legislation

During the 1990s and early 2000s, Congress was not focused on specifically sorting out how to ensure broadband service providers were practicing responsible broadband network management. Rather, legislation at this time focused more on creating ways for this now formidable technological power to create and foster responsible exchange over its portals.⁷⁰ Examples of these attempted laws include: the NET (No Electronic Theft Act) of 1997, the Electronic Signatures in Global and National Commerce Act of 2000, the CAN-SPAM Act of 2003, the E-Government Act of 2002, and the Communications Decency Act of 1996. The functions of these proposals ranged

⁷⁰ Harpham, 75.

from increasing digital access to government archives to virtual consumer protection—all issues that tie back to the fundamental divide behind the Net neutrality debate.

The Communications Decency Act of 1996

The Communications Decency Act (CDA) of 1996 was the first and most notable attempt to write into law restrictions on a citizen's use of the Internet. As part of the Telecommunications Act of 1996⁷¹, the CDA sought to regulate pornographic material in cyberspace in both of the form of indecency and obscenity. Section 230 of the CDA states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."⁷² In practice this is a Good Samaritan clause, but this also exempts ISPs from liability for restricting access to certain forms of material or allowing others to do so on their own network. The CDA was ruled unconstitutional in 1997; the American Civil Liberties Union (ACLU) challenged its constitutionality the day it was written into law. Similar to the argument of many current Net neutrality advocates, those fighting to overturn the CDA in 1996 pointed directly to the First Amendment for their support. Indeed, the Supreme Court ruled the Act unconstitutional because of the way in which it violated free speech. Almost a decade before the Net neutrality debate became highly publicized, the stage was being set for controversy: "The decision will probably define the First Amendment into the next century," said Electronic Privacy Information Center staff counsel David Sobel in 1996.⁷³ Members of the ACLU who protested the CDA and now Net neutrality violations express similar sentiments: "This is recognition that speech

⁷¹ The CDA appears in the Telecommunications Act of 1996 in Article V.

⁷² Communications Decency Act of 1996, 47 U.S.C. § 230 (1996).

⁷³ Courtney Macavinta, "High Court rejects CDA," CNET News, 26 June 1997. <http://news.cnet.com/2009-1023-200957.html>

over the Internet is entitled to the same First Amendment protection that books and magazines have always enjoyed,” said Chris Hansen, former lead counsel for the ACLU.⁷⁴

No Electronic Theft Act of 1997

The No Electronic Theft Act (NET) of 1997 was introduced after it became more common practice for consumers to download mass amounts of information for private use. Because this information could not be legally defined as used for “commercial advantage or private financial gain,” these violators could not be prosecuted under the law at the time.⁷⁵ Mass copyright infringement was now more of a hobby than it had ever been before and the NET Act is how Congress responded. Early legislation like this has effectively deterred some consumers from using peer-to-peer networks like BitTorrent or in earlier cases Napster and Kazaa, but there is still heavy traffic on these networks—traffic that ISPs like Comcast have looked to slow. Could more effective legislation to deter such users help the Net neutrality case?

The E-Government Act of 2002

Passed in the Senate on Unanimous Consent, The E-Government Act of 2002 shows another federal shift in the concentration on the accessibility of government documents and services to the Internet. The Act does not relate directly to Net neutrality issues further down the line, but it indicates the direction in which legislators and the statutes they were writing were focusing their attention on Internet-related issues. The provisions of the statute exemplify themes promoting the expanded use of Internet by citizens, governing through the medium of the Internet, increased accessibility of

⁷⁴ Ibid.

⁷⁵ No Electronic Theft (NET) Act, Public Law 105-147. (1997).

government documents and services and thereby increased accountability and transparency of the U.S. Government by way of the Internet.⁷⁶ The notion of an even playing field on our nation's networks is inherent in the structure of this pre-Net neutrality legislation. With this law the government showed its desire to lead the way early in the 21st century with Internet-based Information Technology and in many ways, the neutral accessibility of the service.

The CAN-SPAM Act of 2003

The CAN-SPAM, or *Controlling the Assault of Non-Solicited Pornography And Marketing, Act of 2003* is often referred to as the "You-Can-Spam" Act because in some ways it specifically legitimized mass e-mail spamming. It does not require senders to receive permission to send any type of messaging or marketing from its receiver. More than anything, this is important for the Net neutrality debate because it falls under the larger umbrella of the type of information and services ISPs, telecom companies, and individuals can actively block. Here again, the legislature avoids violating any type of First Amendment right with the passing of this law.

Proposed Congressional Bills, 2006-2010

Legislation has most generally opposed telecommunication companies, broadband service providers, and some of the free-market scholars and advocacy groups discussed earlier in the analysis. Many of the legislative attempts since the 2005 Madison River Communications case have focused on the reformation of the Telecommunications Act of 1996. In fact, the previously discussed SavetheInternet.com Coalition composed of thousands of different free-speech advocates, interest groups, consumer rights

⁷⁶ The E-Government Act of 2002, Pub. L. 107-347, 116 Stat. 2899 (2002).

organizations, and bloggers was specifically created in 2006 in order to “ensure that Congress passes no legislation without meaningful and enforceable Network neutrality protections.”⁷⁷ Others have focused on the reclassification of the FCC’s regulatory power or revising anti-trust laws to appease the many skeptical of the lack of competition in the Telecommunications Industry. Over the past three sessions (109th-111th Congress) more than seven different bills have been introduced regarding different aspects of Net neutrality. The following table (Table 1) will provide an overview of several of the bills, some of which I will describe in further detail.

Table 1. Overview of Proposed Congressional Bills, 109th-111th Congress.

Title	Bill Number	Date Introduced	Sponsors	Important Provisions	Status
109th Congress (January 2005-January 2007)					
Internet Freedom and Nondiscrimination Act of 2006	S. 2360	March 2, 2006	Senator Ron Wyden (D-OR)	Prohibits a network operator from: (1) interfering service transmitted over the operator's network; (2) discriminating in allocating bandwidth from a subscriber; or (3) assessing a charge to any service provider not on the operator's network. ⁷⁸	Killed by end of 109 th Congress
Advanced Telecommunications and Opportunities	H.R. 5252	March 30, 2006	Rep. Joe Barton (R-TX)	Requires ISPs to allow each subscriber to: (1) access and	Passed in House with Markey

⁷⁷ Save The Internet Coalition, “Frequently Asked Questions.” <http://www.savetheinternet.com/faq>.

⁷⁸ U.S. Senate. 109th Congress. *S. 2360, Internet Non-Discrimination Act of 2006*. ONLINE. GPO Access. Available: <http://thomas.loc.gov/cgi-bin/bdquery/D?d109:11:./temp/~bdzloT:/home/LegislativeData.php?n=BSS;c=109> [2 March 2006].

Reform Act				post any lawful content and any web page; (2) access and run any application, software, or service; (3) connect any legal device (if the device does not harm the ISP's network); and (4) receive clear information, in plain language, about estimated speeds, capabilities, limitations, and pricing. ⁷⁹	Amendment removed, killed by end of session
Network Neutrality Act of 2006	H.R. 5273	April 3, 2006	Rep. Ed Markey (D-MA)	States that it is the policy of the United States to, among other things, maintain the freedom to use broadband telecommunications networks, including the Internet, without interference from network operators. ⁸⁰	Defeated 34-22 in committee
Communications, Consumer's Choice, and Broadband Deployment Act of 2006	S. 2686	May 1, 2006	Senators Ted Stevens (R-AK) & Daniel	Requires each communications service provider to contribute to support universal service (the	Sent to full Senate by committee, defeated by the end of 109 th

⁷⁹ U.S. House. 109th Congress. *H.R. 5252, Advanced Telecommunications and Opportunities Reform Act*. ONLINE. GPO Access. Available: <http://thomas.loc.gov/cgi-bin/bdquery/D?d109:2:./temp/~bd7DYq:@@@D&summ2=m&/home/LegislativeData.php?n=BSS;c=109> [30 March 2006].

⁸⁰ U.S. House. 109th Congress. *H.R. 5273. Network Neutrality Act of 2006*. ONLINE GPO Access. Available: <http://thomas.gov/cgi-bin/bdquery/D?d109:1:./temp/~bd81mh:@@@D&summ2=m&/home/LegislativeData.php?n=BSS;c=109> [3 April 2006].

			Inouye (D-HI)	provision of communications service in rural, insular, and high-cost areas). Outlines requirements for distribution of universal service support to eligible communications carriers. ⁸¹	Congress
110th Congress (January 2007-January 2009)					
Title	Bill Number	Date Introduced	Sponsors	Important Provisions	Status
Internet Freedom Preservation Act (Snowe-Dorgan bill)	S. 215 (previously S. 2917 in 109 th Congress)	January 9, 2007	Senators Olympia Snowe (R-ME) & Byron Dorgan (D-ND)	Amends the Communications Act of 1934 to establish certain Internet neutrality duties for broadband service providers including not interfering with, or discriminating against, the ability of any person to use broadband service in a lawful manner. ⁸²	Read twice and referred to the Committee on Commerce, Science, and Transportation.
Internet Freedom Preservation Act of 2008	H.R. 3458	February 12, 2008	Reps. Ed Markey (D-MA) &	Amends the Communications Act of 1934 to declare that it is U.S. policy	Introduced into House Energy and Commerce Committee.

⁸¹ U.S. Senate. 109th Congress. *S. 2682, Communications, Consumer's Choice, and Broadband Deployment Act of 2006*. ONLINE. GPO Access. Available: <http://thomas.loc.gov/cgi-bin/bdquery/z?d109:SN02686:@@D&summ2=m&> [1 May 2006].

⁸² U.S. Senate. 110th Congress. *S. 215, Internet Freedom Preservation Act*. ONLINE. GPO Access. Available: <http://thomas.gov/cgi-bin/bdquery/D?d110:2:/temp/~bdoD0v:/home/LegislativeData.php?n=BSS;c=110> [9 January 2007].

			Charles Pickering (R-MS)	to: (1) maintain the freedom to use broadband telecommunications networks, including the Internet, without discrimination by network operators; (2) enable the US to preserve its global leadership in online innovation; (3) promote the open and interconnected nature of broadband networks; and (4) guard against unreasonable discriminatory favoritism for content by network operators based upon its source on the Internet. ⁸³	
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The focus of these bills almost always overlaps in meaningful ways. Most notably, many of the bills introduced by Democratic Senators focus on amending the original 1934 Telecommunications Act to give the FCC authority to regulate broadband telecommunication networks and prevent the discrimination by those who operate these networks. Some of this legislation more loosely attempts to prevent operators from discriminating in a harmful ways and others simply demand carriers to be transparent and fair with their actions—including price discrimination. This is undoubtedly an issue that

⁸³ U.S. Senate. 110th Congress. *S. 215, Internet Freedom Preservation Act*. ONLINE. GPO Access. Available: <http://thomas.gov/cgi-bin/bdquery/D?d110:2:./temp/~bdoD0v:./home/LegislativeData.php?n=BSS;c=110> [9 January 2007].

spans party lines; half of the bills in Table 1 include bipartisan co-sponsorship. Some of the bills focus on prohibiting price-tiering, while others focus on prohibiting content-blocking. In the last few years, legislators associated with these bills have tried and tried again to redraft a viable bill.

When Senators Dorgan and Snowe reintroduced the Internet Freedom Preservation Act in 2007, they firmly believed it would receive a warmer reception than it had in previous cycles. In the past, votes had been split in the Senate roughly along party lines, but Senator Snowe was optimistic because of the newly founded majority in both the House and the Senate after the 2006 Midterms. Other long-time Net neutrality supporters like Rep. Ed Markey (D-MA) also expressed feelings of positive change with the new Congress, “We’re moving from a leadership that was clearly against Net neutrality in Congress to a new day.”⁸⁴ What many of these optimists did not predict, however, was the massive number of legislative campaigns that were to take precedence once Democrats came into power in 2006. The Iraq War, health care, the environment, and the soon-to-be issue of the Great Recession presented themselves as much more pressing issues than Net neutrality for the new majority. Additionally, it proved even harder to legislate without a clear business model from the ISPs. Again, mostly along party lines, there is a group ideologically in favor of the promotion of Net neutrality and a group against government intervention. Those in between probably will not commit until there is more clarity within the broadband marketplace.⁸⁵

⁸⁴ Catherine Holahan, “Web War: Nothing Neutral About It,” *BusinessWeek*, 29 January 2007. http://www.businessweek.com/technology/content/jan2007/tc20070129_444703.htm.

⁸⁵ *Ibid.*

Harpham notes how closely the language of these proposed bills overlap with the way in which the FCC approaches the issue. Although much of the attention Congress has given to Net neutrality has been as a result of pressure from public interest organizations hailing Net neutrality as the “First Amendment of the Internet,” there is an obvious gap in language between the protection consumers want and what Congress is willing and able to provide.⁸⁶ Snowe, in her introduction of the revised Internet Freedom Preservation Act frames the bill as beneficial for primarily economic reasons, not consumer protection. She remarked in her statement on the bill, “the benefits of the Internet on small businesses—and on rural places like my home state of Maine—cannot be overstated.”⁸⁷ Even in the Technology Agenda section of President Obama’s Change.gov website, Net neutrality is framed as important primarily as a means to “preserve the benefits of open competition on the Internet.”⁸⁸ The uncertain nature of the progress of Net neutrality legislation thus far provides further incentive for public interest advocacy groups to focus their lobbying efforts not on Congress or the FCC but the Executive. Obama has showed support for the issue but little has been done in order to encourage him to engage proactively.

Similar versions of the above bills have been introduced in the House and Senate during the 111th Congress, but none have become anything more than a draft. Chairman of the Senate Committee on Commerce, Science, and Transportation Senator Jay Rockefeller (D-WV) and House Energy and Commerce Committee Chairman Henry Waxman (D-CA) introduced no joint bills into committee since attempts in early 2009.

⁸⁶ Harpham, 80.

⁸⁷ Senator Olympia Snowe (R-ME). “Statements on Introduced Bills and Joint Resolutions.” *Congressional Record*. May 19, 2006, Page 4840.

⁸⁸ The Office of the President (Barack Obama). “Agenda: Technology.” http://change.gov/agenda/technology_agenda/.

2010 Waxman Attempt

As the 2010 Midterms approached, Representative Waxman attempted to introduce, without much success, a new bill draft into House Committee. He did not actually introduce the draft as a bill, but issued a statement outlining what the provisions were to be. The newest version of the proposed legislation would have given the FCC authority for two years to enforce existing guidelines.⁸⁹ Some of those working on Net neutrality on Capitol Hill were interested in a bipartisan consensus at that point in the legislative calendar, while others, like major Net neutrality advocate Rep. Markey very much opposed legislation without provisions prohibiting managed services for wireless and mobile networks in addition to wireline broadband services. One House staff member simply identified the September-October 2010 attempt at legislation as the “least-worst option” for both sides of the line to come to some kind of consensus on the issue.⁹⁰

Republicans saw this, in late 2010, as just another item on the Majority’s long list of big government moves. Rep. John Culberson (R-TX) grouped Net neutrality attempts along with other contentious topics like health care, the auto industry, banking, and insurance: “It comes as no surprise that they attempt to control commercial activity over the Internet before they lose control of Congress,” he said.⁹¹ Without bipartisan support the proposed Waxman bill sunk without so much as an introduction into committee. Key House Republican leadership like Minority Leader John Boehner (R-OH) would not support a Net neutrality bill for fear of great government regulation of the Internet even

⁸⁹ Cecilia Kang, “House Lawmakers close to net neutrality bill,” *Washington Post*, 17 September 2010. http://voices.washingtonpost.com/posttech/2010/09/house_lawmakers_close_to_net_n.html.

⁹⁰ *Ibid.*

⁹¹ Anders Bylund, “Will This Filibuster Ever End?” *TheMotleyFool.com*, 5 October 2010. <http://www.fool.com/investing/general/2010/10/05/will-this-filibuster-ever-end.aspx>.

though GOP support seemed more plausible because of its preferability to more stringent regulation under the FCC.⁹²

Midterms 2010: Next Steps Unsure

With the death of the Waxman proposal, many wondered about next steps. Rep. Gene Green (D-TX) helped organize a letter early in 2010 signed by 70 Democrats who oppose reclassification, but Rep. Markey felt this would give the FCC grounds to pursue regulation. Green believes that legislation must first be passed to grant the FCC this authority, while Markey thinks quick action to protect consumers, fair competition, and the open nature of the Internet are the most important next steps.⁹³ Jay Inslee's (D-WA) call for FCC action was even stronger: "There is only one cop on the beat with the whistle and the enforcement power,"⁹⁴ he said now that legislation is impossible for the time being. To many critics, the provisions of the bill appeared to be somewhat of a convoluted and complicated mess of assumptions. Some even speculated that public interest groups, specifically the very vocal Free Press lent a hand to kill the October 2010 Waxman bill because of the concessions it had made to conservative interests. Not only did the bill not get necessary Republican support, but Free Press also indicated it would withdraw from the Open Internet Coalition (OIC) if the organization decided to support the bill at all.⁹⁵

⁹² Sara Jerome, "House aides: Boehner won't back Democrats' net-neutrality legislation," *The Hill*, 29 September 2010. <http://thehill.com/blogs/hillicon-valley/technology/121567-house-aides-boehner-wont-back-net-neutrality-bill>.

⁹³ Sara Jerome, "House Dems: Want of net-neutrality bill is not a permit to reclassify," *The Hill*, 21 September 2010. <http://thehill.com/blogs/hillicon-valley/technology/120121-house-dem-want-of-net-neutrality-bill-is-not-a-permit-to-reclassify>.

⁹⁴ Joan McCarter, "Waxman, Inslee reiterate call for FCC action on Net Neutrality," *Daily Kos*, 11 October 2010. <http://www.dailykos.com/storyonly/2010/10/11/908773/-Waxman,-Inslee-reiterate-call-for-FCC-action-on-Net-Neutrality>.

⁹⁵ Sara Jerome, "Disagreement over Free Press's role in complicating Waxman bill," *The Hill*, 1 October 2010. <http://thehill.com/blogs/hillicon-valley/technology/122165-disagreement-over-free-press-role-in-complicating-waxman-bill>.

What can be gathered from these recent legislative attempts? Simply put, Congress finds it too difficult to legislate on network neutrality issues. It is a simple issue of whether or not the government should be able to prevent Internet providers from discriminating for or against specific services but the debate has become terribly long-winded. Obama's earliest tech policy campaign pledges clearly show that FCC has the mandate to write a simple set of rules, but since Genachowski introduced his "third way" approach in Spring 2010, the trend on the regulation end has been non-action. Reclassification of Title II of the original Telecommunications Act in no way requires Congressional authority; the FCC simply needs to produce a majority vote from its five commissioners.⁹⁶ Three of these five have vocally supported and argued for Net neutrality rules. As before, the problem lies in that advocates are not insisting urgency in legislation or regulation to prevent market failure, but rather to take preemptive action to ensure the future openness of the Internet.⁹⁷

It is important to understand that the regulatory nature of the Net neutrality debate has shaped how the controversy has proceeded over the last few years. The FCC has presented weak versions of support for neutral networks and from what we have seen; Congress has tried and failed numerous times to introduce legislation that mirrors FCC policy. The bills, although important attempts, ultimately offer limited perspectives on the issue. Legislation may be difficult to draft but, in this case, Congress has not taken the bold leadership steps needed to do its part in resolving the matter. The FCC could regulate but Genachowski still feels the need to only move forward with Congressional

⁹⁶ Rob Pegoraro, "It's put-up or shut-up time for FCC net-neutrality advocates," *The Washington Post*, 3 October 2010. <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/02/AR20101002200567.html>.

⁹⁷ Randolph J. May, "Broadband Legislation and Net Neutrality Soap Opera," *CBSNews.com*, 7 October 2010. http://www.cbsnews.com/8301-501465_162-20018849-501465.html.

support. Legislation and regulation are caught in a vortex of commercial, political and free speech issues that appear to be nearly impossible to separate.

CHAPTER FOUR: PRESIDENT OBAMA AND NET NEUTRALITY

The election of President Barack Obama should have had a substantial effect on the staging of Net neutrality. Far before Obama was elected into our country's highest office, he made it clear he supported the principles of an open Internet. Briefly explaining the issue in an October 2007 interview, Obama shared his views:

What you've been seeing is some lobbying that says that the servers and the various portals through which you're getting information over the Internet should be able to be gatekeepers and to charge different rates to different Web sites...so you could get much better quality from the Fox News site and you'd be getting rotten service from the mom and pop sites...and I think that destroys one of the best things about the Internet—which is that there is this incredible equality there.⁹⁸

In all official e-publications from the Office of the President-Elect on Whitehouse.gov, Obama's agenda has promoted openness and diversity in American networks. Before inaugurated, Change.gov proclaimed that Barack Obama and Joe Biden would “ensure the full and free exchange of ideas through an open Internet and diverse media outlets” and “protect the openness of the Internet by supporting the principle of Network neutrality to preserve the benefits of open competition on the Internet.”⁹⁹ Later in the term, Obama sat down with Steve Grove¹⁰⁰, Director of Politics at YouTube to answer questions fielded by the American public. A respondent from Indianapolis asked the President what his commitment to “keeping Internet open and neutral in America” was and Obama replied very definitively by saying:

Well, I'm a big believer in Net neutrality. I campaigned on this. I continue to be a strong supporter of it. My FCC Chairman, Julius Genachowski, has indicated that he shares the view that we've got to keep the Internet open; that we don't want to create a bunch of gateways that prevent somebody who doesn't have a lot of money but has a good idea

⁹⁸ Anna Broache, “Obama pledges Net neutrality laws if elected president,” *CNET News*, 29 October 2007. http://news.cnet.com/8301-10784_3-9806707-7.html.

⁹⁹ [Change.gov](http://change.gov):The Office of the President-Elect. “Agenda: Technology,” http://change.gov/agenda/technology_agenda/.

¹⁰⁰ CMC '00

from being able to start their next YouTube or their next Google on the Internet. So this is something we're committed to.

We're getting pushback, obviously, from some of the bigger carriers who would like to be able to charge more fees and extract more money from wealthier customers. But we think that runs counter to the whole spirit of openness that has made the Internet such a powerful engine for not only economic growth, but also for the generation of ideas and creativity.¹⁰¹

As a Senator, Obama was one of thirteen co-sponsors of Senator Snowe's original Internet Freedom Preservation Act, but never commented on the Bill. Obama's interest and promotion of Net neutrality is also part of a larger idea of keeping the government transparent and modernized through a maximization of digital democracy. For example, Obama was the first President to appoint a Chief Technology Officer of the United States. Obama provided what Head of Google Washington D.C. Alan Davidson referred to as "one place for unified technology leadership in our executive branch."¹⁰² The administration has also committed billions to both stimulate the economy and expand the national broadband infrastructure. This takes some of the pressure off of telecom companies, but it is still not completely clear the way in which this will affect Net neutrality¹⁰³ if there are no controls to mandate regulation. Like other branches of government, the Executive's focus has largely been economic. There have, however, been notable outbursts from officials touting the free speech and First Amendment side of the controversy. In 2009, Obama's Deputy Chief Technology Officer Andrew McLaughlin¹⁰⁴ compared the cable companies' efforts to regulate to the Chinese government's communist censorship:

¹⁰¹ Jesse Lee, "That Time You Interviewed the President," *The White House Blog*, 1 February 2010. <http://www.whitehouse.gov/blog/2010/02/01/time-you-interviewed-president>.

¹⁰² Stephanie Condon, "Obama's search for a CTO," *CNET News*, 6 November 2008. http://news.cnet.com/8301-13578_3-10084006-38.html.

¹⁰³ Harpham, 85.

¹⁰⁴ Former head of Global Policy Issues for Google.

The juxtaposition of these free speech issues—Internet censorship and Net neutrality—pulls away the layer of confusion about Net neutrality that opponents have hidden behind for years. Unrestricted, the Internet may be mankind’s greatest tool ever to promote individual freedom. We ought to do everything we can to protect that possibility—and if we aren’t careful it can become a tool to censor, surveil and manage captive audiences...¹⁰⁵

Early in Obama’s term, media outlets reported that telecom companies would be facing new Internet rules backed by the new President’s administration. CEO of Sprint Nextel Corp. Dan Hesse explained how this kind of threat was viewed in light of Obama’s election: “Probably the thing that scares the industry most about a Democratic administration is regulating the one real shining star that’s really working well—and that’s the Internet.”¹⁰⁶ Two years later, this initial promise still has not played out, but the early threat gave the telecom industry reason to fight back against any type of legislative or regulatory attempts.

Partisan Response to the Obama Administration

Leaders of the respective prominent political parties have also clearly stated opinions regarding the adoption of Net neutrality rules. In late September 2009, Republican leaders formally urged Obama to direct the FCC away from Net neutrality. Minority Leader John Boehner (R-OH) and Whip Eric Cantor (R-VA) emphasized in this letter the need to refocus efforts and resources on the development of a national broadband plan instead.¹⁰⁷ They indicated the larger belief of the party was that these regulations would do more harm than good and discourage investment. Reps. Boehner

¹⁰⁵ Kim Hart, “Obama’s deputy CTO stokes net neutrality fight,” *The Hill*, 24 November 2009. <http://thehill.com/blogs/hillicon-valley/605-technology/69361-obama-deputy-cto-stokes-net-neutrality-fight>.

¹⁰⁶ Molly Peterson and Ian King, “AT&T, Comcast Face New Web, Antitrust Enforcement Under Obama,” *Bloomberg*, 4 November 2008. <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=avbe0i9bvBCg>.

¹⁰⁷ Kim Hart, “Republican leaders to Obama: Net neutrality regulations are harmful,” *The Hill*, 2 October 2009. <http://thehill.com/homenews/house/61469-republican-leaders-to-obama-net-neutrality-regulations-are-harmful>.

and Cantor said broadband investment would be in jeopardy if the FCC were to “micromanage” network management.¹⁰⁸ Markham Erickson, director of the Open Internet Coalition, stressed that this letter had other, more politically inclined motives: “To suggest this is a radical policy u-turn is simply incorrect. In fact, it is critical to investment that this issue be addressed sooner rather than later—further delay in addressing this core policy issue will harm investment flows into new and innovative technologies.”¹⁰⁹ In reviewing past legislation, it is clear that Republicans, in their previous majority, had also taken steps to prevent network management and discrimination over the Internet.

Conservative groups also have consistently critiqued Obama for both associating with those who have vested interest in the monetary gain to be had from government regulation and stacking his administration with far-left liberal Net neutrality advocates. Aaron Klein’s book, *The Manchurian President*, “exposes” the ties that Susan Crawford, Obama’s former¹¹⁰ Special Assistant to the President for Science, Technology, and Innovation Policy, had to Free Press, an organization Klein referred to as a “Marxist-run liberal media think tank” that wants to heighten government control of the news media.¹¹¹ Klein and those he cites in his book believe the FCC, Congress, and Obama administration use or plan to use the powers of government to “silence voices objecting to their vision of what American should be.”¹¹² Well-known conservative politician

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Crawford left her post in January 2010 at the end of her sabbatical from University of Michigan Law School.

¹¹¹ Brenda J. Elliott, “Obama ‘Internet czar’ linked to ‘Net neutrality’ effort,” *WorldNetDaily*, 5 May 2010. <http://www.wnd.com/?pageId=150185>.

¹¹² Marianne Lavelle, “BIG MONEY. Citizen Action Spent \$7 Million on Political Ads in the 1996 Campaign. When DoGooders Get Into Bad Trouble: The Teamster Connection at Citizen Action,” *U.S. News & World Report*, 13 October 1997, http://www.laborers.org/USNWR_10-13-97.html.

Michele Bachmann also sprinkled Obama's Net neutrality policy stances with accusations of Communist ideology. In an interview with conservative political commentator Sean Hannity, the Minnesota representative blamed Net neutrality efforts on a conscious attack by the Executive: "They're advocating Net neutrality which is essentially censorship of the Internet. Why? They want to silence the voices that are opposing them."¹¹³ Scott Cleland, spokesman for the ISP-backed Precursor Group, frames the same argument a bit more reasonably in thinking back to 1996 and the bipartisan support received for the deregulation of the Internet via the Telecommunications Act. By this logic, he rejects the notion that Congress or any other party must apply jurisdiction because consumers are still getting the content they choose.

"It's time...and it's impossible"

U.S. Communications law, which still operates under the assumption that voice, data, and television services are carried on separate networks, no longer makes sense.¹¹⁴ Susan Crawford, however, understood that given the current political climate, reform of this clunky legislation is very unlikely. On somewhat of a dubious note she concluded that although "it's time...it's impossible" to reform current Communications laws to promote non-discrimination of our broadband networks.¹¹⁵ In January 2010, the Department of Justice submitted a letter to Congress detailing its recommendations for broadband expansion. The DOJ found no evidence of market failure and suggested that

promoting competition is likely to take the form of enabling additional entry and expansion by wireless broadband providers, applying other appropriate policy levers, and

¹¹³ Hart Van Denburg, "Michele Bachmann calls net neutrality an Obama censorship plot," *The Blotter*, 20 April 2010. http://blogs.citypages.com/blotter/2010/04/michele_bachman_80.php.

¹¹⁴ Larry Downes, "Why the White House is backing away from Net neutrality," *CNET News*, 8 January 2010. http://news.cnet.com/8301-1035_3-10430009-94.html.

¹¹⁵ *Ibid.*

spurring competition among broadband providers by improving the information available to consumers about the service offerings in their areas.¹¹⁶

Has the Obama administration been backing away from Net neutrality? Is the focus on the economic implications of some sort of regulation of network management catching up with Executive officials? The 2009 stimulus bill mandated the growth of the national broadband plan and it is obvious that achieving this goal is quickly becoming the priority. Everyone has been affected by the country's Great Recession and focusing on achieving universal high-speed access is recognized as a top priority for economic growth and globally competitive technology innovation.¹¹⁷ Investment efforts by public and private sources are heavily distorted: corporate telecom companies had invested \$60 billion by 2009, while only \$7 million was allocated by the stimulus bill.¹¹⁸ Private interests are naturally inclined to be less comfortable with investment if they believe Net neutrality rules would hamper their ability to make some sort of return on investment. "Net neutrality is making Wall Street uncomfortable about financing broadband deployment. That in turn is making the White House nervous," says Downes.¹¹⁹ What is one way to interpret this debacle? Net neutrality is simply distracting us from the more important actions—using broadband expansion to spur recovery and economic growth. What is another interpretation? Legislation and regulation simply have not and will continue to not work in this particular situation.

¹¹⁶ Ex Parte Submission of the United States Department of Justice, "In the Matter of Economic Issues in Broadband Competition: A National Broadband Plan for Our Future," GN Docket No. 09-51. 4 January 2010. Accessed: <http://fjallfoss.fcc.gov/ecfs/comment/view?id=6015504395>.

¹¹⁷ Larry Downes, "Why the White House is backing away from Net neutrality," *CNET News*, 8 January 2010. http://news.cnet.com/8301-1035_3-10430009-94.html.

¹¹⁸ Broadband.gov, "Chapter 4: Broadband Competition and Innovation Policy," <http://www.broadband.gov/plan/4-broadband-competition-and-innovation-policy/>.

¹¹⁹ Larry Downes, "Why the White House is backing away from Net neutrality," *CNET News*, 8 January 2010. http://news.cnet.com/8301-1035_3-10430009-94.html.

CHAPTER FIVE: SOLVING THE ISSUE OF NET NEUTRALITY

I have defined the terms of the debate, discussed the major regulatory and legislative action, and even examined how the nature of the game shifted after President Obama was elected into office in 2008. Net neutrality is fundamentally a question of governance of a technical regulation versus content, but how must we arrive at an appropriate policy decision? The legislative process is highly inflexible; even archaic technology has a way of outpacing the development of appropriate legislative efforts. The regulatory process in this case has also been completely ineffective. The FCC has the ability to articulate, advance, and enforce more than “principles” by which telecommunications companies must adhere, but has so far failed to do so. Although legislation carries a certain weight of legitimacy and regulatory action can be finely tuned by those carrying a deep knowledge of the specific regulation’s field, both are simply too slow-moving in the instance of Net neutrality. The speed and authority of an executive order would combine legitimacy with staying power in order to most effectively govern and protect the Internet. With the impending Republican-controlled Congress and Democratic executive come January 2011, the push for an executive order is even more essential to push Net neutrality through America’s governmental pipelines.

What Is An Executive Order?

An executive order is a written issued by the President that carries the full force of law. Although this ability draws from the executive power granted in the Constitution, there is no explicit provision permitting executive orders. There is a vague grant of power given in Article II, Section I, Clause I of the Constitution stating “the executive

Power shall be vested in a President of the United States of America”¹²⁰ and further clarification that the Head of State must “take Care that the Laws be faithfully executed”¹²¹ later in the document. History has shown that presidents use this Constitutional basis to justify the oft-controversial authority they assert with the issuance of executive orders. Until the 1950s, there were not even general guidelines to clarify exactly what a president had the power to do with “the stroke of a pen.” After Harry Truman’s Executive Order 10340 placing all steel mills in the country under federal control was invalidated by the Supreme Court¹²² because it attempted to make law rather than clarify or act to further a law put forth by Congress or the Constitution, presidents have been careful to specifically cite under which laws they are acting when they pen executive orders. Along the same lines, Obama would simply be writing an order to clarify the authority the FCC has to make such regulatory decisions—a political move the Commission is not willing to do on their own. The first predecessor of what we now know as an executive order was assigned by George Washington in 1789 as a response to the request of Congress to recommend “to the people of the United States a day of public thanksgiving...”¹²³ Like most executive orders or other presidential directives, it was directed to executive officials and agencies.

Generally, these orders establish policies with the force of law. Whether or not this authority holds, however, of course depends on if the specific provision fits within the President’s authority, if they conflict with constitutional stipulations, and how they fall in line with the standing law. Many historical instances have shown that these

¹²⁰ “The Constitution of the United States,” Article II, Section 1, Clause 1.

¹²¹ “The Constitution of the United States,” Article II, Section 3, Clause 8.

¹²² *Youngstown Sheet & Tube Co. v. Sawyer*, 343 US 579 (1952).

¹²³ *Annals of Congress*, vol. 1, September 25, 1789, pp. 88, 914-915.

directives can and will be challenged by Congressional or judicial forces. Congress is able to overturn an executive order by passing legislation that conflicts with it or using its purse strings by rejecting the necessary funding to enforce it.¹²⁴ The guidelines for executive orders are vague, but important policy questions present themselves along with the introduction of an executive order: (1) whether a given power the President possesses ought to be used to advance a particular policy objective, and (2) whether a particular draft directive effectively advances such a policy goal.¹²⁵ Executive orders have the ability to effect wide-ranging and significant policy changes with their authority. Harry Truman attempted to integrate the armed forces in his time and Dwight Eisenhower was able to desegregate public schools under executive order. These orders, however, more often than not have little direct effect on the private citizen. These are important considerations to keep in mind when thinking about the effectiveness of an executive order for Net neutrality.

From where does the President draw this power?

The President of the United States is constitutionally obligated to fulfill certain functions. If an executive order falls under one of these uses or functions, the authority he asserts will most likely be considered legitimate. The President of the United States acts as the country's Commander in Chief, Head of State, Chief Law Enforcement Officer, and Head of the Executive Branch.¹²⁶ In Article II, the Framers of the Constitution decided to institute a "unitary executive" who was to hold the executive power of the country alone. Along with this authority, the President has the power to

¹²⁴ Catherine Edwards, "Emergency Rule, Abuse of Power?," *Insight on the News*, 23 August 1999, 18.

¹²⁵ Todd F. Gaziano, "The Use and Abuse of Executive Orders and Other Presidential Directives," *The Heritage Foundation Legal Memorandum Executive Summary*, 21 February 2001. Accessed: <http://www.heritage.org/research/testimony/executive-orders-and-presidential-directives>

¹²⁶ Gaziano, 5.

appoint and nominate all officers in the executive branch. The President, when elected into office, is granted a wide range of responsibilities and power. When exercised lawfully, it is incredible how broad his reach can be on policy decisions. Even Congress cannot do as much to limit this executive authority when the President exercises it appropriately.

How Can This Apply to Net Neutrality?

A President often cites the passing of an executive order as the only way to clarify and ensure certain laws that have already been passed through Congress are properly enforced. These laws are often passed through the House and Senate with very vague wording because of partisan concerns with the executive order serving to strengthen the terms of these laws to favor the President's party of power. Often in this regard, when politics prevents ratification of certain treaties and statutes of importance, the President's executive order calls upon federal agencies to instead issue the appropriate regulations. In the case of Net neutrality, President Obama has the full authority to call upon the FCC in order to reclassify broadband into its proposed "Third Way" approach, between a weak Title I approach and needlessly burdensome Title II approach. This will allow for the continued and necessary innovation for wireless while deterring Internet Service Providers from practicing harmful network management practices.

Although executive orders often have little or no direct effect on the public, a Net neutrality executive order most definitely would. Without the implementation of some sort of ruling by the executive, legislative, or judicial branches, the public is ultimately vulnerable to network discrimination and tiered pricing of Internet services if the powerful Internet Service Providers so decide to implement such rules. The way in

which the public would be affected if Obama were to write an order directly enforcing the principles of Net neutrality, however, would be positive. ISPs would be mandated by rule of law to avoid practices that would force certain users to pay more money for the type and amount of Internet access they prefer.

The Next Two Years

The 2010 Midterms undoubtedly hurt the progress of Net neutrality efforts. More than a third of Democrats who signed the letter against reclassification lost their races. Twenty-seven of the 73 signers were not reelected. Amazingly, none of the 32 who did not sign the letter lost House reelection bids.¹²⁷ Even more shockingly, all 95 House and Senate Democratic candidates that signed a pledge by the Progressive Change Campaign Committee to support Net neutrality lost their elections on November 2nd.¹²⁸ Although the Republican takeover of the House will inevitably mean difficulty in passing Net neutrality legislation, the FCC's Democratic majority has been unchanged by the elections. Verizon, AT&T, and Comcast have gained the upper hand but this does not mean that the fight is over. Many speculate the issue is unlikely to become a priority during Congress' lame duck session (until January 2011) or even until 2012, with a Congress now divided along party lines. Representative Joe Barton (R-TX), the top Republican on the House Energy and Commerce Committee, indicated one of his first actions at the beginning of 2011 "will be to require the Obama administration Federal

¹²⁷ Sara Jerome, "More than a third of Dems who opposed FCC reclassification lost," *The Hill*. 3 November 2010. <http://thehill.com/blogs/hillicon-valley/technology/127637-over-a-third-of-dems-who-opposed-fcc-reclassification-lost->.

¹²⁸ Scott Cleland, "All 95 PCCC Net Neutrality Supporters Lost in the Election," *The Precursor Blog*. 3 November 2010. <http://precursorblog.com/content/all-95-pccc-net-neutrality-supporters-lost-election>.

Communications Commission to explain why it thinks the Internet needs federal government regulation for the first time.”¹²⁹

The FCC would undoubtedly receive backlash from a Republican House, but it is still poised to implement reclassification rules to reverse the outdated regulatory regime that was written and intended to control the infamous monopoly of telephone systems in the 1930s. An executive order from Obama would allow government regulations and bureaucrats to direct how traffic flows over the Internet, rather than leaving it up to the profit-minded decisions of the privately managed telecommunications corporations. Again, Obama’s order could even help to prompt the implementation of Genachowski’s proposed “Third Way” compromise; reclassifying only high-speed portions of Internet access into Title II and allowing for others to remain in Title I. This approach could appease those who believe the reclassification would have a negative impact on broadband deployment, innovation, investment, and job creation in the technology sector. Those most likely to abuse privately managed networks would be regulated by the FCC, but those concerned with more basic uses of the Internet would have no problems.

It would be sensible for Congress to pass legislation in order to ensure the FCC does not overstep its bounds and clearly define what the agency can and cannot do in terms of reclassification of broadband services. We have seen, however, Congress has not and will not be in any place to work collectively towards a viable solution in the next two years. We have also seen that without any action from the legislative branch, the FCC is not ready to impose regulations on broadband services completely on its own. It has the power to do so but Chairman Genachowski has spent the last year avoiding

¹²⁹ Carla Main, “Naked Access, Net Neutrality, News Corp.: Compliance,” *Bloomberg*. 4 November 2010. <http://www.bloomberg.com/news/2010-11-04/naked-access-net-neutrality-news-corp-compliance-update1.html>.

action. He may again call for a new study and ask experts to solve policy issues for him, while at the same time failing to uphold Obama's promise to protect Net neutrality and stand up to the supremacy of these telecommunications industry lobbyists.¹³⁰ An executive order may well put an end to the political struggle the FCC has been having through this entire controversy thus providing forward progress in a pragmatic fashion.

CONCLUSION

As our country continues to advance through the digital age we must be able to construct a governing architecture for the regulation of information. We have faced parts of this issue before with the invention of telephone and television services, but the Internet is different. Internet service is by nature equally accessible to anyone with a computer and an Internet connection. The conflict, of course, arises when corporate interests and capitalist mindsets realize the incredible earning potential in such a valuable form of technology.

United States Telecommunications Law is archaic; technological developments have outpaced the legislation at an alarming rate and the legislative process will continue to be far too cumbersome and inflexible to ever suffice. Regulation, although more finely tuned and crafted by those with more knowledge of the specific issue, is still slow and lacks the same force of legislation. An executive order brings the benefits of legislation to regulation. The President can finely tune the order to correctly direct regulatory decisions. The speed at which an executive order can be drafted and implemented far exceeds legislation and regulation. The way in which it becomes "law of the land" with a

¹³⁰ Josh Silver, "Why it's 'Radical' to Fight Corporate Control of Government (And Why Net Neutrality Is a Remedy), *Huffington Post*. 18 October 2010. http://www.huffingtonpost.com/josh-silver/why-its-radical-to-fight-_b_766694.html.

“stroke of the pen” makes it the most advantageous policy form for Net neutrality. In light of the new divided government Barack Obama will be facing come January 2011, he would be wise to enact such Net neutrality policy while he still has his executive power. Without a solution to this complicated issue, the United States Government puts its citizens at the risk of losing equal and open access to one of this country’s most valuable and treasured resources of ever-expanding importance--our national broadband networks.

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