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Net Neutrality

The ''Save the Internet Act'' Raises Numerous Legal Pitfalls

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The debate over net neutrality has been long and bitter. For nearly twenty years, the Federal Communications Commission—with bi-partisan support—chose to apply a ''light touch'' regulatory regime under Title I of the Communications Act. In 2015, however, the Obama Administration rejected this ''light-touch'' approach and reclassified broadband as a common carrier ''telecommunications'' service under Title II of the Communications Act of 1934. In 2018, the Trump Administration swung the pendulum back and re-reclassified broadband internet access as a Title I service, an order which is currently on appeal before the D.C. Circuit in the case of Mozilla v. FCC. If ever there was a need for comprehensive legislation to put a contentious political debate to bed, the fight over net neutrality is it.

Unfortunately, that is not to be. House Democrats have announced that sometime during the week of April 8 they intend to vote on a piece of legislation entitled the ''Save the Internet Act of 2019.'' Yet rather than take a tabula rasa approach and carefully craft a much-needed bi-partisan piece of legislation that would end the net neutrality debate once and for all, the Democrats' plan is to codify the Obama-era 2015 Open Internet Order. But while codifying these rules may prove popular in the court of public opinion, codification is unlikely to play well in a court of law. As a recent law review explains, restoration of the 2015 Open Internet Order carries significant legal consequences.

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An Assortment of Legal Pitfalls First, the Save the Internet Act raises significant due process issues under the Fifth Amendment to the Constitution, which prohibits unlawful ''takings'' without compensation. In particular, as the D.C. Circuit recognized in the case of *Verizon v. FCC*, a ''no blocking'' rule unambiguously constitutes price regulation (albeit ''zero price'' regulation) because it forces Internet Service Providers to carry edge providers' traffic for free. However, in the 2015 Rules the Commission conducted no cost study under any accepted rate methodology to determine whether a mandatory rate of zero fell within the ''zone of reasonableness'' as dictated by the caselaw. Under well-established precedent, therefore, prohibiting ISPs from recovering the costs of carrying edge providers' traffic is what is referred to as a ''confiscatory'' rate, which violates the Fifth Amendment.

Second, codifying the 2015 Rules essentially nullifies the plain statutory language of Section 202 of the Communications Act, which expressly permits carriers to engage in reasonable discrimination (i.e. ''fast lanes'' via paid prioritization)—a reading the FCC conceded

before the D.C. Circuit in the case of *Orloff v. FCC*. To get around this statutory problem, the FCC in its 2015 Rules ignored the plain language of Section 202 and adopted its ''no paid prioritization'' rule under the ''public interest'' catchall of Section 201(b) and Section 706 of the Communications Act. If Congress wants to eliminate the plain language of Section 202(a), then the appropriate course of action is a formal legislative repeal.

Along the same lines, if the 2015 Rules get codified into law, then the validity of Section 10 of the Communications Act—the statute that delineates the agency's forbearance authority—is also called into question.

For example, under the plain terms of Section 10, the FCC may only forbear from enforcing the tariffing requirements of Section 203 of the Act when ''enforcement . . . is not necessary to ensure that the charges . . . are 'just and reasonable' and are not unjustly or unreasonably discriminatory.'' In other words, forbearance from tariffs is only warranted when competitive forces can keep prices in check. However, under the 2015 Rules, even though the FCC found that ISPs were ''gatekeepers''—i.e., which means, by definition, they have the power to raise prices and restrict output—the agency forbore from imposing tariffs under Section 203 reasoning that the ''no blocking rule'' would be sufficient to protect consumers under Section 10. The legal problem with this logic thus becomes apparent: As the D.C. Circuit found in Orloff, once you de-tariff, you surrender pricing to the market—you can't price regulate a deregulated firm. If Congress codifies the 2015 Rules, however, the FCC gets to have its cake and eat it too—a dangerous expansion of agency power without any due process protections.

Finally, there is a significant privacy enforcement problem.

The complexity and breadth of appropriate privacy enforcement demands a single, cohesive industry-wide privacy approach for an industry-wide problem. For this reason, for many years the Federal Trade Commission was the focal point of privacy enforcement in the federal government. However, because the FTC has no jurisdiction over firms which provide a ''common carrier'' service, by turning the internet into a public utility under Title II, the 2015 Rules created a dysfunctional asymmetrical privacy regulatory regime: a restrictive ex ante regime specifically for ISPs with rules enforced at the FCC, and an ex post case-by-case regime enforced by the FTC for everybody else.

While asymmetrical enforcement was bad enough, the FCC's overall approach was problematic. Among other problems, not only did the FCC refuse to harmonize their approach with the FTC's, but reclassification resulted in every ISP—whether wireline, cable or wireless—suddenly finding themselves subject to the Customer Proprietary Network Information (CPNI) statutory framework contained in Section 222 of the Communications Act (added by the Telecommunications Act of 1996)—rules which were designed for pre-internet services offered by the handful of telephone companies in existence at the time.

Given this legal morass, in 2017 Congress struck down the Obama FCC's privacy rules under the Congressional Review Act. Under the express terms of the CRA, the FCC is prohibited from enacting ''substantially similar'' privacy rules on Internet Service Providers. Accordingly, enacting the Save the Internet Act would not reinstate the disapproved FCC privacy rules; instead, we would ironically find ourselves with a gaping privacy enforcement hole in the internet ecosystem where all BSPs—wired and wireless alike—would have no privacy oversight from either the FCC or the FTC.

Is There a Constructive Way Forward? Is there is a legislative solution that can (1) protect consumers; (2) not turn the Internet into a public utility; and (3) not run afoul of the Fifth Amendment? Perhaps.

One place to look is at the FCC's *2011 Data Roaming Order*—a case which was upheld by the D.C. Circuit in *Cellco Partnership v. Verizon*—under which the agency mandated mobile providers to offer data roaming agreements to other providers on ''commercially reasonable'' terms as evaluated by a defined assortment of articulated factors. If Congress wants to ensure that the FCC remains the primary agency responsible for overseeing net neutrality, then the ''commercially reasonable'' standard may be the way to go. While the ''commercially reasonable'' standard is not quite the same as the ''rule of reason'' analysis employed in antitrust jurisprudence, we can at least avoid per se prohibitions on transactions which may be welfare enhancing.

Take the issue of paid prioritization. Under the express terms of Section 202 of the Act, paid prioritization is generally permitted; charging different prices for different qualities of service is standard business practice. While improbable exceptions may be conjured up, consumer-benefitting forms of paid prioritization are abundant, including using it as a tool for expanding broadband adoption. Given these well-established benefits, rather than a per se prohibition on paid prioritization, the better option is legislation that presumes that paid prioritization is lawful—consistent with the spirit of Section 202—subject to a regulatory backstop using the ''commercially reasonable'' standard.

In sum, because the 2015 Rules were—as the FCC's own Chief Economist conceded—crafted in an ''economics-free zone,'' the adverse effects on infrastructure investment were significant. As firms are not passive recipients of regulation, logic dictates that perhaps more care should be paid to legal considerations as well.